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The practical utility of international law in the negotiation and implementation of aboriginal self-government agreements

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The aim of this thesis is to evaluate the practical utility of international norms to indigenous peoples. In recent decades, indigenous peoples have looked increasingly to international fora to secure what they see as their rights. It becomes important, then, to evaluate the potential utility of these efforts. Two conclusions dominate my assessment of the role of international law. Firstly, the lack of enforceability of the norms means that international law is unlikely to achieve change in the face of state resistance. Secondly, the vagueness of the norms, coupled with the complexity of self-government regimes, severely limit the principles' ability in achieving specific change. Instead, the utility of international law is seen to lie in changing attitudes amongst the general public and governments, by establishing common standards of treatment to which all indigenous peoples are entitled, creating new channels of communication and broadening the context of indigenous disputes.

Le but de cette thèse est d'évaluer l'utilité pratique, pour les peuples indigènes, des normes internationales. Au cours de ces dernières décennies, les peuples indigènes ont progressivement fait appel aux fora internationaux afin de défendre ce qu'ils considèrent être leurs droits. Il est donc important d'évaluer l'utilité éventuelle de leurs efforts. Deux conclusions dominent mon interprétation du rôle que joue le droit international. En premier lieu, à cause des difficultés d'application et d'exécution des normes, il est peu probable que, face à une résistance étatique, le droit international puisse apporter les changements requis. En second lieu, l'imprécision des normes, liés à la complexité des accords de gouvernements autonomes, restreint sévèrement la capacité de ces principes d'atteindre des buts précis. Au contraire, l'uilité du droit international est, semble-t-il, de changer l'attitude du grand public et des gouvernements en instituant un traitement égal pour tous les peuples, en créant de nouveaux canaux de communication et en donnant une plus grande audience aux revendications des indigènes.

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INTRODUCTION

In recent years, there has been tremendous increase in the use of international law and institutions by indigenous peoples. Discontented with their positions within their states, they have seized upon international law as a new tool in their domestic struggles. Significant time and money have been expended by indigenous groups and non-governmental organisations in developing a system of norms which reflects the needs and aspirations of indigenous peoples around the world.

The focus of many indigenous demands has been on redefining the relationship between indigenous groups and states, on the basis of equality and mutual respect. In the eyes of indigenous peoples, it is only through changing government structures to give them more control over their affairs, and rebuild a sense of responsibility and confidence in their communities, that their problems can be effectively tackled. As such, claims for autonomy and self-government by indigenous groups have been pushed onto the political agenda of a number of states. This emphasis is reflected by the focus of international efforts on claims of self-determination.

As a result of this new international debate, there has been an explosion of interest in indigenous rights amongst international lawyers and scholars. However, despite an extensive developing literature on the question of indigenous rights, there is a lack of serious debate on the practical utility of the evolving norms. Many commentators simply assume that the international dimension will be of benefit to indigenous communities. However, when one considers the nature of international law, and the structure of the international system, such an assumption appears to ignore important limits on the utility of international law, and often results in an unrealistically positive analysis of the norms. On the other hand, assessments which do question the practical benefits of international law to indigenous peoples tend towards highly

pessimistic and sceptical conclusions.

Given the investment being made in the international dimension by indigenous peoples, it is critical to establish the real impact that international law can have on the problems faced by indigenous peoples. When this is established, it becomes possible to focus future developments so as to utilise the international dimension to its maximum potential. The aim of this thesis, therefore, is to evaluate the practical utility of international law for indigenous peoples in their attempts to redefine their relationships with their states. As such, it will analyse the potential roles of international law in turn, taking into account theoretical and practical limits of the law. Although the focus will be largely on self-government and self-determination, other examples of the utility of international law may be considered to enable a fuller analysis.

The first chapter will outline the evolving system of international indigenous norms, placing it in the context of the wider right of self-determination and the rights of minorities. Given their links, tracing the development of all three concepts is necessary for a more nuanced understanding of the debates surrounding indigenous self-determination today. Equally, this will facilitate a better analysis of the theoretical problems and strategic decisions faced by indigenous peoples discussed in chapter two.

In the second chapter, there will be a full analysis of the utility of international law for indigenous peoples in general terms, taking into account its theoretical limits. The potential roles of international law will firstly be outlined. This chapter will then go on to evaluate the specific normative development of indigenous rights, focusing on the decisions to create a distinct category of indigenous rights, rather than joining the wider minority movement, and to demand the explicit recognition of a right to self-determination. Finally, the relevance of state sovereignty, the traditional

barrier to the claims of non-state parties in international law, will be evaluated.

The third chapter will put the normative framework in a practical context through the use of a case study. The position of the Crees of James Bay in Canada will be focused upon in order to illustrate further difficulties in the practical utility of international law. By using the analytical framework of chapter two, the practical application of the various roles will be examined, and the impact of some of the theoretical problems will be seen. By doing this, the real value of international law will be established.

1. INTERNATIONAL LAW AND STRUCTURES OF GOVERNMENT - THE DEVELOPMENT OF SELF-DETERMINATION, MINORITY RIGHTS AND THE RIGHTS OF INDIGENOUS PEOPLES

1.1 Introduction

Although international indigenous rights and self-determination have only come into focus in the past twenty years, the protection by international law of culturally-defined groups has a long, if controversial, history. Minority rights, and the wider right of self-determination, have existed in international law since the eighteenth century, and remain the subjects of fierce debate today. In order to analyse fully the concept of indigenous self-determination, the primary focus of this thesis, it is necessary to trace the development of these three connected, although distinct, normative frameworks.

These concepts are inextricably linked, despite frequent assertions to the contrary by states. The exercise of self-determination, for example, through the creation of a sovereign state almost inevitably creates minorities within that new state, given that ethnic, linguistic and religious differences exist in almost every society. Equally, the connection between minorities and indigenous groups is strong, since the latter often constitute a minority today in their states. However, with their fundamentally different cultures and philosophies, and their particular historical experiences, they are generally viewed as more than a minority, with separate needs and concerns.[1]

The core of the problem running through the development of international law in its handling of these interrelated concepts is the definition of the groups

[1] The factors which differentiate indigenous groups from other minorities are the subject of fierce debate, and will be discussed in further detail in chapter two.

involved.[2] This is compounded by a perception of disastrous and inevitable consequences. The creation of a new state results in many states fearing the ultimate disintegration of the international community. Equally, the existence of legally protected minorities makes certain states uncomfortable, especially where the state policy is assimilation or integration. Consequently, the international community has insisted on the separate nature of the rights, thereby significantly hampering their coherent development.

The goal of this chapter is therefore to outline the development of international indigenous protection by placing it in the context of the wider protection of culturally-defined groups. Once this new framework has been established, it will be possible to analyse the concepts and debates involved, and then put them in a practical context.

1.2. Early Development

The political principle of self-determination developed at the end of the eighteenth century, as part of the revolutionary theory being promulgated in France and the United States of America. The central idea in these theories was that the sovereignty and power of the state lay in its people, rather than its monarchies. In international terms, this meant that the consent of the rulers was insufficient to allow the transfer of territory from one state to another. Rather, there was a need to obtain the consent of the people, through plebiscites. This theory was particularly strong in France, with a number of plebiscites held in order to ascertain the opinion of various populations on

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[2]For discussion of possible defining factors see, e.g., A. Margalit and J. Raz, "National Self-Determination", 1990 J. of Philosophy 364; also B. Slattery, "The Paradox of National Self-Determination" (1995) 33 Osgoode Hall L.J. 346.

the question of becoming part of France.[3] In this way, a clear shift in power from monarchies to the people of the state took place in this period.

This concept, reflecting the power of the people, fused in the nineteenth century with theories of nationalism, which were developing as a reaction against the multinational states across Europe. Advocates of such ideas believed that the state should coincide with the nation, and thus every national group had a right to determine its own future through independent statehood. As such, the political ideal of national self-determination was born.[4] However, such notions were largely for internal consumption and did not at this stage have a significant impact on the organization of the international community.[5]

By contrast, rights of minorities featured quite regularly in international relations during this period. The protection of minorities in international treaties first appeared in the mid-seventeenth century,[6] with the protection of the religious freedom of nationals occupying land ceded to another state. As such, the provisions were bilateral, between the new state in which the group found themselves and the previous kin-state. For example, the Treaty of Oliva of 1660 between Poland and Sweden protected the religious freedoms of the inhabitants of Livonia and Pomerania, on the occasion of their cession.[7] Equally, the Treaties of Peace of 1713 and 1763 between France and Great Britain relating to Canada both provided protection for the Catholic

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[3]See A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 12.
[4]See M. Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice"(1994) 43 I.C.L.Q. 241 at 250.
[5]*Ibid.* at 253.
[6]See, e.g., P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991) at 25.
[7]*Ibid.*

populations there.[8]

This tradition continued throughout the eighteenth and nineteenth centuries, with the treaties becoming increasingly multilateral and geographically focused on Eastern and Central Europe. A broader range of protection was also developed, with provision starting to be made for national minorities, rather than purely religious ones. Equally, wider civil and political rights were brought into the fold. For example, the Treaty of Berlin of 1878 provides that in Bulgaria "[i]n the districts where Bulgarians are intermixed with Turkish, Romanian, Greek or other populations, the rights and interests of these populations shall be taken into consideration as regards the elections and drawing up of the Organic Law of the Principality."[9] At this time, though, protection was still highly unorganized and random. Equally, this protection developed separately from the theories of self-determination. It took the First World War and the Versailles Peace Settlement to link the two concepts, and set up a regularized system of minority protection in Eastern and Central Europe.

1.3. The Treaty of Versailles and the Inter-War Years

In the aftermath of World War I, Europe lay in ruins, requiring the construction of new states in place of the Austro-Hungarian, Ottoman and Russian empires. It was in this context that US President Woodrow Wilson drew up his Fourteen Point Plan, laying down some principles for this task, of which self-determination was the central one.[10] In this context, it meant

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[8] *Ibid.*

[9] *Ibid.* at 31.

[10] For more about Wilson, see D. Heater, *National Self-Determination: Woodrow Wilson and His Legacy* (New York: St. Martin's Press, 1994).

firstly that the will of the people should be followed. Moreover, it incorporated a nationalist aspect, with a premise that state boundaries should largely follow national boundaries. Following in the American liberal tradition, it also had a strong democratic pull, laying down principles for the internal operation of the state.

However, there were problems in applying the principle in practice. The nationalist content raised the problem of actually defining national groupings. Political considerations militated against certain solutions which would have been central examples of self-determination. In such cases, plebiscites were not held, and the territory simply transferred according to the political requirements. Thus, areas of Germany were ceded to Poland and Czechoslovakia without any popular consultation.[11] Equally, it was politically impossible for Germany to unite with Austria, regardless of the wish of the people, and the fact that such a solution accorded with national groupings.[12] Consequently, the principle was applied selectively, in accordance with political necessities. As such, it was clearly a political principle, rather than a norm of international law, a fact recognized by an International Commission of Jurists in the *Aalands Islands Case*.[13]

There were further practical problems which made the perfect application of self-determination impossible. Even where politically acceptable, logistically it was impossible to hold sufficient plebiscites to ascertain the will of the

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[11]See Cassese, *supra* note 3 at 24.
[12]*Ibid.*
[13]League of Nations O.J. Spec. Supp. 3 (1920); *The Aaland Islands Question: Report to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations B.F. 21/68/106 (1921).

people.[14] Moreover, the populations of Eastern and Central Europe were so intermingled that it was simply not feasible to create states built purely on the basis of national origins. Thus, lines had to be drawn and the imperfections of implementation dealt with in other ways. Consequently, the Western Powers struggled to deal with not only the continuing presence of minorities, but the creation of new ones in the Versailles Peace Treaty. The Settlement had eased the problem by about half, but twenty-five to thirty million people still lived as national minorities.[15]

It was in this context that minority protection became clearly linked with national self-determination, as such rights were held up as the fall-back, or consolation, provision for groups who were unable to attain independent statehood for political or logistical reasons.[16] There were also strong practical grounds for protecting minorities at this point. Previously oppressed minorities suddenly found themselves with a new state to control, and their oppressors as a new minority. Equally, many minorities felt bitter about their failure to acquire a new state, or unite with their kin-state, having had their expectations raised by the talk of self-determination. The potential for conflict in such situations was clear, and the protection of minorities seen as an essential component of a peaceful settlement.[17] The Great Powers also felt a moral responsibility towards the minorities to ensure their protection, since they had decided their fate.[18]

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[14]Only five plebiscites were actually held - in Schleswig, Allenstein & Marienwerder, Klagenfurt Basin, Upper Silesia and Sopron. Beyond that, the will of the people had to be assumed by the political leaders. See H. Johnson, *Self-Determination Within the Community of Nations* (Leyden: A.W. Sijthoff, 1967) at 76.
[15]I. Claude, *National Minorities: An International Problem* (New York: Greenwood Press, 1955) at 13.
[16]*Ibid.*
[17]*Ibid* at 14.
[18]*Ibid* at 15.

With the new international structure of the League of Nations being developed concurrently, there was an opportunity to create an international system of minority protection, outside of the purely bilateral arena. The newly created states had to sign Minority Treaties, which would be overseen and ultimately guaranteed by the League. Ultimately, eight states signed treaties and, for the first time in international relations, opened up their domestic affairs to external scrutiny.[19] However, the system was not applied universally, and more politically powerful states with similar minority problems, such as Germany, France and Italy, were not required to sign such treaties. Equally, it never occurred to the leaders to apply the provisions to the colonies.[20]

In substance, the treaties gave largely individual rights to the members of stated minorities. The Polish Treaty,[21] signed in 1919, was the first of the League Minority Treaties and worked as a model for the subsequent ones. Two groups of rights were set out, the first section relating to equality and rights of nationality, and the second series applying to individuals as members of minorities. Consequently, there were rights to life and liberty without discrimination,[22] to the free exercise of religion,[23] to equality before the law and in civil and political rights,[24] and to equal treatment and security in

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[19]The eight states in question were Poland, Bulgaria, Czechoslovakia, Yugoslavia, Austria, Romania, Hungary and Greece. There were also certain bilateral treaties put into the system, a number of unilateral declarations, such as by the Baltic states and Albania, and provisions in the Peace Treaty concerning Turkey and Greece. See Thornberry, *supra* note 6 at 41.

[20]H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 28 [Hereinafter *Autonomy, Sovereignty and Self-Determination*].

[21]112 Great Britain T.S. 232, reprinted in H. Hannum, ed., *Documents on Autonomy and Minority Rights* (Dordrecht: Martinus Nijhoff, 1993) at 683.

[22]Article 2.

[23]*Ibid.*

[24]Article 7.

law.[25] There were also various provisions giving a right of Polish nationality to the members of the minority groups. These general provisions were supplemented by specific minority protection, allowing for their own religious and social organizations and schools.[26] Moreover, article 9 provided that in towns and districts with large minority populations, the minority had a right to primary school teaching in its own language and an equitable share in public funds for religious, educational or charitable purposes. Therefore, although the system was largely individually centered, reflecting the liberal traditions of Wilson and the other Western leaders, it was not doctrinally pure. Apart from the collective rights related to language and education, rights to autonomy featured, for example, in the Romanian, Greek and Czech treaties.[27]

In terms of enforcement, a two-fold guarantee of the rights was put in place. Firstly, the provisions, under article 1, had to be contained in the constitution of the state, thereby creating a domestic enforcement mechanism. Secondly, through article 12, the constitutional provisions could not be changed without the consent of the Council of the League of Nations. Moreover, the Council and Permanent Court of International Justice had jurisdiction over any disputes or infractions. Individuals and minority groups had the right to submit petitions to the Minorities Section of the League Secretariat concerning alleged breaches of the provisions, although they had no standing to take the complaints any further.[28] Thus a strong international dimension

[25] Article 8.
[26] *Ibid.*
[27] In Romania, the Szeklers and Saxons of Transylvannia were granted autonomy in educational and religious matters. Similar provisions were made in favour of the Vlachs of Pindus in the Greek Treaty. Equally, the Ruthenes and Carpathians were to have the "greatest degree of autonomy compatible with the Czechoslovak State". See Thornberry, *supra* note 6 at 43.
[28] For more detail of the procedure see Claude, *supra* note 15 at 23.

was added to previously bilateral disputes.

The system, however, ultimately failed.[29] Poland renounced its treaty in 1934 and by 1939, the petition system had effectively ground to a halt.[30] The lack of universality in the system created resentment in the affected minority states, who also objected to the interference in their internal policies. They further criticized the system as being too favorable to minorities and impeding progress towards assimilation and peaceful co-existence by giving the groups special status and a right to go over the head of the government. By contrast, the minority groups believed that the provisions did not go far enough, particularly in recognizing their collective rights, and demanded a more direct and substantial role in the complaints procedure. The neutral states, moreover, showed little interest in the international guarantee, and thus bilateral disputes could not be avoided in practice. These were exacerbated by an absence of formal duties on the minorities relating to loyalty, which helped to engender distrust and suspicion among all the parties. The constant use and abuse of the system by Germany and its minorities around Europe led to substantial instability within affected states. Finally, the political developments in Europe in the 1930s destroyed any chance of success that the minorities system, and indeed the whole League of Nations organization, may have had.

However, the inter-war experience did make some important steps for international relations and law. Most fundamentally, it breached state sovereignty and opened up to international scrutiny the treatment of a state's own nationals. As such, it was the first step towards international human rights law. Secondly, it made the explicit link between national self-

[29]For a greater discussion of the reasons of failure see Claude, *ibid.* at 31-50.
[30]In 1939, there were only 4 petitions, 3 of which were rejected. See Thornberry, *supra* note 6 at 46.

determination and minority rights which the international community has been trying to deny ever since.

1.4. World War II and the United Nations

As the Second World War reached its conclusion, discussions were underway concerning a new international organization to replace the League of Nations. In the new system to emerge, self-determination and minority rights received very different treatment. Self-determination made two appearances in the Charter of the United Nations (UN)[31] as the "principle of equal rights and self-determination of peoples", in articles 1 and 55, concerning the purposes of the new organization, and international economic and social co-operation respectively.

Self-determination in the Charter is not defined. However, the context and travaux preparatoires strongly suggest that its meaning was not that of the inter-war years. It clearly was not intended to mean that national minorities had a right to independent statehood.[32] Equally, it did not give populations the right to free and fair elections. Given that it did not feature in the chapters concerning colonial territories,[33] it probably did not give the right of independence to colonial territories.[34] Rather, it is taken to refer to the relationship between sovereign independent states, equating "peoples" with the whole populations of such territories, affirming a vague right of self-

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[31]*Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, 145 U.K.F.S. 805.
[32]See Cassese, *supra* note 3 at 42.
[33]See articles 73-85. The terminology, rather, referred to development towards self-government or independence. Therefore, although the spirit of decolonisation was present, the link with self-determination was not explicitly made at this stage.
[34]*Ibid.*

government.[35] As such, it emphasized fundamentally statist principles of international law including the sovereign equality of states and non-interference in the internal affairs of another state. The fact that it is also simply a principle, a goal of the United Nations, lessened the potential impact upon states. Although the provision is thus relatively weak, it provided the law with a starting point for development in the 1950s and 1960s.

By contrast, minority rights did not fare well in the early years of the UN. Despite many proposals during the Second World War to set up a system similar to the League treaties,[36] specific minority protection was rejected in the UN Charter. A number of factors led to this decision.[37] The abuse of minority rights on the lead up to the War, especially by Germany, turned many against the idea of special protection for minorities. Far from being seen as an essential part of peace, as they were at Versailles, minority rights were now seen as a hindrance to stability. Moreover, the Western powers instrumental in the drawing up of the Charter, particularly the United States, were from traditions emphasizing the assimilation of minorities. Such leaders had difficulty in understanding the rationale for special minority protection designed to maintain differences and cultural groups. Equally, following the experience of the Second World War, many minorities did not wish to be separated out for differential treatment.

As such, the problem was recast, and alternative solutions found. Firstly, the minority problem in Europe was substantially lessened by an element of frontier revision. Further, the physical transfer of minorities was accepted as

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[35]*Ibid.* See also R. Higgins, "Self-Determination" in *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 111 at 112.
[36]For more details on the various proposals see Claude, *supra* note 15 at 55-69.
[37]See Claude for a greater discussion of these issues, *ibid.* at 69-125.

a legitimate response to the problem. The creation of the state of Israel allowed for much of the remaining Jewish minority to emigrate. Finally, fifteen million Germans were expelled from Poland, Czechoslovakia and Hungary, along with a number of smaller population transfers,[38] thereby physically eliminating the German minority problem.

The second part of the equation came through the emergence of a universal system of human rights, concerned with the treatment of all the nationals of a state, and which in turn subsumed the rights of minorities. As Claude observed,

> [a] considerable part of wartime thinking was based on the premise that there was no problem of national minorities as such; there was only the problem of individuals, struggling to have their rights recognized and respected. Members of national minorities might have exceptional difficulties, but their problem was fundamentally the same as that of other individuals, and their only legitimate aspiration was to enjoy equality of rights with their fellow citizens.[39]

Not only was a system of minority protection akin to that of the League clearly rejected at this time. In the drafting of the Universal Declaration of Human Rights, the proposed minority articles were ultimately rejected, with support for them coming almost exclusively from Eastern and Central Europe.[40] The emphasis was instead on equal rights for all citizens, with strong provisions relating to non-discrimination.

Despite these exclusions, though, the question of minority rights was not totally ignored by the UN. Under the auspices of the Commission of Human Rights, a Sub-Commission on the Prevention of Discrimination and the Protection of Minorities was established. Additionally, the *Convention on the*

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[38]Claude, *ibid.* at 114-125; also Thornberry, *supra* note 6 at 114.
[39]Claude, *ibid.* at 71.
[40]Thornberry, *supra* note 6 at 135.

Prevention and Punishment of the Crime of Genocide[41] was adopted by resolution of the General Assembly in December 1948, and came into force three years later. Whilst relating to the physical existence of minorities, and thus of fundamental importance, it failed to include cultural genocide in its definition section, thereby restricting the protection to the physical existence of members of minorities, and failing to protect the minority culture.

Consequently, in the initial years of the UN, self-determination and minority rights were considered by the international community, and both rejected in their inter-war form. Self-determination was recognized, indeed included in the Charter. However, it was a very weak version, with none of the nationalist pull implicit in its Versailles incarnation. Moreover, the link with minorities was very firmly broken, with the use of the word "peoples". By contrast, minority rights failed to make any significant impact on the new international order, which focused instead on a regime of universal human rights. Concepts such as equality and non-discrimination were held up as the solution to minority problems.

1.5. Decolonisation and the Human Rights Movement

The 1950s and 1960s witnessed two separate but linked developments for self-determination, namely decolonisation and the discussions surrounding the drafting of the International Covenants on Human Rights. These both served to bring self-determination to the forefront of international law.

The pressure for decolonisation mounted in the aftermath of World War Two, following the emphasis on the ideal of freedom in Europe and the new

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[41] *The Convention on the Prevention and Punishment of the Crime of Genocide*, Can. T.S. 1949 No. 27, 78 U.N.T.S. 277.

weakness of the colonial powers. Through the Western education of many colonial elites, ideas of Western philosophy had been exported to decolonisation movements, one of the most potent of which was nationalism. Spreading from India around Asia and finally over to Africa, the demand for freedom and equality, meshed with the galvanising of nationalist spirit, could not be stopped. This was supported by a strong anti-colonial mood in the UN General Assembly, a body with a large Latin American and communist anti-colonial contingent. Self-determination, with its traditional symbolism of freedom from domination, become the focal point of the claims. A number of resolutions were passed by the General Assembly, demanding the direct application of the right to colonial peoples.[42] These culminated in the *Declaration on the granting of independence to colonial countries and peoples*,[43] which declared the right of all peoples to self-determination. However, this right of self-determination was still relatively limited in scope. It was a right, most importantly, that attached to the whole population of the territory, not ethnic groups, thereby denying the possibility of the break-up of the colonial borders. *Uti possidetis*, a principle developed in the context of the decolonisation of South America, was strictly applied. As such, a right of states to territorial integrity began to accompany the right of self-determination in international instruments. Equally, self-determination had no significant internal content, with the advent of independence being a one-off exercise of the right.

Thus, in this fifteen year period, self-determination evolved from being a vague purpose of the UN to a fully fledged right of all peoples. Equally, it

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[42]See, e.g., *Recommendations concerning international respect for the right of peoples and nations to self-determination*, GA Res. 1188, UN GAOR, 1957.
[43]*Declaration on the granting of independence to colonial countries and peoples*, GA Res. 1514, UN GAOR, 1960, Supp. No.16, UN Doc.A/4684 (1960) 66.

was now applied to peoples other than sovereign independent states, becoming the legal right whereby colonial peoples could gain their independence. This period of development has created a very strong bond between self-determination, decolonisation and the achievement of independent statehood, which continues through to today. This link had a detrimental effect on the development of minority rights, however, reinforcing the denial of self-determination to minorities. Moreover, any recognition of culturally-defined groups became threatening to states. Minority rights were thus still viewed as the intermediate stage between non-recognition of groups and self-determination. However, rather than being perceived as the consolation prize, as they had been in Versailles, minority rights were now seen as the first step to the recognition of a right of self-determination, and thereby independent statehood.

It was also in the 1960s, through the two Human Rights Covenants of 1966 that both self-determination and minority rights moved into the realm of human rights law. Article 1 of the two Covenants reads,

> All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

The right of self-determination in the human rights context was seen as the prerequisite to the exercise of all the other human rights. As such, it clearly relates to the right of non-interference and the right to be free from external oppression, tying in with the decolonisation interpretation. It does also have an internal dimension. The Human Rights Committee, the body which monitors the Covenants, expects State Parties, in their periodic reports, to "describe the constitutional and political processes which in practice allow

the exercise of [self-determination]."[44] The problem in this context is that there is still no clear agreement as to the internal content.[45] The extent to which it requires a democratic structure of government, for example, is highly controversial. Franck grounds his right to democratic governance on such an interpretation.[46] Thornberry, in contrast, sees it encompassing only a right to a system of government which is compatible with, and supports, the other human rights.[47] The evidence at present suggests that Franck is being premature in equating the increasing practice of elections with a legal right to such a system under article 1. Equally, "peoples" still appears to refer largely to the whole population of a state, and does not apply separately to minorities.

Consequently, in this era one can see self-determination established as a right of all peoples. However, its meaning developed in two quite distinct ways. Firstly, it is granted to peoples living under colonial rule, giving to them a right to independent statehood. Therefore, whilst the content of the right is similar to that at Versailles, its application is quite different. Secondly, an internal dimension is accepted, although its exact content remains unclear. The one consistent factor in definition, however, is that self-determination does not apply to minorities.

Minority rights also enjoyed greater success at the international level in this era, with a specific minority right entering mainstream human rights law. This

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[44]Quoted in Thornberry, *supra* note 6 at 215.

[45] This is exacerbated by the refusal of the Human Rights Committee to examine cases involving self-determination on the basis that an individual has no standing to bring a claim concerning a right of peoples. See *Ominayak and The Lubican Lake Band* v. *Canada*, Communication 167/1984, UN Doc. CCPR/C/38/D/167/1984. Further, the European Convention of Human Rights, with its rich jurisprudence, has no right of self-determination.

[46]T. Franck, "The Emerging Right to Democratic Governance" (1992) 86 A.J.I.L. 46.

[47]Thornberry, *supra* note 6 at 214.

is article 27 in the *International Covenant of Civil and Political Rights*, which remains the key minority provision in an international convention,[48] and reads,

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.

It is clearly an individualistic, narrow provision, and the extent of the positive obligations placed upon states regarding minorities is unclear.[49] A number of cases regarding its application have been brought to the Human Rights Committee under the individual petition system established by the Optional Protocol. In these cases, the Committee has recognised the essential group component of the right, weighing collective interests and individual rights, and thereby accepting certain limits on the exercise of such rights where they would threaten the ultimate survival of the culture. In *Lovelace* v. *Canada*,[50] a provision of the Canadian Indian Act by virtue of which Indian women who married non-Indian men lost their status as Indians, and thus their rights to live on their reserve, was held to be in breach of article 27. The Committee accepted the need to define and restrict the members of a minority group in order to preserve the groups' resources and identity. However, such restrictions must have "both a reasonable and objective justification and be consistent with the other provisions of the Covenant read as a whole."[51]

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[48]The UNESCO *Convention Against Discrimination in Education 1960*, U.N.T.S. 429 also contains a provision that requires states to "recognize the right of members of national minorities to carry on their own education activities..." See article 5(1)(c).

[49]For greater discussion of this see Thornberry, *supra* note 6 at 155-247.

[50]Communication 24/1977, UN Doc. CCPR/C/OP/1, at 83, reprinted in 68 *International Legal Materials*.

[51]*Ibid.*, at para.17. Contrast *Kitok* v. *Sweden*, Communication 197/1985, UN Doc. CCPR/C/35/D/197/1985. Here the Human Rights Committee examined Swedish restrictions on the ability of Sami engaging in other economic activities to take part in reindeer husbandry. They were held to be justified in order to preserve the position of those Sami still relying on their traditional and collective way of life.

Therefore, one can see in this era the reacceptance of the need to protect the cultural identity of minority groups. Whilst this is being realised within the individualistic framework of international human rights law, it is possible to detect an acceptance of the inherent group nature of the right in the jurisprudence of the Human Rights Committee.

1.6. The Post-Colonial Era

The thread running through the post-war development of both self-determination and minority rights, emphasized throughout the process of decolonisation and the era of human rights, has been the norm of non-discrimination. It has, for the most part, constituted minority protection, and article 27 certainly works in tandem with concepts of equality and non-discrimination.[52] Moreover, as decolonisation drew to a close, in the late 1960s, attention switched to the situations of minority white rule in Rhodesia and South Africa, where concepts of non-discrimination had particular relevancy. Given the disenfranchisement of the majority of the people, and the obvious links with colonialism, self-determination was the discourse adopted to articulate the struggle for change. As such, self-determination began to evolve a meaningful internal dimension.

This is made clear in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*,[53] where self-determination is defined

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[52] The fundamental justification for article 27 is to put minorities in a truly equal position to majority populations. See the introductory reflections and conclusions of Thornberry, *supra* note 6 at 1 and 385.

[53] *Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625, UN GAOR, 1970, Supp. No.28, UN Doc. A/5217 (1970), 121.

"bearing in mind that the subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle..." The guarantee relating to territorial integrity is restricted to States "conducting themselves in accordance with the principle of [self-determination] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." An unambiguous internal right is thereby brought into the legal discourse on self-determination, giving the whole population the right to a certain type of governmental structure, namely one which is representative and does not discriminate.

The continuing universal relevance of self-determination was reaffirmed in the *Helsinki Final Act* of the Conference on Security and Co-operation in Europe (CSCE).[54] Principle VIII of the guiding principles for state relations was equal rights and self-determination. The provision is a sweeping one, declaring that,

> All peoples always have the right, in full freedom, to determine when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

Whilst the motivation behind the provision was related to the political situation in Eastern Europe, the affirmation of existing borders and non-intervention in the domestic affairs of states, it has served to continue the debate in a non-colonial context.

Following the effective end of decolonisation, and building on these new assertions of the right, attempts have been made to expand the right in a

[54]This is now the Organisation on Security and Co-operation in Europe (OSCE).

number of different ways and give it practical relevance to the international scene today. Firstly, there is the democratic interpretation of the right, which has traditionally been a key element in the liberal acceptance of self-determination. With the end of the Cold War, and the increasingly intrusive nature of human rights today, the democratic content of the right has been seized upon. This asserts that all citizens of the state have a right to a democratic structure of government, with regular free and fair elections enabling the people to decide on their destiny. Franck argues that this "right to democratic governance" is the sum of three separate rights - self-determination, freedom of expression and the right to free and fair elections.[55]

Secondly, nationalist claims to self-determination are increasingly being pressed. The tension between the popular meaning of self-determination, as the right of national groups to decide their own destiny in the form of independent statehood, and the very narrow and fundamentally statist conception in international law has always been apparent. However, with the geopolitical changes in the world in the past five to ten years, and the continuing ethnic tensions and rivalries, the demands for greater protection and remedies in international law by national groups have grown tremendously. These claims can essentially be divided into two types, corresponding with internal and external self-determination.

Firstly, a large number of nationalist movements have claimed a right of self-determination, justifying their secession from the larger state. The creation and recognition of the new states of the former USSR, Czechoslovakia and Yugoslavia, as well as Eritrea, have led some analysts to conclude that such

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[55]*Supra* note 46.

a right is indeed evolving in international law.[56] However, the weight of opinion is that the response to these claims for statehood was very firmly political in nature, and did not amount to a development in the law.[57] Given the existence of so many multinational states on every continent, and the fact that international law is the creation of these states, a general right of national groups to secede is unlikely to become part of the law.

The second claim of national groups is for internal self-determination, giving them a right to a relationship with the state in which they have sufficient control over their own affairs. This incorporates other human rights, such as the right to participate in the political life of the state, but goes further, requiring a specific type of state structure for these rights to be effectively fulfilled.

The area in which this concept has been most articulated and developed has been that of indigenous peoples. As such, the final section of this chapter will outline the specific indigenous norms as they have been evolving, and the effect that this development has had on minority rights.

1.7. Indigenous Rights

Indigenous peoples have made attempts for many years to gain wider international recognition of their problems. For example, the Iroquois chief Deskaheh tried to get the League of Nations to consider disputes between his

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[56]See, e.g., D. Cass, "Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories" (1991) 18 Syracuse J. Int'l L.& Comm. 21.
[57]See, e.g., H. Hannum, "Rethinking Self-Determination" (1992) Va. J. Int'l L. 388 [Hereinafter "Rethinking Self-Determination"].

people and Canada.[58] Despite some support, the initiative was ultimately defeated. The position of indigenous peoples was instead viewed largely as a domestic matter for the affected state. One exception to this was the interest of the International Labour Organisation (ILO). The ILO displayed substantial interest in the working conditions of indigenous workers in the 1920s and 1930s, focusing on the conditions of forced labour in South and Central America. A series of resolutions and conventions were passed on the issue, following the establishment of a Committee of Experts on Native Labour in 1926.[59]

It was also through the ILO that the first piece of comprehensive international protection for indigenous peoples was promulgated, the *International Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries.*[60] This went far beyond the issue of labour conditions, containing sections on vocational training, handicrafts and rural industries, social services and health, education and communication, and administration. The guiding principles for the provisions, as laid down in article 2, were "protection" and "integration". Thus, the tone of the convention was paternalistic and assimilationalist, although "artificial" assimilation was considered improper.[61]

After the promulgation of Convention No.107, the issue of indigenous rights was quietly forgotten by the international community. However, a number of

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[58] See, e.g. A. Simpson, "The Role of Indigenous Nongovernmental Organisations in Developing Human Rights Standards Applicable to Indigenous Peoples" [1986] Proceedings of the American Society of International Law 282.
[59] See Thornberry, *supra* note 6 at 334.
[60] *International Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries*, ILO Convention No. 107, 1957, 328 U.N.T.S. 247 1957 [Hereinafter Convention No.107].
[61] Article 2(2)(c).

factors have brought the attention of the world to the plight of indigenous peoples, leading to the current normative development.

The 1970s saw the development of natural resources in areas previously unrequired or resistant to development such as Alaska, the Northern parts of Canada and the Northern Territory in Australia. These areas contained significant numbers of indigenous peoples, often with young leaders acquainted with Western culture and thus able to respond effectively to the threat to their lands through the courts, the political system and the media. Thus, indigenous peoples themselves were mobilized into a force able to articulate their demands and complaints to a world community becoming increasingly concerned with human rights standards. Solidarity was also found between groups from different states, and international indigenous organizations established.[62] Human rights organizations, concerned about the often appalling conditions of indigenous people, also took up the cause.[63]

Political leaders recognized the need to work out agreements with these groups for a variety of reasons. Uncertainty was damaging to potential investors in the resource development projects. Equally, the human rights movement supported by these leaders, and the increasing value put on diversity in society, made it much harder to resort to older methods of suppression and assimilation policies.

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[62]For example, the World Council of Indigenous Peoples and the Inuit Circumpolar Conference. See the comments of Professor O'Brien in R. Thompson, ed., *Indigenous Rights in International Law, Workshop Report* (University of Saskatchewan Native Law Centre, 1986) at 22.

[63]See H. Hannum, "New Developments in Indigenous Rights" (1988) 28 Va. J. Int'l L. 649 at 658 [Hereinafter "New Developments"].

Finally, in the UN, during the Decade to Combat Racism and Racial Discrimination, a report on racial discrimination by Herman Santa Cruz contained a section on indigenous peoples around the world, showing them to be amongst the poorest and most discriminated against sections of society.[64] This finding led to the commissioning of a report exclusively on the problem of discrimination faced by indigenous peoples.[65] However, the report turned out to be far more complex than had been anticipated. After 12 years of work, Martinez Cobo submitted a report which concluded that the problems were not related to discrimination. Rather, the problem was the relationship of dependency and exploitation with the state.[66] The solution was thus to give back to indigenous peoples far greater control over their lives than they had. Martinez Cobo concluded,

> Governments must abandon their policies of intervening in the organization and development of indigenous peoples, and must grant them autonomy, together with the capacity for controlling the relevant economic processes in whatever way they themselves consider to be in keeping with their interests and needs.[67]

The response of the UN was to set up a Working Group on Indigenous Populations. This group, made up of independent experts, has proved to be sympathetic to indigenous claims, and has thus far proved to be the focus of the international indigenous movement. There are hopes that the body can be given a more permanent mandate.

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[64]See "New Devlopments" *ibid.*

[65]Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN ESCOR, 1986, UN Doc. E/CN.4/ Sub.2/1986/7/Add.4 (1986) [Hereinafter the Martinez Cobo Report].

[66]See Jones in Thompson, *supra* note 62 at 50-54; R. Williams, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) Duke L.J. 669 at 677.

[67]Paragraph 268. For discussion of this see, e.g., A. Lawrey, "Contemporary Efforts to Guarantee Indigenous Rights" (1990) 23 Vand J. Transnat'l L. 703 at 765.

At this time, under pressure from non-governmental organizations,[68] the ILO also decided that Convention No.107 was hopelessly outdated, and set about modernizing the provisions to deal with the new mood in favour of encouraging the flourishing of indigenous culture. The result of the ILO process was Convention No.169, which entered into force in 1991. The first significant change was in the title, where the term "indigenous peoples" was substituted for "indigenous populations". This stresses the collective identity of the group, and their distinctive and coherent cultural, economic and social structures. However, states were clearly concerned about the possibility of linking indigenous groups with a right of self-determination, and consequently, article 1(3) spells out that,

> The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

The tone of the Convention was quite different to its predecessor, with a much greater emphasis on participation of indigenous peoples themselves in the protection of their culture. As such, it recognises that indigenous groups have,

> the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.[69]

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[68]Hannum, "Indigenous Rights" in *Autonomy, Sovereignty and Self-Determination, supra* note 20, 74 at 78.
[69]Article 7(1).

This provides groups with significant rights over the process of development. However, the substantive provisions of the Convention accord the State with the position of power in the relationship. The role of indigenous groups is very much advisory, complemented by an obligation on the state merely to take account of, and recognize, indigenous institutions, values and laws. Consequently, although the Convention is a substantial improvement in protection for indigenous peoples, it does not alter the fundamental power structure, and fails to give ultimate control over their development to indigenous groups. This result may reflect the drafting process of the Convention, which was heavily state-centred, with little contribution from indigenous groups themselves.[70]

By contrast, the UN *Draft Declaration on the Rights of Indigenous Peoples* was the work of the UN Working Group on Indigenous Populations, and featured very significant indigenous participation.[71] This involvement has lead to a far more radical set of provisions, which reflect indigenous demands for institutional control over their affairs. Most significantly, article 3 proclaims a right of self-determination for indigenous peoples. Indeed, a condition of indigenous participation in the drafting process was the inclusion of the right of self-determination.[72] In a statement by indigneous delegates to the Working Group, it was stated that, "[d]iscussion of the right to self-determination has been and still is the *sine qua non* condition of our participation in the drafting process. The right of self-determination must be explicitly stated in the declaration...We will not consent to any language which limits or curtails the right of self-determination."[73] The right is thus of

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[70]C. Tennant, "Indigenous Peoples, International Institutions and the International Legal Literature from 1945-1993" (1994) 16 Hum.Rts.Q. 1 at 48.
[71]Tennant, *ibid.* at 43.
[72]See Tennant, *ibid.*
[73] *Ibid.*

fundamental importance to indigenous groups, reflecting symbolically, as well as practically, freedom from oppression.[74] It confers on indigenous groups a status in international law more reflective of their past sovereignty. It also, of course, alludes strongly to the decolonisation process. This quasi-colonial aspect has been explicitly recognized by Berman, when he argues that,

> their relationship to dominant societies are structurally indistinguishable from classic colonialism. Indeed, it can accurately be termed a process of *internal colonization*, in which indigenous peoples endure administrative control, dispossession from lands and resources, and forced or induced assimilation.[75]

Moreover, the internal dimension to self-determination is elaborated upon. As well as rights to participate in decisions concerning their development, article 31 confers an institutional right, providing that,

> Indigenous peoples, as a specific form of exercising their rights to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as means for financing these autonomous functions.[76]

The whole Declaration emphasizes the collective element of cultural protection, with most rights being accorded to individual peoples, and only certain, specific rights benefiting indigenous individuals. Given the strength of these provisions, many states have not been willing to support the Declaration, and the prospect of turning it into a binding Convention must be a distant one. The rights to self-determination and autonomy have been

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[74]C. Iorns, "Indigenous Peoples and Self-Determination: Challenging State Sovereignty" (1992) 24 Case W. Res. J. Int'l L. 199 at 225.

[75]Panel Discussion, "Indigenous Peoples and the Right to Self-Determination" (1993) Proceedings of the American Society of International Law 190 at 190.

[76]This provisions also appears in the Inter-American *Draft Declaration on the Rights of Indigenous Peoples*, OAS, Inter-American Commission of Human Rights, 90th Sess., OEA/Ser/L/V/II/90, Doc. 9 rev.1 (1995).

particularly criticized by states as "vague".[77]

Self-determination is therefore the centrepoint of the evolving normative framework, symbolising control and empowerment. Alongside this are a variety of other rights relating to more specific areas of protection. The UN Draft Declaration, for example, contains sections focusing on cultural identity, the manifestations of culture such as language, custom and philosophy, land tenure and cultural property.

The developments in the indigenous field have clearly revitalized the debate on internal self-determination, providing a new focus for analysis. In turn, minority rights have re-emerged from the shadows of international law to witness a number of new instruments starting to recognize the collective and institutional elements of cultural protection, although such ideas have not stretched as far as self-determination. There are a variety of reasons for this resurgence in interest. The theoretical debate on the position of minority groups in society has changed the mood of the international community. Increasingly, value is being placed on the existence of diversity within society, and the realisation has grown that this cannot be achieved within a purely individualistic framework. The passage of time has diminished memories of the League of Nations, as well as more recent examples of ethnic separation such as in the USA. Equally, as decolonisation has ended, a gap in the international agenda has opened up, and allowed the issue of minorities to get some attention.

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[77]See L. Stomski, "The Development of Minimum Standards for the Protection and Promotion of the Rights of Indigenous Peoples" (1991) 16 American Indian L. Rev. 575 at 578.

Moreover, there has been a re-emergence of the argument that minority rights are essential to stability and peace. The new twist to this guiding principle of Versailles is that the stability referred to is within states and not between them. Thus, the role of international minority protection is perceived today to be creating conditions of internal stability and justice. Finally, the increasing globalisation and supranationalism, especially seen in Europe, has put pressure on the regions, and raised the need for greater cultural protection.[78] Therefore, the emphasis is once again on the internationalisation of minority protection. However, the institutional framework is much stronger today than at any time in the past.

The first instrument of note in this context is the UNESCO Declaration on Race and Racial Prejudice,[79] which strongly affirms the rights of groups, as well as individuals. Article 1 declares that,

> All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such.

Equally, there is a requirement to respect,

> the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international context, it being understood that it rests with each group to decide in complete freedom on the maintenance and, if appropriate, the adoption or enrichment of the values which it regards as essential to its identity.[80]

Thus, the collective right to identity is explicitly recognized. Moreover, some level of control over cultural development by the group in question is required.

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[78] See, e.g., Kulcsár, *Prospects and Realities: An Outline of a Potential Vision in the Political Development*, trans. Glatz (Budapest: Europa Institute, 1995).
[79] UNESCO *Declaration on Race and Racial Prejudice*, 1978.
[80] Article 5(1).

The UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*[81] requires the protection of the identity of the group, and the adoption of any measures necessary to do so. However, all the substantive rights of the Declaration are attached to members of minorities and are thus purely individual in nature. The rights to participate in public life and any decision-making affecting the group are phrased individually, and consequently fall far short of the sort of collective protection seen in the Draft Indigenous Declaration.

Europe, however, has seen a proliferation of regional instruments, which have more implications for institutional arrangements. The OSCE has been the most active institution, setting up a High Commissioner on National Minorities to study specific situations and act as an early warning system. The question of minorities has also featured substantially in the Concluding Documents of the Vienna and Copenhagen Meetings, as well as the Charter of Paris. These documents set up a Meeting of Experts on National Minorities, in Geneva. The report of this meeting examined in detail the issue of institutional arrangements for minorities, reasserting the position that national minorities are "matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective state." When decisions affecting the position of minorities are being made, they have a right to be involved in the decision-making process. Paragraph IV goes even further than this, referring to,

> the need to take the necessary measures to protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity.

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[81]UN Commission on Human Rights, Res. 1992/26, approved by the General Assembly, UN GAOR, 1992, UN Doc. A/RES/47/35 (1992).

Recognizing the variety of circumstances and constitutional systems, the report goes on to list a number of institutional ways in which this protection can be achieved, such as autonomy, advisory and decision-making bodies with minority representation and elected assemblies for national minorities.

The Council of Europe Framework Convention for the Protection of National Minorities also incorporates such ideas. The terminology being developed for such protection, though, clearly does not at present explicitly incorporate self-determination, in contrast to the indigenous instruments. Rather, the approach in the Framework Convention is to require states to,

> create the conditions necssary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.[82]

Whilst this relates to the rights of individuals, and not the group as such, the explanatory memorandum lists ways in which these conditions can be created as including consultation with representative institutions and decentralized or local forms of government.

The Council of Europe has also produced a Draft Protocol on Minority Rights to the *European Convention of Human Rights*. This too includes an institutional right in the form of article 11, which states that,

> In regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal local or autonomous authorities or to have a special status matching the specific historical and territorial situation and in accordance with the domestic legislation of the state.

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[82]Article 15.

It is clear that, in Europe at least, minorities are starting to develop rights, which although phrased individualistically, are essentially collective rights to certain types of governmental institutions whereby they have control over their development. Therefore, the outcome of the rights is similar to that of indigenous rights. However, the context and justifications are quite different. The new minority protection is evolving from human rights such as the right to participate in public life and the right to protect one's identity. In contrast, the indigenous norms are focusing on an extension of self-determination and thereby using a very different and more radical discourse, which ultimately threatens more directly the legitimacy and sovereignty of the state.

Consequently, despite the links, the indigenous normative framework has evolved quite separately from minority rights. Equally, this framework pushes the concept of self-determination further than ever before. The fact that the agenda on indigenous rights has been driven by indigenous peoples and not states, as is largely the case with minority rights, has interesting repercussions. The extent to which states will be willing to accept and implement the norms, for example, remains to be seen. Taking into consideration all these factors, the next chapter will analyse the real utility of this evolving international law, and the wider international arena, for indigenous peoples.

2. THE UTILITY OF THE INTERNATIONAL LAW IN THE FURTHERANCE OF ABORIGINAL DEMANDS FOR SELF-GOVERNMENT

2.1. Introduction

At first glance, international law is a strange institution for indigenous peoples to be attempting to exploit. Whilst a regime for the protection of indigenous rights is slowly emerging, as discussed in chapter one, the historic usage of international law has generally centred around the interests of powerful European states, to the detriment of others, such as indigenous populations.[1] Some early writings did argue for the protection of indigenous peoples, such as those of Francisco de Vitoria.[2] However, the preponderance of legal opinion came to support the colonial ambitions of Europe and international legal doctrines were ultimately utilised by the Europeans to justify the taking of land and sovereignty of what became the settled colonies.[3] The application of specific international principles depended more upon circumstance than doctrine, though, with the position of indigenous peoples

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[1]For an examination of the historic uses of international law see, e.g., D. Sanders, "The Re-Emergence of Indigenous Questions in International Law" (1983) Can.Hum.Rts.Y.B. 3 at 4 [Hereinafter "Re-Emergence"]; B. Berg, "Introduction to Aboriginal Self-Government in International Law: An Overview" (1992) 56 Sask. L.R. 375 at 382; P. Hutchins, "In the Spirit of the Times: International Law Before the Canadian Courts (A Work in Progress)" (Address to the Canadian Bar Association Continuing Education Committee and the National Aboriginal Law Section, 28-29 April 1995); R. Williams, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) Duke L.J. 660 at 672.

[2]See "Re-Emergence", *ibid.*

[3]For example, the doctrine of discovery was used to give sovereignty over the new, unoccupied land to the first European nation present. Terra nullius supplemented this by proclaiming certain indigenous groups so primitive and uncivilised as to not exist for legal purposes. For more on this see, e.g. I. Brownlie, *Principles of Public International Law*, 4th ed., (Oxford: Clarendon Press, 1979) at 149; Berger in R. Thompson, ed., *The Rights of Indigenous Peoples in International Law* (University of Saskatchewan Law Centre, 1986) 1. For a slightly different reading of the historical evidence see B. Slattery, "Aboriginal Sovereignty and Imperial Claims" [1991] 29 Osgoode Hall L.J. 1.

varying accordingly. For example, the periodic signing of treaties did improve the position of some of those groups and arguably showed some recognition by the Europeans of a level of sovereignty or political autonomy of indigenous groups,[4]

A number of the more detrimental international philosophies have been carried through to domestic legal systems today, by decisions such as the Marshall trilogy in the United States.[5] The current legal regime in Canada, whereby underlying title lies with the Crown, and aboriginal groups possess certain rights of usage of the land, subject to their extinguishment by the Crown, stems back to the international doctrine of discovery. Equally, in Australia the international principle of terra nullius served to deny its aboriginal population any common law recognition and was only abandoned in 1992.[6] Significantly, it was a change in international law in the International Court of Justice decision of *Western Sahara*[7] which contributed to the pressure on Australia to alter its law.

This historical role of international law can be better understood when one examines the traditional structure and formation of international law. The complete domination of the process by states has led to a system centred,

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[4]This is asserted by, e.g.,W. Heinz in *Indigenous Populations, Ethnic Minorities and Human Rights* (Saarbrucken: Verlag breitenbach Publishers, 1991) at 49.

[5]These three cases, basing concepts of aboriginal rights in US law on the doctrine of discovery, are *Johnson and Graham's Lessee* v. *McIntosh* (1823) 8 Wheaton 543; *Worcester* v. *The State of Georgia* (1832) 31 US. 350; and *The Cherokee Nation* v. *The State of Georgia* (1831) 30 US. 1. These cases held that the doctrine of discovery was applicable between the European nations to decide who had the right to assert sovereignty. However, it had no direct effect on the position of the indigenous population.

[6]This was in the High Court case of *Mabo* v. *The State of Queensland* [1992]107 A.L.R. 1, where the law of aboriginal rights in Australia was totally rewritten. For a discussion of the justification for such radical judicial intervention see, e.g., J. Webber, "The Jurisprudence of Regret: The Search for the Standards of Justice in *Mabo*"(1995) 17 Sydney L.R. 5.

[7] Advisory Opinion, [1975] I.C.J. Rep. 12.

until recently, around the interests of states and unable to respond to the views and interests of non-state parties. Only states, for example, have had international legal personality and thereby standing to use international institutions such as the International Court of Justice. Moreover, the creation of conventional and customary law, as well as its enforcement, is based on the will and consent of states. Thus, the development of normative standards is dependent upon their acceptability to those states. Without a central authority superior to states, the obedience to international norms has become strongly dependent upon the mutual self-interest of the states involved.[8] As such, international law has generally followed the mood of the international community which has created and utilised it, moving from domination by colonial philosophies to a focus on non-discrimination and assimilation in the 1960s, a change reflected in the *I.L.O. Convention No. 107.*[9]

Since the end of World War Two in particular, the system has been evolving to one in which states, although still dominant, are no longer quite so central. The structure of the United Nations, for example, aided by the process of decolonisation, has opened the system up to many new states, thereby bringing into the international system a wide variety of alternative cultures and interests. This has broadened the appeal and scope of international law and encouraged the development of norms reflecting these differing philosophies.

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[8]This means that norms in areas such as diplomatic protection and the law of the high seas are more likely to be complied with in practice than norms of a human rights nature, for example. For further discussion of the factors relevant to state compliance with international law, see R. MacLean, "The Proper Function of International Law in the Determination of Global Behaviour" (1989) Can. Y.B. Int'l L. 57 at 67.

[9] *I.L.O.Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations*, 26 June 1957, 328 U.N.T.S. 246, in force 2 June 1959 [Hereinafter Convention 107].

This has been accompanied by the dramatic rise in human rights law, which is quite different in nature to traditional international law. Rather than speaking to the relations between states, it concerns the relationship between a state and its individual citizens. Whilst the achievement of internal stability and contentment may have a positive effect on the stability and peace of the wider international community, the human rights movement has at its heart a profoundly moral dimension, namely that all human beings are entitled to a certain measure of security, dignity and freedom by simple virtue of their human existence.[10] As such, states are under increasingly intrusive obligations regarding the treatment of their citizens, which are evermore difficult to ignore.

Indigenous groups, by contrast with states, possess very little in the way of traditional economic, military or political power.[11] However, they are attempting to exploit an international system subject to far more diverse interests and influences than at any other point in time. Consequently, although states may retain a central role in the future development of indigenous rights, there is a growing opportunity to push the evolving normative structure in a direction compatible with the interests of indigenous peoples.

Despite the changing world system, there remains real scepticism amongst a number of analysts as to the real value of international law to indigenous peoples. It is indeed vital that a realistic appraisal of the utility of

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[10]For a basic outline of the arguments concerning the nature of human rights see, e.g., Weston, "Human Rights" in *The New Encyclopedia Britannica*, Volume 20, 15th Edition (1992) 656 at 658.

[11]For a more detailed discussion of the lack of traditional tools of power see F. Wilmer, *The Indigenous Voice in Politics: Since Time Immemorial* (Newbury Park, California: SAGE Publications, 1993) at 21.

international law be undertaken, given the financial and political expenditure required to become involved in the international scene.[12] There is a danger that indigenous peoples gain unrealistically high expectations of what the international arena can achieve for them.[13] Following the inevitable disappointment, any real benefits of international law could be lost by a hasty disregard of the entire system.

Further, the increased level of indigenous participation in the international process creates dangers in itself. Their participation adds substantial legitimacy and credibility to the creation of international indigenous norms. Given that states will remain in ultimate control of the process, indigenous peoples are relying on the willingness of states to accept the standards advocated by indigenous peoples. There is a risk that indigenous peoples will simply add legitimacy to a process which will ultimately produce normative standards inadequate in their eyes, and instead in the interests of states. Consequently, the attempt to use international law can be seen as a high-risk strategy, with potential actually to damage the long-term position of indigenous groups.[14]

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[12]Whilst there is UN Voluntary Fund, which helps indigenous groups to attend Working Group sessions, many groups still have to suffer financial hardship in order to send their representatives.

[13]For example, Marantz claims that " many indigenous groups concluded that the Year [of Indigenous Peoples] had failed them because permanent solutions to their needs had not been met." See D. Marantz, "Issues Affecting the Rights of Indigenous Peoples in International Fora" in *People or Peoples: Equality, Autonomy and Self-Determination: The Issues at Stake of the International Decade of the World's Indigenous People* (Montreal: International Centre for Human Rights and Democratic Development, 1996) at 36. Clearly, international law cannot provide these kinds of solutions to all the problems experienced by indigenous peoples, and such expectations are bound to lead to disappointment.

[14]For a full exposition of this interesting point, see C. Tennant, "Indigenous Peoples, International Institutions and the International Legal Literature from 1945-1993" (1994) 16 Hum. Rts. Q. 1 at 49-55. As Tennant asserts at p.55, "[t]he danger is that the gesture towards increasing the participation by indigenous peoples will prove an empty one, to which indigenous peoples will have committed much of their political capital."

It is thus of great importance to assess realistically the benefits and utility of international law, taking into account its inherent and practical limits. As such, the next section will discuss the various roles that the general international dimension can play in the furtherance of aboriginal claims, such as those for self-government. It will examine, firstly, the influence that the internationalisation of indigenous problems can have on the domestic policy agenda, and then go on to discuss the role that international law can play in domestic courts.

2.2. The Potential Roles of the International Law in Indigenous Claims

2.2.1. The Internationalisation of the Problems of Indigenous Peoples

For international law to be of practical use to indigenous peoples, it must have an impact on their domestic position in terms of law and policy. Ovide Mercredi, Grand Chief of the Assembly of First Nations in Canada, and Mary-Ellen Turpel, for example, state that for international norms to be truly beneficial, they must be implemented at the domestic level.[15] Equally, Leroy Little Bear argues that "[w]e look to international law to change the situation in Canada".[16] As such, the aim is to bring into this domestic dispute an international angle, one which can influence the way that each party acts. The simple articulation of an international standard and introduction of an interested third party can potentially have this impact in a number of ways.

The development of norms provides a point of comparison for groups in domestic disputes, setting out a series of basic entitlements. This can firstly

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[15] O. Mercredi and M.E. Turpel, *In the Rapids: Navigating the Future of the First Nations* (Toronto: Viking, 1993) at 199.
[16] See the Summary of Discussions in Thompson, *supra* note 3 at 24.

assist indigenous groups in getting to the negotiating table if their interests are suddenly threatened, or if groups are more generally unhappy with their legal regime. Having international rights gives groups a specific entitlement around which they can campaign. Rather than simply arguing that they are discontented with their position, they can argue that they have a right to be in a better position. This is the basis of a much stronger, more objective case, and thereby allows more substantial pressure to be applied to the state to negotiate.

International principles can also provide a general framework and point of comparison for the negotiation and implementation of domestic self-government agreements.[17] Whilst these international principles are very general, and thus have limited value in the negotiation of specific provisions, they do provide a basic starting point for an agreement, and can be pointed to by indigenous groups if their government is simply refusing to accept proposals in line with the international norms. Therefore, negotiations proceed on the basis that the indigenous group in question has a right to live on its land and practise its traditional lifestyle. As such, it is the government which is under pressure to justify actions which are contrary to these basic premises. Whilst this may not push negotiations very far forward, it is clearly a better starting point for indigenous peoples than one in which they are viewed simply as individual members of society with no special rights.

The existence of an external standard is supported and given further international significance by the presence of the international forum in which to air the views of indigenous peoples and publicise the actions of their government. Given that the grievances of indigenous groups are of a largely

[17]This point is made by Mary-Ellen Turpel in "The Draft Declaration on the Rights of Indigenous Peoples - A Commentary" [1994] 1 C.N.L.R. 50 at 51.

domestic nature, to be able to appeal to this second arena for support can be of great utility. It effectively brings in a third party, who may be able to apply pressure on the state which the indigenous group cannot do by itself. As such, the international publicisation of their grievances can work as a negotiating tactic in domestic disputes.

Further, the internationalisation of the issues opens up new channels of communication between states and indigenous groups. International law usually involves different, often more senior levels of government, and can thus lend greater weight to domestic decisions concerning indigenous peoples. This can help to push indigenous considerations into a more mainstream domestic policy discourse, rather than marginalising the issues to a specific low-grade department. The debate is also occurring one step removed from domestic politics, making it possible to forge a greater level of consensus between indigenous groups and states than is often the case at domestic level. This idea of communication is made clear in the report of the Working Group Session 1994, where it is stated that,

> [b]oth indigenous peoples and Governments had stated that they greatly valued the opportunity they had had since 1982 to meet annually and to engage in a frank exchange of views, on a basis of equality, which had developed into a constructive dialogue.[18]

Equally, the international fora give indigenous groups a further opportunity to educate decision-makers and the public about indigenous cultures, and thereby create a climate of greater mutual respect, understanding and tolerance.[19]

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[18]Working Group on Indigenous Populations, *Report of the 12th Session*, UN ESCOR, 1994, UN Doc. E/CN.4/Sub.2/1994/30 at 33.

[19]See the opening remarks of Dr. Daes in the Working Group on Indigenous Populations, *Report on the 10th Session*, UN ESCOR,1992, UN. Doc. E/CN.4/Sub.2/1992/33/Add.1 at p.6.

The final aspect of internationalisation is that it creates opportunities for indigenous groups to forge links with other indigenous groups. This may lead to the exchange of useful information regarding similar domestic disputes. It also provides emotional support, thereby strengthening the resolve of individual groups. Equally indigenous groups can increase their own domestic power by putting their problems in a wider, international context, allowing them to align with other movements, not all of which will be specifically indigenous. The most obvious example in this context has been the association between indigenous and environmental groups. Through these links, indigenous groups are often negotiating with their government not simply as a poor, powerless single indigenous group. Rather, they are part of a wider international movement to stop the development of their traditional homeland, for example. That may increase their domestic support in turn, as it is easier to mobilise the public to save something tangible such as a tree than it is to protect something as amorphous as a culture.[20]

One key reason why the internationalisation of indigenous issues, in all these different ways, can have a domestic impact is that international law has an aura of legitimacy,which serves to enhance its influence.[21] The emergence of international norms is the result of an international consensus on a particular issue, whether it be in the form of an agreed convention or through the state practice and *opinio juris* of customary law. As such, it reflects broad agreement amongst a number of states on the desirability and justification of a particular norm. This idea of legitimacy has come increasingly to the fore in human rights law, since the justification of many of these norms is

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[20]This was a point made by Brian Craik, Director of Federal Relations of the Grand Council of the Crees (Quebec), during a telephone interview conducted by the author on July 18 1996.

[21]See, e.g. Berg, *supra* note 1 at 376.

essentially moral. Consequently, the promulgation of new norms represents often not merely a political consensus but a moral one.[22] Kingsbury describes this as the "compliance-pull" of international law, and argues that one of the key functions of the norm-creating process is the generation of a perception of legitimacy in the final product.[23]

This idea of legitimacy can add much to indigenous claims in the domestic arena. It becomes easier to counter the argument that their land claims are the result merely of greed,[24] as indigenous peoples can point to the international arena and argue that these claims represent a norm which has the approval of the wider world community. This potentially could assist indigenous peoples in shifting domestic public opinion towards them, as government denials of claims increasingly can be seen as breaching international standards to which many other states adhere. A further element of legitimacy is that, increasingly, participation in the international community is dependent on the legitimacy of the government. To be part of this system, certain basic rules must be accepted and followed, of which the framework of fundamental human rights is central.[25] By making the treatment of its

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[22]The current debate on the cultural bias of human rights norms is beyond the scope of this thesis. For a discussion of the extent to which these do represent a moral consensus, or whether they reflect the dominance of simply Western philosophies see, e.g. R. Pannikar, "Is the Notion of Human Rights a Western Concept?" (1982) 120 *Diogenes* 75; A. An-Na'im, *Human Rights in Cross-Cultural Perspectives - A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992).

[23]B. Kingsbury, "Claims by Non-State Groups in International Law" (1992) 25 Cornell J. Int'l L. 480 at 482.

[24]Despite the international involvement, in a recent poll conducted for DIAND in Canada, 54% of the public believe that aboriginal peoples are being unreasonable in their land claims, compared to a figure of 46% in 1994. See Aubrey, "Canadians growing less tolerant of aboriginals' demands: poll" *The [Montreal] Gazette* July 8 1996 A5. Therefore, more effective use of the international rights is required if this role is to be realised in practice.

[25]See, e.g. J. Brosted, *Native Power: The Quest for Autonomy and Nationhood of Indigenous Peoples* (Bergen: Universitetsforlaget, 1985) at p.198, where he states that "as a member of the international system, every state will need some legitimacy, and that legitimacy will be tested, among other things, on the basis of its human rights

indigenous peoples a component of a state's legitimacy, there would be continual international pressure concerning the treatment of indigenous peoples.

One key aim, therefore, of internationalising aboriginal claims, through the promulgation of international standards and the usage of international fora, is ultimately to enhance the domestic negotiating position of indigenous groups. As such, it is a practical role, subject to the whims of domestic politics and public opinion, and the interests of the international media. Thus, its utility is, at heart, precarious. Nonetheless, with favourable circumstances, indigenous groups can improve their domestic position significantly through the effective internationalisation of their disputes.

2.2.2. A Role in the Interpretation and Evolution of Domestic Law

A second usage of the developing international norms is through their direct application in domestic courts. The central barrier to the application of the evolving international norms in domestic legal systems is that most systems, particularly in the common law tradition, follow a dualist, rather than monist, theory. As such, the international and domestic systems are treated separately, and international norms must be transformed into domestic ones before they can be applied directly by the domestic courts. However, even in these systems, international standards are playing an increasingly important role in the interpretation of domestic rights. This is particularly the case with human rights standards, as international human rights covenants are used as interpretative aids in cases examining the meaning of domestic rights

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performance."

instruments.[26]

International law has, for example, begun to play a crucial role in the direction of domestic aboriginal rights law. The Australian cases of *Mabo*[27] demonstrate this influence. *Mabo No.1* struck down Queensland legislation purporting to extinguish aboriginal title on the basis of the *Race Discrimination Act.*[28] This Act was in fact an express incorporation into Australian law of international anti-discrimination norms, thus showing the potential direct application of international principles, albeit in a domestic form. In *Mabo No.*2, international law was used less directly, yet just as effectively. The domestic law of Australia had consistently denied the existence of any aboriginal land rights at common law, continuing to apply rules based on the colonial doctrines of discovery and terra nullius. However, in *Mabo No.2*, the High Court of Australia quite radically changed the law, accepting the existence of an aboriginal title subject to the possibility of extinguishment. Hence, this approach is very similar to that taken by the courts in North America. The court justified its actions in a variety of ways. The international human rights movement, especially its strong anti-discrimination focus, was clearly an underlying element in this decision. Brennan J. explicitly used the language of international law to justify the court's actions. He stated that,

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[26] *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 is such a case in Canada. For a full discussion of the role of international law in Canadian courts see Hutchins, *supra* note 1; more generally see MacDonald, "The Relationship between International and Domestic Law in Canada" in *Canadian Perspectives in International Law and Organisation* (Toronto: Toronto University Press, 1974).
[27] *Mabo No.1* (1988) 166 C.L.R. 186; *Mabo No.2, supra* note 6.
[28] *Racial Discrimination Act 1975* (Cth).

> [t]he common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary to both international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[29]

This demonstrates a use of international law which could have practical relevance for other indigenous peoples. This role is further supported by Purich when he claims that "courts can be very influenced by gut reactions to political undercurrents", citing the role of international human rights law, particularly in the areas of slavery and decolonisation, in improving in practice the rights and positions of individuals around the world.[30]

There are clearly ways in which international law can be utilised by indigenous groups to improve their domestic position. How effective this usage will ultimately prove to be depends substantially on the types of norms being developed. It was clear in chapter one that indigenous peoples have very strong views on the future normative development, with great emphasis placed on self-determination, and a right to autonomy by itself being unacceptable to indigenous groups. By asserting their rights as "peoples", indigenous groups are also making a clear break with minorities and pursuing their own strategy. There may be strong reasons for this approach, but it does mean that indigenous peoples have in many ways shut themselves off from the parallel developments in minority rights which, although set in a very

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[29] *Mabo No.2, supra* note 6 at 29.
[30] See his comments in Thompson, *supra* note 3 at 25.

different discourse, are leading in practice to the sort of rights which indigenous peoples too are seeking. The next section will therefore analyse the benefits and problems of this strategy adopted by indigenous peoples. The first issue to be addressed is whether indigenous peoples are wise to be separating themselves from other minority groups.

2.3. The Utility of the Specific Norms Being Developed by Indigenous Peoples

2.3.1 A Separate Category of "Indigenous"

By insisting on a separate designation from other ethnic, linguistic and religious minorities, indigenous peoples are reflecting a genuine belief that they are in a class of their own.[31] They assert that their cultures and philosophies are more fundamentally contrary to the societies in which they are now living, than is the case with other minorities. They further argue that their history as independent peoples entitles them to a status different to other ethnic minorities. It must also be remembered that although indigenous peoples are usually in a non-dominant position in their states, they are not always a numerical minority. The Inuit population of Greenland, for example, constitutes approximately 90% of the whole population. The indigenous peoples of Bolivia, such as the Quechua, make up about 60% of the Bolivian population.[32] As such, by aligning with minorities, a number of indigenous groups would run the risk of losing any protection.

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[31]For elaboration of this point see R. Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) 80 *A.J.I.L.* 369 at 376.

[32]For further similar figures see J. Corntassel and T. Primeau, "Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing Self-Determination" (1995) Hum. Rts. Q. 343 at 347.

However, this distinction does raise the highly problematic issue as to how to define "indigenous".[33] As with the terms "minority" and "peoples", there is no accepted definition of "indigenous". A commonly cited definition is the one developed by Martinez Cobo in his UN Study.[34] This reads,

> Indigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.
>
> On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group).[35]

This definition incorporates a number of objective elements, such as historical association with the land, an experience of invasion or colonisation, a position of non-dominance, and a distinctive culture. It also requires subjective elements, in the criteria of group consciousness and acceptance of membership. There are a number of difficulties, though, as the definition is potentially left open to a wide variety of other minorities. Qualifying the group by terms such as "pre-invasion" and "pre-colonial" does not assist greatly, without a further definition of "invasion" or "colonial". As such, this

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[33]For a full discussion of the problems of definition, see, e.g., Barsh, *supra* note 31 at 373; Hannum, "New Developments in Indigenous Rights" (1988) 28 Va. J. Int'l L. 649 at 662; C. Bröhlmann and M. Zieck, "Indigenous Rights" in Bröhlmann, Lefeber and Zieck, eds., *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff, 1993) at 190.

[34] Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*,UN ESCOR, 1986, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986) [Hereinafter the Cobo Martinez Report].

[35]*Ibid.* in the final conclusions at p.50, 51.

definition clearly covers the groups traditionally thought of as indigenous, such as the Indians of North and South America, the Aborigines of Australia and the Maori of New Zealand. However, the indigenous movement is not restricted to these groups. There are many other groups who share similar nomadic and land-centred cultures, such as the Karen in Thailand, who are generally accepted to be indigenous.[36] Many of these groups argue that they too have suffered invasion and colonisation by different, non-European groups. However, if this wider idea of colonisation is accepted, it is hard to see why most European minorities, who also claim to have been invaded or colonised, are excluded from the concept of indigenous. There does appear to be a cultural dimension to the concept of "indigenous" which Martinez Cobo does not mention. This point is supported by the fact that there is a minority in Europe which is generally considered to be indigenous, namely the Sami in Scandinavia, who practise nomadic and land-based traditions.

By contrast to Martinez Cobo, the definition adopted in the *I.L.O. Convention 169* brings tribal peoples into the fold, thereby implying a cultural dimension. It defines the beneficiaries of the Convention as,

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[36]See Bröhlmann and Zieck, *supra* note 33 at 193; H. Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: The University of Pennsylvania Press, *1990)* at 89 [Hereinafter *Autonomy, Sovereignty and Self-Determination*]. In a series of addresses to the UN General Assembly by indigenous leaders on the World Day of Indigenous Peoples 1993, leaders came from a wide variety of groups including the Kuna of Panama, the Chakma of the Chittigong Hill Tracts in Bangladesh, the Inuit of Greenland, the Ainu of Japan, the Masai of Kenya and the Kelabit of Malaysia. For the texts of their speeches see *Voice of Indigenous Peoples: Native People Address the United Nations* (Sante Fe, New Mexico: Clear Light Publishers, 1994).

> (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographic region to which the country belongs, at the time of conquest or colonization of the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[37]

It also places self-identification as a "fundamental criterion" in the determination of relevant groups. However, the definition is still vague, and fails to establish clear boundaries between indigenous peoples and other minorities.

Indeed, to produce a definition in cultural terms is extremely problematic. Whilst there may be some general features linking these various groups, one is still looking at a vast array of cultures, ranging from nomadic tribes of the African desert to Amazonian rainforest tribes. When one takes into account the effect that contact with the European nations has had on many indigenous groups, the cultural links become even harder to see. Moreover, the natural evolution of cultures means that any definition freezes the culture at that point in time, stopping its natural development.

The problem of definition can be seen from two angles. Indigenous peoples are not only claiming to be different from their dominant societies in a cultural or linguistic sense. All minorities claim that. Rather, they are claiming that they are so different that they justify special consideration.

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[37]Section 1.1.

Therefore, the task is to exclude other minorities from the concept. Secondly, the category of "indigenous" links together all the peoples who are different from minorities in this way. As such, the second function is to bring together indigenous peoples.

Indigenous peoples do feel links with each other, and the international arena provides them with a great opportunity to meet and share their experiences and ideas. The opportunity to work with states and non-governmental organisations, as well as other indigenous groups, has helped to develop and strengthen many groups' sense of identity.[38] It is also clear that many groups who are in a relatively strong position with significant resources and education, such as those in North America, do feel an obligation to push the international agenda forward and establish normative standards which may be of marginal utility to them, but could be of enormous importance to less fortunate groups.[39] Consequently, indigenous groups do appear to see connections among each other, despite the problems in actually defining what those links are.

The response of indigenous peoples to this problem of definition has been to stress self-identification as the ultimate criterion.[40] Thus, if a group perceives itself to be indigenous, then that is sufficient to qualify as "indigenous". Indigenous peoples strongly claim that they have the right to define their own membership, in line with self-determination. As the next step, they see that they have the exclusive right to define their class of "indigenous". Moreover, indigenous peoples assert that states have often denied their existence and

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[38]This point is made by E. Stamatopoulou, "Indigenous Peoples and the UN: Human Rights as a Developing Dynamic" (1994) 16 Hum. Rts. Q. 58 at 69.
[39]This point was also made clear in my interview with Brian Craik, *supra* note 20.
[40]For further discussion of this see Corntassel and Primeau, *supra* note 32 at 348;

there is a justifiable fear of the consequences if the identification of groups is dependent upon state recognition.[41] However, this argument does confuse the issues of definition and who has the right to make the identification. It would be possible to lay down objective criteria independent of the level of recognition accorded to the indigenous group by the state.

The approach of self-definition does have the very clear advantage of avoiding the whole issue of what constitutes "indigenous". However, by claiming to be indigenous, each group must have an idea of what the concept means. It is also doubtful that indigenous groups would allow the indigenous movement to be taken over by a variety of European minority groups not generally considered to be part of the indigenous movement, simply because the groups in question "perceived" themselves to be indigenous.

The UN Working Group on Indigenous Populations, after spending the second and third sessions hotly debating the issue without reaching any agreement, decided to leave the question of definition open. As such, any group which perceives itself to be indigenous can participate in sessions. This approach has opened the Working Group up to a wide variety of groups. In recent years, there has been a great increase in the number of African and Asian groups involved in the process including, for example, the Kwanyama Tribe of the Republic of Namibia and the Maa Development Association from Kenya.[42] This has also resulted in the participation of a number of states who would not traditionally be perceived to contain indigenous peoples, such as France, Greece, Italy, India, Syria and Turkey.[43]

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[41] *Ibid.*

[42] See Stamatopoulou, *supra* note 38 at 71.

[43] Corntassel and Primeau, *supra*, note 32 at 352 in note 31. These states rather contain groups traditionally considered to be minorities, such as the Basques, Macedonians, Sardinians and Kurds.

This approach does clearly run a substantial risk of giving other, less "deserving" groups a "free ride" into the international system. If states can see that the process is being used by a variety of minorities to gain additional rights, rather than simply indigenous peoples, there is a danger that their qualified support could vanish, or that the good-will which has been so carefully cultivated could be diminished. This is a real problem, and the presence of groups such as the Rehoboth Bastar (Boer) community of Namibia and the Afrikaner Volksfront at Working Group meetings does not bode well for the future.[44]

Another side to this open and undefined approach to the concept of indigenous is that the law is attempting to deal with a huge range of traditions and circumstances. Mercredi and Turpel estimate that there are 250 million indigenous peoples in over 70 states.[45] Whilst their underlying philosophies and traditions arguably may be similar enough to justify inclusion within the general concept of indigenous, there is still enormous diversity between groups, their interests and their circumstances. Consequently, the most that anyone can hope for in the international norms is a set of highly general principles which must then be translated by each group into concrete and practical protection. Whilst this is also a problem for domestic systems, the international dimension clearly exacerbates it.

This diversity also contributes to the emphasis on vague terms such as "self-determination" and "autonomy". Given the lack of agreement between indigenous groups, as well as between states, there has been a need to use

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[44]This latter group has sought to be recognised as indigenous, and attended a UN indigenous rights conference in furtherance of this aim. See Corntassel and Primeau, *ibid.*, at 364.

[45]*Supra* note 15 at 198.

vague, flexible, usually undefined terminology, which can be interpreted in a variety of ways by the different parties.[46] Tennant asserts, for example, that "the concept of self-determination can work pragmatically with sovereignty: it can be stretched both to satisfy the aspirations of indigenous peoples and to avoid challenging the territorial integrity of states."[47]

The development of indigenous norms is based not only upon an assumption that there are some cultural links between the groups. It also assumes that all indigenous peoples do have some practical common problems and interests which can be dealt with similarly. Whilst this may be the case at a basic level, the dissension amongst indigenous peoples as to their priorities and aspirations must also be recognised, and is a factor in the current normative development. Ambitions of political control may figure in the minds of most indigenous groups. However, the current focus on self-determination and political rights has resulted from the fact that the driving force of the international indigenous movement has thus far proved to be largely North American.[48] The emphasis of indigenous peoples in South and Central America, for example, has been on land and economic rights.[49]

Despite these very considerable conceptual and practical problems in the separate categorisation of "indigenous", there are very significant benefits to be gained from maintaining a distinct identity. States, despite these problems, have been willing to see a separate designation, with specific fora and declarations. Moreover, states have shown themselves to be potentially more

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[46]Tennant, *supra* note 14 at 29.
[47]*Ibid.* at 30.
[48]Ulltveit-Moe and Plant, "Responding to Indigenous Demands in the New World Order: Some Human Rights Challenges" in P. Morales, ed., *Indigenous Peoples, Human Rights and Global Interdependence* (Tilburg, Netherlands: International Centre for Human and Public Affairs, 1994) 137 at 147.
[49]*Ibid.*

sympathetic to the rights of indigenous peoples than to those of minorities generally. It firstly sets up a category which is narrower than minorities and thus less vulnerable to fears of the uncontrolled application of rights such as self-determination. Therefore, it may be possible to acquire rights here that states are unwilling to grant to other minorities. This may be further assisted by the general weakness, in economic and political terms, of indigenous groups, which may make their claims appear less threatening and potentially destabilising to states. The consistent economic disadvantage of these groups also makes it easier to utilise arguments of social justice and the discourse of non-discrimination than is the case with other minorities. Indigenous peoples argue that they have interests and aspirations quite different from those of other minorities. They wish to see, for example, the upholding of the rights gained under treaties, rights which have no place in minority debates.[50]

Separate consideration moreover avoids some of the problematic historic associations that continue to plague minorities, such as the League of Nations and the experience of the lead-up to World War Two. Rather, the historical symbolism which can be invoked relates to colonialism. There is an implicit desire to draw parallels with the decolonisation process, and exploit the anti-colonial, non-discriminatory thrust of much of international law today. The decolonisation discourse also provides tremendous symbolism which is vital to indigenous peoples. It represents the ending of oppression and the taking back of control over their futures.[51]

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[50]For discussion of these ideas see R. Stavenhagen, "Indigenous Rights: Some Conceptual Problems" in W. Assies and A. Hoekema, eds., *Indigenous Peoples' Experiences with Self-Government* (Copenhagen: International Work Group on Indigenous Affairs/ University of Amsterdam, 1994) 9 at 22.

[51]See the comments of C. Iorns, "Indigenous Peoples and Self-Determination: Challenging State Sovereignty" (1994) 24 Cas. W. Res. J. Int'l L. 199 at 225.

Indigenous peoples do perceive their situation to be similar to that of classic colonisation, citing as evidence the economic exploitation and history of political domination. Consequently, their leaders do use the language of decolonisation to describe their own struggle. For example, Mercredi and Turpel claim that, "decolonisation is a right for all human beings, including the indigenous peoples around the world".[52] The establishment of such a link would emphasise the moral dimension of their claims and add weight to their position. There are also clearly established rules regarding decolonisation, and the unequivocal acceptance of an international role in the process. As such, it further helps to internationalise the issue. Moreover, the strong link between decolonisation and self-determination would be useful to indigenous peoples in their struggle to gain acceptance of their right of self-determination.

However, whilst the colonial parallel can clearly provide important symbolic links, there are limits as to how far such comparisons are likely to be accepted by states. One of the key parts of decolonisation, and the subsequent development of those new states, has been the insistence on territorial integrity and the indivisibility of states. The "blue water" thesis, whereby the colonised peoples could not claim the secession of land contiguous to the colonizing state, has never been completely refuted by the international community.[53] As such, it may prove difficult to gain acceptance as "colonised peoples", in a technical and legal sense.

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[52]*Supra* note 15 at 199.

[53]Belgian attempts, for example, in the 1950s to extend ideas of decolonisation to groups such as the indigenous groups of the Americas, were roundly rejected, with the criteria for decolonisation being geographic and ethnic separateness. For further discussion see M. Lâm, "Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination" (1992) 25 Cornell Int'l L.J. 603 at 616; M. Reisman, "Protecting Indigenous Rights in International Adjudication" (1995) 89 A.J.I.L. 351 at 352.

A further consideration is that indigenous peoples can exploit a greater moral authority than is available to the wider minority movement. Whilst most peoples and minorities have suffered oppression at some point in time, the history of the relationship between indigenous peoples and other settlers is consistently littered with tales of abuse, exploitation and violence. Particularly in the settled colonies of North and South America, Australia and New Zealand, where the international movement and indigenous advocacy are strong, powerful arguments can be advanced based upon the historical treatment of the first inhabitants of those lands. These injustices can often be seen to be continuing today, as land is still being appropriated and developed without indigenous consent.[54] Whilst these points may have a limited utility in deciding the appropriate solution today, they do provide a strong moral dimension to the case of indigenous peoples which is harder in practice for other minorities to consistently maintain.

In practice, indigenous peoples are also tapping into an international public opinion which is sympathetic to the basic tenets of their philosophies. The environmental movement has raised awareness of many issues of equal concern to indigenous groups, such as the destruction of the Amazonian rain forests. Consequently, indigenous peoples can make use of the resources and lobbying-power of environmental groups to protect their own lands from development and destruction. In addition, they can raise their own level of support from the general public by making clear the links between their cultures and environmental protection. The perception can be created that protecting indigenous cultures also protects the environment, thus heightening public sympathy and support for their campaigns. Equally, indigenous groups can exploit the general discontent in many Western states with the way their

[54]See the comments of Berger, in Thompson *supra* note 3 at 15.

own cultures and societies are developing. There is a general interest in indigenous philosophies, and their tendency to emphasis community, spirituality, nature and non-materialistic values, which can assist indigenous peoples in gaining public support for the maintenance of their cultures.

This dimension thus stems from the substance of their cultures, rather than the separate categorisation of "indigenous". However, whilst this angle could also be exploited if indigenous groups were subsumed into the general category of minorities, the separate designation makes this an easier task. There is not the same need to make the link in every case. Equally, that goodwill and general support can be transferred to a wider context, which does not necessarily involve the environment directly, and more easily utilised.

Clearly, though, indigenous interests are not always the same as those of the environmental movement, and whilst a general alignment is useful to indigenous groups, their separate identity needs to be maintained. Moreover, indigenous peoples must be careful not to link their identity inextricably, in the minds of the public, to romantic notions of a "primitive", pre-modern culture,[55] which is often the imagery conveyed in the environmental context. There is often substantial indigenous interest in developing land, and therefore a danger that support would evaporate when the modernity and reality of much indigenous culture and activity today becomes evident.

In conclusion, despite the severe problems in the definition of a separate category of "indigenous", one can also see significant benefit in maintaining a distance from other minorities. They can exploit a variety of imagery and public sympathies not available to many other minorities, and can thereby

[55]For a full discussion of the perceptions of indigenous peoples, and the impact that these have on the developing indigenous movement see Tennant, *supra* note 14 at 41.

push states further than they may be willing to go in other cases. However, whilst states have thus far tolerated the Working Group and its activities, the process has had little direct impact on the obligations of states. It may be that as the proposed standards of the Draft Declaration come closer to achieving the status of binding norms, states will grow increasingly uncomfortable with the current open position. It must be noted that in the I.L.O. Convention, the drafting of which was heavily state-centred, a definition was adopted. Therefore, one may see increasing pressure on indigenous groups to articulate their conception of "indigenous" and how they are defining themselves in order to move from a largely rhetorical advantage to one of practical and normative utility.

2.3.2. The Right of Self-Determination

Indigenous peoples place the norm of self-determination at the centre of their campaign, and it is useful to examine why this particular right is of such fundamental importance. Given that most indigenous groups do not wish independent statehood, one may wonder why a right of autonomy or self-government would not be adequate, especially with the history of state resistance to claims of self-determination.

The value of a right to self-determination lies in its essence, namely the idea of control. The crux of the claim therefore is the right to make a choice, not the right to a particular result. A right of self-government, by contrast, lays down a substantive solution for indigenous peoples, thereby reducing their control over the result. Self-determination is therefore a right related to process and procedures more than a substantive style of governance. As Mercredi and Turpel say, "[s]elf-determination is people acting for themselves, not waiting for another nation to tell them they can move left or

right, backward or forward."[56] This has obvious symbolism for indigenous peoples, as the practical need to be part of a larger state can be perceived as their choice rather than as a result of conquest, in whatever form.

The acceptance of self-determination would also strengthen the more general position of indigenous peoples in the international arena. The other rights being developed in the area, such as those related to land, cultural identity and economic development, would be linked together by the general idea of control. It would then be possible to ask whether a particular interpretation of these rights complied with the more fundamental ideas of self-determination. Consequently, indigenous rights would not be simply a series of rights recognised by states. Rather, they would be a reflection of the inherent and basic right to self-determination. The conceptual basis of all of the rights, then, would be strengthened. Given the fundamental and universal importance of self-determination, the durability of the rights would thereby be increased. There is also greater emotional potency in self-determination than in a more technical right to self-government, thereby making it potentially easier to stir international public opinion.

Self-determination would also bring a greater international presence to indigenous peoples. Rather than being merely an autonomous minority within a state, they would be a people exercising their right of self-determination, albeit usually within another state. Therefore, instead of the dispute being an essentially domestic one, between a state and its minorities, the argument would concern the exercise of two competing rights to self-determination. This would arguably give indigenous peoples a stronger international position than that of other minorities. Equally, as international law opens up

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[56] *Supra* note 15 at 205.

increasingly to non-state actors, indigenous peoples would be in a good position to take advantage of any developments. It can be noted in this context that the representatives of the two non-state actors considered "peoples" in the post-colonial era, namely the Palestinian Liberation Organisation representing Palestinians, and the African National Congress representing the black population of South Africa, were both accorded observer status at the United Nations.

The vagueness of self-determination, moreover, plays on the inherent strengths and weaknesses of international law. With the wide variety of circumstances affecting indigeous peoples, and the complexity of self-government, the utility of international law is clearly not in the specifics of autonomy. The emphasis of self-determination on procedure rather than substance nicely avoids this weakness. Rather, the utility of international law lies in getting indigenous peoples to a negotiating table, and encouraging their involvement in decisions concerning their interests. This, of course, is the essence of self-determination. Consequently, the very nature of self-determination exploits the strengths and practical utilities of international law, and minimises some of its inherent weaknesses.

It is clear that there are very strong advantages to pursuing a right of self-determination in terms of the protection it can offer. The nature of self-determination, rather than a more technical right of self-government, provides a good focus around which indigenous peoples' international efforts can develop. It fits in well with the practical utilities of international law, and is sufficiently vague for all indigenous groups to support. However, the concept of self-determination has been fiercely protected by states, since it appears to challenge their own territorial integrity. Indeed, the spectre of state sovereignty looms large in any consideration of the future development of

indigenous rights, especially when these occur through the assertion of self-determination.

2.4. The Barrier of State Sovereignty

It is impossible to assess realistically the future role of international law for indigenous peoples without discussing the central barrier to indigenous claims, state sovereignty. As the basis upon which all international law has proceeded, this principle places the state at the pinnacle of the international system, to the exclusion of non-state parties. A state is the exclusive arbiter over its own affairs, and no other state can tell it how to act.[57] Following on from this idea, international law is based on the consent of states, with conventions, for example, binding only upon their parties. The creation of customary law is based on the practice and opinion of states, and whilst unanimity is not required, there is a need for substantial consensus. Recourse to the International Court of Justice is reliant upon the consent of the state in question. Equally, the doctrine of non-intervention in the domestic affairs of states stems from the idea of sovereignty. This clearly places barriers on the development of meaningful indigenous rights, the beneficiaries of which are non-state parties. The extent to which this statement reflects the reality of the situation, and therefore a substantial block on the utility of international law, will be analysed in the next section.

[57]For a general discussion of sovereignty see, e.g., Brownlie, *supra* note 3 at 287.

2.4.1. The Assertion of a Competing Sovereignty

The claims of indigenous peoples clearly challenge the exclusive sovereignty of the state in question. Whilst most groups may not wish to secede, they do demand ultimate control over their own destiny. As such, they challenge the right of the state to make all the decisions concerning the future development of its people and resources. The claims of indigenous peoples may themselves be limited, and continue to accept the sovereignty of the wider state over certain issues. However, they do challenge the exclusive and unlimited nature of many states' claims to sovereignty. Whilst most states do accept the need for the autonomy of their indigenous peoples, this does not include the right of these groups to make the ultimate decisions concerning their future.[58] Claims of self-determination, however, fundamentally limit the decision-making capacity of states on certain issues and the more radical claims of continuing indigenous sovereignty can also challenge, at their heart, the legitimacy of certain states. By asserting a continuing sovereignty in, for example, America and Australia, they may require these states to question how they acquired their own sovereignty, thereby heightening state resistance.

Commentaries on the appropriate strategy for indigenous peoples with regard to state sovereignty are usually grounded in the assumption that the current system simply cannot deal with indigenous claims to some element of sovereignty. One argument frequently presented, for example, is that, in order to derive real benefit from international law, indigenous peoples need to

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[58] See, for example, the comments of states such as Brazil, who would accept an internal right of self-determination for indigenous peoples, but express serious reservations about giving indigenous groups the right to secede in any circumstances, in the Working Group on Indigenous Populations, *Report on the 12th Session*, UN ESCOR, 1994, UN Doc. E/CN.4/Sub.2/ 1994/30.

reduce their claims to a level acceptable to states and thereby abandon serious claims to self-determination. This approach is strongly taken by Jeff Corntassel and Tomas Hopkins Primeau.[59] They argue that indigenous aspirations to political control and cultural survival can be achieved through current human rights norms and instruments. The quest for self-determination and sovereignty accordingly is unnecessary, and has only served to alienate states, who immediately see the possibility of secession. As they assert,

> [w]ithin the international system one sees an emerging norm: all states must adhere to a minimum international community standard regarding the treatment of their own populations including their indigenous populations. But demanding respect for this minimum standard is quite different from proposing and pursuing strategies that ultimately challenge the political sovereignty and territorial integrity of nearly every state in the international system. In pursuing such a course of action, indigenous groups and their leaders should expect not only intractability on the part of host states, but outright hostility.[60]

Consequently, in their opinion, indigenous peoples must change their demands to fit in with the needs of states, or face total state resistance and thereby achieve nothing.

An alternative approach, which emphasises instead the need to change the whole paradigm of international law to one more receptive to indigenous claims, is taken by Catherine Iorns. She frames the strategic decision facing indigenous peoples as a choice between "pragmatism" and "principle", with the implication that only by being pragmatic with their demands and accommodating state interests will indigenous peoples achieve gains now.[61] She does see significant long-term benefits in pursuing self-determination, however, and her emphasis is therefore on shifting the whole structure of

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[59] *Supra* note 32.
[60] *Ibid.* at 145.
[61] *Supra* note 51.

international law away from state sovereignty in order to examine seriously indigenous demands.

If one takes the view that claims to self-determination can only be dealt with when the whole paradigm of international law shifts, then the future of indigenous claims are indeed bleak. In order to see concrete gains for indigenous peoples in the international arena, it would seem necessary to give up notions of self-determination. However, this position both overstates the dominance of ideas of exclusive state sovereignty, and underestimates the practical utility of the international legal arena in the face of state resistance.

2.4.2. The Changing Nature of Sovereignty

Many international commentators have maintained that the international structure is under direct challenge on a number of levels.[62] Whilst the realists have asserted for many years that the legal doctrine of state sovereignty does not match the facts of international relations, the evolution of the world community has strengthened these arguments and increased the level of debate on the issue.

One can argue very strongly, for example, that the nature of human rights law has had a profound impact on traditional notions of sovereignty. It is no longer possible to treat one's citizens badly without international comment. The international community, international institutions and human rights organisations are constantly monitoring the actions of states, and pointing out

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[62]For a good overview of the different challenges see R. Walker and S. Mendlovitz, eds., *Contending Sovereignties: Redefining Political Community* (Boulder and London: Lynne Rienner Publishers, 1990). For a specifically postmodern view see J. Bartelsen, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995).

breaches of international standards. Whether or not a state has become a party to a particular convention is often irrelevant in a practical sense. Whilst it may remain impossible to enforce legally such standards where there is no such state consent, it is not the case that states can simply ignore standards to which they have not given their consent. Playing a meaningful role in the international community requires the acceptance of basic restrictions on the treatment of a state's citizens. Consequently, there has been a real blurring of the lines between international and domestic jurisdiction, with a marked decrease in the areas in which states can act unfettered by international considerations.[63]

Equally, whilst enforcement of international law through legal mechanisms such as the ICJ remains dependent upon state consent, there are other means of less direct enforcement, which are not fettered by sovereignty. The use of publicity, moral persuasion and informal political and economic pressure cannot be ignored by the disobedient state.

This is complemented by the increase in activity, power and importance of non-state actors in the international scene. International corporations, NGOs and international "social movements"[64] amongst others are becoming evermore relevant to domestic decision-making. As Camilleri points out,

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[63]For an overview of the evolution of international law, including this blurring of the line between international and national legal systems see, e.g., Weiss,"The New International Legal System" in R. Jasentuliyana, ed., *Perspectives on International Law* (London: Kluwer Law International, 1995) 63.

[64]For a discussion of the role of social movements and other non-state actors, see, e.g., Falk, "Evasions of Sovereignty" in Walker and Mendlovitz, *supra* note 62, 61 at 71.

> [t]hough states remain important actors in world politics..they are nevertheless bound in webs of transactions and organizations which restrict their theoretical freedom to make unilateral decisions...Formal authority continues to be vested in the governments of nation-states, but effective authority - moral, customary, and even coercive authority - is widely dispersed.[65]

With the loss of control over the dissemination of information, states are increasingly subject to the actions of non-state bodies. It is hard to describe this transfer of power as a transfer of sovereignty. Rather, this evolution relates more to the diminution and scope of sovereignty as a whole.

Therefore, states are having to decide increasingly on their actions with reference to other actors, and are unable to act in a totally free and unfettered manner. This is indeed supported by the simple fact that indigenous claims are being heard and actually having an impact on international relations, despite the lack of traditional power of indigenous groups, suggesting that states are vulnerable to other forces.[66]

However, it has been argued, in response, that this line of thought misrepresents the nature of state sovereignty.[67] Hinsley asserts that sovereignty has never been a factual observation that states can act however they wish in all circumstances. Rather, it relates to the idea that there is no higher authority in the world system than states, and therefore, there is no body which can force states to act in a certain way. He argues further that states clearly cannot act in any way they wish and have never been able to do so. He closes by claiming that, "it is wrong to conclude that because the

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[65]See Camilleri "Rethinking Sovereignty in a Shrinking, Fragmented World" in Walker and Mendlovitz, *ibid.*, 13 at 28.
[66]Wilmer, *supra* note 11 at 26.
[67]The key exponent of this view has been F.W. Hinsley. See *Sovereignty* (Cambridge: Cambridge University Press, 1986).

state has experienced a decline in its international freedom in action, sovereignty is no longer compatible with the state's international position."[68] What is required instead is a re-evaluation of the meaning of sovereignty today, taking into account these other factors.

In this modified form, though, sovereignty does not appear to act as such a major bar to indigenous claims, even if it does remain a central element of international relations. It may continue to exclude indigenous groups formally from international decision-making. However, indigenous groups and NGOs representing their interests can clearly exert influence over the future direction of international norms, albeit it in a less direct role.

In a second strand of arguments relating to the decline of state sovereignty, interests such as economics, security and the environment are becoming evermore globally orientated. As such, there is increasing pressure on states to relinquish some elements of their sovereignty in order for meaningful action to be taken. International crimes such as drug-trafficking, money laundering and terrorism simply cannot be dealt with by individual states. Equally, the consequences of nuclear warfare or environmental disaster cannot be kept within state boundaries, and their regulation must be globally centred.

We are today seeing the emergence of institutions which do involve some element of shared sovereignty. The European Union, for example, is based on states pooling their sovereignty over certain issues which must be dealt with at a regional level.[69] As such, the laws of the European Union are

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[68] *Ibid.* at 226.

[69] See, e.g., R. Steiner, *Textbook on EU Law*, 4th ed. (London: Blackstone Press, 1988) at 47; Hartley, *The Foundations of EU Law*, 3rd ed.(Oxford: Oxford University Press, 1994) at 195.

supreme over those of individual states, a clear diminution of exclusive sovereignty. Whilst other institutions may not have acquired the legal power of the EU, and do not therefore legally challenge state sovereignty, there can be no denial that restrictions are continually being placed on states regarding their individual action.[70] The existence of federal states is in itself an example of the sharing of sovereignty between a number of different bodies.

This re-evaluation of the locus of power and general trend towards globalisation has also resulted in local and regional discontent in the position of smaller political communities.[71] As such, pressure is being placed on states to take account of local concerns and devolve power where necessary.[72] This factor was seen in the growing international focus on minority rights, discussed in chapter one, and is leading to a more detailed consideration of the relationship between the different levels of political community - the local, national and international. This new concept of state sovereignty, where states co-exist with other levels of power, poses no significant barrier to aboriginal claims and is indeed compatible with aboriginal sovereignty.

In conclusion, it remains unlikely that states will be removed from the centre of international relations in the short term. However, it is clear that there are increasingly non-state participants in the international system, with power to influence the direction and content of international law. Further, state sovereignty, in its traditional, exclusive conception, cannot be sustained in the long-term. Rather, the notion of sovereignty is becoming increasingly

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[70]H. Hannum, "The Limits of Sovereignty and Majority Rule: Minorities, Indigenous Peoples and the Right to Autonomy" in Lutz, Hannum and Burke, eds., *New Directions in Human Rights* (Philadelphia: University of Pennsylvania Press, 1989) 3 at 5.
[71]See Magnussen, "The Reification of Political Community" in Walker and Mendlovitz, *supra* note 62 at 45.
[72] See A. Eide, "Human Rights, World Society and Particular Communities" in Morales *supra* note 48 at 51.

devolved, leaving room for other parties. It is in this space that indigenous peoples must work, to push for ideas of shared and complementary sovereignty. Therefore, state sovereignty need not be viewed as a continuing and absolute bar to the claims of indigenous groups.

2.4.3. The Potential Role of Self-Determination in the Face of Sovereignty

It is also possible to see significant utility in continuing to pursue self-determination in the face of opposition by states. The nature of international law, and its primary uses outlined in section two, must be remembered in this context. The question which must be addressed is whether there is significant added utility in securing indigenous rights in a binding convention, or even non-binding declaration, which would justify the abandonment of their claims to self-determination.

Indigenous peoples have at present no international personality and there is little likelihood of full personality being accorded in the near future. Consequently, unless a specific procedure were established to hear complaints, indigenous peoples would have no institutional means to enforce a stronger legal instrument. They would be reliant on other states taking up their cases. With the dearth of such cases in general human rights law, the chances of such action would be slim.

Moreover, international law is by nature very bad at enforcing its normative system, especially through the imposition of sanctions.[73] International human rights norms are defied every day by states, and there is no reason to think

[73]For a discussion of how the strength of international law lies in encouraging future compliance rather than punishing past transgressions see, e.g., L. Brilmeyer, "Groups, Histories and International Law" (1992) 25 Cornell J. Int'l L. 555.

that an indigenous rights convention would be obeyed any more than the conventions against torture, racial discrimination or genocide currently are. A convention which is clearly accepted by states does give added weight to a particular norm and is therefore a desirable instrument to be developed. As such, it must remain the ultimate goal of indigenous peoples. However, it is debatable whether it would achieve in practice a greater level of compliance than would be possible with a non-binding instrument. The aim must be to encourage long term compliance with the normative standards,[74] and this must ultimately be done through working towards a consensus with states which can reflect the interests of states, as well as the aspirations of indigenous peoples.

Furthermore, an international right of self-determination cannot provide specific norms to be applied at a practical level. As discussed above, the central, practical role of international law in this area is creating publicity and putting pressure on governments to negotiate governmental agreements with indigenous groups. This can be done without having a binding instrument in the possession of indigenous groups. Domestic public opinion is unlikely to be swayed by the fact that the Draft Declaration is just that, and consequently not yet accepted by states, let alone binding upon them. Whilst it is necessary for the claim to have some reasonable basis and not be totally outrageous, the effectiveness of this type of pressure is not dependent upon an explicit prior acceptance of the claim.

Moreover, self-determination gives indigenous peoples a focus for their complaints and an aspirational standard to which they can push states. It creates a debate, thereby in itself increasing publicity. Indigenous peoples are

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[74]This point is strongly made by R. Torres, "The Rights of Indigenous Populations: The Emerging International Norm" (1991) 16 Yale J. Int'l L. 127 at 174.

getting their viewpoint heard, and forcing governments to react and defend their positions publicly. The Draft Declaration represents very substantially the aspirations and hopes of indigenous people. Without the right to participate in institutions such as the United Nations General Assembly, there are few fora for non-state parties to articulate directly their views.[75] Whilst the long-term aim must be to come to a consensus with states, indigenous peoples must be able to inject the debate with their own views, and thereby gain significant influence over the final result.

The Working Group, even if its Draft Declaration is not ultimately accepted by states, has played a great role in allowing real indigenous voices, and not just those of relevant non-governmental organisations, to be heard. Moreover, having this opportunity to get their views into the world system is not only beneficial for indigenous peoples, but also could have a general influence on the future direction of international law.

2.5. Conclusion

It has become apparent in this chapter that whilst international law has undoubted benefits for indigenous peoples, its use remains complex in theory and subject to a number of practical difficulties.

The internationalisation of domestic indigenous disputes is an attractive strategy, especially given the frustration felt by many indigenous peoples. The promulgation of international standards and creation of international publicity can be used by indigenous groups to improve their domestic negotiating

[75]For example, the UN Draft Declaration has achieved significantly more in terms of publicity and debate than the various individual declarations of rights by indigenous groups. See Torres, *ibid.* at 147.

position. A different avenue of communication has been opened up, providing new opportunities for education and constructive dialogue with states. Equally, the international angle connects indigenous groups, providing emotional and practical support, and allows for wider alliances. Finally, international law can prove a significant influence in the future direction of domestic law.

However, when one tries to apply the international principles in these different ways, a number of practical difficulties must be faced. For example, the generality of the principles raises serious questions about their practical utility in a specific context, especially when the negotiation of a highly complex self-government agreement is the issue at stake. Equally, can the simple international publicisation of indigenous problems put real pressure on governments and achieve positive change? With the enormous diversity of aboriginal groups, is it possible to exchange information and ideas meaningfully? Finally, does the lack of enforcement of the international principles weaken their practical utility?

In order to answer these questions, it is necessary to apply the principles to a specific case. Therefore, the final chapter will examine the position in Canada, focusing on the experiences of the Crees of James Bay.

3. THE PRACTICAL UTILITY OF INTERNATIONAL LAW FOR ABORIGINAL SELF-GOVERNMENT IN CANADA - THE CASE OF THE JAMES BAY CREES

3.1. Introduction

The purpose of this final chapter is to put the international norms outlined and analysed in chapters one and two into a practical context. In this way it will be possible to illustrate further the utility and failings of international law for indigenous peoples. The context used will be that of Canada, with a case-study focusing on the Crees of James Bay in Northern Quebec. Canada has thus far proved to be a leader in the negotiation and implementation of aboriginal self-government, providing a wealth of material to be examined. In addition, Canada is a state which cares about its international reputation, and therefore it is generally vulnerable to the use of international law and fora described in chapter two, making it a very appropriate state to examine. The case of the Crees is also useful for this chapter, given the substantial experience of the Crees with a self-government agreement. They are, moreover, highly conscious of the international dimension, and provide a number of concrete examples of internationalisation.

The first part of this chapter will outline briefly the evolution of ideas of aboriginal self-government in Canada, as well as three key models of self-government. This will provide the background and context for the more detailed discussion of the Crees. Moreover, it will serve to illustrate some of the key problems of international law, such as the complexity of agreements and the multiplicity of circumstances simply within one state. The position of the Crees will then be examined in detail, with the focus being on the *James Bay and Northern Québec Agreement (JBNQA)* and the utility of

international law in its negotiation and implementation.

3.2. The Inherent Right to Self-Government in Canada

The claim by aboriginal peoples in Canada to control their own development has been in existence throughout their contact with European peoples.[1] As such, ideas of self-government have always been implicit in the thinking of aboriginal peoples. However, it has only been in the past fifteen years that this demand has been explicitly the focus of aboriginal claims, and seriously debated across the nation. It is the culmination of the debate started in the 1960s, as more aboriginal peoples became politically educated and active in mainstream Canadian life, and the wider Canadian population developed a greater awareness of the situation of aboriginal peoples.[2] The 1960s focus on non-discrimination and equality, in political, economic and social terms, resulted in the federal government's ill-fated White Paper of 1969, calling for the abolition of Indian status and protection and demanding instead the total assimilation of the aboriginal population into wider Canadian society. This was roundly rejected by aboriginal peoples, who saw in the proposals the ultimate elimination of their cultures.[3]

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[1] Aboriginal leaders are currently advocating a fairly hard-line stance, claiming sovereignty and advocating the use of civil disobedience to achieve their aims if required. See Cox, "Sovereignty the only answer for Indians: Mercredi" *The [Montreal] Gazette* July 9 1996, A7.

[2] For a more detailed discussion on this evolution see J. Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Kingston and Montreal: McGill-Queens University Press, 1994) at 66.

[3] This era saw the creation of a number of pan-Indian regional and national organisations to represent their interests in the national arena. For a discussion of this evolution in specifically British Columbia see P. Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia 1849-1989* (Vancouver: University of British Columbia Press, 1990) at chapter 12, p.151.

Land claims became the primary focus of aboriginal rights in the 1970s, reflecting both the traditional importance of land to aboriginal communities and the practical need to establish a land base. As such, these claims were part of the wider desire to control their own destiny and thus inextricably linked to ideas of self-government. Three key events served to emphasise this focus on land.[4] Firstly, the Supreme Court decision of *Calder* v. *Attorney General of British Columbia*,[5] whilst ultimately a loss for the Nisga'a, provided strong support for the existence of an aboriginal title to land, subject to the possibility of extinguishment. The proposed hydro-electric development in James Bay, and the effect on the indigenous peoples there, sparked further debate on the issue of land. Finally, the Berger Report on the oil pipeline in the MacKenzie Valley provided a third forum for discussion of the issues.

The patriation of the Canadian constitution in 1982 created a new arena for the discussion of aboriginal claims, and it was here that demands for self-government started to be explicitly heard. The inclusion of section 35,[6] and the subsequent section 37 negotiations between aboriginal leaders and First Ministers concerning the identification of aboriginal rights, may have initially focused on land, but soon evolved into more fundamental debates concerning the constitutional position of aboriginal peoples and the right to self-government.[7]

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[4] See Webber, *supra* note 2 at 69-72.
[5] [1973] S.C.R. 313.
[6] This reads that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." See *Constitution Act 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.
[7] For discussion of these negotiations and their failings see, e.g., D. Hawkes, *Negotiating Aboriginal Self-Government: Developments Surrounding the 1985 First Ministers' Conference* (Kingston: Institute of Intergovernmental Relations, Queens' University, 1985); Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Governmental Relations, Queens University, 1989).

At the forefront of aboriginal claims today is the inherent right of self-government.[8] In the eyes of aboriginal peoples, this right was never extinguished by Canada, and therefore, it continues to exist today. They further assert that it has been given constitutional protection as an existing aboriginal right under s.35 of the *Constitution Act 1982*. As such, the right exists independently within the Canadian state structure, and does not result from a grant of power by Canada. Aboriginal self-government, in this view, constitutes a third order of government in Canada, alongside and equal in status to federal and provincial governments.[9] To express the right in these terms is important to aboriginal communities in terms of its symbolic, legal and political implications. It marks the severing of the relationship of dependency between the state and aboriginal groups, thereby empowering them,[10] as well as reflecting their wider right to self-determination. It also gives them a much stronger form of government, in legal and political terms, since it cannot be revoked by the government at will.

This view is largely supported by the Royal Commission on Aboriginal Peoples, which accepts the existence of an inherent right. It compares aboriginal self-government to a tree "still rooted in the same soil from which it draws its sustenance" but now in a "complex ecological system", having to co-exist and share power with other governmental structures.[11] The courts, by contrast, have been reluctant to recognise explicitly a continuing right to self-

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[8] For a discussion of the concept of the inherent right see, e.g., A. Fleras and J. Elliott, *The 'Nations Within': Aboriginal-State Relations in Canada,, the United States and New Zealand* (Toronto: Oxford University Press, 1992) at 23; F. Cassidy and R. Bish, *Indian Government: It's Meaning in Practice* (Lantzville, B.C.: Oolichan Books, 1989) at 33 and 39.

[9] For a more detailed discussion of this see, e.g., Webber *supra* note 2 at 264.

[10] See Fleras and Elliott, *supra* note 8 at 56.

[11] See Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Royal Commission on Aboriginal Peoples, 1994) at 37.

government.[12]

The federal government denied for many years the existence of an inherent right to self-government, arguing that any right which once existed was totally extinguished by the assertion of British sovereignty or by the *Constitution Act 1867*.[13] This position has evolved recently, though, with limited recognition of the right today. This was reflected in the Charlottetown Accord, which strongly supported the constitutional entrenchment of a right of aboriginal self-government.[14] Recent policy documents have also clearly accepted the existence of the inherent right, and called for negotiations to enable it to be exercised.[15] However, the focus of the federal government has been on the practical application of the right rather than its symbolic recognition, the essential demand of many aboriginal peoples.

3.3. The Different Models of Self-Government

In Canada, a number of quite different models of self-government have developed over the years, reflecting changing governmental policies, as well as the different traditions, circumstances and aspirations of aboriginal groups. In order to facilitate a deeper understanding of the JBNQA, it is necessary to briefly describe the models which developed both prior and subsequent to its

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[12]See the cases of *Delgamuukw* v. *British Columbia* (1993) 104 D.L.R. 470 (B.C.C.A.), especially at 515-520; *Pamajewon* v. *R.* (22 August 1996), (S.C.C.) [unreported].

[13] *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c.3. This is argued to have exhaustively divided governmental powers between the federal and provincial governments.

[14] This was rejected by the Canadian public, including Reserve Indians, in a national referendum. For discussion of the Charlottetown Accord and the practical implementation of aboriginal self-government, see Webber, *supra* note 2 at 270.

[15] The Government even "recognises the inherent right of self-government as an existing right under s.35 of the *Constitution Act 1982*", thereby strengthening the argument that it is already entrenched in the constitution. See the Federal Policy Guide to the Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, 1995.

signing, namely the *Indian Acts*, municipal models and comprehensive claim models. This places its provisions and philosophies in a historic context. Equally, these three models demonstrate the fundamentally different ways in which ideas of self-government and self-determination can be fulfilled within a single state.

3.3.1. The Current Model: The *Indian Acts 1876, 1951*

The basic model of aboriginal government in Canada was established under the *Indian Acts*, and operates essentially as a restricted municipal government under the authority of the federal Department of Indian Affairs and Northern Development (DIAND). The *Indian Act 1951*[16] set up the comprehensive scheme of today, although further powers have been subsequently devolved to the local level. Amendments to the Act in the 1980s, for example, transferred more power over membership codes and band finances.[17] Equally, community development programmes to encourage the involvement of more aboriginal people in the administration of aboriginal affairs were operated in the 1960s.[18]

In terms of structure, each group has a band council, which operates under delegated authority to run the local administration and has the power to make certain bylaws, usually on a reserve.[19] However, these cannot be inconsistent with the *Indian Act* or regulations by the Governor -in-Council or the Minister

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[16] *Indian Act*, R.S.C., 1952, c.149.

[17] See Cassidy and Bish, *supra* note 8 at 6.

[18] See Tennant's discussion of this is British Columbia, *supra* note 3 at 186. The programme actually served to heighten opposition to the system.

[19] Under s.81, areas of jurisdiction include health of residents, the regulation of commerce, traffic and buildings, the zoning and distribution of land and band membership. See Cassidy and Bish, *supra*. note 8 at 42.

of Indian Affairs.[20] As such, the power of band councils is heavily controlled. Their position is further hampered by their lack of corporate status, thereby denying them the ability to trade in real property and limiting potential economic development. The alienation of land is also tightly constrained by the federal government and the land therefore cannot be sold or put up as collateral for development.

Cassidy and Bish see the current arrangements as profoundly contradictory, incorporating elements of self-governance and paternalism.[21] Equally, DIAND faces the impossible task of mediating between government and aboriginal groups, a task which involves often opposing goals.[22] The result is unsatisfactory for all parties, and has led to the current searching for alternative models. Moreover, many aboriginal people object to the nature of the regime and demand greater autonomy and recognition, although there is often no clearly agreed alternative.[23]

3.3.2. Municipal Government: The Sechelt Model

The model used by the Sechelt Band in British Columbia is one popular with

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[20] Section 73.

[21] *Supra* note 8 at 47.

[22] Fleras and Elliott, *supra* note 8 at 83.

[23] There is in fact much internal dissent within aboriginal communities over future developments. For example, some women's groups have taken a strong and vocal stand against reforms which would weaken their position, demanding the application of the Canadian Charter of Rights and Freedoms to any model of aboriginal self-government. See, e.g. T. Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter" in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Justice Issues* (Ottawa: RCAP, 1993) 359; contrast M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Differences" (1989-90) Can. Hum. Rts. Y.B. 6.

both federal and provincial governments.[24] This approach involves severing the question of land claims from self-government, and developing autonomous governing institutions independent of issues such as the ownership of land and the wider control of resources. As such, the structure very much resembles a municipal government, similar to the *Indian Act* band council, but with much greater powers.[25]

The new Indian Band is firstly a legal entity, which puts it in a much stronger position than under the *Indian Act*.[26] The Band owns its reserve lands in fee simple,[27] although they are to be held for the "use and benefit of the band and its members."[28] Their lands remain as reserve lands for the purpose of the *Constitution Act 1867*,[29] thereby maintaining ultimate federal jurisdiction. The Band also has jurisdiction over their lands, with the power to legislate over, for example, access to and residence on their lands, zoning and land-use planning, taxation of interests in the land and of occupants of the land, health services, roads and public order and safety.[30]

There is a written constitution of the band, providing for, amongst others, membership, the management and disposal of land and natural resources, financial provisions and the constitution of the new Band Council. The Sechelt also participate in regional politics and development, and there is an

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[24] For a detailed discussion of these arrangements see Cassidy and Bish, s*upra* note 8 at 135; also C. Etkin. "The Sechelt Indian Band: An Analysis of a New Form of Native Self-Government" (1988) 8 Can. J. Native Studies 73.

[25] For a useful comparison of the powers of the Sechelt, Indian Act Band Councils and Canadian municipalities see Etkins, *ibid.* at 88-89.

[26] See *An Act Relating to the Establishment of Self-governance For The Sechelt Band*, S.C. 1986, c.27, s.6.

[27] S. 23.

[28] S. 25.

[29] S. 31.

[30] S. 14.

Advisory District Council to enable the views of non-Natives living on Sechelt land to be heard.[31] The arrangements have no constitutional protection, though, being the result of power delegated by federal and provincial legislation, rather than recognised as an inherent aboriginal right under s.35(1). This leaves the institutions vulnerable to legislative repeal.

The Sechelt model has been the subject of much criticism by other aboriginal groups, who view it as a poor substitute for self-government and a dangerous route for aboriginal peoples to be following. Its lack of constitutional protection and reliance on delegated powers has been a particular target. As the Union of British Columbia Indian Chiefs argues,

> Perpetual vulnerability is the quicksand upon which Indian people will be standing if they choose the municipal model of Indian self-government. A municipal government is not a distinct order of government. It does not have distinct jurisdiction...It is a creature of the senior level of government that created it and it can be limited or destroyed by its creator with impunity.[32]

It is clearly the fear of many aboriginal groups that this model will be pushed onto them when it is not appropriate for their aspirations. As a result of the reaction, the Sechelt withdrew from membership in the national and regional aboriginal organisations.

However, Cassidy and Bish argue that, despite its theoretical shortcomings, the model has worked quite effectively in practice for the Sechelt. The Band was impatient with the constitutional wrangling and wished to proceed with the practical implementation of a model as soon as possible. As a result, they

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[31] Created by British Columbia in *The Sechelt Indian Government District Enabling Act*, S.B.C. 1987, c.16.

[32] Quoted in Cassidy and Bish, *supra* note 8 at 141.

have managed to redefine their relationship with both the federal and provincial levels of government in a way appropriate to their needs, and which gives their own government space to operate within the federal structure. They have retained the fiduciary obligations of the federal government and their rights as status Indians. As such, it has proved to be a pragmatic way forward for a band with resources to develop and for whom the *Indian Act* was a particular hindrance in this quest. However, in the eyes of most aboriginal groups, the municipal model is clearly inadequate to provide the level of autonomy and control required.

3.3.3. Comprehensive Claims: The Yukon Model

The second key model with which groups and the government are experimenting is the comprehensive claim model, whereby land claims and self-government agreements are combined to redefine the whole situation of the aboriginal group. One clear example of this is the series of agreements concluded in the Yukon.[33] These included an Umbrella Agreement for the whole region, along with Final Agreements and Self-Government Agreements with individual First Nations. Four groups have made such agreements.[34]

Land, which can include reserves, is selected to become Settlement Land. This is then owned in fee simple by the First Nation. The First Nation gains largely concurrent jurisdiction over the Settlement Land, and can thereby legislate over, amongst other things, the use, management and disposal of the land and resources, the administration of justice and the establishment and

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[33] Another similar agreement is the recent Agreement-in-Principle with the Nisga'a in British Columbia.

[34] These are the Ventut Gwich'in, the Nacho Nyak Dun, the Teslin Tlingit and the Champagne and Aishihik.

operation of local services.[35] The First Nation also plays a significant role in the resource management of a much wider area, by participating in joint-management bodies such as the Surface Rights Board, the Fish and Wildlife Management Board, the Land Use Planning Advisory Committee and Renewable Resources Council. Finally, the First Nation has jurisdiction over all of its citizens wherever they may live in the Yukon over matters such as adoption, marriage, language provision and education.

This style of agreement is clearly more in line with the aspirations of aboriginal leaders mentioned above. It resembles much more closely a third order of government, with real autonomy and stability. However, the specific constitutional position of the Yukon, and the demographic situation, with fewer non-aboriginal people involved, facilitated such an agreement. The practical operation of such arrangements has also not yet been tested.

The aboriginal agreement with which there is most experience in Canada is the *James Bay and Northern Québec Agreement*,[36] and it is to this that I now turn. This is an agreement born out of a crisis, and is an early example of a comprehensive claims agreement. As such, the link between land and self-government, implicit throughout aboriginal claims, comes into focus here. The agreement also provided for the significant devolution of power, and consequently remains an important model for any discussion of self-government in Canada. Finally, this chapter will focus on the rights and experiences of the Crees rather than the Inuit, although there are obviously

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[35] For a useful discussion on the different levels of jurisdiction see P. Hogg and M.E. Turpel, "Implementnal
Issues" (1995) 74 Can. Bar Rev. 189; also J. Olynyk, "Approaches to Sorting out Jurisdiction in a Self-Government Context" (1995) 53 U. Toronto Fac. L. Rev. 235.

[36] *James Bay and Northern Québec Agreement and Complimentary Agreements* (Québec: Les Publications du Québec, 1991 edition) [Hereinafter *JBNQA* or "the Agreement"].

very large similarities.

3.4. The James Bay and Northern Québec Agreement

3.4.1. Background and Negotiations[37]

In 1971, the Premier of Quebec Robert Bourassa announced the construction of a major hydro-electric project in Northern Quebec. It was to symbolise the economic strength and territorial integrity of Quebec, and would involve, ultimately, the flooding of 23,000 square kilometres.[38] However, living on the territory were 6,000 Crees, relying on the land to sustain their traditional hunting lifestyle, and none of whom were consulted over the proposal. Moreover, under the *Quebec Boundaries Extension Act 1912*,[39] Quebec was under a legal obligation to settle the land claims of the aboriginal peoples of the area.

Led by a group of young, dynamic leaders, the Crees began a campaign to stop, or at least modify the development which threatened to flood large sections of their traditional hunting territory. With the government paying little attention to the concerns of the Crees, a motion for an interlocutory injunction was filed and the case went to court. After 71 days in court and 167 witnesses, the 180-page judgment in the case of *Robert Kanatewat et al.*

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[37] For more discussion of this see generally, B. Richardson, *Strangers Devour the Land* (Post Mills, VT: Chelsea Green Publishing, 1991); R. MacGregor, *Chief: The Fearless Vision of Billy Diamond* (Markham, Ont: Penguin Books, 1989); B. Diamond, *Highlights of the Negotiations Leading to the James Bay and Northern Quebec Agreement* (Nemaska, Que: Grand Council of the Crees (Quebec), 1976).

[38] See, e.g., M.A. Gagné, *A Nation Within a Nation: Dependency and the Cree* (Montreal: Black Rose Books, 1994) at 110 for a discussion of the planned schedule of flooding and development.

[39] *An Act Respecting the Extension of the Province of Quebec by the Annexation of Ungava* R.S.Q., 1912, c.7.

v. *James Bay Development Corporation et al.*[40] was read by Judge Albert Malouf, and the injunction was granted.[41] Despite the overturning of the verdict the following week by the Quebec Court of Appeal, the judgement clearly gave a tremendous boost to the bargaining position of the Crees, with parties getting nervous about the potential delays and uncertainty a further appeal to the Supreme Court of Canada would bring.

Negotiations were begun, with the findings of the legal proceedings providing significant evidence and a framework for discussion.[42] The aims of the Crees in these negotiations were realistic and clearly thought out. A demand simply to stop the whole project, whilst certainly the most desirable option, would not succeed, given the importance of the project for Quebec. Equally, although the Crees had a certain level of support from the Federal Government, the political situation in Quebec militated against intervention on behalf of the Crees.[43] Consequently, the basic goal was to ensure substantial modifications of the project to minimise its impact on the Cree way of life.[44]

The second strand to the Cree negotiating position was the desire to redefine the whole relationship with the state, to ensure that the Crees had some

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[40] [1974] R.P. 38 (Sup.Ct.); [1975] C.A. 166

[41] For a detailed account of the court case see Richardson, *supra* note 36.

[42] See I. La Rusic et al, *Negotiating a Way of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement*, Report prepared for the Research Division, Policy, Research and Evaluation Group of the Department of Indian and Northern Affairs (Ottawa: DIAND, 1979) at 9.

[43] For an account of the role of the Federal Indian Affairs minister, Jean Chrétien, see MacGregor, *supra* note 36 at 86.

[44] For an account of how the communities all agreed to this strategy, see H. Feit, "Legitimation and Autonomy in James Bay Cree Responses to Hydro-Electric Development" in N. Dyck, ed., *Indigenous Peoples and the Nation State: 'Fourth World' Politics in Canada, Australia and Norway* (St. John's, Newfoundland: Institute of Social and Economic Research, Memorial University of Newfoundland, 1985) 27.

element of control in the development of the land in the future. As Feit summarises,

> Cree elders viewed the hydro-electric project in the broader historical perspective of long-term relationships with whites: the project required that relations between Cree and whites be restructured. The goals encompassed both a modified project and a new relationship with governments that had to include the recognition of a Cree role in determining the development of their land.[45]

A measured approach was also taken to redefining their relationship and the opportunity to acquire significant power. According to La Rusic, a strategic decision was made not to challenge directly the sovereignty of Canada or Quebec, which was likely to achieve little. Rather, it was felt that the real power lay in the higher reaches of the bureaucracy and thus the Crees focused on building up close links and communication with that level of government. The Crees could then achieve meaningful autonomy through the administration of their own affairs.[46] As such, the Agreement centres on the devolution of administrative powers rather than the transfer of political decision-making.

The context of the Agreement must be borne in mind when examining its provisions. It was negotiated under severe pressure, with work continuing on the project throughout the process. Thus, the Crees were aware that negotiations and court proceedings could not be dragged out indefinitely. A deal had to be struck. Equally it was the first modern treaty between aboriginal people and the state, and consequently there was a genuine lack of experience and comparison in the process.

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[45] *Ibid.* at 57.
[46] *Supra* note 42 at 40-44.

The negotiations continued until November 1974, when an Agreement-in-Principle was signed. A further year passed with negotiations hammering out the details, and in November 1975, the Final Agreement was signed between the Governments of Quebec and Canada, the James Bay Energy Corporation, the James Bay Development Corporation, Hydro-Québec, and the Crees and Inuit of Northern Quebec. In the Introduction by John Ciaccia, the Special Representative of Robert Bourassa, the philosophy of the Agreement is discussed, and its two guiding principles outlined. Firstly, there is the need of Quebec to "use the resources of its territory, all its territory, for the benefit of all of its people", including its future needs. This is balanced by the need to protect the Cree and Inuit and their cultures, since "[t]heir fate as collectivities would be sealed if the Government of Quebec were not determined to give their culture the chance of survival as long as it has the vitality, and as long as they wish their culture to survive."

The Agreement was then supplemented by the *Northeastern Quebec Agreement* in 1978, whereby the Naskapi Indians of the region were brought within the provisions, and by a series of subsequent agreements amending the original provisions.[47] The Agreement was finally enacted in legislation by a series of federal and provincial Acts of Parliament.[48] The self-government provisions were enacted by the *Cree-Naskapi (of Québec) Act,* [49] which also established the Cree-Naskapi Commission to report on the operation of the

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[47] For example, Complementary Agreement Number 1 amends various provision to bring the Naskapi Indians into the Agreement; Complementary Agreement Number 3 redefines some of the Cree lands; Complementary Agreements Numbers 4 and 5 provide for further remedial works.

[48] See, e.g., *James Bay and Northern Quebec Native Claims Settlement Act* R.S.C. 1976, c.32; *An Act approving the Agreement Concerning James Bay and Northern Quebec* R.S.Q 1976, c.46; and a series of amending Acts concerning, for example, education and the environment. See,e.g., *An Act respecting the hunting and fishing rights in the James Bay and New Quebec Territory* R.S.Q. 1978, c.93.

[49] R.S.C. 1984 c.18.

self-governing provisions every two years.

3.4.2. A Substantive Overview of the *James Bay and Northern Quebec Agreement*

(a) Land Rights

The Agreement sets up a complex regime covering the ownership and jurisdiction of the Territory, divided between the federal and provincial governments and the aboriginal parties. The Crees firstly agree, under section 2.1, to,

> cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Quebec, and Quebec and Canada accept such surrender.

Thus, vague and undefined aboriginal rights are extinguished and replaced by the specific rights in the Agreement. In return, the Crees and Inuit get $225 million compensation,[50] and renounce any rights to the royalties of development in the area.[51]

The land regime is then established whereby the territory is divided into three main categories, each with different rights of ownership and jurisdiction attached.[52] Category I lands for the Crees are sub-divided into Category 1A, owned by Canada, and 1B, owned by native corporations. Canada gives to the Crees the exclusive right to reside, hunt, fish and trap on Category 1A

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[50] S. 25.1.1. and s.25.2.2.

[51] S.25.2.1.

[52] For a description of this regime see, e.g. Cassidy and Bish *supra* note 8 at 145; Moss, "The Implementation of the James Bay and Northern Quebec Agreement" in B. Morse, ed., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*, (Ottawa: Carleton University Press, 1985) at 684.

lands.[53] Quebec acquires jurisdiction over Category IB lands only. The villages are all situated on IA land and thus remain under federal jurisdiction.[54] Category II land is unoccupied Crown land, under provincial jurisdiction, but the Crees have exclusive hunting, fishing and trapping rights on the land.[55] The land can be appropriated by Quebec for development purposes without the consent of the Crees, but compensation must be provided. The James Bay Regional Zone Council has the jurisdiction of a municipality over these lands, and comprises half Cree membership. The vast Category III lands are also Crown land, under provincial jurisdiction, and constitute the rest of the territory covered by the Agreement.[56] The Crees' preferential right to hunt fish and trap is subject to developmental requirements on these lands.

(b) Local Government and Social Services

The splitting of Category 1 lands by the Crees, dividing jurisdiction, means that there are three levels of government operating in the area. In terms of Cree jurisdiction, each of the Cree communities is incorporated as a public corporation.[57] The corporations are administered by the local council and have the power to make certain by-laws relating to the environment and resource use over Category 1B land. This is supplemented by provisions concerning accountability to the local communities. Band councils are also established, with jurisdiction over Category 1A lands, under federal

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[53] S.5.1. This covers 5,544 square kilometres.
[54] However, the Inuit decided not to split their land and, as such, have not retained any federal jurisdiction.
[55] S. 5.2. This regime covers 25, 130 square kilometres.
[56] The territory covered by the Agreement consists of all of the land given to Quebec in the boundary extensions of 1989 and 1912.
[57] S.10.

jurisdiction.[58]

In terms of the delivery of services, administration is devolved to the local level. A series of boards and committees are established dealing with various sectors, such as the Cree Regional Board of Health Services and Social Services,[59] the Cree School Board,[60] the James Bay Native Development Corporation,[61] the Cree Trappers' Association[62] and a Joint Economic and Community Development Committee.[63] These all have significant Cree representation and have varying levels of final decision-making power.

In the realm of the administration of justice, the emphasis is on the participation of Crees in the structure, and a greater sensitivity towards Cree culture by non-aboriginal people.[64] Thus, the approach is to temper federal and provincial policies to suit local needs more closely. For example, specifically Cree police units are provided for, which are under the administration of Quebec police. Equally, judges and court procedures are to be sensitive to, and take account of, the "usages, customs and psychology of the Crees."[65]

Finally, two key regional bodies are also established. The Cree Regional Authority represents the James Bay Crees as a whole, appoints the Cree representatives onto the various joint-management bodies, and co-ordinates

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[58] S.9.
[59] S.14.0.2
[60] S.16.0.4.
[61] S. 28.2.1.
[62] S.28.5.1.
[63] S. 28.8.1.
[64] S. 18.
[65] S.18.0.7, 18.0.17.

programmes where requested by the local corporations.[66] As such, much of its power is delegated by the bands as required, and not laid down in the Agreement. Secondly, the James Bay Regional Zone Council is set up to exercise powers over Category II Lands.[67] Consequently, there is a proliferation of bodies with responsibilities over the different categories of land.

(c) The Environmental Regime

The competing interests present throughout the Agreement are the need to develop the land and the need to protect the Cree way of life centred around hunting, fishing and trapping. This balancing act becomes most evident in the provisions on the environment. The regime provides for "the protection of the Cree people, their economies and the wildlife resources upon which they depend" as well as the right to develop the Territory.[68] An Advisory Committee on the Environment, with joint membership of the Crees, Inuit and Naskapis, Canada and Quebec, monitors the whole regime,[69] acts as a consultation body to the governments regarding the regime,[70] and makes recommendations on impact assessments and possible legislation or regulation.[71]

There is, moreover, a system of social and environmental impact assessments,

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[66] S. 11A.
[67] S. 11B.
[68] S.22.2.2 lists the general provisions of the regime, and these two elements constitute subsections (e) and (f).
[69] S. 22.3.1.
[70] S. 22.3.24
[71] S. 22.3.25 and 27.

with their mandatory use in the case of certain types of development.[72] Two Environmental and Social Impact Assessment Committees, one covering matters of federal jurisdiction and one regarding provincial matters, review the findings along with any other submissions and recommend whether the project should proceed.[73] All proposals and impact statements must go to the Cree Regional Authority for comments, thus ensuring some level of Cree participation. However, the Review Committees, while containing Cree members, maintain a government majority. Therefore, while Cree objections must be heard, they can ultimately be overridden, thereby weakening Cree influence.

(d) The Harvesting Regime

This was felt to be a crucial part of the Agreement, given the central importance of these activities to the whole of Cree culture. [74] As mentioned above, exclusive hunting, fishing and trapping rights on Category I and II land, and predominant hunting rights on Category III land were provided for the Crees, collectively known as the right to harvest.[75] The key restriction on

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[72] Schedule 1 of section 22 lists types of developments which automatically require an impact assessment. Schedule 2 lists those which are exempt. All other projects are examined by an Evaluation Committee, which then decides whether an assessment is necessary, and if so, what type. See s. 22.5.

[73] S. 22.6.13.

[74] For a discussion of the provisions in this section see, e.g., H. Feit "James Bay Cree Self-Governance and Land Management" in E. Wilmsen, ed., *We Are Here: Politics of Aboriginal Land Tenure* (Berkeley, CA: University of California Press, 1989) [Hereinafter "James Bay Cree Self-Governance"] ; Feit, "Conflict Arenas in the Management of Renewable Resources in the Canadian North: Perspectives Based on Conflicts and Responses in the James Bay Region, Quebec" in *National and Regional Interests in the North, Proceedings of a Workshop* (Ottawa: Canadian Arctic Resources Committee, 1983) 435 [Hereinafter "Conflict Arenas"].

[75] This includes the right to harvest for commercial purposes.

the right is the principle of conservation,[76] defined under s.24.1.5 as,

> the pursuit of the optimum natural productivity of all living resources and the protection of the ecological systems of the Territory so as to protect endangered species and to ensure primarily the continuance of the traditional pursuits of the Native people, and secondarily the satisfaction of the needs of non-native people for sport hunting and fishing.

Priority is thus given to the Crees ahead of non-native hunters, a fact emphasised later in the section where harvesting levels are determined.[77] Moreover, the regime recognises traditional Cree hunting structures, without actually codifying them, thereby allowing Cree hunters to continue their practices with the flexibility required.[78] Such recognition is required for any governmental regime to operate successfully in practice.[79]

This regime is overseen by a Hunting, Fishing and Trapping Coordinating Committee (Coordinating Committee).[80] This has a mixed membership, with an equal number of non-Aboriginal members (representing Quebec and Canada) and Aboriginal members (representing the Crees, Inuit, and Naskapis). The chairmanship, which has the casting vote, rotates every year. This is largely a consultative body, with the right to "initiate, discuss, review

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[76] S.24.2 There are also restrictions in the exercise of the right in non-native settlements and where it is interfering with the physical activities of others or endangers public safety. See s.24.3.6 and 7.

[77] S.24.6.

[78] See, e.g., "Conflict Arenas" *supra* note 74 at 440 for Feit's discussion of how "traplines"and "tallymen" in the Agreement correspond to Cree concepts of hunting territories and "owners" of the land.

[79] H. Feit, "Self-management and State-management: Forms of Knowing and Managing Northern Wildlife" in Freeman and Carbyn, eds., *Traditional Knowledge and Renewable Resource Management in Northern Regions* (Edmonton: Boreal Institute for Northern Studies, University of Alberta, 1988) 72 at 84 [Hereinafter "Forms of Knowing and Managing"].

[80] S. 24.4.

and propose" any measures concerning the regime,[81] although it does have certain decision-making powers over, for example, outfitting permits.

The hunting regime is complemented by an Income Security Program for Hunters and Trappers.[82] This provides a guaranteed level of income, designed around the hunting year, for Cree persons who wish to hunt as a way of life. Benefits are calculated according to the number of days spent hunting, and are administered by the Cree Hunters and Trappers Income Security Board. The aim of this program was to make hunters less dependent on, and thereby less vulnerable to, the fur trade markets and price fluctuations, as well as providing a general income supplement. As such, hunting could be seen as a more stable and viable way of life which individuals would be more encouraged to pursue, thereby protecting the whole Cree culture.

(e) Conclusion

It is clear that the JBNQA was a comprehensive agreement, covering every aspect of Cree life. The complexity and importance of the environmental and harvesting regimes reflect the culture of the Crees and the need to put in place very specific measures of protection. Compared to the more recent comprehensive agreements, such as in the Yukon, it is quite fragmented, with a series of separate bodies established to deal with individual issues, rather than a single governing authority with jurisdiction over all areas of policy. As such, there are dangers of, for example, a lack of co-ordination or conflict of policies between bodies. This lack of a single governing body is also reflected in the emphasis on administration rather than political decision-making.

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[81] S.24.4.25.
[82] S. 30.

The final sections of this chapter will examine the extent to which international law could have aided the negotiation of the JBNQA, and its utility today in forcing its implementation. The role of international law in preventing further development of the land and in the event of accession to sovereignty by Quebec will also be discussed. First, however, the actual involvement of the Crees in the international arena will be outlined.

3.5. The Experience of the Crees at International Level

The Crees have been involved in the international arena for a number of years now. The first international initiative occured in 1980, in the wake of the JBNQA, in relation to specific problems in implementation. Canada and Quebec had not complied with obligations regarding the provision of healthcare and sewerage facilities. The result was an outbreak of gastro-enteritis and the death of several children. With little publicity and action in Canada, the Crees turned to the World Health Organisation (WHO), and one of the Cree chiefs involved, Billy Diamond, went to Geneva to appeal for help from the international community. WHO could not act unless the federal government of Canada requested it to do so, which it refused to do.[83] However, the activities of Diamond did result in significant international publicity on the issue. Seeing the potential of the international arena, as well as its limits, the Crees attended the first meeting of the UN Working Group on Indigenous Populations and have attended every session subsequently. As such, they have been significantly involved in the design of the UN Draft

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[83]See the comments of Bill Namagoose of the Grand Council of the Crees (Quebec) in evidence given to the Royal Commission on Aboriginal Peoples, Montreal 93/05/28 p.1124-5 My thanks to John Paul Murdoch, on whose summaries of the Royal Commission evidence I have relied. See also R. Salisbury, *A Homeland for the Cree: Regional Development in James Bay 1971-1981* (Kingston and Montreal: McGill-Queens University Press, 1986) at 4.

Declaration, and the general evolution of indigenous rights in international law.

In 1987, the Grand Council of the Crees (Quebec) were the first individual tribal group to be granted consultative status by the Economic and Social Commission, thereby acquiring the same status as non-governmental organisations such as Amnesty International.[84] Ted Moses, the Cree representative in the international arena, was the first indigenous officer of an official UN meeting when he became the rapporteur of a UN Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States in 1989.[85] He went on to present the report of the Seminar to the Human Rights Commission.[86] The Crees have, moreover, used the international arena to publicise issues concerning them such as the Great Whale Project and their position in the event of secession by Quebec,[87] the effectiveness of which will be analysed later in this section.In addition, the language of many of the Cree leaders is loaded with references to international law and the right of self-determination. As such, the Crees have invested significant time and money on the international process.

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[84]D. Sanders, "The UN Working Group on Indigenous Populations" (1989) 11 Hum. Rts. Q. 406 at 419; also the comments of Bill Namagoose, *ibid.*

[85]See D. Sanders, "Another Step: The UN Seminar on Relations Between Indigenous Peoples and States" [1989] 4 C.N.L.R. 37 at 39.

[86]*Ibid.*

[87]Ted Moses made a presentation to the Working Group in its most recent session, August 1996, on the position of the Crees in the context of Quebec sovereignty. See "Our rights are threatened in Quebec, Crees tell UN forum" *The [Montreal] Gazette* August 3 1996 A7.

3.6. The Practical Utility of International Law for the Crees

3.6.1. Internationalisation of their Problems

In the previous chapter, the internationalisation of domestic disputes was one of the main uses of international law. This concept of internationalisation was broken into four dimensions, namely the establishment of new, objective standards, the publicisation of governmental action to increase pressure on the government in question, the creation of a new avenue of communication between states and indigenous groups and the development of links with other groups, both indigenous and non-indigenous. The aim of the next section is to examine, through this analytical framework, the practical utility of international law for the Crees.

(a) The Establishment of Objective Standards

The first point to be examined in this context is whether the existence of international standards, such as those contained in the UN Draft Declaration, would have been of any assistance to the Crees at the time of the negotiation of the JBNQA. It is often argued, for example, that international principles provide a framework for the negotiation of self-government agreements.[88]

The complexity and detail of the JBNQA, coupled with the generality of the international principles, make it hard to see any significant practical benefit in the actual negotiation of the provisions. For example, if one looks at the land regime established, it is a highly complex system, with land categorised

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[88]See, e.g., M.E. Turpel, " The Draft Declaration on the Rights of Indigenous Peoples - A Commentary" [1994] 1 C.N.L.R. 50.

in three ways resulting in different rights for each of the parties. By contrast, the provisions relating to land in the Draft Declaration simply affirm the rights of indigenous peoples to "maintain and strengthen their distinctive spiritual and material relationship with the land...and other resources which they have traditionally owned",[89] to "own, develop, control and use the lands"[90] and to "determine and develop priorities and strategies for the development or use of their lands".[91] How such vague declarations could have practically assisted in the detailed negotiation of the provisions of the JBNQA, such as those described above is unclear.

Equally, the provisions were drawn up in accordance with the particular culture and circumstances of the Crees. The hunting, fishing and trapping regime, for example, was very specifically designed around the needs and traditions of the Crees. The provisions took into account the organisation of the Cree hunting culture. The specific context of the Agreement, raising the need to have some control over further development for example, also resulted in particular emphasis being laid on the sections relating to environmental protection. Even within the JBNQA, the Crees and Inuit had different provisions to suit their own needs, such as the splitting of only Cree land into Category 1A and 1B. Therefore, the strong desire of the Crees to maintain some federal jurisdiction, which was not matched by the Inuit, has made the Agreement quite different for the two parties. Again, international law could not have provided assistance in the practical negotiation of these provisions.

Despite these failing, it is possible, however, to see other less direct ways in

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[89] Article 25.
[90] Article 26.
[91] Article 30.

which the international principles could have been of benefit. They may have been able to improve the general tone of the negotiations. The Crees would have been entering the room with agreement over their very basic rights. Therefore, they would have started the negotiations on the basis that they had a separate cultural identity, centred around a lifestyle strongly tied to the land, and they had a right to maintain this culture and their traditions. As it was, they had to argue consistently that they were still practising their traditional culture and lifestyle, and that they should be able to continue doing so. Had Quebec been willing to accept the international principles, it would have set the boundaries for the negotiations in a way that accepted at least the basic rights of the Crees to continue their way of life. This could have been useful, and perhaps could have changed the tone and basic boundaries of the negotiations more in favour of the Crees.

However, the disagreements in state-aboriginal relations are often not over the basic right of aboriginal groups to continue to practise their culture. A state which is willing to negotiate will usually accept this premise. The problems largely concern the details of implementation. The delineation of the land involved, the definition of traditional activities, the level of financial support and the details of devolving power, for example, are more likely to be the points of contention. General principles, as discussed above, cannot resolve these issues.

A further way in which the international principles could have been of use to the Crees is that they would have provided a coherent approach, centred around the idea of self-determination. A problem with the structure of the JBNQA is its fragmented approach, as discussed above. The international rights would have at least linked the various areas together through overarching principles, such as the right to maintain and develop their

indigenous identity[92] and of course the right to self-determination.[93]

Therefore, it is possible to speculate that the promulgation of international standards could have helped to improve the tone and boundaries of the negotiations in favour of the Crees. They may have provided a more coherent and stronger overall framework for the provisions. However, they could not have provided significant assistance in the actual negotiation of the Agreement, thereby diminishing their practical utility significantly.

In the context of the JBNQA today, the existence of international standards can serve as a point of comparison for the specific provisions. This can work in two ways. Firstly, JBNQA provisions which do not conform to the international standards can be attacked, and an argument made for renegotiation. Alternatively, where provisions do conform to international standards, the Crees can use those standards to pressure the government into total compliance.

The JBNQA was agreed by all parties under extreme pressure to strike a deal as quickly as possible. Equally, it was negotiated over twenty years ago, in a context much more hostile to aboriginal rights. Given this background, although the Crees feel that they negotiated as good a deal as was possible, they would like to see some of the terms re-evaluated. By bringing in international law, they can attack the legitimacy and validity of undesirable provisions today from a new angle. For example, in submissions to the Royal Commission on Aboriginal Peoples, Billy Diamond argued that the JBNQA, "fails to meet both existing and emerging international standards, and this is more and more becoming a barometer by which the legitimacy of Canadian

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[92] Article 8.
[93] Article 3.

norms are measured."[94] As such, they are holding up the Draft Declaration as the expression of their rights today, and comparing these with the provisions of the JBNQA. Their conclusion is that "[v]irtually all of the provisions of the agreement fail by that draft universal declaration."[95] Their aim is effectively to renegotiate certain provisions which are highly detrimental to the position of the Crees and not in line with their international rights.

The clause which has been the subject of most discontent has been the extinguishment clause, under which the Crees appear to extinguish all of their aboriginal rights in return for the rights specified in the JBNQA. This is obviously a problematic clause for them when trying to stop further development of the land, in particular. They have to argue domestically, for example, that the clause does not mean what it says, that they simply gave up their rights concerning the development proposed at the time, or that they only extinguished the right to exclusive occupation and not all rights of control over the land.[96] Whether a Canadian court would interpret the provision in the way suggested by these arguments, however, is perhaps doubtful.

The Crees have started to attack the whole legitimacy of the clause, arguing that to extinguish their fundamental rights over the land is impossible. Consequently, the provision cannot be valid, whatever the agreement may say. The discourse of these arguments is highly international, and peppered with ideas of self-determination. Matthew Coon Come, for example, argues

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[94]Made in Montreal, 93/05/28, *supra* note 83 at 1112.
[95]Comments of Billy Diamond, *ibid.*
[96]This is the argument of the Crees' lawyer James O'Reilly in S. Vincent and G. Bowers, eds., *James Bay and Northern Quebec: Ten Years On* (Montreal: Recherches amérindiennes au Québec, 1985) at 153.

that,"[i]t is time for Canadians to recognise that extinguishment, being based upon archaic and discredited principles of racial and religious superiority and national supremacy, cannot stand the tests of constitutional validity, respect for Canada's international human rights commitments, or common decency."[97] The argument which is being presented is that the idea of extinguishment stems from the principle of terra nullius, under which indigenous populations were deemed too savage to merit legal rights. With the international abandonment of terra nullius, ideas of extinguishment can no longer be sustained.

There is indeed growing domestic pressure to abandon the policy of extinguishment. However, the international arguments are more complex than is being suggested, and the Cree representatives perhaps overstate the case. Whilst the principle of terra nullius certainly has discriminatory and racist tendencies, to question the concept of extinguishment would ultimately challenge the legal basis and legitimacy of title to the land in many states. It moreover had very practical justifications, relating to the need for certainty over the future of land. It must also be remembered that although *Mabo* rejected terra nullius, it embraced the concept of extinguishment, perhaps demonstrating that the latter is not subject to the same pressure on the international front. Therefore, while the argument is there, and can be used to increase the pressure on Canada to abandon its policy, it is a more complex issue than terra nullius was. Moreover, the Crees still have to counter the argument that they signed the Agreement and therefore consented to the extinguishment of their rights. The fact that Quebec and Canada were so determined to insert the extinguishment clause indeed shows recognition of the Crees' rights to the land, and thus contrasts strongly with the philosophy

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[97]See the presentation by Grand Chief Matthew Coon Come in Montreal 93/05/28, *supra* note 83 at 1164.

underlying terra nullius. A domestic court remains unlikely to disregard the plain meaning of a text and question the legitimacy of the means with which the Crown has acquired its territory. In this context, international law can work as a long-term pressure to change the attitudes of government and the courts. However, given that the doctrine of extinguishment has not been clearly repudiated by the international community, an emphasis on international law with regard to this issue is unlikely to be of substantial benefit.

The second element to the use of the international standards is in pressurising Canada and Quebec to implement the JBNQA in full. This works in tandem with the next element of internationalisation, namely the international publicisation of domestic disputes and actions.

(b) International publicity and opinion

Publicising breaches of the JBNQA by Canada or Quebec to an international audience potentially applies pressure on those parties to rectify their behaviour. As such, the use of the international arena in this way at the time of negotiation of the JBNQA could have assisted the Crees to some extent.

The first problem faced by the Crees in the wake of the announcement of the James Bay Project was getting Quebec to take their claims seriously and negotiate with them. It was only after the Malouf judgment[98] that Quebec was willing to sit down and talk about the possibility of a deal. However, even during the negotiation process, it was clear that the project would go

[98] *Supra* note 39.

ahead, with construction continuing throughout the period in question.[99]

Had international indigenous rights been so prominent at this time, the Crees could clearly have appealed to the Working Group, or international NGOs or media, for publicity, which could have put pressure on Quebec to negotiate. Given the very weak position of the Crees at the time, this could have been important. Moreover, it might have provoked greater public sympathy, as they could have presented their case as a furtherance of their international rights, rather than being perceived as "anti-Quebec" or "anti-development".[100]

Whilst this is clearly an area in which international law could have been beneficial to the Crees, there is an inherent limit to this role. For international publicity to work, the government must care about its international reputation, and thus be willing to take into account the views of the international community in the formulation of its policies. Canada generally is a state which does care about its image,[101] and therefore international publicity can be exploited and prove quite effective. However, there are circumstances in which perceived national interests rise above this concern. Whilst it is impossible to come to any firm conclusions on this question, it could be argued that the project was so important to Quebec in terms of the economic benefit, the prestige in developing such a huge project, and the

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[99]See, for example, the testimony of Billy Diamond before the Royal Commission on Aboriginal Peoples, where he states, "[t]he construction of the hydro-electric project was continuing. The Court of Appeal clearly was going to rule against us... By the time we got to the Supreme Court, the construction would be ended" Montreal 93/05/28, *supra* note 83 at 1105.

[100]For a description of the general public perception in Quebec of the Cree claims at this time see Richardson, *supra* note 37.

[101]This is supported, for example, by the comments of Professor O'Brien in R.Thompson, ed., *The Rights of Indigenous Peoples in International Law* (University of Saskatchewan Native Law Centre, 1986) at 26, where she compares Canada's "international rectitude" with the attitude of the U.S.A.

political need to assert its sovereignty over its northern territory,[102] that a certain level of international criticism and publicity would have been ignored, or even nationalistically defied.

Moreover, although indigenous rights may be discussed at the international level, the relative weakness of the Crees and the strength of Canada and Quebec means that serious pressure, such as the imposition of trade sanctions, would have been unlikely. Consequently, although the Crees may have been able to use the international arena to pressure Quebec into negotiating an agreement concerning the future of their lands, it must also be accepted that since the development was economically important to Quebec, it may well have been willing to ride out a level of international criticism, publicity and pressure. Further, it must be remembered that it is the federal government which represents the whole of Canada at the international level. However, Quebec was the party to whom the Crees needed to apply particular pressure. It would have been hard to apply pressure specifically on Quebec, as simply one province within Canada. These considerations would have hampered the practical utility of international law for the Crees in this context.

In terms of the practical implementation of the JBNQA, a number of significant problems have been experienced. Funding has proved to be the most consistent one throughout the past twenty years. There have been a number of disagreements over exactly what the level of financial obligation on the part of the government is under the Agreement. Even where there is consensus, the federal government has been reluctant to commit the required

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[102]Quebec had been arguing for many years that the northern part of its territory and its inhabitants were a federal responsibility. In the 1960s, though, with the rise in Quebec nationalism, there was a new desire to assert its presence ahead of that of the federal government. See Richardson, *supra* note 37 at 114.

funds. The level of financial support was indeed negotiated and a Statement of Understanding reached with DIAND in 1984. This provided for secure and continuing levels of funding by the federal government. However, the government was of the view that the Statement was not binding on them, despite two years of negotiation, and the Treasury Board has referred to it as merely a guideline. This has not only caused financial insecurity, and thus hampered administrative development, but has resulted in tremendous bad feeling between the two parties.[103]

This is clearly a key problem for the Agreement. Without stable and sufficient funding, the self-governing structures simply lurch from crisis to crisis, unable to engage in long-term planning and development. A need has arisen to "justify every penny".[104] With such a situation, the dependency on the whims of the government cannot be avoided and the process becomes a "charade".[105] As Diamond correctly observes, "[p]owers granted without the means of attaining objectives is an unacceptable and meaningless process."[106] Moreover, this is a question of government attitude and priority, rather than structural defects in the Agreement. The Crees may well in the end get sufficient funds to administer their programmes, but the lobbying required is time consuming, expensive in itself and clearly unsatisfactory.[107]

The international fora here can be used to publicise obvious failures of Canada and Quebec in this regard. The Crees can portray both federal and

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[103] See the Report of the Cree-Naskapi Commission 1986, which also viewed the Statement as legally binding.
[104] See the comments of Mark R. Gordon in Vincent and Bowers *supra* note 96 at 145.
[105] See B. Diamond, "The James Bay Crees and the Financing of Aboriginal Self-Government" in D. Hawkes and E. Peters, *Issues in Entrenching Aboriginal Self-Government* (Kingston: Institute of Intergovernmental Relations, Queens University, 1987) 93.
[106] *Ibid.*
[107] See Moss, *supra* note 52 at 691.

provincial governments as willing to sign agreements with its aboriginal population, but with no intention of following through on the financial commitments. Further, the Crees have tried explicitly to link the exercise of self-determination in the form of self-government, with the financial requirements for those arrangements to operate. [108] As such, without financial self-sufficiency, and the means to acquire that, self-determination cannot be achieved. The presentation of the facts in this way, rather than as a series of failures to implement adequately the Agreement, makes it easier to get public attention. The use of international standards also adds weight, legitimacy and coherence to the complaints being publicised.

However, the Crees need to be careful not to overplay their hand in this context. In comparative international terms, they are substantially better off than many other tribes facing persecution and physical danger. Therefore, whilst the international fora can be useful to apply pressure on Canada and Quebec to implement fully the JBNQA, there may be limited public sympathy for these complaints. Moreover, by fixing on international standards, the Crees run the risk of tying their ambitions to the lowest common denominator amongst indigenous peoples around the world, to the detriment of comparisons of living standards with other Canadians.

There have been other explicit breaches of the JBNQA. The federal government, for example, has failed to carry out all of the required impact assessments, often arguing that jurisdiction over the development, and therefore responsibility for the mandatory assessment, lay exclusively with

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[108] See the comments of Billy Diamond *supra* note 105 at 93.

Quebec.[109] However, whilst international publicity might again have some utility, it would be hard in practice to mobilise public support for these problems. Moreover, these complaints again pale in comparison to many of the other complaints heard in the Working Group.[110]

Other problems of implementation relate to the structure of the JBNQA and the practical operation of the provisions, such as a lack of trained Cree personnel.[111] Equally, the fragmentation of the administration has led to problems of co-ordination for all parties.[112] Moreover, the impact on the environment of the flooding has been much worse than was anticipated. A number of unforeseen problems have occurred,[113] such as the production of methyl mercury. This has led to the poisoning of large numbers of fish, and has, in turn, penetrated the diet of the Crees, for whom fish is a major foodstuff. It will be many years before the effects of the mercury subside, and this has severely curtailed the fishing ability of the Crees. The flooding and ecological changes have also disturbed the patterns of animals, causing large numbers to drown.[114]

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[109] See, e.g., *Cree Regional Authority* v. *Robinson* [1991] 4 C.N.L.R. 84 (Federal court trial division) concerning the Great Whale Project; also *Eastmain Band* v. *Robinson* [1992] 1 C.N.L.R. 90 concerning the Eastmain development.

[110] See, for example, R. Williams, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) Duke L.J. 660 at 680, where he describes tales heard in the WGIP of "gold miners who shoot Yanamami Indians from trees in the rainforest for profit - or worse, just for fun", and of "indigenous peoples who have fled death squads and wars in their countries and now crowd into refugee camps along the Mexican border."

[111] La Rusic, *supra* note 42 at 35.

[112] See the comments in a Debate, Vincent and Bowers, *supra* note 96 at 160.

[113] See, e.g., A. Penn, "Uneasy Coexistence: La Grande and the James Bay Cree" in B. Hodgin and K. Cannon, eds., *On the Land: Confronting the Challenges to Aboriginal Self-Determination in Northern Quebec and Labrador* (Toronto: Betelgeuse Books, 1995) at 129; Richardson, "Epilogue" in *Strangers Devour the Land*, *supra* note 37 at 344; Gagné, *supra* note 38 at 110.

[114] See, for example the drowning of 10, 000 caribou and clear reductions in the numbers of geese and fish. B. Diamond, Address to the Institute for Canadian Studies, Oslo, August 1990 in *Briefs, Submissions and Speeches on Behalf of the Grand Council of the*

A good example of practical implementation problems is the operation of the central body of the regime, the Coordinating Committee. Landmann, in a detailed study of its operation, discovered a number of serious flaws, some structural and some operational.[115] Its role is confused, combining both technical advice-giving and political discussion of resource allocation between groups. There was a lack of regular attendance and preparation for meetings, undermining their effectiveness, exacerbated by a lack of suitable personnel, particularly on the Inuit and Naskapi sides. Moreover, the voting structure and attitudes of the parties consistently led to confrontation, block voting and an inability to break down the political walls. For instance, the Quebec representatives were accused of being preoccupied with protecting their jurisdiction. The reliance by the aboriginal groups on non-native advisors weakened local participation and focused the debate on the legal interpretation of the provisions. Consequently, it tended to be very politically orientated, emotionally charged on occasion and achieved little in the way of constructive dialogue between the parties.

However, it is hard to see how international law could have an impact on any of these problems, which are highly specific to the Agreement, and result from the complex provisions. Problems in co-ordination and personnel, the changing ecological balance, the political nature of the Coordinating Committee are issues that really can only be solved by those on the ground. Moreover, these provisions appear to be in line with international principles such as the right to autonomy and self-determination. Indeed, the innovative co-management provisions seem to embody ideas of co-existing sovereignties

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Crees (Quebec) from April 1988-November 1990) (Nemaska, Que; Grand Council of the Crees (Quebec), 1990) at 16.

[115] Landmann, *Co-Management of Wildlife under the James Bay Treaty: The Hunting, Fishing and Trapping Co-ordinating Committee*, M.A. Thesis, Université Laval, August 1988.

and self-determination, with state and indigenous parties having real input into the future of environmental issues which affect them all. Therefore, in normative terms, international law can contribute nothing. In terms of publicising the problems, the international arena could put pressure on the various parties to find solutions and not just ignore the problems. However, this would appear to be of marginal utility for the Crees

One example of the effective use of international publicity to achieve change in the position of Quebec, however, was the campaign concerning the Great Whale Project. The James Bay hydro-electric project was split into three stages - La Grande River, the Great Whale Project and the Nottaway, Broadback and Rupert Rivers Project (NBR). The first stage, La Grande, has now been completed, but there has been much debate over further development. Developments concerning Eastmain and the NBR project were contemplated in the JBNQA. The Great Whale Project, however, represented new development, and the Crees claimed that Quebec needed fresh consent in order to proceed. Quebec argued, by contrast, that the Crees gave up all their rights to the land in the extinguishment clause of the JBNQA and therefore had no further interest in the matter.[116] As well as working through domestic avenues,[117] the Crees were able to publicise the issue in the United Nations. Their case was made, for example, in a report to the Sub-Commission on Discrimination and Minorities concerning the development of indigenous land.[118] This gave them the opportunity to relay their experiences on the first stage of development, including the methyl mercury

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[116] See the comments of the Crees' lawyer James O'Reilly in Vincent and Bowers, *supra* note 96 at 48.

[117] See the cases of *Coon Come* v. *La Commiso-Électrique de Québec* [1991] 2 C.N.L.R. 31; *Cree Regional Authority* v. *Robinson* [1991] 2 C.N.L.R. 41.

[118] UN Transnational Corporations and Management Division to the Sub-Commission on Discrimination and Minorities, *Transnational Investments and Operations on the Lands of Indigenous Peoples*, UN ESCOR, 1992, UN Doc. E/CN.4/Sub.2/1992/54.

poisoning, as well as their fears about the Great Whale Project.

Moreover, in a different style of internationalisation, the Crees appealed directly to third parties who had influence in the situation. They could see that this second phase of development was intended to produce electricity not for Quebec, but for export to the USA. A number of Northeastern states had signed contracts with Hydro-Québec, such as New York. Thus, the strategy was to pressure these states to cancel their contracts, and thereby make the project financially unviable.[119] They succeeded in persuading, for example, New York to cancel its contract through publicising the potential environmental costs of the development and mobilising public support. As a result, the project was delayed indefinitely in 1992.

This is a concrete example of the successful effects of internationalising indigenous issues. However, this is a style quite different from the use of institutions such as the UN and international law. Indeed, there was little appeal to the legal niceties. Rather, the emphasis was on raising environmental awareness and mobilising that particular lobby. Through this campaign, the Crees were able to utilise very specific economic levers of a third party. It is unlikely that action through the UN alone, for example, would have achieved the same results.

These events demonstrate some further weaknesses of international law in this role of applying pressure to governments. Firstly, whilst international law may have a weight and legitimacy that can be useful, it is far easier to mobilise international opinion and publicity through the environmental lobby. For the general public, the simple breach of international law is not

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[119] For the texts of a number of such speeches in the USA see *Speeches, Briefs, Submissions, supra* note 114.

sufficiently powerful to lead to mass action or pressure. Rather, international law generally supports campaigns against outrageous behaviour which have already captured world attention, such as environmental destruction or physical violence. By contrast, the institutions which may care about the simple breach of international standards, such as the UN, lack the power to apply effective pressure. The tools used in this case were economic, and hit very directly at the required target.

As such, international law and its institutions lack the bite and effective powers to seriously challenge the actions of states, especially where those actions are strongly tied to a perceived national interest. Rather, a more direct form of internationalisation, using public opinion, political power and the economic leverage of other influential states can prove effective.

Despite this weakness, though, international law can still be of some utility in a situation such as Great Whale. International standards mark the existence, interest and concrete rights of the Crees in an authoritative manner. As such, it makes it hard for Quebec to ignore the issue completely. Equally, the use of, for example, the UN, adds weight and legitimacy to the arguments of the Crees. Quebec could still argue that the Crees have no rights over the land and refuse to negotiate with them. Quebec, however, is then in the position of justifying and defending its stance. This would contrast with the situation in the 1970s, where it was the Crees who were constantly under pressure to justify continuing their traditional hunting, fishing and trapping lifestyle.

In this way, international standards work most effectively on a long-term basis to encourage the incorporation of indigenous rights into the actual decision-making process regarding development. Disputes currently arise on

the announcement of such developments, which is very late in the process. There is a need for the concerns of the Crees to be considered during the decision-making process, and for prior, meaningful consultation with the Crees to take place. International law constantly reminds decision-makers of the presence and rights of the Crees. If the officials can see that to decide on such developments unilaterally always results in conflict, bad publicity and antagonism with the Crees, it may encourage them to look at the views of the Crees before the final decision is actually made.

This is supported by the very nature of the right of self-determination, as discussed in chapter two. Self-determination does not simply question the actual decision made, but instead throws doubt on the validity of a decision-making process which excludes the voice of the Crees. Given that the essence of self-determination is the idea of choice and control, the breach of self-determination is not in approving the development itself. Rather it is in a decision-making process which ignores the views, rights and interests of the Crees. Consequently, the role of international law in the long-term is not in actually preventing all development of indigenous lands. Rather, it is in questioning the legitimacy of current decision-making processes, and encouraging new methods which give the Crees a significant influence and role in the development of their lands.

Therefore, the use of international publicity and pressure, backed up by clear international standards, can be of utility to the Crees, although it is unlikely to change dramatically their position in the short term. The complexity of the JBNQA and generality of the international principles substantially limit the practical utility of international law for the Crees, in terms of improving their position under the JBNQA or pressurising Canada and Quebec into full compliance. Equally, the lack of bite in international law and its institutions

curtails their effectiveness in situations such as Great Whale, where groups are threatened by development. However, it can work effectively as a long-term pressure on states to include indigenous peoples in decision-making procedures over matters in which they have a direct interest. Equally, international standards can help to establish a more favourable environment and starting point for the negotiation of self-government agreements.

(c) A New Avenue of Communication

Through using the international institutions, indigenous groups may be able to gain more direct access to government than is often otherwise possible. In Canada, the department which deals specifically with aboriginal affairs, the Department of Indian and Northern Development (DIAND) has low political weight in the overall structure of government. Therefore, even when aboriginal peoples can get commitments out of DIAND, there is no guarantee that other relevant departments will agree. When dealing in self-government, the co-ordination of a number of different departments is needed, such as education, health and social services and finance. DIAND, in these circumstances, rarely has the required influence over these other departments to secure compliance with the agreements. This has been the experience of the Crees in the implementation of the JBNQA, and the process is consequently very frustrating.

However, when dealing at the international level, the Department of External Affairs enters the picture, a very senior department with substantial power, influence and connection to the Prime Minister. Suddenly, aboriginal peoples are dealing with a senior level of government, which is capable of forcing through commitments it makes. This also allows discussions to be one-step removed, for example, from the heat of Quebec politics, and it is possible to

be less confrontational.

The creation of a special desk on international aboriginal affairs in the Department of External Affairs is claimed by the Crees to be a direct result of their actions at the international level. Such a desk should give a focus to aboriginal communications and open up a whole new level of contact which could not have been achieved in a purely domestic context. It should also add weight to indigenous demands which are a fulfilment of international standards, and provides a new, influential party with interest in the treatment of the Crees. Unfortunately, in the eyes of the Crees, the desk has become the focus of government efforts to resist the development of strong aboriginal rights at international level.[120]

Even if communication does improve between the parties through this new avenue, though, this still needs to be translated into better communication with domestic departments. There is no guarantee that good communication with the Department of External Affairs will have any direct impact on relations with DIAND or any of the departments involved in the implementation of self-government. Finally, this dimension of international law again works on a long term basis at changing attitudes and improving understanding between the parties. As such, its practical utility today is limited.

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[120]See the comments of Bill Namagoose to the Royal Commission in Montreal, 93/05/28, *supra* note 83 at 1126.

(d) Links with other groups

In the final dimension of internationalisation, the Crees may be able to benefit from forging links with other groups, both indigenous and non-indigenous. It was clear from the discussion of the Great Whale project that the Crees have already made substantial use of alliances with environmental groups. Given that many of their struggles concern the condition of the land and future development, these are clearly alliances which can be useful in the future.

It is also possible to use the international arena for comparative purposes to see other groups' experiences and ideas on similar problems. Therefore, other examples of co-management could be examined in order to find ways to improve the Crees' own structures. Whilst this can be done unilaterally, the existence of the WGIP in particular makes this process easier than it would otherwise be, given the resources of groups. The WGIP also provides a focus for the exchange of information, both in terms of personal contact and compiling reports.

In this way, the Crees could provide information on the successes and failures of the JBNQA to other groups, and contribute to the development of regimes elsewhere. For example, the provisions concerning hunting could prove useful for other groups wishing to maintain a similar lifestyle. Sections such as the Income Security Programme have been relatively successful. The number of people hunting as a way of life increased after the JBNQA came into force, and has remained relatively stable since that time.[121] This has helped to

[121]The number of ISP beneficiaries peaked in 1975-76 at 4,046, dropped in 1976-77 to 3,672 and has remained steady at that level since, numbering 3,477 in 1986-87. See the statistics of the Annual Reports of the Cree Hunters and Trappers Income Security Board, cited in H. Feit and C. Scott, *Income Security for Cree Hunters: Ecological, Social and Economic Effects* (Montreal: McGill Programme in the Anthropology of Development, 1992). For

maintain the traditional social structure of the Crees, centred around hunting. This has led, in turn, to a great sense of confidence and autonomy in Cree communities. Such experience could offer practical assistance, as well as some sense of hope, to other groups. However, whilst such information may be of some use, it has to be cautiously used and clearly adapted to the context.

3.6.2. A Role in the Interpretation of Domestic Law

The second way in which international law can be of assistance to the Crees is in domestic courts. For example, it would be possible to plead international principles in the interpretation of the JBNQA. Hutchins argues that the courts already consider international law in their decisions, albeit often indirectly.[122] For example, in the case of *Simon* v. *The Queen*,[123] the Supreme Court were willing to look at international law principles as analogies with, although not determinative of, the case. Aboriginal litigants have invoked international principles such as *pacta sunt servanda* and *rebus sic stantibus* to support either the continuing force or inapplicability of treaties.[124] Equally, the Crown continually pleads principles from international law, such as the doctrine of discovery, to justify their position. Consequently, although international law is not a direct source of law, it is increasingly being pleaded as a relevant influence, particularly in aboriginal claims, and could therefore play an important role in the future development of the law.

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further analysis of the figures see, e.g., H. Feit, "Waswanipi Cree Management of Land and Wildlife: Cree Ethno-Ecology Revisited" in Cox, ed., *Native People, Native Lands: Canadian Indians, Inuit and Métis* (Ottawa: Carleton University Press, 1986); also "James Bay Cree Self-Governance" *supra* note 74.

[122] Hutchins,"In the Spirit of the Times: International Law Before the Canadian Courts (A Work in Progress)" (Address to the Canadian Bar Association Continuing Education Committee and the National Aboriginal Law Section, 28-29 April 1995) [unpublished].

[123][1985] 2 S.C.R. 387.

[124] See Hutchins, *supra* note 122.

However, in the context of the Crees, this becomes more problematic. What is at issue is usually the interpretation of the JBNQA, rather than the development of the common law. As such, cases revolve around, for example, the allocation of jurisdiction between different bodies or levels of government. Compounding this is, of course, the generality of the principles. In most cases, an international right to autonomy is likely to be compatible with a variety of interpretations of the provisions. Only in a clear-cut case where one interpretation is in line with the international standard, and one is clearly not, could international law possibly make a difference to the result. The pleading of international law is more likely to yield results in cases where the future direction of the domestic law is being decided, such as in *Mabo*. Thus, for example, the clear establishment of an international right to self-government could gradually influence the courts to accept that such a right does actually exist and is protected under s.35(1) of the *Constitution Act 1982*.[125] However, it is unlikely to be able to influence the interpretation of a technical provision.

In conclusion, the roles identified for international law in chapter two have substantial problems when applied in a specific context. Whilst the international principles and fora do have some utility for the Crees, the generality of the principles and the lack of bite of international law limits their practical relevance in many cases. However, the final section of this chapter examines one situation in which international law suddenly has enormous value for the Crees - the possible secession of Quebec.

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[125]See, e.g. Turpel, *supra* note 88 at 50 for an argument of this position.

3.7. The Possible Secession of Quebec

The most pressing concern of the Crees currently is the possible secession of Quebec from Canada and the formation of a new independent state of Quebec. Whilst this is a fairly unique situation, it shows that, despite the often largely long-term role of international law, scenarios can arise in which its role is vital. Whilst a detailed examination of the arguments of the parties is beyond the scope of this thesis, a brief summary of the positions is required to enable an analysis of the potential role for international law in this context.

The Quebec sovereigntists have consistently argued that an independent Quebec would be indivisible and that the Crees can have no separate right to decide their own future. They are part of Quebec and must comply with the wishes of the majority. The sovereigntists therefore deny that the Crees have a distinct right to self-determination. In order to support this argument, a study by five international law experts was commissioned on the question of the rights of aboriginal peoples and other minority groups in the event of the achievement of a sovereign Quebec.[126] Their opinion was that, on the basis of *uti possidetis*, Quebec's boundaries would be secure, and the Crees could have no right to dismember a sovereign Quebec.[127]

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[126]Franck, Higgins, Pellet, Shaw and Tomuschat, "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté" in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *Les Attributes d'un Québec souverain* (Québec: Bibliotheque nationale du Québec, 1992), Exposés et études, vol. 1 377 [Hereinafter, *the Pellet Report*].

[127]The Crees have argued in response that this is only the case once Quebec has successfully acquired sovereignty, for which effective control over Cree territory would be required. Until that time, Quebec's borders would be vulnerable to competing claims, including their own. See *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Nemaska, Que: Grand Council of the Crees (Quebec), 1995) at 235.

However, the Crees are unimpressed with these legal arguments.[128] Firstly, the clear denial of a right of self-determination to the Crees, in the context of a such a right for Quebec, is believed to be a racist double standard which goes against everything indigenous peoples have been claiming. It sets a dangerous precedent for indigenous groups generally and does not inspire great confidence that their rights will be adequately protected in an independent Quebec. Their lack of control over, for example, their future citizenship and constitutional rights heightens these fears. What is at stake, in the eyes of the Crees, is their right to choose their future political status, the crux of self-determination. To some extent, then, whether or not they would wish to be part of an independent Quebec is beside the point.

The Crees are also clearly concerned about their position in a sovereign Quebec as compared to their current position within Canada. The future security of the JBNQA, and the loss of one of the parties, for example, causes great concern. Not only would this fundamentally change the nature of the agreement. There is concern as to the future security of the whole agreement, or vital parts of it, if it can be changed so radically without the consent of the Crees. The fiduciary relationship with Canada, and all the protection which that gives, would also be lost. Moreover, there is a genuine distrust of Quebec, based on past experience and the rhetoric emanating from the sovereigntist camp. The Crees claim that Quebec does not support the Draft Declaration and the rights therein.[129] There is no history of aboriginal participation in Quebec's political system, a problem compounded by the fact that most aboriginal peoples speak English and not French as their second language. Finally, there is a perception that Quebec is generally in favour of developing the land as far as possible, and that without the potential

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[128]See *Sovereign Injustice, ibid.* at chapter 12 p.385.
[129]*Ibid.*, at 398.

intervention of the federal government, further Cree land would be subjected to development without their consent.

In their fight for self-determination in this context, it is clear that the Crees view international law as an important tool. Their submissions to the Royal Commission on Aboriginal Peoples centred around an international right to self-determination. As Romeo Saganash, the Deputy Grand Chief of the Grand Council of the Crees of James Bay, states,

> The Crees should not be refused their rights, especially the fundamental right to self-determination. This is a question of fairness, logic and fundamental human rights and has a firm foundation in international law. The Cree nation must participate directly and fully in the discussion of any question that may have an impact on its traditional lands or that may change the constitutional structure of Canada and Quebec.

At the height of the campaign in the 1995 referendum in Quebec, their book *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* drew heavily on international materials and arguments relating to self-determination. Moreover, they have made presentations on the matter to the UN Commission on Human Rights[130] and Working Group on Indigenous Populations.[131] Consequently, the Crees are making their position clear well in advance of any potential negotiations, and trying to ensure that the international community is aware of the situation now.

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[130]See the Submission on the Status and Rights of the James Bay Crees in the Context of Quebec's Session from Canada, made to the UN Commission on Human Rights, 48th Session, 1992, noted in C. Tennant, "Indigenous Peoples, International Institutions and International Legal Literature from 1945-1993" (1994) 16 Hum. Rts. Q. 1 at 43, note 199.

[131]Their most recent submission was in August 1996. See "Our rights are threatened in Quebec, Crees tell UN Forum", *supra* note 88.

Indeed, the Crees argue that the international community is under an obligation to protect their rights, given the importance of the rights being potentially violated by Quebec, the vulnerability of the indigenous groups and the precedent such behaviour would set for other would-be secessionist movements. They submit that, "the international community has an important role to play in the current debate concerning Quebec secession. In particular, there is a compelling need to ensure full respect of the right of Aboriginal peoples to self-determination"[132]

The very nature of the dispute is fundamentally altered in this context. The international community and law are inevitably drawn into the conflict, as a new state is created and Quebec appeals for international recognition and admittance to organisations such as the UN. Moreover, Quebec itself invokes rights of international law, such as self-determination, to justify its secession. In contrast to most other indigenous issues, this dispute therefore has an inherently international dimension, immediately making the role of international law more pronounced.

Recognition of independent states is a matter of political rather than legal consideration. Therefore, it would be possible for states to recognise Quebec regardless of its legal right to secede, or its treatment of the Crees. However, the legitimacy of a state is becoming increasingly tied to its human rights record. As such, the Crees may well be able to argue successfully that recognition of Quebec should be dependent upon a suitable accommodation being found with the Crees.[133] Quebec may be able to ride out some general criticism of its development projects, but it could not ignore conditions on its recognition by the international community.

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[132]*Sovereign Injustice, supra* note 127 at 378.
[133]This is a strategy also recognised by the Crees. See *Sovereign Injustice, ibid.* at 369.

Such conditions are not unprecedented in international relations. In 1991, the European Union formulated guidelines for the recognition of new states in Eastern Europe. One of the requirements was, "guarantees for the rights of ethnic and national groups and minorities in accordance with those subscribed to in the framework of the CSCE."[134] The position of the Crees would go further than this statement, though, in that they would be pushing for recognition of their separate right of self-determination. This goes substantially beyond the general minority rights recognised by the OSCE. Moreover, it would require the recognition of a separate right of self-determination for part of a population, a position beyond that currently recognised by states, as discussed in chapter one. Therefore, it may be difficult to get such a right explicitly recognised by the international community.

However, the general discourse of self-determination would be useful, especially given the context in which the debate would be occurring. It would be Quebec, not the Crees, asserting a right of self-determination justifying secession. The fact that Quebec is invoking international rights, yet dismissing similar rights of the Crees, would strengthen the case of the Crees. Moreover, as a non-state actor, Quebec is no more entitled to exercise self-determination on a traditional reading than the Crees. If Quebec is asserting a new interpretation of the right, it is unclear why it applies only to Quebec and not to the Crees. If Quebec wishes to argue that it has legitimately acquired statehood through the exercise of self-determination in support of its international recognition, it must address this issue. As such, it is an issue the Crees can use to publicise their position and argue for their own right of self-determination.

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[134]*Declaration on Yugoslavia and on the Guidelines on the Recognition of New States of the European Communities*, December 16, 1991.

Alternatively, these issues could be dealt with by the UN taking reasonable and proportional measures against a newly independent Quebec which refused to take account of the rights and interests of its aboriginal peoples. This could include, for example, monitoring by the Security Council, the adoption of resolutions on the matter and, ultimately, the enforcement of economic or cultural sanctions.[135] The Crees argue that such action would be mandated by the breach of the fundamental human right of self-determination, as well as the Draft Declaration and evolving standards on indigenous rights. As such, the Crees assert that "the international community has a clear interest in ensuring compliance with existing and emerging standards."[136]

There are consequently clear opportunities for the Crees to assert their international rights in the context of Quebec sovereignty. In terms of the substantive protection that international law can offer to the Crees, here the essence of self-determination again becomes crucial. The role of international law is in ensuring that the Crees are involved in deciding their own future, and are not simply passed from one state to another without their consent. It cannot lay down what the solution is for the Crees, in terms of staying within Canada or becoming part of a sovereign Quebec. However, it may require that the Crees be involved in making that decision.

In conclusion on the role of international law in the context of Quebec sovereignty, it is clear that there is great scope for the use of self-determination, beyond that of a general bargaining lever. On the occasion of independence, it may be possible to persuade states that the recognition of Quebec be dependent upon its acceptance of the rights of the Crees, and the production of a result acceptable to all parties. Alternatively, it may be possible to push the UN to adopt measures against a newly independent

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[135]*Sovereign Injustice, supra* note 127 at 380.
[136]*Sovereign Injustice, supra* note 127 at 459.

Quebec to remedy any breaches of the international standards. Consequently, international law could play a critical role in protecting the position of the Crees in the event of Quebec sovereignty.

3.8. Conclusion

The purpose of this chapter has been to show international law in practice, and assess its application in the context of a specific group and their problems. It is clear that whilst international law can achieve important benefits, there are practical limits on its utility. In examining the practical utility of international law, using the analytical framework outlined in chapter two, a number of basic difficulties seemed to dominate the analysis. Firstly, the complexity and individual nature of self-government agreements such as the JBNQA, make it very hard to see a specific utility for the highly vague principles being developed at the international level. Secondly, the lack of bite and enforcement in international law substantially limited its effectiveness. The reliance on political pressure, moral authority and the conscience of the state diminished its potential influence in situations such as Great Whale and the initial James Bay development. This is coupled with the difficulty of applying pressure to the relevant party, where it is a province rather than the federal government.

The utility of international law, in the case of the Crees, is in applying long-term pressure on Canada and Quebec and slowly changing attitudes in their favour. The establishment of standards creates a point of comparison and a clear statement of their entitlements. The international fora open a new avenue of communication, and lead to constant monitoring of the treatment of the Crees by third parties. These factors encourage the forging of better relationships and the wider acceptance of the Crees' basic right to continue to

practise their culture and lifestyle. It also may lead to greater involvement in decision-making processes, particularly in the sphere of resource development.

Finally, in the event of the secession of Quebec, international law provides some support for the claims of the Crees, the central one of which is involvement in the final decision, although it may not recognise a full right to self-determination. As such, it does not solve their problems. However, it should help to ensure their participation in a situation in which international law could have a crucial role.

CONCLUSION

The aim of this thesis, as outlined in the introduction, was to evaluate the practical utility of international law to indigenous peoples in their attempts to redefine their relationships with their states. This was achieved by outlining the potential roles for international law, and analysing in turn their theoretical and practical limitations, using a case study of the Crees of James Bay.

In conclusion on the various potential roles of international law, the argument that international law can have a direct and decisive effect on the domestic position of indigenous peoples is clearly undermined by two factors. Firstly, the lack of enforceability of the indigenous norms very substantially weakens their practical utility in this context. This was clearly seen in the campaign by the Crees against the Great Whale project, where international law failed to have a significant impact. The inability to apply sanctions, and the need to rely instead on moral persuasion, political pressure and the conscience of the state, renders the international norms virtually useless in the face of a state determined to develop its resources. By contrast a direct appeal by the Crees to the USA, using its economic power through the mobilisation of the environmental lobby, was highly successful. The fact that the presence of international norms would have probably had only a marginal effect on Quebec's decision to undertake the first phase of development in James Bay, reinforces this failing. This problem is reinforced by the decision of groups to focus efforts on the right of self-determination, a claim traditionally resisted by states. As such, the development of binding norms will be slow.

Secondly, the juxtaposition of highly complex and specific arrangements for self-government with the vague principles being developed at the international level undermines the ability of the principles to achieve specific ends. The

desire to widen the indigenous movement to encompass all groups of a land-centred tradition from around the world has considerably lowered common interests and lessened the points of agreement between groups. As such, the principles could contribute very little to the drafting of the JBNQA, its interpretation or enforcement today. The complexity of the land categorisation in the JBNQA, for example, was contrasted with the vague principles protecting indigenous control over the land. Equally, despite their tremendous differences, the Sechelt, Yukon and James Bay models of self-government were all appropriate for the groups in question, and could all therefore be seen as fulfilling the international principle of self-determination.

Despite these weakness of international law in this context, though, there are other ways in which indigenous peoples can derive substantial benefit from the international arena, albeit less directly and in a more long-term fashion. Links with other groups, indigenous and non-indigenous, can bring valuable new experiences and resources to a group wishing to improve its position or facing a sudden threat. Equally, the emotional support provided by other groups, and the sense of solidarity gained from the experience of forging the new norms, should not be underestimated. The creation of a new channel of communication provides fresh opportunities for cross cultural dialogue and the education of both parties. It becomes possible to discuss contentious issues outwith the environment of domestic politics, thereby lessening the pressure on the parties. Through dealing with the Department of External Affairs, indigenous peoples are also provided with a potentially powerful ally in the enforcement of the international norms.

Moreover, international law can act as a strong influence on the future direction of domestic law, as has been seen in Australia. It can push the common law forward in a direction compatible with international standards, and therefore in the general interests of indigenous peoples. Indigenous groups

can also use international law as a point of comparison in order to argue for the reform of their legal or political position.

The international standards provide a better starting point for the negotiation of self-government agreements, which accepts the basic right of indigenous groups to continue to practise their traditions. As such, the boundaries and tone of the negotiations may be more favourable to indigenous peoples than would otherwise be the case. International law also places the individual domestic struggles of aboriginal groups into a wider context, portraying their claims as a furtherance of basic rights under international law, to which all other indigenous peoples are entitled. This adds a greater legitimacy and weight to indigenous claims.

Equally, wider international law occasionally has an impact on the lives of indigenous peoples, such as in the case of the potential secession of Quebec. Here, other rules of international law play a vital part in deciding an issue which has a great impact on indigenous peoples. As such, it is crucial that indigenous peoples develop a voice in the international arena, which can ensure their participation, to some degree, in the decision-making processes. In the case of Quebec, the Crees claim that they have the right to decide their own future political status. Whilst the international community may not accept that the Crees have a full right of self-determination, the general discourse and international arena could be vital to the Crees, especially given the assertion by Quebec of its right to self-determination. The strength of international law in this context is not in deciding the issue for indigenous peoples. Rather, it is in ensuring that they participate in the decision-making process, the essence of self-determination.

There are other cases in which other of rules international law have a similarly direct impact on the lives of indigenous peoples, and where their

participation would be very important. The drafting of international environmental regulations, for example, which restrict the right to hunt or fish certain species, may have a very profound impact on the traditional hunting lifestyle of a group. The ability to influence such measures, by invoking rights to self-determination or cultural identity, could be of enormous benefit to indigenous groups. Therefore, it is vital that indigenous peoples have access to international law in order to voice their claims, thereby enabling their interests to be adequately protected.

The real utility of international law, therefore, is as a long term influence on domestic attitudes, policies and laws, rather than as a way for indigenous peoples to suddenly improve their position. Expectations of the direct impact of international law on domestic indigenous affairs must accordingly be measured and realistic. This is not to dismiss international law as pure rhetoric. Attitudes of the public and governments do change over time, and international law has played a very substantial role in raising the profile of issues such as racial discrimination, the rights of children and women, as well as more general human rights. International law can add real legitimacy, moral weight and a new impetus to indigenous claims. By doing so, it can help to push indigenous rights, and the claims of indigenous peoples to have some control over their own affairs and futures, towards wider public acceptance.

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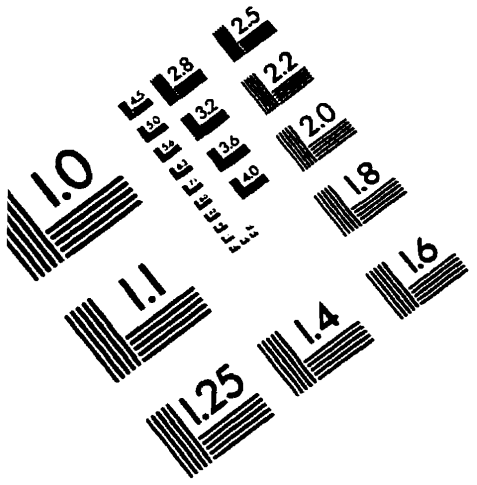

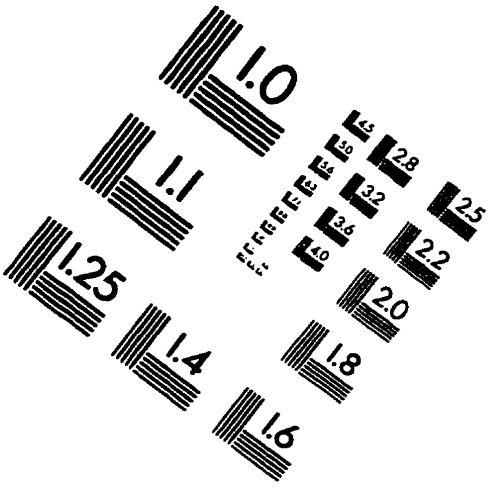

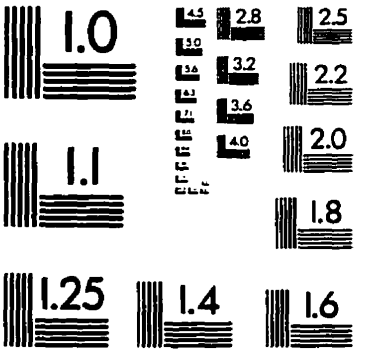

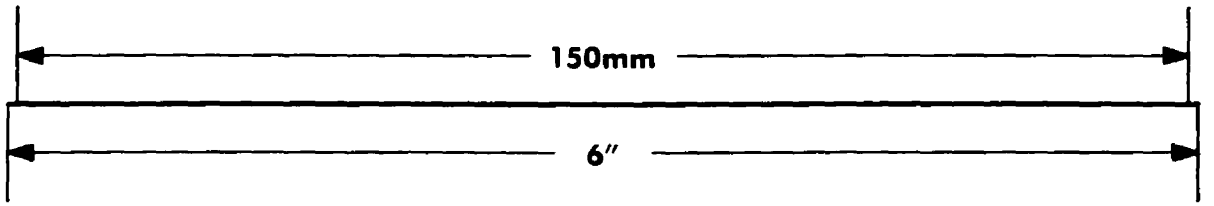

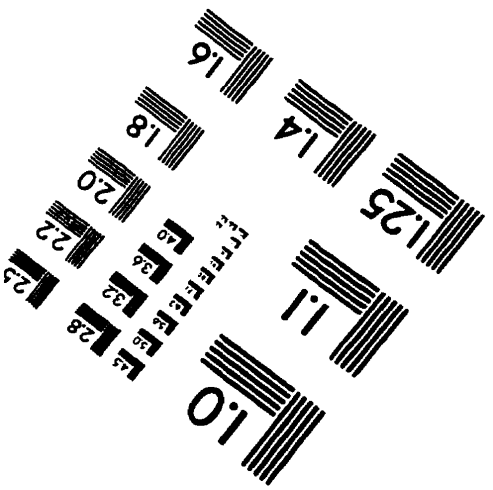

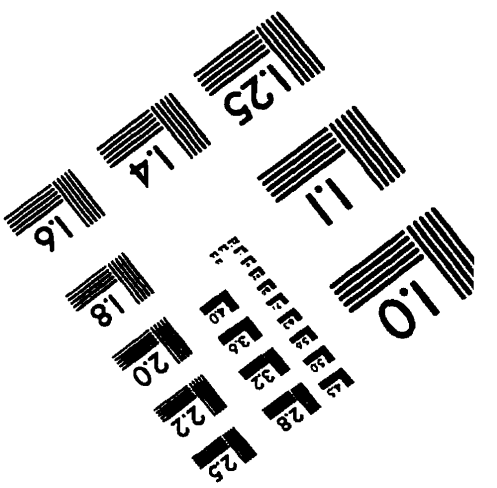

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