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Dialogical Sovereignty: Preliminary Metaphorical Musings

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STATE SOVEREIGNTY:
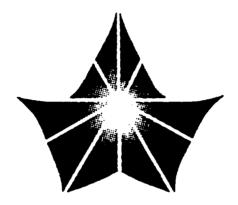
THE CHALLENGE OF A CHANGING WORLD

"New Approaches and Thinking on International Law"

LA SOUVERAINETÉ ÉTATIQUE:

LE DROIT D'UN MONDE EN BOULEVERSEMENT

"Nouvelles approches et théories du droit international public"

DIALOGICAL SOVEREIGNTY:
PRELIMINARY METAPHORICAL MUSINGS

Craig Scott*

The problem of the interrelationship of the basis and superstructures...can be elucidated to a significant degree through the material of the word.

[T]he essence of this problem comes down to how actual existence (the basis) determines sign and how sign reflects and refracts existence in its process of generation.

What is important about the word...is not so much its sign purity as its social ubiquity. The word is implicated in literally each and every act or contact between people.... Countless ideological threads running through all areas of social intercourse register effect in the word.. It stands to reason, then, that the word is the most sensitive index of social changes, and what is more, of changes still in the process of growth, still without definitive shape and not as yet accommodated into already regularized and fully defined ideological systems....The word has the capacity to register all the transitory, delicate, momentary phases of social change.[1]

If it may be assumed that `Sovereignty' and its aspirational counterpart `Self-Determination' are linguistic signs under siege in contemporary discourses of international law and politics, how is late Twentieth Century "existence" being "reflected and refracted" in these all-governing words and how is it that we should respond? Jean Elshtain, in a recent article entitled "Sovereign God, Sovereign State, Sovereign Self"[2], reproduces a

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[1] V.N. Volosinov, Marxism and the Philosophy of Language 19 (L. Matejka and I.R. Titunik trans., 1986) (1929) [emphasis in original]. There is considerable debate over whether Volosinov is simply a pseudonym for Mikhail Bakhtin, whose work in post-revolutionary Soviet Russia lies at the centre of much of current social and literary theorizing about the fundamental `dialogicality' of social existence. For the view that Marxism and the Philosophy of Language is "ninety percent... the work of Bakhtin himself", see Caryl Emerson and Michael Holquist, "Introduction" in M.M. Bakhtin, The Dialogic Imagination xxvi (Michael Holquist ed. and Caryl Emerson and Michael Holquist trans., 1981) (1975). For a brief survey of the debate and its significance, see Michael Gardiner, The Dialogics of Critique: M.M. Bakhtin and the Theory of Ideology 2, 196-197 (1992). Like Gardiner, I will be agnostic in this debate, and treat Volosinov and Bakhtin as engaged in constructive dialogue with each other whether or not they are the same person.

[2] 66 Notre Dame Law Review 1355 (1991).

description by Perry Anderson in his <u>Lineages of the Absolute State</u>[3] of Europe's system of law and political organization as "`a patchwork of overlapping and incomplete rights of government...inextricably superimposed and tangled ...[with]....different juridical instances...geographically interwoven and stratified, ...plural allegiances, asymmetrical suzerainties and anomalous enclaves [abounding]'".[4] Elshtain responds in the following terms: "Is this any way to run a continent.?"[5]

Europe. A cauldron of change and instability, with State Sovereignty being reaffirmed in the most absolute sense as the focus of resurgent nationalist aspiration even as movements for local, non-statist autonomy and international supra-statist structures tug on State Sovereignty from above and from below. All that may be granted, but surely Anderson's description is overstated, if not melodramatic. Surely, we are not yet there. His account is still the future -- and we can head it off if we manage things right. Right?

As it transpires, in the above quotation it was actually Europe's medieval past that Anderson was describing, not the current upheaval. Furthermore, the Anderson description occurred in the course of a more or less standard historical account of the kind of state of affairs that helped lead to a felt juridical need for a near-absolute conception of sovereignty which would locate (ideally) indivisible, inalienable and supreme `sovereignty' in the State.[6] Accordingly, the point that many would take is precisely one of a lesson of history according to which part of <u>the</u> story of historical progress has been the emergence of the State to civilize and discipline such "hopeless fragmentation and chaos"[7]. Whatever social forces are now at work and whatever pathologies state sovereignty may now possess, the lesson is that we have to prevent a recurrence of this kind of chaotic world.

However, I am far from convinced that we should be investing our conceptual and practical energies in seeking to head off this kind of world. Even if we could. (Which is part of the point). We are along for the ride. And we cannot respond to the current politics of identity and politics of democratic inclusiveness by taking a management stance. At the very least, we owe it to ourselves to see what our many lives together are forcing onto the pages of our history books that is not only inexorable but also desirable in some respects. Perhaps our project needs to be one of rethinking, both imaginatively and pragmatically, how we

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[3]Anderson, <u>Lineages of the Absolute State</u> (1974).

[4]Elshtain, <u>op. cit</u>. at 1366, quoting Anderson, <u>ibid</u>. at 20, 23.

[5] Elshtain, <u>ibid</u>..

[6]Elshtain, <u>op. cit.</u> at 1366-67, discussing the classical theories of sovereignty of Bodin and Hobbes.

[7]Elshtain, <u>op.cit.</u> at 1366.

as individuals, groups and societies live in a world where self-conscious pluralism is vociferously resisting (and sometimes seeking to transform) colonization by forces of standardization and normalization (even as new standards and norms are advanced in their stead). In other words, rather than seeking to suppress "fragmentation and chaos (negative characterization)" we may want to ask whether we should be fostering and cultivating "heteronomy (good word)".[8]

I approach these thoughts convinced that theorizing about domestic legal and political systems, and the pressures they face, and theorizing about international law and life cannot continue to be as isolated from each other as they have tended to be. We are all aware that there are social forces pushing toward increasing fluidity and complexity in the way in which both legal maps and maps of personal identity, within and between current states, are being drawn as we move into the Twenty-first Century. I will suggest, in particular, a more fluid relationship between the claims and discourses associated with the international human rights process and the claims and discourses associated with processes of state formation and dissolution, in part by focusing on the collective dimensions of rights. If statehood and human rights discourses are conjoined, they can, I would suggest, be approached as intersecting and overlapping sovereignty discourses, and, as such, offer potential insights into how we can break out of seeing `jurisdiction' and `rights' as two different and compartmentalized aspects of the constitutional ordering of societies and the world as a whole. Instead, we can imaginatively re-think the way in which we, as both individuals and collectivities, relate to one another.

Perhaps the best example of such a conjoined process is almost certainly the Draft Universal Declaration on the Rights of Indigenous Peoples,[9] about which more will be said later. For the moment, it is worth noting that part of what we appear to be on the cusp of is expressed by the lead preambular paragraph of the current draft which affirms that "all indigenous peoples are free and equal in dignity and rights to all peoples in accordance with international standards, while recognizing the right of all individuals and peoples to be different, to consider themselves different, and to be respected as such."[10] It is no small coincidence that on the very day of this conference panel on the future of sovereignty, the announcement of the awarding of the Nobel Peace Prize to Guatemalan indigenous leader Rigoberta

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[8]*Ibid*.

[9]Currently being drafted by the Working Group on Indigenous Populations, a sub-organ of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. For the latest published version, see *Report of the Working Group on Indigenous Populations on its tenth session*, U.N. Doc. E/CN.4/Sub.2/1992/33 (20 August 1992), Annex I at 44 [henceforth, Draft Declaration].

[10]*Ibid*. at 44.

Menchú greets us on the front page of the morning newspapers.[11] The web that links us to her is intricate, but, ultimately, the politics of identity and the pursuit of equality and unity in difference know no boundaries, to use a worn-out cliché and a didactic metaphor. This is the woman whose autobiographical narrative, I, Rigoberta Menchú[12], has been at the centre of the attempt to open the literary canon to new perspectives and voices in basic courses across American and, to some extent Canadian university campuses and, consequently, the focus of considerable backlash against such 'subversion'. This is also the woman who has spent "`11 years..going through hallways and corridors of the United Nations, to one meeting after another....[finding] it extremely difficult to accept that we have to negotiate human rights -- but we have done it.'"[13] And this is the woman who, in her Nobel acceptance speech and in comments made in Canada shortly before that speech, called for the adoption of the Draft Universal Declaration as a symbol not only of the Columbian Quincentennial but also of the passage from a relationship of oppression to one of "`mutual respect, where indigenous people will not only be present, but live in respect in the Americas, deciding their own destiny.'"[14]

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[11]Photo with byline, "Peacemaker", The Globe and Mail, October 17, 1992, at A1. For the related story, see Associated Press, "Guatemalan Indian activist awarded Nobel Peace Prize",) The Globe and Mail, October 17, 1992, at A12.

[12]Rigoberta Menchú, I, Rigoberta Menchú: An Indian Woman in Guatemala (Elisabeth Burgos-Debray ed. and Ann Wright trans., 1983).

[13]Graham Fraser, "Nobel Peace Prize opens doors for Rigoberta Menchú: World now focused on rights abuses, winner says", The Globe and Mail, November 13, 1992, at A5.

[14]André Picard, "Nobel Peace Prize laureate calls for U.S. activist release: Leonard Peltier `symbol of all Indian political prisoners,' Menchú declares", The Globe and Mail, November 10, 1992, at A3. Menchú goes on to comment further: "It is no longer acceptable to exclude whole peoples from national and international alliances. We have to learn to live together in peace, as brothers and sisters." And later, she commented on why she does not see the struggle for rights of the Mayan people in Guatemala as leading to an independent Mayan state: "We want a country that is pluralistic, that recognizes diversity within national unity. I don't think we can have an indigenous nation, alone in the world, at the end of the 20th century": Fraser, op. cit.. These passages are quite illustrative of the intertwined nature of statehood (or self-determination) discourse and human rights discourse, and of the `national' and `international' realms, within aboriginal struggles for recognition. For an initial foray into conceiving of self-determination, minority rights and human rights discourses in terms of overlapping justificatory underpinnings and for the observation that aboriginal claimants at the international level often eschew traditional statehood as the only desirable outcome of their claim (even if the ultimate power to invoke the right to be a state is never abandoned), see Benedict Kingsbury, "Claims by Non-State Groups in International Law", 25 Cornell Int'l Law Jl.

I would like to suggest that a rethought sovereignty might consciously seek to borrow from strands of both state sovereignty and democratic sovereignty discourses that embrace presumptive respect for concrete differences between societies, on the one hand, and diffusion of the democratic will through processes of participation, on the other hand, as paradigmatic sovereign values. In this vein, I suggest that we might consider opening ourselves up to two dimensions of sovereignty, what I will refer to as <u>variegated sovereignty</u> and <u>procedural sovereignty</u>. According to the first dimension, the formation of sovereignty is part of a dialectical and largely horizontal process of mutual recognition as between different actors whose various self-definitions and responses to others' self-definitions result in the formation of the identity of the various actors participating within the process. Out of such processes of recognition may emerge many different political and legal collectivities, each of whose `international legal personality' may consist of a different bundle of legal rights and duties. We divide such bundles into `sovereign' and `non-sovereign' at risk of glossing over by fiat the diversity and richness of identities and concrete responses to concrete problems in international life. According to the second dimension, the democratic or popular face of sovereignty takes on a radical proceduralist dimension whereby the monovocal and monolithic voice of the `people' "dissolve[s] into processes of intersubjectivity, ...limiting itself to democratic procedures and to the ambitious communicative presuppositions of their implementation"[15]. These participatory processes and procedures of the `public sphere' presuppose and feed into official state (and interstate) institutions without themselves forming part of those institutions.

Together these two dimensions might be said to produce an umbrella conception of sovereignty that emphasizes dialogical processes of collective and individual identity formation which dialogues, amongst societies-in-the-world and amongst individuals-&-groups-in-society, merge with the generation of

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481 (1992). <u>See also</u> James Anaya, "Indigenous Rights Norms in Contemporary International Law", 8 <u>Arizona Jl. of Int'l & Comp. Law</u> 1 (1991) for consideration by an aboriginal scholar of the need for aboriginal self-determination claims not to reify full (or at least traditionally-conceived) statehood and a corollary need to channel respect for aboriginal status in creative and potentially varied directions.

[15] Jurgen Habermas, "Ist der Herzschlag der Revolution zum Stillstand gekommen? Volkssouveranitat als Verfahren. Ein normativer Begriff der Offentlichkeit" in <u>Die Ideen von 1789 in der deutschen Rezeption</u> 7, 30-31 (Forum fur Philosophie Bad Homburg ed., 1989) <u>as quoted in translation</u> by Seyla Benhabib, <u>Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics</u> note 43, 119 (1992). This is Habermas' most recent writing on the subject of the public sphere made famous in <u>The Structural Transformation of the Public Sphere</u> (Thomas Burger trans., 1989) (1962). For a particularly useful treatment of the idea of the public sphere as it relates to communicative ethics, <u>see</u> Kenneth Baynes, <u>The Normative Grounds of Social Criticism: Kant, Rawls and Habermas</u> 77-121, 174-181 (1992).

normative standards that seek both to regulate and constitute communal life. Such a conception of dialogical sovereignty would be simultaneously applicable to both the `domestic' realm (within the territorial state's legal order) and the `international' realm (outside the territorial state's legal order), constantly querying this distinction even while constantly using it as a (contingently) necessary conceptual reference point.[16]

By dialogue, I mean little more than (actual and notional) conversations between legal and social actors (and their agents) in which the `intersubjective' generation of norms (and their interpretive application) is intimately tied to mutual construction of identity through reciprocal recognition. Rather than either identity or normative standards being established from within (subjectively) or without (objectively), they are forged through the communicative interchange between subjects, as well as through the "dialogic interaction between concrete utterances" outside of the `pure' dialogic situation of "face-to-face speech acts"[17]. The regulative ideal of dialogue may be stated to be that of achieving intersubjective consensus or mutual assent (as to the `better answer' in the context in question) through rhetorical processes of reciprocal persuasion - - the giving of reasons and counter-reasons, claiming and counter-claiming, viewing and counter-viewing. In concrete institutionally-structured contexts,[18] such an ideal is approximated and provisionally achieved for the practical purposes at hand, but such pragmatic dialogical results should not obscure the fact that in virtually all modern contexts, any given (normative) word or concept is both multiaccented and always imprinted, even deeply engraved, with privileged accents. In this sense, norms very rarely approximate let alone match up to the above-mentioned regulative ideal of reflecting, in either

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[16]To give one example, to the extent that aboriginal peoples have a right to uninhibited transnational communication and contacts as between themselves regardless of borders, the idea of states and their domestic legal orders serves as the normative standpoint that makes sense of calling this a `transnational' right even as it could be said that the aboriginal people in question have a right which itself partakes of the `international' and which does not require validation by reference to states: see Operative Paragraph, Draft Declaration, op. cit. at 51.

[17]Gardiner, op.cit. at 12, discussing Volosinov's view that the "continuous flow of verbal interaction in particular contexts ...is the fundamental reality of the phenomenon of language". In another summary of Volosinov's dialogism, Gardiner notes that Volosinov makes the case for "language [being] a dynamic process, a `ceaseless flow of becoming'" and "language competence [being] not simply a matter of the production of grammatically-correct sentences, but rather indicat[ive of] the creative adaptation of a given speech-act by particular social agents to fluid and changing social situations": Ibid. at 11.

[18]In the broadly defined Habermasian dialogical tradition, the measure of the worth of dialogue is its imbrication in actual social, political and legal structures: see Benhabib, op. cit. at 54-5.

their general articulation or their specific interpretations and applications, a consensus of all those actually affected by or legitimately interested in the norm.[19] Thus, any given norm (whether it be a statement regarding the division of jurisdictional power or with respect to a right against government) is a site of competing conceptions and, in the context of a foundational concept like sovereignty, a site of competing understandings of what concrete arrangements and actions are generated by the concept. Volosinov has situated the elusiveness of any particular understanding of any given linguistic `sign' within a broader context of an ideological social struggle for meaning in which dominant ideological interests always have an interest in denying the dialogicality of a concept, that is, suppressing or obscuring its openness to new voices as well as to its current multiaccented nature:[20]

> Existence reflected in sign is not merely reflected but _refracted_. How is this refraction of existence in the ideological sign determined? By an intersecting of differently oriented social interests within one and the same sign community, i.e., _by the class struggle_.

> Class does not coincide with the sign community, i.e. with the community which is the totality of the users of the same set of signs for ideological communication. Thus various different classes will use one and the same language. As a result, differently

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[19]Thus, a caveat must be lodged. This regulative ideal is Janus-faced because it can tend all too easily to sublimate difference to sameness: see Steven G. Gey, "The Unfortunate Revival of Civic Republicanism", 141 U. Pa. Law Rev. 801, 833-854 (1993). In my view, the regulative ideal of consensus through dialogue has to be tempered by a vibrant awareness of the fact that, in virtually all practical discourses, imbalances of power, unequal access to information, and other disparities will lead to `recognition' of mutual identity and normative relations which belie genuine consensus, what Charles Taylor calls "misrecognition": see Taylor, Multiculturalism and `The Politics of Recognition' 25 (1992); see also John Brenkman, Culture and Domination 232 (1987) on the "blocking" of mutual recognition in situations of domination. Thus it is that one must resist distilling a new monologue (consensus) from the liberating idea of dialogue. In practice, `consensus' is as much a consensus to accept a current and temporary resolution of the exchange as it is a consensus over the substantive validity of what has emerged from the dialogue.

[20]Volosinov, op.cit. at 23-4 [emphasis in original]. Note that Volosinov, writing in Stalinist Russia, assimilates all social struggle to a class struggle. It is not my perspective that major ideological patterns can be reduced to class. Rather, they include a range of grounds for making distinctions or `othering', such that the following quoted passage should be read as if "class" included such bases of privilege as gender and skin colour. As well, reference to "contradiction" in the singular should be understood as "contradictions" in the plural.

oriented accents intersect in every ideological sign.
Sign becomes an arena of the class struggle.

This social multiaccentuality of the ideological
sign is a very crucial aspect. By and large, it is
thanks to this intersecting of accents that a sign
maintains its vitality and dynamism and the capacity
for further development. A sign that has been
withdrawn from the pressures of the social
struggle...inevitably loses force, degenerating into
allegory and becoming the object not of live social
intelligibility but of philological comprehension. The
historical memory of mankind is full of such worn out
ideological signs incapable of serving as arenas for
the clash of live social accents....

The very same thing that makes the ideological
sign vital and mutable is also, however, that which
makes it a refracting and distorting medium. The
ruling class strives to impart a supraclass, eternal
character to the ideological sign, to extinguish or
drive inward the struggle between social value
judgments which occurs in it, to make the sign
uniaccentual.

In actual fact, each living ideological sign has
two faces, like Janus. Any current curse word can
become a word of praise, any current truth must
inevitably sound to many other people as the greatest
lie. This inner dialectic quality of the sign comes
out fully in the open only in times of social crises or
revolutionary changes. In the ordinary conditions of
life, the contradiction embedded in every ideological
sign cannot emerge fully because the ideological sign
in an established dominant ideology is always somewhat
reactionary and tries, as it were, to stabilize the
preceding factor in the dialectical flux of the social
generative process, so accentuating yesterday's truth
as to make it appear today's.

Thus, we might wish to think of sovereignty as a multifaceted
prism reflecting diffuse and continuous processes of dialogue
over who we are (identity dialogues) and how we want to live
together (normative dialogues)[21], but also refracting such
dialogues by virtue of the fact that, while light enters the
prism by passing through all of the faces of the prism (however
small in surface area), light exits from the prism on
trajectories that require it to pass almost entirely through
those faces which correspond to established or dominant
ideologies.

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[21]For a classic account of rhetorics, a sub-category of
dialogue, which sees identity formation and the formation of norms
as being an inextricable process, see Kenneth Burke, A Rhetoric of
Motives (1969). See also Frost, Towards a Normative Theory of
International Relations (1986) for linkage between commitment,
recognition and normativity.

As will hopefully be clarified, nothing in what I have to say is meant to argue that `states' would not or should not exist within a new understanding of sovereignty, even if the relevance of the abstract `State' for conceptualizing socially and legally normative relations will continue to diminish. What I mean to say is that sovereignty and statehood should no longer be viewed as coterminous, and that sovereignty should be accepted as something to be spread around and as something that simultaneously bears a multitude of meanings. As such, sovereignty and its aspirational analogue (self-determination, the right to be sovereign) are words whose distribution is something to be constantly argued about just as the meaning or implication (general or specific, short-term or long-term) to be privileged in any instance is also something to be squarely· faced. For example, the general principle outlawing forcible intervention may be seen as a right enjoyed by both states and other actors even as the kind of substantive conditions that qualify that basic right might distinguish the precise scope of the right of non-intervention as between the various actors. In some respects, this <u>does</u> represent `merely' a definitional move, that strips states of near-exclusive control of the word `sovereignty' but, in so doing, opens the door to some new word to describe the bundle of rights (and duties) that states have. However, the notion of multivocality should push us to resist stabilizing pressures that would continue to make `statehood' synonymous with `sovereignty'. On this view, `statehood' would be the compendious description of the bundle of rights and duties that dialogues over sovereignty have parcelled out to the territorially-based polities we will continue to wish to call states.

Perry Dane, in a stimulating foray into what the school known as `legal pluralism' has to say about sovereignty in the context of relations between aboriginal and non-aboriginal society, says that in "stress[ing] the expansive, flexible, potential of sovereignty-talk" we still must ask "[b]ut where does it end?". The framework for his reply to that question is as follows:

> One instinct, apparent in some of the literature on legal pluralism on which this essay builds, is to reject, in principle at least, any limits on the concept of a legal order. In this view, any association, group or institution can be a full-fledged legal regime. But this...demands either too much or too little from the state. An unlimited account of non-state sovereignty might require the state to dissolve. This would be demanding too much. More likely, it will dissolve into a version of ordinary rights-talk. That would be demanding too little... There must be some way for the state to bring itself to encounter other legal orders without abandoning its own identity as a legal order. If every social order that the state confronts is a legal order, there is no legal order.[22]

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[22]Perry Dane, "The Maps of Sovereignty: A Meditation", 12 <u>Cardozo Law Review</u> 991-2 (1991).

These concerns of Dane's, perhaps best summarized as the concern about the division between legal pluralism as utopian chaos and legal pluralism as idealistic realism, must be kept in mind.[23] What kind of account of "non-state sovereignty", as he puts it, is compatible with the desirability and reality of the institutional actors that we call states? In the end, I think it will have to be one that eschews the tempting solution of finding the answer in a set of ideal and (ideally) stable legal criteria. The aspirations that lie behind the concepts of both `sovereignty' and `self-determination' are so powerful, the concepts themselves so general, the claims made in the name of the concepts so fundamental and the historical fragments of meaning circulating through the concepts so diverse that any rendering of these ideas in terms of limited meaning is, virtually by definition, suppressive of deeply felt (and deeply felt to be legitimate) aspirations for freedom, equality and community. `Sovereignty' and `self-determination' (not unlike `human rights') are the kind of all-encompassing, near-totalizing conceptual rubrics that seek to explain and justify human existence itself. Thus, in my view it is desirable to associate such all-encompassing concepts with metaphors that themselves seek to express fundamental dimensions of what it is to be human, to grasp our `nature' as social and linguistic beings.[24] As Charles Taylor puts it,

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[23]Arnold Krupat expresses this in terms of whether a "commitment to dialogism" leads one to embrace "infinite semantic openness", which he rejects, or a "radical pluralism", which he advocates and defines as follows:

> a more relativized openness, concerned to state meanings provisionally in recognition of the legitimate claims of otherness* and difference. Norms, here, are decidedly established but these are not seen as denying -- the denial enforced by legitimated violence -- the proposal of alternatives.

Arnold Krupat, The Voice in the Margin: Native American Literature 196 (1989).
In this sense, the Volosinovian multiaccentuality of words still allows for norms but norms that are unstable and always (potentially) open to new voices and new understandings.
See infra for Krupat's view that while dialogue as infinite openness leads to a view of social organization as pure `carnivalesque' difference, dialogue as radical pluralism suggests a fluid and adaptable process of "cosmopolitan" social ordering.

[24]See Jennifer Nedelsky and Craig Scott, "Constitutional Dialogue" in Social Justice and the Constitution: Perspectives on a Social Union for Canada 59-83 (Joel Bakan and David Schneiderman eds., 1992) advancing a troika of metaphors for constitutional rights as `sites of dialogue', `sites of social struggle' and `relationships'. Given that these metaphors are descriptive of all words, they would in a certain sense risk being seen as trivial were it not for the all-encompassing, near-totalizing aspects of (fundamental) rights discourse.

In order to understand the close connection between
identity and recognition, we have to take into account
a crucial feature of the human condition that has been
rendered almost invisible by the overwhelming
monological bent of mainstream modern philosophy.

> This crucial feature of human life is its
> fundamental _dialogical_ character. We become full human
> agents, capable of understanding ourselves, and hence
> of defining our identity, through our acquisition of
> rich human languages of expression.....People do not
> acquire the languages needed for self-definition on
> their own. Rather, we are introduced to them through
> interaction with others who matter to us -- what George
> Herbert Mead called `significant others'....We define
> our identity always in dialogue with, sometimes in
> struggle against, the things our significant others
> want to see in us....Thus my discovering my own
> identity doesn't mean that I work it out in isolation,
> but that I negotiate it through dialogue, partly overt,
> partly internal, with others. That is why the
> development [in modern times] of an ideal of inwardly
> generated identity gives a new importance to
> recognition. My own identity crucially depends on my
> dialogical relations with others.[25]

My contention is that this fundamental dialogicality describes
identity formation not just of individuals but also of
communities.[26] Even if we limit the possible range of meanings

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[25]Taylor, _op. cit._ at 32-34. Note that much of law is not
readily seen as being related to interchange over identity. There
will always be wide areas of shared understandings in relatively
stable social situations in which the role of dialogue, let alone
of recognition of identity, will not be perceived. Such strong
shared understandings themselves help contribute to monological
accounts of law as essentially emanating either from the sovereign
will above or the sovereign will within (rather then from
`between'). In relation to the fact that it has only been
relatively recently that people have focused so much on seeking
recognition of their own sense of self, Taylor noted that "in the
earlier age recognition never arose as a problem. General
recognition was built into the socially derived identity by virtue
of the very fact that that it was based on social categories that
everyone took for granted": Taylor, _ibid._ at 34. In eras,
societies or simply mindsets premised on homogeneity and
unchallenged social roles, the centrality of dialogue is not
perceived or is denied. All is right in the world, as identity and
norms seem to flow naturally from within and without at the same
time.

[26]See William Bloom, _Personal identity, national identity and
international relations_ (1990). _See also_ Michael Walzer, "The
Moral Standing of States: A Response to Four Critics" in
International Ethics 217-237 (Charles R. Beitz et al. eds., 1985).
I should not be understood as taking a position on the extent to
which we can speak of the existence of the group independently from
individuals, such that groups as such can interact. I will simply

of `sovereignty' to the claims that a social group can
legitimately make as and in the name of a political and legal
order, this is in some sense a limitation by fiat as there is a
whole tradition that sees `sovereignty' as ultimately vindicated
through respect for the autonomy of individual human beings.[27]
Rather than taking this approach, I would like to briefly draw
attention to the dialogical "dance of recognition"[28] that has
occurred over the past decade between aboriginal and non-
aboriginal societies and aboriginal and non-aboriginal persons in
the public forum of the United Nation's Working Group on
Indigenous Populations and the renegade normative product to date
of that dialogical encounter.[29]

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note for the moment that we do speak comfortably and pragmatically
of groups in terms that personify them and in terms which
"attribute[] moral agency and responsibility" to communities:
Ronald Dworkin, Law's Empire 168 (1986).

[27]See, e.g., Conference on Yugoslavia Arbitration Commission,
Opinions on Questions Arising From the Dissolution of Yugoslavia,
31 Int'l Legal Mat. 1488 (1992). In Opinion 2, the Arbitration
Commission, known otherwise as the Badinter Commission, had to
decide whether Serbs in Bosnia-Herzegovina and in Croatia enjoyed
the right to self-determination. The Commission treated the right
to self-determination as having group rights and individual rights
dimensions merging with what would otherwise seem to be a `minority
rights' discourse. "[G]roups within a state constituting one or
more ethnic, relgious or language communities...have the right to
recognition of their identity under international law." And,
"every individual may choose to belong to whatever ethnic,
religious or language community he or she wishes": Ibid. at 1497.

[28]Price, "Indian-Federal Regulations From the Inside Out: A
Comment on Perry Dane's Meditation", 12 Cardozo Law review 1007,
1008 (1991) (describing the Dane thesis).

[29]For an account of the Working Group process as a dialogical
encounter, see Robert Williams, Jr., "Encounters on the Frontiers
of International Human Rights Law: Redefining the Terms of
Indigenous Peoples' Survival in the World", Duke Law Jl. 660
(1990). It is worth noting that Richard Bernstein's description of
what ideally constitutes a "dialogic encounter" represents what, in
my view, has occurred (in rough terms) within the Working Group:

> Here one begins with the assumption that the other has
> something to say to us and to contribute to our
> understanding. The initial task is to grasp the other's
> position in the strongest possible light. One must
> always attempt to be responsive to what the other is
> saying and showing. This requires imagination,
> sensitivity and perfecting hermeneutical skills. There
> is a play, a to-and-fro movement in dialogical
> encounters, a seeking for a common ground in which we can
> understand our differences. The other is not an
> adversary or an opponent, but a conversational partner.
> Conflict is just as important in dialogical encounters,
> because understanding does not entail agreement.

In view of the fact that the Working Group is a forum within the `human rights' structures of the United Nations, it is helpful to situate the construction of collective identity and rights in a similar framework to that of construction of individual identity and rights. As social and language beings, human beings engage in intimately-connected processes of identity formation and norm generation[30]. As any student of international law will know, ready-made in international law is a discourse of `recognition' that suggests that collectivities interact normatively in a similar fashion, to whatever extent this interaction can be reduced to the communicative interaction amongst the diplomatic and other elites who are able to speak as if they were the collectivity. I will not develop the thesis further in this paper, but it is clear to me that the `way out'

Richard Bernstein, The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity 336-7 (1992).

Bernstein also adds that a dialogical pluralism can easily slip into "powerful centrifugal tendencies towards fragmentation" by exalting difference and thereby reifying it, or by valuing the "infinite openness" criticized by Krupat, op. cit., for its own sake. In my view, the only way that dialogism should be embraced is in the context of a good faith commitment to dialogue (used both as verb and noun) or in terms of a general mindset or set of dispositions committed to living lives together with others (and Others) in a conversational space between stability and change. In this world of dialogic commitment, one can embrace, and not fearfully lash out at, "counter-tendencies [to fragmentation] - not towards convergence, consensus, and harmony - but towards breaking down of boundaries, a `loosening of old landmarks' and dialogical encounters where we reasonably explore our differences and conflicts": Bernstein, ibid. at 339.

[30]So much so that McDougal, Lasswell and Miller can speak of legal prescriptions in the following terms:

> Every type of prescription or agreement ... is a communication in which parties seek through signs and deeds to mediate their subjectivities.

M. McDougal, H. Lasswell and J. Miller, The Interpretation of Agreements and World Public Order: Principles of Content and Procedure xi (1967) [emphasis added], quoted in Ian Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities", 12 Mich. Jl. of Int'l Law 317, 374 (1991). Much interesting work could be done relating the view of the New Haven School of law as a process of communication to the project of Habermas and Habermas scholars to situate legal discourse within a procedural communicative ethics paradigm: for the most recent overviews of Habermas' project, see Jurgen Habermas, Moral Consciousness and Communicative Action (Christian Lenhardt and Shierry Weber Nicholsen trans., 1990) (1983) and Jurgen Habermas, The Philosophical Discourse of Modernity: Twelve Lectures (Frederick G. Lawrence trans., 1987) (1985). For some elements of such a `bringing together', see Friedrich Kratochwil, Rules, norms and decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs (1989).

of the interminable oscillation between viewing recognition as being `declaratory' and as being `constitutive' is to focus on the way it is neither and both[31]. That is to say, we cannot ignore the fundamentally <u>intersubjective</u> nature of recognition, which is simply an offshoot of adopting an intersubjective and dialogical view of personhood and normativity. Identity, like normativity, is something that is mutually constructed or constituted, a dialectical interplay between declarations to others of whom we are and constitution of whom we are by others according to which both (or all of the) conversational partners affect identity and, in turn, have identity affected. The following observation has arisen out of a discussion of the work of Benedict Anderson[32]:

> ...Anderson's [analysis] enables the crucial recognition that -- like gender -- nationality is a relational term whose identity derives its inherence in a system of differences. In the same way that `man' and `woman' define themselves reciprocally (though never symmetrically), national identity is determined not on the basis of its own intrinsic properties but as a function of what it (presumably) is not. Implying `some element of alterity for its definition', a nation is ineluctably `shaped by what it opposes'. But the very fact that identities depend constitutively on difference means that nations are forever haunted by their various definitional others.[33]

Just as the above passage makes evident that reciprocity does not entail symmetry (while still accommodating difference), mutuality or reciprocity should also not be taken to entail either equality of respect or power in the dialogue of recognition. Difference easily shades into domination. The master still gazes more powerfully down on the slave while the slave's attempt to carve out a self-definitional space takes place in the context of resistance to a `dialogue' whose terms the slave has very little

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[31]Note that international legal usage is ambiguous with respect to what `declaratory' refers to. It can refer to a collectivity or other entity `declaring' its existence to the world for the world to unconditionally accept or it can refer to the world, or separate actors in the world, recognizing that which is already in existence, and, in that sense, `declaring' that fact. I prefer to keep both usages, noting that, while they may be viewed as largely saying the same thing, the latter description already has built into it the kernels of the `constitutive' view of recognition (i.e. one does not really exist -- or at least <u>fully</u> exist -- until others have gazed upon you, accepted you and made clear the terms of that acceptance.)

[32]Benedict Anderson, <u>Imagined Communities: Reflections on the Origin and Spread of Nationalism</u> (1983).

[33]Andrew Parker, Mary Russo, Doris Sommer, and Patricia Yaeger, "Introduction" in <u>Nationalisms and Sexualities</u> 5 (Parker, Russo, Sommer and Yaeger eds., 1992), <u>quoting</u> Perry Anderson, "Nation-States and National Identity", <u>London Review of Books</u> 3 (May 9, 1991).

input into (at least initially).[34] Imbalances and consequent distortions in the recognition dialogue are perhaps the rule rather than the exception, such that it is still the case that recognition, as a sociological phenomenon, approximates the constitutive pole of the traditional debate more than the declaratory pole, especially where it can be said that the dialogue of recognition is between society as a whole and new status claimants.[35] As Martha Minow notes, even as the

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[34]This is not to deny that there is a good case to be made that even the master-slave dialogue still has elements of mutuality in the sense that, first of all, the slave is never completely (perhaps even mostly) constituted by the master's gaze and that, secondly, each's identity and sense of self is modified as a result of the interchange, even if the absence of mutuality as equality of position results in both emerging `misrecognized' or malformed. On the first point, see Martha Minow, "Identities", 3 Yale Jl. of Law and the Humanities 97, 102 (1991) in which Minow discusses various works of literature, including some dealing with American slavery, and points out:

> People vested with little or no power may nonetheless exercise control over their identities. Individuals craft images for others to believe in while preserving a different inner self.

See also Edward Said, Culture and Imperialism (1992), esp. Ch. 3, "Resistance and Opposition", 191-281.

On the second point, see Hegel's "Independence and Dependence of Self-Consciousness: Lordship and Bondage" in G.W.F. Hegel, Phenomenology of Spirit 111-119 (A.V. Miller trans., 1977) (1807) and the discussion in Charles Taylor, op.cit., at 36, 50; see also Minow, ibid. at 104-108 for her rich discussion of Flannery O'Connor's "The Displaced Person" in Flannery O'Connor, Collected Works 285 (1988).

[35]Such a `dialogue' tends more toward monologue in which recognition becomes a discourse of sameness, recognizing ourselves in others and projecting our self-understandings onto others. Arguably, the societal gaze's constitutive effect is rendered less and less univocal the more the claimant to status speaks from a position of (numerical or symbolic) power, which position can be achieved through strategies of building coalitions amongst all those with identical or similar status claims or through entering into a dialogue with society on the basis of the claimant's status as a community as such. Aboriginal recognition discourses have tended to achieve a measure of dialogical power through both of these two avenues. There is a strong analogy between `society' and the `international community' as the latter speaks through the processes of international institutions, most notably through procedures of admission to membership, but also through the varying degrees of acceptance of participation in the work of the institution: see John Dugard, Recognition and the United Nations (1987). In Dugard's (implicit) claim that recognition is both becoming more and more collectivized (and thus `constitutive' in nature) and, in the process, that new criteria for statehood have been added to the traditional effectiveness criteria (thus setting

reciprocal or negotiated nature of identity formation (and related participation in processes of norm-creation and interpretation) is undeniable, the reciprocity or negotiations may be formal in the extreme:

> Merely noticing the inevitable mutuality of meanings --
> the contributions of readers to the meaning of texts
> and of outsiders to the meanings of identity -- should
> not supplant needed attention to the patterns of
> social, political, and economic power within which
> people relate. These patterns create constraints
> against which individuals may push, but each person is
> situated differently in relation to constraints.
> ...The weight of one's own experiences and social
> position and the press of others' expectations and
> practices stack the negotiations over identity.[36]

Within the conscious strategy of coalitions of Aboriginal Peoples strategically to use the fora and processes provided by international institutions, starting with the League of Nations and, of late, by way of the complex of United Nations human rights bodies and activities, the stacked nature of the

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parameters for whom can `declare' their existence with an expectation of recognition from others on the basis simply of that declaration), it is interesting that a strong measure of dialogicality and intersubjectivity (as between status claimant and recognizers) can nonetheless be observed. Notably, even within a discourse of recognition of sameness (`sovereign equality'), it cannot be ignored that modern day `sovereignty' has been infused with the insights of the self-determination decolonization movement that struggled against European societies' construction of the normative universe in their own image in a way that caused the relationship of difference between non-European and European societies to become a relationship of domination. Thus, after the period of high colonialism ended with the decolonizations of the 1960s and 1970s, many new states on the block diverged significantly from the classical criteria for statehood based on effectiveness, due to the juridical effects created by the powerful self-determination principle, namely presumptions of respect for societal (including cultural) difference and for national autonomy. See Robert Jackson, Quasi-states: sovereignty, international relations and the Third World (1990). So it is that we can see that, within both individual human rights discourses and collective sovereignty discourses, the dialectic of recognition, or "normative acknowledgement", has always melded claims of sameness based on equal and abstract human worth and potential and claims of difference based on legitimate and concrete human diversity: see Richard Falk, "Cultural Foundations for the International Protection of Human Rights" in Human Rights in Cross-Cultural Perspective: A Quest for Consensus 44, 48 (Abdullahi Ahmed An-Na`im ed., 1991) for a discussion of struggles for "normative acknowledgement"; see also Richard Falk, "The Rights of Peoples (Especially Indigenous Peoples)" in Richard Falk, Revitalizing International Law 199-220 (1989).

[36]Minow, op. cit. at 110. Recall also Volosinov, op. cit., and the discussion of refraction in the ideological sign.

negotiations of identity between Aboriginal Peoples and States is all too obvious. Yet, within this over-all context of statist (and other ideological) hegemony, Robert Williams, Jr., advances the thesis that the dialogues that indigenous peoples have participated in through the Working Group over the past decade have provided an example of the "strategic functioning of rights discourse"[37]. Rights-talk has, to paraphrase Williams, shown itself in this context (at least to date) capable of operating as a site of intersubjectivity, a space within which dialogue (whether conflictual or cooperative) has led to a remarkable, if preliminary and highly fragile, consensus on the status, rights, and duties of indigenous peoples that goes well beyond anything remotely conceivable before the Working Group process began. What is crucial to note is that this state of affairs has not been produced by making use of the master's tools to dismantle the master's house nor by building a house in the far reaches of the master's backyard in a way that seems innocuous and nonthreatening to the master, but, rather, by refurbishing some parts of the master's house and renovating others while starting to build a house across the street that looks a lot like the master's in some respects but very different in others. Williams, one of the leading critical culture and race theorists writing in the American legal academy today, adopts a highly optimistic view of the results of this process centred on the Working Group whereby persons, especially acting in concert, can take mainstream vocabulary, employ it to describe their own experience and sense of identity and work some transformation in the dominant perception of their status and their rights[38].

The Draft Declaration, as it currently reads, is a paradigm-shifting document. I do not wish to sustain that claim in any detail, in part because the draft text is a rolling text and will almost certainly have been revised by the time these conference proceedings are published. However, a few general points should be made. It would seem to be the case that the current draft is at least as favourable to aboriginal claims as the draft on which Williams was basing his analysis several years ago. In particular, it should be noted that the lead article, Operative paragraph 1, currently reads:

> Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government.[39]

When compared to the clear success Canada and other states had in securing language in I.L.O. Convention 169 to the effect that the collective rights of indigenous peoples presumptively do not

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[37]Williams, _op. cit._ at 701.

[38]Williams, _ibid._ at 701-702.

[39]Draft Declaration, _op. cit._ at 46.

include rights to state sovereignty[40], this paragraph, if it survives, will potentially revolutionize the way we think about self-determination and sovereignty. However, what I would like to suggest is that the revolutionization is not to be found in the fact that Operative paragraph 1 can easily be argued to include the traditional right of self-determination units to choose plenary statehood if they wish. Rather, its paradigm-shifting impact will reside in how Operative Paragraph 1 will creatively interact with the other dimensions of this document, even if, perhaps _especially if_, the right to self-determination does not necessarily lead to full state status. Whether the status of many indigenous peoples as less-than-full-states results from an interpretation that the Draft Declaration itself does not provide for full statehood or whether, as is my preferred interpretation, from their own self-determining choice of "[an]other political status"[41] than full statehood, it can reasonably be assumed that many, if not most, indigenous societies will continue to be other-than-States.

My claim is that this status will be a profoundly dialogical sovereignty. Aboriginal peoples will simultaneously exist within and outside States, which is to say that they will exist _in relation to_ States. They will have human rights not only in the classical mode of rights against States but also in the post-classical mode of rights of a jurisdictional nature such that `human rights' become a rubric inclusive of `powers of government'. Aboriginal persons will be both citizens of a society at large and members, perhaps nationals, of aboriginal societies with which they identify. Aboriginal peoples and

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[40]_Convention Concerning Indigenous and Tribal Peoples in Independent Countries_, 28 _Int'l Legal Materials_ 1384 (1990). Apart from the qualification of "peoples" as being "in Independent Countries" (_see_ title and Art. 1), there is also Art. 1(3), a provision caustically often referred to as the `Canada clause' due to Canada's role in securing its placement in ILO Convention 169. Art. 1(3) reads:

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

[41]To use the terminology of the Friendly Relations Declaration which provides in paragraph four of "The principle of equal rights and self-determination of peoples":

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, U.N.G.A. Res. 2625 (XXV) (October 24, 1970), _reprinted in_ 9 _Int'l Legal Materials_ 1292 (1970).

Aboriginal persons will have rights vis-à-vis each other as well as vis-à-vis States. Aboriginal peoples, living in a transnational space `between' the domestic-international divide, will have not just human rights of a collective, indeed jurisdictional, nature on the domestic plane but also human rights on the international plane that amount to incidents of international personality.

`Human rights' and `sovereignty' become part of a fused dialogue over the conditions in which human beings should interact as human beings, as communities, as persons-in-community and, ultimately, as persons-in-and-of-many-communities. Not only does such a human rights discourse construct the state differently than in the past -- in that it does not simply confirm the centrality of the state through a discourse of substantive claims that presuppose and depend on the state for their vindication (although it _does_ continue to do that) -- but also it fashions a discourse of non-state sovereignty. The multifarious and overlapping provisions of the current Draft Declaration might be said to be premised on a set of ideas that sit uneasily with current conceptions of human rights, sovereignty and the status of non-state actors, which I will summarize briefly as follows: (1) a more relational than hierarchical idea of difference between states and indigenous peoples; (2) coexisting collective and individual human rights, tied to multiple and interactive identities of both collectivities and individuals; (3) human rights to governmental jurisdiction as well as human rights against governmental jurisdictions; and (4) human rights which construct what in the existing paradigm would be thought of as incidents of international personality normally associated with state sovereignty and which thus construct other-than-state sovereign persons.

Some (many) will respond by pointing to the hopeless complexity and, indeed, contradictory messiness of all of this. The claim will be that the intermingled conceptions in the Draft Declaration smack of irresponsible utopianism, capable of being joined together in one document only because of the lack of accountability of the process to the dictates of the real world. As for the perceptions of irreconcilable contradictions `inherent' in the Draft Declaration, I would only say for present purposes that this is a result of overly monological conceptions of coherence and a failure to accept that there are sustainable conceptions of coherence based on dialogicality.[42] As for what

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[42]_See_ Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights", 27 Osgoode Hall Law Jl. 868, 804-805 (1989), where the putative internal contradictions of the Universal Declaration of Human Rights are addressed in terms which relate coherence to a conception of the "global community as a dialogical community":

[A] comprehensive and airtight consistency whereby all principles are derivable from some foundational principles... is an overly restrictive version of philosophical coherence.... It is possible to understand

could be called `fluidity angst', Perry Dane has responded in
terms which I would like to endorse:

> To draw a multiplicity of maps, or recognize a
> multiplicity of other sovereigns, or understand the
> variety of ways in which sovereign selves can define
> their relations with each other, is complicated
> business. But it is not mystical or unrealistic.
> Indeed, I would posit that it is less mystical, more
> realistic, more the ordinary stuff of legal craft, than
> an approach in which all reality is reduced to a single
> map, and all relations to one or two fixed categories,
> stubborn and impoverished.[43]

I would like to suggest that the comments of Dane tap into a
branch of positivistic pragmatism in international legal
scholarship with which I have an ongoing love-hate relationship,
namely that represented by Brownlie[44] and O'Connell[45]. Each's
positivism is very much of the social facts school (as opposed to
sovereign command school) of legal positivism, seeking to extract
normative statements out of the disparate indicators thrown up by
the facts of international life. This approach involves positing
international law as being an institutional complex of norms that
stands in some sense above all actors and relationships regulated
by it, at least for purposes of argument and practical resolution
of disputes. Whatever limitations this conception might have,
which I shall not explore here, it, at the very least, accounts
for the way everyone of us speaks of international normativity at
least some, if not most, of the time. In that vein, I have
always found the following passage by O'Connell on international
legal personality to be exceedingly instructive for thinking
about how identity and norms come together in international legal
discourse in a fashion that can theoretically carve up the legal
universe in an infinite variety of ways:

> coherence as requiring a structure of mutually supporting
> claims which do not have to flow logically from a common
> foundation.... [A]s long as all the rights are not
> treated as absolute and as long as the idea of mutual
> adjustment and accommodation is accepted[,]...[i]t
> becomes possible to conceive of a kind of dialectical and
> hermeneutical coherence that ... uses the text as a
> starting point for a broad international human rights
> discourse out of which more universally rooted agreement
> as to the importance and compatibility of the entire
> spectrum of rights emerges.

I would like to take this opportunity to thank Prof. Elizabeth Kiss
of Princeton University for her assistance in fashioning the above
views on coherence; acknowledgement of her contribution was omitted
due to oversight in the original text.

[43]Dane, op. cit. at 1005.

[44]See, in particular, Ian Brownlie, "Recognition in Theory and
Practice", 53 Brit. Yrbk. of Int'l Law 197 (1982).

[45]D.P. O'Connell, International Law (2nd ed., 1970).

It is clear that the word `person' is used to refer to
one who is a legal actor, but that is of no assistance
in ascertaining who or what is competent to act. Only
the rules of international law can determine this, and
they may select different entities and endow them with
different legal functions, so that it is a mistake to
suppose that merely by describing an entity as a
`person' one is formulating its capacities in law....

The correct questions should be: (a) Do the rules
of international law establish that this claimant to
capacity has the capacity which it claims? (b) What
exactly is the capacity which it claims and which is
allowed to it, or in other words, just what sorts of
legal relations may this entity enter into? If the
claimant to capacity is a novelty there will be, of
course, no rule of international law on the subject at
all until it appears and asserts itself, whereupon
there arises the question (c), should the entity be
recognised as having the capacity which it claims to
have? Recognition here means acquiescence in the claim
by the other parties to international actions....

Capacity implies personality, but always it is
capacity to do those particular acts. Therefore
`personality' as a term is only short-hand for the
proposition that an entity is endowed by international
law with legal capacity. But entity A may have
capacity to perform acts X and Y, but not act Z, entity
B to perform acts Y and Z, but not act X, and entity C
to perform all three.[46]

Thus, any international lawyer of the pragmatic positivist
variety would lose patience with endeavours that seek (explicitly
and implicitly) to reduce all international legal persons to
states (for instance, through the sterile subject/object
dichotomy) or to the ultimate product of state will. Whether we
are talking about international organizations, mandate and trust
territories, colonial self-determination units, organs within
intergovernmental organizations like the General Assembly or the
Security Council, condominia, minority groups, individual human
beings, corporations and so on, at any given time `international
law' parcels out different rights and obligations that add up to
produce (or construct) the legal entities, or `persons', in
question. That being said, one can doubt whether one can justify
reliance on the "ordinary stuff of legal craft", to use Dane's
phraseology, in order to discern "rules of law" which allocate
capacities and incapacities to such actors. While I would accept
that this reference to international legal rules is a way of
speaking that largely fits the argumentative orientation adopted
by those within the particular enterprise that styles itself
`international law', the key in the O'Connell passage is not the
reference to extant legal rules but rather the focus on pragmatic
inquiry into claims and recognition of those claims. Unlike
O'Connell who articulates recognition as being at work only in
the movement from `not-law' (political claim and political

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[46]O'Connell, _ibid._ at Vol. I, 80-82.

response) to `law', my view is that processes of recognition are pervasive, continuous and, indeed, central to all of international normativity. Furthermore, recognition is at work not only with respect to whether or not an incident of personality exists `in law' in some general sense but also in terms of ongoing interpretive processes over what that incident entails in given situations.[47]

Out of such a focus on intersubjective claim, counterclaim and (eventual) shared understanding, we begin to see how we should not be focusing on plenary categories like `states' but rather on cumulative, contingent and, in a sense, piecemeal construction of personality. In other words, rather than beginning with a `status' to be recognized and working from there to the rights and duties attaching to it, recognition can just as easily, in theory and implicitly in practice, consist of a piecemeal recognition of rights that eventually add up to represent the `nature' of the entity in question. So, if it came to be accepted that indigenous peoples have a right to be represented on state delegations at international conferences at which their interests (jurisdictional or non-jurisdictional) are being discussed,[48] this `right' is recognized and, thereby, also recognized is one element of their international personality. Over time, with the recognition of other international dimensions of aboriginal legal personality,[49] the bundle of rights in question cumulatively comes to be associated with a particular status or kind of entity, i.e. an `indigenous people', and the recognition question would then tend to become one that focuses on a more general personality and less on specific incidents of that personality. What the Draft Declaration does, in effect, is produce a more concentrated and more collectivized process of negotiation which has put into textual form a series of rights that could be said to constitute various incidents of international personality of aboriginal peoples.

In the process, we have been presented with a document which emphasizes the variegated nature of international personhood which can emerge from actual dialogical processes in international life. The personality in question, that of `indigenous peoplehood', suggests that plenary claims to rights, especially when phrased in terms of claims of rights tied to status (sovereignty to statehood), are only shorthand claims for a particular bundle of rights (and obligations). But the insights that this Draft Declaration has thrown into relief go well beyond bringing us back full circle to some basic pragmatic `truths' about international law suggested by the O'Connell quotation of over a quarter of a century ago. As discussed

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[47]See Johnstone, op. cit. for an understanding of normativity in the treaty interpretation context as involving ongoing good faith constructions of relationships involving continuous processes of reciprocal recognition.

[48]See Operative Paragraph 26, Draft Declaration, op. cit. at 50.

[49]See, e.g., Operative Paragraphs 28, 31 and 32, Draft Declaration, op. cit. at 51.

above, the legal person that emerges from this document partakes of a richness and novelty that defies fundamental categories and crosses conceptual boundaries in international law. Thus, we have, as I said at the outset, multiple maps of personal identity and jurisdictional demarcation. We have persons who are members of collectivities themselves with human rights, persons who are also citizens of a larger state and persons who, as a consequence, are bearers of individual human rights vis-à-vis both states and indigenous communities. We have actors at once `internal' and `external' -- more transparently transnational than ever before. And, I would like to suggest, we have a normative event that should be embraced (however pragmatically and gradually) rather than shunned.[50] As Dane, once again, so eloquently puts it:

> [W]illingness to draw two maps, or three maps or four maps is, as much as anything, the surest sign of sovereignty-talk at its most mature, its most expansive, its most real....Sovereignty-talk, at its best, comprehends the willingness and the ability to hold, in tandem, apparently contradictory images of the relationship between self and other.....It is the epistemic courage to see that these images need not be reduced one to the other, or to some single compromise position that is unfaithful to them all.[51]

Arnold Krupat, in his consideration of Bakhtinian dialogism in the context of literature by and about `Native Americans', is critical of one implication of reading such dialogism as "infinite openness" as opposed to "dialogic pluralism", namely that the prescription on the social level (as opposed to the purely literary level) would so exalt difference that life should seek to become an unfettered daily carnival, with little concern to establish patterns of stable interaction and to value any significant degree of commonality. I would like to suggest that the Danian imagery of sovereignty as multiple cartography fits nicely with the social and political consequences of the "dialogic pluralism" envisaged by Krupat, namely

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[50]Or, worse, ambushed as it passes out of the purer dialogical space provided by the Working Group into less receptive fora higher up in the United Nations hierarchy. The ongoing study of which these conference comments form a part will seek to come to terms with how the proceedings in the Working Group approximate an actual manifestation of domination-free dialogue, and how the nature of that dialogue will change as the Working Group moves from being a space unto itself to being a producer of a form of what I call `renegade normativity' which seeks to influence official generation of norms in the U.N. Commission on Human Rights and the General Assembly. This will be a more explicit focus on the `procedural sovereignty' dimensions of `dialogical sovereignty' than has been possible in this paper.

[51]Dane, op. cit. at 991

"`cosmopolitanism'".[52] Dialogism must take us beyond
"reify[ing] local identities" or "essentializ[ing] difference"[53]
without creating dispositions toward and conditions for reifying
sameness and constructing essentialist universal identities. To
liberate the dialogism latent in human language and human
existence is not to reject normativity in the effort to reject
orthodoxy and thus to advocate a "heterodoxy" as "an absolute
commitment to difference unending".[54] Rather, to embrace
dialogism is to seek to foster a pervasive level of comfort with
heterodoxy as "difference within a normative context",[55] a world
where we move (dialogically) from reference point to reference
point and not a world where we revel in pure dialogicality, the
absence of reference points.[56] So, what, at the level of
ethical and political commitment, is the corollary of dialogism
as a descriptive claim about life and language? What is
"cosmopolitan world order" in Krupat's view?

> Cosmopolitanism, then, is the projection of heterodoxy
> not to the level of the universal, but, rather, to the
> level of the `inter-national'.... It seems to me that
> the way to cosmopolitanism in social terms is through
> the local, from thence to the national -- where

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[52]Krupat, op. cit. at 198, borrowing Paul Rabinow's definition
of cosmopolitanism as

> an ethos of macro-interdependencies, with an acute
> consciousness (often forced upon people) of the
> inescapabilities and particularities of places,
> characters, historical trajectories, and fates.

Paul Rabinow, "Representations Are Social Facts: Modernity and
Post-Modernity in Anthropology" in Writing Culture: The Politics
and Poetics of Ethnography 234, 258 (James Clifford and George
Marcus eds., 1986).

[53]Rabinow, ibid. at 258.

[54]Krupat, op. cit. at 199.

[55]Ibid.

[56]When I speak of movement from reference point to reference
point, I do not wish to be taken as saying that I believe there can
be a single (i.e. univocal) reference point on any given subject.
Rather, we speak and act as if there were such norms, even if we do
so ironically, that is to say, in full realization that norms will
always be internally dialogical. As such, except in areas of very
high societal consensus, most identifiable reference points will
display the refracting quality spoken of by Volosinov, op. cit.,
and thus will tend to privilege certain ideological accents over
others, even if that privileging does not consist of
straightforward reflection (and thus reproduction) of those
accents. The dialogical agenda within a framework of "difference
within a normative context", to repeat the Krupat formulation,
becomes one of producing norms that refract privileged accents to
as great an extent as possible by melding those accents as much as
possible with less privileged accents.

heterodoxy is acknowledged as legitimate within the
political boundaries of nation-states -- and, after, to
some concretely imaginable cooperation on an
international scale leading to the cosmopolitan
community, heterodoxy legitimated globally. To be
sure, this is to offer a conceptual paradigm -- an
image, a vision -- not a political program; and to
imagine the cosmopolitan polyvocal polity in his way is
also utopian -- but perhaps only in the sense that it
does not yet exist. To imagine it may also be to make
a contribution to its existence.[57]

However, in my view, in such a cosmopolitan world order,
discourses of universalism would still find a place, driven by
the argumentative premises provided by a host of ideal notions
such as dignity, equality, community, freedom, spirituality and
especially humanity. But what an ethic of dialogism would
accomplish would be (hopefully) to take the monological edge off
of `universalism', to prevent either human rights or sovereignty
talk from degenerating as easily as it currently does into an
exercise in projecting oneself and ourselves onto the rest of the
world (whether this means across the street in Sarajevo, across
town in Toronto or across the Pacific Ocean) and in too ready
recourse to violence and other forms of coercion as a supposedly
effective and legitimate way to instill values elsewhere in the
world.[58] Instead, what we could see is inter-national dialogue
intersecting with transnational dialogues (produced to a great
extent through non-governmental organisations and the media) in a
way that takes seriously propositions about respecting concrete
differences among communities as, at one and the same time,
propositions about what it is to treat individuals as truly
human. Similarly, propositions about respecting the humanity of
individuals can be taken seriously as propositions about what
kind of community should be striven for, whether `at home' or
`abroad'. I would like briefly to mention one example of the
interaction between these kinds of claims which would seem
appropriate in the context of an essay using the status of
aboriginal peoples as a departure point for discussing
sovereignty more generally. There is a wealth of information
that points to the validity of the claim that "for centuries
before and after the arrival of Europeans, gay and lesbian
`American Indians' were recognized and valued members of tribal
communities", known in some indigenous societies by the French
word berdache and fulfilling "alternative" but respected roles
"[a]s artists, providers and healers" in over 135 First Nations

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[57]Ibid. at 201. For similar visions, see Iris Marion Young,
Justice and the Politics of Difference 257-260 (1990) and Elshtain,
op. cit. at 1376-1378.

[58]See Said, op. cit. esp. at Chapter 4, "Freedom From
Domination in the Future", 282-336. See also Benhabib, op. cit. at
168:

    Without engagement, confrontation, dialogue and even a
    `struggle for recognition' in the Hegelian sense, we tend
    to constitute the otherness of the other by projection
    and fantasy or ignore it in indifference.

in North America.[59] Without romanticizing these roles or pretending that such `special' treatment accords with the current preferred self-understanding of most gay and lesbian American Indians, it nonetheless remains the case that many indigenous societies as part of their traditions viewed gays and lesbians as equal human beings and valued members of the community at a time when European settler society was profoundly homophobic. Whatever liberalization of attitudes and laws have begun to occur in North America in recent decades, it is also the case that gay and lesbian indigenous persons currently face homophobia from society at large as well as from their own indigenous communities, where whatever traditions that existed have been profoundly modified by contact with new cultural attitudes and imposed laws and institutions.[60] The reason for this example is to point out the dual nature of the dialogue that can take place, indeed is currently taking place, at the interface between respect for aboriginal difference and respect for the humanity of gays and lesbians. Lesbian and gay indigenous persons will be in a position to present claims to cultural sovereignty of aboriginal societies as statements to the world affirming respect for the humanity of gays and lesbians. They will also be in a position to present claims to their individual rights as gays and lesbians as statements about what kind of community warrants being treated with respect, whether that is broader society or indigenous societies seeking to be true to or return to their own historical tradition.

The example of the American Indian <u>berdache</u> illustrates how a claim about community (or peoplehood) is simultaneously a claim about individuality (personhood), and <u>vice versa</u>. Beyond this, the <u>berdache</u> and the contemporary struggle for recognition of gay and lesbian indigenous persons living in North America provides a fitting way to end this essay. The <u>berdache</u> was the embodiment of dialogicality, and, as the following passage suggests, `<u>berdache</u>' could well provide another evocative metaphor for sovereignty itself:

> One of our traditional roles was that of `go-between' -- individuals who could help different groups communicate with each other. This is the role GAI [Gay American Indians] hopes to play today. We are advocates for not only gay but American Indian concerns, as well. We are turning double oppression into a double opportunity -- the chance to build bridges between communities, to create a place for gay Indians in both the worlds we live in, to honour our past and secure our future.[61]

I would like to end this essay by suggesting that the metaphor of the <u>berdache</u> would seem to complement the metaphor of the Gus-

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[59] Randy Burns, "Preface" in <u>Living the Spirit: A Gay American Anthology</u> 1 (Will Roscoe ed., 1988). <u>See also</u> the chart, "Tribes with Berdache Roles" in <u>Living the Spirit</u>, <u>ibid.</u> at 217-222.

[60] Burns, <u>ibid.</u> at 3.

[61] Burns, <u>op. cit.</u> at 5.

Wen-Tah, or Two Row Wampum, that many North American First
Nations spokespersons have long sought to advance as the way to
reconfigure relations between aboriginal and non-aboriginal
society.[62] That metaphor presents contact between societies
(and, by extension, persons) as a flowing relationship of shared
autonomy, a river on which societies (and persons) travel in
their own vessels, but over a common body of water and in the
same general direction. Aided by the power of such imagery, we
can, if sufficiently motivated, prepare ourselves to re-launch a
flotilla of vessels of all shapes and sizes and begin to
reconceptualize fundamental rights, whether they come labelled as
`sovereignty' or `human rights', as the river's water that
connects us and permits, indeeds necessitates, our constant
communication with each other.