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SOVEREIGNTY AND SELF-DETERMINATION: THE RIGHTS OF NATIVE AMERICANS UNDER INTERNATIONAL LAW

JOHN HOWARD CLINEBELL*
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INTRODUCTION

Native Americans have stressed for many years that they are sovereign peoples who were originally and now should be recognized as independent, self-governing nations. That plea today falls on deaf ears in the United States. Indians are therefore turning to the international community and asking the nations of the world to recognize the right of Native Americans to be judged by the same standards as other countries.¹ The purpose of this article is to consider the proper status of Native Americans under international law. Part I will analyze the legal principle of sovereignty. The first step in that section will be to measure Indian tribes, both before the European invasion and in 1979, against the international law definition of a state. Since there are many different types of states, ranging from totally dependent to fully independent, the second step will be to investigate the degree of independence enjoyed by Native Americans at the time of the European arrival. Then we will discuss several justifications which have been offered for denying Native Americans their prior legal status, and test those arguments against basic standards of international law.

Even if some or all native nations have the right, the ability, and the desire to enjoy their full sovereign independent status, others may not have that right, may not wish to exercise it, or may wish to work toward it gradually. It is therefore important to discuss a second principle of international law, the right to self-determination. If that principle is applicable, it will allow each eligible native group to choose the relationship its government will have with other nations, whether

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1. See, e.g., D. SANDERS, *THE FORMATION OF THE WORLD COUNCIL OF INDIGENOUS PEOPLES* (1977); *Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere*, Akwesasne Notes, vol. 10, no. 3, at 16 (1978); *The First International Conference of Indigenous Peoples Meet at Tseshahat B.C.*, Akwesasne Notes, vol. 7, no. 5, at 34 (1975).

complete sovereign independence, total dependence, or something in between. We will examine that principle in Part II by describing its history, measuring its current status, then testing its applicability to Native Americans.

Both sovereignty and self-determination are imprecise concepts in international law. Part III will therefore synthesize the two discussions and suggest an interrelation, particularly in their application to Native Americans.

A dichotomy that affects this subject is the deviation between theory and practice of international law. The practice of states, which is one source of international law, often does not conform to the theory of international law, and does not respect some of its principles and rules. However, if nations had allowed that problem to deter their attempts to develop, improve and implement standards of international law, they would have given up long ago. The emphasis in the world community is on establishing more exact and uniform principles of law through covenants, treaties, declarations, and the United Nations Charter and resulting documents, rather than relying on vaguely defined notions of the practice of states. The approach in this article will be to analyze the accepted written sources of international law.²

For example, the United States has, by means of superior numbers, technology and weaponry, assumed a great deal of control over the lives, property and rights of Indian people and governments. This fettered relationship is very similar to the colonial empires established in the 15th, 16th and 17th centuries by European nations and later by the United States.³ Those imperial powers established colonies on other continents to exploit the natural resources, acquire vast land holdings and utilize indigenous people as cheap labor to achieve their commercial ends.⁴ The United States has, by threat and use of force, imposed its laws on native people,⁵ removed and exploited natural resources on native lands,⁶ suppressed native religions and

2. See generally I. BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* (1966).

3. See *The Navajo Nation: Cultivating Underdevelopment*, Akwesasne Notes, vol. 10, no. 4, at 7 (1978); *The Global Supermarket*, Akwesasne Notes, vol. 10, no. 2, at 19 (1978); *The Effects of Colonialism on Indian Life*, Akwesasne Notes, vol. 6, no. 4, at 40 (1974).

4. M. BROWN, *ECONOMICS OF IMPERIALISM* (1974); Ryan, *Indian Nations Compared to Other Nations*, *Am. Indian J.*, vol. 3, no. 8, at 2 (1977).

5. See notes 10 & 11 *infra*.

6. *Resource Exploitation: The Cutting Edge of Genocide*, Akwesasne Notes, vol. 10, no. 2, at 9 (1978).

culture⁷ and restricted native peoples' control of their external affairs and certain elements of their internal affairs.⁸ In an attempt to justify that exploitation under its own law and under principles of international law, the United States government has pieced together an inconsistent, often contradictory and incoherent patchwork of statutes, regulations, and policies with which it purports to govern native people.⁹ The underlying principle which supports that body of Indian law is the "plenary power" of the United States over Indian tribes and people; the United States Congress assumes the authority to enact and enforce any kind of limitation on native people and their rights and property which it deems appropriate.¹⁰ The courts also assume this authority.¹¹ Those realities may seem inconsistent with any claim to sovereignty and self-determination, but what we are analyzing are the rights of native people under international law. If the United States is imposing restrictions in violation of international law, the restrictions do not change the rights which native people are entitled to exercise under that law.

This article will make repeated references to domestic United States law. This is not meant to imply that the United States is entitled to exercise any control over Indians or that the body of Indian law developed by the United States is fair, just or consistent with international law. Those references show only that under the self-serving interpretation of international law used by the United States, and under federal Indian law, with its inherent injustice to Indians, the conclusions described in this article hold true, just as they do under accepted standards of international law. Indian people face the same contradiction when they recognize the injustice of a legal system that explicitly precludes recognition of native governmental rights, but are nevertheless forced by practical realities to argue within that system for protection of their remaining rights.

Another variable which complicates this subject is the diversity among Indian tribes. The locations and experiences of Indian tribes

7. *The Issue is Not Feathers: Legal Attacks on Native Religious Traditions*, Akwesasne Notes, vol. 9, no. 3, at 21 (1977); *Interior Department Raids Crack Down on Native Use of Feathers*, Akwesasne Notes, vol. 6, no. 2, at 37 (1974).

8. See notes 145, 242, & 243 *infra*.

9. See 25 U.S.C. §§ 1-1675 (1976); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1st ed. 1942).

10. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Kagama*, 118 U.S. 375 (1886).

11. See *Oliphant v. Suquamish Tribe*, 434 U.S. 949 (1978); *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 175 (1977); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

have placed them in vastly differing situations. To realistically apply principles of international law, the situation of each tribe should be investigated individually. Since such a monumental task is beyond the scope of this article, we have attempted to extract the lowest common denominator by discussing the very basic principles of international law applicable to groups with certain basic characteristics that most tribes possess. Those variations suggest another difficulty confronting native sovereignty and self-determination: the potential for a number of independent mini-states, few of them large enough to sustain themselves. But that is not a necessary result. Tribes may choose any of a variety of forms of government and degrees of independence. Further, Indians have the ability and have already begun to overcome that problem by means of working arrangements with other governments, both native and non-native, and with private businesses and organizations. And in any case, those factors do not change the rights which Indians have under international law.¹²

This article makes reference to and requires at least general familiarity with a number of historical and contemporary facts and circumstances. It would be impossible to fully narrate or document those facts in anything shorter than a lengthy history textbook or series. That is due to the number of Indian tribes, the variety of their circumstances, the lack of written documentation of much of the historical and even contemporary material, and the sheer volume of factual matters that underlie the application of these legal principles to native peoples. Unfamiliarity with the factual matters necessary to a discussion of those legal principles, and the lack of a comprehensive discussion of that material in one place, cannot be allowed to prevent consideration of the proper status of Native Americans under international law. That discussion must go forward at the same time documentation of the needed factual material is occurring.

I. NATIVE AMERICANS AND SOVEREIGNTY

Part I of this article will analyze the concept of sovereignty under international law as applied to Native Americans. Section A will discuss whether Native American nations qualify as "states" under international law, both before the arrival of Europeans in the 15th cen-

12. "[T]he question of territorial size, geographic location and limited resources should in no way delay the implementation of the Declaration [on the Granting of Independence to Colonial Countries and Peoples] with respect to the territories concerned." 30 U.N. GAOR, Supp. (No. 34) 3429, U.N. Doc. A/10034 (1976).

ture and at the present time. The many types of states under international law may be divided into two general categories: sovereign (or independent) and semi-sovereign (dependent).¹³ Section B will analyze which types of states native nations originally were, as recognized by other nations, international law scholars, and United States courts. Section C will discuss whether any of the various justifications which have been offered to deny Native Americans their independent sovereign status are valid under international law.

A. *Indicia of Statehood Under International Law*

Article I of the Montevideo Convention on the Rights and Duties of States¹⁴ notes the criteria that define a state for the purposes of international law: a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states.¹⁵

1. *Population.* There is no serious dispute that Native American nations have for centuries had, and still have, permanent populations.¹⁶ Indians constitute a separate racial group,¹⁷ as well as distinct political groups under their own laws and federal law.¹⁸ Before the European invasion they were organized in bands and villages, and to some extent tribes. The size of the native population has of course varied, but has always been defined by birth into one of those bands or groups.¹⁹ Indian population is specifically counted today both by tribe and as a total. The United States counted not quite 800,000 Native Americans in its 1970 census.²⁰ One writer has stated that in order to fulfill the requirement of a permanent population a people must be sufficient in number to maintain and perpetuate itself.²¹ If Native Americans can survive and maintain their identity in the face of the destructive policies of the United States government,²² they certainly have permanent and durable populations.

13. 1 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 47 (1940).

14. Dec. 26, 1933, *Inter-American*, 49 Stat. 3097, 3100 T.S. No. 881.

15. 1 G. HACKWORTH, *supra* note 13, at 47; 1 C. HYDE, *INTERNATIONAL LAW* 16-17 (1st ed. 1922).

16. *United States v. Mazurie*, 419 U.S. 544 (1975).

17. W. BODMER & L. CAVALLI-SFORZA, *GENETICS, EVOLUTION AND MAN* (1976).

18. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 60 (1978); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-69 (1963); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

19. F. COHEN, *supra* note 9, at 136.

20. U.S. DEP'T OF COMMERCE, *WE, THE FIRST AMERICANS* (1973).

21. 1 C. HYDE, *supra* note 15, at 16-17.

22. See text accompanying notes 101-94 *infra*.

2. *Territory*. Before the European arrival natives had the use of the entire North American continent and controlled activities within that territory. There were some territorial divisions; many tribes, bands and villages had primary or even exclusive use of particular areas, and those divisions were recognized either through cooperation and agreement or as a result of disputes and the use of force.²³ When the Europeans came to North America, they recognized it as an area inhabited by the native people.²⁴ Though boundaries were in some places only vaguely defined, a lack of precise boundaries is not a bar to statehood under international law; a group may be recognized as a state even though its frontiers are not certain as long as it controls an area of land.²⁵

The territory controlled by Native Americans is even more specifically defined today. Control over most of the land on the continent has been assumed (though in many cases illegally)²⁶ by the United States. But the treaties which transferred most of the land spelled out various areas which were reserved for the use and control of the tribes. Typical of the many treaties signed by the United States and Native Americans is a provision in the treaty with the Sioux, which specified that "[t]he United States agrees that the following district [legal description] shall be and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein."²⁷

In 1976 there were 267 Indian reservations containing over 51 million acres.²⁸ That is a considerably larger area than many countries of the world. In fact, certain Native American nations are larger than some states recognized as independent by the international community. The Navajo Reservation, for example, is larger than forty self-governing foreign nations.²⁹ The United States Supreme Court has long recognized the distinct status of Indians lands and the authority of Indian tribes and their governments within those lands.³⁰ The Indian Claims Commission, an adjudicative body established by the United States Congress to pay compensation for land improperly taken from

23. See, e.g., C. WISSLER, *INDIANS OF THE UNITED STATES* (rev. ed. 1966).

24. See D. QUINN, *NORTH AMERICA FROM EARLIEST DISCOVERY TO FIRST SETTLEMENT* 4-10 (1977).

25. I. BROWNLIE, *supra* note 2, at 67.

26. See text accompanying notes 101-94 *infra*.

27. Act of April 29, 1868, 15 Stat. 635, 636.

28. BUREAU OF INDIAN AFFAIRS, *REAL PROPERTY MANAGEMENT REPORT* (1976).

29. V. DELORIA, *BEHIND THE TRAIL OF BROKEN TREATIES* 166-68 (1974).

30. *Fisher v. District Court*, 424 U.S. 352 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959).

Indian tribes, requires, as a precondition to recovery, proof of an identifiable population and land area.³¹ The Commission has made dozens of awards; thus it has recognized that Native Americans meet those first two requirements of statehood.³²

3. *Government.* The third criterion of statehood is control over the population and territory, or effective government. A group must provide a legal order and a stable political community for its social and political structure.³³

Historians and anthropologists have documented in some detail the social and governmental systems of a number of Indian tribes in the days before contact with the Europeans.³⁴ Although there existed a wide variety and diversity of systems, almost all tribes, bands and villages regulated activities and relations among their members with one degree of formality or another.³⁵ Many tribes had quite formal, well developed and stable governmental structures and political communities which provided for their governance and social and legal order.³⁶ Chief Justice John Marshall, the prime architect of federal Indian law, recognized quite early that Indian tribes were originally self-governing peoples when he referred to "the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself."³⁷ After hearing testimony from a number of historians, anthropologists and native elders in *United States v. Consolidated Wounded Knee Cases*, federal district Judge Warren K. Urbom commented: "The Sioux, and undoubtedly many other tribes as well, had a highly developed governmental system, a religion proclaiming the sacredness of all nature and life, and a disposition toward peacefulness at least as effective as that of the white intruders."³⁸

31. 25 U.S.C. § 70 a (1976).

32. *E.g.*, *Crow Tribe of Indians v. United States*, 284 F.2d 361 (Ct. Cl.), *cert. denied*, 366 U.S. 924 (1960).

33. I. BROWNIE, *supra* note 2, at 67.

34. *See generally* A. DEBO, *A HISTORY OF INDIANS IN THE UNITED STATES* (1977); P. FARB, *MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE* (1968); D. SNOW, *THE ARCHAEOLOGY OF NORTH AMERICA* (1976).

35. *See* P. FARB, *supra* note 34.

36. *See id.*; V. DELORIA, *supra* note 29. *See also* B. DUTTON, *INDIANS OF THE SOUTHWEST* (1965); J. SWANTON, *THE INDIANS OF THE SOUTHEASTERN UNITED STATES*, H.R. Doc. No. 767, 77th Cong., 2d Sess. 137 (1946).

37. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

38. 389 F. Supp. 235, 240 (D.S.D. 1975).

Most tribal governments today are still the structures providing a political community and governance of the social and legal order in native society. There are many types of tribal governments: some have retained or regained a traditional native structure; others are patterned in the western democratic constitutional mold, as a result of the United States influence and/or coercion.³⁹ Although many tribal governments suffer from turmoil and do not always represent the majority, those same problems characterize the governments of a number of other countries in the world. Whatever their form, tribal governments perform the entire range of functions and services expected of an effective government: law enforcement, administration of justice, definition and control of tribal membership and exclusion of non-members, jurisdiction over property and resources, taxation, land use, control of descent and distribution of property, control of domestic relations and juvenile welfare, provision for health, welfare and education services, collection and disbursement of funds, and regulation of business activities.⁴⁰

The United States recognizes and encourages tribal government,⁴¹ albeit not in the way most conducive to tribal sovereignty.⁴² The Supreme Court has repeatedly and consistently recognized the authority of Indian tribes on reservations.⁴³

The fact that some governmental functions on Indian reservations are performed by the United States government does not change the conclusion. A state may delegate some of its powers and arrange to have them provided by another government without losing its statehood or sovereignty.⁴⁴

4. *Capacity to carry on foreign relations.* The fourth criterion which a group must meet to qualify for statehood under international law is the capacity to enter into foreign relations, to have dealings with other states.⁴⁵ The history of native peoples' dealings with European and other foreign states is the best testimony to their capacity and authority to carry on foreign relations. For centuries Native

39. See text accompanying notes 143 & 242-43 *infra*.

40. CHARTERS, CONSTITUTIONS AND BY-LAWS OF INDIAN TRIBES OF NORTH AMERICA (G. Fay ed. 1967).

41. 25 U.S.C. §§ 461-479 (1976); 25 U.S.C. § 450 (1976); THE AMERICAN INDIAN—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970).

42. See text accompanying notes 244-45 *infra*.

43. See note 30 *supra*.

44. See text accompanying notes 158-60 *infra*.

45. 1 C. HYDE, *supra* note 15, at 16-17.

Americans have entered into treaties with the United States and other countries.⁴⁶

Native Americans first signed treaties with Great Britain and France—nations seeking the aid of the Indians in their continuing struggle for control of the continent.⁴⁷ The British colonies, established on the eastern coast of North America, entered into a number of treaties with Indians, and in fact many of the colonies survived because of protection and assistance from Natives.⁴⁸ The United States later explicitly recognized and mandated observance of the treaties which Indians had signed with other nations.⁴⁹ After its independence, the United States continued to deal with Native Americans through the execution of some 370 treaties.⁵⁰

The subject matter of the treaties indicates recognition of the sovereign status of Native Americans:⁵¹ war and peace,⁵² boundary settlements,⁵³ extradition,⁵⁴ passport systems,⁵⁵ trade,⁵⁶ and relations with other countries.⁵⁷ The United States Supreme Court has noted the import of the treaties and the tribes' capacity for carrying on foreign relations. Chief Justice Marshall wrote:

They have uniformly been treated as a State from the settlement of our country. The numerous treaties made with them by the United

46. S. ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 108 (1970).

47. *AMERICA'S FRONTIER STORY* 126, 182 (R. Billington & M. Ridge eds. 1969); *10 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK* (E. O'Callaghan ed. 1858).

48. *AMERICA'S FRONTIER STORY*, *supra* note 47, at 62; F. JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 34 (1975). *See also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832).

49. *See, e.g.*, *Treaty Between the United States and the French Republic*, April 30, 1803, 8 Stat. 200, T.S. No. 86.

50. *See* *INDIAN AFFAIRS, LAWS AND TREATIES* (C. Kappler ed. 1904).

51. *See generally* *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 115 (1962) [hereinafter cited as *RESTATEMENT*].

52. *See, e.g.*, *Treaty with Delaware Indians*, Sept. 17, 1778, art. 2, 7 Stat. 13 ("if either of the parties are engaged in a just and necessary war with any other nation or nations"); *Treaty with Wyandot Indians, et al.*, July 22, 1814, art. 2, 7 Stat. 118 ("tribes and bands above mentioned engage to give their aid to the United States in prosecuting the war against Great Britain").

53. *See, e.g.*, *Treaty with Wyandot, Delaware, Chippawa and Ottawa Indians, et al.*, Jan. 21, 1785, art. 3, 7 Stat. 35.

54. *See, e.g.*, *Treaty with Creek Indians*, Aug. 7, 1856, art. 14, 11 Stat. 699; *Treaty with Quapaw Indians*, Aug. 24, 1818, art. 6; *Treaty with Sioux Indians*, June 19, 1858, 12 Stat. 1031.

55. *See, e.g.*, *Treaty with Creek Indians*, Aug. 7, 1790, 7 Stat. 35.

56. *See, e.g.*, *Treaty with Delaware Indians*, Sept. 17, 1778, art. 5, 7 Stat. 13.

57. *See, e.g.*, *Treaty with Comanche Indians*, Aug. 24, 1835, art. 9, 7 Stat. 474, 475.

States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual in their community. . . . The acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts.⁵⁸

He later concluded:

The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation," are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth; they are applied to all in the same sense.⁵⁹

Since 1871, the United States has refused to deal with Native Americans by means of treaties. By an act of legislation, Congress decided that Native American nations would no longer be recognized as independent nations or powers.⁶⁰ The United States refusal to enter into a treaty, however, does not change the Indian tribes' capability of doing so. The statute does not prevent native nations from entering into treaties with other foreign powers; it is merely a charge to the executive branch to desist from entering into any additional treaties with Native Americans.

The United States has argued that even at the time the treaties were signed, the United States did not recognize them as enforceable obligations in the international law sense of the term. That argument deserves two responses. First, it is contradicted by statements of the United States own Supreme Court⁶¹ and Congress.⁶² Second, the United States has obtained immeasurable benefits under those treaties, most important, extinguishment of Native claims to millions of acres of land. It cannot now deny benefits under provisions of those same treaties to the other signatories.⁶³ Native Americans today are still en-

58. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

59. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832).

60. Act of March 3, 1871, 16 Stat. 544, 566.

61. See text accompanying note 59 *supra*.

62. See Act of March 3, 1871, 16 Stat. 544, 566.

63. RESTATEMENT, *supra* note 51, § 138 (1962).

tirely capable of carrying on relations with foreign countries. The main obstacle preventing them from doing so is the prohibition enforced by the United States government. Superiority in force of arms and physical strength is no longer a valid means, under international law, for interfering with one state's international political status.⁶⁴

Native Americans have the skills and experience necessary to act in the international community.⁶⁵ The desire and need to protect their rights, resources and authority has led them to develop expertise in business, law, government and diplomacy with which they can quite adequately protect their interests at the international level. That is in addition to their traditional ways of dealing with other peoples that would be of much assistance to other nations of the world who have forged less than a brilliant record in international peacekeeping. That skill and expertise is demonstrated by their dealings with multinational corporations that, though nominally American in status, are international in scope; by cooperative agreements which are negotiated and executed with the United States and local governments within the U.S. federal system; and by similar agreements and alliances with each other. Even that small amount of land not taken from Native Americans by the United States is well-endowed with natural resources.⁶⁶ Those resources, plus the skills which Indian nations have developed and the agreements they have worked out with other governments, would quite adequately sustain them on the international level.

Although Indian tribes vary quite dramatically in their characteristics and their circumstances, most qualify as states under international law today, as they did before the arrival of Europeans. Each tribe (or confederation of tribes) is entitled to have that determination made, based on the standards of international law.

B. *Original Sovereignty*

Although many native nations qualify as "states" under international law, there remains the question: what kind of state—fully

64. See text accompanying notes 136-37 *infra*.

65. See, e.g., M. GRIDLEY, INDIANS OF TODAY (4th ed. 1971); R. Bennett, *Indian Land Development: Good or Bad Economics?* INDIAN VOICES (1970); SUBCOMMITTEE ON ECONOMY IN GOVERNMENT, 91ST CONG., 2D SESS., TOWARD ECONOMIC DEVELOPMENT FOR NATIVE AMERICAN COMMUNITIES (Joint Comm. Print 1969).

66. H. HOUGH, DEVELOPMENT OF INDIAN RESOURCES (1967).

independent, completely dependent, or something in between? Before the arrival of Europeans, native nations of North America were, in varying degrees, organized, self-governing entities.⁶⁷ Their independence and sovereign⁶⁸ status was recognized by Europeans and was later acknowledged by the United States after its independence.

Three European scholars of the Middle Ages, Francisco de Vitoria, Emmerich de Vattel and Hugo Grotius, are recognized as the developers of what has come to be known as international law.⁶⁹ Each gave either explicit or conceptual support to native sovereignty. Vitoria considered "whether the aborigines in question were true owners in both private and public law before the arrival of the Spaniards"⁷⁰ He concluded that "[t]he upshot of all the preceding is, then, that the aborigines undoubtedly had true dominion in both public and private matters"⁷¹ Grotius considered impermissible the Roman practice of asserting jurisdiction over a territory simply because it was occupied by a people whose government was different from the Roman form.⁷² Alberico Gentili, a 16th century Spanish jurist and professor of law, a predecessor of Grotius, considered natives equal to other peoples under the law of nations.⁷³ Vattel too has stated:

Every nation that governs itself, under what form soever, . . . is a *Sovereign State*. Its rights are naturally the same as those of any other state. . . . To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it govern itself by its own authority and laws.⁷⁴

67. See text accompanying note 34 *supra*.

68. Sovereignty is defined as the "supreme, absolute, and uncontrollable power by which any independent state is governed." BLACK'S LAW DICTIONARY 1568 (4th rev. ed. 1968). *Accord*, *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1908); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) (sovereignty is the right to govern; a nation or state-sovereign is the international person in whom that resides).

69. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942).

70. F. VITORIA, *DE INDIS ET DE JURE BELLI RELECTIONES* § 1, tit. 4, at 120 (E. Nys ed. 1917).

71. *Id.*, tit. 24, at 128.

72. H. GROTIUS, *THE LAW OF WAR AND PEACE* 120 (F. Kelsey trans. 1925).

73. *Id.* at 89-90.

74. E. DE VATTEL, *THE LAW OF NATIONS* bk. 1, § 4 (J. Chitty trans. 1852) (1st ed. Neuchatel 1758).

Later European writers, including Spanish,⁷⁵ German,⁷⁶ Italian,⁷⁷ French,⁷⁸ and British,⁷⁹ recognized the sovereignty of natives in the "New World."

During the Middle Ages the Catholic Church was the only voice advocating a universal order and rule of law, a position that had been developed by the Greek and Roman Empires in earlier times.⁸⁰ The Church spoke out strongly in support of native sovereignty, a position it did not consider inconsistent with a perceived moral duty to Christianize the heathens.⁸¹ Bartolomé de las Casas, a missionary priest, authored several treatises defending Indian sovereignty in the New World.⁸² Pope Paul III declared in the Bull *Sublimis Deus* in 1537:

The said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property, nor should they be in anyway enslaved; should the contrary happen, it shall be null and of no effect.⁸³

Spanish colonial law (which formed the basis of current United States domestic law on Indian affairs, and was itself heavily influenced by the European scholars Vattel, Vitoria and Grotius)⁸⁴ explicitly recognized the rights of Indians, and therefore the authority of Indian nations to establish those rights. The Law of the Indies provided that Indian land rights should not be abridged⁸⁵ and that any Spanish farm located to the prejudice of an Indian dweller would be removed.⁸⁶

75. See, e.g., B. AYALA, *ON THE LAW AND DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE* (J. Bate trans. 1912).

76. HEFFTER, *DAS EUROPÄISCHE VOLKERRECHT* (1867).

77. P. FIORE, *NOUVEAU DROIT INTERNATIONAL PUBLIC* (1886).

78. L. SOLOMON, *DE L'OCCUPATION DES TERRITOIRES SANS MAÎTRE* (1889); JEZE, *ÉTUDE THÉORIQUE ET PRATIQUE SUR L'OCCUPATION COMME MODE D'ACQUÉRIR LES TERRITOIRES EN DROIT INTERNATIONAL* (1896).

79. W. BLACKSTONE, *COMMENTARIES*.

80. *THE HISTORY AND NATURE OF INTERNATIONAL RELATIONS* 81-82 (E. Walsh ed. 1922).

81. See Losada, *The Controversy Between Sepulveda and Las Casas in the Junta of Valladolid*, reprinted in *BARTOLOMÉ DE LAS CASAS IN HISTORY* 298-99 (J. Friede & B. Keen eds. 1971).

82. See L. HANKE, *BARTOLOMÉ DE LAS CASAS* 44-46 (1951).

83. Papal Bull *Sublimis Deus*, cited in F. MAC NUTT, *BARTHOLOMEW DE LAS CASAS, HIS LIFE, HIS APOSTOLATE, AND HIS WRITINGS* (1909).

84. Cohen, *supra* note 69.

85. Law of June 11, 1594 [RECOMPILACION DE LEYES DE LOS REYNOS DE LAS INDIAS (1681) bk. 4, tit. 12, law 9].

86. *Id.* at bk. 2, tit. 31, law 13.

British colonists,⁸⁷ and later the United States,⁸⁸ recognized that Indian nations were sovereign when the Europeans arrived. The British, Dutch, Spanish and French sought alliances with the Indian nations in their ongoing struggle with each other,⁸⁹ and recognized Indian sovereignty.⁹⁰ Benjamin Franklin marveled that the Iroquis Confederacy "should be capable of forming a Scheme for such a Union, and be able to execute it in such a Manner, as that it has subsisted Ages, and appears indissolable."⁹¹ The Northwest Ordinance, passed by the United States Congress in 1787, shows recognition of the Indians' rightful status:

The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.⁹²

Henry Knox, Secretary of War under President Washington, declared that "[t]he Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not to be divested thereof, but in consequence of fair and bona fide purchases . . ." ⁹³ He felt that the tribes "ought to be considered foreign nations."⁹⁴ Thomas Jefferson believed "the Indians had the full, undivided and independent sovereignty as long as they chose to keep it and that this might be forever."⁹⁵

Perhaps most telling is the clarity with which the Supreme Court has recognized and declared that Indian nations were sovereign entities at the time of the European invasion. In 1831, Chief Justice Marshall commented: "So much of the argument as was intended to prove

87. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832).

88. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 11 (1831).

89. See F. JENNINGS, *supra* note 48, at 38.

90. See J. BRODHEAD, *COLONIAL HISTORY OF THE STATE OF NEW YORK* 99 (1856); J. KINNEY, *A CONTINENT LOST—A CIVILIZATION WON* 11-12 (1937); *NATIVE RIGHTS IN CANADA* 97 (P. Cumming & N. Mickenberg eds. 1972).

91. 4 *THE PAPERS OF BENJAMIN FRANKLIN* 119 (L. Labaree & W. Bell, Jr., eds. 1961).

92. Act of Aug. 7, 1789, art. 3, 1 Stat. 50.

93. G. HARMON, *SIXTY YEARS OF INDIAN AFFAIRS, 1789—1850*, at 2 (1941).

94. *Id.* at 3.

95. F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834*, at 141 (1962).

the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful."⁹⁶ One year later, Marshall observed that "[t]he only inference to be drawn from [the articles of the treaty] is, that the United States considered the Cherokees as a Nation."⁹⁷ Justice Story also wrote:

There is no doubt that the Indian tribes, inhabiting this continent at the time of its discovery, maintained a claim to the exclusive possession and occupancy of the territory within their respective limits, as sovereigns and absolute proprietors of the soil. . . . Their right . . . stood upon original principles deductible from the law of nature, and could not be justly narrowed or extinguished without their own free consent.⁹⁸

Recently, the Supreme Court has observed that "after 1871, the tribes were no longer regarded as sovereign nations,"⁹⁹ thus implying that before 1871 they were sovereign nations.¹⁰⁰

C. *Native Sovereignty Has Not Been Terminated*

Although Native Americans qualify as states under international law, and were originally sovereign, independent states, the United States has taken the position that circumstances have changed over the years and Native Americans are now, at best, dependent nations¹⁰¹ subject to the will of the United States government.¹⁰² Several theories have been offered to justify that position, some purportedly based on international law principles, some unique to United States domestic law. This section will analyze these arguments.¹⁰³

96. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

97. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 553 (1832). *See also* *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-69 (1973).

98. J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 2, 3 (4th ed. 1873).

99. *DeCoteau v. District County Court*, 420 U.S. 425, 432 (1975).

100. *See* text accompanying note 60 *supra*.

101. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

102. *Oliphant v. Suquamish Tribe*, 98 S. Ct. 1011 (1978); *United States v. Wheeler*, 98 S. Ct. 1079 (1978); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

103. The arguments are more difficult to respond to because of the imprecision and inconsistency with which they are offered. The United States—and particularly its courts—offer at best only vague, general reasons to support restrictions on native sovereignty. The matter is simply accepted as a political reality. *Compare* *Beecher v. Weatherby*, 95 U.S. 517, 525 (1877), *United States v. Santa Fe P. R.R.*, 314 U.S. 339, 347 (1941), *and Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955), *with Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544-45 (1832).

1. *Discovery and Occupation.* International law is often glibly cited as authority for the principle that discovery of North America by European explorers gave their countries authority over the land and its people.¹⁰⁴ That theory is inaccurate both in its factual perception of North America and its analysis of international law. Europeans did not discover North America. Native peoples had been here for centuries before the first contact from Europeans.¹⁰⁵ If discovery is a valid means of acquiring title and establishing sovereignty, then Native Americans are the owners of and the sovereigns over North America. As Vitoria observed, "the aborigines in question had true dominion before the Spaniards arrived."¹⁰⁶

Even if the continent had been uninhabited, the European arrival would not have satisfied the requirements of international law for establishing sovereignty. Discovery of a territory, the first arrival, does not establish sovereignty until the land is settled and controlled. Discovery must be followed by effective occupation.¹⁰⁷ England reacted to the early Spanish claims in North America by stating that they had "no claim to property there except that they had established a few settlements and named rivers and capes Prescription without possession is not valid."¹⁰⁸ The Permanent Court of Arbitration said in the *Island of Palmas* case in 1928: "The title of discovery . . . would, under the most favorable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation."¹⁰⁹ The United States government has recognized this principle. In 1924 Secretary of State Hughes stated that "the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement of the discovered country."¹¹⁰

The United States Supreme Court explicitly recognized this prin-

104. See, e.g., *Jones v. United States*, 137 U.S. 202, 212 (1890).

105. D. QUINN, *NORTH AMERICA FROM EARLIEST DISCOVERY TO FIRST SETTLEMENTS* 1 (1975); C. WISSLER, *supra* note 23, at 27; F. JENNINGS, *supra* note 48, at 15.

106. F. VITORIA, *supra* note 70, tit. 7.

107. 1 OPPENHEIM'S *INTERNATIONAL LAW* 558-59 (H. Lauterpacht ed. 8th ed. 1955); I. BROWNLIE, *supra* note 2, at 146; E. DE VATTEL, *supra* note 74, at § 208.

108. Cheyney, *International Law Under Queen Elizabeth*, 20 *ENGLISH HIST. REV.*, 659, 660, 910 (1905).

109. 22 *AM. J. INT'L L.* 867, 867 (1928) (reporting the *Island of Palmas* Case (*United States v. Netherlands*) (Perm. Ct. Arb. Hague 1928)).

110. 1 G. HACKWORTH, *supra* note 13, at 399.

ciple. Chief Justice Marshall discussed the effect of a charter given by a European crown to a colony in North America:

It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants [or through earlier discovery].

. . . .

. . . The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.

. . . .

. . . [T]hese grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.¹¹¹

The simple act of landing on the shores of North America thus did not establish sovereignty. Effective occupation requires "effective, uninterrupted and permanent possession."¹¹² Even in centuries following the Europeans' "discovery," there remains a good deal of territory under native control which has never been occupied by non-Indians.¹¹³

A second failing of this theory is that effective occupation is applicable only to uninhabited lands.¹¹⁴ The Court in the *Island of Palmas* case observed that "an inchoate title, however, can not prevail over a definite title founded on continuous and peaceful display of sovereignty."¹¹⁵ If a land is inhabited, discovery extinguishes the aboriginal right only with the consent of the natives.¹¹⁶ Some theorists argued that in a legal sense North America was uninhabited because the natives were savages who had not reached a degree of civilization which would give them the right to have their sovereignty or control of the land recognized.¹¹⁷ That perception of Native Americans is inaccurate, as well as irrelevant. Historians and anthropologists indicate

111. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544-46 (1832).

112. 1 G. HACKWORTH, *supra* note 13, at 404.

113. See text accompanying notes 23-32 *supra*.

114. *F. VITORIA*, *supra* note 70, § 2. See also *Jones v. United States*, 137 U.S. 202, 212 (1890).

115. 22 AM. J. INT'L L., *supra* note 109, at 867.

116. See *F. VITORIA*, *supra* note 70, § 2. See also *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 589-91 (1823).

117. See L. HANKE, *ARISTOTLE AND THE AMERICAN INDIANS: A STUDY OF RACE PREJUDICE IN THE MODERN WORLD* 44 (1975); J. SEPULVEDA, *DEMOCRATES SEGUNDO ODE LAS JUSTAS CAUSAS DE LA GUERRA CONTRA LOS INDIOS* (1951).

that even at the time of the European arrival Natives had highly developed cultures, governmental systems, laws, religions, and social systems.¹¹⁸ In fact, based on the treatment which the white people showed toward Indians and vice versa, it was the whites, rather than the natives, who were the savages.¹¹⁹ Whether from ignorance, or from the inability or unwillingness to appreciate a culture different from their own, Europeans simply misstated the facts in describing Native Americans as uncivilized.

International law recognizes that social, political or technical advancement is not a valid measure of the rights to which a people is entitled.¹²⁰ Some of the earliest and most respected writers argued that Europeans' actions in North America violated the basic principles of international law.¹²¹ They said that Indians—even if heretics and savages—were entitled to have their territory and political integrity respected. Vitoria pointed out that this principle was recognized by the Church in Europe and as early as ancient Palestine.¹²² Thus, the European nations had no authority over the natives, but could determine rules and guidelines (establish "trade and proselytizing zones"¹²³) only for their dealings with each other. The continuous attempts by Europeans to force "aid" on natives and assert dominion over them in order to civilize them was deemed contrary to the standards of natural law.

Many writers added a qualification to the principle of discovery which would justify European settlements in North America. Vattel, for example, wrote that the "law of nature and nations" requires that land should be cultivated or otherwise put to use. No group of people has a right to occupy more land than it needs to support itself. Since North America was a vast area capable of supporting more than just the natives, they could be required to surrender portions of the land for settlement by others.¹²⁴ But that limitation is in no way incon-

118. See text accompanying notes 34-36 *supra*.

119. See F. JENNINGS, *supra* note 48, at 36-41; R. MARDOCK, *THE REFORMERS AND THE AMERICAN INDIAN* 69-70 (1971); R. UTLEY, *FRONTIER REGULARS* 27 (1973); D. WRONE & R. NELSON, *WHO'S THE SAVAGE? A DOCUMENTARY HISTORY OF THE MISTREATMENT OF THE NATIVE NORTH AMERICANS* (1973).

120. H. GROTIUS, *supra* note 72, at 61.

121. See, e.g., E. DE VATTEL, *supra* note 74, bk. 1, §§ 203-10.

122. Cohen, *Original Indian Title*, 32 *MINN. L. REV.* 28, 44 (1947) (discussing Vitoria's suggestion that Indian land titles were entitled to respect).

123. *Id.* (paraphrasing F. VITORIA, *supra* note 70, tit. 10).

124. E. DE VATTEL, *supra* note 74, bk. 1, § 81.

sistent with native sovereignty, and has no effect on the right to independence and self-government of Native Americans.¹²⁵

Native Americans have always been more than willing to share the resources of this land. From the first European arrival in North America to the present, natives have assisted and tried to accommodate foreigners.¹²⁶ Many colonies and settlements would not have survived their humble and harsh beginnings without the aid of the natives.¹²⁷ Much sharing of resources and skills takes place today, ranging from native medicines and healing skills to natural resources lying on and under Indian land.¹²⁸ From their first contact with Europeans, natives sought an accommodation that would allow each group the land and resources it needed, asking only that they be left to maintain their own ways of life. Several hundred treaties, as well as other contractual dealings and outright gifts, attest to the willingness of Native Americans to share the land with non-Indians. As the natives were gradually pushed westward across the continent for four centuries, they maintained their willingness to recognize the rights of all people to coexist on the land, and continually thought they were signing agreements which assured those rights.¹²⁹ Conflict has occurred because non-Indians have used the principle to justify their actions but then have ignored it when they have wanted to encroach on the lands natives need to support themselves.

2. *Conquest.* Another explanation sometimes offered to justify assertion of authority over Native Americans is that they were conquered by the Europeans and are therefore rightfully subject to non-Indian jurisdiction.¹³⁰ Conquest does not, however, stand up under inter-

125. The requirement that natives relinquish control of land excess to their needs, even if it is accepted as valid, does not pretend to limit native sovereignty on the land retained. The Europeans were simply trying to justify their presence in a land which was already inhabited. They were not arguing that their coming reduced the status of Native Americans as a sovereign nation.

126. A. BROWN, *THE FIRST REPUBLIC IN AMERICA* 41-42 (1898); F. JENNINGS, *supra* note 48, ch. 3.

127. A. DEBO, *supra* note 34, at 45; F. JENNINGS, *supra* note 48, ch. 3.

128. V. VOGEL, *AMERICAN INDIAN MEDICINE* (1970); G. WISSELER, *supra* note 20, ch. 23.

129. *See generally* V. DELORIA, *supra* note 29; *INDIAN AFFAIRS, LAWS AND TREATIES*, *supra* note 50.

130. It is not entirely clear that the United States relies on conquest as the basis of its authority. After its independence from Britain, the United States took the position that the Indians were conquered peoples. F. PRUCHA, *supra* note 95, at 34. It quickly abandoned that claim, however, when military skirmishes made it clear that the United States was not able to assert its will over the Indians. W. WASHBURN, *THE INDIAN IN AMERICA* 158-60 (1975). The young nation's first pronouncement on the subject, the Northwest Ordinance, promised respect for native rights. In 1872, the Com-

national law as a justification for restricting native sovereignty. First, it is not an accurate description of the facts. Many native nations were never subdued by means of military force.¹³¹ Many peace and friendship treaties between Native Americans and the United States (or its predecessors) were signed in situations where the Indians held a superior military position.¹³² Chief Justice Marshall described the colonists' fear that the natives would join Great Britain, and their consequent effort to enlist the aid of the Indians: "Far from advancing a claim to their lands, or asserting any right of dominion over them, Congress revolved [sic], 'that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies.'" ¹³³ Treaties were therefore signed "to preserve peace and friendship."¹³⁴

It is significant to note that the United States has throughout its history used physical force and violence to drive Indians from their land. The military and law enforcement arms of the government have played a central role in this country's taking of native lands and resources and denial of fundamental human rights.¹³⁵ Under contemporary international law, United States policies are illegal and contrary to basic standards set forth in a number of international agreements and documents. The movement to ban force as a valid tool in international dealings began around the turn of the century, picked up momentum after World War I and climaxed after World War II in the adoption of the United Nations Charter. Scholars and national

missioner of Indian Affairs reported that in its 85 years of existence the United States had scrupulously respected the Indians' right to their land, obtaining it only when the Indians agreed to sell. In his 1890 Report, the Commissioner reiterated that "the government has never extinguished an Indian title as by right of conquest [with one exception where the tribe involved was later compensated for its land and provided with another reservation]. W. WASHBURN, *AMERICAN INDIANS AND THE UNITED STATES* 176, 435 (1973). Thomas Jefferson made the same observation in his time. *See* S. PADOVER, *THE COMPLETE JEFFERSON* 632 (1943). *See also* W. WASHBURN, *RED MAN'S LAND/WHITE MAN'S LAW* 56-57 (1971).

131. *See* S. AMBROSE, *CRAZY-HORSE AND CUSTER* (1975); W. & E. HARTLEY, *OSCEOLA: THE UNCONQUERED INDIAN* 93 (1973); J. OLSON, *RED CLOUD AND THE SIOUX PROBLEM* 247-50 (1965); D. VAN EVERY, *DISINHERITED: THE LOST BIRTHRIGHT OF THE AMERICAN INDIAN* 191 (1966); G. WALTON, *FEARLESS AND FREE, THE SEMINOLE INDIAN WAR, 1835-42* (1977).

132. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 550 (1832); V. DELORIA, *supra* note 29, ch. 6.

133. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832).

134. *Id.* *See also* *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622 (1970).

135. *See* D. BROWN, *BURY MY HEART AT WOUNDED KNEE* (1971); A. DEBO, *THE ROAD TO DISAPPEARANCE* (1967); H. JACKSON, *A CENTURY OF DISHONOR* (1974); G. JAHODA, *TRAIL OF TEARS* (1975); K. KICKINGBIRD & K. DUGHENEUX, *ONE HUNDRED MILLION ACRES* (1973); H. MINER, *THE CORPORATION AND THE INDIAN* (1976).

leaders now almost unanimously agree that force employed against the political and territorial integrity of another state is illegal,¹³⁶ and that this principle is a part of customary international law.¹³⁷

The United States continues to threaten and use force to take land from and deny fundamental human rights and self-government to Native Americans; those actions are therefore illegal and cannot be considered valid limitations on native sovereignty. Examples are not hard to find. Many of the policies of the United States government and its subdivisions constitute violence against Indian people and their rights. Outright killings and other physical brutality are too common to be coincidental.¹³⁸ Welfare and child protection agencies remove Indian children from their homes at rates far in excess of the rate found among non-Indians. White case workers apply the cultural standards of non-Indian society in order to condemn the home and family practices of Indians and justify removing the children from their homes.¹³⁹ The educational system set up by the United States for Indian children provides a few large schools which often require that the Indian children be taken from their homes and forced to live at the school, separated from their families for large parts of the year. Indian children are punished for using their native language, and are taught a white version of history that has no regard for the history of their own people and that ignores or skims over the brutality the United States has exhibited toward Indians.¹⁴⁰ Government

136. Kellogg-Briand Pact, Aug. 27, 1928, art. II, 46 Stat. 2343; League of Nations Covenant, art. 12, LEAGUE OF NATIONS O.J. (1920); U.N. CHARTER, art. 2, para. 4 ("all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in other manner inconsistent with the purposes of the United Nations"); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. No. 28, 121, U.N. Doc. A/8082 (1970); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. No. 16, 66-67, U.N. Doc. A/4684 (1960); Treaty of Non-Aggression and Conciliation, Oct. 10, 1933, 49 Stat. 3305; I. BROWNLIE, *supra* note 2, at 173.

137. See I. BROWNLIE, *supra* note 2, ch. 22; R. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 2, 53 (1963).

138. K. KICKINGBIRD & K. DUCHENEAUX, *supra* note 135, at 183; B. ZIMMERMAN, *AIRLIFT TO WOUNDED KNEE* (1976); *The Quality of American Justice*, Akwesasne Notes, vol. 8, no. 2, at 32 (1976); *Courtroom Clash at Sioux Falls*, Akwesasne Notes, vol. 6, no. 2, at 14 (1974).

139. S. UNGER, *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* (1977); *AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON INDIAN EDUCATION* (1976); *INDIAN FAMILY DEFENSE*, BULLETIN No. 10 (1978); *The Future is the Family*, Akwesasne Notes, vol. 9, no. 2, at 4 (1977); Mindell & Gurwitt, *The Placement of American Indian Children—The Need for Change*, 1977 AM. ACAD. CHILD PSYCH.

140. OKLAHOMA STATE ADVISORY COMM. TO THE U.S. CIVIL RIGHTS COMMISSION, *INDIAN CIVIL RIGHTS ISSUES IN OKLAHOMA* 14-15 (1974).

hospitals have sterilized Indian women, often without informed consent, at a rate far greater than their percentage of the population would dictate.¹⁴¹

In addition to those direct, open uses of force, the United States has employed more subtle methods of limiting native sovereignty with the threat of force. Congress has enacted laws which place severe limitations on native sovereignty and take away property and other resources from Indian tribes. Those laws are enacted by a legislative body which has no native representation. If Indians refuse to acknowledge and obey those laws, they will be enforced against Indians by the United States courts, marshals and other law enforcement agencies. It is therefore fully accurate to say that restrictions on native sovereignty are today being imposed by the United States against the wishes of Native Americans by the threat and use of force. Examples include the Indian Claims Commission,¹⁴² which awards damages to tribes for what the United States admits were illegal, fraudulent or unfair takings of land. The Commission has no authority to return the land, which is what tribes need to protect and reassert their sovereignty. The Commission merely seeks to legitimize the theft of native land with money payments. The Indian Reorganization Act¹⁴³ has been used to coerce tribes to adopt an Anglo form of government and limits the powers of tribal government. Public Law 280¹⁴⁴ allows the governments of subdivisions within the United States to assert jurisdiction and enforce some of their laws within Indian reservations. The Alaska Native Claims Settlement Act,¹⁴⁵ "resolves" conflicting Alaskan land claims by limiting Natives to a certain number of acres and paying them off for the rest of their claims. It requires natives to set up economic corporations on the western capitalist model in order to take advantage of the money payments. The Bureau of Indian Affairs sells and leases land and resources without the consent of, and usually on terms disadvantageous to, the native owners.¹⁴⁶

141. *Killing Our Future, Sterilization and Experiments*, Akwesasne Notes, vol. 9, no. 1, at 4 (1974); *Sterilization of Native Women Charged to IHS*, Akwesasne Notes, vol. 6, no. 5, at 6 (1975).

142. 25 U.S.C. §§ 70-70w (1976).

143. *Id.* §§ 461-479.

144. *Id.* §§ 1321-1323.

145. 43 U.S.C. §§ 1601-1627 (Supp. V 1975).

146. K. TOOLE, *THE RAPE OF THE GREAT PLAINS* 51 (1976); U.S. CIVIL RIGHTS COMMISSION, *THE NAVAJO NATION: AN AMERICAN COLONY* 23-24, 122-26 (1975); Cohen, *The Erosion of Indian Rights 1950-53: A Case Study in Bureaucracies*, 62 *YALE L.J.* 348, 364-65 (1953); *The Navajo Nation and Resource Development*, Akwesasne Notes, vol. 10, no. 3, at 26 (1978); *Killing the Earth, Air, Water*, Akwesasne Notes, vol. 9, no. 1, at 8 (1977).

Native sovereignty and property are therefore being infringed by the United States with the threat and use of force, in direct violation of accepted principles of international law. That illegal use of force cannot be claimed as a basis for authority over Native Americans.

International law does provide that the validity of an action must be judged by the legal standards which were in effect at the time of the action.¹⁴⁷ What, then, are we to conclude about the use of force to deprive Native Americans of their property and rights before the use of force was condemned by international law? It is important to note that even before the ban on the use of force by international law there were limitations on its use.¹⁴⁸ Grotius wrote that injury inflicted on a nation is the only just cause of war¹⁴⁹ and that "war is not to be undertaken, except for the enforcement of law, nor is it to be waged, when undertaken, except for the enforcement prescribed by law and good faith."¹⁵⁰

The Supreme Court, speaking of the European colonies in North America, noted that "The power of war is given only for defence, not conquest."¹⁵¹ No one argues that the United States was fighting in self-defense when it attacked native people; nor that it was maintaining any rights that natives were infringing. The United States used military force against Indians to remove them from their land, to open those lands to non-Indian settlement and exploitation of natural resources.¹⁵²

Another rule of international law invalidates the argument that the United States has acquired dominion over Native Americans by conquest:¹⁵³ Conquest was recognized as a mode of acquiring territory "only if the conquered territory was effectively reduced to possession and annexed by the conquering state."¹⁵⁴ Even the United States own concept of its authority over Native Americans does not satisfy

147. R. JENNINGS, *supra* note 137, at 53.

148. Vattel noted that "[t]he right of employing force, or making war, belongs to nations no farther than is necessary for their own defense and for the maintenance of their rights." E. DE VATTEL, *supra* note 74, bk. 3, § 26. "[A] nation is not allowed to attack another with a view to aggrandize itself by subduing and giving law to latter. This is just the same as if a private person should attempt to enrich himself by seizing his neighbor's property." *Id.* bk. 1, § 184.

149. H. GROTIUS, *supra* note 72, at 61.

150. *Id.* at 25.

151. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 553-54 (1832).

152. *See* note 135 *supra*.

153. *See generally* G. HACKWORTH, *supra* note 13.

154. *Id.* at 427.

that definition. The multitude of treaties between the United States and various Indian tribes reserve a large amount of land covering a sizeable total area to Native Americans.¹⁵⁵ Further, control of internal tribal affairs is reserved to the tribes even according to United States law.¹⁵⁶ The United States has never asserted possession or jurisdiction over reservations so as to qualify for acquisition by conquest, even under the terms of pre-20th century international law. Native Americans have retained a land base and a degree of authority which, even under the restrictive terms of domestic United States law, negates any argument that conquest has taken away native sovereignty.

3. *Cession, Agreement.* Another argument often advanced is that Native Americans have agreed to be included within the United States and to be subordinated to the United States Government. By signing treaties which affirmed their allegiance to the United States and their desire for its protection, it is said that Indian tribes surrendered whatever sovereignty they had at the time. The argument continues that the actions of the United States and Native Americans since treaty times reinforce the concept of voluntary merger; they are United States citizens, they have transferred their land to the United States, they have accepted benefits from the government and participated in government and politics, both as individuals and as tribes, and they have reorganized their tribal affairs based on United States law.¹⁵⁷ That argument is directly contradicted by international law, which holds that association with another state does not necessarily result in a surrender of sovereignty. Vattel expressed the general rule:

We ought, therefore, to account as sovereign states those which have united themselves to another more powerful, by an *unequal alliance*

The conditions of those unequal alliances may be infinitely varied. But whatever they are, provided the inferior ally reserve to itself the sovereignty, or the right of governing its own body, it ought to be considered as an independent state, that keeps up an intercourse with others under the authority of the law of nations.¹⁵⁸

155. See text accompanying notes 23-32 *supra*.

156. *United States v. Antelope*, 430 U.S. 641, 643 n.2 (1977); *Fisher v. District Court*, 424 U.S. 382, 390 (1976); *Talton v. Mayes*, 163 U.S. 376, 380 (1895); *United States v. Kagama*, 118 U.S. 375, 381-82 (1885).

157. AMERICAN INDIAN POLICY REVIEW COMMISSION, SEPARATE DISSIDENTING VIEWS, FINAL REPORT 574 (1976) [hereinafter cited as AMERICAN INDIAN POLICY REVIEW COMMISSION].

158. E. DE VATTEL, *supra* note 74, bk. 1, § 5.

The United States clearly recognized that principle and applied it to Native Americans.

To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them

. . . .

. . . The very fact of repeated treaties with [Indian tribes] recognizes [the Indians' right to self-government]; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State.¹⁵⁹

That would be the law even if native nations had agreed to the partial delegation of authority which the United States has decreed. But the Indians did not willingly agree, or understand that they were agreeing, to any large scale transfers of their rights, authority and autonomy when they signed the treaties.¹⁶⁰ The United States Supreme Court recently observed that "[t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent."¹⁶¹ Indian people have continuously objected to infringements on their sovereignty.¹⁶² Many of the treaties were fraudulently imposed. They were written in English and United States negotiators often misrepresented the contents of the treaties.¹⁶³ Even more common was the United States' policy of abiding by a treaty agreement only until it wanted more land, at which point it would ignore the treaty, argue that it should be interpreted differently, or coerce the Indians into signing a new agreement giving up more of their land. The military's presence in the background often

159. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 553-54, 560-61 (1832).

160. *Id.* at 560-61.

161. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *see Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 367 U.S. 818 (1962).

162. *See* note 177 *infra*.

163. *See, e.g., Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Whitefoot v. United States*, 293 F.2d 658, 667 n.15 (Ct. Cl. 1961), *cert. denied*, 367 U.S. 818 (1962); L. SCHEMECKEBER, *THE OFFICE OF INDIAN AFFAIRS, ITS HISTORY, ACTIVITIES AND ORGANIZATION* 59 (1927); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 CALIF. L. REV. 601 (1975).

implied that the Indians would suffer if they did not consent.¹⁶⁴ That course of action has become as well recognized as it is notorious, admitted even by the United States itself;¹⁶⁵ thus, the United States Congress established an Indian Claims Commission to compensate for those improprieties.¹⁶⁶ International law has always condemned the use of such deception. Vattel wrote:

[G]ood faith demands . . . that each party should express his promises clearly, and without the least ambiguity. The faith of treaties is basely prostituted by studying to couch them in vague or equivocal terms, to introduce ambiguous expressions, to reserve subjects of dispute, to overreach those with whom we treat, and outdo them in cunning and duplicity. . . . Subterfuges in a treaty are not less contrary to good faith. . . . [A]n evidently false interpretation is the grossest imaginable violation of the faith of treaties.¹⁶⁷

Therefore, even if the treaties contained any surrender of sovereignty, they were often unwilling concessions.

The Indians' understanding of the treaties was consistent with Vattel's and Marshall's descriptions of "unequal alliances." As Marshall discussed in *Worcester v. Georgia*, the Indians perceived the treaties as a promise of protection, and not as any surrender of sovereignty, except in the particulars agreed in the treaties.¹⁶⁸ The Indians regarded land as available for the use of all members of the group. They often thought that the treaties entitled whites to come into their area; they did not agree or understand that they were to be excluded from land they had traditionally inhabited. And regardless of the various understandings and misunderstandings as to the use of land, they certainly did not knowingly relinquish any of their

164. A. BLEDSOE, *INDIAN WARS OF THE NORTHWEST* 158-60 (1885); W. BRANDON, *THE LAST AMERICANS* 274 (1974); G. FOREMAN, *INDIAN REMOVAL* 198, 236 (1932); W. HAGEN, *AMERICAN INDIANS* 55-56 (1961); G. HARMON, *SIXTY YEARS OF INDIAN AFFAIRS* 174, 188-91, 197, 361 (1941); A. JOSEPHY, *THE INDIAN HERITAGE OF AMERICA* 282-84 (1968); O. McNICKLE, *THE INDIAN TRIBES OF THE UNITED STATES* 39 (1962); S. MORISON, W. COMAGER & D. LEUGHTENBURG, *THE GROWTH OF THE AMERICAN REPUBLIC* 439-40 (6th ed. 1969); W. WASHBURN, *THE INDIANS IN AMERICA* 17-96 (1975).

165. "It is not denied that wrong was often done in fact to tribes in the negotiation of treaties of cession. The Indians were not infrequently overborn or deceived by agents of the Government in these transactions . . ." REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (1872).

166. [1946] U.S. CODE CONG. & AD. NEWS 1347.

167. E. DE VATTEL, *supra* note 74, bk. 2, §§ 231-233. See also RESTATEMENT, *supra* note 51, §§ 3, 158.

168. 31 U.S. (6 Pet.) 515 (1832); see text accompanying notes 158-63 *supra*.

sovereignty.¹⁶⁹ As Vitoria stated, fear and ignorance vitiate any consent to be governed.¹⁷⁰ In short, the United States explained the treaties to the Indians in one way, and now claims a quite different interpretation.

Native Americans have ceded and sold a great deal of land to the United States and to private purchasers. Many of those sales were not voluntary. They were often made after persuasion or promises from government officials, "trustees" appointed for "incompetent" Indians (a common fiction used to ease land away from natives), and other Indians whom the government had pressured or bribed into advocating the non-Indian cause. Sales were often made without the consent of the Indian owner (his signature was forged or one signature would be obtained for a parcel with many joint owners); many times he was coerced and threatened until he agreed.¹⁷¹ But even if some of the land sales and cessions were considered valid, they would not change the fact that Indian tribes have retained millions of acres of land under their control and jurisdiction, land that is a more than adequate basis for their sovereignty.¹⁷² Further, even if the treaties could in some way be considered a surrender of sovereignty, any such grant would have to be considered long ago rescinded by virtue of the wholesale violation of the treaties by the United States. The United States cannot ignore its treaty obligations, and then insist that concessions made by the Indians are still binding.¹⁷³

Another element of the "agreement" argument is that the widespread participation by Indians in American government and society operates as a waiver of any claim to sovereignty. That argument is not persuasive because Indians have been forced into the non-Indian system against their will. Indians were made citizens of this country without their consent.¹⁷⁴ They have been forced to depend on Anglo governments, to observe United States laws, to participate in the legal, political and economic systems in this country, to organize themselves on the American model, all because their resources and culture have been devastated by the United States. The United States has taken Indian land and resources, forced them to abandon their traditional ways

169. See text accompanying notes 158-63 *supra*.

170. F. VITORIA, *supra* note 70, § 2, para. 16; see Cohen, *supra* note 69, at 13.

171. See, e.g., A. DEBO, *supra* note 135, ch. 17; K. KICKINGBIRD & K. DUGHE-NEAUX, *supra* note 135.

172. See text accompanying notes 23-32 *supra*.

173. See RESTATEMENT, *supra* note 51, §§ 138, 158.

174. 8 U.S.C. § 1401 (1976).

and tried to force them into the western mold.¹⁷⁵ Given the numbers, the technology and the use of force which have characterized the non-Indian society, it is not surprising that Indians have bent under the pressure and adopted some non-Indian ways. Indian tribes and people have, in recent years, begun to reverse that process and recover their traditional ways of life, social organization and government. But that will likely be a long, slow process, which will permit only a gradual divorce from the American system. Native people are entitled to an opportunity to choose how they will be governed and to have returned to them the resources needed for self-sufficiency. It is therefore not accurate or reasonable to say that participation in non-Indian systems is an agreement by Indians to give up their sovereignty.

4. *Acquisitive Prescription*. One method sometimes recognized in international law for establishing title to land is acquisitive prescription, a concept akin to adverse possession in English common law. It allows a nation to cure a defect in title or wrongful origin of title by the exercise of control over an extended period. The possession must be peaceful and uninterrupted and must be with the acquiescence of the original sovereign and other sovereigns.¹⁷⁶ There is disagreement over whether prescription is a valid means of acquiring title. However, even if it is recognized, it is not applicable to Native American lands. First, Native Americans have retained a share of their lands which the United States does not possess. Second, in those lands where the United States has coerced or assumed a transfer from the Indians, its possession has not been peaceful; Native Americans have consistently opposed the white occupation, and the United States has often reverted to force, or the threat of its use, to maintain or establish possession.

Similarly, United States possession has not been with the acquiescence of all other sovereigns. The native nations have not willingly agreed to United States control.¹⁷⁷ An arbitration decision in a case involving the United States and Mexico discussed those principles:

Without thinking it necessary to discuss the very controversial question as to whether the right of prescription invoked by the United

175. See A. DEBO, *supra* note 34; F. JENNINGS, *supra* note 48; F. PRUCHA, *AMERICAN INDIAN POLICY IN CRISIS* (1976); *AMERICANIZING THE AMERICAN INDIANS* (F. Prucha ed. 1973).

176. R. JENNINGS, *supra* note 137, at 23-24.

177. "If the [original sovereign] keeps its claim alive by protest or the bringing of an action, there will not be that undisturbed or 'peaceable' possession which alone enables a State to prescribe a title." *Frontier Land Case*, [1959] I.C.J. 209, 227. See also R. JENNINGS, *supra* note 137, at 23; A. JOSEPHY, *RED POWER* 9-15 (1971); V. DELORIA, *supra* note 29, at 20-21.

States is an accepted principle of the law of nations, in the absence of any convention establishing a term of prescription, the commissioners are unanimous in coming to the conclusion that the possession of the United States in the present case was not of such a character as to found a prescriptive title. Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by United States was undisturbed, uninterrupted and unchallenged. . . . On the contrary it may be said that physical possession taken by citizens of the United States and the political control exercised by the local and federal government have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents.¹⁷⁸

Also, the reasoning applicable to land acquisition described above¹⁷⁹ would control here even if acquisitive prescription were applicable. Acquisition of title to even the bulk of North America by the United States would not terminate Native American statehood and sovereignty, since natives still retain control of a good deal of territory and fulfill the other requirements of statehood.¹⁸⁰

5. *Changed Circumstances.* Non-Indians often point to the substantial changes which have taken place in both Indian and non-Indian societies as justification for restriction on native sovereignty. They argue that even if Indians have not explicitly surrendered their sovereignty, changed circumstances have made that sovereignty unrealistic.¹⁸¹ A general category, tentatively suggested by one writer to justify changes in title or jurisdiction when none of the traditional concepts will work, is termed historical consolidation.¹⁸² That principle focuses not on the origin of possession or its development, but on the current nature of possession, the way in which authority is being exercised and the political relationships among contending sovereigns. In some ways it is similar to acquiescence or estoppel in that it validates a situation that has been accepted because of the passage of time despite questionable origins and practices.

178. Chamizal Arbitration (United States v. Mexico) June 15, 1911, cited in G. HACKWORTH, *supra* note 13, at 441-42. It is not valid to argue that Indian protests have not been strong enough. Again, from the Chamizal Arbitration:

It is quite clear from the circumstances related in this affidavit that however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico cannot be blamed for the milder forms of protest contained in its diplomatic correspondence.

Id. at 442.

179. See text accompanying notes 23-32 *supra*.

180. See text accompanying notes 14-66 *supra*.

181. See AMERICAN INDIAN POLICY REVIEW COMMISSION, *supra* note 157, at 574.

182. See R. JENNINGS, *supra* note 137, at 23, 27.

Historical consolidation has not been accepted as a valid principle under international law. Its originator did so only tentatively, suggesting that it *might* be a useful term; he then went on to say, "that it has never been, as it were, spelled out as a doctrine by any court."¹⁸³ Even if historical consolidation were a valid principle, it could not be properly applied to Native Americans. The concept seems to be intended for a situation where changed circumstances have come to be mutually accepted as the most realistic way of handling the situation by the parties involved. It seems designed to validate a situation that is on the whole reasonable, but has some technical defect in its legal justification. Circumstances in which Native Americans find themselves do not fit that pattern. The relationship imposed on them by the United States is not at all reasonable from the standpoint of either Indians or of non-Indians.¹⁸⁴ The "defect" which the United States seeks to remedy is not a mere technical violation of some abstract principle but rather a continuing policy of violations of the sovereign and individual human rights of Native Americans. It is a brutal, ill-conceived and inconsistent attempt to maintain a colonial form of exploitation of the lands and resources of native people. The United States has violated and continues to violate a number of provisions of international law in order to effect and maintain the conditions which it seeks to validate. The principle is designed to validate political relationships that have come to be accepted as legitimate because they reflect current realities and are realistic and reasonable for the people involved. It perhaps ignores the historical questions of illegality and impropriety, but it cannot ignore continuing violations of international law. An assertion of authority—of title and jurisdiction—which conflicts with accepted standards of international law cannot be legitimized by reference to the principle of historical consolidation when it is maintained only by virtue of the dominant state's superiority in numbers, strength and technology. International jurisprudence provides that *ex injuria jus non oritur*—acts contrary to law—cannot become a source of legal rights for the wrongdoer.¹⁸⁵

Another rule which might justify changing the law when circumstances have changed is the principle of *rebus sic stantibus*.¹⁸⁶

183. *Id.* at 27.

184. See AMERICAN INDIAN POLICY REVIEW COMMISSION, *supra* note 157, at 601; C. WILLIAMS & W. NEUBRECH, *INDIAN TREATIES: AMERICAN NIGHTMARE* (1976).

185. I. BROWNLIE, *supra* note 2, at 498; R. JENNINGS, *supra* note 137, at 54.

186.

An international agreement is subject to the implied condition that a sub-

Rebus sic stantibus has uncertain qualifications under international law: "International tribunals and other courts, while not denying the existence of the doctrine, have generally avoided giving it effect, usually on the ground that it was not applicable to the facts at hand."¹⁸⁷ The Permanent Court of International Justice was presented with the argument, but refused to rule on the issue since key allegations were missing. "The Court did not state whether it would apply the doctrine if the facts were proved."¹⁸⁸

The principle is by its own terms inapplicable to Native Americans. Conditions which "were an essential basis of a consent to be bound" have not changed so as to "radically transform the scope of the obligations" to which the parties agreed.¹⁸⁹ The Indian treaties—which are to be interpreted as the Indians understood them¹⁹⁰—were intended to guarantee various rights and elements of sovereignty to the Indians. Native Americans are capable and desirous of exercising their right of self-government, and would still be in a position to do so were it not for the actions of the United States which violate international law. Even if conditions had changed so as to satisfy the language of the principle, it would nevertheless be inapplicable. First, the principle cannot be used to negate a treaty which has established a boundary.¹⁹¹ Since most treaties signed by Native American nations delineated boundaries between native and non-native areas, the United States cannot rely on *rebus sic stantibus* to withdraw recognition of those agreements. Second, a nation may rely on the principle only if it did not cause the change in circumstances by action inconsistent with the purpose of the agreement.¹⁹² Since Native nations understood that treaties would preserve their existence and protect their status as separate groups apart from the incoming whites, the subsequent actions of the United States that have violated and compromised their

stantial change . . . in a state of facts existing at the time when the agreement became effective, suspends or terminates . . . the obligations . . . to the extent that the continuation of the state of facts was of such importance . . . that the parties would not have intended the obligations to be applicable under the changed circumstances.

RESTATEMENT, *supra* note 51, § 153(1).

187. *Id.* § 153, comment.

188. *Id.* at 471.

189. S. ROSENNE, *supra* note 46, art. 59(1)(b).

190. See *Antoine v. Washington*, 420 U.S. 194, 200-01 (1975); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625 (1969); *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968).

191. S. ROSENNE, *supra* note 46, art. 59(2)(a).

192. RESTATEMENT, *supra* note 51, § 153.

separate existence are inconsistent with the purpose of the agreements. That caveat is expressed in slightly different language by the Vienna Convention.¹⁹³ It would preclude reliance on *rebus sic stantibus* if the change in conditions is a result of a breach either of the treaty or of some other international obligation by the party seeking to invoke the principle. Since the change in conditions under which Native Americans live has been caused by the United States—expanding its population into areas occupied by Native Americans, forcibly relocating Indians, exploiting and taking land and resources from the natives—the United States may not limit native sovereignty on the basis of a change in conditions since the time treaties were signed.¹⁹⁴

Although tribes have a wide variety of histories and circumstances, the general conclusion is that none of the arguments offered by non-Indians justifies existing limitations on native sovereignty. The United States blithely assumes that it has legitimately restricted native sovereignty. As noted at the beginning of this section, courts in particular have not presented a clear analysis for that conclusion. A more careful consideration of the facts and the applicable law would reveal some surprises.

II. THE RIGHT TO SELF-DETERMINATION

Discussion of the concept of self-determination has come to international law only recently. The appearance of this idea represents one part of a significant change which has taken place in international law and in the practice of states in their international affairs. Prior to the 20th century, international law used the rule of force and physical power as the foundation for international relations. Stronger sovereigns were able to dictate to weaker nation-states international policies and laws that would be followed by the world community. There has been a dramatic change during the 20th century in at least the theory, if not entirely in the practice, of international law towards basing those relations on principles of equality and respect for the rights and integrity of states and peoples. That change has been manifest both in the substantive provisions of international law and in the pro-

193. See S. ROSENNE, *supra* note 46, art. 59.

194. Although *rebus sic stantibus* applies by its terms only to agreements, the United States uses a similar argument in denying Indians their aboriginal rights. The principle is inapplicable for the same reasons that it does not justify changes in treaty agreements.

cedure or process by which international affairs are carried on and international law is developed and applied.

One result of that change is the recognition of the need for protection of individual human rights. A related development, but one which is broader in scope, is respect for the integrity of peoples and states. That development has been embodied in recognition and, to some extent, implementation of the right to self-determination. Self-determination has progressed from an abstract and idealistic theory to an international legal right that is firmly established in international legal documents and is being defined more specifically and implemented as time goes on. The concept of unit self-determination is defined most broadly as "the right to determine one's own fate,"¹⁹⁵ and more specifically as the "right freely to determine without external interference, their political status and to pursue their economic, social and cultural development."¹⁹⁶

A. *Development of the Concept*

Self-determination has a broad historical base. The concept grew out of the spirit of nationalism that evolved and mushroomed during the 17th and 18th centuries, and was expressed in such events as the French and American revolutions. The essence of nationalism or popular sovereignty was that "government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to which they belong should be able to secede and organize themselves as they wish."¹⁹⁷ The sovereignty of the monarch was replaced by the sovereignty of the people, and in the new sovereign, the nation, was vested the sole authority to exercise the right of sovereignty. Thus, in its beginnings, self-determination was equated with the political idea that nations have a right to sovereign independence, and with the people's desire to be free from external or internal domination. The concept of self-determination continued to develop through the 19th century in Europe; states were unified as a result of national movements which were based on the

195. Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Concept*, 70 AM. J. INT'L L. 1 (1976).

196. Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, *supra* note 136, at 123.

197. J. SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 17 (1973).

principles of self-determination. The term itself was first used by German philosophers and scholars who derived it from the German word *selbstbestimmungsrecht*.¹⁹⁸

Formalization of the concept coincided with the first attempt to establish a mechanism which would regulate international affairs. Discussions which led to the creation of the League of Nations included considerable emphasis on the need to protect the right to self-determination. One of the strongest advocates of the concept was President Woodrow Wilson, who remarked, "every people has a right to choose the sovereignty under which they shall live."¹⁹⁹ Later, in an address to Congress in 1917, he stated: "No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were property."²⁰⁰ The concept was institutionalized to some extent by such actions as establishments of Mandate Territories by the League of Nations, which provided for international oversight of certain areas which had been colonies of the powers defeated in World War I. Those that had advocated protection of the right to self-determination emphasized the rights of national minorities.

The Turkish Government's extermination of the vast majority of the Christian population in the Ottoman Empire and the even more egregious acts against the Jewish people by Hitler's Third Reich led the international community to establish some restrictions and guidelines on, and mechanisms for dealing with, not only conduct between states but actions within a state which violate fundamental human rights and other elements of international law. The Nuremberg War Crimes Trials indicated that international authority would be used to punish nations and persons who violated those standards. There was a consensus that certain actions by states were so contrary to accepted standards as to be crimes against humanity and that the nations committing such wrongs should be punished.

Among those developments was a definitive recognition of the right to self-determination. The United Nations Charter recognized that the right to self-determination must be protected if the basic goals of the organization, to maintain world peace and security, were to be

198. U. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* 3 (1972).

199. 2 *THE PUBLIC PAPERS OF WOODROW WILSON* (R. Baker & W. Dodd eds. 1926).

200. 54 *CONG. REC.* 1742 (1917).

achieved. The description of the purposes of the United Nations contained in Article I of the Charter calls on United Nations members "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" ²⁰¹

Many developments since the adoption of the United Nations Charter have affected the right of self-determination. Unfortunately, they have left much uncertainty over the current status of the concept in international law. For example, although the principle is well-established in international documents, it has not become a universal part of the practice of states.²⁰² With that uncertainty in mind, we feel it is important to analyze developments since establishment of the United Nations in the following frame of reference. The United Nations Charter sets forth an ideal: a general, theoretical statement of the right to self-determination. It was inevitable that it would take a certain amount of time and experience to develop the manner in which that principle would be implemented. The United Nations Charter should be viewed as a general statement of the principle, which was to be, and has been, followed up by more specific and detailed standards to implement the principle. That process has in fact been occurring in the thirty years since the United Nations Charter was signed.

Two of the most basic United Nations documents are the Covenant on Economic, Social and Cultural Rights²⁰³ and the Covenant on Civil and Political Rights.²⁰⁴ Article I of each provides:

1. 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.
2. The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The State Parties to the Covenant, including those having responsibility for the administration of Non-Self-Governing territories, shall

201. Article 55 of the Charter provides in part: "With a view of the creation of the conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"

202. Carey, *Self-Determination in the Post-Colonial Era: The Case of Quebec*, 1 A.S.I.L.S. L.J. 37 (1977).

203. [1966] U.N.Y.B. 419.

204. *Id.* at 423.

promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The United Nations General Assembly has adopted three declarations which stress the importance of the right to self-determination. In the Declaration on the Granting of Independence to Colonial Countries and Peoples,²⁰⁵ the Assembly declared:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their political, economic, social and cultural development.

In the Declaration on the Inadmissibility of Intervention in Domestic Affairs and Protection of their Independence and Sovereignty,²⁰⁶ the Assembly affirmed:

All states shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations²⁰⁷ proclaimed:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, *all peoples* have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the re-

205. G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66-67, U.N. Doc. A/4684 (1960).

206. G.A. Res. 2131, 20 U.N. GAOR, Supp. (No. 14) 11-12, U.N. Doc. A/6014 (1965).

207. G.A. Res. 2625, 25 U.N. GAOR, Supp. No. 28) 121, U.N. Doc. A/8082 (1970) (emphasis added).

sponsibilities entrusted to it by the Charter regarding the implementation of the principle in order:

- (a) To promote friendly relations and co-operation among States; and
- (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Several resolutions of the United Nations General Assembly over the years have reaffirmed the importance of the principle of self-determination and encouraged various means for bringing about protection of that right. In 1950, the General Assembly "call[ed] upon the ECOSOC to request the Commission on Human Rights to study ways and means which would insure the right of peoples and nations to self-determination . . ."²⁰⁸ In more recent resolutions, the General Assembly has reaffirmed the right of all peoples, particularly those of Southern Africa,²⁰⁹ to self-determination, freedom and independence, and the legitimacy of their struggle to free themselves from colonial oppression,²¹⁰ and has reaffirmed the inalienable right to self-determination, freedom and independence of all peoples under control and foreign domination and alien subjugation, in conformity with the Assembly's Declaration on the Granting of Independence to Colonial Countries and Peoples.²¹¹ In 1977, the Assembly unanimously invited all states to become parties to the Human Rights Covenants,²¹² recognized the progress achieved in the elimination of colonialism and the realization of the right of peoples to self-determination, and demanded "the release of all individuals detained or imprisoned as a result of their struggle against *apartheid*, racism, and discrimination, colonialism, aggression, and foreign occupation and for self-determination independ-

208. G.A. Res. 421, 5 U.N. GAOR, Supp. (No. 20) 42, 43, U.N. Doc. A/1620 (1950).

209. G.A. Res. 3222, 29 U.N. GAOR, Supp. (No. 31) 84-85, U.N. Doc. A/9631 (1974).

210. G.A. Res. 3246, 29 U.N. GAOR, Supp. (No. 31) 87, U.N. Doc. A/9631 (1974); G.A. Res. 32/14, 32 U.N. GAOR, Supp. (No. 45) 133-34, U.N. Doc. A/32/45 (1977).

211. G.A. Res. 3246, 29 U.N. GAOR, Supp. (No. 31) 87, U.N. Doc. A/9631 (1974).

212. G.A. Res. 32/66, 32 U.N. GAOR, Supp. (No. 45) 139, U.N. Doc. A/32/45 (1977).

ence, and social progress for their peoples."²¹³ The Assembly recognized that racial discrimination, threats against national sovereignty, and the refusal to recognize the fundamental right of self-determination constitute "flagrant violations of all human rights and fundamental freedoms of peoples as well as of individuals."²¹⁴ Thus, since its inception, the United Nations has treated self-determination as an essential aspect of human rights belonging to groups that qualify as "peoples," and not merely to political entities that may have come to power by methods that do not reflect the wishes of the people.

It is important to note that the United States has consistently supported the principle of self-determination. President Woodrow Wilson was one of the most outspoken advocates of the principle after World War I. In 1947, the United States State Department asserted that "[i]n the inter-war period, the United States Government continued its traditional support of self-determination and self-government as well as non-discriminatory treatment in dependent territories."²¹⁵ On October 27, 1945, President Truman proclaimed "that all peoples who are prepared for self-government should be permitted to choose their form of government by their own freely expressed choice, without interference from any foreign source."²¹⁶ The United States has even recognized that Native Americans are entitled to exercise that essential right. In a message to Congress in 1970, former President Nixon stated: "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."²¹⁷ On January 4, 1975, Congress enacted the Indian Self-Determination and Education Assistance Act,²¹⁸ which purports to support and encourage the tribes' right to govern their own affairs and administer their own programs and activities. In the statement of findings, Congress found that "the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons."²¹⁹

213. G.A. Res. 32/122, 32 U.N. GAOR, Supp. (No. 45) 145, U.N. Doc. A/32/45 (1977); G.A. Res. 32/121, 32 U.N. GAOR, Supp. (No. 45) 144-45, U.N. Doc. A/32/45 (1977).

214. G.A. Res. 32/130, 32 U.N. GAOR, Supp. (No. 45) 150, U.N. Doc. A/32/45 (1977).

215. U.S. DEP'T OF STATE, THE UNITED STATES AND NON-SELF-GOVERNING TERRITORIES 4-5 (1947).

216. *Id.*

217. 116 CONG. REC. 23131 (1970).

218. 25 U.S.C. §§ 450(a)-(n) (1976).

219. *Id.* § 450(a)(2).

B. *Current Status of the Principles of Self-Determination*

1. *Who has the right to self-determination?* The United Nations Charter and other international documents refer to "self-determination of peoples" and sometimes to "self-determination of all peoples." Although the definition of "people" for the purpose of the principle of self-determination has not been extensively analyzed, there are several very specific descriptions of the elements of the definition. Contemporary authority most often cited is the 1970 Greco-Bulgarian case decided by the International Court of Justice. A people was defined as:

A group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by the identity of race, religion, language and tradition in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.²²⁰

The International Commission of Jurists, a nongovernmental organization with consultative status in the United Nations, has proposed the following criteria for defining a people: (1) a common history; (2) racial or ethnic ties; (3) cultural or linguistic ties; (4) religious or ideological ties; (5) a common territory or geographical location; (6) a common economic base; and (7) a sufficient number of people.²²¹

2. *Elements of the right to self-determination.* A more detailed consideration of the elements of the principle of self-determination is found in a recent commentary:

A people is entitled to be free:

1. From internal or external domination;
2. From discrimination on grounds of race, color, creed or political conviction;
3. To pursue their own economic, social and cultural development;
4. To enjoy fundamental human rights and equal treatment;
5. To form a government of their own choosing.²²²

The exercise of these interrelated freedoms combines to form the foundation of self-determination.

220. [1970] P.C.I.J., ser. B, No. 17, at 21.

221. SECRETARIAT OF THE INTERNATIONAL COMMISSION OF JURISTS, *THE EVENTS IN EAST PAKISTAN 70* (Geneva 1972).

222. U. UMOZURIKE, *supra* note 198, at 188.

3. *Obstacles to the principle of self-determination.* There are two principles of international law that some states and commentators have used as justifications for denying the right to self-determination: the principle of territorial integrity, and limitation of the concept to overseas colonies. Article 2(7) of the United Nations Charter precludes the United Nations from intervening in matters which are "essentially within the domestic jurisdiction of any state." That provision, however, does not preclude consideration of a people's status simply because a nation claims jurisdiction over that group of people. Article 2(7) makes an exception for matters that, under Chapter VII of the Charter, are considered a threat to international peace. The international community has determined that the denial of the right to self-determination is just such a threat to international peace and stability. The Declaration on the Granting of Independence to Colonial Countries and Peoples²²³ states:

The General Assembly,

. . . .

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

. . . .

Convinced that the continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

. . . .

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

. . . .

Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of World Peace and co-operation.

The Restatement provides that "[a] violation of international law gives to a state or international organization adversely affected, a claim

223. Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 205.

that may be adjudicated in appropriate forum"²²⁴ Therefore, Native American nations have a right to present violations of international law discussed in Part I of this article to the appropriate international forums.

Some commentators have stated that the right to self-determination does not include the right to secede from an established state.²²⁵ Those who do adhere to the principle, however, recognize that it applies only to people who have originally made a choice to be included in a state. Once they have made that initial selection, the nation is defined and not even the right to self-determination justifies secession from the political entity.²²⁶ Therefore, Article 2(7) cannot be used to perpetuate control or jurisdiction by a state over a people that has not chosen to be included within that state. One commentator has proposed a resolution of the apparent conflict by suggesting a test of reasonableness:

In short, to approximate a public order of human dignity, the test of reasonableness is the determining factor in deciding how to respond to the claim of self-determination. The total context of such claim must be considered: the potential effects of the grant or denial of self-determination upon the sub-group, incumbent group, neighboring regions, and the world community.²²⁷

. . . .

. . . A critical issue in assessing the lawfulness of a claimant group's demands, consequently, is the degree to which their value demands are compatible with global community demands and policies.²²⁸

The same commentator analyzed paragraph 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples.²²⁹ He observed that the drafters of the Declaration did not mean that self-determination would be unavailable to groups within established bodies politic. Paragraph 6 merely condemned intervention by third parties.²³⁰ Finally, we note that President Carter, in a speech to the

224. RESTATEMENT, *supra* note 51, § 3.

225. See Carey, *supra* note 202, at 53; Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 465 (1971).

226. Carey, *supra* note 202, at 50, 62 n.90.

227. Suzuki, *Self-Determination and the World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779, 784 (1976).

228. *Id.* at 814.

229. Paragraph 6 provides: "Any attempt aimed at the partial or total destruction of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

230. Suzuki, *supra* note 227, at 843.

United Nations General Assembly on March 17, 1977, stated that "no nation can claim that mistreatment of its citizens is solely its own business."

Another obstacle to the right of self-determination is the restriction that has been placed on it by some states and commentators who would apply it only to overseas colonies. However, the drafters of the various United Nations documents which bear on the subject did not intend that the principle would be so limited: "A colony is a colony, whether it is the product of overseas expansion or the product of overland expansion."²³¹ In the plenary session which considered the matter, several members of the General Assembly stated that the principle of self-determination is not restricted to peoples living in colonies but extends to all peoples.²³² The Declaration on the Granting of Independence to Colonial Countries and Peoples condemns all forms of colonialization.²³³

C. *Self-Determination and Native Americans*

1. *Native American nations are "peoples" for the purpose of the right to self-determination.* Each native nation, either individually or as part of a larger group, is part of an identifiable race, and has a religion, language and set of traditions and customs which has united it through the centuries and continues to unite it today. It seeks to maintain, and is maintaining, its cultural and religious unity. It passes on through its generations a reverence for the group's history, the importance of its land base and connection with the earth and all living things. It maintains its economic system and its ways of making a livelihood. In short, it fulfills the requirements of the definitions given by the International Court of Justice and the International Commission of Jurists for a "people".²³⁴

2. *Exercise of the right to self-determination.* Earlier sections of this article have demonstrated that Native Americans are both capable and desirous of choosing their own forms of government, of providing for their own well-being and protection, of developing and maintaining their economic, social and cultural institutions. However, the United States government enforces laws and policies which effectively

231. U.N. GAOR, 15th Sess., Plenary 1145, A/P.V. 935 (1966), cited in Nawaz, *The Meaning and Range of the Principle of Self-Determination*, 1965 DUKE L. J. 82.

232. *Id.* at 93.

233. Declaration of the Granting of Independence to Colonial Countries and Peoples, *supra* note 211.

234. See text accompanying notes 220-21 *supra*.

interfere with their exercise of the right to self-determination. Native Americans are not free from internal and external domination. Under the plenary power doctrine,²³⁵ the United States claims, and in many cases enforces, the right to pass laws which govern Indian territory whether the Indians agree with the law or not. The United States treats Indians as citizens of the United States, again without the consent of the Indians.²³⁶ Indian tribes are subjected to internal domination when intelligence agencies of the United States, such as the F.B.I. and C.I.A., place informers and agents within the Indian tribes and organizations for the purpose of disrupting them and providing information to the United States Government.²³⁷ Also, Native Americans are subjected to racial discrimination.²³⁸

Native nations and people do in fact pursue their own economic, social and cultural development. Although the United States pretends to respect those institutions, it actually places both de jure and de facto restrictions on natives' freedom of choice.²³⁹ Earlier parts of this article have noted some of the attacks which the United States and non-Indian society in general have carried against native social and cultural institutions and practices.²⁴⁰

Even though the United States unilaterally forced citizenship on Indian people, it nevertheless denies Indians fundamental human rights, equal application of the laws, and equal participation in the economic and political systems of this country.²⁴¹ Finally, the United States enforces significant limitations on the discretion of Indian people to choose and implement their own form of government. Federal statutes create explicit requirements for the structure of tribal govern-

235. See text accompanying note 10 *supra*.

236. See text accompanying note 174 *supra*.

237. See *Blue Dove of the F.B.I.*, Akwesasne Notes, vol. 8, no. 3, at 12 (1976); *F.B.I. and Indians*, Akwesasne Notes, vol. 6, no. 5, at 31 (1975); *Portrait of an Informer*, Akwesasne Notes, vol. 5 no. 3, at 47 (1973).

238. See UNITED STATES COMM. ON CIVIL RIGHTS, *THE NAVAJO NATION: AN AMERICAN COLONY* (1975); NEW MEXICO ADVISORY COMM. TO THE UNITED STATES COMM. ON CIVIL RIGHTS, *THE FARMINGTON REPORT: A CONFLICT OF CULTURES* (1975); *There are Thousands of Political Prisoners in the United States*, Akwesasne Notes, vol. 10, no. 3, at 18 (1978); *"If You're Indian, You're In" Has Different Meaning in Oklahoma*, Akwesasne Notes, vol. 7, no. 2, at 22 (1975).

239. For example, the Bureau of Indian Affairs has considerable control over the development of resources on Indian Reservations. See 25 U.S.C. §§ 391-415 (1976); 25 C.F.R. §§ 120-184 (1978).

240. See, e.g., text accompanying notes 119, 138-41 *supra*.

241. OFFICE OF PROGRAM RESEARCH, HOUSE OF REPRESENTATIVES, *THE LEGAL RELATIONSHIP BETWEEN WASHINGTON STATE AND ITS RESERVATION BASED INDIAN TRIBES* 12 (1972).

ments:²⁴² some require that native governments perform particular activities, while others contain prohibitions.²⁴³ Federal laws that are applied to Indian people without their consent are an indirect method of taking away from Indians the power to choose their own government.

In short, the United States and non-Indian society place limitations on native self-determination in each of the five elements that constitute the right of self-determination. That the United States is, by means of superior force of arms, infringing on that right in violation of international law, does not change the conclusion that native people have the right.

3. *Territorial integrity and the limitation of self-determination to overseas colonies.* As discussed previously, these two obstacles have blocked the institution of self-determination. Section II(b)(3) described some general responses to attempts to limit the principle. Those responses are particularly applicable to Native Americans; the attempts at limitation should not prevent Native Americans from exercising the right of self-determination.

The United States' control over Native Americans is a striking example of authority imposed in violation of international law.²⁴⁴ Even if certain native nations did elect to separate themselves completely from the United States, they would be separating themselves from a state which has improperly and illegitimately forced Indians into its political boundaries. Further, even if the right to self-determination is not interpreted as including the right to secede, the "one time only" exception to that principle²⁴⁵ leaves natives free to make their choice since they have never voluntarily consented to be assimilated into the international state known as the United States.²⁴⁶ Finally, not even the United States argues that Indian tribes are a fully integral part of the United States. Supreme Court decisions repeatedly refer to Indian tribes as semi-sovereign states, recognizing at least a degree of their independence, and therefore debunking the theory that Indians are merely a part of the United States.²⁴⁷

242. See, e.g., 25 U.S.C. §§ 476, 477, 1302, 1303 (1976).

243. See, e.g., 18 U.S.C. §§ 13, 1152, 1154, 1161 (1976). See also *United States v. Burns*, 529 F.2d 114 (9th Cir. 1975); *United States v. Blackfeet Tribe*, 364 F. Supp. 192 (D. Mon. 1973); AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT OF TASK FORCE ON TRIBAL GOVERNMENT (1976); AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT OF TASK FORCE ON FEDERAL, STATE AND TRIBAL JURISDICTION (1976).

244. See text accompanying notes 101-94 *supra*.

245. See text accompanying note 228 *supra*.

246. See text accompanying notes 157-75 *supra*.

247. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Oliphant v. Suquamish Tribe*, 434 U.S. 949 (1978); *United States v. Wheeler*, 434 U.S. 816 (1978).

The discussion above noted that the right to self-determination is not intended to be limited to geographically separate colonies. Even if the principle were so limited, however, it would still be applicable to native nations. Tribes have their own separate land areas,²⁴⁸ and suffer under conditions that satisfy any definition of colonized people.²⁴⁹

III. SELF-DETERMINATION: SOVEREIGNTY OR ?

Sovereignty and self-determination represent two different categories of legal principles. Sovereignty is a substantive legal status that defines one of the many types of states found in the international community. Self-determination is more in the nature of a procedural mechanism which allows those groups of people who meet certain qualifications to choose among the various international legal statuses, of which sovereignty is one.

We suspect that when the analysis of sovereignty described in Part I of this article is applied to each native nation in North America, it will show that some Indian tribes are entitled to full sovereignty and independence, while others are entitled to something less than full and complete sovereignty. An automatic mandate that every Indian tribe assume full sovereign status, or any other status, would not fit the needs of all tribes. There are a myriad of possibilities: Some might choose full sovereign, independent status; some might choose confederation with one or more other native nations;²⁵⁰ some might choose alliance with the United States, either individually or in confederation with other native nations; some might choose to keep their current status; some might choose termination of their tribal status and assimilation into the United States; some might choose other options. Along a continuum that proceeds from fully dependent or subjugated states on one end to fully sovereign and independent states on the other, Indian tribes will undoubtedly choose a variety of points along that scale.

The right to self-determination is the procedural mechanism which allows each Indian tribe meeting the definition of a "people" to make its choice of where along that continuum it wishes to place itself; it means the right to choose among the various political statuses and means of economic, social and cultural development to which a people is entitled. However, since some groups may qualify as "peoples" for

248. See text accompanying notes 23-32 *supra*.

249. See text accompanying notes 1-12 *supra*.

250. See I. BROWNLEE, *supra* note 2, at 79.

the purpose of the right to self-determination, yet may not fill all the requirements for fully sovereign status, we believe that the right to self-determination must mean that the choices open to a people are limited to those options for which it meets the substantive legal requirements. That is, if a people is not, and does not fulfill the requirements for, a sovereign state, the options from which it can choose in the exercise of the right to self-determination do not include the choice of sovereign status.

In each of the first two parts of this article, there is a danger that the discussion will leave contradictory impressions about Native Americans' sovereign status and about their right to self-determination. Part I pointed out that Native Americans are still entitled to their sovereign status but that the United States has placed severe limitations on the exercise of that sovereignty. That the United States is enforcing those limitations does not change the fact that natives are still entitled to their full sovereign rights. If the limitations are being enforced in violation of international law, as Part I shows that they are, then those limitations do not change the right of native peoples to sovereign status. The same is true of the right to self-determination. Although the United States prevents Indian tribes from exercising the right to self-determination and making the free choices that constitute that right, it is doing so in violation of international law. Those illegal actions do not take away natives' rights to self-determination.