Vanderbilt Journal of Transnational Law

Volume 23
Issue 4 *Issue 4 - 1990*

Article 1

1990

Contemporary Efforts to Guarantee Indigenous Rights Under International Law

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Vanderbilt Journal of Transnational Law

VOLUME 23 1990 NUMBER 4

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ABSTRACT

This Article examines recent attempts to improve international standards governing the rights of indigenous peoples. In this context, Ms. Lawrey analyzes the Australian Government's 1988 commitment to negotiate a treaty with Australia's Aboriginal and Torres Strait Islander peoples.

Ms. Lawrey discusses the strained relationship between international law and indigenous peoples. At present, indigenous groups are not guaranteed special rights under international law. Furthermore, traditional individual rights are inadequate to effectively protect indigenous land rights and the right to self-determination. Ms. Lawrey identifies developments in indigenous rights since World War II, including International Labor Organization Convention Number 107 (Convention 107) and the United Nations Working Group on Indigenous Populations. Despite these advances, Ms. Lawrey indicates Convention 107 is of little practical value and that for the United Nations Working Group to succeed, it must effectively address the issues of land rights and self-determination and must recognize the importance of treaties to indigenous peoples.

Ms. Lawrey also discusses the contemporary relevance of treaties, high-

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lighting the recurring conflicts between indigenous peoples and their national governments. In addition, Ms. Lawrey questions the practical value of treaties as guarantees of indigenous rights, as states are free to modify or terminate such treaties on a unilateral basis.

Under this framework, Ms. Lawrey examines the Australian Aboriginal Treaty proposal against the background of the settled colony doctrine in Australia and its implications for Aboriginal rights. Aborigines have called for a solemn and binding negotiated treaty. Although the Australian Government publicly has committed itself to negotiate such an agreement, there are political difficulties to overcome before this commitment can be fulfilled.

Ms. Lawrey concludes that a worthwhile Universal Declaration on indigenous rights must deal with the sensitive issue of indigenous self-determination in a way that is acceptable both to indigenous groups and national governments. She further concludes that for any domestic agreement on indigenous rights to be effective, it must include a credible guarantee that it will not be subject to unilateral modification or termination by future governments. Ms. Lawrey indicates that possible alternatives to this requirement include mandatory international oversight, international dispute settlement fora, independent conciliation, and other methods of guaranteeing the binding character of treaties or agreements with indigenous peoples.

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I. INTRODUCTION

The Australian Government has announced its intention to negotiate a treaty with Australia's Aboriginal and Torres Strait Islander peoples at a time when efforts to devise international standards on indigenous rights are underway. The International Labor Organization (ILO) revised its Convention Number 107 (Convention 107) on Tribal and Indigenous Populations, and the United Nations Working Group on Indigenous Populations (UN Working Group) is developing a Draft Universal Declaration on Indigenous Rights (Draft Declaration) and embarking on a study of treaties with indigenous peoples. The Australian treaty proposal will be of considerable interest to individuals and groups concerned with indigenous rights in general, and to the UN Working Group in particular. The timing of this exercise provides Australia with an opportunity to make a positive contribution to the development of new approaches on indigenous rights. The successful conclusion of such an agreement would serve as a useful precedent in itself and could include innovative provisions that other countries might incorporate in existing or future agreements with their indigenous peoples.

This Article examines Aboriginal treaty concepts in the context of current international developments on indigenous rights and suggests how these concepts might contribute to the development of international standards for such rights. The Article first will address the relationship be-

tween indigenous rights and international law, the prospects for new international standards on the subject, and the difficulties confronting the UN Working Group. These difficulties include the issue of self-determination and addressing the importance that indigenous peoples attach to treaties. Section III discusses the contemporary relevance of treaties with indigenous peoples, both in terms of their symbolic value as evidence for the recognition of indigenous sovereignty or nationhood, and their practical value as guarantees of indigenous rights. Section IV analyzes the Aboriginal treaty proposal against the background of the settled colony doctrine as applied in Australia, its unfortunate consequences for Aborigines and Torres Strait Islanders, and the uncertain prospects for more helpful judicial approaches in the future. Section V suggests possible approaches to the questions of indigenous self-determination, monitoring government commitments on indigenous rights, and guaranteeing the binding character of treaties or agreements with indigenous groups.

II. INDIGENOUS PEOPLES AND INTERNATIONAL LAW

International law developed as "a system of rules governing the conduct of inter-state relations,"[1] and traditionally did not concern itself with matters falling within the domestic jurisdiction of individual states, such as the way states treated their own nationals and others living within their borders.[2] This distinction is becoming harder to sustain as international law evolves to suit an increasingly complex and interdependent world. In particular, a state's treatment of its own nationals has become a legitimate subject of international concern since World War II. The proliferation of international conventions on human rights[3] that build on the principles delineated in the United Nations Charter[4] and the Universal Declaration of Human Rights[5] has resulted in a body of international legal norms that addresses what usually is an area of domestic jurisdiction.

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1. D. GREIG, INTERNATIONAL LAW 1 (2d ed. 1976).

2. *Id.* at 398-99.

3. Today, there are approximately 70 international instruments dealing specifically with human rights issues.

4. *See* U.N. CHARTER art. 1, para. 3. Article 1 includes, as one of the Organization's fundamental purposes, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ." *Id.*

5. The Universal Declaration of Human Rights was adopted by the UN General Assembly on December 10, 1948 to serve as "a common standard of achievement for all peoples and all nations." (Preamble), *reprinted in* THE INTERNATIONAL BILL OF HUMAN RIGHTS 3, 4 (1981).

Individual rights comprise the majority of what are accepted today as human rights.[6] Even when dealing with rights that presuppose the existence of a group to exercise them, the language used in human rights instruments tends to be individualistic.[7] One collective right is that of all individuals to self-determination,[8] but its application outside the context of decolonization remains highly problematic,[9] with no accepted application to indigenous peoples.[10]

As a group, indigenous peoples have no special rights under current

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6. Brownlie, *The Rights of Peoples in Modern International Law*, in THE RIGHTS OF PEOPLES 1, 2 (J. Crawford ed. 1988).

7. Article 27 of the International Covenant on Civil and Political Rights (adopted by the UN General Assembly on December 16, 1966, entered into force on January 3, 1976), provides that "[i]n those States in which ethnic, religious or linguistic minorities exist, *persons* belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." *Reprinted in* THE INTERNATIONAL BILL OF HUMAN RIGHTS, *supra* note 5, at 31, 48 (emphasis added).

8. Article 1 of the UN Charter refers to "the principle of equal rights and self-determination of peoples." The concept is developed in many UN resolutions and other instruments, including article 1 of both the International Covenant on Civil and Political Rights, *supra* note 7, and the International Covenant on Economic, Social and Cultural Rights, (adopted by the UN General Assembly on December 16, 1966, entered into force on March 23, 1976), *reprinted in* THE INTERNATIONAL BILL OF HUMAN RIGHTS, *supra* note 5, at 13. Article 1 of both Conventions provides that "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . . . The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right . . . ."

The ICJ endorsed the right of self-determination in the context of decolonization in its *Namibia* advisory opinion:

> the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. . . . [T]he ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain . . . the *corpus iuris gentium* has been considerably enriched, and this the Court may not ignore.

1971 I.C.J. 9, 31-32 (advisory opinion).

The ICJ quoted this passage with approval in its *Western Sahara* opinion, 1975 I.C.J. 6, 32 (advisory opinion), and left no doubt that the right to self-determination applied to the inhabitants of the Western Sahara. *Id.* at 36.

9. *See* J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 84-102 (1979).

10. Some commentators have argued that the right of an individual to self-determination should apply to indigenous people. *See, e.g.*, Clinebell & Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFFALO L. REV. 669 (1978).

international law. Individually, they have the rights available to all individuals and minorities. Many of these rights, such as the rights of nondiscrimination,[11] religious freedom, freedom to speak one's native language, and maintaining one's cultural traditions[12] are relevant directly to the situation of indigenous peoples. These general human rights, however, offer little help to indigenous peoples who consider land rights and the right to make choices about their own future as crucial to their survival as distinct peoples.

The fairly vague concept of distinct indigenous rights "has its foundations in 16th and 17th century interpretations of international law, [and] was incorporated and further developed in British colonial policy and has had its fullest expression in the case law of the United States."[13] The degree to which indigenous rights are acknowledged, denied, ignored, or deliberately extinguished in particular states always has been determined by the individual state as a matter of domestic jurisdiction. Accordingly, there is a dearth of customary international legal norms on the rights of indigenous peoples and only one international convention, which is of limited application, that deals with the subject.[14]

A. *Theoretical Background: The Acquisition of Inhabited Territory*

Writers on the subject of indigenous rights usually begin with the Spanish theologian Vitoria and the age of discovery.[15] In 1532, Vitoria dismissed the notion that, as uncivilized heathens, the natives of South America were not the true owners of their land before the arrival of the

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11. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination (adopted by the UN General Assembly on December 21, 1965, entered into force on Jan. 4, 1969). In article 2 of the International Covenant on Economic, Social and Cultural Rights, the states parties "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind . . . ." *See* International Covenant on Economic, Social and Cultural Rights, *supra* note 8, art. 2.

12. *See* International Covenant on Civil and Political Rights, *supra* note 7, art. 27. Strictly speaking, this is a negative right: "[P]ersons . . . shall not be denied the right . . . ." *Id.*

13. NATIVE RIGHTS IN CANADA 14 (P. Cumming & N. Mickenberg 2d ed. 1972).

14. ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957 [hereinafter ILO Convention or Convention 107]. The Convention has been ratified by only 27 countries. *See infra* note 68.

15. Davies, *Aspects of Aboriginal Rights in International Law*, in ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA 16, 20-23 (B. Morse ed. 1985) ("Vitoria" also is spelled "Victoria"); Sanders, *The Re-Emergence of Indigenous Questions in International Law*, 1983 CAN. HUM. RTS. YB. 3, 4-5.

Spaniards.[16] Accordingly, Vitoria rejected discovery as the basis of Spanish title to the Indies.[17] Vitoria also rejected claims that the Emperor was entitled to seize the lands of the Indians, and that the Pope was entitled to bestow sovereignty over them on Spain. He did not consider that either the Indians' refusal to accept Christianity or their sins justified the Spanish conquest of South America, and dismissed claims that the Indians had chosen to accept Spanish rule.[18]

Discovery[19] or effective occupation[20] of new territory could have conferred legal title to territory only if the lands in question were *terra nullius*.[21] This did not mean that the territory was uninhabited, but

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16. F. DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECIONES 127-28 (1964) (J. Bate trans. 1917).

17. Vitoria wrote:

> [T]he barbarians were true owners, both from the public and from the private standpoint. Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant . . . . And so, as the object in question was not without an owner, it does not fall under the title we are discussing . . . . [Discovery] in and by itself . . . gives no support to a seizure of the aborigines any more than if it had been they who had discovered us.

Id. at 139.

18. *Id.* at 130-48. Although Vitoria clearly was uncomfortable about the moral and legal validity of Spain's conquest of South America, he conceded that if the Indians denied Spain the right to trade or to preach the Gospel in their lands, Spain might seize their lands as a last resort. *Id.* at 152-58. He added that other possible titles might be based on the need to rescue the Indians from the tyranny of their rulers or from tyrannical laws, on a genuine voluntary choice by the Indians, or on alliances with some Indians against others in a lawful war, but he was doubtful about a Spanish right to rule on the grounds that the Indians were unfit to govern themselves according to civilized standards. *Id.* at 159-61.

19. "Discovery" involves a symbolic taking of possession, not "mere visual apprehension." 1 D. O'CONNELL, INTERNATIONAL LAW 408 (2d ed. 1970); M. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 131-32 (1926).

20. O'Connell explained the difference between discovery and effective occupation as follows:

> The realities of territorial expansion in the past three centuries were such that only actual settlement and administration, coupled with at least the presumption to exclude others by force if necessary, invited the sanction of the law. Hence was born the notion of effectiveness of occupation. It stood in opposition to the notion of discovery, and so constituted a change in legal doctrine.

1 D. O'CONNELL, *supra* note 19, at 409 (footnote omitted).

21. "Equally shameless is it to claim for oneself by right of discovery what is held by another, even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one." 2 H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 550 (F. Kelsey trans. 1925). In its Advisory Opinion on the *Western Sahara*, the ICJ noted, "it was a cardinal condition of

rather that it belonged to no sovereign.[22] In the sixteenth and early seventeenth centuries, Popes and princes evidently were happy to allocate or appropriate lands that did not belong to a Christian sovereign.[23] In practical terms, however, European authorities ultimately drew a distinction between societies with some degree of political organization—and therefore capable of exercising sovereignty—and those lacking such organization.[24] As the International Court of Justice (ICJ) noted in its Advisory Opinion on the *Western Sahara*:[25] "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period [*i.e.*, the period beginning in 1884] indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*."[26] The *Western Sahara* decision indicates that the degree of social organization necessary to preclude acquisition of territory through occupation of *terra nullius* did not approach Western standards of the time. Justice Gros went even further in his separate declaration on the *Western Sahara*: "I consider that the independent tribes travelling over the territory, or stopping in certain places, exercised a de facto authority which was sufficiently recognized for there to have been no *terra nullius*."[27]

Vitoria's conclusions that "the barbarians" were true owners and that their lands, therefore, were not available for appropriation by right of discovery, are regarded as the starting point for the theory of indigenous rights.[28] Indeed, in a separate opinion on the *Western Sahara*, Justice

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a valid 'occupation' that the territory should be *terra nullius*—a territory belonging to no-one—at the time of the act alleged to constitute the 'occupation' . . . ." 1975 I.C.J. 12, 39 (Advisory Opinion).

22. "[I]f a tract of country were inhabited only by isolated individuals who were not united for political action, so that there was no sovereignty in exercise there, such a tract would be *territorium nullius*." M. LINDLEY, *supra* note 19, at 23.

23. For a survey of practice in this regard, see *id.* at 24-25.

24. *Id.* at 20-23; *see also* 1 D. O'CONNELL, *supra* note 19, at 409.

25. 1975 I.C.J. 12 (Advisory Opinion).

26. *Id.* at 39. None of the separate opinions disagree with the main judgment on this particular point. Furthermore, that the nomadic tribesmen inhabited the Western Sahara did not, in the Court's view, render it *terra nullius*:

> [T]he information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them. It also shows that, in colonizing Western Sahara, Spain did not proceed on the basis that it was establishing its sovereignty over *terra nullius* . . . .

Id.

27. *Id.* at 75.

28. Davies, *supra* note 15, at 20-33; *see also* Sanders, *supra* note 15, at 4-5.

Ammoun argued for a return to Vitoria's rejection of the idea that inhabited lands could be treated as *terra nullius*.[29]

Vitoria was the first in a long line of commentators denying that inhabited lands could be acquired by occupation as opposed to conquest or cession.[30] These commentators included Grotius, who used Vitoria's arguments both generally[31] and to reject Portugal's pretensions to the East Indies,[32] and Blackstone, who restricted occupation to desert or uncultivated lands.[33] Vattel asserted that European nations needing more land could lawfully take lands "which the savages have no special need of and are making no present and continuous use of,"[34] because nomadic tribes were not entitled to "more land than they have need of or can inhabit and cultivate."[35]

By the late nineteenth century, some theorists indicated a more restrictive view of indigenous rights.[36] In terms of actual state practice over the

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29. Justice Ammoun reasoned:

> In short, the concept of *terra nullius*, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned. It is well known that in the sixteenth century Francisco de Vitoria protested against the application to the American Indians, in order to deprive them of their lands, of the concept of *res nullius*.
>
> The approach adopted by the eminent Spanish jurist and canonist, which was adopted by Vattel in the nineteenth century, was hardly echoed at all at the Berlin Conference of 1885. It is however the concept which should be adopted to-day.

1975 I.C.J. at 87.

30. M. LINDLEY, *supra* note 19, at 12-17.

31. 2 H. GROTIUS, *supra* note 21, at 550.

32. H. GROTIUS, THE FREEDOM OF THE SEAS 13, 16-18, 21 (R. Magoffin trans. 1916).

33. 1 W. BLACKSTONE, COMMENTARIES *107-08. Blackstone regarded Britain's American colonies as the products of conquest or cession. *Id.*

34. 3 E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 85 (C. Fenwick trans. 1964).

35. *Id.*

36. Lindley's extensive survey of the relevant publicists concludes that:

> [E]xtending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one. But that, and especially in comparatively modern times, a different doctrine has been contended for and has numbered among its exponents some well-known authorities; a doctrine which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit, and, in its most advanced form, demands that such peoples shall have progressed so far in civilization as to have become recognized as members of the Family of Nations before they can be allowed such rights.

M. LINDLEY, *supra* note 19, at 20; *see also* J. CRAWFORD, *supra* note 9, at 175.

entire period of European expansion, however, lands inhabited by "primitive peoples" only rarely were regarded as *terra nullius*.[37]

B. *The Question of Indigenous Sovereignty*

The debate over the acquisition of inhabited land arose out of the colonizing states' interest in supporting their respective territorial claims against each other—their primary objective being the exclusive right to settle or otherwise exploit particular areas. Rationalizing their acquisition of territory against the indigenous inhabitants was a separate question that had more to do with methods of taking land away from the indigenous inhabitants than with the right of European states to do so. They usually resolved this issue pragmatically through the use of force, treaty, or unilateral governmental action.[38]

According to one source, "[t]he North American Indian nations which entered into treaties with the European settler states from the seventeenth to nineteenth centuries were obviously subjects of international law, but their status as 'indigenous' nations or states had no international legal relevance."[39] Nevertheless, some Indian tribes were effectively treated as states during the early stages of European contact.[40]

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37. M. LINDLEY, *supra* note 19, at 24-44. In fact, "only Australia and the South Island of New Zealand were treated as falling within that category, apart from scattered islands or totally uninhabited tracts," although some areas of North America were neither conquered from their indigenous inhabitants nor ceded by them. J. CRAWFORD, *supra* note 9, at 180 (footnotes omitted); *see also infra* text accompanying notes 237-39.

38. As Chief Justice Marshall wrote in *Worcester v. Georgia*, the principle of discovery as a basis for title

> 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 as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.
>
> The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place.

31 U.S. (6 Pet.) 515, 544 (1832). This explains why the discussion of indigenous rights had more to do with property rights than with their sovereignty in the fullest sense of the term.

39. Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 652 (1988).

40. *See, e.g.*, Barsh & Henderson, *Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and "Constitutional Renewal,"* 17 J. CAN. STUD. 55, 63-65 (1982) (discussion of early treaties concluded with Indian tribes on Canada's east coast); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

European states did regard some non-European communities as states,[41] but arguing otherwise would have been difficult in the cases of China, Japan, or Siam (Thailand). Others were recognized as states, although not necessarily as members of the community of nations, by the power that acquired them.[42] In effect, such recognition served to validate the natives' surrender of sovereignty over their territory. This philosophy of recognition occurred during the nineteenth century colonization of Africa. Normal state practice at the time consisted of staking a claim to a given area, as against other European states, by means of agreements with the tribes who lived there.[43]

Logically, cession presupposes native sovereignty in the fullest sense, as one cannot cede something one does not possess.[44] At least one colonizing power did recognize the sovereignty of some native chiefs.[45] The international arena, however, never explicitly acknowledged this recognition of sovereignty. On the contrary, the Berlin Act, which set out the minimum conditions for European occupation of new territory on the African coasts, did not require consent of the native tribes.[46] In *Island of Palmas*,[47] Arbitrator Huber started with the premise that indigenous communities were not states.[48] With colonial protectorates in mind, Huber did not regard treaties with indigenous peoples as constituting titles in international law. Rather, he explained that the colonial power's sovereignty as against other states was based not on the treaty itself, which

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41. J. CRAWFORD, *supra* note 9, at 176-77. The examples cited are China, the Ottoman Empire, Afghanistan, Japan, Korea, Thailand, the Maratha Empire in India, the Kingdom of Swaziland, Morocco, Algeria, Tunisia, Hawaii, Tonga, and probably Samoa. *Id.*

42. In 1839, the British authorities regarded New Zealand as a state, although not, apparently, as a member of the community of nations. Secretary for War and Colonies Dispatch, Aug. 1839. Parliamentary Papers, 1840, volume XXXIII (238) *quoted in* M. LINDLEY, *supra* note 19, at 41.

43. M. LINDLEY, *supra* note 19, at 34.

44. Lindley has observed:

> The Powers themselves, as we have seen, have in large numbers of cases accepted sovereign rights from the chiefs, and based their titles upon such cessions, and, unless one is prepared to argue that the maxim *Nemo dat quod non habet* has no application to such a case, it must be admitted that the chiefs themselves possessed those rights.

Id. at 44.

45. Great Britain recognized the sovereignty of King Lobengula over Matabeleland. *In re* Southern Rhodesia, 1919 App. Cas. 211, 214.

46. J. CRAWFORD, *supra* note 9, at 178; *see also* M. LINDLEY, *supra* note 19, at 144.

47. Island of Palmas (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829 (1928).

48. *Id.* at 858.

was "a form of internal organisation of a colonial territory," but on its "suzerainty over the native State."[49] Even Lindley, who argued that agreements with the native authorities were necessary to the creation of colonial protectorates, conceded that the establishment of an effective administration in the territory cured any defects in an agreement.[50]

C. *Indigenous Rights and International Law*

1. International Legal Personality

The views discussed above reflect late nineteenth century colonialist attitudes that coincide with a positivist approach to international law and a period when large areas of the African continent were regarded as available for appropriation by European powers. However mistaken these scholars' underlying assumptions were, they are reflected in contemporary international law, which denies legal personality to indigenous peoples.[51] Indigenous communities are not states, international organizations, or national liberation movements in the accepted sense.[52] Indigenous communities also are not analogous to such special entities as the Vatican or Taiwan and, therefore, do not match any of the accepted categories of subjects of international law.[53] As indigenous peoples are not subjects of international law, they have no recourse to extra-national avenues of redress other than appeals to world opinion or complaints to the Human Rights Committee if their state has signed the Optional Protocol of the International Covenant on Civil and Political Rights. For example, North American Indians' repeated attempts to petition the United Nations (UN) have been fruitless, because the UN is without mandate to deal with private submissions.[54]

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49. *Id.*

50. M. LINDLEY, *supra* note 19, at 175-77. Lindley noted that if the cession agreement is invalid, "the acquiring Power loses the legal protection which a valid Agreement would have given it for a reasonable time between the making of the Agreement and the establishment of an efficient administration over the territory." *Id.*

51. *See, e.g.*, Cayuga Indians (Gr. Brit.) v. United States, 6 R. Int'l Arb. Awards 173 (1926); G. BENNETT, ABORIGINAL RIGHTS IN INTERNATIONAL LAW 7 (1978); Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in THE RIGHTS OF PEOPLES 17, 18-19 (J. Crawford ed. 1988); Green, *Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 339 (1983).

52. Arguably, the Palestine Liberation Organization has a degree of international personality. D. GREIG, *supra* note 1, at 104-05.

53. *See, e.g., id.* at 92-119.

54. Sanders, *supra* note 15, at 14.

2. Aboriginal Title to Land

The concept of indigenous rights focuses on Aboriginal claims of original title to land, an idea derived from Vitoria and his successors. Aboriginal title has been recognized by courts in the United Kingdom,[55] United States,[56] Canada,[57] and, at a very early stage, New Zealand,[58] but it never has been acknowledged by the Australian judicial system.[59] The principle of recognizing Aboriginal title in the absence of specific statutory provisions is not a customary rule of international law, because it clearly is based on a British colonial practice that has been maintained by only two of the four former colonies where it was imposed. Even in the United States and Canada, indigenous peoples are not guaranteed security of tenure in their remaining lands, because the national government unilaterally can extinguish indigenous title and associated rights.[60]

3. A Question of Survival

Indigenous peoples, therefore, are subject entirely to the domestic jurisdiction of their states of nationality. The only international legal norms under which they can appeal are contained in general human rights instruments or, if their state of nationality has ratified it, International Labor Organization Convention Number 107 (Convention 107 or ILO Convention).[61] This situation is profoundly unsatisfactory. While Latin America was under Spanish rule, for example, the most enlightened and humane domestic laws failed to prevent savage mistreatment of the Indians.[62] Government policies, especially those involving forced assimilation, can have disastrous consequences for indigenous peoples. The United States experience with its allotment policy in the 1880s and its termination policy of the 1950s is a sobering case study in the field of

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55. *See, e.g.*, Nireaha Tamaki v. Baker, 1900 N.Z.P.C.C. 371; *In Re* Southern Rhodesia, 1919 App. Cas. 211; Amodu Tijani v. Secretary, Southern Nigeria, 1921 App. Cas. 399.

56. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v Georgia, 31 U.S. (6 Pet.) 515 (1832); United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941).

57. *See, e.g.*, Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145 (1984); Guerin v. Regina, 13 D.L.R.4th 321 (1984).

58. Regina v. Symonds, 1847 N.Z.P.C.C. 387.

59. Milirrpum v. Nabalco Pty Ltd., 17 F.L.R. 141 (1971).

60. *See, e.g.*, Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145 (1973).

61. *See infra* Part II.D.1.

62. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 9-11 (1942).

forced assimilation.[63] Yet, forced integration—or at least terminating any special status indigenous peoples have under domestic law—still is a recurring temptation for national governments.[64] Indigenous peoples can combat such measures effectively only by mobilizing sufficient domestic and international political pressure.[65]

D. *International Action*

The formation and activities of international indigenous organizations, such as the World Council of Indigenous Peoples (WCIP), the International Indian Treaty Council, and the Indian Law Resource Centre, have generated greater international awareness of indigenous issues. Since World War II, the substantial development of international human rights law has produced a more favorable climate for international action on indigenous rights. It increasingly is difficult for governments concerned about their human rights image to ignore blatantly the problems of their indigenous peoples.[66] Indigenous groups finally are gaining attention in international fora, and the 1980s marked the beginning of an unprecedented period of international activity on the question of indigenous rights.

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63. *See, e.g.*, Mason, *Canadian and United States Approaches to Indian Sovereignty*, 21 OSGOODE HALL L.J. 422, 451-52, 454-55 (1983).

64. For example, Canada introduced proposals for a new Indian policy in 1969 that would have terminated the special status of Indians in Canada. These proposals sought rapid integration to end the "unequal treatment" of the past, and an end to Canada's Indian treaties was foreshadowed at the same time. *Id.* at 431. In the late 1970s, Brazil drafted a decree providing for the forced emancipation of its Indians and an end to the protected status of their lands. A. Ramos, *Indian Rights and Indian Policy in Brazil Today*, 1-4 (Institute of Latin American Studies, University of Glasgow, Occasional Paper No. 28 1979).

65. Political pressure has been applied by indigenous peoples before in both Canada and Brazil. In Canada, extremely strong Indian opposition made the 1969 Canadian proposals a major embarrassment to the government, which withdrew them. Sanders, *The Rights of the Aboriginal Peoples of Canada*, 61 CAN. B. REV. 314, 319-20 (1983). Similarly, the Brazilian emancipation decree aroused such opposition that it was redrafted to provide for continuing protection of Indian lands, and in the end it was never signed by the President. *See* A. Ramos, *supra* note 64, at 3-4.

66. States that claim no indigenous populations include the USSR, India, and China. Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369, 375 (1986). African countries were not covered in the Martinez Cobo Report because of the lack of information. "[T]he data furnished to the Special Rapporteur in reply to requests for information for the study either denied the existence of such populations or stated that all groups in those countries were indigenous, or both." *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8, para. 20 [hereinafter Martinez Cobo Report].

1. ILO Convention Number 107

Convention 107 is the only international instrument specifically dealing with rights for indigenous and tribal populations. Although the 1967 ILO Conference unanimously accepted Convention 107, which includes a strong provision on indigenous land rights,[67] only twenty-seven states have ratified it.[68] The United States, Canada, Australia, and New Zealand have indigenous populations, but have not ratified Convention 107.

Although Convention 107 attempts to address indigenous rights issues, its focus on the ultimate integration of indigenous peoples is now considered out of date.[69] Convention 107's usefulness is limited further, because few states have ratified it. Additionally, within those few states, its effectiveness as a guarantee of indigenous rights is questionable.[70] These weaknesses prompted one commentator to note that "Convention 107 has been an embarrassment to the ILO."[71]

Following review[72] and consultation with indigenous groups,[73] the

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67. Article 11 provides that "[t]he right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized." ILO Convention, *supra* note 14, art. 11.

68. Angola, Argentina, Bangladesh, Belgium, Bolivia, Brazil, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Mexico, Pakistan, Panama, Paraguay, Peru, Portugal, Syria, and Tunisia.

69. Barsh, *Revision of ILO Convention No. 107*, 81 AM. J. INT'L L. 756, 756 (1987).

70. The Martinez Cobo Report on discrimination against indigenous populations concluded that:

> Convention 107 has not proved very effective in protecting and developing the human rights and fundamental freedoms of indigenous populations in countries which are parties to it, since today, more than 25 years after its adoption, there is little difference between the countries which are and are not bound by it, and such differences as exist are not always in favour of the States parties to it.

Martinez Cobo Report, *supra* note 66, para. 335. The Martinez Cobo Report originally was issued in parts as U.N. Docs. E/CN.4/Sub.2/476/Adds.1-6 (1981); E/CN.4/Sub.2/1982/2/Adds.1-7 (1982), and E/CN.4/Sub.2/1983/21/Adds.1-5 (1983). It has since been reissued as U.N. Doc. E/CN.4/Sub.2/1986/7 Adds.1-4 (1987). The Library of the Department of Aboriginal Affairs in Canberra holds a copy of the original version, which is the one cited in this Article.

For a survey of the Convention's implementation in Latin America, see Swepston, *The Indian in Latin America: Approaches to Administration, Integration, and Protection*, 27 BUFFALO L. REV. 715 (1978).

71. Berman, *The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988*, REV. INT'L COMMISSION JURISTS 48, 49 (1988).

72. Barsh, *supra* note 69, at 761.

seventy-sixth session of the International Labour Conference accepted the revised ILO Convention in 1989. Interestingly, in view of current efforts by the UN Working Group to develop a Universal Declaration on Indigenous Rights (Draft Declaration),[74] the revision, ILO Convention Number 169 (Convention 169), largely retains the comprehensive focus of Convention 107.[75]

Convention 169 does offer the prospect of binding international rules on how ratifying states treat their indigenous inhabitants. The ILO itself regards Convention 169 as an effort to raise the minimum standards for governments' dealings with their indigenous peoples.[76] In fact, Norway, the first state to ratify Convention 169, has stated that it did so for this very purpose.[77] It is uncertain, however, whether a revision will attract substantially more ratifications than did the original.[78] How a revision will fit within the standard-setting efforts of the UN Working Group also is not clear.[79] No matter how many governments ratify Convention 169, its value as a guarantee of indigenous rights is suspect if it is widely opposed by indigenous peoples. There have been indications that this may be the case. For example, at the seventh session of the UN Working

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73. *Id.* at 762.

74. *See infra* text accompanying notes 90-94.

75. As one authority notes:

> While the problems with Convention 107 are glaring, it is not entirely clear why the ILO determined to resuscitate the instrument at this time. Since 1982, United Nations human rights organs have been engaged in standard-setting on indigenous rights with the active participation of indigenous peoples and NGOs. As a specialized agency with a limited and defined mandate relating to labour issues, the ILO seems poorly positioned to concern itself with the fundamental indigenous rights issues that have emerged in the U.N. process: self-determination, territorial integrity including resource rights, and cultural integrity.

Berman, *supra* note 71, at 49.

76. Statement by Mr. Lee Swepston, ILO, to the UN Working Group on Indigenous Populations, July 31, 1989, at 3.

77. *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Eighth Session*, U.N. Doc. E/CN.4/Sub/1990/42, para. 47.

78. Only one country has ratified ILO Convention 169, and at least one other is contemplating ratification. A second ratification would bring the Convention into force. *Id.* paras. 46-67.

79. The ILO has kept the Working Group informed about the revision process, and has presented Convention No. 169 as an exercise in setting minimum standards which does not pre-empt the Working Group's standard-setting efforts. Statement by Mr. Lee Sweptson, ILO, to the UN Working Group on Indigenous Populations, July 31, 1989 at 2-3. However, there is always the risk that, once minimum standards are in place, taking the process any further will be seen as less urgent.

Group in August 1989, the indigenous preparatory meeting submitted a resolution strongly condemning the revised ILO Convention, calling on states not to ratify it, and demanding that its terms be disregarded in the process of developing a Draft Declaration.[80]

Indigenous groups condemn the revised ILO Convention on the grounds that it promotes tokenism and that the drafters did not adequately consult them.[81] To support these claims, the groups focus on several of the revised ILO Convention's articles. First, they cite article 1(3), which states that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law," thus side-stepping the contentious issue of whether indigenous peoples are entitled to self-determination.[82] Second, they cite article 6, which only imposes an obligation to consult indigenous peoples "with the objective of achieving agreement or consent" on measures that would affect them directly, rather than imposing a clear obligation to secure their consent before proceeding with such measures.[83] Third, the groups cite article 8(2),

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80. *Resolution of the Indigenous Peoples Preparatory Meeting—Geneva Relating to the International Labour Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989* [hereinafter *Resolution of the Indigenous Peoples*]. The resolution:

1. Calls upon Indigenous Peoples all over the world to seize every opportunity to condemn the ILO and the revision process.
2. Calls upon states not to ratify the revised Convention.
3. Calls upon Indigenous Peoples to monitor the ILO and governments in the implementation of the Convention.
4. Calls upon support groups of Indigenous Peoples to urge states not to ratify the Convention and to publish lists of governments who ratify the revised Convention.
5. Calls upon members of the Working Group and the Sub-Commission on Prevention of Discrimination and the Protection of Minorities to condemn the racist revision.
6. Calls upon the Working Group to monitor the implementation of the revised Convention.
7. Calls upon governments and human rights experts involved in the process of drafting the Declaration on Rights of Indigenous Peoples not to repeat the mistake of the ILO.
8. Calls upon the Working Group, the Sub-Commission and governments to disregard the terms of the revised Convention in the process of achieving a meaningful development on the Declaration on the Rights of Indigenous Peoples.

81. *See* Berman, *supra* note 71, at 51-42.

82. Statement by Sharon Venne to the 1989 ILO Plenary, extract from ILO Provisional Record No. 31, submitted to the seventh session of the Working Group on Indigenous Populations.

83. *Id.*

which states that indigenous peoples have the right to keep their own customs and institutions "where these are not incompatible with fundamental rights as defined by the national legal system," a proviso that some read as "an invitation to further assimilative measures by governments."[84] Finally, the indigenous groups claim that the provisions concerning indigenous land and resource rights generally are inadequate.[85] Nevertheless, indigenous opposition to Convention 169 is not uniform. While some groups continued to criticize it at the ninth meeting of the UN Working Group in August 1989, others supported it and endorsed ratification by states with indigenous populations.[86]

2. The UN Working Group on Indigenous Populations

The involvement of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission) in indigenous issues began as a spin-off from its work on racial discrimination and minority rights.[87] The Sub-Commission established a Special Working Group in 1982 to review developments, especially in individual rights affecting indigenous populations. While the Working Group's job

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84. *Id.*

85. *Id.*

86. The Report of the Working Group provided:

> Several indigenous observers expressed disappointment with the revised ILO Convention inasmuch as it did not fully and adequately respect indigenous demands. The Convention was challenged as paternalistic and oriented towards the interests of Governments. It did not, it was said, sufficiently require Governments to recognize indigenous rights to territory, land and resources and, furthermore, it did not properly recognize the crucial requirements for indigenous consent. Other indigenous representatives expressed support for the revised Convention and for the efforts of the ILO to promote and protect indigenous rights. They endorsed ratification by all States which have indigenous peoples within their borders and felt that respect for the Convention's provisions would improve the situation of indigenous peoples in most countries.

Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Eighth Session, U.N. Doc. E/CN.4/Sub.2/1990/42, para. 47.

87. The Sub-Commission's 1969 study on racial discrimination included a chapter on indigenous peoples. *See Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres*, U.N. Doc. E/CN.4/Sub.2/307/Rev. 1 (1971). Country reports under the Convention for the Elimination of All Forms of Racial Discrimination also refer to the situation of indigenous peoples. *See* Hannum, *supra note* 39, at 658. The Sub-Commission's 1976 study on the rights of ethnic, religious, and linguistic minorities suggested that discrimination against indigenous peoples warranted special attention. U.N. Doc. E/CN.4/Sub.2/384, *cited in* Eide, *United Nations Action on the Rights of Indigenous Populations*, in THE RIGHTS OF PEOPLES IN INTERNATIONAL LAW 11, 21 (R. Thompson ed. 1987).

is identifying issues rather than apportioning blame, it is well informed on developments affecting indigenous peoples,[88] and listens to indigenous groups' criticisms of government policies.[89] From the beginning, the Working Group has proven itself as a uniquely accessible UN body by accepting oral and written representations from any indigenous organizations, not just from those that have formal consultative status with the Economic and Social Council.[90] In addition, government observers actively participate in the Working Group's meetings. For some states, this participation is an exercise in damage limitation, while other states, such as the USSR, India, and China, participate even though they claim to have no indigenous populations.[91] Nevertheless, the debate between government and indigenous observers that occurs at Working Group sessions is a positive development.

While the Working Group continues to review developments affecting the rights of indigenous peoples, its main efforts now are focused on developing a draft declaration on indigenous rights.[92] At its sixth session in August 1988, the Working Group discussed its Chairman's "Universal Declaration on Indigenous Rights" draft.[93] The draft has since been revised in light of the discussion and subsequent written comments by interested parties.[94] During its eighth session the Working Group established three informal drafting groups to continue the "elaboration" of the draft declaration on the basis of this first revised text.[95] The next stage

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88. *See* Eide, *supra* note 87, at 12.

89. *See* Hannum, *supra* note 39, at 661.

90. *Id.* at 660.

91. *See* Barsh, *supra* note 66, at 375.

92. *See* Hannum, *supra* note 39, at 661; Barsh, *supra* note 66, at 373.

93. The draft declaration is at Annex II of the same document. It covers the following main subjects:

Part I: The right to freedom, equality and non-discrimination;

Part II: The collective right to exist, to be free from genocide and ethnocide, and to preserve their cultural identity;

Part III: Land rights and associated issues;

Part IV: The right to maintain their traditional lifestyle and means of subsistence; assistance with economic and social development, reflecting their priorities; and control of all social and economic programmes which affect them;

Part V: The right to full participation in the life of the state, and to control of their own internal and local affairs;

Part VI: Dispute settlement mechanisms.

94. *See First Revised Text of the Draft Universal Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1989/33, 4-8 [hereinafter *First Revised Text*].

95. *Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations in its Eighth Session*, U.N. Doc. E/CN.4/Sub.2/1990/42,

will be to circulate the Working Group's report, "containing all proposals and discussions concerning the first revised text," to all interested parties for written comments and suggestions.[96] A study on "treaties, agreements and other constructive arrangements between states and indigenous populations" also is being undertaken for the Working Group,[97] which endorsed a draft outline prepared by the Special Rapporteur at its sixth session.[98]

E. *Indigenous Claims: Land, Treaties, and Self-Determination*

Professor Nettheim identifies ten specific classes of indigenous claims: "physical survival; cultural survival and cultural identity; sovereignty; self-determination; self-government; land rights; control of land and its resources; compensation; non-discrimination; and affirmative action."[99] Land, and the rights associated with land, are at the core of indigenous claims. The Martinez Cobo study claims that "[i]t is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture."[100] The study adds further that "[t]he recognition and protection of land rights is the basis of all indigenous movements and claims today in the face of continuous encroachment on their land."[101]

The World Council of Indigenous Peoples (WCIP) submitted to the

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para. 51. The reports of the three drafting groups are at Annexes III, IV, and V of the Report. A summary of comments made in the drafting groups and in the plenary meetings is included in the report. *Id.* paras. 56-130.

96. *Id.* para. 54.

97. *See First Revised Text, supra* note 94, at 25-30.

98. *Discrimination Against Indigenous Populations—Report of the Working Group on Indigenous Populations on its Sixth Session*, U.N. Doc. E/CN.4/Sub.2/1988/24, Annex 1 [hereinafter *Report on Indigenous Populations*].

99. Nettheim, *"Peoples" and "Populations"—Indigenous Peoples and the Rights of Peoples*, in THE RIGHTS OF PEOPLES 107, 116 (J. Crawford ed. 1988). Similarly, the second assembly of the World Council of Indigenous Peoples (WCIP) identified 14 "irrevocable and inborn rights which are due to us in our capacity as Aboriginals," including: self-determination; the right to maintain their culture, language and traditions; the right to recover land that has been taken from them; inalienable, collective land ownership; the right to administer and use their land and resources; government funding; respect for indigenous culture; and education in accordance with their culture and traditions. *Special General Assembly of the World Council of Indigenous Peoples: Declarations and Resolutions, reproduced in* Martinez Cobo Report, *supra* note 66, *reissued in* U.N. Doc. E/CN.4/Sub.2/1986/87.

100. Martinez Cobo Report, *supra* note 66, para. 196.

101. *Id.* para. 215.

Working Group's fifth session a draft declaration of principles which provided that:

> Indigenous people shall have exclusive rights to their traditional lands and its resources, where the lands and resources of the indigenous peoples have been taken away without their free and informed consent such lands and resources shall be returned.
>
> The land rights of an indigenous people include surface and subsurface rights, full rights to interior and coastal waters and rights to adequate and exclusive coastal economic zones within the limits of international law.
>
> No action or course of conduct may be undertaken which, directly or indirectly, may result in the destruction of land, air, water, sea ice, wildlife, habitat or natural resources without the free and informed consent of the indigenous peoples affected.[102]

Similarly, indigenous nongovernmental organizations (NGOs) submitted to the same session a draft declaration which asserted that:

> Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. This includes surface and subsurface rights, inland and coastal waters, renewable and non-renewable resources, and the economies based on these resources.
>
> Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples.
>
> In cases where lands taken in violation of these principles have already been settled, the indigenous nation or people concerned is entitled to immediate restitution, including compensation for the loss of use, without extinction of original title. Indigenous peoples' desires to regain possession and control of sacred sites must always be respected.[103]

National governments must realize that indigenous peoples would not accept a declaration on indigenous rights that failed to include a strong statement on land rights. Whether these governments are prepared to consider full restitution and compensation for land taken from indigenous peoples, however, remains to be seen. Major difficulties likely will

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102. *Declaration of Principles Adopted at the Fourth General Assembly of the World Council of Indigenous Peoples* (Panama, 1984), *reproduced in Report of the Working Group on Indigenous Populations on its Fourth Session*, U.N. Doc. E/CN.4/Sub.2/1985/22, Annex III *quoted in* Hannum, *supra* note 39, at 669-70.

103. *Draft Declaration of Principles Proposed by the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference, and the International Indian Treaty Council, reproduced in Report of the Working Group on Indigenous Populations on its Fourth Session*, U.N. Doc. E/CN.4/Sub.2/1985/22. Annex III, *quoted in* Hannum, *supra* note 39, at 670 n.76.

arise with indigenous peoples over the importance indigenous peoples attach to the issue of self-determination. At the sixth session of the Working Group, for example, an overwhelming majority of indigenous group representatives declared that self-determination and self-government must be included as fundamental principles of any draft declaration. Some of these representatives indicated that treaty states had recognized rights of self-determination and self-government for indigenous peoples but that these states also violated these fundamental rights.[104]

Indigenous representatives repeatedly expressed the view that these treaties represent "nation-to-nation relations, connote recognition of the legal capacity of indigenous peoples, and in no way impair the right to exercise indigenous sovereignty." The representatives emphasized particularly "the recognition of the sovereign capacity of indigenous peoples to enter into bilateral agreements with other sovereign nations. . . ."[105] Furthermore, "[a] number of indigenous observers referred to the importance of treaties entered into between states and indigenous peoples in providing recognition, not only of the legal capacity of indigenous peoples, but also of indigenous self-determination."[106] These "[t]reaties were said to recognize and confirm indigenous autonomy, self-government, and self-determination. . . ."[107]

Indigenous peoples claim the right to self-determination, although the meaning particular groups attach to the concept of self-determination varies, and not all indigenous peoples aspire to independent statehood.[108]

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104. *See supra* note 77 and accompanying text.

105. *See supra* text accompanying notes 76-80.

106. The Martinez Cobo Report already had noted the "paramount importance" of treaties to indigenous peoples. Martinez Cobo Report, *supra* note 66, paras. 388-89.

107. *Report on Indigenous Populations, supra* note 98, at 110.

108. For example, the Dene of Canada's Northwest Territories seek "the recognition of the Dene nation by the governments and the peoples of the world," and "independence and self-determination *within the country of Canada.*" Dene Declaration, Statement of Rights, July 19, 1975, *reprinted in* Davies, *Aboriginal Rights in International Law: Human Rights*, in ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA, 745, 781 (B. Morse ed. 1985) (emphasis added).

On the other hand, the indigenous participants in the 1977 International NGO Conference on Discrimination Against Indigenous Populations in the Americas proposed that indigenous peoples who desired it and who met the fundamental requirements for statehood be granted "recognition as nations, and proper subjects of international law;" that "[i]ndigenous nations or groups shall be accorded such degree of independence as they may desire in accordance with international law;" and that treaties between indigenous peoples and states be "recognized and applied in the same manner and according to the same international laws and principles as the treaties and agreements entered into by other States." *Reprinted in* Martinez Cobo Report, *supra* note 66, Annex IV, 1-2.

Unfortunately, states fear that self-determination ultimately leads to secession. Consequently, in UN literature, the right to self-determination always is accompanied by a ritual obeisance to the "national unity" or to the "territorial integrity" of the state.[109] Care and flexibility on both sides are needed if the issue of self-determination is not to block progress on indigenous rights in the UN. A declaration will be of little value to indigenous peoples if it cannot attract the broadest possible support.

A non-binding declaration could be the first step towards a binding international convention.[110] Even absent a subsequent convention, a declaration could still begin a process leading to the emergence of a new norm of customary international law. Such a norm could emerge, however, only if a sufficiently large and representative number of states support the declaration and demonstrate, through subsequent state practice, that they feel obliged to observe its principles.[111]

A related issue is the importance indigenous peoples attach to their "sovereignty" or "statehood."[112] Indigenous groups want both greater control of their own destinies and international recognition of their unique status, which they view as "clearly distinct from minorities or other tribal and ethnic groups."[113] This desire for international recogni-

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109. *See, e.g.*, G.A. Res. 1514(xv), 1 U.N. GAOR (947th plen. mtg.) supp. (No. 16) 188, 1989, U.N. Doc. A/4684 (1960). Article 2 states that "[a]ll peoples have the right to self-determination," but article 6 adds that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

110. For instance, the Universal Declaration on Human Rights eventually led to the International Convention on Civil and Political Rights and the International Convention on Economic and Social Rights.

111. Greig explained this process as follows:

> In order for a customary rule to develop, it must at some stage be possible to imply from the conduct of a group of states that between them it is regarded as a matter of legal duty that they should act in a certain way. Such a rule will only attain the position of a general rule of international law if a sufficient number of states accept it as binding on them, and if the rest of the international community fail to register an effective protest . . . .

D. GREIG, *supra* note 1, at 26.

112. *See supra* text accompanying note 108; the Dene Declaration and the Declaration of the 1977 International NGO Conference on Discrimination Against Indigenous Populations in the Americas.

113. The Martinez Cobo Report observed:

> [Indigenous peoples] consider themselves to be the historical successors of the peoples and nations that existed on their territories before the coming of the invaders of these territories, who eventually prevailed over them and imposed on them colonial or other forms of subjugation, and whose historical successors now form the predominant sectors of society. It is also abundantly clear that indigenous peoples

tion does not mean necessarily that indigenous peoples desire full statehood status under international law, but such recognition is important in terms of dignity and self-respect. Additionally, international recognition has a practical aspect: without even a modicum of international legal personality, indigenous peoples had no international forum to hear their special claims until the establishment of the UN Working Group.[114] Nevertheless, the concept of indigenous sovereignty or statehood is bound to cause problems for national governments, and the Working Group's study on treaties could become a focus for such concerns.

III. THE CONTEMPORARY RELEVANCE OF TREATIES

A. *The Legal Significance of Treaties*

National governments often refrain from using the term "treaty" in relation to their indigenous populations, for fear of possible international legal implications. For example, in 1871, the United States Congress prohibited the signing of further treaties with Indian tribes, stating that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ."[115] In Canada, two commentators[116] claim there is "virtually a conspiracy of silence"[117] concerning the early treaties concluded with Indians in Maritime provinces, precisely because those treaties had a more definite international character than the later, more famous numbered treaties.[118] In 1981, when the Australian government agreed to examine the idea of an agreement between the Commonwealth and Aboriginal people, it noted that "the Government cannot legitimately negotiate anything which might be regarded as a 'treaty,' implying as it does an internationally recognized agreement between two nations."[119]

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consider themselves different from those other peoples and demand the right to be considered different by other sectors of society and by the international community. Martinez Cobo Report, *supra* note 66, para. 376.

114. *See supra* text accompanying note 54.

115. 25 U.S.C. § 71 (1988).

116. Barsh & Henderson, *supra* note 40, at 55.

117. *Id.* at 62.

118. *Id.* at 62-65.

119. Attachment to March 3, 1981 letter from Minister of Aboriginal Affairs to National Chairman, National Aboriginal Conference, *cited in Two Hundred Years Later . . . Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* 20-21 (1983) [hereinafter *Two Hundred Years Later*].

States fear the argument that indigenous peoples might be entities with independent legal existence and, therefore, legitimate claims either to full political independence or to a more equal association with their state of nationality. Normally, treaties are concluded between states or other entities with international legal personality,[120] while individuals or groups that are the subjects of a state on the international plane cannot act on their own behalf.[121] Above all, because national governments are fearful of raising doubts about their legitimacy and of encouraging separatist movements, they want to avoid giving the impression that they believe in the sovereignty or nationhood of their indigenous peoples. Accordingly, treaties with indigenous peoples are not regarded as international instruments.[122]

At the same time, indigenous peoples attach great symbolic importance to the existence of such treaties as evidence of their sovereignty or nationhood.[123] The precise legal content of the terms used in this context is unclear. Some individuals and groups argue their sovereignty never has been legally extinguished and that they have the right to external self-determination, including the option of full independence.[124] Some seek domestic and international recognition as a "nation" within an existing nation,[125] while others would be satisfied with acknowledgment of their former sovereignty and more equitable arrangements for the future.[126] All indigenous peoples, however, agree on the importance of sovereignty and self-determination, and the relevance of treaties in that context.

B. *International Instruments?*

Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention) defines treaty as "an international agreement con-

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120. THE VIENNA CONVENTION ON THE LAW OF TREATIES art. 2(1)(a), 3 (1969); *see also* D. GREIG, *supra* note 1, at 456-58.

121. D. GREIG, *supra* note 1, at 92-93, 118.

122. *See infra* Part III.B.

123. *See supra* text accompanying notes 104-07.

124. Similarly, the indigenous participants in the 1977 International NGO Conference on Discrimination Against Indigenous Populations in the Americas proposed that indigenous peoples who desired it and who met the fundamental requirements for statehood be granted "recognition as nations, and proper subjects of international law." *Reprinted in* Martinez Cobo Report, *supra* note 66, Annex IV, 1-2.

125. The Dene of Canada's Northwest Territories seek "the recognition of the Dene nation by the governments and the peoples of the world," and "independence and self-determination *within the country of Canada.*" Dene Declaration, Statement of Rights, July 19, 1975. *Reprinted in* Davies, *supra* note 108, at 745, 781 (emphasis added).

126. *See infra* text accompanying notes 344-46.

cluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[127] Although the Vienna Convention applies only to written agreements, this does not necessarily mean treaties must be in written form,[128] although they usually are. Treaties also do not necessarily have to be between states,[129] but they usually are, because states are the primary international actors and the traditional subjects of international law.[130] As international agreements, however, treaties must be concluded between parties that have the capacity to act on the international plane, and they must be governed by international law.[131] No agreement, whatever its title, that fails to meet these criteria can be considered a treaty in the international legal sense.

The treaties indigenous peoples have concluded with national governments are not regarded as international instruments, because indigenous peoples are not regarded as subjects of international law.[132] To the extent such treaties with indigenous peoples have been considered in international tribunals, they are regarded more as contracts than as treaties between sovereign states. For example, in *Cayuga Indians v. United States*,[133] the American-British Claims Commission held that treaties between the Cayuga Indians and the State of New York were municipal contracts. Specifically, the commission noted that "[n]either in form nor in substance was the Treaty of 1795 [with the Cayuga Indians] a Federal treaty; it was a contract of New York with respect to a matter as to which New York was fully competent to contract."[134] To justify this conclusion, the Commission explained that the Cayugas, as an Indian tribe, were not a legal entity under international law.[135] In *Island of*

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127. THE VIENNA CONVENTION ON THE LAW OF TREATIES 45 (R. Wetzel ed. 1978).

128. Article 3 makes it clear that agreements outside the scope of the Convention can still be treaties under customary international law. *Id.*

129. *Id.*

130. "States are, of course, the principal examples of international persons. The attributes of statehood, as developed in customary law, provided the criteria for determining the 'personality' of other entities. Indeed, under the traditional view only fully sovereign states could be persons in international law." L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 168 (1980).

131. D. GREIG, *supra* note 1, at 451.

132. *See supra* text accompanying notes 51-54.

133. 6 R. Int'l Arb. Awards 173 (1926).

134. *Id.* at 186.

135. The claims commission held that:

> The obligee was the "Cayuga Nation" an Indian tribe. Such a tribe is not a legal unit of international law. The American Indians have never been so regarded . . . .

Palmas,[136] Justice Huber, the arbitrator, reached a similar conclusion:

> As regards *contracts between a State* or a Company such as the Dutch East India Company and *native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties.[137]

On the other hand, contrary authority argues that some American Indian nations meet the accepted criteria of statehood, including the capacity to enter into international agreements, and that they retain this capacity irregardless of international acknowledgment.[138] United States practice before 1871 also supports this view.[139] In *Cherokee Nation v. Georgia*,[140] the United States Supreme Court cited treaty agreements as evidence that the United States government had recognized the Cherokee nation as a state.[141] The Court found that although Indian tribes were

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> From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied . . . . So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it.

Id. at 176 (citations omitted).

136. 2 R. Int'l Arb. Awards 829 (1928).

137. *Id.* at 858 (emphasis original).

138. Clinebell & Thomson, *supra* note 10, at 672-79.

139. According to Cumming and Mickenberg,

> [T]he Federal power to make treaties was the basis for both international treaties and agreements with the Indians. During the treaty-making period, American Indian tribes were described as dependent nationalities and a tribal Indian was a legal alien. In 1828, the United States Attorney-General examined the contention that the treaties between the Indians and the United States were ineffective because they were not treaties with an independent nation. In his opinion, he concluded that the Indian tribes had sufficient independence for the purpose of entering into treaties.

NATIVE RIGHTS IN CANADA, *supra* note 13, at 54 (footnotes omitted).

140. 30 U.S. (5 Pet.) 1 (1831).

141. Chief Justice Marshall reasoned:

> They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United 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 of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts.

Id. at 16.

not foreign states, they were "domestic dependent nations."[142] In *Worcester v. Georgia*,[143] the Supreme Court regarded the relationship between Indian tribes and the United States as a protectorate in the original sense of the term.[144] The Court also refused to distinguish between international treaties and Indian treaties.[145]

The Court did not hold that Indian tribes had the legal capacity to conclude treaties with states other than the United States, as the protectorate relationship implicitly limited their external relations powers.[146] Although Chief Justice Marshall's reasoning in support of Indian sovereignty placed the tribes clearly within United States federal jurisdiction,

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142. Chief Justice Marshall further wrote:

> [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Id. at 17.

143. 31 U.S. (6 Pet.) 515 (1832).

144. "This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master." *Id.* at 555. The Court explained this relationship as follows:

> [T]he 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.

Id. at 560-61.

145. The Court provided the following discussion of treaties:

> 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 the other nations of the earth. They are applied to all in the same sense.

Id. at 559-60.

146. The Court explained that:

> They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17-18.

the United States Congress eventually became concerned about possible international legal implications of its treaties with the Indians. The Act of March 3, 1871, which prohibited the conclusion of further treaties, formally declared that "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty," although it confirmed the binding character of existing treaties.[147] This statutory language strongly implies that Indian tribes could have been acknowledged as independent states before the Act was passed.[148] Henceforth, United States Indian treaties were regarded as purely domestic instruments, regardless of their true status before March 1871. If the Indian tribes had the capacity to conclude international treaties, the right of Congress to terminate that capacity unilaterally is questionable at best. Nevertheless, the 1871 Act disposed of the matter.[149]

The United States approach before 1871 was unique. In Canada, although there is no clear definition of the status of the Canadian Indian treaties under domestic law,[150] case law confirms that Indian treaties have been regarded as contracts rather than international instruments.[151] In *Pawis v. Regina*,[152] the Canadian Court noted that:

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147. *See* Barsh & Henderson, *supra* note 40, at 55.

148. A Canadian judge in *Rex v. Wesley* supported this interpretation:

> Until the year 1871 the United States conceded to the Indian tribes the right to treat upon terms of national equality and numbers of treaties were entered into which were deemed to have the same dignity and effect as a treaty with a foreign nation. In the year 1871 this was changed by statute.

[1932] 2 W.W.R. 337, 351 (Alta. App. Div.) (McGillivray, J.).

149. According to Cumming and Mickenberg, "[t]here is no indication in the American materials examined that the power of Congress to terminate treaty-making with the Indians was open to challenge." NATIVE RIGHTS IN CANADA, *supra* note 13, at 55 n.17.

150. Sanders, *Aboriginal Peoples and the Constitution*, 19 ALTA. L. REV. 410, 417-19 (1981).

151. One well-known example is *Rex v. Syliboy*, in which the court held:

> Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' right of sovereignty even of ownership was never recognized . . . . In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement . . . .

1 D.L.R. 307, 313 (1929).

In *Rex v. Wesley*, Justice McGillivray argued that Canada's Indian treaties were "on no higher plane than other formal agreements," a status he saw as distinct from that of United States treaties before 1871. [1932] 2 W.W.R. 337, 351.

152. 102 D.L.R.3d 602 (1980).

> It is obvious that the Lake-Huron Treaty, like all Indian treaties, was not a treaty in the international law sense. The Ojibways did not then constitute an "independent power," they were subjects of the Queen. Although very special in nature and difficult to precisely define, the Treaty has to be taken as an agreement entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them . . . . The agreement can therefore be said to be tantamount to a contract . . . .[153]

European powers frequently used treaties with native chiefs to acquire territory in Africa, Asia, and Australia.[154] The status and legal significance of these treaties varied from case to case.[155] The Treaty of Waitangi, which ceded the North Island of New Zealand to Britain, is one example. In 1839, British authorities recognized New Zealand as a state, but not as a full member of the community of nations:

> We acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert.[156]

This language suggests that the Maori tribes possessed "at least a degree of legal status" and that the treaty had some international character. The terms of the treaty, however, entail a complete surrender of sovereignty to the British Crown.[157]

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153. *Id.* at 607.

154. M. LINDLEY, *supra* note 19, at 31-43.

155. Crawford has observed that:

> If the native community was a State, or possessed a degree of legal status, then the treaty was either generally or *pro tanto* of an international kind. However, that did not mean that the community remained a State—or retained its lesser international status—subsequent to the treaty. Before cession or protectorate, the status and interpretation of the treaty depended on the status of the community: subsequently, the status of the community depended to a large extent on the treaty and, in some cases, on subsequent practice or usage. Even where the treaty purported to guarantee benefits to the community or its members in perpetuity, cessions of territory tended in practice to be regarded as absolute.

J. CRAWFORD, *supra* note 9, at 182 (footnote omitted).

156. Secretary for War and Colonies Dispatch, August 1839. Parliamentary Papers, 1840, volume XXXIII (238) *quoted in* M. LINDLEY, *supra* note 19, at 41.

157. Britain's position was clear:

> The chiefs of the confederation of the united tribes of New Zealand, and the separate and independent chiefs who have not become members of the confederation, cede to Her Majesty, the Queen of England, absolutely, and without reservation, all the rights and powers of sovereignty which the said confederation or individual

To the extent the Treaty of Waitangi acknowledged Maori sovereignty over the North Island of New Zealand, it likewise extinguished that sovereignty. In effect, Britain treated the Maori signatories as a state only to the extent of asserting its own sovereignty over the North Island by means of an agreement, rather than through discovery and effective occupation as it did with the South Island. The Treaty of Waitangi arguably falls within Huber's category of contracts with native princes or chiefs "not recognized as members of the community of nations," which he regarded as "a form of internal organisation of a colonial territory."[158] International law governed the Treaty of Waitangi only in the sense that the rest of the international community considered such treaties of cession as a valid means of acquiring title to inhabited territory, and not in the sense that the Maori parties were considered subjects of international law. Clearly, the Treaty of Waitangi does not support the case for indigenous sovereignty as did some of the treaties Britain concluded with the American Indians.

In summary, existing treaties concluded with indigenous peoples are not international treaties under either domestic or international law, and have not been regarded as international agreements for at least the last century. Indigenous peoples lack the necessary international legal personality.[159] Accordingly, the existence of treaties does not in itself prove anything about indigenous sovereignty or statehood under contemporary international law.

C. *The Practical Value of Treaties*

Although some North American treaties, especially earlier ones, had a definite political character, many were essentially land transactions in which the government gained new land for settlement and exploitation in return for compensation and the setting aside of specified areas for the Indians' exclusive use. The treaties were not an original source of Indian rights. They merely formalized the surrender of the Indians' title to specified areas of land and guaranteed those rights that had not been surrendered.[160] United States courts recognized Indian title to land even

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chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective territories as the sole sovereigns thereof.

M. LINDLEY, *supra* note 19, at 42.

158. Island of Palmas Case (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829, 858 (1928).

159. *See supra* text accompanying notes 51-54.

160. For example, the treaties between the United States and the Cherokee, as summarized by Chief Justice Marshall in Worcester v. Georgia, 31 U.S. (6. Pet.) 515 (1832), "mark out the boundary that separates the Cherokee country from Georgia;

when no treaty existed.[161] The source of title to this land was occupancy or possession, not a governmental act.[162] Similarly, Canada accepted that original Indian title continued undisturbed until it was lawfully extinguished by the Crown.[163] Canada also used treaties as one means of clearing title to lands required for settlement or resource development.[164]

Treaty guarantees, however, were far from absolute. The Cherokee Indians, for example, were expelled forcibly from lands guaranteed to them by treaty,[165] even though the United States Supreme Court had upheld their treaty rights in *Worcester v. Georgia*.[166] While United States federal courts traditionally have been reluctant to deny treaty obligations[167] and generally consider themselves bound to construe treaties liberally in favor of the Indians,[168] less dramatic violations of treaty pro-

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guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself." *Id.* at 561-62.

161. *See, e.g.*, Cramer v. United States, 261 U.S. 219 (1923); United States v. Santa Fe Pac. R.R. Co. 314 U.S. 339 (1941); Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967).

162. "Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action." *Santa Fe Pac. R.R. Co.*, 314 U.S. at 347.

> Indian title based on aboriginal possession does not depend on sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned . . . .
>
> The correct enquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights.

Lipan Apache Tribe, 180 Ct. Cl. at 492 (citations omitted).

163. St. Catharines Milling & Lumber Co. v. Regina, 13 S.C.R. 577 (1887).

164. In the 11 "numbered treaties" negotiated between 1871 and 1921 with Indians of northern and western Canada, the Indians surrendered all title to their land in return for annuities and reservations. Treaties one through seven also promised them tools, livestock, and seed grain so they could take up agriculture, and Treaties three through eleven guaranteed their hunting and fishing rights over the ceded territory. Zlotkin, *Post-Confederation Treaties*, in ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA 272, 273-74 (B. Morse ed. 1985).

165. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFFALO L. REV. 637, 656, 664-65 (1978).

166. 31 U.S. (6 Pet.) 515 (1832).

167. *See, e.g., id.*

168. In *Worcester*, Justice McLean reasoned that "[t]he language used in treaties with the Indians should never be construed to their prejudice." *Id.* at 582 (McLean, J.). In Jones v. Meehan, 175 U.S. 1 (1899), the Court noted that, given the unequal status of the parties, "the treaty must therefore be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id.* at 11. However, Mason cites Oliphant v. Suquamish

visions are not uncommon.[169] The United States Supreme Court rationalized this situation in *Lone Wolf v. Hitchcock*,[170] by finding "that Congress' 'plenary power' over Indians gave it the right to take any action concerning Indians regardless of treaty provisions."[171]

In Canada, the courts regarded treaty obligations as moral or political in character, rather than as legally binding instruments. In *St. Catharines Milling & Lumber Co. v. Regina*,[172] the Canadian Supreme Court held that:

> The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.[173]

In *Attorney-General for Canada v. Attorney-General for Ontario*,[174] the Judicial Committee held that the treaty right at issue amounted to no more than "a promise and agreement."[175] Justice Johnson used this phrase in *Regina v. Sikyea*,[176] in which he stated, "[t]his 'promise and agreement,' like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament by legislation, properly within s. 91 of the *B.N.A. Act*, from doing so."[177] This is not to say that Canadian courts do not take treaties seriously; on the contrary, they have placed some emphasis on the moral, if not legal, obligations involved. For example, after determining that a particular treaty between Indians and the Canadian Government was not a true international treaty, the court in *Rex v. Syliboy*[178] noted that:

> Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty . . . . That is a matter for representations to the proper authori-

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Indian Tribe, 435 U.S. 191 (1978) as an example of a treaty liberally construed against the Indians. Mason, *supra* note 63, at 450 n.228.

169. This was effectuated through the United States Government's reservation policy. Mason, *supra* note 63, at 451.

170. 187 U.S. 553 (1903).

171. Mason, *supra* note 63, at 450 n.228, 451.

172. 13 S.C.R. 577 (1887).

173. *Id.* at 649.

174. 1897 App. Cas. 199.

175. *Id.* at 213.

176. 43 D.L.R.2d 150 (1964).

177. *Id.* at 154.

178. [1929] 1 D.L.R. 307 (1928).

ties—representations which . . . could hardly fail to be successful.[179]

While Canada has no special rules for the judicial interpretation of Indian treaties, there is a tendency to construe them in favor of the Indians.[180] On occasion, Canadian courts have upheld treaty rights against provincial legislation,[181] but they also have ruled that federal legislation prevails over treaty rights.[182] This reflects that under the British-North America Act, the Indians were under federal legislative jurisdiction and subject to provincial laws of general application, which in turn were subject to the terms of treaties or federal legislation.[183]

Until quite recently, New Zealand's Treaty of Waitangi has not been any more useful as a guarantee of Maori rights. In 1847, the court in *Regina v. Symonds*[184] held that aboriginal title was a legal right, albeit vulnerable to legislative extinguishment, and the Treaty of Waitangi was merely declaratory of that right.[185] Subsequent court decisions, however, took a more restrictive approach to Maori title. In *Wi Parata v. Bishop of Wellington*,[186] the court viewed the issue of a Crown grant as an implied extinguishment of native title.[187] The court ruled that the Treaty of Waitangi could not establish the Maori's right of occupancy as a legal right, since, as far as it purported to cede the sovereignty of New Zealand, it was still a "simple nullity."[188] The Treaty, in fact, was declaratory of the Crown's rights and duties under international law as following the annexation of New Zealand.[189] Not only did Maori rights exist only at the sufferance of the Crown, but in *Nireaha Tamaki v. Baker*,[190] the court declared the Crown's actions in that context were not subject to judicial review.[191] The trend in New Zealand courts has been to enforce

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179. *Id.* at 314.

180. NATIVE RIGHTS IN CANADA, *supra* note 13, at 61; *see also* Regina v. White & Bob, 50 D.L.R.2d 613, 651 (1964) (Norris J.A.); Regina v. Taylor & Williams, 34 O.R.2d 360, 267 (CA 1981).

181. *See, e.g., White & Bob*, 50 D.L.R.2d at 613; *Taylor & Williams*, 34 O.R.2d at 360.

182. Regina v. Sikyea, 43 D.L.R.2d 150, 159 (1964); Regina v. George, 55 D.L.R.2d 386 (1966).

183. *George*, 55 D.L.R.2d at 386.

184. [1847] N.Z.P.C.C. 387.

185. *Id.* at 390.

186. [1877] 3 N.Z.J.R. 72.

187. *Id.* at 77.

188. *Id.* at 78.

189. *Id.*

190. [1894] 11 N.Z.L.R. 483.

191. The court indicated that:

[T]he mere assertion of the claim of the Crown is in itself sufficient to oust the

only statutorily created or Crown-granted Maori land rights.[192] While the 1909 Maori Land Act, which, as amended over the years, provided statutorily recognized land rights,[193] the Act did not recognize these rights as against the Crown.[194]

Until the passage of the Treaty of Waitangi Act in 1975 (Waitangi Act), the Treaty of Waitangi was of little benefit to the Maori in declaring legally enforceable rights. Essentially, the Waitangi Act established the Waitangi Tribunal to investigate Maori claims that individuals or tribal groups are likely to be affected prejudicially by government acts, regulations, or practices that are inconsistent with the principles of the Treaty.

The New Zealand High Court reassessed the Treaty of Waitangi in *Huakina Development Trust v. Waikato Valley Authority.*[195] While the Treaty still conferred no legally enforceable rights in itself, it did have legal significance, because it was recognized by Parliament in the Treaty of Waitangi Act of 1975 and the Waitangi Day Act of 1976.[196] Furthermore, New Zealand inserted references to the Treaty's principles into several statutes,[197] which led to judicial recognition of those principles

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jurisdiction of this or any other Court in the colony. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice.

Id. at 488.

192. McHugh, *Aboriginal Title in New Zealand Courts*, 2 CANTERBURY L. REV. 235, 253 (1984).

193. *Id.* at 265.

194. *Id.*

195. [1987] 2 N.Z.L.R. 188.

196. The court noted:

This review of the authorities invites the conclusion that the Treaty is not part of the municipal law of New Zealand in the sense that it gives rights enforceable in the Courts by virtue of the Treaty itself . . . . [T]he authorities also show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute of the obligations of the Crown to the Maori people. Among the direct recognitions are the Treaty of Waitangi Act of 1975 and the Waitangi Day Act of 1976 both of which expressly bind the Crown. There can be no doubt that the Treaty is part of the fabric of New Zealand society. It follows that it is part of the context in which legislation which impinges upon its principles is to be interpreted when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material.

Id. at 210.

197. *See, e.g.*, State-Owned Enterprises Act 1986; Environment Act 1986; Conservation Act 1987. Palmer, *Law, Land, and Maori Issues*, 3 CANTERBURY L. REV. 322, 338-45 (1988).

for the first time.[198] Because legislation now incorporates the Treaty's principles, the Treaty finally is serving as an effective guarantee of Maori rights. Nevertheless, rights under the Treaty are not directly enforceable in municipal law, and there is no legal restraint on Parliament's ability to override its provisions or principles.[199]

While it is a fair assumption that the North American treaties have played an important part in preventing the total erosion of Indian rights, their effectiveness as a guarantee of Indian rights is limited severely, most notably by the federal government's ability to ignore, override, or unilaterally abrogate treaty provisions. In New Zealand, the Treaty of Waitangi has become a useful guarantee of Maori rights only since the government took legislative action to that effect, over 130 years after the Treaty was signed. But, because the guarantee depends on statutory action rather than on the treaty itself, Parliament has the power to modify or remove it.

D. *Modern Treaty Substitutes*

Two modern "non-treaties" also warrant examination in this discussion: the Alaska Native Claims Settlement Act of 1971 (ANCSA) and the James Bay and Northern Québec Agreement of 1978 (James Bay Agreement). These "non-treaties" illustrate two different approaches to indigenous claims: a government-devised "settlement" without formal negotiations with the indigenous communities concerned, and an agreement arrived at through negotiation between governments and indigenous communities.

No treaties had ever been concluded with the Indian, Inuit, and Aleut peoples of Alaska, essentially because their traditional lands were of no particular interest to the United States Government.[200] The perceived need to settle the unextinguished indigenous claims that covered over ninety percent of Alaska[201] arose with the discovery of important petroleum reserves in the region and subsequent plans for a pipeline across the state.[202] ANCSA was not a negotiated agreement.[203] Several indige-

198. N. Z. Maori Council & Latimer v. Her Majesty's Attorney-General, [1987] 6 N.Z.A.R. 353.

199. *Id.* at 371, 399.

200. Morse, *The Resolution of Land Claims*, in ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA 617, 669 (B. Morse ed. 1985).

201. NATIVE RIGHTS IN CANADA, *supra* note 13, at 265.

202. Morse, *supra* note 200, at 669.

203. "Although the Indian, Inuit and Aleut populations appeared before congressional committees and actively lobbied in the halls of Congress, they did not actually

nous organizations, however, supported ANCSA as the best possible settlement at that time.[204] The legislation extinguished indigenous title to land throughout Alaska, along with indigenous hunting and fishing rights, in return for a large cash settlement and title to approximately ten percent of the state's territory.[205] While the settlement may seem generous by historical standards, it did not guarantee indigenous land ownership "in perpetuity" or protect indigenous subsistence—matters of major concern to the peoples involved.[206] As an exchange of most of the land involved for specified concessions, ANCSA continues the tradition of North American treaties. ANCSA's innovative element is a set of complicated arrangements to apportion compensation money and land among a specially established network of regional and village corporations designed to encourage native economic development.[207] Unfortunately, ANCSA has fallen short of its goals, and rather than providing a positive new start for the native peoples of Alaska, it is a focus of discontent.[208]

Unlike ANCSA, the James Bay Agreement was the product of negotiations with indigenous peoples. One commentator described it as "the broadest and most exhaustive land claim settlement involving indigenous people anywhere in the world."[209] Under the terms of the James Bay Agreement, the Cree and Inuit peoples of the region have surrendered their aboriginal title in return for money, some land, and hunting, fishing, and trapping rights over additional areas of land. Québec can expropriate all of these lands, subject to compensation, with the province retaining all mineral rights.[210] While the core of the Agreement is the surrender of aboriginal lands in return for specified concessions, the Agreement addresses the important new dimension of active native involvement in, or control of, local and regional governments and authorities.[211] Other distinctive features of the James Bay Agreement are an

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negotiate or have any control over the terms of the final settlement." *Id.*

204. T. BERGER, VILLAGE JOURNEY 26 (1985). This is the report of the Alaska Native Review Commission, sponsored by the Inuit Circumpolar Conference and the World Council of Indigenous Peoples to review ANCSA in 1983.

205. *Id.* at 24.

206. *Id.* at 26.

207. *Id.* at 21-26.

208. *Id.* at 26.

209. Morse, *supra* note 200, at 657.

210. *Id.* at 656.

211. "The agreement also provides for the establishment of local and regional governments, environmental committees, health and social services boards, school boards, separate police forces and economic development committees in which the Cree or Inuit

income security program for Cree hunters and trappers, and environmental review and assessment provisions.[212] The Agreement has the status of a contract, and its provisions have been ratified and implemented in federal and provincial legislation.[213]

Indigenous groups have had a mixed response to the James Bay Agreement. One source claims that the Cree and Inuit generally are satisfied with its terms, but are dissatisfied with its implementation.[214] Another source offers more resounding criticism by noting that "most of the native peoples affected"[215] have rejected the Agreement, and that the native leaders negotiated a poor settlement from a poor bargaining stance.[216]

Indigenous groups undoubtedly are in a poor bargaining position when dealing with governments, even in genuine negotiations. Nevertheless, the James Bay Agreement pays more attention than ANCSA to the key concerns of the indigenous peoples with whom it negotiated. Admittedly, the problems with ANCSA are partly organizational and partly administrative, but the basic assumptions behind its compensation arrangements are fundamentally out of step with the aspirations of the native communities involved. Furthermore, ANCSA largely has ignored the indigenous groups' primary concerns of secure long-term title to their land and the continued viability of their traditional subsistence economy. Presumably, these differences reflect that the ANCSA process involved

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participate actively or control." *Id.*

212. Moss, *The Implementation of the James Bay and Northern Quebec Agreement*, in ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA 684, 684 (B. Morse ed. 1985).

213. *Id.*

214. According to a consultant for the Cree, "[t]he Cree and Inuit still maintain that the Agreement is satisfactory in its terms, even though both groups have been very unhappy about the performance of both [federal and provincial] governments on certain aspects of it." *Id.* at 686.

215. Barsh, *Indigenous Policy in Australia and North America*, in INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS 95, 100 (B. Hocking ed. 1988).

216. One commentator has observed:

> Natives' designated representatives often have a personal stake in seeing that some agreement, however bad, is reached. Native leaders are under pressure from both sides to demonstrate their ability and justify their leadership. Native technocrats are also frequently the major beneficiaries of cash settlements and the establishment of new administrative machinery. As a result, government can usually rely on native leaders to rationalise concessions and conceal failures for as long as possible. The principal Cree negotiator for the 1976 James Bay agreement was its leading exponent until the full details of the settlement emerged. He then became the agreement's most aggressive critic.

Id. at 100-01.

only limited consultations with indigenous peoples, while the James Bay Agreement was the product of a formal negotiating process.

IV. An Aboriginal "Treaty"?

Australia's approach to indigenous concerns differs from North America's in two key respects. First, Australia did not conclude treaties with its indigenous inhabitants.[217] Second, Australia has not judicially recognized that Aboriginal and Torres Strait Islander land rights exist other than those conferred by statute.[218]

A. *The Settled Colony*

In the minds of colonial authorities, the European encroachment on Aboriginal land and the sustained violence against resisting Aborigines did not constitute war. Australia was regarded as established by settlement rather than conquest. Because Europeans viewed Australia as *terra nullius*, Britain acquired it by effective occupation.[219] Of course, the land was not without an owner—it was owned by the Aborigines who had occupied it from time immemorial. *Terra nullius*, however, refers to territory that is not under anyone's sovereignty. The test for sovereignty is whether the people concerned have attained a sufficient degree of social and political organization.[220] Australia's indigenous inhabitants were considered too primitive to exercise any degree of sovereignty or even rights of ownership over their land.[221]

Contrary to colonial beliefs, we know today that the Aborigines did have social and political organization and a system of customary law that included rules governing rights and obligations to land. Given the preconceptions of the time, it is not surprising that the first settlers failed to recognize these facts. Nevertheless, settlers who came into contact with the Aborigines must have realized quickly that the Aborigines had a profound attachment to their land, well-defined ownership beliefs, and

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217. The Batman "treaty" of 1835 is an exception that was really a private contract for the purchase of Aboriginal land, and was repudiated by the colonial authorities. Keon-Cohen, *The Makarrata: a Treaty within Australia between Australians—Some Legal Issues*, Current Aff. Bull., Feb. 1, 1985, at 4, 6.

218. In Milirrpum v. Nabalco Pty Ltd., 17 F.L.R. 141 (1971), Justice Blackburn explicitly rejected the contention that communal native title was part of the common law of Australia. *Id.* at 244-45.

219. Keon-Cohen, *supra* note 217, at 5; Cooper v. Stuart, 14 App. Cas. 286 (1889).

220. For a discussion of the concept of *terra nullius*, see *supra* text accompanying notes 19-37.

221. Keon-Cohen, *supra* note 217, at 5.

customary laws. Even so, the settlers never seriously pursued the possibility of negotiating treaties or other land-surrender instruments with the Aborigines.[222]

Despite some legal controversy during the first part of the nineteenth century,[223] the proposition that Australia was *terra nullius* acquired legitimately by settlement first received judicial endorsement in the 1889 decision of *Cooper v. Stuart*.[224] As recently as 1978, Justice Gibbs considered it "fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest,"[225] and cited *Cooper v. Stuart* as authority for the proposition that Australia always has been regarded as a settled colony.[226] Justice Murphy, however, noted that this view was not binding on the High Court.[227]

The implications of the *terra nullius* doctrine—that the people concerned were too "primitive" to exercise sovereignty over their territory, or even to own their land—understandably are offensive to indigenous peoples. These implications, therefore, explain the symbolic importance indigenous peoples attribute to treaties.[228] The existence of a treaty recognizes that the indigenous community has both the capacity and rights necessary to enter a treaty. The idea that inhabited land can be *terra nullius* denies both, and explains in part the importance on which Aboriginal Australians place the notion of their unsurrendered sovereignty, and their vehement rejection of the idea that Australia was a settled colony.[229] In Australia, the *terra nullius* doctrine also trivializes the Aborigines' sustained resistance, against overwhelming odds, to European encroachment on their lands[230] and denies Aboriginal Australians the

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222. H. REYNOLDS, THE LAW OF THE LAND 54 (1988).

223. Hookey, *Settlement and Sovereignty*, in ABORIGINES AND THE LAW 1, 2-6 (P. Hanks & B. Keon-Cohen eds. 1988).

224. 14 App. Cas. 286, 291 (1889).

225. Coe v. Commonwealth of Australia, 24 A.L.R. 118, 129 (1978).

226. *Id.*

227. *Id.* at 137. Justice Aickin concurred with Justice Gibbs. *Id.* at 138. Justice Jacobs agreed with Justice Murphy on this point:

> The view has generally been taken that the Australian colonies were settled colonies; but, although that view was expressed in Cooper v. Stuart, 14 App. Cas. 286 (1989) and in Randwick v. Rutledge, 102 C.L.R. 54 (1959), there is no actual decision of this court or of the Privy Council to that effect. The plaintiff should be entitled to rely on the alternative argument when it comes to be determined whether the aboriginal inhabitants of Australia had and have any rights in land.

Id. at 136.

228. *See supra* text accompanying notes 104-07.

229. *Two Hundred Years Later*, *supra* note 119, at 37-42.

230. *Id.* at 42.

right to be proud of their past.

In recent years, there has been a growing awareness that Aborigines and Torres Strait Islanders deserve more respect than the *terra nullius* doctrine suggests. The Australian Senate made the first formal acknowledgement of the Aborigines' prior occupation of Australia in a 1975 resolution urging Australia "to admit prior ownership by the said indigenous peoples, and introduce legislation to compensate the people now known as Aborigines and Torres Strait Islanders for dispossession of their land."[231] The matter rested until 1988, Australia's bicentennial year, when the House of Representatives passed a resolution acknowledging the Aborigines' and Torres Strait Islanders' prior occupation of Australia, and affirming their entitlement to "self-management and self-determination subject to the Constitution and the laws of the Commonwealth of Australia."[232] The preamble to the draft Aboriginal and Torres Strait Islander Commission (ATSIC) Bill acknowledged prior ownership as well as prior occupation, and noted that compensation has not yet been paid.[233] The preamble also delineated its objectives of recognizing past dispossession, ensuring indigenous participation in government policy, and promoting self-determination.[234] Nevertheless, while the ultimate goal of rectifying past injustices is admirable,[235] Australia is

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231. Senate Journals, 367 *quoted in Two Hundred Years Later*, *supra* note 119, at 12.

232. AUSTL. H.R. DEBATES, Aug. 23, 1988, at 137.

233. Specifically, the ATSIC Bill's preamble provides:

> . . . AND WHEREAS the peoples whose descendants are now known as the Aboriginal and Torres Strait Islander peoples of Australia were the prior occupiers and original owners of this land;
>
> AND WHEREAS they were dispossessed by subsequent European occupation and have no recognized rights over land yet recognized by the Courts other than those granted or recognized by the Crown;
>
> AND WHEREAS that dispossession occurred without compensation and no serious attempt was made to reach a lasting and equitable agreement with them on the use of their land;
>
> AND WHEREAS, as a consequence of these and subsequent deprivations, the Aboriginal and Torres Strait Islander peoples have become, as a group, the most disadvantaged in Australian society . . . .

A Bill for an Act to establish an Aboriginal and Torres Strait Islander Commission, and for related purposes. Preamble, *reprinted in* A TREATY WITH THE ABORIGINES? 48 (K. Baker ed. 1988).

234. *See id.*

235. The preamble went on to state that:

> it is the intention of the people of Australia to make provision for rectification . . . of the consequences of past injustices and to ensure for all time that the Aboriginal and Torres Strait Islander peoples receive full recognition and status within the

still a long way from achieving it. Unfortunately, this preamble was deleted from the ATSIC legislation by the Senate.[236] Its content, however, was embodied in a separate Senate resolution that was sent to the House of Representatives along with the Senate's amendments to the Bill.[237] The final paragraph of the Senate resolution provided "that an instrument of understanding and reconciliation with the Aboriginal and Torres Strait Islander peoples should be negotiated by the Australian Government."[238]

B. *Land Rights in a Settled Colony*

Blackstone's distinction between settled and conquered, or ceded, colonies[239] has important legal consequences. In settled colonies, all applicable English laws automatically are in force from the moment of first settlement. Conquered or ceded colonies, however, retain their own laws until the new sovereign changes them.[240] Given Australia's classification as a settled colony, "British law applied to the new colony insofar as its conditions permitted, and that law chose not to recognise any special rights vested in Aborigines."[241] Even though many now concede that Australia was colonized by occupation in the face of some armed Aboriginal resistance, "the constitutional doctrines denying Aboriginal sover-

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Australian nation to which history, their prior ownership and occupation of the land, and their rich and diverse culture, fully entitle them to aspire . . . .

Id.

236. AUSTL. SENATE DEBATES, Oct. 17, 1989, at 2022.

237. *Id.*

238. AUSTL. H.R. DEBATES, Oct. 24, 1989, at 1685-86.

239. Blackstone described colonies as follows:

Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have [been] either gained, by conquest, or ceded to us by treaties.

1 W. BLACKSTONE, COMMENTARIES *108.

240. Blackstone drew the following distinction:

There is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force . . . . But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient [sic] laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.

Id. (footnotes omitted).

241. Keon-Cohen, *supra* note 217, at 5.

eignty and title to land remain."[242]

Australia's importation of British common law, with its feudal notions of land tenure, was seen as incompatible with the notion of any continuing Aboriginal rights of land ownership.[243] In North America, large areas of land were neither conquered from their indigenous inhabitants nor ceded by them. For example, no treaties were ever concluded with the Indians, Inuit, and Aleuts of Alaska.[244] Further, the only treaties made with the Indians of British Columbia applied to Vancouver Island,[245] and the Inuit of Canada's north are not parties to any treaty.[246] Since those areas were neither ceded nor conquered, they must have been acquired by settlement or, possibly, by prescription.[247] Yet, unlike the situation in Australia, the inhabitants of these areas unquestionably have valid claims to their traditional lands as long as their government did not extinguish their aboriginal title.[248]

In Australia, such claims are not recognized. The plaintiff in *Milirrpum v. Nabalco Pty. Ltd.*,[249] for example, argued that "at common law, communal occupation of land by the aboriginal inhabitants of

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242. *Id.*

243. For example, according to one source:

> A basic principle of British law was that, on settlement, land vested in the Crown which became the fons et origo of land rights in the Colony.
>
> The land which was not alienated by way of freehold grant or for a lesser term was designated as "wastelands of the Crown." There is no indication in the Australian cases that the radical title of the Crown to Australian land was subject to any usufructuary right on the part of the Aboriginal inhabitants.

Lumb, *Aboriginal Land Rights: Judicial Approaches in Perspective*, 62 AUST. L.J. 273, 277 (1988) (footnote omitted). The cases referred to are: Williams v. Attorney-General for New South Wales, 16 C.L.R. 404, 439 (1913); Randwick Corp. v. Rutledge, 102 C.L.R. 54, 71 (1959); Australia v. New South Wales, 33 C.L.R. 1, 28 (1923).

244. Morse, *supra* note 200, at 669.

245. Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145, 163 (1923).

246. T. BERGER, NORTHERN FRONTIER, NORTHERN HOMELAND: THE REPORT OF THE MACKENZIE VALLEY PIPELINE INQUIRY 1, 169 (1977).

247. Greig provides the following description of prescription:

> Even if a particular land area is under the dominion of one state, it does not follow that the taking possession of that area by another cannot create a new title. Whereas occupation applies to a territory which is a *res nullius*, prescription applies a similar line of reasoning to territory that did have a sovereign. A combination of the passage of time and the implied acquiescence of the dispossessed sovereign are the basis of prescriptive rights.

D. GREIG, *supra* note 1, at 163.

248. Such claims are recognized by the Alaska Native Claims Settlement Act. *See supra* text accompanying notes 197-200; *see also* Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145 (1973); Guerin v. Regina, 13 D.L.R.4th 321 (1984).

249. 17 F.L.R. 141 (1971).

a territory acquired by the Crown is recognized as a legally enforceable right"[250] that could be extinguished only by the Crown.[251] After a comprehensive survey of the relevant authorities,[252] Justice Blackburn concluded that "English law, *as applied to a settled colony*,"[253] did not include a doctrine of communal native title "except under express statutory provisions."[254] Blackburn then held "the doctrine does not form, and never has formed, part of the law of any part of Australia."[255] Blackburn emphasized Australia's settled status[256] as a determinative factor in establishing the absence of Aboriginal rights to land at common law.

One commentator suggests that the legal effects of settlement on indigenous rights, as distinct from conquest or cession, are less clear-cut in that "[t]he importation of the common law associated with the establishment of a settled colony does not necessarily involve the extinction of existing rights in land. Those in possession, at least, may be protected."[257] This contention finds some support in two Canadian cases concerning land in British Columbia, which was a settled colony. In *Calder v. Attorney-General of British Columbia*,[258] the Canadian Supreme Court accepted that Indian title existed in British Columbia independently of the Royal Proclamation of 1763 or other statutory provision.[259] The court was divided evenly, however, on the question of whether the title of the Nishga Indians had been lawfully extinguished.[260] Admittedly, Justices Hall and Judson, the two leading authorities on indigenous ownership, differ significantly in their interpreta-

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250. *Id.* at 198.

251. *Id.*

252. *Id.* at 209-42.

253. *Id.* at 244 (emphasis original).

254. *Id.*

255. *Id.* at 245.

256. *Id.* at 244. In addition to his emphasis on "English law, *as applied to a settled colony*," Justice Blackburn did not consider himself bound by *In re* Southern Rhodesia, [1919] A.C. 211, because Australia was not a conquered or ceded colony. *Milirrpum*, 17 F.L.R. at 253. Blackburn also questioned the application of those principles to a settled colony by the British Columbia Court of Appeal in *Calder v. Attorney-General of British Columbia*, *id.*, although he relied on *Calder* as authority for communal native title in a settled colony. *Id.* at 223.

257. Hookey, *supra* note 223, at 17.

258. 34 D.L.R.3d 145 (1973).

259. *Id.* at 156, 190, 210-11.

260. Justices Judson, Martland, and Ritchie held that the title of the Nishga Indians had been lawfully extinguished. *Id.* at 167. Justices Hall, Spence, and Laskin held that it had not. *Id.* at 210-12.

tion of Indian title.[261] Nevertheless, in *Guerin v. Regina*,[262] four Canadian Supreme Court justices cited *Calder* with approval as recognition of "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands."[263] Of the remaining four judges in *Guerin*, one took the existence of the Indian group's interest in the land on its face,[264] while three judges supported the existence of Indian title[265] independent of statutory recognition.[266]

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261. According to Justice Judson:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help . . . to call it a "personal or usufructuary right." What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign."

Id. at 156. Justice Judson later refers to "any right of occupancy which the Nishga Tribe might have had . . . ." *Id.* at 167.

This approach contrasts with that of Justice Hall:

> [P]ossession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial and, therefore the burden of establishing that their right has been extinguished rests squarely on the respondent.
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> . . . .
>
> While the Nishga claim has not heretofore been litigated, there is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here.

Id. at 190. Justice Hall also considered that "aboriginal Indian title does not depend on treaty, executive order or legislative enactment," *id.* at 200, and that "[o]nce aboriginal title is established, it is presumed to continue until the contrary is proven." *Id.* at 208.

262. 13 D.L.R.4th 321 (1984).

263. *Id.* at 335.

264. "The nature of the interests of the Indian band, the federal Crown and the Crown in the right of the province has been long ago settled . . . ." *Id.* at 346 (Estey, J., concurring in the judgment).

265. Justice Wilson explained the existence of Indian title:

> I think it is the acknowledgment of a historic reality, namely, that Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it. This is not to say that the Crown . . . holds the land in trust for the bands. The bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree.

Id. at 356-57 (Wilson, J., concurring in the judgment).

Although *Milirrpum* was not appealed, a subsequent case raising similar issues is now before the High Court. In *Mabo v. Queensland*, a group of Murray Islanders seek judicial recognition of their customary title to their islands, waters, seabed, and reefs.[267] The principal action has yet to be decided,[268] but necessarily will involve a re-examination of Blackburn's conclusions in *Milirrpum*. There is a reasonable chance that Justice Blackburn may be overruled on the question of Aboriginal title at common law. His judgment in *Milirrpum* has been the subject of academic and judicial criticism.[269] In *Calder*,[270] Justice Hall criticized Justice Blackburn's "acceptance of the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer," a proposition that he considered "wholly wrong" upon review of a long line of authority.[271] These authorities, however, are subject to multiple interpretations, as a comparison of *Milirrpum* and *Calder* clearly demonstrates.[272] In addition, given Australia's unique historical background,

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266. "Indian title has an existence apart altogether from s. 18(1) of the *Indian Act*." *Id.* at 359 (Wilson, J., concurring in the judgment).

267. Mabo v. Queensland, 63 A.L.J.R. 84, 85 (1988).

268. The judgment in *Mabo* concerned the validity of the Queensland Coast Islands Declaratory Act 1985, which purported to retrospectively extinguish any indigenous title to the islands. A majority of the court held that the Act conflicted with § 10 of the Racial Discrimination Act 1975 and could not serve to block the principal action in the case.

269. *See, e.g.*, Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?*, 5 FED. L. REV. 85 (1972).

270. Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145 (1973).

271. *Id.* at 218. The authorities reviewed by Justice Hall include: St. Catharines Milling & Lumber Co. v. Regina, 13 S.C.R. 577 (1887); Regina v. White & Bob, 50 D.L.R.2d 613 (1964); Worcester v. Georgia, 31 U.S. 6 (Pet.) 515 (1832); United States v. Tillamooks, 329 U.S. 40 (1946); *In re* Southern Rhodesia, 1919 A.C. 211; Cramer v. United States, 261 U.S. 219 (1923); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941); Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967); Regina v. Sikyea, 43 D.L.R.2d 150 (1964); Tijani v. Southern Nigeria, 2 A.C. 399 (1921); Oyekan v. Adele, 2 All E.R. 785 (1957); Regina v. Symonds, 1847 N.Z.P.C.C. 387.

272. This difference also is found in the judgments in St. Catharines Milling & Lumber Co. v. Regina, 13 S.C.R. 577 (1887). Justice Strong wrote:

> [I]n the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned . . . . Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold

some Australian judges might hesitate to accept into Australian common law a doctrine of communal native title which, while originating in British colonial practice, was most fully developed by North American courts.

C. *Conquest, Customary Law, and Land Rights*

It has been argued that the Aborigines might be better off if Australia were regarded as a conquered rather than a settled colony.[273] If Australia were regarded as conquered, it would mean the original acquisition of Australia by Britain was unlawful, or it would force the courts to recognize Aboriginal customary law in general, and Aboriginal laws of land ownership in particular.[274] The complaint filed in *Coe v. Australia* sought to argue both propositions.[275] The proposition, however, that Britain acquired Australia unlawfully by conquest does not help the Aborigines' cause. In *Coe*, the High Court ruled unanimously that a municipal court cannot hear a challenge to Australia's sovereignty.[276] Even if a municipal court could hear such a challenge and determined that Australia had been acquired by conquest, such a determination would not make the acquisition illegal. While conquest no longer is considered an acceptable means of acquiring new territory,[277] even if it was clearly illegal

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that it nevertheless existed as a rule of the unwritten common law . . . .

Id. at 612-13 (Strong, J.). Justice Taschereau reasoned that "[t]he Indians must in the future . . . be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control." *Id.* at 649 (Taschereau, J.).

273. Hookey, *supra* note 223, at 16.

274. *Id.*

275. Coe v. Australia, 24 A.L.R. 118, 121-23 (Austl. 1979).

276. *Id.* at 118-19.

277. According to Greig:

> Whereas under traditional international law a cession imposed by force would be valid, the development of the twentieth century concept of the illegality of aggressive war would seem to cast doubts on the possibility that such a rule has survived. . . . .
>
> Whatever might have been the position before the Covenant of the League [of Nations] became operative with the signing of the Peace Treaties in 1919-20, the various war crimes tribunals were convinced that Article 10 of the Covenant, together with the undertaking to renounce war as an instrument of national policy in the Kellogg-Briand Pact, and a series of bilateral and multilateral arrangements tending in the same direction, had made annexation in the course of a war of aggression ineffective as a means of transferring title.

D. Greig, *supra* note 1, at 160. Article 2(4) of the UN Charter provides that all "Members shall refrain in their international relations from the threat or use of force against

under current international law,[278] the original acquisition of Australia would not be unlawful. It is a fundamental rule of international law that past actions must be judged according to the law as it stood at the relevant time,[279] and there is no doubt that conquest was perfectly lawful when Great Britain acquired Australia.[280]

The method by which Britain acquired sovereignty, rather than the actual acquisition itself, might be a more effective challenge in an Australian court.[281] If Australia were to be regarded as a conquered colony,

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the territorial integrity or political independence of any state . . . ." U.N. CHARTER, art. 2, para. 4. Article 1 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Annex to UNGA Resolution 2625 (XXV) of Oct. 24, 1970) specifies that "[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal."

278. This proposition is debatable. As noted by Greig, there is a definite trend towards outlawing conquest as a means of acquiring territory, but it is not clear whether this has become a generally accepted norm of customary international law. Examples such as Israel's continued retention of the West Bank and the Gaza strip, and the Iran-Iraq war suggest that state practice has not yet fallen into line with UN pronouncements on the illegal use of force against the territorial integrity of other states. On the other hand, the world community's response to Iraq's invasion of Kuwait may signal the final demise of conquest as a tacitly accepted fact of international life.

279. In the *Island of Palmas* case, Arbitrator Huber noted that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." Island of Palmas Case (Neth. v. U.S.), 2 R. Int'l Arb. Awards 831, 845 (1928).

280. A century later, international law texts discuss conquest as a legal (if regrettable) activity of nation states. For example, according to Woolsey, "international law acknowledges the fact of conquest after it has become a permanent fact in the world's history, and in some degree, the right also." T. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 22 (5th ed. 1879). Similarly, a straightforward discussion of the passage of title to conquered territory is set forth in 2 HALLECK, INTERNATIONAL LAW OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 480-83 (1878). In his discussion of the period from 1815 to 1914, Brownlie notes that:

> Apart from the functioning of the public law of Europe . . . the right of states to go to war and to obtain territory by right of conquest was unlimited although some qualifications to this position had appeared by 1914. Situations resulting from resort to force were regarded as legally valid as in the case of the Prussian annexation of the Danish duchies and the annexation of Alsace-Lorraine by the German Empire.

I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 20 (1963).

281. In Coe v. Australia, 24 A.L.R. 118 (Austl. 1979), Justices Murphy and Jacobs argued that this aspect of the issue could be argued in the High Court, *id.* at 137, 138, although Justices Gibbs and Aickin disagreed. *Id.* at 128.

a case could be made for the continuing effectiveness of Aboriginal customary laws, including those relating to the ownership of land, on the grounds that neither British nor Australian authorities have replaced them with the common law. On the other hand, one could argue that European settlement and the continuous application of the common law for two hundred years really has effectively replaced Aboriginal customary law as a matter of government policy.[282] Therefore, the reinstatement of Aboriginal customary law would require specific legislation.

Even if Aboriginal customary laws were still in force in Australia, their application presumably would be restricted to the Aboriginal community or areas under Aboriginal control, as is the case today with tribal jurisdiction in the United States.[283] Although such recognition would be an important gain for the Aborigines,[284] it would not necessarily help their case for land rights. History documents the conquerors' intent to dispossess the Aborigines and extinguish their title to land.[285] Additionally, the recognition of original Aboriginal title in the United States and Canada does not depend in any way on surviving indigenous laws. Nevertheless, the conquest theory is helpful in recognizing that conquest alone did not disturb the existing rights of private owners: some further action by the Crown was required. The Judicial Committee of the Privy Council developed this theory in *In re Southern Rhodesia*,[286] and fur-

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282. As the *Southern Rhodesia* court explained:

> According to the argument the natives before 1893 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council.

In Re Southern Rhodesia 1919 A.C. 211, 234.

283. Mason, *supra* note 63, at 459-60.

284. Recognition of Aboriginal customary law is an important issue for the Aboriginal community. The Barunga Statement calls for "[a] police and justice system which recognizes our customary laws . . . ." *See infra* text accompanying note 304.

285. Hookey, *supra* note 223, at 13-14.

286. The Committee wrote:

> In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.

1919 A.C. at 233.

ther reiterated it in *Tijani v. Southern Nigeria*:[287] "A mere change of sovereignty is not to be presumed to disturb the rights of private owners."[288] Although Justice Blackburn would have considered himself bound by *In Re Southern Rhodesia* if Australia had been a conquered or ceded colony,[289] the case is questionable precedent for the Aborigines. If the native rights claimed

> were not in the nature of private rights, they were at the disposal of the Crown when Lobengula fled and his dominions were conquered; if they were, any actual disposition of them by the Crown upon a conquest . . . would suffice to extinguish them as manifesting an intention expressly to exercise the right to do so.[290]

Under this analysis, everything hinges on the nature of the rights claimed. In theory, nothing prevents the recognition of communal native title as a right of private property.[291] While the concept of communal land ownership recognized in *Tijani* is similar to Aboriginal beliefs, there is no guarantee that an Australian court would accept the analogy. In *Milirrpum*, Blackburn concluded that the Aboriginal clans' undoubted interest in the lands at issue was not a proprietary interest recognizable under Australian law.[292] Blackburn reached this result despite his awareness that, in *Tijani*,[293] the Privy Council clearly had recognized the existence of indigenous concepts of land ownership that did not fit comfortably within the matrix of British common law.[294] Interest-

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287. 2 A.C. 399 (1921).

288. *Id.* at 407.

289. Milirrpum v. Nabalco Pty Ltd., 17 F.L.R. 141, 253 (1970).

290. *In re* Southern Rhodesia, 1919 A.C. at 234.

291. For example, in *Tijani*, the Privy Council pointed out the native title at issue was

> prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation . . . . The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances.

2 A.C. 399, 409-10 (1921).

292. Milirrpum v. Nabalco Pty. Ltd., 17 F.L.R. 141, 272-74 (1971).

293. 2 A.C. 399 (1921).

294. In *Tijani*, the Privy Council urged a cautious approach:

> [I]n interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely . . . . The title, such as it is . . . may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members

ingly, in *Calder v. Attorney-General of British Columbia*,[295] Justice Hall commented that "the trial Judge's consideration of the real issue was inhibited by a preoccupation with the traditional *indicia* of ownership. In so doing, he failed to appreciate what Lord Haldane said in *Amodu Tijani* . . . ."[296] Although Blackburn attempted to consider the content of the ownership concept rather than the traditional indicia, his conclusion was influenced strongly by Anglo-Australian property concepts.[297]

Thus, while a judicial determination that Australia had been conquered rather than settled could be helpful to the Aborigines, there is no guarantee that it would produce the desired practical results. It would acknowledge formally, however, the Aborigines' persistent resistance to European efforts to dispossess them of their lands, and counter the insulting implications of the *terra nullius* theory.

D. *The Treaty Concept*

The Aborigines' current situation is profoundly unsatisfactory, and the prospect of judicial remedy is uncertain. Aborigines can continue lobbying for legislative remedies, as they have for some years now. Yet, however widespread and well-intentioned the consultative process, Aborigines cannot hope to influence the content of government legislation as they could with a negotiated agreement. The Aborigines also cannot prevent future legislative amendments that might weaken the guarantees they have managed to secure, which already has happened with land rights legislation. According to recent media reports, some Aboriginal groups believe that a similar result will follow in relation to the protection of Aboriginal sacred sites in the Northern Territory. Further, the history of Australian Aboriginal policies inspires little confidence that governments, however well-meaning, are best able to judge the Aborigines' needs. The idea of a solemn and binding negotiated agreement, not subject to unilateral modification or future governmental interference, is an understandably attractive alternative.

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are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

Id. at 402-04. (Blackburn cited this passage in *Milirrpum*, 17 F.L.R. at 264-65.)

295. 34 D.L.R.3d 145 (1973).

296. *Id.* at 187.

297. 17 F.L.R. 141, 272-73 (1971).

The idea of such a treaty is not new. In April 1979, the National Aboriginal Conference (NAC) resolved to "request that a Treaty of Commitment be executed between the Aboriginal nation and the Australian Government."[298] In the same year, a group of concerned non-Aboriginal Australians formed the Aboriginal Treaty Committee to canvass support for the treaty concept among the non-Aboriginal community.[299] The Australian Government indicated its willingness, in principle, to examine the concept, although it expressed concern about some aspects of the proposal.[300]

In October 1981, the Senate Standing Committee on Constitutional and Legal Affairs was asked to examine the feasibility of "securing a compact or Makarrata between the Commonwealth Government and Aboriginal Australians."[301] The Committee's report, published in 1983, recommended that "the preferred method of legal implementation of a compact" would be a constitutional amendment to "confer a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people."[302] The Committee was concerned only with appropriate legal methods of implementing such a proposal as there was no government decision to actually enter into negotiations with the Aboriginal community.

The matter remained unaddressed until 1988. Following the election of the Hawke Labor Government in 1983, which "revived hopes of national land rights legislation involving Aboriginal control of mining, inalienable freehold title, protection of sacred sites and compensation,"[303] the treaty concept receded into the background until Australia's bicentennial year. On June 12, 1988, Australian Prime Minister Hawke met with representatives of the National Coalition of Aboriginal Organizations at the Barunga Festival in the Northern Territory. The National Coalition presented the Prime Minister with a statement of Aboriginal demands known as the Barunga Statement,[304] and Hawke agreed "that there shall be a treaty negotiated between the Aboriginal people and the Government on behalf of all the people of Australia."[305]

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298. National Aboriginal Conference, *The Makarrata Report* (July 1980), *quoted in Two Hundred Years Later, supra note* 119, at 14.

299. *Id.* at 13.

300. *Id.* at 17-18.

301. *Id.* at 1.

302. *Id.* at xii.

303. Baker, *Introduction*, in A TREATY WITH THE ABORIGINES?, *supra* note 233, at 1.

304. *Reprinted in id.* at 47.

305. Transcript of the Prime Minister's Speech at Barunga Sports and Cultural Fes-

Such an agreement will have to go beyond the traditional focus of treaties with indigenous peoples if it is to be successful. The Barunga Statement (Statement) summarizes key Aboriginal claims: self-determination, self-management, permanent control and enjoyment of ancestral lands, compensation for the loss of land, protection and control of access to sacred sites and sacred objects, respect for and promotion of Aboriginal identity, and basic human rights as guaranteed under general human rights instruments. To this end, the Statement called for the Commonwealth Parliament to address these claims with legislation.[306] All of these claims could be met through appropriate legislation, as requested in the Statement itself, but the Aboriginal representatives at Barunga presumably were intent on developing a treaty. There is nothing to suggest, however, that the "treaty"[307] is intended to be anything but a domestic instrument. Indeed, the Prime Minister has since made it clear that "[t]he treaty will be negotiated by people who share the one nation and the one future—it will be a treaty between Australians and for Australians."[308]

Undoubtedly, the proposed agreement will be of great interest to those concerned with indigenous rights in general, and the UN Working Group in particular. It would be the first modern agreement of its type, other than settlements dealing with the land claims of particular indigenous tribes or groups. The agreement also would be the first concluded between a government and all the indigenous groups in its territory.[309] The agreement shares its purpose with the UN Working Group's treaty study: to further "the effective protection and promotion of indigenous rights through ensuring a solid, durable and equitable basis for current

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tival, Northern Territory (June 12, 1988) [hereinafter Prime Minister's Speech].

306. *See supra* note 303 and accompanying text. Specifically, the statement demanded that the Commonwealth Parliament legislate:

> — a national elected Aboriginal and Islander organization to oversee Aboriginal and Islander affairs;
>
> — a national system of land rights;
>
> — a police and justice system which recognizes our customary laws and frees us from discrimination and any activity which may threaten our identity or security, interfere with our freedom of expression or association, or otherwise prevent our full enjoyment and exercise of universally recognized human rights and fundamental freedoms.

See supra text accompanying note 304.

307. *See* Prime Minister's Speech, *supra* note 305.

308. Hawke, *A Time for Reconciliation*, in A TREATY WITH THE ABORIGINES? 4, 5 (K. Baker ed. 1988).

309. The North American treaties and agreements were concluded with individual tribes, or with groups of tribes in a given region, and in New Zealand the Treaty of Waitangi never applied to the South Island.

and future relations between indigenous populations and States."[310] The UN Working Group and indigenous organizations outside Australia most likely will monitor Australia's progress towards an agreement in Australia. Thus, a retreat from this commitment by the Australian Government would assure the Aboriginal groups of a sympathetic hearing.

E. *An International Instrument?*

The Fraser Liberal Government, the previous administration, was wary of the term "treaty." Its response to the NAC proposal explained that the Government could not "legitimately negotiate anything which might be regarded as a 'treaty,' implying as it does an internationally recognized agreement between two nations."[311] On the contrary, any such agreement "must reflect the special place of Aboriginal and Torres Strait Island people within Australia as part of one Australian nation."[312] In deference to this view, the NAC called the proposed agreement the "Makarrata."[313] Despite this label, Prime Minister Hawke has agreed specifically to negotiate a treaty. In his Barunga speech, however, Hawke left the formal title of the agreement open: "[T]reaty, compact—call it as we will decide."[314] At the sixth session of the UN Working Group in August 1988, the Australian Observer Delegation notified the Working Group of "the Government's commitment to the negotiation and resolution of a Treaty between the Australian Government and the Aboriginal and Torres Strait Islands People."[315] But in his speech to the United Nations General Assembly on October 4, 1988, the Australian Minister for Foreign Affairs and Trade, Senator Evans, announced: "[W]e are seeking to complete a compact or agreement with our Aboriginal people and Islanders," though since that speech, the latest term introduced into the debate is "instrument of reconciliation."[316] Clearly,

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310. *See supra* note 77 and accompanying text.

311. *Id.*

312. Letter from the Minister for Aboriginal Affairs to the NAC, Mar. 3, 1981, *reprinted in Two Hundred Years Later*, *supra* note 119, at 17.

313. *"Makarrata"* is a Yirrkala word meaning "coming together after a struggle." *Two Hundred Years Later*, *supra* note 119, at 3.

314. Prime Minister's Speech, *supra* note 305.

315. UN Working Group on Indigenous Populations. Sixth Session, Geneva, Aug. 5, 1988. Statement by Mr. R. Winroe on behalf of the Australian Observer Delegation under Item 6, Outline of a Study on the Significance of Treaties, Agreements and Other Constructive Arrangements.

316. Minister for Foreign Affairs and Trade News Release No. M162, Oct. 5, 1988, at 7. Senator Evans was a member of the Senate Standing Committee on Constitutional and Legal Affairs at the time of the Makarrata inquiry, which concluded that past trea-

however, the Australian Government has committed itself to negotiating some kind of instrument with Australian Aborigines and Torres Strait Islanders, and has publicized that commitment in relevant international fora.

At the same time, the treaty concept has been the focus of much acrimonious debate within Australia, and so far the broad political support needed to make it a reality seems to be lacking. The Australian government, however, remains strongly committed to a process of reconciliation with Aboriginals and Torres Strait Islanders, and continues to regard an agreement or document as a desirable outcome of that process.[317]

Although the Government has not suggested plans to negotiate anything more than a purely domestic instrument, some individuals and groups would like to go much further. One authority, for example, argues for recognition of a separate Aboriginal state.[318] Another commentator regards the Makarrata concept as a "sell-out,"[319] and wants a "Sovereign Treaty" that would "enshrine and protect our rights forever,

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ties were inappropriate precedents for an agreement between Aborigines and the Commonwealth. *See Two Hundred Years Later, supra* note 119, at 58. *See also* Statement by the Honorable Robert Tickner, MP, Minister of Aboriginal Affairs, on behalf of the Australian Government to the Eighth Session of the UN Working Group on Indigenous Populations. July 30, 1990, at 6 [hereinafter Tickner Statement] ("The Prime Minister has referred to the document as an Instrument of Reconciliation.").

317. Tickner claimed, "My strongly held view is that attention must be focussed at this time not on the name of some document (which is an option at the end of an extensive reconciliation process) but instead we ought to focus on the process itself as the process is as important as the final outcome." Tickner Statement, *supra* note 316, at 6.

318. In his view:

> Aboriginal people ought not to sell ourselves short by perceiving ourselves in terms of a unit of Australian society—an ethnic [group] or minority—who are just getting a hard time. We are in fact a nation of people and we ought to stand up and acknowledge it. If this is the case, then any agreement between Aborigines and Australia takes on a different status. It is not a status capable of being unilaterally enforced or not enforced by a white government as has been the case in New Zealand and the United States. It means it comes under the purview of international law.
>
> Now I can change from using the word 'agreement' to using the word 'treaty'.
>
> . . .
>
> The essential difference is that a treaty is an acknowledgement that there are two states, two entities in international law, and not one state—Australia—dealing with citizens of its own country. In that context, John Howard was right when he said you can't have a treaty between citizens; you can't.

Mansell, *Treaty Proposal Aboriginal Sovereignty*, 2 ABORIGINAL L. BULL. 4, 5 (1989).

319. K. GILBERT, ABORIGINAL SOVEREIGNTY, JUSTICE, THE LAW AND LAND 23-24 (1988).

under the Vienna Convention on the Law of Treaties."[320] This view rises from the premise that an Aboriginal nation with rights derived from international law already exists.[321]

On the other hand, the argument for a separate Aboriginal state holds that the Aboriginal community currently does not meet the traditional criteria for statehood,[322] although this is not an insurmountable obstacle to recognition of an Aboriginal state.[323] Both commentators, however, demand an international treaty. Two key concerns are central to this demand: the recognition of Aboriginal sovereignty and guarantees that the Commonwealth Government cannot unilaterally modify or repudiate the treaty. As discussed above, existing treaties with indigenous peoples are not international instruments[324] in that they do not recognize continuing indigenous sovereignty in the sense of independent statehood.[325] Furthermore, these treaties are vulnerable to unilateral modification or abrogation by the central government.[326]

It is unlikely any national government could recognize the continuing sovereignty of its indigenous people. Even recognition of a prior sovereignty that is now extinguished would be difficult, because it could raise

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320. This commentator demands that:

> [a]ll Rights and Principles of any Treaty we may so enter are to be:
> (a) retroactive to our original position of Sovereignty, prior to invasion by the British Crown
> (b) to allow of no amendment or voiding or termination.
>
> No other party but the fully Accredited Sovereign Representatives of the Aboriginal Nation shall enter into negotiation purported to be a Treaty. They shall be the representatives chosen directly by the Aboriginal community groups and shall in no manner be selected by agents of the coloniser.

Id. at 51.

321. *Id.* at 48-49.

322. The traditional criteria for statehood include a defined territory, a permanent population, a government, and the capacity to enter into relations with other states. D. GREIG, *supra* note 1, at 94-98. "The two problems I do see are in relation to government and the capacity to enter into relations with other states." Mansell, *supra* note 318, at 5.

323. Mansell points to the ICJ Advisory Opinion on the *Western Sahara* and notes that some African governments recognized Biafra as a state as potentially helpful precedents. Bangladesh might have been a better example of the case for constitutive recognition. Mansell, *supra* note 318, at 6.

324. *See supra* Part III.B.

325. The American doctrine of tribal sovereignty does recognize a degree of limited Indian sovereignty within the United States. McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L. L. REV. 357, 359 (1978).

326. *See supra* text accompanying notes 165-91.

the question of whether the extinguishment was legitimate. This question of legitimacy would not necessarily be resolved in favor of the Aborigines. Two hundred years of uninterrupted exercise of authority by Britain and its successor, Australia, unchallenged by any other state recognized under international law, would likely have cured any defect in the original acquisition. In other words, if Australia were not acquired by settlement or conquest, it may have been acquired validly by prescription. As discussed above,[327] the international legal rules governing the acquisition of additional territory were developed by states and are operative as between states. The indigenous peoples involved were incidental factors to be dealt with by the acquiring state on whatever basis it could devise under the circumstances. Only states can challenge the acquisition of territory through prescription, and indigenous peoples are not states under current international law.

A more productive course of action might be to seek recognition of prior occupancy or ownership, its consequences for land rights, and the acceptance of a corresponding obligation to compensate Aborigines for the loss of those lands. The original preamble to the ATSIC legislation suggests that the Hawke Labor Government is prepared to move in this direction.[328] It is not clear, however, if there is sufficient community and bipartisan support at all levels of government for the Hawke Government to pursue this intention. Without such support, it may be impossible to conclude a treaty of lasting value. Moreover, one problem that has not been discussed in recent years and needs to be addressed is that of giving the Aboriginal and Islander communities credible assurances that any agreement is truly binding, and not subject to unilateral abrogation or modification in the future.

F. *A Domestic Treaty?*

Not all agreements between entities with international legal personality are treaties. Some agreements are governed by municipal law, "either by express provision or by implication from the nature of the transaction,"[329] and are not considered treaties. The intent of the parties determines whether an agreement will be governed by international law. But even if the Australian Government clearly intended that the proposed agreement be governed by international law rather than by domestic law, it would not necessarily be a treaty in the international legal sense, as

327. *See supra* text accompanying notes 38-40.
328. *See supra* text accompanying notes 232-35.
329. D. GREIG, *supra* note 1, at 459.

not all agreements governed by international law are treaties.[330] An international treaty also must contain an agreement between entities with the necessary international legal personality and treaty-making capacity. Under current international law, no indigenous peoples have such international legal personality or treaty-making capacity in their own right.[331]

Therefore, the terminology applied to the proposed agreement with the Aborigines and the Islanders is a problem. "Compact" and "agreement" are vague terms that do not have the same symbolic value as a "treaty," which conveys the idea of a solemn and binding agreement not easily broken or abrogated. The "Makarrata" suggestion is not ideal in that the word refers to the celebration marking the end of a conflict rather than to the agreement itself.[332] In addition, the term is meaningless to non-Yirrkala Aborigines.[333]

While an Aboriginal treaty could not be recognized as a true international treaty under current international law, some Aborigines and other interested groups would interpret it as an acknowledgment that Aboriginal Australia is some sort of entity in its own right.[334] Even without such an intention, the conclusion of a treaty might be interpreted in that sense. The 1979 Government reaction to the terms "treaty" and "Aboriginal nation" implies a fear that the interpretation of a treaty as recognizing the Aborigines as a separate sovereign state might be a real possibility. Some parties cling to that interpretation, either to discredit the concept entirely,[335] or to carry it further than the Government or, quite probably, the majority of Aborigines and Islanders wish.[336]

To avoid the problems that would arise if an Aboriginal treaty were interpreted as recognizing an Aboriginal state, the Australian Government almost certainly must make it clear that the Aborigines were not

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330. The Arbitrator in *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.* concluded that the contract between the parties was governed by international law. 35 I.L.R. 136, 173-74 (1963).

331. *See supra* text accompanying notes 51-53.

332. The Yirrkala community told the Senate Committee that "makarrata" was the wrong word, and that the appropriate term was "garma." *Two Hundred Years Later, supra* note 119, at 22.

333. *Id.*

334. "If the basic objective is to recognise Aborigines as a separate Sovereign nation exercising powers derived from its occupation of Australia since time immemorial and not from any legislative Act of the colonisers, then an international treaty is appropriate." Keon-Cohen, *supra* note 217, at 7-8. *See also* notes 318-19.

335. Howard, *Treaty is a Recipe for Separatism*, in A TREATY WITH THE ABORIGINES? 6, 6 (K. Baker ed. 1988).

336. Mansell, *supra* note 318, at 4; *see also* K. GILBERT, *supra* note 319, at 30-31.

being treated as if they were a separate state or even a separate community.[337] It also is becoming less and less likely that the term "treaty" will be used. The currently preferred term is "instrument of reconciliation."[338] Such an approach could avoid the separatist implications that otherwise might be inferred from the proposed agreement, but it would not solve the problem of providing the symbolic and binding character normally attributed to treaties.

V. Possible New Approaches

Existing general human rights instruments are not tailored to the particular needs and aspirations of indigenous peoples, and therefore do not address some of their key concerns. The essentially individualist approach of these instruments also does not comport with what traditionally are group claims. The efforts of the UN Working Group to develop international standards in the field of indigenous rights reflect the need for new approaches to the problem. The Working Group must be careful, however, that such issues as self-determination, and treaties in the context of self-determination, do not obstruct its progress.

Indigenous peoples are unlikely to benefit from a declaration too radical to attract support from a large majority of states, especially those with indigenous populations. Such a declaration most likely would not lead to a widely ratified international convention. On the other hand, a declaration not adequately addressing indigenous concerns likewise would be a waste of time. This means that, in addition to the fundamental question of land rights and basic principles such as the right to survive as distinct peoples, the declaration must cover the right of indigenous peoples to control their own affairs and have an effective voice in determining policies and programs that affect them directly. In essence, some form of self-determination must be provided. Another problem, given the history of dealings between indigenous peoples and states, will be the credibility of assurances a government might be prepared to give on indigenous rights.

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337. A letter from the Attorney-General's Department to the Aboriginal Affairs Department recommends that the Australian Government include "any provisions needed to make it clear that Aborigines were not being treated as if they were a community separate from the Australian community, and provisions to ensure that the arrangement was not conceived as being analogous to a treaty between separate nation States." Letter from Secretary, Attorney-General's Department to Secretary, Department of Aboriginal Affairs, July 26, 1980, *quoted in Two Hundred Years Later*, *supra* note 119, at 57.

338. *See* Tickner Statement, *supra* note 316, at 6.

A. *The Importance of Self-Determination*

As a direct consequence of European colonial expansion, indigenous peoples have been deprived of their independence, their land, and their right to choose their role in the modern state. They are at the mercy of governments that may claim to have their best interests at heart, but have been singularly unsuccessful at promoting or protecting those interests. After centuries of "enlightened" government policies, indigenous peoples are still among the most severely disadvantaged groups in their states.[339] As a result, indigenous people doubt that national governments have the ability or the desire to provide a better future. Moreover, government policies traditionally have focused on assimilation, a goal that indigenous peoples categorically reject. Indigenous peoples want to continue as distinct peoples and do not want to disappear into the general population.[340]

The right of self-determination has no accepted application outside the context of decolonization,[341] and does not amount to a right of secession.[342] Self-determination, to the extent it can be held to legitimize the aspirations of any indigenous communities within existing states, is unlikely to be generally accepted by the international community. Promoting self-determination, however, could cause political problems within the United Nations if some states that either do not have indigenous populations or that classify such populations as national minorities, support full, external, self-determination for indigenous populations of other states.

At least one attempt has been made in the past to use the plight of indigenous peoples to score political points in international politics.[343]

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339. *See* Martinez Cobo Report, *supra* note 66, para. 625.

The Martinez Cobo Report was originally issued in parts as U.N. Docs. E/CN.4/Sub.2/476/1-6 (1981); E/CN.4/Sub.2/1982/2/Adds.1-7 (1982); and E/CN.4/Sub.2/1983/21/Adds.1-7. It has since been re-issued as U.N. Doc. E/CN.4/Sub.2/1986/7 & Adds.1-4. The Library of the Department of Aboriginal Affairs in Canberra holds a copy of the original version, which is the one cited in this Article.

340. *See supra* text accompanying notes 112-14.

341. Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 459-62, 465 (1971); *see also* J. CRAWFORD, *supra* note 9, at 84-102.

342. UN General Assembly Resolution 1514 (XV) on the granting of independence to colonial countries and peoples. Article 2 states that "All peoples have the right to self-determination . . . .," but article 6 adds the rider that "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

343. G. BENNETT, ABORIGINAL RIGHTS IN INTERNATIONAL LAW 13 (1978). U.N.G.A. Resolution 275 (III), adopted in May 1949, directed ECOSOC to study the

Such an approach is completely unhelpful to the indigenous peoples and must be avoided if the possibility for useful progress on indigenous rights is to continue. In particular, politicizing the debate through undue insistence on external self-determination for indigenous peoples could threaten state support for an indigenous people's right to internal self-determination. As one authority notes, not all indigenous groups are demanding self-determination in its fullest, external sense: many groups simply want greater control of their own affairs within the confines of the state.[344] For example, in the comments to the First Draft Universal Declaration on the Rights of Indigenous Peoples, the National Indian Youth Council noted that,

> What indigenous self-determination requires is the recognition of a duty by States to make structural accommodations and to secure entitlements for the indigenous peoples within their borders in order that each may continue its unique existence according to its desires. Only in the rarest of circumstances would the true expression of an indigenous people's self-determination require the dismemberment of a State willing to realize these goals.[345]

The problem is "[s]elf-determination does imply the right, although not the necessity, of independent statehood, and governments tend to equate all demands for self-determination with independence and secession."[346] The concept of self-determination often provokes an immediate

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situation of indigenous populations on the American continent. According to Bennett, the debate became politicized, with the Eastern Bloc attacking the West. In the end the United States managed to block the proposal.

344. The authority describes this desire as follows:

> The ultimate political status sought by indigenous groups through self-determination varies tremendously, reflecting the diversity of situations in which indigenous peoples find themselves and the diverse character of the indigenous groups themselves. Some groups aspire to complete independence and statehood, while others demand autonomy or self-government only in specific areas, such as full control over land and natural resources. A statement prepared by indigenous groups prior to the 1987 session of the Working Group emphasizes that freedom of choice is the "most fundamental element of the right to self-determination" and recognizes that indigenous self-determination "may be realized in many ways ranging from the choice of full independence to various forms of autonomy, self-government and participation in the political processes of the state."

Hannum, *supra* note 39, at 671-72 (footnote omitted).

345. *Discrimination Against Indigenous Peoples. Analytical compilation of observations and comments received pursuant to Sub-Commission resolution 1988/18.* U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1, 14, para. 5 [hereinafter *Discrimination Against Indigenous Peoples*].

346. Hannum, *supra* note 39, at 672. The Martinez Cobo Report notes that "[i]n

negative reaction that stems from self-determination's linkage with the creation of new states through decolonization[347] or secession,[348] and because some indigenous groups equate self-determination with full independence.[349] This negative reaction overshadows the possibility of finding acceptable compromises on forms of internal self-determination that would not threaten the unity of the state, but that would provide indigenous groups with an effective degree of control over their own destinies. These negative connotations probably explain the reluctance of some states to admit that they have indigenous populations,[350] an attitude which suggests that indigenous groups in Africa and parts of Asia might not benefit directly from any future declaration or convention on indigenous rights. Unless the concept is clarified, there is a real risk that the issue of self-determination could become a major obstacle on the path to a meaningful declaration.[351] There is a similar risk that associating treaties with an indigenous right to self-determination will inspire governments to adopt an even more restrictive attitude to treaties than in the past.

On the other hand, self-determination is as much a key issue for indigenous peoples as land rights,[352] and must be addressed adequately in any international instrument on indigenous rights. At the sixth session of the UN Working Group, "[a]ccording to the overwhelming majority of indigenous representatives, self-determination and self-government should be amongst the fundamental principles of the draft declaration."[353] If self-determination is the ability of a given people to make

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their reaction, governments often confuse any claim for autonomy and self-determination with a demand for absolute and immediate freedom, independence and sovereignty." Martinez Cobo Report, *supra* note 66, para. 148.

347. Emerson, *supra* note 341, at 462.

348. Bangladesh and Biafra are two examples.

349. Consider the proposal of the indigenous participants in the 1977 International NGO Conference on Discrimination Against Indigenous Populations in the Americas. *See supra* notes 108, 344.

350. *See supra* note 66.

351. The UN Working Group is well aware of this. At its sixth session, one member observed that the issue of self-determination "underlies much of the discussion in the Working Group. The concept should be demystified since in this case it did not mean statehood or independence or any sort of secession." *Report on Indigenous Populations, supra* note 98, para. 76.

352. "Indigenous observers concluded that, together with self-determination, the rights to land and resources were fundamental to the very existence of indigenous peoples, their identity and their well-being." *Id.* para. 82.

353. *Id.* para. 80.

meaningful choices about their future,[354] then indigenous peoples have strong grounds for complaint.[355] If self-determination is the ability to make meaningful choices according to their own standards, the situation is worse[356] in that the assumption that institutions and approaches based on European models are inherently superior to those of more "primitive" peoples tends to operate at the expense of indigenous institutions.[357] As the Martinez Cobo Report concluded:

> Respect and support for the internal organization of indigenous peoples and their cultural expressions constitute an essential consideration for any arrangement aimed at securing appropriate participation by indigenous communities in all affairs which affect them. Consequently, Governments must abandon their policies of intervening in the organization and development of indigenous peoples, and must grant them autonomy, together with the capacity for controlling the relevant economic processes in whatever way they themselves consider to be in keeping with their interests and needs.[358]

The first revised text of the Draft Declaration reflects three primary

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354. "As far as it applies to indigenous nations and peoples, the essence of this right is the right to free choice, and therefore the indigenous peoples themselves must to a large extent create the specific content of the principle." Martinez Cobo Report, *supra* note 66, para. 276.

355. These grounds include: (1) terms on which indigenous peoples coexist with the broader community invariably have been imposed from outside, either as a matter of government policy or as an inevitable consequence of European colonization; (2) indigenous policy is in the hands of central governments that generally do not represent their interests; and (3) though some governments are now disposed to consult with indigenous peoples about policies that affect them, this does not necessarily imply effective indigenous input into the decision-making process. Hanks, *Aborigines and Government: The Developing Framework*, in ABORIGINES AND THE LAW 19, 38-45 (P. Hanks & B. Keon-Cohen eds. 1984).

356. The Martinez Cobo Report notes that the "*de facto* or *de jure* recognition of the existence of indigenous communities as local or regional politico-administrative entities means little or nothing if interference in basic forms of internal organization is such as to produce disequilibrium and destabilization in their midst." Martinez Cobo Report, *supra* note 66, para. 156.

357. The Martinez Cobo Report adds:

> This is one of the defects pointed out in the United States Indian Reorganization Act of 1934, which, while according recognition of important aspects of initiative and responsibility to the indigenous communities, peoples and nations of that country, imposed upon them, as has been mentioned, foreign ways of consulting the will of their members and of determining when and how decisions are reached which are binding for those members.

Id. para. 157.

358. *Id.* para. 268.

elements of internal self-determination for indigenous peoples: (1) the right to participate in the development of national indigenous policies; (2) the right of indigenous communities to determine the structure and character of their own institutions; and (3) the right of indigenous peoples to run their own internal affairs.[359] How these elements will be achieved necessarily depends on the circumstances of each case and on the wishes of the particular indigenous community, but it should not be unduly difficult for governments and indigenous peoples to agree on a broad platform for internal self-determination.

Compromises, however, are needed on both sides. For example, it is hard to imagine a state agreeing that none of its laws would be applicable to certain areas or groups, but it should be possible to work out a balance between state and indigenous jurisdictional areas. One commentator is concerned about the willingness of indigenous communities that have a degree of self-determination to observe general human rights standards.[360] In *Lovelace v. Canada*,[361] we have a good example of the conflict between non-discrimination standards and an indigenous community's desire to control its own membership. On the other hand, the Mikmag nation of Canada responded to these concerns by ratifying the International Convention on Civil and Political Rights, and the Interna-

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359. *Discrimination Against Indigenous Peoples. First revised text of the Draft Universal Declaration on Rights of Indigenous Peoples prepared by the Chairman-Rapporteur of the Working Group on Indigenous Populations, Mrs. Erica-Irene Daes, pursuant to Sub-Commission resolution 1988/18.* U.N. Doc. E/CN.4/Sub.2/1989/33 of 15 June 1989, 4-8. The relevant principles are:

> 22. The right to participate fully at the State level, through representatives chosen by themselves, in decision-making about and implementation of all national and international matters which may affect their life and destiny.
>
> 23. The [collective] right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions.
>
> 24. The right to decide upon the structures of their autonomous institutions, to select the membership of such institutions, and to determine the membership of the indigenous people concerned for these purposes.

With the single exception of the square brackets around the word "collective" in Principle 23, these principles are identical to the original draft. *Report on Indigenous Populations, supra* note 98, at 32, 35.

360. Hannum, *supra* note 39, at 673-74.

361. 2 Hum. Rts. L.J. 158 (1981). The case illustrates a conflict between the desire of an indigenous community to determine its membership and general principles of non-discrimination.

tional Convention on Economic and Social Rights.[362] While this action has not been recognized by the international community,[363] it indicates a clear commitment by one indigenous group to observe international human rights standards.

Because there currently is no authoritative definition of self-determination outside the context of decolonization, there is no impediment to devising a specific definition of indigenous self-determination that would be acceptable both to governments and to indigenous peoples, and which could be incorporated into a declaration on indigenous rights. Realistically, such a definition would have to focus clearly on self-determination within the state, or the declaration would fail to attract the requisite degree of state support. Admittedly, such a definition would not satisfy those indigenous groups that aspire to full external self-determination. Nevertheless, it would be a significant advancement in the field of indigenous rights if governments acknowledged indigenous peoples as competent and entitled to manage their own affairs.

Australia supports indigenous self-determination as long as it is limited to self-determination within the confines of the state.[364] The Australian Government has experimented with mechanisms for consulting its indigenous peoples on matters that concern them,[365] and it has taken steps to ensure the close involvement of Aborigines and Islanders in developing and implementing the policies that affect them.[366] The most

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362. Hannum, *supra* note 39, at 674 n.93.

363. *Id.*

364. The Australian House of Representatives resolution of August 23, 1988 affirms that Aboriginals and Torres Strait Islanders are entitled to "self-management and self-determination subject to the Constitution and the laws of the Commonwealth of Australia." AUSTL. H.R. DEBATES, Aug. 23, 1988, at 137.

365. These experiments include the National Aboriginal Consultative Committee, the National Aboriginal Conference, and the Aboriginal and Torres Strait Islander Commission.

366. Nevertheless, Australia's current position on the relevant principles of the draft declaration is fairly cautious. Its comments were as follows:

Principle 22

The principle is supported in the context that Aboriginal people have equal rights with all other Australians to participate fully at the State level and elect their parliamentary representatives.

Under the Australian Constitution, there is no special provision for political representation of Aboriginal people. It is highly unlikely that a referendum to allow for such provision would be successful.

Principle 23

While the Australian Government is supportive of collective rights to autonomy, the implication of segregation in principle 23 could not be supported. As currently formulated the provision would potentially conflict with article 1, paragraph 4,

notable step includes the establishment of ATSIC, which replaced the former Department of Aboriginal Affairs in 1990. The structure of the Commission is intended to ensure "maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that affect them."[367] For example, three of the twenty Commissioners are to be appointed by the Minister, and the remaining seventeen are to be elected from among their number by the members of regional councils made up of elected Aboriginal and Islander representatives.[368] Furthermore, only Aborigines and Torres Strait Islanders are eligible to vote in the regional council elections[369] or to become appointed or elected as Commissioners or regional councilors.

Some would argue that ATSIC is a white man's structure imposed on Aborigines from the outside.[370] At the same time, the Commission, the regional council, and the electoral process are designed to give all Aborigines and Torres Strait Islanders the option of having an input into the policies and programs that affect them directly. This system is a major advance on past paternalistic approaches. It does, in effect, appear to meet Aboriginal demands for "a national elected Aboriginal and Islander

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and article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination. To avoid this conflict, the principle could be qualified by reference to the special needs of indigenous people. This could be done by inserting the words "where indigenous peoples require protection" at the beginning of principle 23. It would also be preferable that the collective right "only be exercisable with the full consent of the indigenous peoples and so as not to establish a system of racial segregation."

Principle 24

In principle 24, the word "institution" needs to be clarified. If "institutions" means indigenous community organizations, then Australia would support this principle, as the Australian Government provides assistance to many community organizations. However, if "institutions" means, for example, a separate political institution, then principle 24 could not be supported.

Discrimination Against Indigenous Peoples, supra note 345, at 29-30.

367. Aboriginal and Torres Strait Islander Act of 1989, No. 150, Part 1 § 3(a).

368. *Id.* Part 2, Div. 3, § 27; Part 3, Div. 7, § 131.

369. *Id.* Part 2, Div. 3, § 31(1); Part 3, Div. 4, §§ 101-102.

370. Statement delivered by Paul Coe, Chairperson of the National Aboriginal and Islander Legal Services Secretariat, to the Eighth Session of the UN Working Group on Indigenous Populations, July 30, 1990, at 3-4. Coe argues that the Commission was imposed on Aboriginal people without their consent, that it does not provide for enforcement of their individual or collective rights, and that it is essentially a white bureaucratic structure dressed up as an assembly of Aboriginal and Islander Commissioners. He also regards the use of "white man's procedures" for selecting Commissioners, and the prescription of regional and zonal boundaries without regard for traditional boundaries as "fundamental violations of our right to self-determination." *Id.* at 4.

organization to oversee Aboriginal and Islander affairs."[371] The ATSIC's credibility as an organization representing Aborigines and Torres Strait Islanders will depend directly on the willingness of its constituents to participate in the process, as voting in the regional council elections is optional. Australia appears to be well placed to set an example in the area of indigenous rights, particularly if the other key elements of indigenous self-determination are enshrined in an Aboriginal agreement or otherwise are implemented in the reconciliation process.

B. *The Question of Meaningful Guarantees*

Indigenous peoples are subject to the exclusive jurisdiction of their states of nationality and have no international legal personality in their own right. Therefore, they do not have recourse to extra-national remedies against government oppression. In negotiations, debates, or outright disputes with a national government, indigenous peoples depend on that government's goodwill. To the extent indigenous rights currently are recognized under domestic law, they are subject to unilateral modification or termination by the state. Treaties often have been broken in the past and can be overridden by domestic legislation or otherwise unilaterally terminated by the government. Courts in the United States and Canada have done much to uphold indigenous and treaty rights, but this is possible only in areas in which those rights have not been extinguished already by the state. Legislation guaranteeing indigenous rights can be weakened or abolished by future governments. National legislatures presumably would not take such action without good cause, yet indigenous land rights might not prevail against powerful interests that seek to develop traditional indigenous land or its resources. Indigenous peoples are seriously under-represented in national legislatures,[372] and many constitute only a small minority of the general population. A constitutional guarantee, if possible, would offer more security, because constitutions generally are difficult to change.

Given the history of dealings between indigenous peoples and states, it seems only fair for governments to offer credible assurances that future agreements or treaties will not be unilaterally modified or terminated except in the most exceptional circumstances. Having suffered from broken promises and policy fluctuations for generations, indigenous peoples understandably are cynical about government assurances. Hence, indige-

371. The Barunga Statement, *reprinted in* A TREATY WITH THE ABORIGINES?, *supra* note 233, at 47.

372. Martinez Cobo Report, *supra* note 66, paras. 257-61.

nous groups insist that existing and future treaties should be subject to the same rules as international treaties,[373] which, in principle, would mean that they were not subject to unilateral modification or termination.[374]

Requiring assurances that treaties and agreements will not be modified is a sensitive issue, because states naturally would regard such arrangements as interference in their domestic affairs. Admittedly, a wide range of general human rights instruments have made a state's treatment of its own nationals an issue of general international concern. While no state enjoys being criticized for its human rights record, such criticism by other states is the prime mechanism for ensuring that human rights are respected by governments. International criticism serves to remind states that their international image suffers as a result of flagrant human rights violations and maintains pressure on the state to improve its human rights record. Although not universally effective, it is preferable to no mechanism at all.

The existence of a universal declaration of indigenous rights would focus international criticism of domestic indigenous policies, and make it harder for governments to hide behind the screen of domestic jurisdiction. Those states concerned with their human rights image would feel morally obliged to respond more positively to the concerns of their own indigenous communities. While this already is happening in the United States, Canada, New Zealand, and Australia, a declaration certainly would give impetus to such efforts.

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373. *See, e.g.*, The Draft Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere, proposed by the indigenous participants in the 1977 International NGO Conference on Discrimination Against Indigenous Populations in the Americas. "Treaties and other agreements entered into by indigenous nations and groups with other States, whether denominated as treaties or otherwise, shall be recognized and applied in the same manner and according to the same international laws and principles as the treaties and agreements entered into by other States." *Reprinted in* Martinez Cobo Report, *supra* note 66, Annex IV, 2.

374. Accordingly, at the sixth session of the UN Working Group,

> [o]ne indigenous observer noted that the resolution of treaty disputes is usually left in the hands of the State, thus rendering the State interested party, administrator and adjudicator should the indigenous party wish to challenge the actions of the State. Indigenous peoples are then confronted with a State apparatus of considerable financial resources with which to pursue a prolonged series of negotiations, litigation and other legal manoeuvres. For these reasons, indigenous observers emphasized the need for international oversight during the implementation of treaties.

Vienna Convention on the Law of Treaties, May 22, 1969, art. 26, 39, 42(2), 54.

C. *International Oversight?*

Through some form of international oversight, it might be possible to encourage governments to recognize universal indigenous rights. The United Nations, like other international fora, is familiar both with voluntary and mandatory reporting systems. A voluntary, informal reporting system on indigenous rights already exists in the sense that participating governments provide information to the UN Working Group. The proposed Universal Declaration could signal the desirability of continuing this voluntary exchange of information and encourage governments to provide information on the progress towards implementing its principles. Compliance by concerned states would draw attention to others who did not provide information and would be reinforced if the declaration also provided for the continuing provision of information by non-governmental organizations and indigenous groups. This approach would formalize the way the UN Working Group operates and would intensify international pressure on the subject, especially if the Working Group conducts regular reviews of the progress toward realizing the principles of the declaration.

However numerous, widely ratified international human rights instruments provide for mandatory reporting by the states parties.[375] While including a mandatory reporting requirement in a non-binding declaration would be inappropriate, it might be possible to effectuate a reporting requirement in the form of a protocol to the Convention on the Elimination of All Forms of Racial Discrimination.

Ideally, the proposed declaration is just the first step towards a viable international indigenous rights convention that would include a mandatory reporting system and mechanisms for international oversight of compliance. That, however, is a distant goal. Meanwhile, the states that genuinely seek to improve the status of their indigenous peoples must set an example through imaginative approaches to indigenous policies and programs, and by providing constructive precedents for others.

D. *A New Type of Instrument?*

The proposed Australian treaty could become a precedent for international consensus on the rights of indigenous peoples. While it is too soon to predict its overall character and specific content, it could become the first of a new generation of treaties designed to ensure "a solid, durable

375. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 7, art. 40; International Covenant on Economic, and Social and Cultural Rights, *supra* note 8, art. 16.

and equitable basis for current and future relations between indigenous populations and States."[376] Admittedly, not all states will see a comprehensive treaty or agreement as an appropriate mechanism for addressing the concerns of their indigenous peoples. Modern approaches to settling indigenous claims are becoming more comprehensive in scope than traditional treaties, and more sensitive to the genuine concerns of indigenous peoples.[377]

This more comprehensive approach to indigenous claims is a significant step forward because traditional treaties, for all their symbolic and practical value have fallen short of the expectations that they are guarantees of indigenous rights.[378] While the problem has less to do with the instruments themselves than the manner in which governments have implemented their treaty commitments, relying on traditional models is not necessarily the best approach for the future. While there still is a need for agreements concerning the settlement of specific land claims, any tendency for such agreements to look beyond the basic question of land ownership and address issues that affect the particular community's way of life, aspirations for the future, and capacity to handle its own affairs should be encouraged. This might be the most practical way to handle the claims of specific indigenous groups, so long as it is done through a process of genuine negotiation, rather than unilateral determination by the government.

This approach, however, is only a partial answer to the problem and only caters to those indigenous communities that still have a land base. Indigenous communities without a land base also have problems and concerns that deserve attention. For example, access to education in their traditional language and culture is of particular concern to indigenous people who no longer occupy their traditional land. An umbrella treaty or agreement could address issues of key concern to all indigenous communities on a national basis and lay the foundations for a more positive relationship between indigenous peoples and the rest of the community. This approach particularly is relevant to a country like Australia, whose indigenous peoples are fragmented and widely dispersed. In addition to the specific commitments enshrined in such a treaty, its very existence would have considerable symbolic value—especially for those indigenous communities that do not have an existing treaty with their state of nationality. A treaty would formally acknowledge their existence, their im-

376. *Report on Indigenous Populations, supra* note 98, para. 98.

377. *See* Canada's James Bay and Northern Québec Agreement, *supra* notes 209-16 and accompanying text.

378. For a discussion of the practical value of treaties, see *supra* Part III.C.

portance as a part of the national community, and their pride in their own history and culture.

The Australian treaty is regarded as a test case for this type of approach. The exercise would be more meaningful, both in terms of its primary purpose and as a constructive precedent in the field of indigenous rights, if the government took the opportunity to offer formal assurances that the treaty, as concluded, would not be unilaterally modified or terminated at a future date.

E. *An International Dimension?*

It might be appropriate to give an indigenous treaty an international dimension to reinforce the instrument's solemn and binding character, and to give the indigenous party credible assurances it will not be unilaterally modified by the government. There are several ways of accomplishing this goal without compromising the treaty's character as an intrinsically domestic instrument rather than an international treaty.

1. International Dispute Settlement?

It is possible for a treaty to include a provision that requires serious disputes over the treaty be referred to some form of extra-national conciliation or arbitration mechanism if the dispute cannot be resolved domestically. For example, international arbitration clauses often are included in mineral exploitation agreements between states and foreign companies, although such agreements clearly are contracts rather than true international agreements. A dispute settlement provision would reassure the indigenous party that its government intended to abide by the treaty, and that a future government could not simply ignore it.

Submitting such disputes to an impartial third party, ideally an expert in the field, would do much to offset the unequal status and bargaining power of the state and indigenous parties. In international arbitration, the third party's ruling could not be enforced directly; however, the state undoubtedly would be exposed to strong international criticism if it failed to implement such a ruling. A state that is concerned enough about human rights to enter into an indigenous treaty might well hesitate to subject itself to such criticism. On the other hand, even the most well-intentioned state might be reluctant to tie its hands in this manner. Circumstances such as a serious economic crisis might make it difficult for a state to fully honor domestic commitments made in good faith. In addition, an outside arbitrator might not be in a position to appreciate fully the dimensions of the domestic problem. Although unmerited complaints by indigenous extremists could be filtered out of the process,

there still is a very real risk that contentious arbitration decisions could simply exacerbate tensions between the parties. Although the analogy is far from perfect, the Minorities Treaty system in Europe is a sobering example of the possible problems inherent in international policing of domestic commitments.[379]

On balance, it is hard to imagine any government formally committing itself to compulsory, binding international arbitration on the implementation of an indigenous treaty. One indicator to this effect is that less than half the states which are parties to the International Covenant on Civil and Political Rights (ICCPR) have ratified its Optional Protocol, which involves less intimidating, non-binding procedures for examining individuals' complaints of humans rights violations.[380]

2. Independent Conciliation?

Another possible solution is an agreement to ask that a reputable international figure use his "good offices" to help the parties reach an accommodation in the event of a serious disagreement over the implementation of the treaty. The UN Secretary-General traditionally has played a similar role in helping mediate serious differences between states. As far as the implementation of an indigenous treaty is concerned, the chairperson of the UN Working Group would be the obvious person to mediate. As the process would involve mediation and conciliation at the request of both parties, rather than a determination of who was right, taking on such a role would not compromise the non-judgmental character of the Working Group. A "good offices" approach, because it is more private and less adversarial than a formal arbitration procedure, might be more constructive in the long run.

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379. Those undertakings were imposed on particular states from outside, and were enshrined in international treaties with very limited provisions for the minorities concerned to complain directly, rather than through sympathetic states. I. CLAUDE, NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 16-30 (1955). It is at least arguable that the system failed because of the cynical way it was used and abused by the parties, but it undoubtedly did much to aggravate ill-feeling between both sides. *Id.* at 39-48.

380. As of January 1, 1988, 86 states had ratified the ICCPR, but only 39 had ratified the Optional Protocol. The Human Rights Committee holds closed meetings to consider complaints under the Optional Protocol, art. 5(3); it forwards its views to the state party and individual concerned (article 5(4)); it includes a summary of its activities under the Optional Protocol in its annual report, art. 6.

3. A Binding International Commitment?

Once the treaty is concluded, the Australian Government will wish to formally advise the UN Working Group of the treaty's conclusion. The Government could take this opportunity to underscore the treaty's solemn and binding character, and announce that it undertook to refrain from future modification or termination of the treaty without the consent of its indigenous peoples. If a national emergency arose, the treaty could be suspended for a limited time. Although the Working Group's sessions are attended by government officials rather than by ministers, such an announcement, if it had the Prime Minister's explicit approval, might constitute a unilateral declaration that would bind Australia under international law. As the International Court of Justice held in the *Nuclear Tests Case*:[381]

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations . . . . When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not within the context of international negotiations, is binding.[382]

If the Prime Minister or the Minister for Foreign Affairs and Trade made such a statement in the United Nations General Assembly, there would be no doubt of Australia's intent to enter into a binding international commitment to that effect. The position of the person making the statement, the character of the statement, and the forum to which it was made would make this clear.[383]

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381. Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253.

382. *Id.* at 267-68.

383. The Court stated:

> Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State . . . . Thus, in whatever form those statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and the circumstances in which they were made.
>
> . . .
>
> It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced.

In the event of future government action to modify or terminate the treaty without the consent of the Aborigines and Torres Strait Islanders, grounds for international action against Australia would exist. If a state wished to take the matter to the ICJ, Australia could not object, because it has submitted itself to the compulsory jurisdiction of the Court. The Court, however, might decline jurisdiction on the grounds that the state initiating the action was not affected directly by the breach of the international commitment. When Ethiopia and Liberia, in their capacity as former members of the League of Nations, alleged that South Africa had contravened the Mandate for South West Africa, the ICJ found that "the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims, and that, accordingly, the Court must decline to give effect to them."[384]

On the other hand, the ICJ could give an advisory opinion on the subject at the request of the UN General Assembly.[385] Accordingly, such a commitment would inspire future governments to consider the effect of their actions before enacting legislation to modify or terminate the treaty on a unilateral basis.

4. A Commitment to Invite International Scrutiny?

Another possible approach might be for the Australian Government to submit periodic reports on the implementation of the treaty to the UN Working Group on a voluntary basis, and to invite the Working Group to review the operation of the treaty in an advisory capacity. A willingness to submit to international scrutiny would effect an additional guarantee of the government's good faith, especially if the treaty provided for such scrutiny.

VI. CONCLUSION

Governments have encroached upon the basic rights of indigenous peoples for centuries. Nevertheless, indigenous peoples are still pressing for recognition of their rights, including self-determination and self-government. While these goals warrant attention and are beginning to be

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Id. at 269.

384. South West Africa Cases (Ethiopia v. S. Afr.; Liberia v. S. Afr.) 1966 I.C.J. 4, 99.

385. Article 65(1) of the Statute of the International Court of Justice provides that: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

recognized by the international community, actual implementation has been problematic. Imaginative approaches are needed if real progress is to be made on indigenous rights.

A widely ratified Universal Declaration on indigenous rights could contribute to the protection of indigenous rights, if it addresses key issues such as land rights and self-determination in a manner acceptable to both indigenous groups and national governments. Australia's recently-established Aboriginal and Torres Strait Islander Commission is one example of a constructive approach to the problem area of indigenous self-determination. Such examples could inspire a more positive debate on this issue in the UN Working Group and elsewhere.

The proposal for a treaty or "instrument of reconciliation" between the Australian government and its Aboriginal and Torres Strait Islander peoples gives Australia a further opportunity to make a positive contribution to the development of international standards on indigenous rights, notably in the area of legally binding treaty guarantees. An international dimension to a domestic treaty or agreement could reinforce the credibility and binding character of such guarantees.