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FINAL REPORT

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES IN CANADA.

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Prepared for the Royal Commission on Aboriginal Peoples
contract # 2632-2b27

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May 12 1995

EXECUTIVE SUMMARY

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES IN CANADA

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The Supreme Court of Canada, in the *Simon* and *Sioui* cases, argued that aboriginal treaties are "*sui generis*"--*that is*, a unique category of instruments which must be applied and interpreted without regard to the rules ordinarily applicable to public international treaties. The same sentiment was expressed by Lord Denning in the *Indian Association of Alberta* case, and has long been the rule in the United States. Are these Canadian and American rules defensible in international law? Or do Aboriginal peoples have valid claims to international legal status, and to international remedies, based upon their treaties with Britain, France, and other European powers?

This report begins with an examination of the European scholarly debates on the legal capacity and rights of non-Christian and tribal peoples, which took place during the century following the "discovery" of the Americas. It proceeds to a survey of diplomatic practices from the 16th to l9th centuries, tracing the use of treaties in demarcating the boundaries of Europe's emerging secular nation-states, and in the subsequent expansion of European commercial interests to Asia, Africa, and the Americas. This is followed by a critical review of changes in Europeans' interpretation of their treaties with indigenous or tribal peoples, and a comparison of contemporary Anglo-Canadian law with the most recent decisions of United Nations bodies.

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Four broad stages of historical development can be discerned from this analysis, which may be summarized as follows:

- The exclusive Christian order of the Holy Roman Empire, in which there was only a single European state, many subordinate rulers, and no recognition that diplomatic relations could exist at all with non-Christian societies. This world-order disintegrated in the 16th century in the wake of the Reformation, expanding trade with non-Christian peoples, and the rise of independent European nation-states.
- An expanding, inclusive and universal community of sovereign and independent, secular States associated by treaties of alliance, commerce or "protection," under a conception of natural law that recognized the equality of all peoples and States. We call this period the Treaty Order, because its foundation was contractual. This world-system achieved its zenith in the mid-1800s, when the treaty network linked more than 1,000 European states and tribal nations globally.

- European colonialism or imperialism, characterized by the rapid contraction of the international community into a small club of aggressively dominant European States. During the period marked roughly by the 1885 Berlin Africa Conference and the adoption of the Charter of the United Nations, this European club arrogated oligarchic power to create and change international law, convert treaties of protection into instruments of domination, and deny the legal capacity of non-white peoples to govern themselves.

- Post-colonial law, decolonization, and the self-determination of peoples under the Charter of the United Nations, leading to the re-emergence of an inclusive, global, and colour-blind community of nations such as had existed under the Treaty Order. Canadian law, in this context, has not yet been decolonized.

For five centuries, treaties were used routinely to establish the legitimacy of competing European states' claims to trading monopolies and spheres of influence in Africa and Asia, as well as the Americas. "Discovery" alone was insufficient to establish dominion; at best, the discoverer could claim the right to exclude other European States from diplomatic contacts with the inhabitants. Even this convention broke down, in practice, by the early l9th century.

Treaties made with the Aboriginal nations of Africa, Asia and the Americas did not differ materially from each other. Similar words can be found among them all. A central theme in the construction of the Treaty Order was "protection," which originally meant the creation of an exclusive, but revocable treaty relationship between the protected nation and a protecting Power. Nearly all European "colonies," on all continents, began as protectorates in this sense. It was only in the late l9th century that European States began using their vast military power to impose their own laws and interests on their protectorates in violation of treaties.

Both Canada and the United States began distinguishing Aboriginal treaties from other treaties once they had the military power to do so --that is, in the late l9th century. In both countries, treaties have been subjected to municipal legislation on the theory of parliamentary supremacy. The principal difference between the two legal systems has been the entrenchment of "existing" treaty rights by section 35 of the *Constitution Act, 1982*. No such constitutional protection yet exists for treaties in the United States. Differences in the extent to which treaty rights are actually enjoyed today are attributable to Canadian courts' tendency to construe treaty provisions more narrowly, and past legislative enactments more broadly--not to any underlying difference in the contents of

the treaties, or the respect which has on the whole been given to them by successive governments after the 1880s.

Since 1945 the International Court of Justice has begun a process of decolonizing international law, revising its racist and colonialist underpinnings. Treaties must be interpreted according to their spirit and intent at the time they were originally made, not through the lens of European imperialism. It follows that treaties of protection have not extinguished the original international personality of indigenous nations, which can re-emerge. The world court has moreover adopted a "progressive" approach to the implementation of human rights and self-determination, applying these new "peremptory" norms of international law to territorial arrangements which arose prior to 1945.

These principles are also now enshrined in the Vienna Convention on the Law of Treaties, which Canada ratified in 1970. In accordance with the Vienna Convention and relevant decisions of the world court:

- A State cannot avoid its treaty obligations by arguing "lack of capacity" of the other party to enter into binding international commitments.
- A State cannot invoke its own municipal laws as grounds for not fulfilling its treaty obligations; a unilateral interpretation of the treaty is likewise of no legal force.
- The defense of "changed circumstances" cannot be asserted by a wrong-doer, in cases of territorial (cession) treaties, or where the treaty can still be performed.
- "Unequal" or imposed treaties are voidable by the injured party, returning the relationship between the parties to the status quo.
- Entering into a treaty that is inconsistent with prior treaties, or enacting inconsistent laws, is a material breach, and grounds for suspension by the injured parties.

If they were interpreted according to the same contemporary legal canons and precedents as other treaties, Aboriginal treaties could not have extinguished the international personality of indigenous nations. They granted conditional rights and duties to European States, without expressly relinquishing sovereignty or dominion, and in most instances they have been materially breached.

The main consequences of admitting that "Aboriginal" treaties are treaties in the international sense would be (1) the right to recourse in international fora, as opposed to the courts of Canada, and (2) the right to suspend the operation of treaties until Canada complied fully with its treaty obligations--that is, to restore the *status quo ante.*

The practical question is whether the injured party retains sufficient personality as a State

to take recourse under international law. Thus far, the world court has not been prepared to entertain arguments from Aboriginal nations, but the growing recognition of "indigenous rights" by United Nations bodies suggests that the court's position may change in the near future.

Thus far, the principal objective of aboriginal nations in Canada has been to *constitutionalize* their treaties--that is, to entrench the treaties constitutionally, so that they can no longer be terminated or impaired by municipal legislation, as interpreted by municipal courts. The issue here is whether these treaties can *also* be internationalized–which is to say restored as international instruments enforceable in multilateral *fora* such as the International Court of Justice. The two legal statuses are not incompatible. On the contrary, every treaty is a constitutional document, in the sense that it is the only basis upon which the parties have any legal powers or authority over one another.

Treaty renewal is essential to restoring the dignity and equality of Aboriginal peoples in Canada. Full respect for the Treaty Order on which Canada was historically founded is a direct means of achieving a genuine partnership between Aboriginal nations and European-Canadians. It involves deleting racial and colonial assumptions from Canadian law and bringing Canadian practices into harmony with contemporary, post colonial international law.

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Prologue

Today, as ever, prerogative Treaties pervade Aboriginal consciousness, guiding constitutional relations between the Imperial Crown and First Nations of Canada. Canadian scholars and lawyers appear to ignore the full meaning of these prerogative Treaties and rights however. Since the colonist were first forced to live by the prerogatives of the Crown, the ancient constitution of Great Britain, the very concept of royal prerogatives has been given a nuance of colonial domination. Colonists found ways to reinterpret the prerogative arrangements originally made to govern and control British North America, to disregard them as the origins of their own modern constitution. Today, they are comfortable in believing Canadian government grew out of mystical democratic traditions. This belief is as much a matter of prejudice as convenience.

To these scholars, this study may be disturbing. In this study, we will trace the beginnings and development of Treaties as a legal concept in international law, and part of the prerogative law of the United Kingdom. Treaty making with Aboriginal nations was not a uniquely North American phenomenon. During the 18th and 19th centuries, Treaties were made with many Aboriginal nations in Latin America, Africa, India, the Pacific, and Asia. Treaties were made by the French, Spanish, Dutch and other empires with the same aim as those of the British. These aims were to establish territorial claims and economic spheres of influence that would be respected by other European powers. In fact, the entire system of imperial relationships that dominated world affairs until 1914 relied on treaties with Aboriginal nations. Thus, the treaty relations between the Aboriginal nations and the United Kingdom can best be understood as a branch of international law.[1]

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[1] *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832; F.S. Cohen, The Spanish Origin of Indian Rights in the Law of the United States, 31 Geo. L. Rev. 1, 17(1942);

As in other branches of Eurocentric thought, international law has traveled in a cycle. In breaking the bonds of the Christian order, it created the Wesphalian treaty order, only to enslave the participants in a colonial order. The colonial order was then unraveled by the decolonization movement. Our modern world is a product of colonialism. It is a phenomena of law and history. It is divided politically into 171 territorial units, usually called nation-states. These political boundaries define territorial ways of life; they also define where people are allowed to belong and their identities. Beyond mere geographical fact, these boundaries inform an international or universal order. This prevailing order, both internationally and nationally, whether founded peacefully, by conquest, by cession, by exploration, or by internal revolution, generally has its own claim to right and justice.

The modern legal order claims to be the heir to an ancient theory of justice and intellectual legitimacy. It reaches back beyond territorial boundaries to ancient religions, philosophies, and, more recently, ideologies that explain the regime to other nations and to itself. The modern order is a Eurocentric order, based on the ancient languages and ideas of the Indo-European civilizations. Although the nation-states each claim an autonomous past and tradition, they also recognize certain modes of rulemaking and application. These modes of law are asserted to be universal and therefore properly their own, no matter where they were initially formulated, even if it be Athens or Rome or London. Even those regimes that are based on nothing more than power politics require justification. Typically, this justification is formulated in terms that other nations understand and approve.

Wherever the European nation-state goes, it carries its intellectual baggage with it, for better or worse. Ancient, medieval, and modern international systems–from the Papacy to the Holy Roman Empire, to the British Empire, to Napoleon, to the Hague Conventions, to the League of Nations, to the United Nations–have sought to retain a universal legal claim that states were not simply antagonistic to each other. In this

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M. Savelle, *Empires To Nations* 1974:138-43.

universalist legal tradition, each normative system has imagined an ultimate arbiter of nations' inevitable disputes, with certain procedures and principles to be applied. That war is the only solution to international disputes has been consistently denied. Yet, every world-system in turn has been jurispathic, killing the diversity of moral cultures that fell within its control.

It is no longer possible to ignore the breakdown of Eurocentric legal order, that has been occurring in the last decade of the twentieth century. The nation-state system is unraveling. While there are 171 states around the globe, there are also some 5,000 peoples. Most existing states are colonial empires. Within the boundaries of the nation-states, there are various peoples who share a language, culture, history and territory, but not a recognized political organization. Most of these peoples are trapped within and behind different colonial state boundaries. Most are indigenous to the territory, but are now considered minorities. Very few of them have ever been given a choice when they were made part of a state.

With the end of the cold war, the ethnic and racial conflict between indigenous peoples and nation-states will become the most explosive issue of our time. If the world was a global village of 1,000 people, the majority of the villagers would be indigenous people. There would be 630 indigenous people (Asia (564), Africa (86), and Americans (80)). There would be only 270 Europeans (210 Europeans; 60 Euro-Americans and Euro-Canadians). The sheer weight of humanity will continue to challenge and dismantle the remnants of the colonial and neo-colonial orders.

Our task, here, is to reconcile the older colonial order with a post-colonial international order. The complicity of law with colonialism is all too often disregarded, conveniently by the legal profession. For a discipline perceived committed to unmasking injustice and oppression, such neglect of the jurispathic traditions of Eurocentric law is remarkable. To explore this neglected area requires us to begin by sketching the development of the legal framework of colonialism. This approach is necessary to correct a prevailing amnesia in the legal profession, and the illusion that the legal profession has

stood outside of, or acted as neutral agents in the history of oppression of Aboriginal people.

The contemporary debate over Aboriginal nations is still confined by the colonial traditions of international law. Modern international concepts of Aboriginal and treaty rights are shrouded in jurispathic principles of European civilization with its fascination with violence as an ordering device, along with its preoccupation with slavery, race, and evolutionism. Yet these principles only developed within the last hundred years to justify the colonial privileges of European nations and their colonizer-immigrants. The colonial version of international law was little more than a conspiracy of European states between 1860-1945 to subject Aboriginal peoples around the globe to totalized racial discrimination, ethnocide, and genocide. They justified this conspiracy in the name of law. But it was race law.

The position of Aboriginal peoples in Canada has been defined by judicial decisions. In the post-colonial legal order these decisions are no longer acceptable. The erosion of the assumptions and presuppositions that supported the colonial order and informed these decisions requires their reinterpretation. Methods and categories inherited from the past have limited validity and utility in the new legal order. Our task is to encourage rather than resist this transformation of the legal order surrounding Aboriginal peoples. Our presentation seeks to stretch and disclose rather than reinforce the boundaries that currently define law.

The term "decolonization" refers to the international process of liberating the peoples seized and absorbed by European powers since 1492. Its legal status within the United Nations is marked by the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960), *The Declaration on the Elimination of All Forms of Racial Discrimination* (1965) and the *Human Rights Covenants* (1966). These statutes begin the third great transformation or revolution in international law. The first transformation was the Gregorian Papal Reform of 1075-1122, that created canon law and the Crusades. The second began with the Treaty of Wesphalia (1648), that embarked

on the establishment of a world order based on the secular sovereignty of nation-states and on treaties. This revolution led to colonialism, national revolutions and to international institutions, such as the League of Nations and the United Nations, designed to manage the ensuing violence. The violent history of colonialism marked the end of the Treaty order and set the stage for the emergence of a post-colonial order based on the liberation of the peoples.

Decolonization is the most recent legal transformation, defined by international declaration and conventions of the United Nations, that is attempting to replace the colonial order with one that is based on eliminating racial discrimination and violence, on human rights, and on self-determination. This transformation is not complete, it is still in its infancy. It is a legal strategy or practice rather than a legal rule. Because the colonial age is slowly coming to an end and is no longer a seamless and self-defining web, we are now able to discern the path of its successor. Decolonization is more than a movement away from colonial political domination. It is a movement away from European values and systems, including the languages that communicate these values. The most important part of decolonization is decolonization of the mind. In place of colonial thought, Aboriginal people face the task of constructing "indigeneity" and distinguishing it from colonial intellectual traditions.

The rejection of Aboriginal rights in international colonial law have become institutionalized in modern municipal or domestic law.[2] In Canada, the gap between the colonial and post-colonial legal orders is apparent. While Canada has endorsed the decolonization process in its international relations, it is actively struggling not to decolonize its municipal law. Only recently have various royal commissions and inquiries

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[2]Veeder, Greed and Bigotry, Hallmark of American Indian Law, 3 Am. Ind. J., no. 12, at 2, 8 (1977); R. Strickland, Genocide-at-Law: An Historic and Contemporary View of Native American Experience 34 U. Kan. L. Rev 713, 740 (1986); R.J. Williams, *The American Indian In Western Legal Thought: The Discourse Of Conquest* (1990).

revealed the extent to which the systemic racism infects the administration of criminal justice in Canada and its provinces. This pervasive racial prejudice is inherent in every part of Canadian law, has been used and continues to be used to undermine Aboriginal peoples' human rights, self-determination, and Treaty rights. This racial law is the prison house of Aboriginal people, and Canadian judicial decisions continue to uphold this anomalous situation.

Our study will trace the legal history of the Holy Roman Empire and its transformation into a Treaty Order as a stage in the development of international law. We will examine the historical origins of the Treaty Order and a regional survey of the treaty practices. We will then deconstruct some of the prevailing myths of international law that were developed by European colonial states after they created the global Treaty Order, in their effort to escape their obligations. Inherent in their attempted justification was the idea of survival of the fittest or most civilized in the struggle over the limited resources of the world. We will then briefly turn to Canadian and United States treatment of treaty rights in domestic law to reveal how colonial racism operate as a restriction of Aboriginal and treaty rights. We conclude with suggestions for decolonizing international law, a discussion of recent steps taken by the United Nations to remedy this continuing problem of jurispathic legal authorities and attitudes in international law.

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PART ONE

ORIGINS OF THE JURISPATHIC LAW OF COLÓNIZATION

A. THE JURISPATHIC LAW OF CONQUEST

In the era of exploration, European consciousness came to America. The mystifying coasts and peoples of America became a new field of space and time for Europeans. None of the existing European intellectual systems, especially the divine knowledge of the Holy Bible, had anticipated these lands or peoples. America's very existence demanded new explanations and created doubts about the foundations of European society. The land, its people—both required justification. Such explanations would ultimately create new categories in the European mind, forcing the traditional knowledge of the Europeans to change dramatically and ending forever an ancient solitude.

The existence of America disclosed some conceptual weaknesses that underlay European civilization and established beliefs. The New World evidenced another human realm which could not be subordinated to the relentless European or Biblical pasts. European knowledge, previously considered universal and divine, appeared fragile, vulnerable, and conventional.

The enigma of the continent and its mysterious societies raised a column of whispered questions. The lack of answers shattered the cloistered universe of Ptolemy and the Holy See. This intellectual system of Christ's universal Christian commonwealth was constructed around the assumption that everything which happens in nature, happens out of special conditions of necessity. The unexplained Aboriginal societies of the "New World" challenged the existing sacred and profane thought of the European mind. They challenged the assumed necessity principle behind its thought.

Conscious of the great silence in European knowledge, European clerics and intellectuals became agonizingly aware of their limited social vision and knowledge—their all knowing God, his divinely instituted Truth and Knowledge, had not anticipated another people, another land. Doubt shrouded the Christian world's worldview and perceived destiny. Petit de Julleville summarized the impact of this discovery on the European world:

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> The discovery of America enlarged the habitable earth and offered to Europeans unlimited fortune in the future and world domination. At the same time the earth, dispossessed of the central place it was to hold in the universe, was no more than a point lost somewhere in unlimited space. These two conceptions, the world at once enlarged and diminished, opened the spirit of conquest and enterprise, and in the eyes of [the] philosopher, reduced to but a grain of dust in the open and bold conceptions of a philosophy freed [from] the chain of authority (Scott 1934:3).

Included in this consciousness were the unresolved conflicts in Europe between spiritual and national authority. These two conceptual realms had fragmented European society, and the current mix was a compromise which attempted to hold human potentiality and society together. At the same time, the two realms also revealed the innermost secrets of a troubled European past.

1. The Formation of the Universal Catholic Commonwealth and Canon Law of the Just War and Crusades.

In terms of European history, the discovery of the New World's societies rekindled existing conflicts, especially the lingering European conflict over national and sacred authority which the Holy See had created in its quest for a global order united under the Petrine mandate of "Feed my sheep" (Williams 1990:14-58). From the European tribal societies existing in Roman times, the Holy See created centralized political structures, over whose Princes the Vatican proclaimed itself the Supreme Power. At first, the Princes rejected this proposed centralized authority, but eventually the Church forced them to accept it. With the discovery of the New World, the Holy See would expanded the Church's supreme authority to include the new realm.

The Holy Roman Church's transformation of European tribal societies into the Holy Roman Empire was the precedent for the conflict which emerged in tribal America. Ironically, forming national states out of tribal Europe eventually created the decline of

the *Republica gentium Christiana* and gave rise to the Law of Nations.

The nationalization of tribal Europe began in the 8th and 9th centuries, when the Church urged the Western European tribal chiefs to codify their tribal laws and accept centralized political authority. The drafting of tribal customs by Christian Princes—the *Salic Law* adopted by Clovis, the first Christian Prince of the Franks, the *Laws of Ethelbert*, adopted by the first Christian Prince of England, and the *Russkaia Pravda*, adopted by Rus, the first Christian Prince of Kiev—were considered an essential part of their conversion to Christianity and to the new European order (Berman 1983).

This codification of tribal law was the first step in transforming European tribalism into centralized political authority. European tribalism, similar to American tribalism, gave no coercive authority to the chiefs. Law was conceived of primarily as a spontaneous expression or mode of communication of the unconscious mind of the people—their "common conscience"—rather than as a deliberate and rational expression of authority. The compilations of European tribal customs, like the sacred writings of the Bible, conferred a new sanctity on the European chiefs. They were transformed from representatives of tribal deities to representatives of a universal deity and Christian heritage (Kern 1939: 179.).

In accepting a centralized Catholic political structure, the tribal chief (*dux*) initiated the universal king (*rex*). Catholicism's moral values, especially its responsibility to protect the poor and helpless against the rich and powerful, removed the tribal chief's passive role in the folklaw. The Christian Princes were thus responsible for directing the development of the law in a way consistent with the Bible (Wallace-Hadrille 1971:29ff.). And so, the concept of *law* began to pervade European tribalism.

In the Gregorian Reforms of the 11th century, the Holy See proclaimed the final structure of this centralized Christian body politic, the *societas Christana*. Pope Gregory VII (1073-1085) asserted legal supremacy over all Christians, clergy and Christian Princes, thereby stripping the Princes of some of their newly cherished powers. He proclaimed the laws governing this universal society in decretals. The decretals were the

binding juristic decisions of the Church, inspired by Roman imperial models. The Holy See seized on these civil law principles to carry on a rationalizing project for its own Canon law, such as the Camaldolese monk Gratian's *Concordia discordantium Canon um* (concord of discordant Canons) or *Decretum* (Williams 1990:26-7). This was the first systematization of Church texts and decretals. It created a formalized, rationalistic legal code for the governance of the universal body politic, *i.e.* the constitutional principles of papal jurisdiction. The *Decretum* also defended the Holy See's administrative authority over subordinate princes and, indirectly, over non-Christians. The Holy See asserted unquestioned legal authority to declare the divine truth and to exorcise any opposition to this universal truth.

The Germanic Princes responded to this absolutist assertion with military action. They did not formulate any theory of secular autonomous authority of their own, however, and eventually acknowledged that for salvation, a human had to be subject to the Holy See. A compromise was reached in the *Concordat of Worms* in 1122. The disputes between the English and Normandy Princes were not finally resolved until the martyrdom of Archbishop Thomas Becket in 1170. The *Concordat of Worms* (1122) and of *Bec* (1170) established the Holy See, as Vicar of Christ under the Gregorian Reforms, with absolute authority over matters of worship and religious belief, and over the clergy. These battles also set the stage for the subsequent promotion of the Crusades, the divine right to enforce the Holy See's vision of truth in non-Christians realms.

Gabriel LeBras stated that after the Gregorian Reforms,

> The Pope ruled over the whole church. He was the universal legislator, his power being limited only by natural and positive divine law. He summoned general councils, presided over them, and his confirmation was necessary for the putting into force of their decisions. He put an end to controversy on many points by means of decretals; he was the interpreter of the law and granted privileges and dispensations. He was also the supreme judge and administrator. Cases of importance—maiores

> causae—of which there never was a final renumeration, were reserved for his judgment (1926:333-34).

Through the system of Canon law, the Church declared and enforced its ecclesiastical claims over both Church organization and the Princes, as well as over the personal lives of Christians. The Gregorian Reforms and the Princes' rebellions against the reforms have been called the first of the Great Revolutions of Western history (Rosenstock-Huessy 1931) which produced a new structure of authority both internationally and locally. They produced a reactive relationship between spiritual and secular spheres, the Church and State, which lasted over four centuries, until the Protestant Reformation and the rise of absolute monarchies.

After the "Great Revolution", European society was divided into two legal realms, two polities—the ecclesiastical and the secular—each with its own jurisdiction. The Christian Princes resisted ecclesiastical authority by creating secular law. They established the foundations of the western legal system, a legal structure of ideals and institutions about secular conduct, equal in authority to Canon law. The secular law of the Prince was aimed at limiting the authority of Canon law, protecting the kingdom's local heritage from the Vatican (Rosenstock-Huessy 1931).

Included in the Holy See's authority was the idea of Holy War. The Holy See could direct the Christian princes against non-Christians. In the fifth century, St. Augustine had argued that civil authority arose from man's sinful nature, and a just war (*bellum justum*) or holy war "sanctioned by God" arose from the need for self-defense or to regulate human wickedness. Pope Gregory VII, as archdeacon under Alexander II (1061-1073), had utilized this authority to justify the Holy See's *reconquista* of land held by infidels (Iberian Peninsula) or by those who resisted the assertion of ecclesiastical privileges (England). He used the same argument against Eastern Christianity. His successor Urban II (1088-1099) began the Holy War to retake Christ's sepulcher in Jerusalem and the Holy Lands from Turkish control. The Holy See's *plenitudo potestatis* ("plenitude of power"), borrowed from the Roman imperial prerogative to grant

dispensations from legislation, came to be regarded as an unbound authority. Thus, Canon law not only established that all earthly authority was subservient to the Holy See, but also that no earthly ruler's power was legitimate unless he believed in the true God and received authority from the Holy See.

In the late Middle Ages, the Holy See's authority was challenged. Utilizing the ancient texts of Roman civil law, the *Digest* and *Justinan codes*, and ancient Greek naturalistic philosophical texts, some Princes and Christian thinkers began formulating a legal theory of royal power. Cicero and other Stoic philosophy argued that the natural state of human existence was rational. The rational nature of humans, rather than their sinfulness, could be used to formulate rules of proper conduct in secular society. In the *Nichomanchean Ethics*, Aristotle argued that universally recognized conduct accepted by all civilized peoples, illustrated the rules of natural justice. Natural justice was an implicate order. It was the rationally ordered universe manifesting itself in daily life, but never fully attained. Such an implicate order could establish a secular order. The ancient legacy of *ius naturale* and *ius gentium* provided the foundation of a human-centered idea of secular law in the Renaissance.

Thomas Aquinas and Pope Innocent IV (1198-1216) harmonized the Aristotelian and the humanist ideas with the Canon law. Aquinas elaborated a Catholic system of natural law, and Innocent IV proclaimed it universal. Both conceded that every rational creature was bound to the dictates of a natural law as prescribed by the Holy See through Christ's message. Whenever rational humans, Christian or not, acted contrary to the Christian version of natural law, the divine law required the Holy See to protect their spiritual well-being. Divine reason, according to the Church, had revealed the immanence of unity and hierarchy of the world. Since human reason was imperfect, God had required mediating influences so that divine reason could be comprehended. God's will, interpreted by the Holy See and priests, thereby expressed a far more perfect rationality than human reason. Those who refused to recognize the one correct way of life revealed to the Holy See were not only irrational, but in error. They needed remediation (Williams

1990:46).

This synthesis of ancient natural law and Canon law also declared that those who rejected Christ's message demonstrated their need for remediation. In Innocent IV's decretal, *Quad super his*, he addressed the rights of non-Christians (Muldoon 1977:191-2). He argued that the Crusades were a just war of defense, an extension of Augustinian's theory of just war for the reconquest of Christian lands seized unlawfully. In addition, he argued that all humans shared universal reason. Accordingly, infidel societies possessed the same natural-law rights as Christian societies to rule themselves (*imperium*), and control land (*dominium*). Neither their lordship nor land could be confiscated by Christians solely on the basis of their nonbelief in the Christian God. Like Christians, however, non-Christians, as rational beings, were responsible for their conduct under natural law. Excessive breaches of the Christianized natural law were evidence of a lack of reason, and this required remediation. The Holy See could call on Christian princes to raise armies to punish such serious violations of natural law by non-believers, or he could order missionaries accompanying Christian armies to convert the violators. In the process of protecting their spiritual well-being, their non-Christian lordships and land could be confiscated by properly authorized Christian armies, for the benefit of either the Holy See or the Christian princes.

Innocent's position was affirmed in the Council of Constance in 1414, which rejected the competing theories of an English Canon-law scholar, Alanus Anglicus. Anglicus advocated denying infidels the natural rights of lordship and land because they were not in a state of grace. In addition, he advocated the Holy See's unilateral right to conquer non-Christian lords and take their land solely on the basis of their non-belief in the Christian God. He asserted the Holy See's authority over all forms of lordship and *dominium*. His views were derived from those of Henry of Susa, bishop of Ostia (d. 1271), known as the Hostiensian (or Ostiensian) doctrine (1984:127 citing Parry 1940:13). Henry had maintained that when Christ had become King of the Earth, heathens had lost their rights to political jurisdiction and worldly possessions. He held

that Jesus had transferred his temporal and spiritual dominion to Peter and hence to the Holy See. In practical terms, he suggested that a people without a knowledge of the true God could retain their lands *only* with the approval of the Church. The Holy See had the right to appoint a Christian ruler in order to bring such people within the fold of the faith (*ibid.,* citing Folmer 1953:21; Parry 1940:320-21). Under the Ostiensian doctrine, Adrian IV had accorded Ireland to Henry II of England in 1156 “as an inheritance”, on the conditions that he should convince the Irish church to accept the authority of Rome and bring order to Ireland’s government.

The Council also declared as heretical the English theologian John Wyclif's argument that *dominium* was contingent on grace. He argued that no person could be a civil lord, prelate, or bishop, while living in mortal sin. All valid exercise of any ecclesiastical or secular authority depended on the officeholder's spiritual state, thus immoral or corrupt clerics or lords had to be removed from office. Any Christian attempt to conquer non-Christians were therefore just, but had to proceed according to Canon law, recognizing their natural rights to lordship, land, and belief. Violation of their natural rights would itself be considered heresy.

Thus, divine reason and truth upheld the Holy See's power to create universal obligations for all peoples' behavior, not merely Christians. Truth, knowledge, power and wealth had been centralized in the Holy See and Christian princes. Powerful Christian armies could facilitate truth and knowledge, and weak Christian armies could patiently appeal to natural rationality to facilitate truth. (Williams 1990:47). These doctrines temporarily appropriated the thirteenth-century humanists' challenges to the Church.

These fragmented realms were new to tribal consciousness. To the American Nations, the entire world was spiritual, mysterious and in a state of endless change, conceived of as an eternal spiral. Nevertheless, the European immigrants brought to America a hostile cognitive vortex of conflicts and desires.

2. American Nations and the Transformation of Canon Law to Civil Law in Renaissance Spain.

The concept of a global league of Christian Princes under the Holy See dazzled the shaken European nobility's minds. It restored their faith in their own cultural values. The Holy See, as Christ's Vicar in the society of nations, proposed to lead both the Christian and converted princes to their "cosmic place" in a world order. However, the unity of the vision did not last. The Pope's dogmatic enactment of the *Bull of Demarcation* in 1493 ended most of the European princes' support of a global Holy Roman Empire and began the battle of legitimate authority, that created the Law of Nations.

Ambiguous events surrounded the 1493 Bull. On the mysterious coast of an unknown island (often called San Salvador), some European sailors stood face to face with painted Taino tribesmen. On the 12th of October, 1492, the Taino people clustered around while Christopher Columbus (or, in the Spanish orthography, Cristobal Colón), an Italian explorer, took symbolic possession of the Caribbean island or cay, called *Guananhani* by the Taino, in the names of Ferdinand and Isabella of Spain. Before the doubtlessly perplexed Tainos, and without paying them any attention, Colón ordered a deed of possession for the island drawn up by his royal notary, armed with the European inkwell. In Colón's *Journal* it was written, "He called upon them to bear faith and to witness that he, before all men, was taking possession of the said island—and in fact then took possession of it—in the name of the King and of the Queen, his sovereigns [...]".

The scribe wrote that the Tainos watched in silence as Colón spoke his foreign language. Colón then turned his attention to the Tainos and carried on an imaginary dialogue with them. He asked them where gold could be found and the location of the residence of Marco Polo's Grand Khan. He presented them little red caps and glass beads which they simply hung around their necks. According to tribal customs, the Tainos gave Colón gifts of parrots, darts, and skeins of spun cotton. Then Colón and his men sailed away to new lands.

The entire event, to the Tainos, was probably incomprehensible. But since that time, European ideas, their problems of order, and their inkwells have surrounded events

affecting Aboriginal peoples everywhere. Colón, however, saw the events differently. Colón regularly claimed to understand what was said to him by the Aboriginals, while giving, at the same time, proof of incomprehension. What he understood in his illusions was gathered from a summary of books by Marco Polo, as well as Pierre d'Ailly's *Imago Mundi* and Pope Pius II's *Historia rerum ubique gestarum*. At other times in his *Journal*, he admits that there is no communication: "I do not know the language of the men here, they do not understand me, nor do I nor any of my men understand them" (Todorov 1982 25-33; *Journal* 27 November 1492). To understand Colón's conflicting statements, one should remember that the 1485 ecclesiastical commission at the University of Salamanca who approved the feasibility of Colón's plan as consistent with the Holy Writ, did so under the scriptural prophecy that all people, tongues and languages would one day be united under the banner of the Savior (Williams 1990:77).

Colón was not a modern thinker. Like most men of his age, he was a Catholic fundamentalist, a final strategist. He was not concerned with understanding the Aboriginals or with observing nature in order to seek truth, for he knew in advance the ultimate truth he would encounter. In the same manner as the Church Fathers interpreted the Holy Scriptures, he understood the New World. The ultimate meaning of the world was given from the start; what he sought was the path linking the givens of medieval knowledge with new experiences.

As with most of his wishful thinking, the New World was not what the Admiral thought it was. Colón did not discover a new land; he "knew" where to find the eastern coast of the Orient. Unfortunately, the land was not the Orient which Marco Polo had described. Although the Aboriginals purportedly told him that he was on an island, Colón rejected their knowledge. Relying on divine authority, he remained convinced that the island of Cuba was part of the islands of China on the Asian continent, thus he called the people *los Indios.* Colón's beliefs were instrumental. They aided his competition with Bartholomew Dias, the Portuguese explorer who had rounded the Cape of Good Hope and reached the East African coast. Dias' voyage laid open the seaway to India for the

Portuguese Crown. The *Treaty of Alcoacovas* of 1479 and the papal *Bull Aeterni regis* of 1481, granted the Portuguese Crown a trading monopoly in India. The Holy See also assigned all discoveries of any new lands south of the Canary Islands and west of Africa to the Portuguese Crown.

Under the Gregorian Reforms, papal grants were considered the ultimate law among Catholic princes. Their authority was the ninth century *Donation of Constantine*. The Donation, technically known as the *ratione peccati* doctrine of indirect papal authority, held that ecclesiastical power was naturally superior to the secular power. Since there was only one Lord of the Earth and the Pope was considered the representative of that power, he was the Vicar of Jesus Christ on Earth, and the only truly moral and just source of law.

The legitimacy of papal Bulls relied on the doctrine of a universal papal dominion in both temporal and spiritual matters. The Canary Islands had also been the subject of a papal grant. In 1433, under Innocentian principles, Pope Engenius IV (1431-1447) issued a bull banning all Christians from the Canary Islands as a protective measure for converted inhabitants and non-Christians. In 1436, King Duarte of Portugal appealed this ban with respect to the islands inhabited by non-Christians. He argued that he was the most effective agent to fulfill the Holy See's indirect (*de jure*) guardianship over non-Christians, to prevent their oppression by other lords, and continue their conversion. He stated that the infidel Canary Islanders:

> are not united by a common religion, nor are they bound by the chains of law, they are lacking normal social intercourse, living in the country like animals. They have no contact with each other by sea, no writing, no kind of metal or money. They have no houses and no clothing except for coverlets of palm leaves or goat skins which are worn as outer garment by the most honored men. They run barefoot quickly through the rough, rocky and steep mountainous regions, hiding [...]in caves hidden in the ground (Maldoon 1977:55).

These infidels would not permit missionaries to land on their islands, thus military force was necessary to protect the missionaries and their work. Because their lifestyle evidenced their incapacity to conduct themselves according to natural law, Engenius issued a papal bull, *Romanus Pontifex*, authorizing the Portuguese King to convert these barbarous Aboriginals and control the island on behalf of the Holy See. This bull was reissued several times, each time extending Portuguese geographical rights to the continent of Africa and its islands. It united spiritual and secular affairs with an evangelical purpose and guardianship.

In 1454, Pope Nicholas V issued a bull granting Portugal the right to possess non-Christian lands on the West Coast of Africa, and delegated authority to establish and enforce trade monopoloies. In 1456, Calixtus III granted the Grand Prior of the Order of Christ, of which Prince Henry was the administrator, spiritual control of all Portuguese dominions then and thereafter existing. A justification for this was the fact that a Catholic Prince had discovered these new lands. This was cited as positive proof that Roman Catholicism was the true faith: God had indicated which religion he wanted taught to these strange people.

In response to the *Treaty of Alcoacovas* of 1479 and the papal *Bull Aeterni regis* of 1481 to the Portuguese Crown exclusive trading jurisdiction to India, the Spanish Crown had commissioned Colón to find a more competitive route to India and Japan by sailing the Atlantic. Spain had just emerged from a four-century war with the Moors. It was the leading European nation in jurisprudence and in the practice of law. It had not only developed constitutional limits on an absolute monarch but also insisted on the legal rights of free people. The Spanish monarchy was receptive to Colón’s explorations because it was in desperate need of new sources of wealth.

The 1492 royal commission to Colón required his expedition “to discover and acquire certain islands and mainland in the ocean sea". The Crown hoped that “with God’s assistance, some Islands and Continents will be discovered and conquered by your means and conduct,” and that “you shall be rewarded for it”. Colón imagined he had

found a new route to India, but he was wrong.

The island he discovered was different from any Christian lands, Muslim lands or recently discovered coasts of the Africa or Asia in a way that confronted European civilization and thought with a difficult set of problems. As long as Europeans conceived of these lands as part of India, there was no contradiction, but it soon became evident that Holy Scripture had omitted an entire hemisphere from its revelation of God's plan. The nature of the land was the easiest of the problems. The unexplained human realm was the deepest of the problems. However, neither the lands nor the people could be reconciled to a European past.

Besides the treaties and decrees confirming these territories to the Portuguese Crown, there was a question in Canon whether that Colón's Commission bore prior papal authority for appropriations of non-Christian land. Under Innocentian principles, secular princes and their agents did not have inherent authority to interfere with infidels' rights of lordship or land. Colón had been detained and interrogated in the Azores on his return voyage by the Portuguese. Upon learning of his discovery, Portugal's King John informed the Spanish ambassador that this new western possession had been discovered on Portugal's behalf by the Spanish Crown's agent. In response, the Spanish Crown dispatched diplomatic envoys to the Holy See in Rome seeking a confirmation of Spain's right to Colón's discovery (Williams 1990:78-79).

Pope Alexander VI (1492-1503) issued three successive bulls confirming the title of the Spanish Crown, based on the petitions drafted by Spanish Canon lawyers. The first bull, *Inter caetera divinai*, issued in May 1493, declared that Colón had come upon a undiscovered people, who were well disposed to embrace the Christian faith, and granted all lands, discovered or be discovered, to the Spanish Crown. The Holy See ruled that these newly discovered people were “human”, and “could better be freed and converted to our Holy Faith by Love than by Force”. The Holy See further declared that “among other works well pleasing to the Divine Majesty and cherished of our hearts; [the discovery of new worlds] assuredly ranks highest, that in our times especially the

Catholic faith and the Christian religion be exalted and everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself."

Hence, within a year of their discovery, the Holy See extended the Great Chain of Being to the inhabitants of America. They were called "Indians" because they were still conceptualized as part of the Indian continent, rather than the emerging idea of America. Even though the "Eastern" (Indian-Asian) region was considered to be inhabited by infidels who were enemies of Christ, the Holy See concluded that the Indians were "sufficiently disposed to embrace the Catholic faith and be trained in good morals" (Davenport 1917: I:56-83). The Vatican adeptly refused to enter on the philosophical implications of either the location of the New World, or the nature and capacity of its Aboriginal peoples.

The Vatican's actions were inconsistent with existing law, however. Canon law protected non-Christians' lordship and lands, although it allowed a papal guardianship to protect them during the process of conversion, and even permitted the military conquest of non-Christian societies that were not well disposed to accept Christianity, or were violating natural law. *Inter caetera divinai* asserted that the mere discovery of peaceful non-Christians, not in violation of natural laws, permitted the confiscation of their lordships and their land.

The Portuguese Crown contested this bull on the grounds of prior delegation, in view of the geography of Colón's discovery. The Bull *Inter caetera* conflicted with the 1479 Treaty of Alcoacovas and the 1481 Bull Aeterni regis, which gave the Portuguese Crown a trade monopoly over India. But if what Colón had discovered actually was China or Japan, the 1493 Bull might not have an encroachment on rights after all. Pope Alexander obligingly issued a second, predated *Inter caetera*, drawing a line of demarcation 100 leagues west of the Azores. Spain took title to all territory west of this line. The bull declared

[T]he peoples inhabiting the said island and lands believe that one

> God-Creator is in Heaven; they seem to be well fit to embrace the Catholic faith and to be imbued with good morals; and there is hope that, were they instructed, the name of the Savior, our Lord Jesus Christ, could easily introduced into these lands and islands (Williams 1990:81).

The Holy See granted to the Spanish Crown "full, free and integral power, authority and jurisdiction to the discovered land," in the following terms:

> we give, concede and assign to you [...]by the authority of Almighty God bestowed upon blessed Peter and by the Vicariate of Jesus Christ which we discharge on earth–all the islands and mainlands, found or to be found, discovered or to be discovered, westwards or southwards, by drawing and establishing a line running from the Arctic to the Antarctic Pole (*ibid.*)

The Bull backed up this grant with the sanction of excommunication. It forbade any other person to approach Spain's newly recognized possessions or future possession for purposes of trade or for any other reason.

To deal with the 1479 Treaty of Alcoacovas, The Holy See resolved these obligations by negotiating the Treaty of Tordesillas between Portugal and Spain in 1494. The 1494 Treaty varied the terms of both the 1481 and 1493 Bulls, formally resolving the jurisdictional disputes between the two kingdoms entitlements by assuming that Colón had found parts of the Orient rather than India. An imaginary line of jurisdiction was established over the newly discovered lands in the Atlantic Ocean, running north and south and extending the original demarcation from one hundred leagues to three hundred and seventy leagues west of the Cape Verde Islands. To the east of the line, Portugal had temporal authority; to the west of the line, Spain had authority. The line created an new international order. In their respective entitlements, each Crown would be secure from intervention. Later, it was discovered that the Holy See had given Spain virtually all of the North and South America, leaving Portugal only a fraction what is now Brazil.

Neither of these Catholic princes questioned the Holy See's characterization of Aboriginal people. Pope Alexander VI’s announcement that the inhabitants of the New

World were human was not a revolutionary concept. What it represented was a merger of two existing paradigms of human nature. St. Augustine had stated that no matter how strange a man might appear in his person or in his customs, and no matter where he came from, there could be no doubt that he descended from Adam (*City of God*, bk. 16, chap. 8.). "All the people of the world are men;" stated Cicero in the Roman law, "and there is only one definition for each and every man, that he is rational" (Elliott 1970:48). Since the papal decree was constructed on these traditions, its categorization of the inhabitants as human and rational caused little stir among Christians.

Different implications of the nature and capacity of the Aboriginal peoples had immediately occurred to Colón, however. On his first day in the New World, he expressed two contradictory thoughts about the inhabitants—and in many ways, these two thoughts represented the collective European mind and its historical contradictions. First, he mused that these gentle and peaceful people might be won over to Christianity better by love than by force. Yet, as he finished his journal entry for that day, a second thought crossed his mind: that the "Indians" could also be easily enslaved (Morison 1942:228-233). Although these thoughts appear inconsistent, both were eventually employed to justify the brutal exploitation of the inhabitants of the New World.

Colón initially wrote of the Aboriginal "Indians", that "they do not hold any creed nor are they idolaters; but they all believe that power and good are in the heaven" (*Spanish Letter* 1493/1893:12-13). On his second voyage, he contradicted himself by noting that each village had a house that contained "wooden images carved in relief" where the people prayed (Second Voyage, 1494-95). In his last will and testament, 1506, Colón referred to the tribal people as "cannibals", a term derived from the Carib tribal language of America meaning "valiant men".

The 1493 Bull did not give the Spanish Crown the right to invade, conquer, storm, attack, or subjugate the Indians; it gave the Crown the authority to "subdue "(*subicere*) them–that is to make them vassals. This varied from the terms of the 1452 Papal Bull granted to Nicholas VI, the King of Portugal, for the African continent, authorizing him

to "invadendi, conquirendi, expugnandi, debellandi, and subjugandi" the Saracens, pagans, and other enemies of Christ he might find there, and reduce them to perpetual servitude. By comparison, the 1493 Bull dismissed any hint of conquest in the Colón commission from the Spanish Crown, although it granted complete temporal jurisdiction over the discovered land in return for the an undertaking to convert the inhabitants to the Catholic faith.

The events in 1492-1494 created an appearance of whim and lack of principles to Canon law. The Holy See arbitrarily divided the New World between the Spanish and Portuguese Crowns, and the fact that existing grants, the principles of universal papal guardianship, and the natural rights of the Aboriginal people were ignored created anxiety among the other Christian princes. The fact that the Pope was a Spaniard (Rodrigo Borgia), who owed his papacy and his family's status to the Spanish Crown, compounded the problem. The Pope's actions did not seem to be divinely inspired, but unprincipled and political.

These Papal decisions dismayed other Christian Princes and left them with a sense of injustice. As they found themselves excluded from the New World's riches, they renewed the smoldering tensions between the sacred and secular authorities. The question of entitlements to the New World simmered among the Catholic nobility in Europe.

The Holy See's allocation of the newly discovered lands gave the Church and Christian Princes an alternative venue to continue their conflict over social control. Both sacred and secular authorities were presented with another chance to extend their respective jurisdictions. The New World provided another opportunity for the Christian Princes to continue to challenge the papal authority, and another opportunity for the Church to prove its sacred authority. Although the northern European princes questioned the Holy See's authority to divide up the universe, the Vatican ignored them. In the subsequent Bull of 1497, the Pope assigned to Spain and Portugal, as God's best tools, the mission of Christianizing the Aboriginals under their separate spheres of influence.

B. GENOCIDE, MORAL SIN AND CIVIL LAWS.

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

“In order to make your sins against the Indians known to you I have come up to this pulpit, I who am a voice of Christ crying in the wilderness of this island,” a priest declared at the end of 1511, “and therefore it behooves you to listen, not with careless attention but with all your heart and senses, so that you may hear it, for this is going to be the strangest voice that you ever heard, and the hardest you expected to hear” (Hanke 1949:17). The speaker was Father Antonio Montesiños, spokesman for the Dominican Order in Española. With his sermon, developed from the 1493 Bull, Canon law and Aquinas' humanistic thought, he began the search for a higher law which protected the Aboriginal people and their rights.

"[T]his voice says that you are in mortal sin, that you live and die in it, for the cruelty and tyranny you use in dealing with these innocent people.” Inherent in Father Montesinos’ condemnation of the immigrants’ mortal sin were forbidden questions: Are the Indians not human? Do they not have rational souls? With what right do Spanish immigrants oppress the Aboriginal people living peacefully in their own land? The assertion of moral sin by the Dominicans, the most zealous defenders of the religious orthodoxy, and the order of Cardinal Torquemada who supervised the Spanish Inquisition, was a serious challenge to the legality of the Spanish administration in of Española in America.

As early as 1501, the Crown instructed the Governor of Española to separate all the Aboriginal people from Spanish Colonists and place them under the Crown's protection. The colonists refused, and the Crown was forced to withdraw its order and re-authorize the *encomienda* system. They argued that only by forcibly denying the Indians their freedom and appropriating their labor could the Holy See's objectives of Christianization and civilization be accomplished. To save the Indians' souls they had to be enslaved. In 1504, the Crown adopted an alternative strategy. Queen Isabella appointed the Dominican missionaries to carry out her papal obligations to the inhabitants within Española, replacing the Franciscan missionaries the first Dominicans arrived in Española in September of 1510. By December of 1511, the Dominicans had

witnessed enough abuse and outrages by the immigrants against the Aboriginals. Thus, they began a struggle to protect the Aboriginal people, which would add fuel to the both Renaissance, the Protestant reformation, and the Law of Nations.

Father Montesiños demanded the immigrants to tell him "by what right or justice do you keep these Indians in such cruel and horrible servitude? On what authority have you waged a detestable war against these people who dwelt quietly and peacefully on their own lands? Why do you keep them so oppressed and weary, not giving them enough to eat nor taking care of them in their illness?"

The congregation could give him no answers. They had assumed their authority, assumed their superiority over the Aboriginals. Faced with this moral and legal predicament, they tried to ignore the Dominican's questions, but the priest refused to conspire with them or to ignore the issues. By the beginning of 1512, local administrators and settlers began to exclude the Dominicans from Española. Exclusion, however, forced the Dominicans to bring their advocacy directly to the Spanish Court.

Beginning with the writings of Peter Martyr, who was on hand at Barcelona to welcome Colón on his first return voyage from America, a tradition had begun of describing the Aboriginal people of America as living in a golden age of liberty, innocence and ease. The vicious existence of European feudalism—the obsession with property and money, concern for the future and pointless aristocratic superfluity, and hard toil to meet the necessities of life—were said to be unknown to the Americans. This image of the inhabitants of the new continent was most troublesome; Spaniards' brutal exploitation of such civilization demanded a serious explanation. The Dominicans forced these issues both in Catholic Europe and America.

Among the congregation at Española listening to Montesiños sermon was Bartolomé de Las Casas. In 1500, he had arrived to make his fortune like other private adventurers. Unable to answer Montesiños questions, he disagreed at first with the Dominicans. Still, the question of mortal sin haunted him. After two years of reflection, he realized the illegality and immorality of the immigrants' actions under Canon law and

converted to the Dominican order in 1522—thereby becoming the first priest to be ordained in the "New World". Increasingly horrified by the Aboriginal policies toward of Diego Colón, governor of Española, Las Casas devoted his life to the conversion and defense of the Aboriginal people, and became a major spokesman of Catholic consciousness in America (Morison 1942: 51, 291. 443, 491, 545).

1. Truth and Knowledge Challenged.

Tribal America gradually revealed its mysteries to the Europeans. The American Hemisphere slowly became a physical fact in European consciousness, easier to explain than the human consciousness existing on it. Catholic theologians and lawyers began making ingenious attempts to explain the disparities between Canon law and the 1493 Bull. They sought conceptually to manage the gap between the known and the unknown.

German geographer Martin Waldseemüller was the first to understand the significance of the early, fragmented land sightings of America. Less than fifteen years after Colón's voyage, in 1507, he published a new map which conceptualized the discoveries as a new and separate continent. He named the continent *America* in honour of the Florentine cartographer and adventurer Amerigo Vespucci. Slowly, other map makers rejected the concept of the continent as being part of mythical Asia—Colón's China and Cabot's Cathay—and confirmed Waldseemüller's vision.

Though God was supposed to have given the Church all heavenly knowledge, still the fact remained that Scripture was silent about this new land or its people. To be sure, there were hints in Roman texts and scriptural prophecy. In *Medea*, Seneca had prophesied that, "An age will come after many years when the Ocean will loose the chains of thing, and a huge land be revealed." And in the Psalms, it was say that the Savior "shall have dominion also from sea to sea, and from the river unto the ends of the earth" (22:8). Yet, these fragments did not reveal anything about the Aboriginal people.

Aboriginal people and America challenged the threefold *oikoumene* of the Christian cosmos. The *oikoumene* concept of faith and authority divided the world into three parts: Europe, Africa, and Asia. *Oikoumene* was a Greek term meaning "the

inhabited (earth)", and is the source of the modern English term *ecumenical*, implying a spiritual-cum-political commonness of humanity in the Christian cosmos. Symbolically, the *oikoumene* was represented by the Holy See's triple crown (Dickason 1984:29). America was clearly not foreseen as a part of this cosmic order of the Holy See.

The peoples of Africa and Asia were already part of the Great Chain of Being. They were mentioned in the Bible and familiar to Europeans. In the slow frontier expansion of medieval times, Christians had long contact with the highly civilized and historically-related Moslem and Jewish peoples. The European kingdoms that explored Africa, especially Portugal, enslaved its peoples without much intellectual resistance from ecclesiastics or scholars. Yet the American peoples were treated differently. The question of who they were, their nature and capacities, profoundly stirred European society. America was a fourth world, a fourth Crown, outside the authority of the Catholic Church. Not only was tribal America beyond the sacred Christian cosmos, but it was a direct contradiction of the sacred writings of St. Paul, who had written that the Gospel *had been heard* "unto the end of the World" (Romans 10:18). The scant evidence showed that Aboriginal Americas had never heard of the Gospel.

The Aboriginal peoples of America challenged the authority of the Holy Bible as a source of truth and reliable knowledge. Tribal America also challenged the Christian belief in absolute truth. How was it possible for the American Hemisphere to exist, along with its peoples, plants and animals, and be completely unknown to the Holy Scriptures? How did the Aboriginal peoples relate to the account in *Genesis* of Adam and Eve—the creation of humankind in a single godly act, at one time and at one place? How did they relate to the peopling of the earth after the expulsions from the Garden of Eden, and the subsequent repopulation of the land by the children of Noah after the Flood? If the Holy Scriptures were silent about the peoples of America, were these peoples really part of the human race?

Incorporating the Aboriginal peoples of the new land into the Catholic *oikoumene* became a pressing issue. Illustrative of the fundamental problem was the language which

Catholics used to conceptualize the new facts. They clung to the name “Indians”, rather than “humans” or even “Americans”. Even after a century’s debate about the origins and humanity of these peoples, and after the realization of the geographical existence of an American Hemisphere, the misnomer “Indians” was still commonly used to obscure the difficulties which the new people created. This problem of labeling was anomalous to Aboriginal thinkers: the original inhabitants of America had never conceived of themselves collectively in such a way.

European secular mythology embraced America as Europeans sought to unite the unknown with the known. There was the story of the Seven Enchanted Cities, created by Portuguese bishops who fled to America when the Arabs invaded the Iberian peninsula. Then there was El Dorado, the land of gold in America, and the later idea that the Americans were descendants of the Welsh nation.

While the royal juntas in Spain established legal protections for Americans in the *Leyes de Indis*, tentative questions were raised at the Fifth Lateran Council about the treatment of Aboriginal people at the hands of the Christian immigrants. The Fifth Lateran Council met in Rome from 1512 to 1517. In 1513, a presentation to Pope Leo X called *Libellus ad Leonem V pontificem maximum* claimed the Americans were “our brothers”. Other theologians argued that the tribal peoples were descended from the Lost Ten Tribes of Israel. Had Christ referred perhaps to the tribal peoples of America, some theologians wondered, when he said “other sheep I have that are not of this fold” (John 10:16). Maybe they were part of the holy secret of the thunder gods which God refused to reveal to John in *Revelations*.

Aboriginal life continued to haunt the European soul. The fact that the Americans were happy, healthy, and long-lived, similar to the patriarchs of the Old Testament, appeared contradictory to Catholic teaching. To help explain this, some Europeans developed the idea that the Americans were devil worshippers, while others argued they had no religion at all; this contradiction went unnoticed as events in America temporarily ended the urgency of explanations.

2. Power and Law Challenged.

With the realization that the American continent was not part of Asia but in fact a separate continent, new doubts over arose around the validity of the 1493 Bull. In the frantic years after the realization of the significance of Colón's mistake, the Church attempted to incorporate the American people within its sacred knowledge. The issue of papal dominion and indirect authority over all peoples was reexamined. Some argued that the Bull was inoperative because it was based on the faulty premise of the new lands being part of India or Asia. If it was truly an unknown land, this argument proceeded, perhaps the Aboriginals were unknown peoples, outside the categories of infidels or "natural slaves", and free humans. Perhaps their lordships and lands should not be protected within the Great Chain of Being.

Colón's initial reports of a terrestrial paradise were soon followed by new reports from Spanish settlers attempting to justify their mortal sin. They asserted that America was composed of hostile cities and cannibals[3] who resisted foreign invasion, argued that the Holy See's conclusion that the Aboriginal people were "humans" had been in error. They refused to comply with the papal guardianship codified in the *Leyes de Indis*. Embarrassed by his initial failure to send any profitable goods from the New World to Spain, Colón had began to round up Indians and ship them off to the slave market in Seville. Finding no gold or profitable trade, he settled on human slavery to support his expeditions and "honour".

Forced slavery, then, rather than peaceful religious conversion, became the first result of Catholic guardianship. When the Tainos and other Aboriginal peoples rebelled to avoid slavery, Colón ordered his men to slaughter them. The Taino fled to the hills or poisoned themselves rather than spend their lives as Spanish slaves. Their resistance to being enslaved led to the genocide of Aboriginal societies by the sword or in the mines of Mexico, Peru and Bolivia (Galeano 1973). This growing horror became known as the

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3 This word is a Caribe tribal term the originally meant "valiant men".

"Black Legend".[4]

Slavery and genocide were part of the existing feudal order of Catholic commonwealth. The Holy See had always officially condemned it, but was unable to change the historic patterns prevailing among the feudal nobility. In both the Holy war and secular warfare, prisoners of war became either slaves or were slaughtered. There was a continual slave traffic through various North African and European ports, but the extension of this practice on a mass scale to the newly discovered land exposed the facade of Catholic civilization. It also demonstrated the Christian aristocracy's continued devotion to pagan practices despite fifteen centuries of Christian teachings.

In 1542, fifty years after the failure of Colón to find the fabled short route to the East Indies, the original Aboriginal population of Española, estimated at more than 300,000, had been reduced to less than 500. On many Caribbean islands entire Aboriginal nations were obliterated. European "civilization" had arrived in America (Morison 1942: 486-9,491-3). The enslavement and massacre of the Aboriginal peoples, the rise of pagan prejudices, and the extension of the African slave trade to America eroded the moral and legal authority of Catholic beliefs. The reversion of Catholics to European paganism forced the Holy See to renew its efforts to control the behavior of Christians.

Colón argued that, while the Spanish rulers were "just as much political lords of this land as of Jerez or Toledo" as a result of the Bull of Alexander VI, the ill-treatment of the Indians was neither intended by the Pope nor a wise policy (Hanke 1965:25). Ferdinand and Isabella nevertheless believed that the Papal donation granted them domination of the land as well as the right to enslave the Indians. In 1503, they ordered that Indians "be compelled to work," albeit "paid a daily wage, and well treated as free persons for such they are, and not as slaves" (Hanke 1965:20). Conquistadores relied upon this authority to create the *encomienda* system of granting Indians as appurtenances to land. *The Laws of Burgos* (1512) endorsed the *encomienda* system on the theory that

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4 Which English colonist ironically later used to justify *their* invasion of the Americas.

the Indians, while inherently free, were idle pagans who could only be disciplined and converted to Christianity through labour. Thus the *encomienderos* were called on to ensure compulsory religious instruction, baptism, and Church marriage, as well as adequate food, shelter and wages. The legal basis for the conquest remained in dispute, however.

The Spanish Crown was astonished at the Dominican reports of abuses of the Aboriginals. It was aware of the international and theological importance of Montesiños' questions, of the harm the Black Legend would cause. The Crown realized that Spain's fragile jurisdiction over America was threatened by the immigrants' actions. The abuses of the Aboriginals' liberty created a demand for a new ordering of social relations in America. As a remedy, the Crown sought to enact a civil code of law protecting the Aboriginal peoples from the immigrants, and to codify the immigrants' Catholic responsibilities (Carro 1971:237-277).

Queen Isabella actively sought to fulfill Spain's obligations under the 1493 Bull and 1494 Treaty. She regarded the Española as an extension of Spain, rather than a Colony, which God had placed in her hands for the conversion and civilization of the Aboriginal peoples. The Aboriginals were new subjects who must be treated like other Spaniards of the Peninsula, but with special love and treatment to protect their material and spiritual welfare. Therefore, she energetically condemned the actions of Colón in sending Indians as slaves to Spain and ordered them set free. The issue of slavery would not be solved so quickly, however.

Overcoming the intrigue of the local authorities and members of own court against the Dominican order, King Ferdinand firmly summoned two legal juntas at Burgos (1512) and Valladolid (1513), where the Canon-law jurists and theologians debated and drafted a civil code regulating Spanish conduct toward the Aboriginals. These new civil laws, which composed the celebrated *Leyes de Indis*, were built on the theological-juridical traditions of the Dominican order, especially the doctrines

formulated by the Thomist tradition.[5]

In these royal juntas, Spanish officials searched their conscience and reviewed their Indian policies in order to correct and punish abuses of Spanish subjects. The Crown sought to make the settlers' actions in America conform to proper Catholic laws, beliefs and doctrines, as well as to fix the standards that should govern the social relations between the Aboriginals and the settlers. The Crown viewed the problem as one of disciplining the immigrant, but some royalist theologians insisted that Indian capacity and character required the *encomienda* system. Aboriginal people's idleness was their greatest vice it was argued, and their enslavement was both a moral necessity and a method of teaching them to be industrious. Other argued that the Aboriginal people were by nature made to be slaves. In Aristotelian terms, they were "natural slaves," destined to serve the Spanish. Still, other argued that the Aboriginal peoples lacked of reason. In short, they evoked every loophole of Canon law to justify the enslavement of the people.

In debating and formulating the *Leyes de Indis*, the Crown directed the various theologians and jurists to present their views in writing. Juan López de Palacios Rubios, a civil jurist (1450-1534), and Matías de Paz, a Dominican professor of theology at the University of Salamanca (1468/70-1524), were requested to give their opinions on the proper relations between the Crown and Aboriginal peoples. Both of these writers declared the Aboriginal peoples to be rational beings, and therefore to possess basic human rights. Both contended it was the Crown's duty to bring them within the fold of the Church (Parry 1940:12-19). These legal opinions began the human rights movement in Canon law, civil law, and the Law of Nations.

Juan López de Palacios Rubios' opinion was published under the title *Of Ocean Isles* (1512). It is the first legal opinion on the source and extent of Spanish authority in the New World. López was considered one of the foremost civil jurists of his time. Previously he had, at the Crown's request, drawn up the official *apologia* for the Spanish conquest of Navarre. His *apologia* condemned the Navarrese rulers as enemies of the

5 The scholastic philosophy and theological thoughts of St. Thomas Aquinas.

Church and rebels against pontifical authority. Based on the authority of two papal Bulls, which gave the Spanish Crown all goods acquired in the “very holy, very just war” against Navarre, he argued that conquest made these goods the property of Spain (Hanke 1949:29). Yet, in examining the legitimacy of just title of the Spanish Crown to the Indies, he reached a different conclusion. He rejected any abstract theory that Spanish authority was derived from either Spain’s discovery of the land or from its conquest of the Aboriginals. In his reading of the papal bulls and treaties, Lòpez found that the title of the Spanish Crown rested solely upon the papal donation of 1493. The 1493 Bull of Demarcation delegated to Spain *conditional* political authority over the New World, the condition being that the Crown would peacefully convert the Aboriginals to the Catholic faith. Thus, the papal donation, or papal entitlement doctrine, was derived from the sacred ideal that the original inhabitants were human.

López position was based primarily on the view of Innocent IV and Thomistic premises. Infidels possessed a natural law right to lordship and their land. The Holy See's indirect authority over them was restricted to caring for their immortal souls. This guardianship could be delegated to a Christian prince. López argued that the Christian prince accordingly possessed a limited right to "enact rules of law [...] by virtue of its supreme power which is inherent in the very marrow of the kingdom" (Hanke 1949:29).

On the authority of the 1493 Bull, López rejected the application of the theory of conquest or just war to the Aboriginals. He could find no papal authority for such a “just war” against them. The sole basis of Spanish authority in America was to bring the Christian faith to the Aboriginals, and not to exploit them. Their souls were worth saving and could be saved. He urged that the Regents must treat the “Indians” like tender new plants, worthy of exquisite care and loving protection. The Regents’ subjects who used them as slaves or otherwise mistreated them under the mistaken notion that they were a conquered people, must restore freedom and properties to the Indians equal to the unjustified riches they had obtained. Restitution was the proper remedy for the settlers’ past misconduct toward the Aboriginals (Hanke 1949:29-30).

About the same time, Matías de Paz warned the Crown that there were doubts among ecclesiastics about the "dominion of Our Catholic and Invincible King over the Indians" (*ibid.* at 29). However, he argued that the Holy See, as Vicar of Christ on Earth, enjoyed direct temporal jurisdiction over all the lands and people. He also argued that all the pre-existing powers and rights of dominion of the heathens had devolved to the Holy See, which the Church has continually rejected in Canon law. It was an attempt to revive the discredited Alanian and Hostiensian doctrines that infidels had no natural rights.

De Paz concluded that it was lawful for the Holy See to delegate this authority temporarily to a Catholic prince and place limits on his authority. The Spanish Crown's title vis-a-vis other princes unquestionably derived from the Holy See's grant in the 1493 Bull. However, to make it lawful for the Crown to govern the Indians politically, and annex them forever, would require additional authorization from the Holy See. The 1493 Bull granted no permanent rights to the Crown, its aristocrats, or the settlers. Its purpose was temporary, and the Crown's authority was limited to the conversion of the Aboriginals to a knowledge of Christ. After their conversion, their dominion, power and rights would be determined by the Holy See. Aboriginal people would owe some reasonable services to the Church, probably greater than other Spanish Christians, because of the travel costs connected with the maintenance of peace and good administration in the distant provinces (*ibid.* at 28.)

Assured of the Crown's delegated authority over the Aboriginal people and their lands, in 1512, the *Laws of Burgos* were enacted as the first comprehensive code of European civil legislation directed at protecting the Aboriginal peoples of America. The legislation tried to reconcile the antagonism inherent in a situation where conflicting interests converged. It covered an extensive range of subjects, from the diet of the Indians to the Holy Sacraments. It firmly recognized the freedom of the Indians, their right to humane treatment, and their place within Spain’s economic system. Yet, it never raise the question of the Aboriginal peoples' consent to be ruled by the immigrants. It was assumed that the Holy See's divine guardianship, as administered by the Spanish Crown,

necessarily excluded the possibility of their capacity to consent in a rational fashion.

These laws did not end the horror of enslavement of Aboriginal peoples, but sought at least to moderate the scope of the enslavement. The Crown had "entrusted" *[encomedar]* a specific number of the Indians to each Spanish settler *[encomendero]* as a reward for his developing the new land for Spain. The settler had an obligation to the Crown to protect the Aboriginals and instruct them in the Catholic faith. The settler could not enslave the Aboriginals permanently, but could exact tribute and labor from them on specific days. The settlers were obligated to pay the Aboriginals for any other uses of their labor. The code also recognized that in order to convert Aboriginals to Catholicism, they must be subjected to some limited forms of coercion. The *encomienda* system was hailed as an "agreement with divine and human law".

Without doubt, the difficulties of imposing this royal code on Spanish settlers were considerable. Moderating the settlers' unrestrained economic and political ambitions became the acid test of Spanish law and civilization. In the conflict between materialism and idealism which the juntas confronted, the *Laws of Burgos* reflected a victory in principle of Catholic idealism over wealth and private interests. Neither public or private outrages nor the immigrants' abuses of the Aboriginals could be considered lawful. Total assimilation to the Catholic truth and knowledge became the official Colonial policy of the Spanish Crown. The laws legitimated the appropriation of Aboriginal resources and labor not as punishment for any violation of natural law, but as a means of facilitating their assimilation. Nonetheless, the destruction of the Aboriginals, the stark reality, continued.

The Spanish Crown enacted the *Requiremiento* in 1513 as a further effort to legalize their authority in America. The *Requiremiento*, or manifesto, had to be announced to the Indians by proper interpreters before any hostilities could legally be launched against them. Most probably drafted by Palacios Rubios, it began with a brief history of the European world, the establishment of the papacy, and the donation by the Holy See to the Spanish Crown. It sought to build a conceptual bridge between European

society and the Aboriginal societies. Unfortunately, it was constructed from only one side of the chasm, the European side.

Every expedition leader officially licensed to make discoveries in the Americas had to take along a copy of the *Requiremiento* and have it read as often as necessary to the Aboriginals. Additionally, every official expedition had to include at least two ecclesiastics approved by the Council of the Indies to instruct the Aboriginals and protect them from the Spaniards. Any violence or cruelty toward the Aboriginals required the ecclesiastics' written consent. The ecclesiastics could only give their consent to actions permitted by "the laws, our Holy Faith, and Christian religion". If any expedition waged war unjustly, in the opinion of the ecclesiastics, its license or contract with the Crown could be revoked. In effect, these instruction may be legally interpreted as treaties or Concordats with the Holy See and creating potected aboriginal states.

Laws defined the administrative papal trust, or "use", given to the Spanish Crown in America. These laws drastically limited any theory of conquest or practice of genocide on tribal Americans. The civil code sought to enfold the Aboriginal rights of the Aboriginals in sacred and profane law. In this regard, the Catholic Sovereigns of Spain rose above the prevailing European medieval ideology of feudalism, slavery and warfare. They acknowledged Aboriginal rights on a sound Catholic conception of man and all his qualities in the individual, social, and political spheres.

The Requirement, despite its inherent horrors and terror in practice, acknowledged the humanity of Aboriginals. Often, this point is lost to modern researchers. It accepted that Aboriginal peoples had a choice in their destiny, and even required certain members of Spanish society to master the Aboriginal languages. It attempted to communicate the Catholic vision of a global order. And it required the Aboriginals to accept only two obligations: to acknowledge the authority of the Crown under the papal donation, and to consent to instruction in the Holy faith. However, in implementation it became a sham and was circumvented by the colonialists.

The 1493 Bull and the *Leyes de Indis* soon created problems between the Spanish

aristocracy and their settlers in New Spain—both a legal problem and an economic problem. In 1523, in accordance with the *Leyes de Indis*, the Spanish Crown sent instructions to Cortes with regard to Mexico, revoking all the *encomiendas* that had been granted in Mexico up to that time and ordering that the Indians pay the *encomenderos* only the tribute that was due the Crown (*Cedulario cortesiano* 1523: 54-55). Noting the unhappy experience with the *encomienda* in the Antilles, and referring to juntas that had been held on this subject, the Crown stated "it seems that since God, Our Lord created the said Indians free and not subject, we cannot in good conscience order them to be given in *encomienda* or distribute them among the Christians."

This order provoked general opposition among the Spanish settlers. At the Spanish court many jurisconsults supported the *repartimientos-encomienda* system. They turned the focus of the system from the settlers to the nature of the Aboriginal peoples themselves. From threads of evidence, mostly from settlers' correspondence, they began citing the "innate indolence" of the Aboriginals, who would not work without pressure, thereby endangering the very existence of the settlers' lives. Despite these pressures from vested interests, on December 1, 1525, the King declared in his instructions to Montesiños upon his departure for Venezuela that in the matter of the *encomienda* and the freedom of the Indians "there are many opinions," but the Indians were to remain free men in order that, until the problem was clarified, "our conscience should be discharged".

Likewise in Cuba, where the Spanish settlers threatened to abandon the island if they were not granted *encomienda*, the Council of the Indies stated that, under the Royal Law of 9 November 1526, "for the discharge of our conscience we have agreed that all the said Indians who are capable of living by themselves in pueblos in order and peace should be set free". It was only in order to ease their mortal sins, and for their Catholic instruction and salvation, that they would be given out in *encomienda* to the Spaniard settlers. The *encomienda* was thus a punishment for Indians who would not live like other Spaniard settlers; it was not a right of Spanish settlers to the labour of the Indians.

3. Defending Truth and Knowledge

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

Implementation of the civil law for New Spain was one problem. Defending the Church's monopoly on truth and knowledge was an equal pressing one. Not every prince, priest, scholar, or merchant within the Church could rise above self-interest or medieval ideology. As gold, the trade metal of the Aboriginal peoples of America, entered into European ports, second thoughts arose about the *Leyes de Indis*. European thinkers sought to dispel the new Catholic ideology and the laws enfolding tribal society in America. Threatened by the Holy Scripture's inability to resolve the quandaries of both the land and peoples of America within Catholic traditions, some theologians returned to European pagan beliefs, and tried to justify a new relationship between the Church and Aboriginal peoples.

European justification for the destruction of the Aboriginal people usually began with a narrow reading of Aristotle, which seemed to support the natural inferiority of some humans. Through this device, they attempted to resolve the Biblical omission of the existence of American Aboriginals. Based on the idea that the Europeans were the first descendants of Adam and Eve, Catholics presumed their own superiority to Aboriginal peoples. Their genocidal acts and the plundering of the Americas proceeded logically from that point.

By 1525, the Dominican friar Tomás Ortíz began challenging the Holy See's conception of the nature of Aboriginal peoples in order to justify their destruction and enslavement. Using contrived ethnography, he told to the Council of the Indies that Aboriginal people had no justice, or respect for law or truth, exercised none of the human arts and industries, and were incapable of learning (Levi-Strauss 1955:67-68). His thoughts were very distant from the ideal of the universal brotherhood of man preached by the Savior, and squeezed the Indians into the mold of European paganism.

In the 1530's the Dominican Domingo de Bentanzo perpetuated the image of Aboriginal peoples as pagans. He argued that the Americans were brute beasts, incapable of learning the mysteries of the faith. But it is said that he retracted this opinion on his deathbed in 1549 (Hanke 1935: 68-69, 96, App. 1, 97-98). Similarly, Andre Thevet, a

French cosmographer, combined some of Colón's observations with the positions of Ortíz and Bentanzo, into an ideology which concluded that the Americans were "a remarkably strange and savage people, without faith, without law, without religion, without any civility whatever, living like irrational beasts, as nature has produced them, eating roots, always naked, men as well as women." The subhuman nature of the Americans resolved the contradiction between the American reality and inherited European past. While Europeans claimed to be looking at Aboriginal people, however, they were always looking at themselves.

Most of this theory was built on the metaphorical language of the travel reports of the Spanish which emphasized the "bestial" nature of primitive life. Americans were regarded as beasts in human shape, and were only grudgingly admitted into the ranks of humanity. As contact increased, the travel reports in the sixteenth and seventeenth centuries suggested that most Indians were devil-worshippers. America, therefore, came to represent the "last outpost" of Satan's kingdom. These views merged with the negative view of the state of nature in political thought reflected in the writing of le Roy (c. 1510-71) later summarized by Hobbes.

Louis le Roy, a professor of Greek at the University of Paris, was one of the first major popularizers of Aristotelian political thought in northern Europe. In his book *Exposition upon Aristotle's Politics* (1568; English edition in 1598), le Roy stressed the distinction between man's natural and civil, moral life and merged it (however inconsistently) with Aristotelian political and moral theory.

Le Roy asserted that the ways of the world formed a complex whole which could be grasped only as its interlocking relationships were understood. In Book I of *Politics*, le Roy quoted Cicero's description of man's primitive asocial life (1598:16-17), and this became a powerful part of his Aristotelian ideology. Building his theory on Cicero's statement that there were no people so savage that they did not have some idea of God (*De Natura Deorum* 1.16.43), he argued that the Indians must have some religion. By 1575, le Roy concluded that the reports of the Aboriginals discovered in America showed

they were “living still as the first men, without letters, without laws, without kings, without commonwealth, without arts, but nevertheless not without religion” (Le Roy 1575:118).

This tradition among Catholic thinkers, their attempt to place the Aboriginal peoples within European paganism, had a dramatic effect. Attempting to justify the Black Legend, these thinkers aided the nascent Reformation movement. Noting the relationship between the Black Legend and the Reformation, Jennings Wise wrote in *The Red Man's Drama in the New World* that on the very day in 1520 that the Catholics “pierced the golden heart of Mexico with the sword of Cortez, Martin Luther nailed his public protest against Rome upon the door of the Wittenberg cathedral” (Wise, 1971:41)**.**

Further attempts to justify the Black Legend propelled heresy, paganism and racism from the realm of abstract philosophy into the sacred and secular realms. This horror raised inquiries into epistemology and the psychological question of why individuals act as they do. In addition, it raised the ethical question of how Catholic sovereigns and subjects ought to act toward the Aboriginals of the New World. Finally, it raised the issue of how secular law ought to intervene in or control human conduct. The answers to these question created a new order.

C. NATURAL LAW AND ABORIGINAL DOMINION.

Confronted with both the Black Legend and the new theory of Aboriginal savagery, the Holy See sought to defend Aboriginal peoples. It attempted to maintain the Catholic *oikoumene* by reforming Christian activity in America. Using basically the same solution it had initiated among European tribes in the 9th century, the Holy See introduced a new sacred doctrine which acknowledged the similarity of the American Aboriginal governments to those of earlier Europe. Similarly, it endeavored to recognize the Aboriginal sovereigns and to bring them under the direct protection of the Church.

Dominican scholars took the lead in establishing a new doctrine of Aboriginal dominion and rights which surpassed the Spanish *Leyes de Indis*. Eventually, the Holy See enacted a new explanatory papal Bull, the Spanish Crown revised its civil code for

the Indies based on the new doctrine, and the European Crowns acceded to the doctrine. The full administrative implementation of this legal order was never accomplished, however. The Vatican underestimated the determination of Europeans to flout the law. Nevertheless, this doctrine created the framework for alliances between the Aboriginal nations and the Holy See in North and South America in the 16th and 17th centuries.

Responding to the Vatican's concerns, the Spanish Regent, Charles V, requested the Dominican Franciscus de Vitoria in 1526 to address the lingering doubts about the status and treatment of the Aboriginal peoples. Vitoria was professor of moral theology at the University of Salamanca, the teaching center for missionaries bound for America. With the authority of the Spanish Regent and the Dominican Order behind his opinions, Vitoria lectured on these issues to his students. His ideas established an enduring analysis in legal history of the just title of the Holy See and Spain as well as other sovereigns.

Vitoria had been a student at Paris in the critical years between 1507 and 1522, and had been exposed to the theory of natural *dominium* by Jean Gerson, Chancellor of the University of Paris. Facing severely limited schemes of explanation to evaluate events in the New World, Vitoria's conclusion rested firmly on an older conceptual problem of the meaning of *dominion*, specifically *papal dominion*, produced by the 11th century Gregorian Reforms. The focus of the new debate, however, centered on America, and the emergence of secular ideas of political control gave new insight into the important role the New World occupied in legal thought. His explanation not only provided an interpretation of the status of the Aboriginal nation in existing legal theory, but also established why they had to be seen in these terms.

1. Natural Dominion in Civil Law.

Dominion has always been an enigmatic concept. For the purpose of grasping the abstract concept in modern thought, one could very well say that it is the essence behind a "fee" in Germanic law, or the modern lay concept behind "ownership". Whereas the concept of "fee" links humans with things or events in the material world, the modern concept of ownership is more physical—like the actual touching or surrounding of an

object.

The notion of papal dominion had a long and tortuous history. It began as a spiritual attempt to find the proper relationship between religious orders and Christians and the material world, between goodness and greed. Though it never fully succeeded, it did create new ways of thinking in European society.

The origins of the concept can be traced to 1279, when Pope Nicholas III issued the Bull *Exiit*. This Bull enumerated five kinds of relationship between a man and a material object: *proprietas*, *possessio*, *usufructus*, *ius utendi* and *simplex usus facti*. In the first four relations—to either land and its products or simply its products (as in the case of *usufructus*)—property could be disposed of *ad libitum* by an agent, a feature which became the factor for determining control of a thing. The last relationship however, simple use (*simplex usus facti*), involved a situation in which a person or his agent simply consumed the commodity, and this characteristic naturally distinguished it from the other four relations, which were deemed *dominium* (property rights). Originally, then, consumption was not considered as a lasting proprietary relationship between humans and material objects.

In 1329, however, the consumption of things was added to the Church's notion of papal dominion. Pope John XXII, in his Bull *Quia vir reprobus*, expanded papal dominion to all of man's moral world. The Bull proclaimed that man's *dominium* over the earth was the conceptual equal of God's *dominium* over His possessions. Adam "in the state of innocence, before Eve was created, had by himself *dominium* over temporal things"—even when he had no one with whom to exchange commodities (Leff 1967:247). Property was thus natural to man, sustained by divine law.

The implication of the 1329 Bull was that all men have a right to a control their material existence. This relationship could correctly be described as *dominium* or property, an inherent relationship established under divine law. The Holy See, thereby denied that property is derived from social and political relationships, still less from civil law (as William of Ockham argued in *Opro Nonaginta Dierum*). The 1329 Bull,

moreover, represented a strongly individualistic theory of property in Canon law.

A modification of this natural rights doctrine was later urged. Following Richard Fitzralph in *De Pauperie Salvatoris* (1350s), that only those men who enjoyed God's grace could be said to have proprietary relationships with the physical world. Proponents of this idea speculated that it was out of God's Grace that God admitted mankind to share in the material world, arguing that in the beginning God had "the full *ius* [usually translated as "the right relationship" or *right*] of possessing the world and using it fully and freely with all things therein contained, by means of possession solely". Hence, "*ius* is the genus of dominium, and all else in it is as the specific difference whereby God's dominium is distinguished from all dominium of his creatures" (Poole 1890:290).

Other thinkers rejected the requirement of a state of Grace for *dominium* as to narrow. They followed Jean Gerson's *De Vita Spirituali Animae* (1402) argument that:

> *Ius* is a dispositional *facultas* [ability] or power, appropriate to someone and in accordance with the dictates of right reason.... This definition includes '*facultas* or power', since many things are in accordance with right reason which do not count as *iura* of those that have them, such as penalties for the damned or punishment for mortal men. Nor do we say that anyone has a *ius* to harm themselves, although that is not far removed from what sacred scripture records about the ordinances of divine providence, as in the passage of I Kings about the *ius regis*, etc. And we do say that demons have the *ius* to punish the damned. The definition includes 'dispositional' since many things allow someone to do something in accordance with right reason,...as a mortal sinner has the *facultas*, or as we normally say, it is not in accordance with present justice [i.e. the sinner has the capacity but not the actual dispositional ability to merit salvation].... I want to say that an entity has *iura*, defined in this way, equivalent to those positive qualities which constitute its identity and therefore its goodness. In this way the sky has the *ius* to rain, the sun to

> shine, fire to burn, a swallow to build its nest, and every creature to do what is naturally good for it. The reason for this is obvious: all these things are appropriate to these beings following the dictate of the divine right reason, otherwise none of them would survive. So man, even though a sinner, has a *ius* to many things, like other creatures left to their own nature...This analysis of *ius* is modified by political theorists, who use the term [for] only what suits rational creatures using their reason (Tuck 1979:25-26 citing P. Glorieux 1962 ed. III:141-2).

By claiming that right relations were an inherent human faculty, Gerson was able to combine the older Roman intellectual system's concepts of liberties and rights. Both the Romans and early medieval lawyers had contrasted liberties with rights. Liberty was the ability to do what one wants, unless prevented by force or a right. Gerson suggested that *all* rights were *dominium*, and hence that the two categories were identical.

> Gerson, moreover, treated liberty itself as a kind of *dominium*, stating:
> There is a natural *dominium* as a gift from God, by which every creature has a *ius* direct from God to take inferior things into its own use for its own preservation. Each has this *ius* as a result of a fair and irrevocable justice, maintained in its original purity, or a natural integrity. In this way Adam had *dominium* over the fowls of the air and the fish of the sea [...]. To this *dominium* the *dominium* of liberty can also be assimilated, which an unrestrained facultas is given by God (Tuck 1979:27 citing Gerson 1973:IX:134).

Building on this strongly naturalistic interpretation of God's gift of ownership to man, Gerson refuted the "grace" theory or rights. He argued that sinners, too, could have right relations with the material realm, as God's gift, although they lacked the kind of grace needed for personal salvation. Gerson argued that when God withdrew grace from a sinner, He did not withdraw the individual's capacity to understand the proper relations between humans and the earth.

Gerson's idea of natural *dominium* was further developed by John Major in *Quartus Sententiarum* (1509). He wrote that *dominium* was simply the right to use something, and the most effective way, or right way, of using something was to appropriate it privately. In Major's view, there was no categorical break between the state of innocence under the law of nature and private property under civil law. The difference between natural and non-natural (civil) *dominia* was simple: natural *dominia* were necessary to cover basic commodities, while civil *dominia* were the product of social conventions.

In accordance with these Scriptural theories of natural rights, there was a right way for everyone to use the material world, which had to be respected by others. *Dominium* had existed from the beginning of time, even when appropriation and exchange were unnecessary. It was not created by the civil laws, nor was there any conceptual break in *dominium* when men decided to trade their property rather than merely consume it. Even one's own liberty, which was undoubtedly a use of things in the material world, could be considered as property—with the implication that it could, if the legal circumstances were right, be traded like any other property (Tuck 1979:29).

2. Aboriginal Dominion

At the University of Salamanca, Vitoria further developed a comprehensive theory of natural *dominium*. To Vitoria, *dominium* was the animating spirit of the sacred legal order, which lay behind any discussion of obligation or rights. His idea and method became the foundation for legal theory produced by his followers until the end of the 16th century (Tuck 1979:46-50).

Vitoria argued that *dominium* was distinct from the concept of rights (*ius*). According to the Roman *Digest* those who have either a legitimate possession or use (*usufructus*) have a right of a kind, but not complete *dominium*. Vitoria in his *Commentarius a la Secunda Secundae de Santo Thomas* pointed out that:

> if someone takes something from a usuary or a usufructuary or a possessor, that is decried as a theft, and they are bound to restore it, but

> such people are not true *domini*; just as if I am the proprietor of a horse which I have hired to Peter, and I then take it from him, I am guilty of theft,...but it is not taken against the will of the proprietor, for I am the proprietor, but against his will who has legitimate possession of it (1934:III:65).

Vitoria suggested an alternative definition for rights (*ius*), distinct from Gerson's active right theory, *e.g.*, "what is allowed under a law". His suggestion was related to the innovative Renaissance humanist movement, which maintained that rights must somehow to be related to a remedy, and was an attempt to revive Aquinas' theories of the laws of nature and God. By insisting on the limited nature of man's natural rights, Vitoria hoped in part to refute the theory of Grace as the source of property—which he blamed for having produced Luther's radical Protestant reformation. Confronted with the problem of the Aboriginal peoples, and the rights of the colonist in the New World, Vitoria used *dominium* as the abstract concept which united all authority on earth.

In his official opinion as legal advisor on Indian affairs to the Crown (a series of lectures which were later published as *De Indis et de Iivre Belli Relectiones* [1532/1917]), Vitoria built on López's papal entitlement theory. Vitoria saw Aboriginal rights as collective human rights, not individual rights. He argued that the world was one society—a *societas naturalis*—linked by God.

Vitoria rejected the idea that the Aboriginal peoples were subject to any European king, as well as the notion that Aboriginal rights were determined by secular law. In terms of *dominium*, he argued, the Aboriginal princes were equal to both the Holy See and Christian Princes. While he admitted that divine law had brought the Holy See and Spanish authority to the Aboriginals, he argued that no one—not even the Holy See—had the right to partition their property (1934/1917 Sect. II:xxii).

Vitoria clearly asserted that Aboriginal ownership and rights under their law and customs were superior to the papal entitlement to the Spanish Crown. Their customary control and use of the land were more than equal to that of any European authority. The

Aboriginals held title to their "principalities", to use Vitoria's expression, on an equal standing with European princes' titles to their estates (Scott 1934:106). The Americans "undoubtedly had true *dominium* in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the grounds of them not being true owners" (1532/1917:I. 24).

Since humans are free by natural right, Vitoria reasoned, dominion is the work of human law; and there is no law or right that confers dominion over the whole world on either the Emperor or the Holy See. All civil power arises, through God's plan, from the natural sociability of man and the rational will of citizens. Sociability and organic societies correspond to the primordial needs of the human nature which God created, but God had left to men the mode of satisfying those needs and determining in whom temporal authority should be vested. The Aboriginal peoples had made their decision, and it should be respected in the same manner as that made by Europeans. This opinion became a milestone in the interpretation of the sacred and secular legal orders.

3. Rejection of the Seven False titles of Conquest

Reasoning from the foundational premise that Aboriginal princes were the "true owners", Vitoria drew a string of consequences. He expressly confronted and rejected the "seven titles" of conquest which others had used to justify the enslavement of Aboriginal peoples. Vitoria argued that these titles had assigned excessive power to both imperial authority and the Holy See. Natural, human and divine law, he argued, offered no basis for supporting them.

Drawing upon the Thomist distinction between the natural and supernatural orders, Vitoria argued that no law or right grants dominion over the whole world to the Spanish Emperor, and stated that neither the Emperor nor the Holy See had any temporal power over the Aboriginal peoples or pagans in general. Even if the Emperor had such global dominion, Vitoria added, he could not occupy the provinces of the Aboriginal people, appoint new rulers or collect tribute. At best, his dominion would amount to a power of political jurisdiction rather than property.

Master Vitoria agreed with Major that the validity of the papal Bulls was restricted, since "the Pope has no civil or temporal dominion over the earth". In particular, he argued that Papal power is of divine and spiritual origins, and can be exerted only over faithful and baptized Christians, not over pagans or Aboriginal peoples. Thus, the Holy See did not have any temporal power over the Aboriginal princes or peoples (1532/1917:II. 3 and 6), and Aboriginal people were not obliged to acknowledge the Holy See.

Even if the Holy See had possessed such power, Vitoria alternatively reasoned, it was not transferable to any European crowns (1532/1917:II.4). The Spanish Emperor could not legally claim, through the Holy See, to be the lord of the earth. Even if the Spanish Crown were granted dominion by the Holy See, that would not entitle him "to seize the territories of the aborigines, nor to erect new rulers, nor to dethrone the old ones and capture their possessions" (1532/1917:II.1), since that was a power the Holy See itself did not possess.

Vitoria also rejected discovery as a false title. Although most of the European princes regarded discovery as sufficient basis for ownership of the new lands and their subsequent conquest, Vitoria did not. Since the Aboriginal peoples and their "*caciques*"[6] were the legitimate owners of the lands by natural and human right, the arrival of foreign navigators and seamen meant nothing. From this point of view, the European discoverers had no more right to America than the Indian would have had if they discovered Europe. The rightful relationship had been given by God to the Aboriginal peoples; only they could legitimately transfer it to the Holy See or the Spanish King.

Stressing a legal distinction between political authority and property rights (1532/1917:II:xx), Master Vitoria asserted that European claims in the New World could only be valid to the extent of ensuring a beneficial order: "because if there was to be an indiscriminate in rush of Christians from other parts to the part in question, they might easily hinder one another and develop quarrels" (*ibid.* :III:xlii). Beyond creating a

6 Taino word for the leader of their society

beneficial order for the Aboriginal owners, he argued, the Pope had no rights to regulate the property of the American nations. In the absence of a just war to protect the aborigines' choice of religion, only the voluntary consent of the majority of the American nations could justify any annexation of the territory to the Spanish Crown (*ibid.* II:xxxii; III:xliv-v).

"Lordship in jurisdiction," Vitoria stressed, "does not go so far as to warrant him [the Spanish Crown] in converting provinces to his own use or in giving towns or even estates away at his pleasure". Discovery and papal entitlements gave no "right to occupy the lands of the indigenous population" (*ibid.* II:xxiv-xxv). Discovery was probably sufficient to prohibit other European princes from trading with the Indians, however (*ibid.* III:xli). Spain had acquired the exclusive right to trade in the New World (*ibid.* III.3 and 7), which could be supported by the use of arms if necessary (*ibid.* III. 12).

Distinguishing between the missionary task and Aboriginal choice, Vitoria also rejected the contention that it was lawful and proper to conquer the Indians in order to preach to them and convert them to Christianity. It was one thing for the Holy See to have the right to preach and send missionaries throughout the world in compliance with the command of Christ, he argued, but quite another to require the Aboriginal peoples or pagans to receive the Gospel. Spaniards had the right to preach the gospel peacefully to the Aboriginals, but not to resort to force if the infidels refused to listen.

In the same light, Vitoria qualified the missionary task. He argued that it is one thing to ask whether the Indians sin if they refuse to receive the faith, and another thing to claim, without any other prerequisites, that their rejection of the faith gave any Christian prince the right to conquer them. War was not a proper means of spreading the faith, nor was paganism sufficient cause for war against pagans. Thus, even though the faith had been announced to the Indians in a clear and sufficient manner, a refusal on their part to receive the faith did not make it lawful to conquer them and despoil them of their property.

Vitoria also rejected the premise that the Crown could gain any title based on the

sins of the Indians, notably their human sacrifices and other crimes against nature. Sins *qua* sins, Vitoria stated, did not give any Christian king any right of military intervention. Neither the Pope nor foreign rulers had the power of jurisdiction necessary to punish the sins of men who were not their subjects, and this was the case with the Aboriginal rulers.

With regard to Aboriginal dominion, Vitoria stated that not even free election of the Indians could give a European prince a valid title. Vitoria granted that such an election could form a legitimate title if it were truly free and not influenced by fear or foreign pressure. If the Indian rulers were legitimate, they could not be deposed, unless for very grave causes. The wishes of their subjects, alone, could justify such changes. If there was no true freedom of choice, then so-called free election were impossible.

4. Seven Responsibilities of Dominion.

Master Vitoria did conceded seven legitimate reasons for Spain's presence in the New World. The first legitimate reason was that of "natural association and communication". This was a very important principle which the justification of conquest had ignored. Human friendship and coexistence derived from natural law, and neither the Law of Nations nor positive civil law could legitimately annul what derives from natural law. Since the Aboriginal people were human, their princes had the same rights and duties as the rulers of all other rational beings, including duties toward other peoples. Thus the Spaniard, as a citizen of the world by natural law, had the right to visit and journey through the American provinces, and perhaps even reside there, so long as he did so without injury to the Aboriginal peoples. Under the principles of natural association, commerce with the Indians was a lawful activity which the Aboriginal princes could not forbid.

The second legitimate reason arose from the right of teaching and learning the truth. This was an extension of the right of natural association and communication. The Holy See had the spiritual right to send preachers to the New World to comply with the command of Christ, so long as they respected the dominion and rights of the Aboriginal peoples. The right to teach the truth, human and divine, and to be taught the truth, were

seen as a natural right, equal for all humans. Aboriginal peoples therefore had the right to be taught, and their princes should not obstruct it or attempt to persecute Aboriginal converts. Spaniards could take measures to secure this right, but must attempt peaceful persuasion before resorting to war.

A third legitimate reason for the presence of Europeans in the New World was based on the right of truly free election and alliance between the Indian princes and European princes. As lords and holders and dominion, Aboriginal people had the right to choose their destiny, "not only on [the authority of] religion, but on human friendship and alliances, inasmuch as the Aboriginal converts to Christianity have become friends and allies of Christians" (1532/1917:III:xiiv). In the exercise of this right of self-determination Aboriginal princes could summon Christian princes to help defend them, create friendships or alliances, and cooperate. "This is what the Tlaxcaltecs are said to have done against the Mexicans" Vitoria stated (*ibid*: xiv), recalling also the *foedera* between Rome and pagan nations.

As a corollary of the freedom of choice doctrine, Vitoria asserted that even individual Christianized Aboriginals, could choose a Christian Prince to protect their freedom of religion. As Christians, they would have the same rights as other Europeans. Vitoria noted that, for the good of their State, the Franks changed their sovereigns and, deposing Childeric, put Pepin, the father of Charlemagne, in his place—a change which was approved by Pope Zacharias (*ibid*: xliv-xiv). Vitoria argued that Christian Aboriginals could demand similar changes in leadership for themselves as well as their entire nation.

With considerable hesitation but with a consistent vision, Master Vitoria added that some Aboriginal princes might be unfit to administer a lawful state. This could justify the presence of a Christian Prince in their dominion, but only if the resulting administration would actually benefit the people. This could only be justified in case where the Aboriginal peoples concerned:

have no proper laws nor magistrates, and are not even capable of

> controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, yea necessaries, of human life (*ibid*. III.18).

Nonetheless, Vitoria rejected the "creative arguments": that Aboriginal people as a whole could not hold land because they were natural slaves, or by reason of their lack of Catholic faith, or their sins against Jesus, or their "unsoundness of mind". Vitoria insisted that dominion was a right given by God's law, not his grace, to all peoples, albeit limited by the laws of nature. [7]

Master Vitoria concluded that "the aborigines in question were true owners, before the Spaniard came among them, both from the public and private point of view" (1532/1917:I:xiii,xiv).

5. Codification's of Aboriginal Dominion

The Spanish monarchy and the Holy See quickly affirmed Vitoria's conclusions, and outlawing the enslavement of the Aboriginal peoples in the Royal Law dated 2 December 1528, which was sent to ecclesiastical authorities in New Spain. It stressed the protection which priests should accord the Aboriginals, warning that "the intention of most of the Spaniards who have come over to that country is not to settle and remain there, but to enjoy it and to rob its Aboriginals."

In the following year (1529) the Royal Council of Spain, assembled in Barcelona, declared that "the Indians are and should be entirely free and are not obliged to render personal service, no more than other free persons of these realms" (Friede 1971:144). Like other Spaniards the Aboriginals were obligated to pay tithes to the Church and tribute to the King. Following Vitoria's doctrines, the Council firmly insisted that the

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[7] Additionally, Vitoria concluded that "liberty cannot rightfully be traded for all the world in the world; it can be traded for life, which is more precious than any gold" (Heredia 1931 43:173-5); hence slavery could never be "voluntary."

Indians "should not henceforth be given in *encomienda* to any person and that all the *encomiendas* made should be promptly taken away because of the evidence that we have of the great cruelties and excessive labour and lack of provisioning". Moreover, the Council stated that "until the said Indians are better instructed in the Faith and learn our customs and have some understanding and practice in civilized life, His Majesty should not give them as vassals to other persons, either perpetually or temporarily...for experience shows that the laws and prohibitions ordered until now, although very good, have not been observed" (*ibid.* 144-45). Later in that year, the Council of the Indies also recommended abolishing the *encomiendas*, compensating the *encomenderos* with land, and limiting the right to collect tribute to one year "in order that they may lose something of the evil habit of exploiting them [the Americans] without measure"(*ibid* 145).

In 1533, the Council of the Indies reiterated its abolition of the *encomienda*. In addition, it warned that the grant of *encomiendas* created a lordship (*senorio*) over the Indians that could threaten the integrity of royal perogatives. These political observation reflect the maturing view of Vitoria. Widespread opposition to the exercise of lordships over the Indians and the *encomienda* system began to appear at the Spanish court (*ibid.* 145).

The Crown also sought to define and limit the power of the existing *encomenderos* over the Aboriginals. The Royal Law of 23 February 1536 stated that the Aboriginal peoples were under the protection of the Crown; the *encomendero* was simply the collector of the Crown's tribute, which he retained as compensation for the obligations he assumed with regard to instruction and Christianization. In the same document, the Crown reaffirmed the personal freedom of the Aboriginals and their ownership of their lands and personal possessions, thereby protecting them against unjust enslavement (*ibid.* 146).

To clarify the status of Americans, Pope Paul III issued an edict addressed to Juan Cardinal de Tavera, Archbishop of Toledo, granting him full power to take whatever

measures he deemed necessary to protect the Aboriginals. In the Bull *Sublimis Deus Sic Dilexit* (also know as the Bull *Excelsis Deus* and *Veritas Ipsa*), issued in 1537, Pope Paul III declared unequivocally:

> The enemy of the human race, who opposes all good deeds in order to bring men to destruction, [...] invented a means never before heard of, by which he might hinder the preaching of God's word of salvation to the people: he inspired his satellites who, to please him, have not hesitated to publish abroad that the Indians of the West and the South, and other people of whom we have recent knowledge should be treated as dumb brutes created for our service, pretending that they are incapable of receiving the Catholic faith.
>
> We [...] consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic faith but, according to our information, they desire exceedingly to receive it. Desiring to provide ample remedy for these evils, we declare [...] that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property, nor should they be in any way enslaved; should the contrary happen it shall be null and void (Walton 1900: 43-48).

The broadly-worded proclamation of the Holy See sought to end the debate over the nature of the Aboriginal peoples of America, and firmly establish the obligations of European Catholics towards them. It reaffirming that indigenous people possessed souls and were human beings with inherent human rights. As humans, they were protected by God, Christ, and the Holy See. They had the capacity of human choice, the human ability to voluntarily embrace and be converted to the Catholic faith. They could not be

enslaved, or forced to accept the Catholic faith or enslaved. With a few modifications, this natural rights doctrine of dominion emerged as the classic theory of human rights in the 18th century.

The Holy See formally rejected the Ostiensian thesis that infidel nations were not legitimate, their rulers could not be recognized, and their lands could be taken without compensation (Dickason 1977: 3-4). The Vatican also rejected the Aristotelian position that the Indians were natural slaves, reaffirming that they were men, rather than devils or beasts, and thus entitled to be governed by universal standards of human conduct. The 1537 Bull reasserted Pope Innocent IV's thirteenth century position that non-Christian states enjoy the same rights and authority as Christian states.

This authoritative opinion eventually led the Spanish Crown to recodify the laws governing New Spain, beginning with a national debate at Valladolid in 1550-51. The Dominican friar Bartholomew de Las Casas replaced Vitoria, who was too ill to attend (Hanke 1959; Losada 1971:279-308). In 1547, the Bishop of Chiapas (Mexico), Bartolomé de las Casas, had traveled to Castile to persuade the King that converting the Indians could not justify aggressive war. Once there, he discovered that Juan Gines de Sepúlveda, professor of theology, had just written a treatise at the request of the Council of the Indies defending the conquest as a just war against unbelievers (Hanke 1965:112-118; Las Casas 1974:9). Las Casas convinced the authorities to stop publication of Sepulveda's book, and in 1550 the Emperor suspended all further expeditions in the Americas pending a public inquiry. Thus fourteen eminent scholars met that year at Valladolid to hear directly from Sepúlveda and Las Casas.

Sepúlveda argued that war was justified to punish the Indians for their sins against religion and nature, and to bring them speedily and effectively to the Church. As backward peoples, moreover, the Indians had been entrusted by nature to the guidance and protection of strong, civilized nations. This was plain from the fact that the Indians, to whom Sepúlveda referred as *hombrecillos*, or "little men", "do not have written laws, but barbaric institutions and customs...they do not even have private property" (Hanke

1965:122; also Zavala 1943:42).[8]

Based on his direct observations, Las Casas replied that Indians were indisputably "rational beings," who compared favorably with the pagan Greeks and Romans of ancient times (Las Casas 1984:42):

> They are not ignorant, inhuman, or bestial. Rather, long before they had heard the word Spaniard they had properly organized states, wisely ordered by excellent laws, religion and custom. They cultivated friendship and, bound together in common fellowship, lived in populous cities in which they wisely administered the affairs of both peace and war justly and equitably, truly governed by laws that at very many points surpass ours, and could have won the admiration of the sage of Athens [...].

Like Vitoria, Las Casas rejected the temporal authority of the Church over the Indians. "The Church is nothing other than the whole Christian people" (Las Casas 1974:80). The Gospels themselves command Christians to obey pagan rulers (*ibid.* 331), thus how could Christians justify overthrowing a ruler merely on account of his paganism? While evidently ignorant, moreover, the Indians had not intended to commit evil. "Does the Indian who has never heard the name of Christ believe any less, at least in a human way, that his religion is true than the Christian does of his religion?" (*ibid.* 320)[9]

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[8]Las Casas replied to this in part by citing Roman descriptions of the Spanish tribes as recalcitrant barbarians, rhetorically demanding whether Sepúlveda believed that the Spaniards had fought an unjust war against Rome's legions (Las Casas 1974:43).

[9]Therefore "no pagan can be punished by the Church--much less by Christian rulers--for a superstition, no matter how abominable or a crime, no matter how serious, as long as he commits it precisely within the borders of the territory of his own masters and his own unbelief" (*ibid.* 97) Las Casas conceded that human sacrifice was an evil, but cleverly observed that to destroy an entire society for the wickedness of a few rulers or priests was to condemn the innocent and guilt alike.

Above all, Las Casas stressed that forced faith is not true faith (*ibid.* 176). The Indians could be brought to Christianity by kindness, example, and reason, but coercion would only make them hate Christianity, and religious war was nothing more than a pretext for the theft of Indians' property.

Las Casas argued for the acceptance of the Vitorian doctrine of Aboriginal dominion as proper Spanish administration policy, as opposed to Majors-Sepulveda's argument to enslave the Indians (Qurik 1954:357-364). No decision was expressly recorded. Judging from the provision of the *Leyes de Indis*, the majority of the Junta accepted the Vitoria-Las Casas position.

The Crown eliminated both the word and concept of "conquest" from the *Leyes de Indis*, and provided that restitution be made for past encroachments on Indian property. Another example of the merger of Aboriginal rights into the 1551 *Recopilacion de Leyes de Indis* commanded the Viceroy:

> that the farms and lands which may be granted to Spaniards be so granted without prejudice to the Indians; and that such as may have been granted to their prejudice and injury be restored to whoever they of right shall belong (White 1841:51)

The *Recopilacion* also firmly reflected Vitoria's doctrine of Aboriginal ownership of the land: no law required that Aboriginal land or rights be dependent upon a royal grant. The *Recopilacion* regulated the Spaniards' rights in tribal lands; it never purported to regulate the Aboriginal nations themselves.

Although licenses for overseas expeditions were issued again beginning in 1566, Emperor Philip II promulgated regulations in 1573 limiting the use of force to the minimum required for "pacification," and prohibiting the enslavement of subject peoples.[10]

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[10]Indian slavery had already been abolished in Mexico and many other Spanish possessions by regulation, and orders issued between 1542 and 1561 (Zavala 1943:60-64).

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

As we will see below, treaties were also used increasingly as an instrument of Spanish Colonial expansion. Military pacts with the Aztec's enemies had strengthened Cortez in his expedition against Moctezuma, and treaties of submission as vassals of the Spanish Crown were exacted from other Central American rulers. In 1605, the descendants of Moctezuma ceded their rights to the Crown in exchange for a pension (Zavala 1943:36-37), signaling a major change in Spanish conceptions of the legitimacy of conquest.

PART TWO

THE RISE OF THE LAW OF NATIONS

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

A. PROTESTANT TRANSFORMATION OF LAW

In 1523, Giovanni de Verrazzano sailed up the Atlantic coastline of North America in search of a passage to Asia. His documentation of the share of the continent, based on fragmented sightings, consolidated the concept of North America in European consciousness. While the glitter of South American treasure rekindled southern Europeans' dreams of wealth and political empires, it was the fishery and trade that exhilarated the northern European mind. These resources temporarily focused European thought on the *material* value of the continent, the *usefulness* of the people, rather than on the underlying problems of human knowledge and consciousness. When finally addressed, however, these problems helped create the concept of human rights.

Since Europeans had already destroyed their own fisheries, the North Atlantic fishery was essential to the survival of European society. Europeans has polluted their rivers and relied on Baltic herring to survive.

> Their rivers were polluted with excrement and carrion, the fish gone or a source of plagues, and starvation was bringing some nations to the verge of extinction. Oily herring caught in the Baltic took so long to absorb the salt meant to preserve it that Europe's Roman Catholics, bound by law to eat no meat 153 days of the year, rarely tasted fish that wasn't in an advanced stage of putrefaction (Callwood 1981:1).

Propelled by such religious necessities, fishing assumed an ever-larger importance in the European economy. In their attempts to feed Catholic Europe, the Basques and Portuguese constantly clashed with English and French fishing fleets. Then, as part of the attempt to control strategic harbors and points along the coast, the European fleets encountered the Aboriginal peoples of North America. Eventually the two peoples were able to establish a practical system of trade that became as important as the fisheries themselves.

Europeans' struggles to control the nourishing summer fisheries around *Terra Nova* (or New Founde Land) led to trading monopolies and fostered private wars.

Attempts to control the growing Indian trade exacerbated the conflict over fishing entitlements. Private wars expanded into public wars, with or without approval from the European princes and by the eighteenth century led the first series of global wars. Out of the expense and futility of the military struggle, first the Holy Roman Church and later the European aristocracies formulated the classic premises of the Law of Nations. At the center of this seventeenth century global order was the doctrine of *Aboriginal dominion*, the *discovery convention*, and the idea of a *treaty commonwealth*.

Legal systems do not "grow" or "develop"; they transform. These transformations are not always about growth or patterns, nor do they focus on a particular goal or idea. Transformation in the legal order is always a paradoxical event. Ensuring stability and continuity are said to be the purpose for law in society. Yet, stability and continuity usually depends on some force or authority outside of the law, itself. When a legal order undergoes transformations there are invariably questions about the continued legitimacy of its authority. Almost all legal historians of Eurocentric law agree that the Protestant Reformation was as significant transformation in law as the Gregorian Revolution of 1150-1200. It has been called the second legal revolution (Berman 1983).

In his book *Law and Revolution. The Formation of Western Legal Tradition* (1983), Harold Berman suggests that the Eurocentric society has experienced six revolutions: the Gregorian Papal Reforms (1075-1122); the Protestant Reformation of Germany (1517-1555); English Revolution (1640-1689); American Revolution (1776-1813); French Revolution (1789); and the Russian Revolution (1917). He demonstrates that each of these revolutions has been marked by fundamental, rapid, violent, and lasting changes in society. Each sought legitimacy in a fundamental law, a remote past, and an apocalyptic future. Each revolution took more than one generation to establish roots. And each revolution eventually produced a new system of law, which embodied some of the major purposes of the revolution, but ultimately remained within the board framework of European legal traditions.

Like other Eurocentric legal transformations, the Protestant Revolution invoked a

theory of restoring earlier traditions that had been betrayed. Luther argued for a return to early Christianity and natural law, following a betrayal of the Holy See. Cromwell similarly argued for a restoration of ancient English liberties denied by Tudor despotism. Using the Black Legend in America as their canvas, Luther and the North European princes began painting a new, secular vision of international law, that would replace the league of Christian states under the Holy See. This vision encompassed the secularization of the law of the prince, a positivist theory of the law, and recognition of the individual consciences of subjects.

The Protestant Reformation broke the Catholic dualism of ecclesiastical and secular law by delegalizing the Church. The Church became invisible, apolitical, alegal. The only law and authority, became the secular kingdom or principality, or in Machiavelli's new term, "the state", the secular kingdoms created a new theory of law–positivism. Legal positivism separated law from morals, denied the law making role of the Church, and established coercion as the ultimate sanction of the law. Law was nothing more than the expression of the will of the absolute monarchs who ruled Europe. It was morally neutral, a means and not an end, a devise for manifesting the policy of the sovereign and for securing obedience to the sovereign's wishes.

At the same time, the Lutheran concept of the power of the individual, introduced a strong contractual element into political and social relations. Individual will was the basis of a new secular Treaty Order with the Law of Nations. The same idea changed the focus of old rules and sanctified the development of the modern individualistic law of property and contract. The Catholic Order became the Treaty Order: Nature became property; economic relations became contract, and conscience became will and intent. Property and contract rights created by the individual were held to be sacred and inviolable, so long as they did not contravene conscience. Individual conscience gave them their sanctity and legitimacy..

The followers of John Calvin, including England's Puritans, took the idea of conscience even farther. They asserted the duty of Christians to reform the world, and

that the local congregation, under its elected minister and elders, is the seat of a truth higher than political authority. As the early Christians founded the Catholic Church by their disobedience to Roman law, so did the seventeenth-century Puritan and Pietism thrive in their open disobedience to English and European law, based on beliefs in the social contract, government by consent of the governed, and human rights. The civil rights that were central to this movement were the freedom of speech and press, free exercise of religion, the privilege against self-incrimination, the independence of the jury from judicial directions, and, the right not to be imprisoned without lawful cause.

As religion became reduced to the level of individual conscience, law itself became less absolutist and more of a personal, private matter. Ideologies were raised to the level of passionate, personal faiths or secular religions. Eventually, the American and French revolutions set the stage for ideologies based on beliefs in Man and his nature, the individual conscience, reason, rights, and citizenship. Individualism, rationalism, and nationalism were given legal expression.

B. TRANSFORMATION TO THE LAW OF NATIONS

While the missionaries struggled to protect the Aboriginal people from European settlers under the Holy See's vision of Aboriginal dominion, European princes were struggling to establish their independence from the *Respublica gentium Christiana*, and to assert their claims in America. Both struggles contributed to a secular transnational order, independent of the Holy Roman Empire, based secular territorial sovereignty under the will of the King and on contracts between them.

The emerging European monarchies created a new normative order around a view of mankind's evil, originating in the doctrine of original sin, reinforced by the Black Legend in America and a Hobbesian secular interpretation of man and society. They were forced to embrace new principles of social cohesion distinct from existing divine law or the Catholic *oecumene.* To support their claim in Europe and the New World, they claimed authority from principles of *justice* rather than divine law. These principles could be discovered objectively by human reason from social life, and had a universal and

eternal validity. In the unfolding of this secular vision of natural law, European aristocracies shaped a Law of Nations based on the study of diplomatic practice.

1. The French Crown.

The French Crown initiated effort to discover the foundation for a new transnational order. They built on Vitoria's doctrines and the works of Jean Bodin and LeRoy. According to Bodin's *Les Six Livres de la Republique* (1577) and le Roy's *De l'Excellence du governement royal* (1575), the search for legitimate political authority must begin with a centralized social order. Absolutism was essential to the Great Chain of Being. Emphasizing rank and order, absolutism placed the monarch at the center of the state; man at the center of the natural order of the Earth; and God at the center of the universe. These interlocking equations forged the stability of the known political and social orders, and justified the secular authority of European Crowns. They justified a Law of Nations basis of sovereign equality. These concepts were extended to the recognition of American sovereigns and established their dominion and rights under the Law of Nations.

In comparison with the political development of Spain, both France and England were said to be almost a century behind, having neither the political nor administrative apparatus to take advantage of America until the end of the sixteenth century. It was widely believed that Colón had originally sought the French Crown's and British Crown's support for his exploration, but had been turned down. In fact, Bartholomew Columbus had been at the French court in 1492, apparently seeking support, when news of his brother's discovery of America arrived (Morison 1942:90-91). Nearly two centuries later, the French were still critical of the blindness of the French Court for not supporting Columbus' original proposal, and jealous of Spain and Portugal's newly acquired wealth from America (Montesquieu 1785/1951: 2:321).

Pope Alexander VI's Bulls of 1493, particularly the second *Inter Caetera*, the Treaty of Tordesillas between Spain and Portugal in 1494, and the papal confirmation from Julius II in the *Bull Ea Quae* in 1506, were not well received in Northern Europe.

Under these documents, the papal power was extended directly into America; thus, the Northern European monarchies viewed these documents as imperial opportunism rather than papal supremacy.

One of France's leading historians of the sixteenth century, Henri Lancelot-Voisin, Sieur de La Popelinière, a Huguenot, challenged the papal division of America drawing on Vitoria's doctrine of Aboriginal consent. He stated that the Americans, had they been consulted, would never have agreed to such a division (La Popelinière 1582:bk. 2:50). It was reported that the Peruvian Inca leaders, upon hearing that the Holy See and the Spanish Crown had divided up their Aboriginal land, told Pizarro that the Pope "must be crazy to talk of giving away countries which do not belong to him" (Lindley 1926:127, citing Prescott).

The French Crown reflected La Popelinière's analysis. From the starting point of Aboriginal dominion, the Crown challenged the papal division of America among Catholic rulers. When Francois I realized that the "islands" of the Indies were actually huge continents, and American gold and silver began to flood European markets, he pressured Clement VIII for a clarification that the Bulls–applied only to the islands actually discovered, not to all the unknown lands. He echoed Thevets' *Cosmographie Universelle* (1558) argument that the French should not accept "that the Pope has granted this huge territory from one pole to another, as it is enough for 50 Christian kings." (1575:965). When his suggestions were rejected by the Holy See, Francois peevishly asked to see Adam's will in order to verify the Pope's right to dispose of the non-Christian lands (Hanke 1949: 148).

In 1524, Francois sent Verrazzano to explore America and chart its northern coast. At the same time, Francios permitted French privateers to begin to harass the Spanish settlements in America, and asserted his temporal independence from the Holy See, claiming French jurisdiction based on discovery, and on the right to trade with, and convert the Aboriginal peoples to Christianity.

To justify French jurisdiction in America, contemporary French historians argued

that the papal grants lacked French consent. This applied the same legal analysis to Aboriginal nations to the European states. "They [the Holy See and Spanish and Portuguese Crowns] made the divisions [in America] without consulting Your Royal Majesty, nor any of Your predecessors" argued Alfonse in *La Cosmographie* to the French Crown "[I]t was an ill-advised and bad partition, as You had as much and as great of Right as they." (1904:83).

2. The British Crown.

Elizabeth I of England also rejected papal grants. Her Majesty acknowledged that papal grants were evidence of Catholic Princes' trading activities, but they could not convey dominion or property rights. She told the Spanish ambassador that:

> she understood not, why hers and other Princes subjects, should be barred from the Indies, which she could not perswade [sic] her selfe the Spaniard had any rightfull title to by the Byshop [sic] of Romes donation, in who she acknowledged no prerogative, much lesse authority in such causes, that he should bind Princes which owe him no obedience, or infeoffe as it were the Spaniard in that new World and invest him with possession thereof; ...but that other Princes may trade in those Countries without breach of the Law of Nations, transport colonies thither, where the Spaniards inhabite not (Camden 1630:2:116).

Elizabeth also rejected any European dominion or ownership derived from the fact that Europeans had "arrived here and there, built Cottages, and given names to a River or a Cape"; instead, she declared that such activities could not "purchase any propriety" (Camden 1630: vol.2, 116).

Her Majesty's position was derived from both the *fondaco* model of Venetian Law (Tepaske 1967:32-55) and the advice of Alberico Gentilis. Gentilis was an Italian jurist who is considered by many scholars to be the founder of the science of international law. Writing his commentaries *De Iure Belli* (1558) at Oxford, Gentilis also confirmed the Aboriginal dominion principle of Vitoria. He declared that the title of the Spanish Crown

in the Americas:

> could not be justified in law by either conquest or war. Wars could only justify taking of Aboriginal property tenure if the Aboriginals had refused to trade with the Spaniards. Since the Spaniards fought for dominion rather than to commercial rights, they never acquired any "just title" or authority in America (I:xix).

Gentilis also held that papal grants, discovery and prescription could not grant Aboriginal dominion in populated lands to any European nation; these theories could grant trading jurisdictions, but not proprietary title (1877 I,XIX).

Until the beginning of the seventeenth century, neither the royal advisors nor the common laws provided any framework for the assertion of royal authority outside the English realm. They had little interest in the position of the Crown in the Law of Nations, and tended to reduce all political questions to domestic traditions. The fragmented medieval thoughts in the common law that regulated disputes among British subjects in newly acquired territories, were gathered together in *Calvin's Case* (1607), [11] which was fabricated by the attorneys and justices to secure a judicial settlement on these issues.[12]

Calvin's Case addressed the effect of the accession of a King of Scots to the throne of Edward I. Robert Calvin, through his guardian, sought the return "of his freehold" in Haggard, that had been "unjustly and without judgment" disseised by Richard and Nicholas Smith. Smith's attorney argued that Calvin was "an alien" who was born out of allegiance to the said lord, "the King of his kingdom of England", and as such ought to be barred from having an answer to his guardian's writ. The question was therefore whether a Scot born after the accession of James VI to the English throne (as James I, 1610-1620) was capable of holding English land. It was an established principle

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11 (1608) 7 Co. Rep 1.

12 Smith, *Appeals to the Privy Council from the American Plantations* 1965:467.

of both the Scottish and English legal systems in the later Middle Ages that an alien could not hold landed property, although prior to the reign of Edward I, it was common for landowners to have estates on both side of the Scottish border.

The dispute was carefully examined by the English Lord Chancellor and twelve common law judges, who seized on this opportunity to debate at great length on various legal aspects of the succession of King James to the English throne. In the end, they held that the James' accession results in a mere *personal* union. England and Scotland remained separate and distinct kingdoms, governed by separate municipal laws. The personal union of the Crowns need not of itself have caused the slightest change in the internal law of the common monarch's separate kingdoms.[13]

The context in which Sir Edward Coke viewed these issues included "ligeance," "kingdoms," "laws," and "alienage". Fundamental to his discussion was the basic medieval distinction between the "realm" and the "dominions of the King not parcel thereof but under his obedience". This distinction also informs the prerogative jurisdictions of the Crown, diversity of laws within foreign dominions, and the limited authority of Parliament in the dominions.

Beginning with the assumption that all lands were held in tenure from some

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[13]This was not the result in Ireland or Wales, whose laws were totally merged in English law. But these nations came to the throne in a different manner. The Court could have resurrected the alleged ancient union of the Kingdoms as expressed in the *Title to the Throne Act* 1603 to reduce Scotland to a "separate yet remaining" kingdom. After the Scottish Stuarts, in fact, the English revolutionaries in an unconstitutional "parliament" under Cromwell declared (by *Acts and Ordinances of the Commonwealth* II:873-5), a union of the two countries. This completely overhauled most of the Scots' land law and courts. After the restoration of Charles II, these land laws and court reforms were rescinded. In 1707, the two territorial sovereigns agreed to create a Union, two countries with a united constitution. This process became a model for Aboriginal treaties.

higher authority (a jurisdictional sovereign), Lord Coke distinguished between the acquisition of territory by conquest of a Christian or infidel kings. In English feudal land law lands come to the King by inheritance, or else those by "conquest." Yet conquest was not military conquest ("by wars of fire and sword");[14]. Blackstone later explained, "what we call *Purchase, perquisitio,* the feudists called *conquest, conquaestus, or conquisitio*".[15] Coke concluded that in any conquest of territory from a Christian king, existing laws remain in force until altered by the English king. On the other hand, where the acquisition of territory was from an infidel king of infidels, if any existing laws conflict with the law of God and of nature, they automatically were abrogated. Until the English king introduced new laws, these infidel societies or people were to be governed according to natural equity.[16] Only in the case of an uninhabited country or "desert", did English settlers carry the common law with them "as their birth right."

Coke's analysis was extended to North America, as the constitutional law of the King's foreign dominions. As inhabited territories, these foreign dominions were exclusively under the prerogative jurisdiction of the Crown. They were not part of the English realm, and could be ordered by distinct laws. Once the law of England was introduced to a foreign dominion, Parliament possessed the power to alter the existing laws, unless by its prerogative charters and commissions the Crown reserved its prerogatives against Parliamentary encroachments..

It followed from this that Aboriginal treaties created "alien born friends in league" with the British Crown. Jurisdiction and proprietary interests in America could only be obtained through contractual purchases, deeds or treaties from the Aboriginal nations. Discovery merely provided an opportunity to establish these friends in leagues.

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[14]7 Co. Rep 17a.

[15]*Commentaries* Book II, Ch. 15 *Of Title by Purchase and First by Escheat.* ¶.*323*-326.

[16]7 Co. Rep 18-18a.

3. Northern European States

Other northern European nations, emerging from plagues and pestilence, and recovering and flourishing on North American cod, also abandoned the papal bulls for a more consensual theory of empire. Under the intellectual leadership of Hugo Grotius, a solid foundation for the Discovery convention was created. Grotius synthesized the diplomatic practice of the northern European nations into a comprehensive, coherent and practical international code of order. His pragmatic selection and reconstruction of historical ideas of law and justice created the terms of acceptance of the Discovery convention by all competing European princes.

In his great treatise, *Mare Liberum* Grotius adopted the Roman law's distinction between "title" (political jurisdiction or authority) and dominion (property or tenure), and argued that discovery of a new land can neither give a full title "without actual possession (1712: chap 2), nor furnish a just cause for acquisition of territory by conquest"(chaps 5 and 8). He also rejected application of the Roman legal concept of *vacuum domicilim* or *terra nullius* to America. Baron Puffendorf agreed with Vitoria and Grotius explaining in *On the Law of Nature and Nations* that "The bare seeing a thing, or the knowing where it is, is not judged a sufficient Title of Possession" (1710:ss.IV, VI, VIII).

Grotius' work is significant because he concretely expressed the emerging Protestant perspective opinions of the northern European nations. In 1646, he defined a *state* as "a complete association of free men, joined together for the enjoyment of rights and for their common interest" (I:I:XIV and II:V:XXIII). He observed that the "'essential character' in a people is the full and perfect union of civic life, the first product of which is sovereign power; that is the bond which binds the state together..." (1646) II:IX:I) Both Vattel (1758 s.1) and Blackstone (1765 I:52) faithfully adopted this classical definition of statehood within the Law of Nations. This notion makes not mention of territory as a requirement of being a state. It was broad enough to describe both tribal and European states.

PART THREE

CONSTRUCTING AN INTERNATIONAL TREATY ORDER.

A. THE THEORY OF THE TREATY ORDER.

The Treaty Order was built on trust and promises. Between political societies or nations, Treaties were voluntary commitments. They were the manifestation of a customary Law of Nations, sovereign will and rationality. They are the cement that has held and still holds the global family together. The object of the promissory regime was to produce an ordered and just system between nations, grounded in principles of universal humanity.

Treaties are based on the first principle that nations may impose obligations on themselves where none existed before. These agreements create the international Treaty Order through the shared use of customary laws. In the absence of agreement, there are no binding rules. Rules of law among nations emanate from their own free will.

The Treaty Order, is a product of the last four hundred years. As we has illustrated, it grew out of the Holy Roman Empire, and was initially based on European customs. It was an intellectual product of diplomats and jurists searching for an alternative to the law of war. The elements that comprise the Treaty Order include: (1) the acquisition of treaty-making power; (2) as its corollary, the acquisition of the right to diplomatic representation; and (3) the logical outcome of the first two, which is the acquisition of international personality. The treaties are the closest things to legislation in international law.

The Treaty Order is composed of principles and rules which the nations have agreed to observe. It is a unique kind of legal order built not on force or coercion,[17] but mutual trust and promises. It was based on a recognition that *others* outside of Europe are part of the same human world, and can share in a single international order. At one level,

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[17] *Reservations of the Convention of Genocide Case*, Advisory Opinion I.C.J. Reports 1951:15 (It is well established that in its treaty relations, a State cannot be bound without its consent).

the Treaty Order represents universal rules of negotiation, consent, and remedies. At the same tune, specific agreements between communities vary from place to place, creating locally-binding principles and rules. Rules can be expressed by written conventions, or discovered in generally accepted usages.

The Treaty Order is best understood from a historical survey of practice, but it useful to settle some questions of terminology. In *Canadian Treaty-Making A.E.* Gotlieb noted that Canada has 37 different usages and words for agreements.[18] Some writers have argued that the historical agreements with indigenous nations and tribes were mere agreements or contracts, not "treaties," and as such were respected only out of the honour and generosity of the state. The existence of such agreements they argue, is not determinative of the issue of the status of Indian nations in international law.[19] This disregards the importance of state practice, history and custom in international law, and adopts a post-hoc colonial and racist theory, completely inconsistent with the primacy of consensual obligations in international law. The focus of the inquiry should be the will of the parties, not their race or culture.

The International Law Commission [ILC], an advisory body and subsidiary organ of the United Nations General Assembly,[20] codified existing international customary law in the *Vienna Convention on the Law of Treaties*, adopted thus far by 79 states. This Treaty on the law of treaties defines a "treaty" to mean:

an international agreement concluded between States in written form and

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[18](Toronto, Butterworths 1968 at 21). Justice Duff of the Supreme Court, in 1922, defined a treaty as "an agreement between States [. . .] a compact between states and internationally or diplomatically binding upon States" (*In re Employment of Aliens,* (1922) S.C.R. 293).

[19]A.H. Snow, *The Question of Aborigines in the Law and Practice of Nation* (1918; reprint Northbrook Illinois: Metro Books 1972 at 128.

[20]The ILC consists of leading jurists from different continents and national traditions.

> governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation (Art. 2(1)(a)).

Canada acceded to the Convention on October 14, 1969, and it came into force in Canada in 27 January 1980. The importance of the Convention in Canada was summarized by the Department of External Affairs in a Memorandum dated June 4, 1970:

> The Convention constitutes a law-making treaty laying down the fundamental principles of contemporary treaty law. Because of the paramount importance of treaties as a source of the international legal obligations binding on states [...], the Convention must be viewed as virtually the constitutional basis, second in importance only to the U.N. Charter, of the international community of states.[21]

In the modern regime of international law a distinction is made between law-making treaties and treaty contracts. Both types of treaties are based on mutual consent. Only law-making treaties, such as the *Vienna Convention on the Law of Treaties*, can be regarded as affecting international law as a whole, rather than the private commitments of individual states. Treaty-contracts, whether bilateral or multilateral, create special rights and obligations like private law contracts, although they may lead to the formation of rules of customary international law or be evidence of the existence of such rules.

B. INTERNATIONAL DISCOVERY CONVENTION.

By translating natural law from philosophical speculation into a international order built on "reason" and "the law of nature", European jurists formulated an convention of discovery and doctrine of Aboriginal dominion as valid ways of acquiring

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[21]Kindred, et al, *International Law Chiefly as Interpreted and Applied in Canada* (Edmond Montgomery Publications 1987 at 114).

authority over other nations around the globe. The terms of the convention were never committed to a written document but existed as customary international law.

The unity in thought among Vitoria, Gentili, and Grotius came from their fundamental belief that the principles of the Law of Nations (as well as national law) were derived from principles of justice which had universal and eternal validity. They referred to these principles as *natural* law because they considered them inherent in the fact that people live together in society and are capable of understanding the necessity of rules for preserving social order. The fact that different nations chose to follow natural law confirmed its universal nature.

In the establishment of the Discovery convention, the European sovereigns transformed Aboriginal dominion into rights and duties within the Law of Nations. The Convention clarified European claims to political and trading authority, and did not assert property rights over the Aboriginal peoples (Pufendorf 1710; Grotius 1712; Twiss 1861).

The law of the Roman Empire, the antecedent intellectual system of the Holy Roman Empire and international law, did not recognize any rights of property based on the mere discovery of new land (*Digest*, XLI. 1&2). The closest equivalent to the Discovery convention was the Roman law of occupation, that dealt with the acquisition of *dominium* or property, but not the acquisition of *imperium* or sovereign rights over the people. The principles of occupancy however were unequal to the task of definitively settling any questions connected with rival claims of sovereignty to territory occupied by Aboriginal owners.

The law of occupation favored Aboriginal dominion, insofar as it gave all right to the first occupant–*quod ante nullius est*. Vitoria's doctrine of Aboriginal dominion had followed Roman law, in this respect. European discovery, he had stated, joined with occupation, "can produce some effect [...] yet in and by itself it gives no support to a seizure of the aborigines any more than if they had discovered us" (1532/1917:III:xlvi-xlv). The only just manner of asserting any political control or property was through a "voluntary and knowledgeable choice" of the Aboriginals (*ibid.*

III:xlvi-xlv). Making mutual agreement with the Aboriginal princes or republics was Vitoria's preferred method of acquiring or transferring Aboriginal rights to either the Holy See or European princes.

Although the actual discovery of populated lands could neither acquire Aboriginal *imperium* or *dominium*, Vitoria argued that it did justify certain exclusive trading privileges by the discovering nation against other European nations. Thus, the Discovery convention limited the discovering nation's right to acquire trading jurisdictions on effective use of the privilege within the new territory. If these privileges were not effectively utilized, they were lost to competing nations.

European princes initially asserted symbolic and trivial acts, actual use and cultivation, the physical power to exclude other Europeans, and conquest to justify their trading jurisdiction in the America. These concept created more conflict than order. For example, trading entitlements within *Míkmáki*, now called Atlantic Canada, were originally claimed by Portugal, France, and Great Britain. Portugal claimed them under the voyages of Gaspar de Cortereal in 1550, and by virute of a fishing colony at Mira Bay (*Solakatik*) on Cape Breton Island (*Unamakik* to the Míkmaq; *Xoracade, Xaracada, or Xaracadi* to the Portuguese). France claimed modern Nova Scotia under the voyages of Verrazzano, Cartier and Champlain, and extended the Portuguese name, rendered in French as "L'Acadie", to the territory. Britain claimed other portions of *Míkmáki* under the vague discoveries of Cabot, but had no claims based on settlement.

The resulting conflicts over new territories based on the locations and dates threatened to become an unworkable international standard. In order to avoid conflicting claims and consequent wars, the European royal families agreed to a flexible principle among themselves: that discovery of new lands gave an initial jurisdiction to the state whose subjects made the discovery. To convert this political authority into title to territory, they accepted Vitoria's principle of Aboriginal choice and realized it through tribal deeds, then purchases, and eventually consensual treaties with the America nations.

As an ordering principle of the Law of Nations, the Discovery convention granted

both freedoms and imposed obligations upon the European sovereigns in regards to the American sovereigns. "All concur," said Sir William Scott (afterward Lord Stowell) in giving judgment in the case of *The Fama* (1804),

> in holding it to be a necessary principle of jurisprudence, that to complete the right of property, the right to the thing, and the possession of the thing itself, should be united... This is the general law of property, and applies I conceive, no less to the right of territory than to other rights. Even in the newly discovered countries, where a title is meant to be established, for the first time [by a European Prince] some act of possession is usually done and proclaimed as a notification of the fact (5 Robinson's Reps. p. 115).

Chief Justice Marshall summarized the effects of this international Convention in *Worcester v. Georgia* (1832):

> Discovery gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. [...] It was an exclusive principle which shut out the right of competition among those [Europeans Princes] who had agreed to it.[...] It regulated the 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 (31 U.S. (6 Pet.) p. 515, 544 (1832).

In short, the Convention held that discovery was the exclusive entitlement to negotiate with the Aboriginal nations for rights. The fact of discovery, by itself, was not sufficient to confer to on European princes a full present territorial or proprietary title in lands held by American nations. It created the original version of "sphere of influence" in international law.

C. THE ROMAN ORIGINS OF EUROPEAN POLITICAL

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

GEOGRAPHY

European Kings adopted the Roman Empire's concepts of political geography, diplomacy and treaties in creating the Treaty Order in the Law of Nations. Some geographers refer to "frontiers of separation" (or "negative frontiers") as hazardous terrain, infertile land or uncertain jurisdiction which minimize contacts between neighboring peoples, and thereby function as *de facto* political borders (Prescott 1987:46). As populations grow, trade networks expand and military states emerge and compete for territory, there is greater contact along these frontiers, and intensified efforts to define precise borders by war or agreement. According to this evolutionary model of borders, treaties historically served a critical role in gradually refining political geography.

There is some evidence for this kind of historical process in the case of Europe itself. Classical Greek geographers focused attention on the control of towns, seaports and trade routes; authority over the intervening, thinly-populated territory remained relatively vague. On the whole, the Hellenic world was defined by a common language, shared ceremonies (such as participation in the Olympiads) and routine trade relations, rather than formal borders. Modern scholars understandably find it difficult to agree, with any confidence, on whether particular outlying Hellenized peoples were part of Greece at any given time, and where exactly to place the boundaries of the Greek state-system (see, *e.g.* Hammond 1967). Greek maps stressed trajectories and distances, rather than landscapes or boundaries (Dilke 1985).

Likewise, the Roman historian Tacitus (in his *Germania*) described the geography of Europe's Teutonic tribes according to their principal settlements, ecology, dialects and customs, rather than borders. Hence a particular tribe was said to live "by the sea" or "along the river," or to extend to a specified forest or prairie, and to be distinguished by their hairstyles, ornaments, and behaviour. Whether this reflected Teutonic reality, or the Romans' lack of more detailed geographic data on the political situation northwards of the Rhine, can never be known with certainty. If accurate, it indicates a

"centre-periphery" worldview, in which peoples identified themselves by places they frequented not by lines separating their own territories from those of others. It may be recalled here that Imperial China still employed this model of political geography in the 19th century, in which all the world was part of China, but simply grew more barbaric (and correspondingly less interesting) with its distance from the Imperial City.

Imperial Rome changed this worldview dramatically by intensifying central administrative control over land, taxes and local officialdom. Although the rectangular-grid system of land surveying was devised by Greek mathematicians in the Fifth Century B.C., it was Roman engineers that began the systematic mapping of Europe and the Empire's political subdivisions (Dilke 1985). There were many practical reasons for this meticulous concern with borders, not the least of which being division of the Empire into precise administrative and tax units. Border lands were frequently annexed for defensive reasons, and Colonized by Roman veterans. This demanded thorough surveys and land grants, superceding any pre-existing Aboriginal land-tenure systems (Salmon 1970:19-21; Dyson 1985:28-29).[22] Land commissioners, dispatched to the site to supervise this entire process, also served as the transitional local government. Land grants (*assignatio*) were sometimes made *ad viritim*, held directly of Rome, but more often as part of a *colonia*, or planned community, in which citizens held their land from the new local government.

In areas that remained in local hands, such as northern Gaul and most of Britain, indigenous leaders were permitted to govern land-use under Roman military supervision, but most tribes were first resettled in open, indefensible countryside for security reasons, their borders marked-off to prevent clashes with neighbouring tribes (Wacher 1978). Significantly, notions of patronage and protection evolved within this administrative system: prominent Roman families became the patrons of provincial towns and tribes,

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[22]The survey was called *limitatio,* from *limite* (boundary), and used a grid of square *centuria* each containing 200 *iugera* of about 125 acres; roads were generally built to mark the main survey lines.

and the Emperor himself the protector of allied, tributary rulers (Dyson 1985:276-78; Sands 1975; Badian 1958). Governorships, provincial military commands and patronage (*clientelae*) relationships evolved into hereditary titles, laying the foundation of the hierarchy of feudal estates that survived the eventual collapse of central Imperial administration in the Sixth Century.

As a result of Roman administration, medieval Europe inherited a well-defined and documented grid of political subdivisions which could be traded back and forth among feudal princes, in the course of war or treaties, without redrawing their borders or modifying their system of internal government (Prescott 1987:176).[23] A single unit could also be subject to different princes, for different purposes, without a change in its territorial integrity. The only exceptions were located along Europe's eastern frontier, where special military defense districts or marches were established as a buffer against invasions by peoples from the steppes of Asia (Prescott 1987:48). Prussia and Austria grew out of a string of marches created to defend Saxony, Bavaria, Bohemia, and Franconia from attacks across the Oder River.

1. Imperial Roman Diplomacy, Treaties, And Patronage.

Both the language and law of European treaty-making have roots in Roman imperialism. Roman diplomacy evolved, in turn, from private-law concepts of personal

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[23]Symbolic of this situation was the practice of identifying a prince by listing all of his individual possessions and his relationship with each of them. For example, the Treaty of Westphalia (1648) identifies Ferdinand II as "King of Germany, Hungary, Bohemia, Dalmatia, Croatia, Slavonia, Arch-Duke of Austria, Duke of Burgundy, Brabant, Styria, Carinthia, Carniola, Marquiss of Moravia, Duke of Luxemburgh, the Higher and Lower Silesia, of Wurtemburgh and Teck, Prince of Suabia, Count of Hapsburg, Tirol, Kyburg and Goritia, Marquiss of the Sacred Roman Empire, Lord of Burgovia, of the Higher and Lower Lusace, of the Marquisate of Slavonia, of Port Naon and Salines" (Toynbee 1967:I.7).

patronage (*clientela*) and trusteeship (*fides*), as they had evolved from earliest times within Roman society itself. The phrase in *fide alicuius esse*, "a trust in someone great," came to mean both a private guardianship or representation, and the moral and legal basis of Rome's supremacy over the other nations comprising its empire.

Patronage could arise by various means, and involve individuals, clans or whole peoples. The act of freeing a slave created a bond of patronage between the freedman and his former master, for example, and this relationship continued in principle, if not in practice, for many generations (Badian 1958:4). Accepting the surrender of a nation that had been defeated in war created a kind of patronage (*deditio*) which could attach to the victorious Roman general as well as the people of Rome as a whole. Different kinds of patronage implied different kinds of reciprocal rights and duties. In the case of a freedman, it might include *tutela* (guardianship)[24] of a client's children, inheritance of a share of the client's estate, and the right to call upon the client for political and military support. Like the relationship of fathers and sons this was ordinarily not a justiciable matter, except in cases of extreme abuse. Its moral weight was clear, however, and the Twelve Tables pronounce patrons who abuse their *fides* as *sacer* (accursed).

In earliest times, Rome simply absorbed its defeated enemies and neighbors, as full citizens entitled to vote and hold office (*civitas optimo iure*) or legal residents (*civias sine suffrago or municipes*). After Rome's conquest and annexation of Latium in 338 B.C its further expansion was mainly built upon treaties of alliance (*foedera*),[25] which

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[24]The term *tutor* (guardian) also described the *lares* (household gods) of Roman families. The English derivatives *tutor* and *tutelage* imply a student-teacher relationship in which the superiority of the patron is based on wisdom rather than (as Romans understood it) power. Likewise, English derives *protection* from *protegere* which meant to cover up, as with a roof, and does not suggest the reciprocity of *clientela.*

[25]From whence English derived the root for *(con)federation.* This was a term of art for treaties of alliance, distinguished from *deditio* (a formal surrender) and

offered Roman military protection in exchange for the supply of troops and funds to support Rome's expansionist adventures elsewhere. *Socii,* the nations thus allied with Rome, were neither subjects nor citizens; however, they necessarily relinquished some of their independence with regard to diplomacy and warfare (Badian 1958:25-32). Like the nations of Europe a millennium and a half later, competing for control of North America, Rome alternately threatened and offered aid, even instigating wars to demonstrate the need for its protection, until all alternative military powers had been turned against each other (Harris 1985:189 *et passim*). [26]

Early Roman diplomacy recognized several degrees of relationships between states, from *amicitia* (mere friendship) and *hospitium* (mutual hospitality to merchants and envoys), to *clientela* (formal patronage). Surviving examples of Roman treaties (surveyed by Sands 1908:10-8) do not often make such fine distinctions, however, simply describing the parties as *socii atque amici*, "allies and friends," a term which later came into general use in modern European treaties on the continent and abroad. This offered Rome a convenient degree of flexibility to make the best of each treaty, as changing circumstances permitted.

As Rome's power grew, it imposed more restrictive terms on client states. Treaty relations were no longer *aequum* (equal); the standard form called for the insertion of a clause in *dicione p.R.*(sovereignty of the Roman people) or, alternatively, in *maiestas p.R.* (supremacy of the Roman people), reminding the client of its subordinate status, and of its moral duty (*pietas*) to respect Roman advice.[27] After destroying Macedonia in 188

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pactus (a contract, commercial or political).

[26]The Polish satirist Stanislaw Lem described this process of turning all against all in *Memories of a Space Traveller 17* (New York: Harcourt Brace Jovanovich 1982), although he was admittedly thinking about the Third Reich, not the Roman Empire.

[27]The first recorded text with this clause was the Aetolian Treaty of 211 B.C., by which the Aetolians agreed to have "the same friends and enemies as the Roman

B.C., Rome had achieved military supremacy throughout the Mediterranean, and no longer felt the need to enforce the precise formalities of its treaty undertakings with other peoples. All allied and dependent states became *clientelae* in fact and were managed in the same way, whether they had been free friends of Rome (*civitas liberes*) like the Greeks, or socii already under Roman protection (Badian 1958: 80-83). Those allied peoples who, like the Aetolians, stood firmly by their treaties and refused to accept Rome's demands for obedience were accused of "ingratitude" and punished (Badian 1958:86).[28]

Thus the status of *foedere* deteriorated from free alliances, with Roman guarantees against common enemies, into patronage under complete Roman legal control. The language of Roman law traces this important transformation. Clients were said to be *in fidem p.R.* or "under trust of the Roman people" and their legal rights were *in beneficio p.R.*, "at the pleasure of the Roman people".[29] Outside of Italy, they were given *libertas*, but Roman jurists meanwhile re-interpreted *libertas* to mean local autonomy, rather than national independence, and to permit Roman taxation (Badian 1958:87-88). In his *Rise of the Roman Empire* (Liber XX, 9), Polybius suggests that Rome's allies did not always understand the intricacies of Latin legal terminology and

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people," and *imperium maiestatemque p.R. comiter conservato–"*promises to observe the empire and supremacy of the Roman people" (Badian 1958:85 n.1, quoting Livy's version).

[28]Rome also took advantage of the practice of periodically renewing treaties with successive kings and governors, to impose more stringent conditions or interpretations on the relationship (Sands 1908:70-73).

[29]Comparisons with "fiduciary responsibility," "trust responsibility" and "at the pleasure of the Crown" are not inappropriate here. Sands (1908:154-162) indeed tried to distinguish British protectorates from their Roman Imperial forebears by arguing (without evidence) that the British Crown has acted from *unselfish motives*.

were resentful later–when they were told how meager were their remaining rights.[30]

D. EXISTING SECULAR TREATIES

The expansion of European economic interests outside the European continent led to diplomatic contacts with non-Christian peoples, first in the Islamic world (by the 11th century), then in Africa (in the early 15th century), and finally the Americas. This posed questions regarding the capacity of non-Christian rulers to enter into binding treaties. Legal recognition of states among other cultures and civilizations was indeed well-established in practice long before the Valladolid debates between las Casas and Sepúlveda on the legal capacity of the "Indians" in Spanish America.

1. Islamic Nations

The capacity of non-Christian nations to enter into treaties with Christian rulers arose as early as the 1414-1418 Council of Constance, where the Teutonic Order challenged the Polish Kingdom's treaties with pagan Lithuanians, which stood in the way of Teutonic conquests on the Baltic coast (Alexandrowicz 1967:84ff). As advocate for Poland, Pawel Wlodkowic, Rector of Cracow's Jagellonian University, reasoned that it was no sin to employ infidels to help defend a Christian kingdom. Nor was it just to make war on infidels merely on account of their faith, he argued, drawing on the writings of St. Thomas Aquinas. The Council took no decision on the matter, but later writers such as Gentili and Grotius accepted the notion that treaties with infidels were valid, as a general principle, provided they did not provide military aid to the one irreconcilable enemy of Christendom, Islam. Hence, for example, the Italian jurist Cacheranus advised against a

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[30]It is also fitting to recall the disgust of Ammianus Marcellinus, in *The Later Roman Empire* (Liber XXX, 4), at Roman lawyers who, "when the court is already deeply perplexed add complications which cannot be disentangled, and make it their business to prevent any peaceful outcome by raising knotty questions to embarrass the judges."

1566 alliance between the Duke of Savoy and the Ottoman Sultan aimed at neutralizing Venice, but saw no legal difficulties in treaties with Persia and India (*ibid.* 87). In a 1686 tract on "treaties with infidels," the English jurist John Henry Pott condemned the 1535 treaty between Francis I of France and the Sultan against the Holy Roman Empire, but approved of Portugal making treaties with Hindu princes.[31]

On the whole, then, the weight of opinion in Europe from the 15th to 17th centuries favoured a universal approach to state capacity. European opinion viewed the situation of Muslim rulers as an exception justified by the perpetual state of war between Islam and Christendom. Islamic jurists entertained parallel doubts about the legitimacy of treaties made with Christians, but Ottoman officials circumvented this by defining their dealings with Christians as mere "truces" in the *Jihad* (Alexandrowicz 1967:91). Even this pretence was dropped by the latter 16th century, once Sulieman had normalized relations with France and opened the door for the wider Ottoman diplomacy with Europe that followed. By the end of the 18th century, European jurists such as Vattel and Wolff had no remaining doubts about the legitimacy of Muslims' treaties; as Vattel concluded in his 1758 *Droit des Gens* (Book II, Chapter XII):

> The law of nature alone regulates the treaties of nations; the difference of religion is a thing absolutely foreign to them. Different people treat with each other in quality of men and not under the character of Christians or of Mahommedans.

The geographical breadth and intensity of European diplomacy in other regions during the 18th century should have extinguished any remaining debate on this question. The Law of Nations had been secularized by a consistent practice of treaty relations with non-Christian rulers.

Muslim law and philosophy divided the world into two antagonistic camps: the

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[31]The French defended their actions by arguing that "differences of religion and cultural tradition cannot destroy the natural association of mankind," which is advanced by peaceful relationships and treaties (quoted in Alexandrowicz 1967:236).

House of Islam (*Dar al–Islam*), which was long conceived as a single state composed of many nations, and the House of War (*Dar al–Harb*), comprised of all states and peoples that do not embrace Islam. The Faithful are obliged to wage war (*jihad*) upon the Unfaithful until all peoples have joined together in Islam,[32] but this never completely excluded temporary pacts or truces, regarded as reprehensible (*makruh*) but not altogether forbidden (Lewis 1982:61-62). Indeed, *shari'a* made various provisions for non-Muslims to live safely in the Muslim world. Individuals, companies, and peoples could be given *aman* (safe-conduct) to travel on diplomatic or commercial business. Whole communities, if they acknowledged the suzereinty of the Sultan by a pact (*dhimma*), and agreed to pay special taxes, could reside permanently in Muslim lands, though ordinarily restricted from any political activity.[33] There was also room for *Dar al -Sulh* (the House of Truce), non-Muslim states that paid tribute and agreed to respect Muslim supremacy unconditionally.

Despite the unrelenting mutual hostility of Islam and Christians, diplomatic contacts between the two civilizations began less than two centuries after the birth of the Prophet. Frankish chronicles report a series of embassies between the courts of Charlemagne and Harun-al-Rashid in 797-807, although there is no confirmation of this in Arabic sources (Lewis 1982:92). As early as 845, the Moorish emir at Cordova

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[32]For centuries, many Muslim scholars have interpreted jihad–which literally means "struggle"–in terms of a relatively peaceful cultural and spiritual antagonism rather than physical war, without recognizing the possibility of any permanent reconciliation. Western colonialism, and during the post-1945 era U.S.-Soviet proxy wars in the Middle East, have revived an aggressive interpretation of *jihad* (Engineer 1980).

[33]The privilege of becoming *dhimmis* (*millet* in Turkish) was limited at first to Christians and Jews, whose religious beliefs were regarded as authentic and divinely revealed, and eventually extended to eleven different ethnic and religious minorities (Hannum 1990:50-51).

reportedly exchanged ambassadors with an unidentified Viking king, and in 953 the Caliph exchanged envoys with Holy Roman Emperor Otto I. By the middle of the next century, the Crusades, Spanish Reconquista, and Muslin Counter-Crusades had begun, forcing Muslim and Christian rulers into increasingly frequent diplomatic contacts. Beginning in the 15th century, Muslim diplomatic manuals included protocol for corresponding with European princes, and European consuls were found in major Muslim cities (Lewis 1982:98-99). Most European states had resident missions in Istanbul by the l500s. Muslims still disdained travel to the West, however, regarding it as barbaric, intolerant, and filthy.

Foreign merchants long enjoyed a customary privilege of residing in their own enclaves, governed mainly by their own personal laws, and this was extended to the first European mercantile colonies in Islamic ports. Their status was revocable, however, unless secured by treaty. Between 1387 and 1480, the Sultan concluded such capitulatory treaties with Genoa, Venice, and other Italian city-states. France and Britain obtained capitulatory rights by treaty in the 16th century, Holland in the 17th century, and all other European powers by the end of the 18th century (Alexandrowicz 1967:99). Although the Sultan surrendered some control over Europeans' activities by this means, no one supposed that the grant of capitulations extinguished the sovereignty or personality of the Ottoman Empire.

After the fall of Constantinople and demarche at Vienna, European exports to Muslim cities flourished under the Ottoman Empire's policy of granting concessions to individual merchants, trading companies and kings in the form of *capitula* ("chapters").[34]

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[34]Here, once again, English derivations from Latin have caused much confusion. The English term, "capitulation," implies an unconditional surrender, quite a different meaning than the medieval term, *capitula*, which could refer to any itemized list of agreements. While it would have been possible for a unconditional surrender to be *capitula*, anyone familiar with Latin would have used the Roman term, *deditio*, instead.

Early *capitula* promised submission to the Sultan and respect for Ottoman supremacy, in return for exemptions from certain regulations and taxes, but as the relative military and economic power of the West grew, even greater concessions were made (Lewis 1982:48-49). Europeans won full immunity from Muslim laws, so that they were answerable only to their own European consuls; in turn, European states were authorized to grant *berats* (certificates of protection) to anyone they pleased. This rendered it impossible to control European activities in the region, and hastened the demise of Ottoman power, already in decline as a result of centrifugal forces at work within the Islamic world itself. During the Western European age of exploration and expansion, Islam was dissolving into a loose web of increasingly autonomous Muslim states (Mossner 1972:208-210).[35]

2. With Barbary Powers Of North Africa

Of particular importance in Mediterranean affairs during the 16th and 17th centuries were the so-called "Barbary Powers" of North Africa--Algiers, Tunisia, and Tripoli. As early as 1157, the city-state of Pisa made a commercial treaty with Tunisia, and in 1270 the princes of France, Flanders, and Luxembourg made a second treaty with Tunisia on the law of shipwrecks, prisoner exchanges, and the rights of Christian merchant enclaves (Alexandrowicz 1973:18). Although 367 treaties were made between "Barbary Powers" and Britain, France, and the Netherlands from 1605 to the early 1800s, some European jurists continued to argue that the Barbary Powers were not "states" because of their lawlessness (*hostis humani generis*) or continued dependence on the Sultan (Mossner 1972:201-205). Indeed, European diplomats frequently inserted clauses in their peace treaties with Istanbul, appealing vainly to the Sultan to disarm the Barbary

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[35]Despite the spiritual unity of the Muslim world, it quickly became divided into distinct states (Persia, the Ottoman Empire, Moghul India and others), which conducted intense diplomatic relations and treaties among themselves (Alexandrowicz 1967:91-92, 232-233).

Powers, for they wrongly assumed that relations among Muslim rulers resembled feudal relations among European princes. Most European scholars acknowledged the Barbary Powers as distinct, if somewhat disreputable states, however, and by Article IX of the Treaty of Utrecht (1713), Spain and Britain expressly recognized the capacity of the Moors to make treaties (Toynbee 1967:I.225).[36]

Although about half of the European treaties with Barbary rulers were essentially *capitula* securing trade concessions to individuals or companies, others made provisions for peace, navigation, exchanges of consuls, and the protection of each party's nationals in the territory of the other (Mossner 1972:213-214). Ordinarily European consuls were given personal jurisdiction of Christians, which would not have caused difficulty for Muslim rulers since jurisdiction under *shari'a* is also personal (Alexandrowicz l973:24, 85). Treaties often also stipulated that mixed disputes should be heard by special mixed tribunals, *e.g.* French treaties with Tunisia (1665, 1824), Spain with Algeria (1786), and Britain with Morocco (1721, 1791). Such arrangements did not only apply to the territory of the non-Christian state: France's treaty of 1631 with Morocco recognized the authority of the Moroccan ambassador to settle disputes between Moroccans residing in France, and there was a similar provision in Tripoli's 1801 treaty with France. Under their 1760 treaty with Britain, similarly, Moroccans were entitled to mixed tribunals in disputes with Britons on British soil. This reciprocity disappeared in the 19th century, however (*ibid.* 28).

These treaties apparently were respected on the Muslim side, and were mentioned repeatedly in the British Court of Admiralty as a basis for recognizing the Barbary Powers as subjects of the Law of Nations. Thus in the case of *The Helena* (1801), 4 C.Rob. 4, 165 E.R. 515, Lord Stowell rejected arguments that the North Africans were

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[36]Interestingly, many European peace treaties prior to the Congress of Vienna refer to establishing a "Christian" peace among the parties, *e.g.*, Articles I of the Treaty of Westphalia (1648), the Treaty of Aix la Chappelle (1748), and the Treaty of Paris (1763). Such language was obviously omitted in treaties with Islamic powers.

mere pirates, and thus not entitled to consideration as states.

> Certain it is, that the African States were so considered many years ago, but they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming them the relations of legal states (165 E.R. at 515).

The case involved the seizure of a European vessel and its subsequent sale. Was the taking an act of piracy?

> Although their notions of justice, to be observed between nations, differ from those which we entertain, we do not, on that account, venture to call into question their public acts (165 E.R. at 5l6).[37]

The Lords of Admiralty nonetheless believed that some flexibility was required, in applying European interpretations of international law to Muslim princes. Again, from Lord Stowell, in the matter of subjecting Muslim merchants to the Law of Nations in respect of rules of war:

> On many accounts undoubtedly they are not to be strictly considered on the same footing as European merchants; they may on some points of the Law of Nations, be entitled to a very relaxed application of the principles, established by long usage between the States of Europe, holding an intimate and constant intercourse with each other. It is a law made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system, which is not familiar either to their knowledge or their observance.

The Hurtige Hane (1801) 3 C.Rob. 324, at 325-326; 165 E.R. 480. Thus while the Law of

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[37]Lord Stowell further observed, in dictum, that "it is by the law of treaty alone that these nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations, but that which us derived from positive compact and convention" (165 E.R. at 516). That is, the learned Lord regarded the Muslim conception of international law to be strictly positivist.

Nations is universal in broad outline, the details of European practice are local in character and application.[38] Again, in *The Madonna del Burso*, 4 C.Rob. 169, 165 E.R. 574, Lord Stowell noted that "the inhabitants of those countries are not professors of exactly the same Law of Nations with ourselves"–hence they are not to be held to the "utmost rigour" of European practices (4 C.Rob. at 172).

E. INTRODUCTION OF THE TREATY ORDER IN THE AMERICAS

Fundamental to the Discovery convention was recognizing that each Aboriginal society was "a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws" (*Worcester v. Georgia*, 31 U.S. 515, 544 (1832)). European sovereigns accepted that the Aboriginal nations had both a legal and just claim to retain possession of their lands, but that discovery by a European Crown or its representative gave it a preemptive right to trade or to purchase the Aboriginal rights (*Johnson v. MacIntosh*, 8 Wheaton 543 (1823)). It was not until the late 19th and 20th century, that racial attitudes attempted to reverse this position and temporarily exclude non-European societies from the benefits of international status and law (Akehurst 1978:19).

1. In French Jurisdictions

The operation of Vitoria's doctrine of treaties and Aboriginal dominion in French political and legal thought is a good example of how the Law of Nations developed among European states. The evolution of French policy toward Aboriginal dominion follows a pattern similar to Spanish policy. Francois I initially claimed French authority in America under the discoveries of Verrazzano, Cartier, and Champlain, but sought to

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[38] In the case at bar, a Muslim freighter had run a European blockade in time of war, a matter of which even Muslims "could not be ignorant in Lord Stowell's opinion 3 C.Rob. at 327.

secure these claims through effective trade and occupation.

Significantly, Francois rejected the claim that the French inherited the New World in the name of Jesus Christ because the Gauls were the descendants of Gomar, Japheth and Noah (Charron 1621:ch.xii, p. 13). Instead, the Most Christian King issued conditional royal charters and seigniorial grants to his domestic subjects and merchant groups within his asserted discovery entitlement. The private grantees were required to establish French control of territories "uninhabited and not possessed or ruled by any other Christian Princes", to put these lands in French possession "by means of friendship and amiable agreements, if that can be done, or by force of arms, strong handed or other hostile means" (Biggar 1930:178). They were also delegated the expensive problems of clearing, settlement, and establishing trading posts.

In these charters, France did not assert any territorial ownership over North America as against the Aboriginal nations. Nor did these charters authorize any surrender of the Crown's political authority. French grantees were somewhat confused about the nature of their rights. The charters merely allowed them to negotiate with the Aboriginal nations for privileges. An example of the confusion is found in the writing of Marc Lescarbot, a French lawyer who traveled to Míkmaq territory (*Míkmáki*) in 1618. Lescarbot asserted a strict Biblical justification for French ownership in New France, which he admitted was inconsistent with both the international doctrine of Aboriginal dominion and French feudalism. He stated:

> as the over-conscientious make difficulties everywhere, I have at time seen some who doubted if one could justly occupy the lands of New France, and deprive thereof the inhabitants; to whom by reply has been in few words ...as God, the Creator has given the earth to man to possess it, it is very certain that the first title of possession should appertain to the children who obey their father and recognize him, and who are, as it were, the eldest children of the house of God, as are the Christians, to whom pertaineth the division of earth rather than to the disobedient children, who

> have been driven from the house, as unworthy of the heritage and of that which dependeth thereon [...] The earth pertaining, then, by divine right to the children of God, there is here no question of applying the law and policy of Nations, by which it could not be permissible to claim the territory of another (1907:16-17).

Lescarbot nonetheless observed that the Aboriginals of New France should not be exterminated "as the Spaniard has those of the West Indies" (1907:17).

France entered into treaties with American nations, notwithstanding such arguments. For example, the 1664 Charter of the *Compagnie des Indes Occidentales* instructed the company's officers to enter into negotiations with the "kings and princes of the country", who were not allies of the Crown, for "peace and alliance," and to establish commercial relations.

The French sovereign never denied the sovereignty of the American nations, nor their Aboriginal dominion or tenure. In 1624, the Haudenosaunee (Five Nations) or Iroquois Confederacy negotiated the first of several treaties establishing a commercial relationship with France. In 1645, the Algonquians negotiated a peace treaty with the French, Dutch, Mohawks and Hurons. In 1665-66, several tribes of the Haudenosaunee were brought under a treaty of protection by which they acknowledged Louis XIV as "their Sovereign", but no territorial concessions were involved (NYCD [O'Callaghan] I:51-52, III:121, IX:46). In 1671, the French Crown also entered into treaties with the assembled "nations" at Sault Ste. Marie (JR55:104-114).

By the 1701 Treaty of Montreal, the Haudenosaunee and western Aboriginal nations renewed and extended their treaty relations with the French. The written treaty "document" contains a recital of the delivery of prisoners, the giving of calumets, and the acknowledgment of the French Governor as an intermediary for maintaining peace. The council itself was the culmination of a lengthy diplomatic process, which covered matters of trade, war, prisoner exchanges, and territory. The record of the 1701 council at Montreal also shows the difference between the western nations, who delivered calumets

as a record of peace, and the Haudenosaunee and Hurons, who delivered wampum. Both forms bear the same spiritual meaning, linked to the concept of peace.

Under these French treaties of protection or peace, neither the Crown nor trading associations ever attempted to subvert or modify tribal sovereignty, territorial rights, or law. Their political status and governmental organization "were left in full force, and were not ever modified in regards to the civil rights of the Aboriginals" (Slattery 1980 I:77). In addition, the French Crown rejected Lescarbot's Biblical justification. It directed that "the officers, soldiers, and all his adult subjects [in New France] treat the Indians with kindness, justice and equity, never resorting to violence against them, nor will anyone take the lands on which they are living under the pretext that it would be better and more suitable if they were French" (Jaenen 1986:94).

Seventeenth century French commissions rejected "force of arms" as an alternative method of obtaining Aboriginal consent. They relied solely on a voluntary cession, or "consent and tuition", of the American nations (Biggar 1930:180; Slattery 1980:8-13); and made no mention of conquest or coercive means (Jaenen 1986:94). The Vitorian doctrine continued to gain credibility in French practice.

The Concordat of *Míkmáki* with the Holy See in 1610-20 distinguished *Míkmáki* from other jurisdictions in New France. Thus, the Míkmaq were always considered as friends or political allies of His Most Christian Majesty, while others, including the Wabanaki, Algonquians and Hurons, were considered "his proper subjects" and under His protection (Jaenen 1986:95). While the French Crown sent the Jesuits to establish St. Anne in Cape Breton in 1630, Richelieu always treated *Míkmáki* differently than he did other tribal lands. As a Christian republic, the *Míkmáki* was subject to limitations on French sovereignty under Canon law, the Law of Nations, and domestic law.

2. Northern European States

Grotius affirmed in his treaties *On the Law of War and Peace*, Grotius affirmed the natural law right of all peoples, including "strangers to the true religion," to enter into treaty relationships. It was a right "so common to all men that it does not admit of a

distinction arising from religion" (Grotius 1646/1925:40). In *Mare Liberum*, he affirmed that a full proprietary title in discovered land could only be acquired by Aboriginal consent (1712: Chapter 2).

Grotius' doctrine was directly translated into legislation in the American settlements. In 1643, the Mohawks entered the "iron chain" treaty of alliance with the Dutch. The two parties called their treaty a "covenant chain". In 1645, the Dutch entered into the Two-Row Wampum Treaty. Both nations agreed to respect each other's sovereignty, boundaries, cultures and religions. They agreed not to interfere in each other's affairs. The treaty was symbolized by a wampum belt showing two parallel lines. One represents a Mohawk canoe, the other a Dutch sailing ship. The belt is interpreted as two ships agreeing to travel the river of life separately and not to interfere with the other. Swedish colonies also accepted Aboriginal choice and purchase doctrines as the sole method of acquiring land rights from the Aboriginal nations (Royce 1899:591).

3. British Jurisdictions

A shared theme of both the Law of Nations and English constitutional development in the seventeenth century was the idea of written laws. Written documents witnessed the idea that people should have a known law to live by and regulate their actions. They defined a balance of power among rulers, and between rulers and those they ruled. The common denominator was the use of writing to limit power (Chain 1966:5-11). This preoccupation with written documents spread to the relations between British immigrants and the American nations.

Beginning with King James' grant of "Acadia" to Scottish poet Sir William Alexander, Crown grantees were directed to enter into treaties with the Aboriginal tribes or clans. In 1628, obedient to their royal grant, the Scotch settlers attempted to convince "Sagamo Segipt" at Port Royal "to come, in the name of the rest[,] to his Ma'tie's subjects, craving only to be protected by his Ma'tie, who did promise to protect them" (Patterson 1893:92). The Míkmaq refused.

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

In 1632, English port officials in England seized the Dutch ship *Endragt* and its cargo of furs from the Dutch Colony of New Netherlands. The Dutch ambassador protested the seizure of the ship on the grounds that no state could "prevent the subjects of another to trade in countries whereof his people have not taken, nor obtained actual possession from the right owners, either by contract or purchase." As to the furs, the ambassador pointed out they had been acquired from the Indians in the Colony "partly by confederation with the owners of the lands, and partly by purchase." The English Crown denied that Indians could be considered the legal possessors of the land or had bona fide rights to dispose of it by sale or donation (Jennings 1975:131-33).

This controversy demonstrated to the English Crown the importance of confederation and contract with the Americans. Treaties of confederation were documentary evidence of trading jurisdictions. In controversies between European nations, they established a proof of a claim and presentation of facts which was far superior to the theoretical nature of discovery, *vacuum domicilim (*t*erra nullius*), prescription, or conquest.

The records of Massachusetts Bay witness several acts of submission by Indian sachems. A 1644 treaty (or covenant in Puritan terms) illustrates the terms and conditions:

> Wee have & by these present do voluntarily, & wthout any constraint or psuasion, but of our owne free motion, put orselues, or subjects, lands, & estates under the government and jurisdiction of the Massachusetts to bee governed & ptected by them, according to their just lawes & orders, so farr as we shall bee made capable of understanding them; & wee do pmise for orselues, & all or subjects, & all or posterity, to bee true & faithful to the said government & syding to the maintenance thereof, to or best ability, & from time to tiem to give speedy notice of any conspiracy, attempt, or evill intension of any which wee shall know or hear of against the same; & wee do pmise to bee willing from time to tiem to bee

> instructed in the knowledg & worship of God.[39]

A different type of treaty was made in 1644 with the Narragansett nation. The Narragansett sachems submitted themselves, their people and their lands directly to King Charles I, rather than Massachusetts Bay. The document reads in part:

> wee, the chiefe Sachems, Kings or Governours of the Nanhigansets (in that part of America, now called New England), together with the joynt and unanimous consent of all our people and subjects, inhabitants thereof, do upon serious consideration...freely, voluntarily, and most humbly...submit, subject, and give over ourselves, peoples, lands, right, inheritances, and possession whatsoever...unto the protection, care and government of that worthy and royal King , Charles King of Great Britaine and Ireland.[40]

Throughout the seventeenth century, the "Narragansett Country" remained a disputed area. In 1665 King Charles II established the Narragansett Country as a royal province, separate from all other Colonies and subject to rule by a prerogative commission.[41] The violation of the these Treaties by the colonists created extended, inconclusive, and costly Indian wars.

Similarly in 1677, Charles II entered into Article of Princes with "several Indian Kings and Queens" in Virginia, and the Haudenosaunee extend the Covenant Chain to the British Crown. In the Virginia Treaty, the British Crown guaranteed protection and the Aboriginal nations acknowledged their subjection to the British Crown (De Puy 1917:1). In the Haudenosaunee Treaty, the "Silver Covenant Chain", the Mohawks stated "The Covenant that is betwixt the Governor Generall and us is inviolable." In 1693, the Crown

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[39]Mass Bay 2:55 cited by Springer 1986:33. For similar deeds and Treaties in other Atlantic colonies, **see**, Vaughan, ed., *Early American Indian Documents: Treaties & Laws, 1607-1789* (Washington D.C.:University Publications of America, Inc.).

[40]Rhode Island 1: 134-35 cited in Springer 1986:34.

[41]*Ibid.* at 2:59-60

entered into a Treaty with the "Sagamores and Chief, Captains" of the Eastern Indians at Fort William Henry. With the free consent of all the Aboriginals, the Aboriginal leaders placed themselves in the "grace and favour" of the Crown. The Chiefs acknowledged their "hearty subjection and obedience unto the crown of England", and agreed to a legal resolution of private disputes. Article 6 stated:

> If any Controversy or difference at any time hereafter happen to arise between any of the English and Indian for any real or supposed wrong or injury done on either side no private Revenge shall be taken for the same but proper application shall be made to His Majesty's Government upon the place for Remedy or induce thereof in a due course of Justice. We submitting ourselves to be ruled and governed by His Majesty's Laws and desiring to have the benefit of the same.

Between 1689-1698, the Five Nations [or the *Haudenosaune*] entered into an exchange of Treaties with the Governors of New York and Pennsylvania (De Puy 2-5). As part of a two-pronged diplomatic initiative, one part of which was the 1701 treaty of peace and neutrality with the French King, the Confederacy also entered into the "Nanfan Treaty" with Britain, which placed the "Beaver Hunting Ground" under British protection. Lieutenant Governor John Nanfan told "all the Sachims of the Five Nations":

> [...] you may be assured not only of the favour and protection of the great King of England my Master the demonstrations whereof you will finde before you goe hence, but of my rediness to serve you on all occasions (*ibid.*).

Before the end of the seventeenth century, the ideal of free association and protection under prerogative treaties became His Majesty's exclusive policy with the Aboriginal owners of America. The prerogative treaties affirmed the international personality and sovereignty of the American nations and their territorial dominion. These prerogative treaties commonly recognized certain inclusive issues of international jurisdiction, established boundaries between British settlements and Aboriginal lands,

privileges and immunities, rights of belligerents, extradition processes, and criminal and civil jurisdiction (*e.g. Francis v. The Queen* (1956) S.C.R. 618:625-26).

The British ministers, accommodating the political traditions of American customary international law (*Níkmanen*[42]) and the symbolic literacy of the wampum, usually had transcripts of the treaty proceedings as well as the written documents formalized for the signatures of national leaders. Most of the American nations recorded the relationships, proper rituals and agreements in their own symbolic literacy through wampum belts and strings. To demonstrate the continuity of the relationship, statements made at earlier meetings frequently were repeated at later meetings as part of the substance of the agreement.[43]

In addition, His Majesty's representatives took special care to demonstrate that the written treaties were the voluntary choice of the nation or tribe of Indians. On most occasions the British ministers had the written Treaty "deliberately read over, and several articles and clauses thereof interpreted unto the Indians, who said they well understood and consented thereunto, and was signed, sealed, and delivered in the presence of us" (CM 1972: 296,298, 299).

Within the law of England, these treaties were exclusive matters of foreign affairs. These "alien born friends in league" documents were usually referred to as "sovereignty" or prerogative treaties (Jacomy-Millette 1975:207-221). They affirmed the legal personality of Aboriginal sovereigns and protected their inherent rights under His Majesty's independent power over foreign affairs, which was distinct from either Parliamentary or Colonial authority. Jurisdictional or proprietary interests in Aboriginal nations, could only be obtained through voluntary consent.

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[42]This is the Míkmaq term of the customary law.

[43]This was a unique innovation in the treaty process, since the conventional European rule was that the resulting documents were to be construed as far as possible without consideration of the *travaux preparatoires*.

F. THE ROLE OF THE TREATY ORDER IN EUROPEAN RELATIONS.

As we have demonstrated, after the breakdown of universal Papal authority in 16th-century Europe, treaties became an essential tool for the emergence of modern, independent nation-states. Through their treaties, states recognized one another's legitimacy and borders by secular means. This process of consolidating nations and borders through reciprocal acts of diplomatic recognition grew in importance after the Reformation demolished any remaining appearances of European religious or legal unity. The Reformation likewise forced European legal scholars to find a secular basis for international law, since there was no longer a common God, Pope or Emperor to serve as an authoritative source of shared legal principles.[44]

The idea of the Treaty Order was a product of independent scholars. Building on the works of Vitoria and Grotius a century after the Treaty of Wesphalia (1648), several influential books emerged. Emmerich de Vattel in *The Law of Nations or Principals of Natural Law* (1758) and G.F. Von Martens in *A Compendium of the Law of Nations Founded on the Treaties and Customs of the Modern Nations of Europe* (1788) sought to consolidate the practices and conception of the Treaty Order. Vattel was a diplomat; Martens a Professor of Public Law at the University of Gottingen.

Vattel defined the territorial state to include all "political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security" (1916:3). Vattel accordingly considered the Aboriginal peoples of America as nations. He stated:

Those ambitious European States which attacked the American Nations

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[44]It would be well to recall here that Justinian's *Institutes,* had served as the core legal treatise of Ocular, positivist foundation, however, deriving legal authority from the will of the people or their rulers. Thus did the great Roman Republican scientist Lucretius, in his *De Rerum Natura* describe laws, like arts and poetry, as a product of "practice and the experiments of the active mind" (Liber 5:1452).

> and subjected them to their avaricious rule, in order, as they said, to civilize them and have them instructed in the true religion–those usurpers, I say, justified themselves by a pretext equally unjust and ridiculous (1916:115-116).

Vattel also wrote that a state does not lose its sovereignty or independent status by placing itself under the protection of another so long as it retains its power of self-government (1916:3). Historically, he noted that in the Roman Empire some protected states lost their standing in the Law of Nations (1916:12). Similarly, Martens wrote

> For a state to be entirely free and sovereign, it must govern itself, and acknowledge no legislative superior but God. Every thing which is compatible with this independence, is also compatible with sovereignty, so that mere alliances of protection, tribute, or vassalage, which a state may contract with another, do not hinder it from continuing perfectly sovereign, of being looked upon as occupying its usual place on the great theatre of Europe (1902:23-24).

These international doctrines were not abstract theories, but based on the actual practices of the European nations in the 17th and 18th centuries.

1. Treaty of Wesphalia, 1648

A turning-point in this process of secularization was the Treaty of Wesphalia (1648), which ended the Thirty Years War and ratified the division of the Holy Roman Empire into Catholic and Protestant states. After establishing "a perpetual, true, and sincere Amity," the parties promised to restore the "Ecclesiastick or Laick State" (*i.e.* religious status) of all affected territories to their pre-hostilities status (Toynbee 1967: I 117 Article VI). They also agreed to a comprehensive territorial settlement, indicating not only whether each town and fief owed "obedience" to France, Spain, or the Emperor, but also confirming the mesne lordships over each town and fief. At least three kinds of arrangements overlap in these territorial provisions: recognition of national sovereignty,

reassignments of feudal rights, and reservations of historical rights of autonomy.

An example of this can be found in Article LXXIV, with respect to the Mayoralty of the City of Brisac, the Landgraveships of Upper and Lower Alsatia, and the Provincial Lordships of ten Imperial Cities in Alsatia, which were all "made over" to the French King. This gave the French King the feudal rights of the Mayor, Landgrave, and Provincial Lords of these fiefs, together "with all the[ir] antient Territory and Dependence". At the same time, it was agreed that all of these fiefs "and their Dependencys" (i.e. the surrounding countryside)

> shall be for ever incorporated with the Kingdom of France, with all manner of Jurisdiction and Sovereignty, without any contradiction from the Emperor, the Empire, House of Austria or any other: so that no Emperor, or any prince of the house of Austria, shall, or ever ought to usurp, nor so much as pretend any Right and Power over the said Countrys... .

In the case of Brisac, however, the Treaty specified that the transfer was "without any prejudice, to the Privileges and Libertys granted the said Town formerly by the House of Austria," meaning its pre-existing rights of local autonomy. Similarly, Article LXXVII obliged France to restore and preserve Catholicism in all of the transferred estates.

The Treaty of Wesphalia thus represents a stage in consolidating the feudal hierarchy into unitary states. The drafters were concerned about the exterior boundaries and "sovereignty" of France, an emerging nation-state, as well as for the lordships and distinctive privileges of specific fiefdoms.[45] The process of consolidation continued in the Treaty of the Pyrenees (1659) that fixed the boundaries of France and Spain. Having agreed to "Peace, Confederation. and perpetual Alliances and Amity," including all of

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[45] Although many articles addressed questions of succession to various fiefdoms, vestiges of feudal political organization, Articles LXVI and LXVII promise the establishment of democratic assemblies for all towns and territories under the control of the Emperor.

their "Subjects, Vassals" and any "Prince or State in Alliance" with them, the two Catholic kingdoms promised to respect the freedom of each other's subjects to travel, conduct trade, reside, and seek legal redress in both realms, without discrimination. Commissioners would be appointed to "mark the limits" of each kingdom through the Pyrenees Mountains.

The drafters painstakingly explaining that this would permanently divide the kings' "Sovereignty, Propriety, Jurisdiction, Prerogative, Possession and Enjoyment of all the said Countrys, Towns, Places, Castles, Lands, Lordships, Provostships, Dominions, Chatsllanys and Bayliwicks, and of all the Places and other things depending of them" (Toynbee 1967:I.69, Article XLI).[46] The French side would be "forever united and incorporated to the Crown of France" notwithstanding "Laws, Customs, Statutes and Constitutions made to the contrary" in the past. "[T]he Men, Vassals and Subjects of the said Countrys, Towns and Lands yielded to the Crown of France" were "absolved henceforth and for ever of the faith, homage, service and oath of Fidelity" they formerly owed to the Spanish King, and "of all obedience, subjection and vassalage which they for that cause might owe him". In this way, the Treaty was careful to transfer sovereignty, property, and alliance, as separate elements of the bargain. By comparison, the articles relating to each kings' claims in Flanders and the Netherlands used the phrase, "seized and enjoy," alone (Articles XXXV– XXIX).[47]

After the Treaty of Wesphalia between the Holy Roman Empire and the King of France in 1648, their respective allies elevated treaties to the highest form of international

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[46]This article provided for preserving the feudal privileges of all of the Bishoprics, Abbies, and other Catholic establishments in the territories exchanged, however.

[47]Despite its sweeping provisions for French and Spanish sovereignty on either side of the Pyrennees, the Treaty reserves the "Libertys and Privileges" of the Catalonians explicitly (Articles LV-LVI). This was renewed by the Treaty of Utrecht, in 1713 (Toynbee 1967:I.226, Article XIII).

right. The Treaty of Wesphalia ended the political hegemony of the Holy See and the Thirty Years' War among Europeans. Instead of the Holy Roman Empire, the independent territorial states became the foundation of the international normative order (Damerow 1978:15-16).

Asserting the revitalized concept of the territorial sovereignty of the Kings borrowed from the ancient Greeks[48] and rejecting the personal allegiance to a Lord or the Church, the Law of Nations movement sought to create a new international order on their consensual agreements. This discourse created a rich heritage of political thought among aristocratic Europe that sharply diverged from the tangled structure of their feudal past. It created the concept of nation-states. The ideological leaders rejected both Christianity or military conquest as method for acquisition of new lands as they created the Law of Nations.

Territorial sovereignty was different from the shared concept of secular jurisdiction of the kings in the Holy Roman Empire. While the kings acknowledged their shared allegiance to the Holy See, as the Holy Roman emperor, they also shared domestic authority with their barons, each of whom had a private army. But they never had undisputed political control over their territory in the way the new concept of territorial sovereignty boldly asserted. Territorial sovereignty was a matter of international jurisdiction. It involved issues of international and constitutional authority over geographical concepts such as territory. It was not like title or property in domestic law.

2. Treaty of Utrecht, 1713

Another important milestone in the consolidation of nation-states was the Treaty of Utrecht (1713), by which the French King recognized the order of succession of the British monarchy, and the heirs to the French and Spanish thrones reciprocally renounced their claims to each other's kingdoms (Toynbee 1967:I.179, Article IV). This was also one of the first European treaties to address conflicting claims to North America. In

[48]**See**, Plato's *Laws*, iv. 704-10, Aristotle's *Politics*, book 7, chps. IV. and V.

Articles X and XIII, France delivered its "possession" of Newfoundland and Hudson Bay, but with regard to Acadia or Nova Scotia, France yielded "all Right whatsoever, by Treatys, or by any other way obtained...to the said Islands, Lands, and Places, and the Inhabitants of the same" (Articles XII).[49] This recognized that Acadia was largely held by France under treaties with the indigenous inhabitants so that only those rights actually obtained by France could be surrendered to Britain. Article XV, in turn, respects the independence of all of the parties' indigenous allies:

> The Subjects of France inhabiting Canada, and others, shall hereafter give no Hindrance or Molestation to the five Nations or Cantons of Indians, subject to the Dominion of Great Britain, nor to the other Aboriginals of America who are Friends to the same. In like manner, the Subjects of Great Britain shall behave themselves peaceably towards the Americans, who are Subjects of Friends to France; and on both sides they shall enjoy full Liberty of going and coming on account of Trade.[50]

A distinction between property and sovereignty was also made with respect to Gibraltar and Minorca, both of which passed by this treaty into British hands. Spain ceded the "Propriety" of Gibraltar "without any Territorial Jurisdiction"; and the "absolute Dominion" of Minorca subject to a right of first purchase should the island ever be resold. All the estates, privileges and offices of the Spanish inhabitants of Minorca were moreover reserved (Toynbee 1967: I.223-225, Articles X and XI).[51] Hence neither

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[49]Reserving to any French subjects there the right "to enjoy the free exercise of their Religion" (Article XIV), a right affirmed by Article VIII of the Treaty of Paris (1763).

[50]Similarly by the Treaty of Paris (1763), the parties recognized the native rulers of Carnatic and Decan, and waived all claims against one another's East Indian allies (Article XI).

[51]By Article XII, Britain obtained a monopoly over the slave trade to certain parts of South America, which was reaffirmed by Article XVI of the Treaty of Aix la

territory was incorporated fully into the British realm.

3. Treaty of Paris, 1763.

By contrast the Treaty of Paris (1763) between Britain, France and Spain employed the phrase, "cedes and guaranties [...] in full right [...] the sovereignty, property, possession, and all rights acquired by treaty" with regard to Nova Scotia and Florida (Articles IV and XX).[52] Virtually the same language appeared in the series of Polish partition treaties a decade later (Toynbee 1967:I.365ff).[53]

With the decline of feudal tenures, and corresponding development of central national legal systems, it became increasingly important to specify the effect of boundary changes on access to courts and choices of law. Both Article LXXIV of the Treaty of the Pyrenees, and Article XXX of the Treaty of Ryswick (1697), preserved the effect of judgments issued by courts of the former sovereign. Article VI of the Treaty of Ryswick also guaranteed equal access to legal process in the future, in language subsequently borrowed by the Treaty of Utrecht:

> That the ordinary Distribution of Justice be revived and open again thro' the Kingdoms and Dominions of each of their Royal majesties; so that it may be free for all Subjects on both sides to sue for and obtain their Rights, Pretensions and Actions, according to the Laws, Constitutions, and

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Chappelle (1748).

[52]The distinction between the Sovereign's personal estate, and the territory of Great Britain as a nation-state, was still sufficiently unclear that George III specified, in Article XX, that the provisions of the Treaty of Paris applied also to his "dominions and possessions in Germany" in his capacity as Elector of Brunswick Lunenbourg.

[53]The Treaty of Paris (1763) designated the Mississippi River as the confines between the dominions" of France and Britain (Article VII), carefully avoiding language of sovereignty because, presumably, it was a region neither state actually possessed or controlled.

Statutes of each Kingdom (Toynbee 1967:I.207, Article VIII).

Only later, in the Treaty of Paris (Toynbee 1967:I.314, Article XVI), was there a reference to applying "the Law of Nations" to the disputes which might arise in the future. Jurisdiction clauses assumed greater importance in the extension of European treaties to non-European, non-Christian nations.

4. Congress of Vienna, 1815

European states' territorial evolution reached another milestone at the Congress of Vienna (1815), which attempted a general settlement of borders throughout the continent (Toynbee 1967:I.519ff). Permanent alterations of borders were described as cessions of "full sovereignty and property,"[54] which "united" the ceded areas to the state. In most cases the Congress also specified a corresponding change in the titles of the sovereign. Hence the King of Prussia, on receiving Saxony, was authorized to refer to himself as the Duke of Saxony, and the King of Sardinia, upon accepting Genoa, became the Duke of Genoa. When lesser rights were intended, the drafters used such terms as "suzeraintye" and "protection" rather than "full sovereignty" (Articles XXIII–XXXII and C), or in one case limited the grant to "demesnial revenues" (Article XXXIX). Significantly, this was the first major territorial treaty to describe the areas ceded by metes and bounds rather than simply naming each parcel; customary knowledge of borders was no longer sufficiently precise.

Even where "full sovereignty" had been transferred, the Congress sometimes inserted conditions for the autonomy of annexed peoples, for example the Poles who, as subjects of Russia, Austria and Prussia were to be given an appropriate "Representation and National Institutions" within each of those states (Article 1). The Congress also preserved, notwithstanding their cession, the traditional "rights and privileges" of East Frieseland, Genoa and Liguria, and the property rights of the inhabitants of Prussian

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[54]This reflected some residual distinction between the nation-state as a political entity, and the sovereign as a feudal landowner.

Saxony (Articles XX-XXII, XXVII, LXXXVIII, and LXXXIX), as well as providing that the Bishopric of Basel would enter the Swiss Confederation on an equal footing with all the other cantons (Article LXVII). In addition, Cracow was to be "a Free, Independent, and strictly Neutral City, under the protection of Austria, Russia and Prussia (Articles VI-X) and Frankfort was to be a free city within the Prussia (Article LXVI). Lastly, the Congress recognized a new State–the Germanic Confederation–that eventually became the German Empire (Articles LIII-LXIV).

The unity of the new international order became a system of treaty relations which bound the European territorial states together. The normative order embodies, to a large extent, treaties of peace based on promise and consent rather than bodies of law backed by irresistible authority and coercion.

G. EXPANDING THE TREATY ORDER AROUND THE EARTH.

Natural-law theorists such as Vitoria, Wolff, and Vattel regarded all states as inherently independent and equal, regardless of religion or culture. Jurists in the Anglo-American tradition, such as Kent and Wheaton, later argued that statehood is conditional on civilization or Christianity. They justified imperialism by denying legal personality to non-European nations, and dismissing those treaties previously made with African, Asian and American peoples as matters of "policy" rather than law (Mossner 1972:217-218). Nonetheless from the 1600s to 1800s, treaties were routinely used to establish the legitimacy of competing European states' spheres of influence in Africa south and Southeast Asia and the Americas. "Discovery" was ordinarily perfected and defended by making treaties with the Aboriginal inhabitants of each territory.

1. South and Southeast Asia

Alexandrowicz (1967) has already published an extensive survey of European diplomacy and treaty practice in the "East Indies" to the end of the 18th century, and this will serve as our main historical source for the early period of European-Asian diplomacy. During this period, European-Asian relationships were both extensive and relatively equal, and contributed to the development of European jurists' thinking about the possibility of a *secular* international legal regime, *i.e.*, the Law of Nations. It is particularly ironic, in that context, that European states retracted their recognition of Asian nations' legal capacity in the 19th century. Well may Edmund Burke have declared, in 1786, that "the Law of Nations is the law of India as well as Europe, because it is the law of reason and the law of nature" (*ibid.* 22), but his words bore little weight in the Colonial frenzy of the next century.

From the earliest stages of their exploration of the East Indies, and development of the spice trade, the Portuguese found it useful and necessary to contract alliances with local Hindu and Buddhist princes, in a common struggle against Muslim powers. Early

treaties with Ormuz (1507), the Raja of Bakla (1559), the Ruler of Cochin, and the King of Kandy (Sri Lanka) declared them vassals (*vassalhos*) of the Portuguese King (Alexandrowicz 1967:29-30). In other cases, the relationship was reversed. Portugal assumed possession of Macao, in 1557, as a Chinese vassal (*ibid.* 17). All European trading companies quickly adapted to local political systems and laws, conducting diplomacy in accordance with Asian traditions (*ibid.* 191-216) and where convenient submitting to the sovereignty of Aboriginal rulers. In 1765, the British East India Company accepted the *diwanees* (fiefs) of Bengal, Bihar and Orissa from the Moghul Emperor, rendering the Company a Moghul vassal; the French East Indian Company assumed the same status in relation to Pondicherry (Alexandrowicz 1967:23, 166).

This diplomatic strategy depended on Europeans' understanding the hierarchies of the Ottoman, Persian, Moghul and Chinese feudal systems so that treaties, could be contracted *at the correct levels*. Europeans found India particularly challenging in this regard, since the Moghul hierarchy was not only baroque, but varied from region to region. The earliest British governors on the subcontinent accepted commissions as officers of the Moghul Emperor to reinforce their treaty relationships with local princes (Alexandrowicz 1967:18). Later, they created their own fiefdoms still within the Moghul legal framework. Hence the Raja of Benares held his diwanee from the British East India Company, while retaining the authority to mint his own coinage, maintain an army, and preserve order. The Company, in turn, held Benares from the Vizier of Oudh, a vassal of the Moghul Emperor.[55]

European relations with local rulers were modeled on Moghul law, then, and the earliest protectorates were feudal in their form. Under an 1801 treaty with the British

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[55]As Alexandrowicz (1967:22) observes this became a central issue in the trial of the British Governor-General, Warren Hastings, for taking military action against the Raja. Edmund Burke contended successfully that the Company could have acquired no greater authority over Benares than its grantor, the Vizier, possessed under Moghul law.

East Indian Company, for instance, the Ruler of Naning (Malaysia) agreed to be "faithful and submissive," and to permit the Company to control his foreign relations (Alexandrowicz 1967:25). According to contemporary British officials, this could not justify any interference in Naning's internal affairs, *e.g.*, crimes or land-tenure, since the treaty was one of vassalage, and not cession or annexation.[56]

Basic elements of international law had already been developed in India by Kautilya, in his 4th-century B.C. treatise *Arthasastra*, which was later incorporated, along with Muslim ideas, into Asian practice. This school of thought viewed sovereignty as absolute and indivisible, even more so than in 16th-century European scholarship, which made it difficult for Asian rulers to acknowledge the sovereignty of European trading companies. That was not a problem for Portugal, which treated directly on a ruler-to-ruler basis. In the case of Britain, France or Holland, however, diplomacy was conducted by their trading companies, and Asian princes often questioned the authority of trading companies to sign treaties.[57] At the same time, the loose, complex and shifting character of Asian feudal, caste and imperial hierarchies offered many alternative niches for Europeans to fill, without compromising their sovereignty.

The Dutch, having challenged Portugal for control of a number of strategic south Asian vassal relationships by the 1590s, experienced the greatest problem in that they

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[56]Although a few Asian treaties provided for security in the form of an exchange of hostages, several contained mediation clauses, and some reserved the parties' right to terminate in case of a breach, most of them lacked specific enforcement provisions (Alexandrowicz 1967:168, 180 Note H). This may have reflected confidence in the centralism and bureaucratic legal processes of Asian states, which distinguished them from African and American societies.

[57]Like Grotius and his European contemporaries, Kautilya treated the sacred and the secular as distinct legal realms, and viewed relations among independent nations as governed by reason, and informed by self-preservation and the abhorrence of anarchy.

were essentially a republic governed by a legislative council, the States General (Alexandrowicz 1967:33). They tried to overcome this by negotiating Asian treaties in the name of the republic's nominal "prince-stateholder," the Prince of Orange. Siam apparently refused to grant sovereign immunity to the Dutch East India Company, but granted this privilege to the Prince. The British company was closed out of India, until King James I personally sent an embassy to the Moghul Court in 1615 (*ibid.* 34-35). It suffered a like embarrassment for many years in Burma. Even after receiving the King's ambassadors, moreover, the Moghuls and other Muslim rulers frequently still refused to deal bilaterally with trading companies, and granted them privileges only by a unilateral *firman* or *caul* (decree). Despite these regional differences in notions of sovereignty, there was little difference between Asian and Romano-European beliefs regarding the obligation of treaties. The Indian Ocean had been as active a basin of commerce as the Mediterranean, although dominated by Arab, Persian and Chinese sailors, and both Hindu and Muslim rulers adhered to the principle of freedom of the high seas (Alexandrowicz 1967: 64).

The expansion of European interests in Asia was accompanied by an intellectual debate concerning the legal aspects of relationships with non-Christian societies. The key role played by Hugo Grotius in this debate underscores its importance in the later development of European notions of international law. Grotius' *Mare Liberum* was written as legal counsel to the Dutch East India Company, which originally sought his advice on whether it could lawfully seize Portuguese merchant vessels in Southeast Asia, as prize ships (Alexandrowicz 1967:43).[58] Grotius began with the premise that Asian peoples "now have and always have had their own Kings, their own government, their own laws and their own legal systems," thus Portugal could not obtain any rights by Papal donation, or by the discovery of *terra nullius.* "Christians [...] cannot deprive

[58]Alexandrowicz notes that *Mare Liberum*, published in 1608, revised part of an earlier work, *De Jure Praedae* (" The Law of Prizes") written three years earlier for the Company but never published.

infidels of their civil power and sovereignty merely on the ground that they are infidels," as las Casas had also concluded (*ibid.* 45-46). While the Papal donation of 1492 might be binding as between Spain and Portugal, it could have no effect on the rights of Asian nations, who retained their right "to trade with whomsoever they please".[59]

Seraphim de Freitas, a Portuguese theologian and professor at the University of Valladolid, replied to Grotius in 1625. He stressed the logical consequence of Asian rulers' sovereignty, *viz*. that they could grant monopoly privileges to European states if they wished. Although free trade might be "natural," it was subject to the "natural" *freedom of contract* of sovereigns (Alexandrowicz 1967:52). Since Portugal had acquired its trading monopoly by treaty (Freitas used the Latin term, *foedere*), it had the right to wage just war against anyone interfering with its trade. Recalling the arguments made a century earlier by las Casas, Freitas conceded that the Pope had no temporal power over Asian rulers, and no right to deprive them of their crowns or lands. However, he supposed that the Pope had the right to insist on Christians' right to preach the Gospel in all lands–freedom of speech in contraposition to freedom of trade. On the other hand, he questioned the legality of Dutch treaties with Muslim princes, because Islam denied the right of Christian nations to exist.

European protectorates evolved gradually from the competition for commercial monopo1ies. European companies not only sought free access to local markets in their treaties, but promises to exclude all other European merchant nations from those markets. Thus the Dutch obtained a monopoly of the spice trade from Amboyna in 1601, and later obtained similar monopoly privileges in the Celebes, Moluccas, Jakarta, Johore, and Cochin. The Dutch even went so far as to require the expulsion of merchants of all other

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[59]Five years later, with Holland facing encroachments by the British East India Company on its own Indonesian monopolies, Grotius amended his views to admit that Asian sovereigns could "by contract extinguish the liberty [of trade] of the law of nations" (Alexandrowicz 1967:58), the same conclusion drawn by his Portuguese critic, Freitas, in 1625.

nationalities, for example in their 1612 treaty with the Carnatic, their 1612 and 1638 treaties with the King of Kandy (Ceylon), their 1667 treaties with Macassar and Tello, and 1688 treaty with Tanjore (Alexandrowicz 1967:43, 130ff). The British company also succeeded in obtaining spice monopolies, for example in Mysore (1770), or at least specifically excluding French competition, as in its 1757-1759 treaties with the rulers of Bengal, Bihar, Orissa and the Deccan. The French Company, as a latecomer to the subcontinent, was forced to negotiate for mere access to these markets (*ibid.* 172).[60]

Trade monopolies evolved into control over foreign affairs. Thus the Dutch-Ceylon treaty of 1766 not only reaffirmed the Dutch monopoly on the island's trade, but forbade the King of Ceylon from engaging in diplomacy with any other European power. The British company exacted the same commitments from the rulers of Carnatic and Tanjore (1792), the ruler of Deccan (1798), the Vizier of Oudh (1798), Mysore (1799), and the Maratha Confederacy (1802), among others (Alexandrowicz 1967:136-137). As Europeans gained effective military power in Asia, such arrangements grew more restrictive, and evolved into protectorates, in fact if not in name. The disintegration of the Moghul Empire towards the end of the 18th century threw subordinate princes and rulers into a struggle for survival in which the British and French companies, who were themselves technically Moghul vassals, played an active role. In many cases, the trading companies used this opportunity to substitute themselves for the Moghul Emperor as ultimate suzerein.

Another byproduct of European competition in the Indian Ocean was incessant high-seas warfare and piracy, placing ships of Asian as well as European flags in constant danger. Portugal took early advantage of this situation by offering maritime protection to its Asian allies, in the form of special safe-conducts (*cartazes*), as mentioned in their

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[60]Many of treaties also included provisions protecting the rights of European shipowners in wrecks--an exemption from the custom in Asia as well as Europe, of treating wrecked goods as abandoned; or provisions regulating export duties (Alexandrowicz 1967:78-80, 173-174).

treaties with the Raja of Bakla (1559) and the Maratha Empire (1670), for example (Alexandrowicz 1967:74). The Dutch followed this pattern, *e.g.*, in their treaties with the Tevar of Ceylon (1660) and the Rulers of Macaasar (1667), Tanjore (1688), and Johore (1784). This amounted to a kind of protection-racket to the high-seas, since Asian countries found it increasingly useful, if not necessary, to shield their ships behind the flag or *cartazes* of a European naval power through treaties of protection.[61]

Treaties or *firmans* also typically included "capitulatory" terms, *i.e.*, jurisdictional arrangements. In Asia, most apparently followed the principle of *actor sequitur forum rei*, that is, the forum and law followed the nationality of the defendant. A different rule generally applied to the collection of debts, however, permitting the company to proceed against its debtors in its own fora, regardless of nationality (Alexandrowicz 1967:103ff). The British company obtained *firmans* from Bringab Raja (1758) and the ruler of Mysore (1763) containing terms of this nature, for example, and they can be found in Dutch treaties with Sumatra (1607), Ceylon (1612) and Cochin (1663). There were instances of agreements on mixed tribunals as well, *e.g.*, in Dutch treaties with Boeton (1613), Timor (1618) and Ternate (1625), and a French treaty of 1687 with Siam. Provision was also sometimes made for the local ruler to indemnify the company for his subjects' uncollected debts, *e.g.*, in a 1639 firman granting the British company the site of Madras, and the Dutch-Macassar (1667) and French-Persian (1669) treaties. There were also grants of capitulatory terms in favour of Asian merchant enclaves in Europe, notably in a 1631 Dutch-Persian treaty and a 1718 Austrian-Turkish treaty (*ibid.* 119-123).[62]

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[61]Freitas had argued, in his critique of Grotius' *Mare Liberum*, that Portugal had the right to protect its territorial interests along the Indian Ocean by controlling access routes on the high seas, including the seizure of any ship lacking a Portuguese cartaze. This would have given Portugal effective control of the entire Indian Ocean, and was a stretch of the right to self-defense not accepted by other nations.

[62]Some treaties also provided for the extradition, *e.g.*, the capture and surrender of European fugitives and deserters (Alexandrowicz 1967: 182, Note 0).

Related to these capitulatory provisions were agreements for the freedom of Christian missionaries and the protection of converts. The Dutch treaties of 1602 with Banda and 1663 with Cochin, and the French treaty of 1685 with Siam, are similar, in this respect, to the Spanish treaties with indigenous nations in Argentina and Chile (Alexandrowicz 1967:170). Some Asian states insisted on reciprocal guarantees of the religious freedom of Muslims and Hindus.

European powers were not especially interested in colonization of they could obtain the riches they sought through control of trade. As a result, few treaties contained cessions of territory–that is, transfers of ownership with full sovereignty. Those cessions which appear in Asian treaties are generally of small, strategic spots such as harbors, or the sites of forts and "factories".[63] Protection, rather than cession was the principal means by which Europeans gained control of the region.

It is noteworthy that the new Union of India took the precaution, upon gaining its independence from Britain, of coaxing accessions from each of the Aboriginal rulers who previously had enjoyed treaty relations with the Crown (Hannum 1990:152). Hyderabad at first refused and took its case to the U.N. Security Council, but when the Union invaded this small state in 1948 it dropped its claims hastily agreed to accede to Indian sovereignty. Kashmir, by contrast, acceded to the Union in the hopes of avoiding annexation by Pakistan, but its action resulted in a war between India and Pakistan that has continued, in fits and spurts, to this day.[64] Contemporary tribal nationalisms in India generally do not rely upon historical treaty claims, but on the fact of ethnic and cultural

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[63]"Factory," in 18th-century English usage, referred to places where factors (purchase agents or brokers) worked, a "trading post".

[64]It should be noted here that Sikkim, long a British protectorate, was simply absorbed by India in the 1970s (Hannum 1990:22), without a formal relinquishment of its treaty rights. The matter has not led to any legal challenges, so far as the authors can ascertain.

distinctiveness.[65]

2. China and Japan

The case of China is distinguished by the sheer scale and bureaucratic complexity of the Celestial Empire, as Europeans encountered it diplomatically from the 13th century onwards. There are nevertheless useful parallels that can be drawn with European practices elsewhere. Muslim merchants were already established in self-governing Cantonese enclaves when the Portuguese arrived. European trading quarters were established as well, strictly segregated from Chinese habitations, and generally governed by Chinese law. The Emperor steadfastedly refused to receive European envoys, however, regarding them as barbarians who were already subject to his universal jurisdiction (Gong 1984). China already governed a large family of neighbouring peoples, in accordance with Confucian tenets of firm, but rational, paternal guidance. While Europeans were generally treated on a footing of equality in countries with Hindu and Hindu-Muslim (Moghul) traditions, Chinese vassal states shared the Emperor's view of Europeans as naturally subordinate. Lord Macartney's refusal to "kowtow" to the Emperor in 1793 was applauded in London as a heroic act, but dismissed by Chinese as proof of European ignorance and barbarity.

China finally condescended to enter into treaties with Russia, at Nertchinsk (1689) and Kiakhta (1727), granting Russia's north-Pacific merchant enclaves the right to govern themselves on the condition that Russian envoys display proper respect to the Emperor. Other Europeans grew increasingly resentful of segregation, lack of direct diplomatic access to the Imperial court, restrictions on their travel, subjection to Chinese criminal laws, and price controls. Chinese efforts to stem the opium trade provided Britain with a pretext for a demonstration of power, forcing the Emperor to submit to an

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[65]The largest tribal movement, among the Santal, for example has its origins in the formation of grassroots political parties in the 1930s, which were quite separate from the hereditary princely rulers of their region (Orans 1965:97).

international protectorate under the treaties of Nanking (1842), the Bogue (1843), Wanghia (1844), Whampoa (1844), and Tientsin (1858). Chinese reluctance to implement the Tsientsin treaty resulted in further European military action, and still another imposed treaty. The Convention of Beijing (1860) opened the entire countryside to European travel, trade, residence, and land ownership, and authorized the siting of European embassies in Beijing. In addition China was forced to consent to the establishment of Treaty Ports, controlled by European states and governed under European laws. The failure of the Boxer Rebellion (1900) led to further restrictions, including European administration of tariffs and European jurisdiction over disputes involving Chinese defendants, and the division of China into spheres of influence.

Sir Francis Piggot, the Chief Justice of Hong Kong, in his book *Exterritoriality* (1907) wrote that in the Far East, the "sovereignty of barbarous chieftains [was] recognized to as full an extent as that of sovereigns of what was formerly called 'Christiandom.'"[66] The basis of His Majesty's "foreign jurisdiction" was treaty, although "other lawful means" were also recognized as a sound foundation for the exercise of jurisdiction and were occasionally used.

> [T]reaty is resorted to whenever possible for its establishment. The due observance of these treaties is as much regarded by the Executive, and, if need be, enforceable by the Sovereign Prince. They are so concluded in virtue of the prerogative and independently of Parliament: hence the terms 'the King's foreign jurisdiction'.

The rights which the King exercises in these countries are not his sovereign rights at all, but merely the delegated rights of the Sovereigns of the Country.[67]

Moreover, Piggot states that "such powers alone as are surrendered by the Sovereigns of the oriental country can be exercised by the Sovereign of the Treaty Power.

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[66] 1907:4

[67] *Ibid.* 4-5 citing *Imperial Japanese Government v D.O. Co.* [1875] AC 644; *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co.* [1901] AC 373.

All those powers which are not surrendered are retained; and to the exercise of such powers by the Sovereign of the oriental country, the subjects of the Treaty Power are bound to submit." Piggot divided the treaties into two groups: in one type the oriental sovereign exercised jurisdiction over his own subjects; the other constituted "a special relationship established between the two Sovereigns themselves *vis a vis* other Powers." He described the latter type as a treaty of protection.

After the establishment of European legations at Beijing, Chinese administrators began to study Western texts on international law (Gong 1984:180 notes that the most popular was Wheaton's classic *Elements of International Law*), invoking these principles in dealings with European diplomats and, by the century's end, attending international negotiations such as the 1899 and 1907 Hague Peace Conferences. Upon establishment of the Republic of China in 1912, Dr. Sun Yat-Sen announced that his government would "try our best to carry out the duties of a civilized nations so as to obtain the rights of a civilized nation" (*ibid.* 181). Ironically, then, China was permitted to regain its effective external sovereignty gradually, in a "probationary" manner, at a time when most of Europe's other Asian and African protectorates were losing theirs. A recurrent issue in this process was China's demand for revocation of "unequal" treaties conferring extraterritorial powers on the enclaves and Treaty Ports established by Britain, France, Russia and the United States. The Republic used its membership in the League of Nations to denounce these treaties as incompatible with the sovereign equality of all states. The League itself took no conclusive action, but European Powers agreed to respect the unity of Chinese territory in the Treaty of Washington (1922), and renounced their extraterritoriality in 1942 in recognition of the Chinese war effort (*ibid.*; Lindley 1926:224).[68]

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[68]Britain's 1902 McKay Treaty had previously held out a promise of renouncing extraterritoriality if China Westernized its legal system. For its part, China took the Anglo-French side in the first World War, in hopes of winning concessions on extraterritoriality.

The dispute over Hong Kong persisted, however. Britain acquired the island of Hong Kong by cession in the Nanking Treaty, the city of Kowloon by cession under the Convention of Beijing and, in 1898, a 99 year lease for the surrounding countryside ("New Territories"). After forcefully crushing local resistance, Britain treated all three tracts as if they had been annexed (Wesley-Smith 1983) The Chinese Republic meanwhile began agitating for the return of the territory on the basis that the underlying treaties had been unequal–particularly the lease, which provided *no qid pro quo* whatsoever. Britain has never admitted the inequality or violability of its 1898 lease, but in effect pleaded *nolo contendere* by agreeing to return the entire Colony to China when the lease expires in 1997. Hong Kong thereby offers a recent and very significant example of the violability of unequal treaties.

A brief comparison with Japan is also in order. Contact with the Portuguese began in the mid-16th century; Dutch, English, and Spanish merchants reached Japan shortly afterwards. After Tokugawa Ieyasu had seized power as Shogun in 1600, however, he expelled all but the Dutch (Suganami 1984). Dutch merchants were confined to Dejima Island, near Nagasaki, and paid homage annually to the Shogun in the same manner as Japanese feudal lords. Japan continued intimate diplomatic relations with Korea, and indirect relations with China through the intermediary vassal state of Ryukyu,[69] but otherwise sealed its coasts and repelled all foreign vessels until 1853, when a U.S. fleet arrived demanded landing rights and diplomatic access. A flurry of Western commercial treaties followed (1854-1858), under which the Powers obtained consular rights, extraterritorial jurisdiction, fixed tariffs, and most-favoured-nation status, offering nothing in return. Resentment towards these unequal treaties helped to precipitate the overthrow of the Tokugawa shogunate and restoration of the Emperor in 1868. Japan studiously embraced the language of international law and imperial tactics, imposed an

[69]It was never entirely clear whether Ryukyu was a vassal of China or Japan, since it was subordinate to both. It was finally annexed by the Meiji Government in 1878.

unequal treaty in 1876 on Korea (which it annexed in 1910), and obtained most favoured-nation status in 1896 with China (before helping suppress the Boxer Rebellion).[70] Japan demanded equality with the Great Powers and soon achieved it, through permanent membership in the League Council.

3. Africa

Our survey of African diplomatic history is based chiefly on the exhaustive analysis by Alexandrowicz (1973), who unearthed hundreds of British, French, Dutch and German treaties in European archives twenty years ago. His research remains definitive and unduplicated, although we may differ in some interpretations of the documentary evidence that he accumulated.

Customary systems of formal diplomacy and alliances among African nations long predated the age of European exploration and Colonization (Bull 1984:105). This included regional confederacies and hierarchies of vassal-states. Islamicization later helped expand and standardize the rules of diplomacy among African kingdoms (Alexandrowicz 1973).

Portugal made the first European voyages to West Africa in the 1440s, and enjoyed diplomatic relations with the King of the Congo by 1482, a decade before Columbus' first voyage. As early as 1629, a treaty with the ruler of Monomotapa (present-day Zimbabwe) made him a Portuguese "vassal". Until the l9th century, however, Europeans made few formal treaties in sub-Saharan Africa although, as discussed above, there was intense diplomatic activity with North Africa throughout the 17th and 18th centuries.

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[70]The absorption of Korea was modeled carefully on British colonial practices: Japan acquired Korea's external sovereignty in 1904, forced Korea to accept a Japanese Resident in 1905, and over the next several years gradually asserted administrative control over Korea's internal affairs (Lindley 1926:218-219). China, Britain, and Russia recognized Japanese spheres of influence in the period 1895-1905.

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

For two centuries, European interest in Africa was centered on the slave trade, which required only a minimal European presence at a few strategic coastal trading stations (Bull 1984:107ff). During this era the pattern of European diplomacy was similar in Africa and Asia, with no issue of large territorial cessions or interference in the external sovereignty of Aboriginal rulers. The slave trade was largely brought to a halt by the Congress of Vienna (1815), but European nations' efforts to police the African coast necessitated a greater armed presence, and provided pretexts for greater intervention in African rulers' affairs. It was only at this stage that Europeans became aware of the potential value of the continent's raw materials, many of which had not yet been exploited by Africans for technological reasons, and its cropland. At this juncture, European objectives shifted to land acquisition.

Once interest in the resources of sub-Saharan Africa intensified, European nations had little doubt as to the legal capacity of African rulers to cede territorial rights by treaty, and frequently expressly acknowledged specific rulers' sovereignty and dominion in the texts of the treaties themselves (Alexandrowicz 1973:30-41). Since treaties of this nature were used to set up claims against other European powers, it was naturally important to demonstrate the authority of individual chiefs, headmen or kings to grant concessions, much like the warranty clause in a deed under private law. Several British treaties affirmed that the African parties were "perfectly independent and pay tribute to no other Power". French treaties often utilized similar phrases, *e.g.*, "*actuellement libres de tout engagement avec des pays étrangers à la France et n'etre soumis ou tributaires d'aucune autre nation*," or even declared that any previous engagements by the African ruler were null and void. (*ibid.* 32, 34-35; Lindley 1926:171). The capacity of African rulers was sometimes challenged by other European powers, however, on the grounds that the signatory lacked such authority under his own legal system[71] or that he was actually

[71]A lawyer in the German Foreign Office wrote a memorandum arguing that African kings were powerless to divest the indigenous community of its land under customary laws, so that all Europeans could obtain was the right to co-habitation, or

dependent on some other sovereign.[72]

In the Island of Bulama arbitration (1870), Portugal successfully argued that the Bulama chiefs lacked authority to cede their territory to the British because they had already accepted Portuguese protection (Lindley 1926:171). Portugal successfully made the same argument in the Delagoa Bay arbitration (1875), adding that the would-be grantors lacked the authority to cede their territory under tribal laws as well (*ibid.* 172). Britain likewise challenged an 1880 Italian treaty with the chiefs of Roheita on the grounds that they were dependents of the Khedive of Egypt, who was himself under Ottoman suzereinty (*ibid.* 170). The Sultan of Zanzibar challenged a number of German treaties in East Africa on the same basis (Alexandrowicz 1973:118).[73] In his decision in the Barotse arbitration, however, the King of Italy concluded that the payment of tribute or deference to a more powerful chief does not necessarily denote dependence, or lack of authority to cede territory by treaty.[74] European states' struggles for expansion often

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Mitbenutzungsrecht (Alexandrowicz 1973:37). Later German scholarly writings retrospectively legitimized Germany's own African treaty claims, *e.g.*, in Namibia (*ibid.* 39).

[72]That Europeans considered these instruments as binding on Africans as collective polities is also indicated by frequent recitations that the obligations will pass to African rulers' "heirs and successors," the same formula that typically was used in treaties between European hereditary rulers (Alexandrowicz 1973:95-96).

[73]So too, the Ottoman Sultan protested French protectorates in North Africa on the grounds that the Maghrebian rulers had been his vassals from time immemorial (*ibid.* 38). By this stage (the 1880s), however, the Great Powers no longer considered Turkey a serious threat, and rarely responded to its protests.

[74]The Italian King defined the paramount chief as one "who exercises governmental authority according to their customs, that is to say by appointing subordinate Chiefs or investing them, by deciding disputes between those Chiefs, by deposing them when circumstances require, and by obliging them to recognize him as

became a race to identify the proper local authorities to make a cession.[75]

This concern for consistency with indigenous peoples' own systems of constitutional law was meanwhile reflected in recitations that the requirements of local law had been met. For example, the 1687 treaty between France and the King of Comendo states that the King acted with the prior consent of "*tous les seigneurs mes subjets, [et] mon Conseil et officiers de guerre*" (*ibid.* 39-41). Such statements appear in the British treaty of 1788 with the King of Sierra Leone, British treaties of 1826-27 with the Kings of the Gambia, Royal Niger Company treaties with the Boussa, Yoruba and Barotse, French treaties with the Kings of Dahomey, and many others. In some instances there was also a concern for interpreting the character of the treaty relationship itself under local law; hence some African rulers swore allegiance to the British Crown "according to the fashion of their Country," as specified in the treaties with the Akropong (1850), Krepee (1861), and Accooafee (1864) (*ibid.* 31).[76]

As in south and Southeast Asia the situation was complicated by the intermediary role played by chartered trading companies. Not only did these British, French, Dutch, and German parastatals act as agents for their governments, *e.g.*, in negotiating treaties and even pursuing war, but they frequently accepted delegations of authority from Aboriginal rulers--a first step towards the evolution of a protectorate.[77] Hence the Sultan

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their Paramount Ruler" (Lindley 1926:170; Alexandrowicz 1973:34).

[75]In one remarkable case (Alexandrowicz 1973:36; Lindley 1926:170), the British Royal Niger Company concluded a treaty with the Chief of Boussa, but France complained that Boussa was a dependency of the King of Nikki. This led to a race between British and French diplomats to reach Nikki and conclude another treaty (the British won).

[76]In a number of instances, European powers also acted as mediators in inter-tribal conflicts, and participated in ritual celebrations of the peace in accordance with local customs (Alexandrowicz 1973:53).

[77]There were also Italian and Portuguese chartered trading companies as well

of Zanzibar delegated administrative power over some of his mainland possessions to British and Italian companies (Alexandrowicz 1973:43). The most extraordinary example of corporate sovereignty was Liberia, founded by a U.S. "Colonization Society" made up of freedmen committed to returning to Africa. Recognized as an independent state by Britain (1847), France (1852) and the United States (1862), Liberia proceeded to absorb neighbouring African peoples militarily, creating a class society divided between Afro-Americans and Africans. The U.S. nevertheless continued to assert a "quasi-parental relationship" with Liberia, and interceded to prevent France from imposing a protectorate there in 1887 (*ibid.* 72).

Unlike European nations' Asian treaties, which frequently secured monopoly trading privileges, most British, French, and German treaties in Africa either guaranteed free trade, or most-favoured-nation status (Alexandrowicz 1973:56). At the same time outright cessions in favour of European states were unusual, save in the Congo (*ibid.* 58-59). The usual form of relationship was "protection," although this term could conceal many variations in intent and practice. When asked to explain its meaning, a British consul told the King of Obopo (*ibid.* 63):

> The Queen (of Great Britain) does not want to take your country or your markets but at the same time she is anxious that no other nation should take them; she undertakes to extend her gracious power and protection which will leave your country still under your government[.]

The meaning of "protection" also appears from specific prohibitions in these treaties, *e.g.*, the protected ruler agreed not to make treaties, engage in war[78] or cede territory without the advice or consent of the protecting power. Thus the form-treaties

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as the Association Internationale de Congo, a Belgian entity, which, under the pretence of scientific exploration, helped establish Belgian claims to central Africa.

[78]Including war or revenge involving other African nations. Several British and French treaties confer authority to mediate disputes with neighbouring tribes or nations, and keep the peace.

used by the British National African Company obliged the signatories (*ibid.* 64):

> not to have any intercourse with any strangers of foreigners except through the said National African Company and we give [...] the Company full power to exclude all other strangers or foreigners from our territory at their discretion.

French treaties contained similar clauses,[79] and frequently also made explicit that the internal government of the protected ruler would be unchanged.[80] Although French treaties frequently contain clauses that "confer the sovereignty" of the territory on France, it was the stated position of the Ministry of Foreign Affairs that this applied only to external sovereignty (*ibid.* 69). Even in the case of Senegal, annexed by France under the express terms of an 1863 treaty, there is a saving clause guaranteeing the peoples' right "to continue to be administered according to their laws, usages and customs".[81]

This often included the explicit reservation of existing property rights, for example, in Britain's 1827 treaty with the Kafir Bulloms, its 1840 treaty with the King of Combo, hundreds of form-treaties made by the National African Company between 1884 and 1892, the French 1883 treaty of protection of Laongo, five French Congo treaties in 1891 and the International African Association's 1884 treaty with the Congolese Macassa (Alexandrowicz 1973:101-102). These instruments refer to "the continued and

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[79] *E.g.,* the signatory "*s'engage aà ne jamais ceder aucune partie de sa souveraineté sans le consentement du gouvernement francais," or*, more firmly, "*ne pourra conceder nulle portion de territoire ni aucun part definitivement or temporairement aàaucune puissance etrangere*" (*ibid.* 65-67).

[80] *E.g.*, that the local ruler "*conserve le gouvernement*", or that "*les francais prétendent ne s'imiscerer en rien dans les affaires du Pays.*" Treaty of 1863 with the King of Porto Novo and Treaty of 1821 with the Trarzas (*ibid.* 67-68).

[81] Several 1883-84 French treaties of protection in Gabon contain the same kinds of reservations, *e.g.,* "*Il n'est rien changé aux mouers, coutumes et institutions du pay"* (Alexandrowicz 1973:102).

unmolested enjoyment of such lands and other property as they now possess," preserving "l'entière proprieté de leurs terres" or similar formulae. Thus it was clear that a change of external or even internal sovereignty was to have no effect on private rights.

It should be noted that many African treaties made provisions for the fair treatment of Europeans under African law. For example, French treaties with the rulers of Gabon (1845), and with the kings of Benito and Brass (1883); while others provided for mixed tribunals to protect European defendants, as in Britain's treaty with Zanzibar (1890), both British (1863) and French (1868) treaties with Madagascar, the French treaties with the rulers of Dahomey (1863) and Somalia (1884-85), and Germany's treaties of protection in Namibia (*ibid.* 85-87). Notably it was only at the end of the 19th century that any treaties provided for European jurisdiction or appeals in cases involving African defendants–for example in the 1893 British treaty with Buganda. In most cases, Aboriginal rulers retained, either expressly or by implication of silence, at least some jurisdiction over disputes involving their own people.

It is difficult to know how clearly Africans actually understood European terms such as "protection" or *Shutzbrief*, or how these concepts were translated into African languages.[82] The British Colonial scholar F.G. Lugard (1893) likened European treaties to the African practice of blood-brotherhood, which in turn might be compared to the formation of confederacies in North America through the fiction of kinship among different clans and nations (Barsh 1986). If treaties were understood thus by Africans, they would have harbored entirely different expectations than their European

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[82] A small number of treaties were prepared with parallel African and European texts, *e.g.*, Swaheli, Amharic, or Arabic (Alexandrowicz 1973: 53-54). In the case of Italy's 1889 treaty with Ethiopia, the Italian text stated that the Emperor *would* avail himself of Italian advice in negotiating future treaties with other powers; the Amharic text used the conditional, *may.* Italy insisted that Ethiopia had delegated its external sovereignty to an Italian protectorate, and used this as the pretext for unsuccessful invasion in 1896 (Lindley 1926:193).

counterparts, *i.e.*, a kind of equal kinship and co-operation, rather than European domination.

The Berlin Africa Conference (1884-85) marked a shift in strategy and legal doctrine. Most of Africa's coasts had been appropriated and the race for control of the interior had just begun. Germany stressed the need for an international consensus on free navigation of Africa's interior rivers, and the means by which new territorial claims should be made and recognized. As the conference began its deliberations, it was generally conceded that existing European claims were mostly based on treaties, not conquest or settlement (Alexandrowicz 1973:46). This implied sovereign equality and freedom of consent, but these concepts did not find expression in the Berlin Act,[83] a matter which distressed the U.S. delegation.[84] The Americans insisted on inserting a statement of their views in the report of the conference (*ibid.* 47), *viz.*,

> Modern International Law steadily follows the road which leads to the recognition of the right of Aboriginal races (African communities) to dispose freely of themselves and of their hereditary soil.

They also stressed their view that aggression would counteract claims otherwise based upon a cession or occupation. As Alexandrowicz (1973: 48-50) observes, most African treaties continued to contain recitations to the effect that the text was explained to the African parties, that they understood it, and consented freely, as well as the signatures of witnesses.

European powers thus still considered it important to preserve at least the

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[83]Articles 34 and 35 of the Act required that any new European claim be preceded by notice to other European powers, and, if on the coast, effective occupation of the territory.

[84]The explorer Henry M. Stanley was a member of the U.S. delegation, and undoubtedly influenced the Americans' views of the respect due to African political systems.

appearance of free consent.[85] Under Article 34 of the Berlin Act, however, it became increasingly common to treat notification of a new claim, and failure of other European powers to protest, as consent to Colonization and/or annexation. In other words, the central issue became the consent of other *Europeans*–implied in their not protesting the territorial claim–rather than the consent of *Africans*. Moreover, the implied consent of other European powers was treated, in practice, as more dispositive than the explicit terms of treaties with Africans. As a result, in last two decades before the World War, European states allowed one another to convert their protectorates into Colonies, with no regard for the underlying treaties.

The operation of these principles is illustrated by the Colonial history of Madagascar. France built Fort Dauphin there 1648, but a century later was expelled by the Hova nation (Alexandrowicz 1973:37). France returned to the other side of the island in 1840 under treaties with the Sakalawa, but the Malagasy Queen denied the capacity of local chiefs to conduct diplomacy (Lindley 1926:170). This did not prevent Britain and France from continuing to build competitive alliances with various Malagasy tribes, however, forcing the Malagasy Queen to accept a British peace treaty in 1865, and French protectorate in l868.[86] As France increased its military presence on the island, the Queen issued a declaration in 1883 re-asserting her independence and warning France that Malagasy territory was inalienable. A French military expedition imposed a more restrictive treaty of protection on Madagascar in 1885, which nonetheless ensured that "the Queen of Madagascar shall continue as heretofore to preside over the internal administration of the whole Island". Britain acknowledged this arrangement in exchange for French acceptance of its protectorate of nearby Zanzibar.

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[85] In the *Island of Lamu* Arbitration, Baron Lambermont concluded that an African treaty must at a minimum be written (Lindley 1926:172).

[86] The parallels here with the history of Nova Scotia and Acadia are not coincidental, but reflect a consistent European approach to using concessions and alliances to defeat one another's competitive treaty colonial claims.

Faced with continued Malagasy resistance, France seized military control of its government in 1895, and forced the Queen to recognize "*le Protectorat avec tous les consequences*" (Lindley 1926: 191). When Britain protested, France replied by declaring Madagascar a Colony by right of conquest (*ibid.* 75-76). What had begun as a competition for the role of protector between Britain and France, was transformed into complete domination by French intervention, and British inaction.

Territorial trading among the Powers resulted in a map of Africa that bears little relationship to the underlying political, ethnic, or linguistic realities of the continent. Although there were occasional attempts to minimize the divisive effects of Colonial boundaries, for example in Rwanda, Liberia, and Somalia (Lindley 1926:282-283),[87] most borders created more problems than they resolved, fostering widespread instability and violence (Sandbrook 1985). Rather than confront this abyss directly, the Member States of the Organization of African Unity have endorsed the principle of *uti possidetis* (Hannum 1990:23). While this creates an appearance of regional stability, it does not answer the aspirations of ethnic and tribal groups, many of which can trace their identity to 19th-century treaties of protection.

4. The Arabian Gulf

Still another useful comparison is with the 11 small kingdoms on the south side of the Arabian Gulf, including Muscat and Oman, Kuwait, Bahrain, Qatar, Abu Dhabi and Dhubai. Like the Barbary Powers, these small states emerged gradually from the central control of the Ottoman Sultan in the 16th-17th centuries. Portugal established its influence in the Gulf early in this period, but was dislodged by Persia in 1622, with British aid (Albaharna 1968:2-5). The British East India Company established offices in the Gulf in 1763, entered commercial relations with Kuwait in 1775, and signed a peace

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[87]The Somali-Ethiopian border agreements did not adequately address the situation of the Eritreans, who were forced to go to war to regain their independence, and were recognized by the United Nations in 1992.

treaty with Muscat and Oman in 1798 (Albaharna 1968:2-4).[88] An 1806 treaty with the tribal shiekh of Qawasim provided for equality of treatment for British subjects. Then in 1820, the British Crown and Gulf rulers joined in a General Treaty of Peace calling for a total "pacification" of the Gulf and collective suppression of piracy and the slave trade. Britain would police Gulf waters and mediate disputes among Arab rulers but, in the words of the treaty, the Gulf states would "all of them continue in their former relation with the exception that they shall not fight with each other, and the [British] flag shall be a symbol of this and nothing further" (Albaharna 1968:25-27).

In practice, Britain interpreted the 1820 treaty as permitting it to take defensive action against non-signatory Arab states, but not to meddle in the domestic affairs of signatories. Lord Curzon described this regional protectorate system as follows, in a 1903 address to the Gulf sheikhs:

> We have not seized or held your territory. We have not destroyed your independence, but have preserved it[.] The peace of these waters must still be maintained; your independence will continue to be upheld; and the influence of the British Government must remain supreme (Albaharna 1968:6, 29).

In the meanwhile, however, British control of the region had been increasing under special treaties with individual Gulf rulers. For example an 1861 treaty gave Britain power to oversee the demilitarization of Bahrain, defend the sheikhdom and represent it in international disputes. In 1867, Britain relied on this treaty for authority to depose the shiekh for mobilizing and seeking Persian aid, without British approval (*ibid.* 32-35). Bahrain agreed in 1880 not to make any treaties without British consent, and in 1892 not to conduct any diplomacy or cede any territory.

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[88] It will be recalled that the original 1661 Charter of the British East India Company empowered it "to make war or peace with any Princes not Christian," and to make treaties in the name of the Crown; in 1838 Parliament terminated this power, and assumed full responsibility for all treaties previously made by the Company.

Similarly, a secret 1899 agreement with Kuwait repudiated Turkish suzereinty and agreed to British protection as a guard against threats of annexation by Turkey or Russia (Albaharna 1968:41-4S). The Kuwaiti kingdom agreed to conduct no diplomacy, nor cede any territory without British approval, and Britain used this clause to veto German railway concessions. Turkey and Britain agreed in 1901 that neither would try to annex Kuwait or make it a protectorate, but a 1914 treaty declared Kuwait "an independent Government under British protection". Kuwait's borders with Iraq, a cause of the recent Gulf War, were negotiated by Britain as Kuwait's representative in 1922-23, at a time when Iraq was also a British dependency.

Between 1798 and 1845, Muscat and Oman made treaties of peace and commerce with Britain, France, the United States, and the Netherlands. In 1862, fearing British annexation, France secured Britain's promise to respect this kingdom's independence, but an 1891 British agreement with Muscat forbid any lease or sale of territory to any foreign power except Britain (Albaharna 1968:48-54). This was tested in 1898, when Muscat tried to lease Omani coastal coaling stations to France, and as a result Britain and France agreed that neither would seek any further concessions in Oman. France obtained extraterritorial jurisdiction of French citizens under an 1844 treaty with Muscat, as the U.S. had done for its citizens in 1833. Britain obtained the same rights by treaty in 1939, together with "integration" of Muscat's armed forces into the British army.

Britain did not treat directly with Qatar until 1868 and regarded it to be a Turkish dependency for another fifty years. Then, in 1916, Qatar entrusted itself by treaty to British protection, submitted its foreign relations to British control, and recognized extraterritorial jurisdiction over British subjects in Qatar (Albaharna 1968:38-39).

What was the practical significance of British protection? Gulf states' foreign relation were conducted by British Residents in their capitols, for one thing (Albaharna 1968:8-17). From 1858 to 1947 this task was assumed by the British Viceregency in India, than transferred to the Foreign Office in London, it being Whitehall's opinion that it would be "inappropriate" to regard the Gulf states as associated with an independent

India. Jurisdiction over British subjects and, in some treaties, other foreigners was entrusted to the British Resident and local British courts, while resident Muslims remained subject only to *shari'a* . The rulers of each state were selected by the senior members of the Arab dynasty, than formally recognized by the British Resident at a ceremony renewing the Crown's treaty commitments.

Despite these arrangements, which parallel the treaties made with Aboriginal nations in North America, all of the Gulf states have since regained their independence and become United Nations Member States. This is even the more remarkable, in comparative terms, in view of the fact that most of the Gulf states were never fully independent before the British protectorate. Muscat and Oman were independent since 1751, and were governed by elected *imams* after 1797. Kuwait was founded in 1756 by a tribe that emigrated from Muscat, however, and was at least nominally under Turkish suzerainty until 1899. Bahrain was founded by a Kuwaite tribe in 1766 under Persian protection, and was claimed as a Turkish dependency until 1923. Abu Dhabi, Dhubai and the other Trucial States were tribal sheikhdoms in the 1800s when they placed themselves under British protection. These tribes were scarcely more "state-like" than those tribes in North America who accepted British protection in the same period.

PART FOUR

THE UNFOLDED TREATY ORDER IN THE AMERICAS

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

A. CONTEXT

Treaties made with the Aboriginal nations of Africa, Asia and the Americas did not differ materially in form or contents. Wording of a parallel character can be found among them all. Indeed, as the claims of Spain to the "Indies" were pursued by diplomatic means, rather than by wars of conquest, as early as the 1590s, American treaties provided an important body of practice and precedent for European diplomats in the Indian subcontinent and Africa in the centuries which followed. This section will be a brief introduction, since other project in the Royal Commission will deal with the specifics of each treaty in Canada.

When Europeans arrived, the Americas were already sub-divided, as was medieval Europe, into discrete named territories, associated with particular families, clans and nations. Europeans initially faced the same quandary as in the "Old World," *i.e.*, discovering the nature and structure of indigenous political systems so that they could depend on making treaties at the appropriate levels with genuine "rulers". This was relatively simple in their dealings with large, centralized tribal confederacies such as the Haudenosaunee (Six Nations) in the North and the "Four Quarters" of the Mapuche in the South. They functioned much like the nations of Sub-Saharan Africa and parts of Asia, with leading chiefs and councils of advisors. More difficult was the situation of dispersed, highly independent-minded prairie and forest peoples, like the Cree and Lakota or, in the South, the "Chaquenos," who appeared to have many chiefs but no one in charge. Europeans nonetheless overcame these difficulties and pursued diplomacy with whomever they could find with apparent authority–and frequently used treaties conscientiously to entrench and centralize tribal chieftainships to make their future dealings more secure.

B. BRITISH NORTH AMERICA

Aboriginal nations and tribes were an integral party of creating the Treaty Order, which permitted the British coastal settlements. They were considered as proper subjects of international law, capable of making agreements "intended to create legal

rights and obligations of the parties"[89] including the protection the Aboriginal nations, dominion and liberties. These compacts and Treaties with Aboriginal nations were implemented and enforced by prerogative law of the Great Britain according to their letter and spirit.

By the end of the seventeenth century, the ideal of free association and protection under prerogative treaties became His Majesty's exclusive policy in dealing with the Aboriginal nations of America (Henderson 1985). Treaties affirmed the international personality and sovereignty of the American nations, established boundaries between British settlements and Aboriginal territories, privileges and immunities, rights of belligerents, extradition processes, and criminal and civil jurisdiction. This policy was called a treaty commonwealth (Labaree 1935 2:715,463). Among the Iroquois it was known as the Covenant Chain. His Majesty had a personal treaty relationship with Aboriginal sovereigns, which made them subjects of the Crown, directly under its protection, but separate from the British realm, or the power of Parliament.

The main ideological force behind His Majesty's extension of free association and treaty commonwealth to the American nations was John Locke. Locke had accepted a position as Commissioner of Trades and Plantations, a new Subcommittee of the Privy Council entrusted with reforming the colonial system, and as such was able to introduce his political philosophy of consensual government and free association into the colonies. What was different about Locke's theory of treaty commonwealth, as compared with Vitoria's Aboriginal dominion, was his derivation of principles from notions of utility, rather than Biblical standards.

Aboriginal governments in America were characterized in Locke's writing on *Two Treaties of Government* as independent states under "kings" or "rulers" (1960 ed. :I, s. 144-5). By analogy, he argued that the relationship among independent states are like those which existed among individuals in a state of nature is the hypothetical

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[89]P. Martin, *Federalism and International Relations*, Ottawa 1968:13.

original condition of humans without political superiors, similar to the independent relations of states to each other in the Laws of Nations (*ibid.,* II, s. 4). "[T]hose who have the supreme power of making laws in England, France, or Holland are to the Indians but like the rest of the world–men without authority" (*ibid.* ss. 144-45:II ss. 9, 105, 108). As independent states, the American nations could enter into treaties to create a more stable political environment and to secure their rights. Locke defined this process as "Treaty commonwealth". He considered the resulting legal compact as distinct from domestic government.[90] Locke's treaty commonwealth was a limited contractual alliance in the Law of Nations, while the domestic social compact of the English realm was a more comprehensive subordination of individual wills. Both addressed the deficiencies of the imagined state of nature by guaranteeing possessions, and establishing laws for the peace, safety, and public good of the people concerned.

After the 1648 Treaty of Neutrality between Britain and France, the Atlantic colonies saw the first application of Locke's treaty commonwealth principles. His Majesty's Instructions directly incorporated Locke's suggestions by clearly requiring colonial governors to enter into treaties and political association with the "several heads of the said Indian Nations or clans and promising them friendship and protection in his Majesty's part" (Labaree 1935:II 469,478-80,742,806). These prerogative treaties were to establish a formal alliance with the Aboriginal nations and place them under the protection of the Crown. The Treaties were also designed to terminate any competing

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[90]It was not every compact, Locke argued, "that put an end to the state of nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic; other promises and compacts men may make one with another, and yet still be in the state of nature. The promises for truck between a Swiss and an Indian, in the woods of America, are binding to them, though they are perfectly in a state of nature in reference to one another. For in truth and keeping the faith belong to men as men, and not as members of society" *ibid.*, II: s.

Aboriginal tenures among the settlers, and to prevent the Colonists from using tribal dominion to exempt them from His Majesty's authority and taxation.

1. *Mohegan Indians v. Connecticut.*

In this lengthy proceeding, the Mohegan nations sought to determine its relations to enforce its treaty relations with the royal colony of Connecticut. Thomas Life, a Colonial solicitor, called this the "greatest cause that ever was heard at the Council Board."[91] Oweneco, the son of the great Mohegan leader Uncas, through his official guardian John Mason, petitioned the Queen in Council in 1703 for a Royal Commission to resolve a land problem. He alleged his people had been deprived of lands reserved to them in a prerogative treaty by the actions of the Connecticut colony, which had distributed Mohegan territory to settlers.

Queried by the Board of Trade, Attorney General Northley determined that royal charters did not include tribal lands protected by prerogative treaties. The territories of treaty tribes were separate prerogative jurisdictions, not covered by domestic laws. Thus, the Queen could lawfully erect a special court within the Colony if an appeal were made to Her in Council (Smith 1950:425).

The Queen appointed such a court in 1705 under a Royal Commission. In an *ex parte* hearing it held that protected tribal lands were not intended to pass to colonies in their royal charters, and it directed Connecticut to restore the confiscated lands to the Mohegan Tribe (*ibid.*, at p. 425). The Governor and Company of Connecticut appealed this decision, challenging the Queen's jurisdiction to establish a court within a royal colony. It argued that Connecticut had acquired absolute title to the tribal lands by conquest, that the tribe was subservient to the colony authority, and that the Royal Commission was illegal because it determined title to land without a jury. The Committee of the Privy Council rejected the colony's arguments. The Mohegan Tribe was a sovereign nation, not subservient to the colony (*ibid.*, at p. 426; PC 2/81/204; 5

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[91] 3 Trumbull *Mss*, 67 a,b

Winthrop Papers, 325-26).

A Royal Court of Commissioners, specially appointed by the King as a reviewing court, reaffirmed the opinions of both Attorney General Northely and the Privy Council Committee in 1743 (*ibid.*, at p. 427-8). It was the first appellate decision on the rights of Indian tribes in British law, holding that Indian tribes were exclusively under the exceptional jurisdiction of the Crown, and not subordinate to either Parliament or Colonial government. It rejected Connecticut's assertion that European treaties, Mohegan treaties, or royal charters had extinguished tribal sovereignty within the Colony's boundaries.[92]

The British subjects in possession of Mohegan lands questioned whether a Royal Commission could lawfully determining title to land without a jury.[93] They argued that the Mohegans were subject to Connecticut laws, and that jurisdiction was properly in the Colonial courts rather than a Royal Commision. The 1743 Royal Court of Commissioners rejected these claims. Commissioner Daniel Horsmanden, later Chief Justice of New York, held, over one dissent, that:

> The Indians, though living amongst the king's subjects in these countries, are *a separate and distinct people from them*, they are treated as such, *they have a polity of their own*, they make peace and war with any nations of Indians when they think fit, *without control* from the English.
>
> It is apparent the crown looks upon them not as subjects, *but as a distinct people*, for they are mentioned as *such* throughout Queen Anne's and his present Majesty's commission by which we now sit. And it is plain, in my conception, that the *property of the soil* of these countries; and that their lands are not, by his majesty's grant of particular limits of them for a Colony, thereby impropriated *in his subjects* till they have made *fair*

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[92]Less than a century later, Chief Justice Marshall in *Worcester v. Georgia* reached the same conclusions.

[93]This is similar to the legal objections in *Calvins' Case*.

and honest purchase of the natives.[94]

Horsmanden concluded that controversies with the tribes of Indians protected by treaty were neither controlled by the laws of England nor colonial laws, but rather by "a law *equal to both parties*, which is the law of *nature* and of *nations*".[95] Under this decision, the American nations were a separate and foreign jurisdiction from the colonies. They were controlled by the law of nature and nations and under the protection of the Crown in Council in London, under the Crown's prerogative jurisdiction of foreign affairs, rather than through local colonial officers. The Governor of Connecticut appealed this decision to the Privy Council, the highest judicial authority in the British Empire, where the case lingered until 1771. By the time the Privy Council affirmed the 1743 Commission's decision,[96] the Connecticut colony had begun its struggle for independence.

Mohegan Indians clarified the status of the Indian nations and tribes in royal colonies. The American nations were part of the international order, while the colonies were not. Conflicts were to be judged according to the "law of nature and nations". It was the highest authority possible in the law of Great Britain, and the basis on which subsequent royal Instructions for British North America were forged. These fundamental legal principles were also codified in the *Royal Proclamation of 1763*. Henceforth, controversies between American nations and colonial authorities were to remain exclusively under the Sovereign's foreign jurisdictions, rather than that of the Parliament or British courts,[97] or any colonial or local assembly. Indian nations or tribes were "separate and distinct", wording which echoes the decision in *Calvins' Case*.

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[94]*Ibid* at 427-8; Certified Copy Book of Proceedings Before Commission of Review 1743 1769:118).

[95]*Ibid.* at 434; Certified Copy Book of Proceedings Before Commission of Review 1743 1769:118).

[96]January 15, 1771 [P.C].

[97]Cf. *Penn v. Lord Baltimore* (1 Vesey Sen. 444).

Treaties united the Aboriginal nation and the English Crown *personally*, while maintaining their distinct territories, governments and laws.

2. Wabanaki Compact, 1725

The Treaty of Utrecht (1713) was the first European treaty to acknowledge English political authority in North America, part of which now comprises Atlantic Canada. In section 12 (XII), the French granted all their rights and pretension to the British political authority "the ancient limits of L'Acadie", which was renamed Nova Scotia; the City of Port Royal, now called Annapolis Royal and to the Island of Newfoundland. Britain promised, in turn, not to disturb the Aboriginal nations, who had been "Friends" to France in the war.

The British diplomats knew that the transfer of Acadia was merely a symbolic concession. One British diplomat described Britain's acquisition as being "in words something, in substance little".[98] Another view was expressed by Matthew Prior, who declared that the international proclamation of sovereignty over territory in North American was immaterial unless it was sustained by the industrious occupation of the settlers. Industry rather than legal declarations, he pointed out, would determine the ultimate control of North America.[99]

Over the next century, attempts to define the scope of the "ancient limits of Acadia" would continue to perplex both English and French diplomats. A special international commission was established to determine this territorial question. The French commissioners interpreted the claim to pertain only to actual French settlements, stressing the unextinguished Aboriginal dominion of the Míkmaq. The British commissioners argued for a broader interpretation, including absentee French seigniorial grants.

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[98]BM Additional Manuscripts 22:206.

[99]McNutt 1965:10.

In practice, the "Friends"[100] of Great Britain and France continued their dominion and freedom of trade, protected by section 15 (XV) of the *Treaty of Utrecht* which stated:

> The Subjects of France Inhabiting Canada and others, shall hereafter give no Hindrance or Molestation to the Five Nations or Cantons of Indians, Subject to the Dominion of Great Britain; nor to the other Aboriginals of America, who are Friends to the same. In like manner, the Subjects of Great Britain, shall behave themselves Peaceably toward the Americas, who are Subjects or Friends to France; and on both Sides, they shall enjoy full Liberty of going and coming on Account of Trade. As also the Aboriginals of those Countries shall, with the same Liberty, Resort, as they please, to the British and French Colonies, for Promoting Trade on one Side, and the other without any Molestation or Hindrance, either on the Part of the British Subjects or of the French.

In the eighteenth century, the terms "liberty" and "franchise" were interchangeably used to denote royal grants of exclusive economic rights. Sir Matthew Hale wrote in *Prerogative of the King* that "liberties or preeminences" were created under the King's *jura regalia*. Liberties included "jurisdictions, franchises, and exemptions" grounded in express grants or charters or in the presumption of long usage (1976 ed. at 201). These liberties were exclusive, inviolable prerogative franchises which limited the Sovereign, as well as subsequent Parliamentary or Colonial legislation (Chitty 1820:119).

Moreover, section XV created the first international commission to determine the status of Aboriginal peoples. "[I]t is to be Exactly and Distinctly settled by Commissaries, who are, and who ought to be accounted the Subjects and Friends of Britain or of France."

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[100]This phase is derived from the Crown's "alien friend in league" in *Calvins' Case*.

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

After European ratification of the *Treaty of Utrecht,* the Crown extended the ratification process to America. This was an attempt to consolidate British external authority through the voluntary consent of the Aboriginal nations. This transfer of authority between European Crowns, was ratified by the Wabanaki Confederacy in 1713 and 1714 (Cumming and Mickenberg [CM] Appendix 3).[101] At Portsmouth, New Hampshire, in 1713, each of the member tribes expressed the "free consent of all the Indians" belonging to their "several rivers and places" to be the lawful subjects of Queen Anne, with each tribe promising its "hearty Subjection & Obedience unto the Commonwealth at Boston" as well as the Crown of Great Britain (Article 1 and 7). The tribal delegates agreed to "cease and forbear all acts of hostility" towards British persons and their estates, and to "maintaine a firm & constant amity & friendship" with them. They agreed not to entertain any treasonable conspiracy with other nations to disturb the British inhabitants (Article 2).

Article 3 clarified the scope of the British estates in New England, and, at the same time, reserved the Aboriginal dominion and liberties as separate from those of the British.

> That her Majesty's Subjects, the English, shall & may peaceably & quietly enter upon, imprive [sic], & forever enjoy, all and singular their Rights of Land & former Settlements, Properties, & possessions with the Eastern Parts of the said Province of Massachusetts Bay and New

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101Manuscipt copy of the treaties are in Public Record Office (PRO), Colonial Office Series (CO), organized by date. The principal colonial correspondence is contained in the Colonial Office Series. They were reorganized by the Public Record Office in England earlier this century. Prior to this Nova Scotia had organized its recordes in Public Archives of Nova Scotia [PANS]. French sources are Archives nationales, Paris [AN], Archives des Colonies [AC], Canada [C11A]. The Public Achives of Canada [PAC], and Documentary History of the State of Maine [DHM].

> Hampshire, together with all the Islands, Isletts, Shoars, Beaches, & Fisheries within the same, without any molestation or claim by us or any other Indians. And be in no ways molested, interrupted, or disturbed therein. Saving unto the said Indians their own Grounds, & free liberty for Hunting, Fishing, Fowling and all other their Lawful Liberties & Privileges, as on the eleventh day of August in the year of our Lord God One thousand six hundred & ninety three.

The Aboriginal rights of the Wabanaki to hunt, fish and fowling are characterized as "free Liberties" or "Lawful Liberties and privileges", that is, as their rights are phrased in prerogative franchises (**see,** Hale, 1979: 201, 227-40). The Wabanaki delegates agreed to provincial "management & regulation" of the all "Trade and Commerce" between the English and the Indians, and not to trade with any English Plantations of Settlements on the New Hampshire side of Saco River (Article 4).

In 1721, the Board of Trade suggested increased missionary activity, treaties and alliances with the Aboriginal nations, and efforts to protect friendly tribes against the depredation of other tribes allied with the English Crown, stating that "every governor upon his making any treaty with the Indian nation, should immediately communicate the same to all other of your Majesty's Governors upon the continent" (NYCD 4:626-27). International competition for trade, jurisdiction, and influence with France in the north and west and, to a lesser extent, with Spain in the south, seemed to heighten the Crown's interest. Violations of the Aboriginal dominion protected by these Treaties created a military conflict.

The Wabanaki Compact (1725) concluded at Boston, ended Drummer's War.[102] It was modeled after the terms of the Treaties of Utrecht. The "Severall [sic] Tribes of Eastern Indians" were represented by the Wabanaki Confederacy; His Majesty was represented by the Lieutenant Governor Drummer of Massachusetts Bay. The *Wuastukwuk* or Malecite Nation of the Saint John River (*Wulstukw*) was also part of the

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[102]See, CO 5 898:173-174v.

Confederacy. The Wabanaki Compact renewed the 1693 political-geographical status quo. The Confederacy's predominant concern was territorial boundaries being respected by the British settlers. The treaty acknowledged they were friends and subjects of the King, however, the British treaty commissioners candidly admitted they were not successful in getting the tribes to recognize King George as the sole owner and proprietor of New England and Nova Scotia. Instead, the agreement, in Drummer's words, was to the effect:

> That the said Indians shall peaceably Enjoy all their Lands & Properties which have not been by them Conveyed and Sold unto, or possessed by the English & be no ways Molested or Disturbed in their planting or Improvement. And further that there be allowed them the free Liberty and Privilege of Hunting[,] Fishing & Fowling as formerly–And whereas it is the full Resolution of this Government that the Indians shall have no Injustice done them respecting their lands–I do therefore assure them that the several Claims of Titles (or so many of them as can be then had and Obtained) of the English to the Lands in that part of this Province shall be produced at the Ratification of the present Treaty by a committee to be appointed by this Court in their present Session, and Care to taken as far as possible to make out the same to the satisfaction of the Indians and to distinguish & ascertain what Lands belong to the English in Order to the effectual prevention of any Contention or Misunderstanding on that Head for the Future.[103]

In a 1726 restatement and renewal of this treaty, the Wabanaki furthermore agreed that "if there happens any robbery or outrage committed by any of the Indians, the tribe or tribes [against His Majesty's Subjects within the Province] they belong to shall cause satisfaction and restitution to be made to the parties injured" (Article 2). This made the district chiefs responsible for their members' acts against British

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[103]PAC RG 1, Vol. 12:15 Dec. 1725.

Subjects, rather than accepting the jurisdiction of civil or criminal courts or provincial legislative bodies. In controversies between Indians, Wabanaki law continued to govern, since internal matters were never delegated to the Crown.

Further ratifications of the Compact by southern Wabanaki tribes were held at Casco Bay in 1727, 1728, 1732, and at Deerfield in 1735. Treaty Conferences were held with the Wabanaki tribes at St. George in 1742, Falmouth in 1749, and St. George in 1752, 1753 and 1754. Some of the Míkmaq district chiefs acceded to the Compact in 1726 at Annapolis Royal, and 1749 at Halifax.

After the 1726 ratification conference at Casco Bay, the spokesperson for the Wabanaki Confederacy, Loron Sagourrat, wrote Lieutenant-Governor Dummer objecting to the written treaty. He wrote that, "Having hear'd the Acts read which you have given me I have found the Articles entirely differing from what we have said in presence of one another, 'this therefore to disown them that i write this letter unto you".[104] In particular, he challenged the addition of a statement that the Wabanaki acknowledge King George to be their King and had "declar'd themselves to the Crown of England." Loron wrote that during the treaty negotiations

> when you hae ask'd me if I acknowledg'd Him for king i answer'd yes butt att the same time have made you take notice that I did not understand to acknowledge Him for my king butt only that I own'd that he was king his kingdom as the king of France is king of His. [105]

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[104] DHM 1916:23.208

[105] *Ibid* 1916:209. The French-speakers present at the ratification confirm that the Wabanaki "come to salute the English Governor to make peace with him and to renew the ancient friendship which has been between them before", not to submit themselves to the English King or accept responsibility for beginning the hostility with the English, or that they would live according to English law ("Traité de paix entre les anglois et less abenakis", 1727, in *Collection de manucrits*, vol. III, (Québec) 1884:134-135.

3. Míkmaw Compact, 1752.

After the War of Austrian Succession, the French and English sovereigns mutually restored all conquests made during the War in the Treaty of Aix-la-Chappelle (1748), restoring Acadia to Britain.. Article III renewed and confirmed the terms of the Treaty of Utrecht, "as if they were therein asserted, word for word". This renewal included Article XV, protecting Aboriginal sovereignty, dominion and trading liberties as allies or "Friends" of either the British or French.

The Wabanaki Compact served as a model for the Míkmaw Compact (1752) which confirmed the British sphere of influence in Acadia. In September of 1752, the Grand Chief of the Míkmaw Nation and Delegation arrived in Halifax with a delegation to establish the terms of peace with the British Sovereign.[106] Nova Scotia Council Minutes on the 14th of September recorded the Grand Chief stating he was empowered by the Míkmaq to treaty with the Crown. The Council Minutes stated:

> He was also asked. How he proposed to bring the other tribes of the Mickmack Nation to a Conference here [Halifax]–who replyd That he would return to his own people and inform them what he had done here, and then would go to the other Chiefs, and propose to them to renew the peace, and that he thought he should be able to perform in a month, and would bring some of them with him if he could, and if not would bring their answer (Akins 1869**:**671).

It was apparent that Nova Scotia's Council knew about the federated structure of the "Mickmack Nation", but little about its actual procedures. The Council stated that they were happy to have the Míkmaq come to bury the hatchet between the "British Children of His Omnipotent Majesty King George and His children the Mickmacks of This Country". They assured the Míkmaq that King George had declared that they were "his

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[106]NSA 1:594; PANS, MSS. Documents, Vol. 35, Doc. 71; Hopson to Board of Trade, 16 October 1752.

Children" and that the Míkmaq "have acknowledged him for your great Chief and Father." The Council stated that King George "has ordered us to treat you as our brethren". Moreover, they explained that "we did not Commence any new dispute with you upon our arrival here but what is past shall be buried in oblivion and for the time to come we shall be charmed to live together as Friends." (*ibid.* at 673; CO 217/13). Friendship and burying the past in oblivion are ideas derived from the wording of the Treaty of Utrecht and British law.

The Council accepted Cope's authority to carry the treaty proposal to the other Míkmaq chiefs.

> We approve of your engagement to go first and inform your people of this our answer and then the other Tribes, with the promise of your endeavors to bring them to a Renewal of the Peace. When you return here as a mark of our good Will we will give you handsome presents of such Things whereof you have the most need: and each one of us will put our Names to the Agreement that shall be made between us. And we hope to brighten the Chain in our Hearts and to confirm our Friendship every year; and for this purpose we shall expect to see here some of your Chiefs to receive annual presents whilst you behave yourselves as good and faithful children to our Great King and you shall be furnished with provision for you and your Families every year. We wish you a happy Return to your Friends and that the Sun and the Moon shall never see an End of our Friendship (*ibid.*, at 673).

The Míkmaw Compact, known to Míkmaq as *Elikawake* (in the King's House) was a direct political union between the heads of states of the two nations. The Grand Chief ("Chief Sachem of the Tribe of Mick Mack Indians")[107] and "Delegates", *e.g.*,

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[107]The title of "Chief Sachem" was new to prerogative treaties. In European writing, the concept was first applied to the Mi'kmaq in Bertrand's letter concerning Grand Chief Membertou's baptism in 1610 the Grand Chief was labeled "du grand

other district chiefs, were formally recognized as the proper representatives of the Míkmaw Nation, marking the acquisition of a legal personality for them in the Law of the Nations and of Britain. It represented the jurisgenesis of the Mi'kmaw Nation under the protection of the British Sovereign.

The Mi'kmaw Compact fulfilled the previous prerogative Instruction to the British governors to enter into a treaty of protection and friendship with the Indian nations and clans. His Majesty promised them that they "shall have all favor, Friendship and Protection shewn them from this His Majesty's Government" (Article 2). The concept of "Protection" had been introduced in the 1713 Treaty with the Wabanaki, although the 1725 Compact promised only His Majesty's "Grace and favor" (Article 1). The promise of "Protection" in the Míkmaw Compact is significant because it is one of the first examples of protectorates in the Law of the British Empire.

Neither the 1752 Compact or its subsequent accession conveyed any property interest to the Crown. His Majesty, moreover, promised that the Míkmaq never would be hindered in their "free liberty" of trading, hunting, and fishing (Article 4)[108] The Míkmaq Delegation rejected the suggestion that all trade and commerce should be

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sagameos" (JR2:89). The concept of Chief Sachem was not used in the Wabanaki Compact. The 1693 Treaty was with the "Sagamores and Chief Captains", the accessions of 1713 and 1714 with the "Delegates", the 1717 Compact with the "Sachems and Chief men", the 1725 with the "Delegates" of the Wabanaki Confederacy, and the Mi'kmaq accessions of 1728 and 1749 with the "Chiefs". In the same manner as the four Delegates who spoke for the Wabanaki in the 1725 Compact, the Grand Chief and the three Delegates spoke for "themselves and their Tribes[,] their heirs and the heirs of their heirs forever".

[108]Previously, the Míkmaw had only the privilege of hunting, fishing, and fowling. Article 1 affirming and incorporating sec. 4 of 1725 Compact into the 1752 Compact.

under the colonial management. [109] Instead, they agreed that Míkmaq

> shall have free liberty to bring for Sale to Halifax or any other settlement within this Province, Skin, feathers, fowl, fish or any other thing they shall have to sell, where they shall have the liberty to dispose thereof to the best advantage.[110]

As mentioned prior, the phrase "free liberty" was a special legal term representing an exclusive prerogative franchise. [111] Thus, the Sovereign established exclusive, inviolable prerogative rights which limited the Sovereign himself, as well as subsequent Parliamentary or Colonial legislation, in Nova Scotia.[112]

In any controversy that might arise, the Crown promised the Míkmaq protection of their tort, contract and property rights in "His Majesty's Courts of Civil Judicature". They were to be treated as equals with British subjects (Article 8).[113] At the same time, the Míkmaq leaders continued to assume responsibility for "any robbery or outrage" committed by their members against His Majesty's subjects within their settlements as in their 1726 and 1749 Treaties. [114] The district chiefs remained responsible for their own communities and intratribal conflicts.

After the brief outbreak of hostilities in Nova Scotia, a Míkmaw delegation met

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[109]Compare, Article 6, 1725 Compact.

[110]Article 4, 1752 Compact.

[111] English legal writers of the period also included exclusive rights to fisheries and game as "franchises" (Chitty 1820:125; Blackstone 2:417; Murdock 1832 Bk II:64,), as discussed above.

[112]Chitty 1820:119.

[113]Article 8 clarified article 6 of 1725 Compact and article 4 of 1726 and 1749 Mi'kmaq Treaties.

[114]In these treaties where the chiefs promised to shall cause satisfaction and restitution to be made to the parties injured (Article 1 confirming Article 2, 1726 Treaty).

with Governor Belcher and the Legislative Assembly in 1760 to renew the Compact. Father Maillard participated in the conference, interpreting the comments of each party.[115] His official notes further reveal the legal nature of the Compact as explained by the man who would be the first Chief Justice in Canada.

Belcher began with his description of the nature of protection and allegiance under the 1752 Compact. "Protection and allegiance are fastened together by links," He told the Míkmaq chiefs.[116] Then he explained the ratification process to the Míkmaq district chiefs:

> [i]f a link is broken the chain will be loose. You must preserve this chain entire on your part by fidelity and obedience to the Great King George the Third, and then you will have the security of his Royal Arm to defend you. I meet you now as His Majesty's graciously honored Servant in Government and in His Royal Name to receive at this Pillar, your public vows of obedience to build a covenant of Peace with you, as upon the immovable rock of Sincerity and Truth, to free you from the chains of Bondage, and to place you in the wide and fruitful Field of English Liberty.

The "Field of English liberties", Belcher promised the assembled district chiefs, would be "free from the baneful weeds of Fraud and Subtlety". To ensure this, "The Laws will be like a great Hedge about your Rights and properties–if any break this Hedge to hurt or injure you, the heavy weight of the Law will fall upon them and furnish their disobedience". The separate dominions of the district chiefs and the British settlements was affirmed and would be strictly protected by His Majesty's law.

Following tribal procedures, the Governor and Joseph Argimault buried the hatchet and washed the war paint from their bodies in token of "a peace that would never be broken". The Governor interpreted the symbolic acts as guarantee of:

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[115]PANS MSS. Documents. Volume 37, Doc. 14.

[116]*Ibid.*, NSA 1:699-700.

> English protection and Liberty, and now proceeding to conclude this memorial by these solemn instructions to be preserved and transmitted to you with charges to your Children's, never to break the Seals or Terms of this Covenant.[117]

Thus the metaphor of the "Covenant Chain" entered into Míkmaw sacred order. The 1752 Compact, which established the terms "Protection" and "Liberty", therefore served to confirm the national or Aboriginal rights of the Míkmaq by the law of nature and the Law of Nations. With the chiefs' public vows of obedience to the Compact, His Majesty's law placed these Aboriginal rights as legal obligations for the Crown to defend.

The chief from Cape Breton Island, speaking for the rest of the assembled chiefs, responded to Governor Belcher's commitments by promising that the Míkmaw Compact would be "kept inviolable on both Sides". The Grand Chief accepted His Majesty as "friend and Ally", and placed the Míkmaq into His Majesty's protection as "a safe and secure Asylum from whence we are resolved never to withdraw or depart". In the name of all Míkmaq, the Grand Chief stated that, "As long as the Sun and Moon shall endure, as long as the Earth on which I dwell shall exist in the same State, you this day see it, so long will I be your friend and ally [...]."[118]

In 1761, His Majesty issued Additional Instructions to the Governors of Nova Scotia and the other colonies. They acknowledged the "inviolable" compacts and treaties which had been made with the Aboriginal nations. They stressed that the peace and security of the colonies "greatly depend upon the Amity and Alliance of the several Nations or Tribes of Indians bordering upon the said colonies." British Governors were admonished to "support and protect" the Aboriginal nations in "their just Rights and Possession and to keep a just and faithful Observance of these Treaties and Compacts which have been heretofore solemnly entered into." This brought Aboriginal

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[117] *Ibid.*

[118] *Ibid.*

treaties into the constitutional law of the colonies. It is a direct act of state ratifying the existing Compacts and Treaties: the consent of the Sovereign to be bound by the Indian Treaties. To ensure the treaties were respected, moreover, he Sovereign ordered that the Governors:

> forthwith cause this Our Instruction to you to be made Public not only within all parts of your Province inhabited by Our Subjects, but also amongst the Several Tribes of Indians living within the same to the end that Our Royal Will and Pleasure in the Premises may be known and that the Indians may be apprized of Our determin'd Resolution to support them in their just Rights, and inviolably to observe Our Engagement with them.[119]

4. Haudensaunee's Covenant Chain

At the same time as the Wabanaki and Míkmaw Compacts, the British Crown was expanding their Compact with the Haudenosaunee or Iroquois. In 1721-33, the Crown and the Five Nations of the Haudenosaunee renewed their Covenant Chain in Treaties of Friendship at Conestogoe, in 1721 and 1732 (Du Puy 1917:7-9). Between these treaties, in 1728, two other treaties were entered between the Crown and the western allies of the Haudenosaunee's, the Chiefs of the Consetogoe, Delaware, Shawanese, and Cattawese Indians (Du Puy 1917:13). In 1736, a Conference was convened to renew the Covenant Chain with the Haudenosaunee, with the exception of the Mohawks. Jointly, the "Six United Indian Nations", Haudenosaunee and the Shawanese, Nanticokes and Delaware, entered into numerous treaties with the Crown concerning the provinces of Pennsylvania (1742, 1744, 1745, 1747, 1748), Virginia and Maryland (1744), Massachusetts and Connecticut (1746). Also, the Haudenosaunee and the Ohio Indian Nations (Twightees, Shawannese, Wyandots, Delawares) participated in treaty conferences polishing the Chain in 1751 and 1753 (Du Puy 1717:17-31).

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[119]PANS RG1 30:58; Micro reel B-1028, 4 May 1762.

After receiving a summary of the treaty minutes from the 1751 conference with the Haudenosaunee, Sir William Johnson wrote to General Gage:

> I have been Just looking into the Indian Records where I find in the Minutes of 1751 that those who made ye Entry Say, that Nine different Nations acknowledge themselves to be his Majesty's Subjects, altho I sat at that Conference, made entrys of all the Transactions, in which there was not a Word mentioned, which could imply Subjection.[120]

Neither the Haudenosaunee or the Western Indian nations of the Ohio Valley, he wrote, would ever declare "themselves to be Subjects or will ever consider themselves in that light whilst they have any Men, or an open Country to retire to, the very Ideal of Subjection would fill them with horror."[121]

On 18 September 1752, the Board of Trade advised the Governor of New York to ensure the inviolable observation of existing treaties with the Haudenosaunee, requested him to use all legal means to redress their complaints about being defrauded of their lands, and directed him not to grant title to any person whatsoever for lands purchased individually by them from Indians. The Board reminded the Governor that when the Indians were disposed to sell any of their land, the purchase ought to be made in His Majesty's name and at public expense. The Board furthermore urged New York to meet with the Indians and forge a new general treaty with them, in cooperation with the Governors of Virginia, Pennsylvania, Maryland, New Hampshire, Massachusetts Bay and New Jersey. In so doing he was:

> to take care that all the Provinces be (if practicable) comprised in one general treaty [with the Aboriginal nations], to be made in his Majesty's name; it appearing to us that the practice of each Province making a separate Treaty for itself in its own name is very improper, and may be

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[120]Johnson to Gage, 31 Oct., 1764 in *The Papers of Sir William Johnson at* *395.*

[121]*Ibid.*

attended with great inconveniences to his Majesty's service.[122]

This suggestion from the Board of Trade set the stage for the famous Albany Congress of 1754, which fueled the southern Colonies' idea of a federated constitutional government modeled after, and designed to confront the Haudenosaunee. It convened on June 19 with representatives from New York, New Hampshire, Massachusetts Bay, Connecticut, Rhode Island, Maryland and Pennsylvania as well as delegates from the Haudenosaunee, Scaakticook and Stockbridge Tribes and the Putuswakn (Ottawa Confederacy or the Seven Nations).[123] The Congress recommended several improvements in the protection of tribal lands. Before the King could act, however, the Seven Years War broke out.

In 1760, Sir William Johnson secured a Treaty of neutrality of the "Seven Nations of Canada", the ring of Indian villages that still protected the French settlements of Montreal and Quebec. The Seven Nations (Putuswakn) renewed and strengthened the "old Covenant Chain which before this War subsisted between us, and we in the name of every Nation here present assure you that we will hold fast the Same, for ever hereafter."[124] In 1760, a separate treaty was entered into with the Huron.[125] This helped end the Seven Years war in North America, and secure British control of Quebec.

5. The Lakes Confederacies

By the Treaty of Paris (1763), France formally passed almost all of His

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[122] *Coll. Mass. Historical Society* Vol. 5-6:22.

[123] NYCD 6:850-92. The Putuswakn, the Míkmaq-Algonquian term, for the confederacy from Wabanaki Confederacy, the Míkmaw Nation, the Christian Mohawks, and the Ottawa Confederacy. It was also called the Council of Fire, the Ottawa Confederacy and the Seven Nations.

[124] *Sir William Johnson Papers*, XIII, 618-619

[125] *R. v. Sioui*, [1990] 1 S.C.R. 1025.

international "pretenses" to North America to His Britannic Majesty. Article II renewed and confirmed Aboriginal liberties secured under the Treaty of Utrecht Article XXIII restored all rights to the Indian allies of France. It stated

> All the countries and territories which may have been conquered in whatsoever part of the world, by arms of their Britiannick and Most Faithful Majesties, as well as those of their most Christian and Catholic Majesties, which are not included in the present treaties, either under the title of cessions, or under the title of restitutions, shall be restored without difficulties and without requiring any compensation.[126]

Consistent with British judicial decisions that held "the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning".[127] His Majesty could not "legally disregard or violate the articles in which the country is surrendered or ceded".[128] Thus Articles II and XXIII of the *Treaty of Paris* was constitutional in nature with respect to Aboriginal rights in what has been New France. Accordingly, in August of 1763, the Board of Trade wrote to Sir William Johnson and declared that both the unknown tribes and nations and those in alliance or confederation with the French were "under His Majesty's immediate protection".[129] The Board also requested that Indian Agents report on the existing status of relations between the Aboriginal nations and the Colonial governments in North America.

Two months later, in the *Royal Proclamation of 1763,*[130] His Majesty

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[126]S&D 1907: Article IV, Treaty of Paris, 10 Feb. 1763. Compare to Article 40 of the Articles of Capitulation (1760), surrendering Montreal and Quebec.

[127]Lord Mansfield in *Campbell v. Hall*, (1774)1 Cow. 204, 208

[128]Chitty 1820:29.

[129]O'Callaghan 1856 Vol. 7:535-536; Sosin 1961:51.

[130]7 October 1763 (Imp.); Privy Council Register, III Geo. vol. 3, p 102; Public Record Office, London, c. 6613683; R.S.C. (1970) Appen. II, No. 1 at pp.

re-affirmed his previous *Instructions* and extended them to the territories newly acquired from France. Since British law assigns power of acquiring foreign jurisdiction to the Crown as part of its prerogative, the *Proclamation* reserved all the unceded Aboriginal territories in the Atlantic Colonies to the Appalachian mountains and set aside all trans-Appalachian western land as "Indian Country", established that only the Crown could purchase these lands, and required a public meeting under Aboriginal law to evidence any future consensual purchases of the reserved land by His Majesty.[131] To avoid any ambiguity, the *Proclamation* provided that the colonial governors and colonists could not, without clear and unequivocal permission from the Crown, use or occupy the lands reserved to Aboriginal nations. Aboriginal nations were to remain under the continuing and exclusive jurisdiction of the Imperial Sovereign.

In the Atlantic colonies, the *1763 Proclamation* established the supremacy of the rights of those "several Nations or Tribes of Indians with whom we are connected, or who live under our Protection." Implementing the earlier order of 1761, the *Proclamation* strictly ordered that the Aboriginal nations within existing colonies "should not be molested or disturbed in the Possession of such Parts of our Dominion and Territories as not having been ceded to or purchased by Us" are "reserved to them, or any of them as their Hunting Grounds [. . .]". The *Proclamation* prevented the Governors from granting lands or allowing settlements on reserved lands by individuals under the pretense of purchases from Indians and forbade any warrants of survey or patents of reserved lands "not having been ceded to, or purchased by Us". Furthermore, it order the removal of unlawful settlements.

The Treaty of Paris and the *Royal Proclamation* of 1763 enabled Sir William Johnson to enter into a comprehensive Niagara Treaty of 1764, which involved twenty-four nations in the old northeast and the Great Lakes, establishing a new peace

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123-29.

[131] *St. Catherine's Milling & Lumber Co. v R* (1888), 14 App. Cas. 46,54.

based on free trade and land rights,[132] and the Treaty of Fort Stanwix in 1768,[133] which aimed to create a permanent line between Haudenosaunee lands and the King's colonies. Johnson delivered a belt of the Covenant Chain to the Ojibways, to keep on behalf of the entire "Lakes Confederacy" (the Western Confederacy). He also gave them a long belt showing the twenty-four nations holding hands, with a ship at one end and a rock at the other, confirming the annual presents the King promised to send the participating nations.

7. Victorian Treaties in Western Indian Country.

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[132] The Six Nation Confederacy ("Naticokes" [Mohawks], "Canoys" [Oneidaes], "Mohicanders" [Tuscaroras], "Algonkins" [Onondagaes], "Nipissengs" [Cayugae], Senecas, Coghnawageys, Ganughsadageys); the Western Confederacy was represented by the "Chippawaes, Ottawaes, Menomineys, Sakis, Outagamies, The Puans, Christineaux , Toughkamiwons [Hurons], , Nipissings" [Algonkins]" *Sir William Johnson Papers*, IV, p. 481. Article Seven of the document signed by the Senecas in April, 1764 making condolences for their bad behavior toward the British they consented to British criminal jurisdiction over them: "That should any Indian commit Murder, or rob any of His Maj'ty's subjects, he shall be immediately delivered up to be tried, and punished according to the equitable laws of England, and should any White man be guilty of the like crime towards the Indians, he shall be immediately tried and punished if guilty. And the Senecas are never for the future to procure themselves satisfaction, otherwise than as before mentioned, but to lay all matters of complaint before Sir William Johnson, or His Maj'ty's Superintendent of Indian Affairs for the time being, and strictly to maintain and abide by the Covenant Chain of Friendship" (Documents Related to the Colonial History of New York) Compare to Míkmaq and Wabanaki Compacts.

[133] Also in attendance were the governor of New Jersey & the Commissioners of Virginia & Penn- sylvania.

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

In the *Constitution Act, 1867*, the Imperial Parliament and Crown created a federal Government of Canada with exclusive delegated administrative authority over "Indian and Lands reserved for Indians" in section 91(24), as well a responsibility for implementing the treaty obligations of the Empire in section 131. In the western Indian Country set aside by the *Royal Proclamation* of 1763, the new Canadian government assumed responsibilities for the respect and protection of the Aboriginal nations by Treaties modelled on those made by the Crown prior to Confederation.

These "peace and good will" treaties did not expressly transfer compete sovereignty from the Aboriginal nations to the Crown or to Canada. They all involved negotiations with existing chiefs and headmen selected by Aboriginal people, thereby recognizing an existing and legitimate political order. Most of the treaties referred to their consent to become constitutionally protected nations of the Crown, and stated that the Aboriginal leaders were to observe the treaty "strictly"[134] and maintain perpetual peace between themselves and the Sovereigns "white subjects". Many referred to peace and friendship or to establishing peace and good will.[135] Some provided for the restoration or exchange of prisoners, mutual assistance, the suppression of insurrections, or efforts to prevent other tribes from making hostile demonstrations against the British government or its people.

The central and common article of the Victorian treaties concerning legal jurisdiction provides:

the undersigned Chiefs and Headmen, on their own behalf and on behalf

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[134]This bore a special meaning for Aboriginal leaders, who undertook to make the treaties part of their own constitutional teachings. *Report of the Aboriginal Justice Inquiry of Manitoba Volume I: The Justice System and Aboriginal People* 1991:17-46.

[135]Many treaties explicitly provided for protection by Her Majesty. The terms of British protection were derived from the international, British and United States law. (*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

> of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will, in all respects, obey and abide by the law, that they will maintain peace and good order between each other, and between themselves and other tribes of Indians and between themselves and others of Her Majesty's subjects, whether Indians, Half-breeds, or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract; and that they will not molest the person or property of any inhabitant of such ceded tract; or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tract, or any part thereof, and that they will assist the officers of Her Majesty in bring to justice or punishment any Indian offending against the stipulations of this treaty, or infringing the law in force in the country so ceded.

In Treaties 8 and 10 the Chiefs promised they would maintain peace, no mention was made about good order.

The treaties stated the intention of the Aboriginal nations and the Crown to open up the certain area in question for settlement, while retaining political control ("maintain peace and good order") and aboriginal rights with the shared territory. The treaties created boundaries between reserved lands and British settlements, although the legal effect of this division was ambiguous.[136] Treaty 1, for example, referred to opening up the area for "settlement and immigration". Within the British legal framework, the territories described in the treaty had been were ceded, released,

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[136] *Re Paulette et al. and Registrar of Land Titles* (1973) 39 D.L.R. (3d) 45***;*** *Re Paulette and Registrar of Land Titles* (No. 2) (1973) 42 D.L.R. (3d) 8. Price, ed., *The Spirit of the Alberta Indian Treaties (1970);* René Fumouleau, As long as this land shall last (1875) Toronto: McGelland & Steward.

surrendered and yielded up by the Aboriginal owners to the Crown forever. As grantors, the Aboriginal nations conceived that they had agreed only to certain use of their territory land for limited purposes. The Crown's title was derivative of, and continued to be subject to Aboriginal dominion. These intentions create the interpretative context for the treaties.

The Chiefs and Headmen also engaged that they accepted responsibility for the faithful performance of their treaty obligations. In particular, they would maintain peace and good order. They understood this as a promise to the Crown to *retain* their political authority, as an inherent rights, with the shared territory. It is similar to the delegation of "peace, order and good government" clause to the federal Government in the *Constitution Act, 1867*.[137] Since the chiefs' authority to represent the people was existing and inherent, however, the Crown did not pretend to delegated them "good government".

The promise to maintain peace and good order within their ancient territory is comprehensive. It was not confined to the customary law that regulated their people. It extended to all peoples who came to the shared territory, "whether Indians, half-breeds or whites". They promised to maintain peace and good order between First Nations, between their people and "other of Her Majesty's subjects" who now inhabit or will in the future inhabit "any part of the ceded land". This is a prerogative article affirming the First Nations' continuing territorial jurisdiction in the ceded lands, all of which came within the Crown's promise of protection.

The treaty delegations of law-making authority to the Crown were narrow and specific. The chief and headmen delegated limited authority to the proper legislative

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[137]The opening words of section 91 confer on the federal Parliament the power "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects of this Act assigned exclusively to the Legislatures of the province; ..."

authority,[138] or to the federal Government, over alcohol, and to the "Government of the ceded country" over harvesting of natural resources in the shared or ceded territory. On the reserves and in the Northwest Territories, the chiefs and headmen in Treaty 2, 4 and 6b, for example, specifically agreed not to allow intoxicating liquor. They also agreed that all laws regarding intoxicating liquor enacted by the Government of the Dominion of Canada would be valid within their own customary legal systems. Most agreed to allow partial regulation "by the Government of the country", acting under the authority of Her Majesty, of their prerogative rights of hunting, trapping, and fishing in the ceded territory.[139] First Nations knew how to delegate authority to other governments. Lacking such express language, no implied authority exists in the Crown. The Imperial Crown's authority over First Nations and the shared territory was clearly derivative not inherent.

As part of maintaining peace and good order, First Nations were partners in the administration of justice. They explicitly agreed not to molest the persons or property of any inhabitant of the ceded territory, or any property of Her Majesty the Queen, or interfere with or trouble any person passing or traveling through these territories. To enforce these treaty obligations, the chief and headmen affirmatively resolved to assist the officers of Her Majesty to bring to justice and punishment any Indian who offends the stipulations of the Treaty, or infringes the laws in force in the ceded country. These articles provide *concurrent* jurisdiction between the First Nations and the Crown in the circumstances described. Otherwise, the First Nations' authority over Indians was exclusive and personal.

For its part in most of the Treaties, the Crown specifically promised to recognize

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[138]This phrase is Treaty 2 terminology.

[139]Treaty 2 does not have any mention of hunting, trapping and fishing rights. Special exemptions were made for certain tracts designated for settlements, mining, lumbering, trading, and other purposes.

hunting, fishing, and gathering rights;[140] promote agricultural and economic development;[141] provide appropriate education;[142] provide health services, social assistance;[143] and share resource revenue sharing.[144]

Treaties with Aboriginal nations formed conceptual legal walls between the societies–English oligarchic society and Aboriginal democratic society. Behind the protective walls of the prerogative treaties, the Aboriginal society and law were protected as an exclusive realm. This protected Aboriginal realm included

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[140]*E.g.*, Treaty 3,4,5,6,7,8,9,10, and 11. Treaties Under the colonial doctrrines of Parlaimentary sovereignty, judicial decisions have dealt with hunting and fishing rights as part of the *Indian Act* regime, they did not comment on the legal enforceability of the treaty provisions, they simply holding them overridden by statutory provisions of the Canadian Parliament. Since 1982, the post-colonial law must view these rights as a constitutional burden running on the share lands.

[141]*E.g.* Treaty 1,2,3,4,5,6,7,8,10, and11.The reserves were established for the purposes of farming, as explicitly stated in Treaties 3 and 5. Treaties 1 and 2 (in the memorandum of outside promises) and Treaties 3 to 5 promised agricultural assistance, in the form of animals and farm implements. Treaties 3, 4, and 5 provide for ammunition and twine.

[142]*E.g.* Treaty 1,2,3,4,5,6,7,8,9, 10 and 11. Generally the treaties promised schools based on the consent of the reserve residents.

[143]*E.g.*, Treaty 6, 8, 10, 11.

[144]*E.g.* Treaty 1,2,3,4,5,6,7,8,9, 10 and 11.The question of the legal enforceability of treaties arose in cases dealing with federal financial obligations. The courts enforced those treaty provisions on the basis of contract law.(*Attorney General of Canada v Attorney General of Ontario* (Robinson Annuities), (1897) A.C. 199; *Henry v The King*, (1905) 2 EX. C. R. 417; *Dreaver v The Queen*, (1935) 5 Canadian Native Law Cases, 92.

unsurrendered Aboriginal rights and vested treaty rights. Treaty commonwealth respected cultural differences and protected cultural integrity of Aboriginal people. Treaties of confederation were documentary evidence in controversies between European nations, moreover, and were indeed used to support British claims to territories west and northwest of Lake Superior.

Section 35 of the *Constitution Act, 1982,* which recognized and affirmed existing treaty rights, is the first explicit provision of it kind giving legal force to these treaties. Lord Denning has ruled that this act transferred the treaty obligations of the Crown to Canada.[145] British courts refused to pronounce upon the contemporary nature and extent of aboriginal and treaty rights, however, since to do so would be to assert jurisdiction over Canada.[146] Chief Justice Dickson of the Supreme Court of Canada for a unanimous court referred to Indian peace and friendship treaties as "*sui generis*". Confronting the arguments that these treaties could be extinguished by modern international laws, Chief Justice Dickson commented that "An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."[147]

In 1989, a Canadian court held for the first time that enforced a treaty hunting and fishing rights are not only enforceable against provincial fish and game laws, but against competing land uses. The Indians, in question, had been promised fishing rights, and continued a traditional fishery in a bay near their reserve. Under provincial law, developers obtained permission to construct a marina in the bay. The British Columbia Court of Appeal held that the marina would substantially affect the Indian fishery

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[145]*The Queen v. Secretary of State* [1981] 4 C.N.L.R. 86 (C.A. Eng.).

[146]*Manuel v. A.G. of England* [1982] 3 C.N.L.R. 13 (Ch.D. Eng.).

[147]*Simon v. The Queen* (1985)2 S.C.R. 387 at 404. This statement was strictly speaking, obiter dictum since the international character of treaties was not at issue in the case.

envisaged in the treaty, and blocked construction of the marina.[148] This offers some hope for a broader interpretation of the spirit and intent of treaties, particularly in application to shared lands and resources.

In 1990, the Supreme Court of Canada declared the meaning of section 35, when it held:

> There is no explicit language in the provision that authorizes this court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraints on the exercise of sovereign power. [...] We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justifications. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.[149]

Moreover, “the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[150] The new rules of the game, the post-colonial constitutional regime, hold that since the honor of the Crown is involved in treaties, no "sharp dealings" or injust constructions can be used in invalidate the terms as they were originally understood.[151] In addition, the courts have held that the particular terms of each treaty must be construed in a fair, large and liberal method in

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[148] *Saanichton Marina v. Tsawout Indian Band* (1989) 57 D.L.R. (4th) 161.

[149] *R. v. Sparrow* [1990] 1 S.C.R. 1075, at 1109, 1119.

[150] *Ibid.*, at 1106.

[151] R. v. Taylor and Williams (1981) 34 O.R. (2d) 360.

the sense they would naturally be understood by the particular Aboriginal grantors, but not in way that should make the treaty promises ineffective in their modern application.[152]

C. UNITED STATES

With the first sparks of the American Revolution in 1775, the British Crown's monopoly on the treaty commonwealth and legal order was profoundly challenged. One of the first actions of the rebellious colonists in the Continental Congress was to initiate separate treaties with American nations, especially the members of the Wabanaki Confederacy, Míkmaq Nation, and the Western Nations. The American revolutionaries understood the critical importance of either the neutrality or support of the American nations in their struggle for independence from Great Britain.

The New England settlers realized that an alliance with the Aboriginal nations north and east of them could be indispensable for their military success. The Superintendent of Indian Affairs for the United States explained to Congress that the Míkmaq's position in the rebellion would decisively determine the outcome of the struggle in Maine and Nova Scotia: if they sided with the British, the United States could not defeat the Loyalists (Kidder 1867:294-5).

Just two weeks after the Declaration of Independence, the Wabanaki Confederacy and the Míkmaw Nation formally recognized the United States of America, becoming the first nations to do so. They entered into a common Treaty of Friendship with the United States of America on 17 July 1776 at Watertown, Massachusetts. Both Aboriginal delegations reminded the American commissioners that they did not have the authority to commit their nations to go to war against the British Sovereign without further consultations and the ratification of their people (Baxter 1916 24:165-193). With this understanding, all six delegates signed the treaty,

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[152] *R. v. Sioui* [1990] 1 S.C.R. 1025: *R. v. Simon* [1985] 2 S.C.R.387; *Nowegijickv. R.* [1983] 1 S.C.R. 29.

by which the Aboriginal nations and the people of the United States of America to be "at peace with Each other, and be considered as Friends & Brothers united and allied together for their mutual defense, safety and Happiness" (Article 1).

As allies of the United States, they agreed to assist the United States against their "public Enemies [...] to the utmost of their ability", and to give no aid or assistance to the King of Great Britain (Article 2), and to attempt to establish a regiment to aid the revolutionaries (Article 6-7).[153] Additionally, the Delegates promised to use their "utmost influence" with their other "Neighbouring Tribes" to enter into the service of the United States as friends and brothers (Article 8). The Aboriginal delegates moreover promised to "annul and make Void all former Treaties by them or by others in behalf of their respective Tribe made with any other power, State, or Person, so far as the Same Shall be repugnant to any of the articles contained in this Treaty" (Article 10).

The Treaty also contained some familiar jurisdictional clauses. In case of any civil "Misunderstanding, Quarrel or Injury" between the United States and the nations, "no private Revenge shall be taken, but a peaceable application shall be made for Redress" (Article 5). If any criminal "outrage" was committed by the subjects of the United States upon the Aboriginal people, the State concern would cause "satisfaction, and restitution speedily to made to the party injured" (Article 3). Likewise, if such outrages were committed by the Tribes against the United States, the Aboriginal leaders would also cause satisfaction and restitution (Article 4). Massachusetts promised to establish a Truckmaster at Machias and supply the Indians with the proper Articles of

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[153] The Delegates told the United States Commissioners they could only answer for themselves in this respect: "It's not in our power to answer now for the whole of our Tribes, but when we go home, we will call together all the young men and see how many will go to War" (Baxter 24:178). But they saw no reason why the other Villages would not have a friendly disposition toward the United States. "We are all Brothers and Cousins–We are of the same Flesh & Blood and can't make War or be attacked separately" (Baxter, 24:178).

"the Necessity and Conveniences of Life" (Article 9). The nations were then to refuse to engage in any commerce with His Majesty (Article 2).

In the course of the negotiations, the United States' plenipotentary James Bowdoin declared, "The United States now forms a long and Strong Chain, and it is made longer and Stronger by our Brethren of the St. John's and Mickmac Tribes joining with us; and may Almighty God never suffer this Chain to be broken." Between July 12 and 23, 1777, the United States negotiated a treaty of peace and friendship with the Passamaquoddies and Malecites at Aukpaque (Kidder 1867:105-6, 121, 234-5). In 1778, they entered into a Treaty of Peace and Friendship with the Delaware Indians (7 Stat. 13), and In 1784, they entered into a Treaty of Protection with the Six Nations. In 1785, they entered into a Peace and Friendship Treaty with the western Wyandotte, Delaware, Chippewa and Ottawa Nations, and a Treaty of Favor and Protection with the Cherokee Nation (7 Stat. 18, art. 1 and 3)), and in 1785, they entered into a separate treaty with the "Shawanoes" (7 Stat. 26).[154] This provided the revolutionaries with the security they needed to pursue their war of independence.

The Constitution of the United States adopted in 1789 recognized Aboriginal treaties made before its adoption as well as under its authority.[155] The President was empowered to make new treaties, with the advice and consent of the Senate (art. II, s. 2, cl. 2.). Under the Supremacy Clause, treaties are superior to any conflicting constitutional provisions or state law (art. VI, cl. 2). More than 370 treaties with Aboriginal nations remain in force.[156] In 1789, the new government entered into treaties with Wyandotte, Delaware, Ottawa, Chippewa, Potawatomie and Sac Nations,

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[154]The United States Supreme Court stated that the Delaware treaty , "in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe" *Worcester v. Georgia*, (1832) 31 U.S. (6 Pet.) 515, at 550. This comments could be applied generally to all these treaties.

[155]*Ibid., at 559.*

[156]**See,** C. Kappler, Indian Affairs: *Laws and Treaties*, vols. 1-5 (1903-41).

that reaffirmed prior treaties with Six Nations the earlier treaties.[157] In 1790, treaties were concluded with the Kings, chiefs and warriors of the Creek Nation (7 Stat. 35), and in 1791 with the Cherokee Nation (7 Stat. 39). In 1832, the United States Supreme Court described the agreement as containing "stipulations which could be made only with a nation admitted to be capable of governing itself".[158].

Treaties with Indian tribes were initially accorded the same dignity as that given to treaties with foreign nations. In *United States v. 43 Gallons of Whiskey,* the Supreme Court stated that "the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy."[159] Several other decisions also drew the parallel between Indian treaties and treaties with foreign nations.[160] For example, Indian treaties are similar in many respects to international

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[157]Article 7: "Lest the firm peace and friendship now established should be interrupted conduct of individuals, the United States and the Six Nations agree, that for injuries done by individuals, on either side, no private revenge or retaliation shall take place; but instead, complaint shall be made by the party injured, to the other, by the Six Nations or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve our peace and friendship unbroken, until the Legislature (or Great Council) of the United States shall make other equitable provision for the purpose."

[158]*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555-56 (1832).

[159](1876) 93 U.S. 188, at 197.

[160]*E.g., Washington v. Fishing Vessel Ass'n,* 443 U.S. 658, 675 (1979); *Holden v. Joy,* 84 U.S. (17 Wall.) 211, 242-43 (1872); *Worcester v. Georgia*, 31 U.S.

treaties. Like the international treaties, these treaties established peace and friendship[161] or a broad peace.[162] Some provided for the restoration or exchange of prisoners.[163] A few treaties included mutual assistance, [164] or included provisions for passports.[165] Some included provisions by which the tribes agreed to suppress insurrections.[166] Others included promises to prevent other tribes from making hostile demonstrations

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(6 Pet.) 515, 559 (1832).

161 *E.g.*, Treaty with the Sacs, May 13, 1816, 7 Stat. 141; Treaty with the Choctaws, Jan. 3, 1786, 7 Stat. 21 (Treaty at Hopewell); Treaty with the Delawares, Sept. 17, 1778, art. 2, 7 Stat. 13.

162 ***See,*** *e.g.*, Treaty with the Comanches and Wichitaws, Aug. 24, 1835, art. 9, 7 Stat. 474, 475

163*E.g.*, Treaty with the Cherokees, July 2, 1791, art. 3, 7 Stat. 39. Sometimes for the detention of hostages until prisoners were restored, e.g, Treaty with the Wiandots, Delawares, Chippawas, and Ottawas, Jan. 21, 1785, art. 1, 7 Stat. 16 (Treaty at Fort M'Intosh); Treaty with the Six Nations, Oct. 22, 1784, art. 1, 7 Stat. 15 (Treaty at Fort Stanwix).

164*E.g.*, Treaty with the Wiandots, Delawares, Chippawas, and Ottawas, Jan. 21, 1785, art. 1, 7 Stat. 16 (Treaty at Fort M'Intosh); Treaty with the Six Nations, Oct. 22, 1784, art. 1, 7 Stat. 15 (Treaty at Fort Stanwix).

165*E.g.*, Treaty with the Cherokees, July 2, 1791, art. 9, 7 Stat. 39, 40; Treaty with the Creeks, Aug. 7, 1790, art. 7, 7 Stat. 35, 37, **also** extradition, *e.g.*, Treaty with the Sisseeton and Wahpaton Bands of Dakotas or Sioux, June 19, 1858, art. 6, 12 Stat. 1037, 1039; Treaty with the Poncas, Mar. 12, 1858, art. 7, 12 Stat. 997, 1000; Treaty with the Choctaws, Sept. 27, 1830, art. 8, 7 Stat. 333, 334 (Treaty of Dancing Rabbit Creek).

166 *E.g.*, Treaty with the Seminoles, Mar. 21, 1866, art. 1, 14 Stat. 755.

against the United States government or its people.[167] The capacity of Indian tribes to make war was frequently recognized.[168]

While all these treaties recognized the separate sovereignty of Indian nations, many expressly recited their consent to become constitutionally protected nations of the United States.[169] The terms of protection were derived from international law and British traditions.[170] Even in the absence of express treaty provisions, the relationship between the United States and Indian tribes has been analogized to a protectorate. Through the application of special canons of construction, the "trust relationship" involved is strictly observed. The basic canons of construction applied to Indian treaties are that they should be construed as the Indians would have understood them; [171] that ambiguous expressions must be resolved in favor of the Indians,[172] and that treaties be

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[167] *E.g.*, Treaty with the Sans Arcs Band of Dakotas or Sioux, Oct. 20, 1865, art. 1, 14 Stat. 731.

[168] E.g., Treaty with the Choctaws, Sept. 27, 1830, art. 5, 7 Stat. 333, 334 (Treaty of Dancing Rabbit Creek) ("no war shall be undertaken or prosecuted by said Choctaw Nation but by declaration made in full Council, and to be approved by the U.S. unless it be in self defense"), discussed in *Fleming v. McCurtain*, 215 U.S. 56, 60 (1909).

[169] Treaty with the Choctaws, Jan. 3, 1786, 7 Stat. 21 (Treaty at Hopewell) discussed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 548-50 (1832); Treaty with the Kaskaskias, Aug. 13, 1803, art. 2, 7 Stat. 78; Treaty with the Creeks Aug. 7, 1790, art. 2, 7 Stat. 35.

[170] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[171] *E.g.*, Choctaw *Nation v. Oklahoma*, 397 U.S. 620, 631 (1970), *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938).

[172] *E.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973);

liberally construed in favor of the Indians.[173] Furthermore, courts will not find that Indian treaties have been abrogated by later treaties or legislation unless there is a clear and specific showing in the later enactment that abrogation was intended.[174]

Most Indian treaties delegated commercial regulatory authority to the United States, and Congress eventually established a comprehensive legislative program under the Commerce Clause to implements this authority.[175] Some expressly provided for the exercise of congressional power over the liquor traffic.[176] Others delegated considerable executive power by the President.[177] Only a few provided that all their

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Carpenter v. Shaw, 280 U.S. 363, 367 (1930)

[173]*E.g., Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

[174]*Washington v. Fishing Vessel Ass'n,* 443 U.S. 658 (1979); *Menominee Tribe v. United States,* 391 U.S. 404 (1968). Until the American Civil War, at lest, the power of Congress to abrogate such treaties was still in doubt. E.g., *Cherokee Tobacco v. United States*, 78 U.S. 616 (1870); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67 (1903). Still, special Congressional Act have compensated the abrogation of specific terms of the treaties. 18 Stat. 549.

[175]*E.g.*, Treaty with the Poncars, June 9, 1825, art. 3, 7 Stat. 247, 248; Treaty with the Chickasaws, Jan. 10, 1786, art. 8,7 Stat. 24, 25 (treaty at Hopewell). See F. PRUCHA, THE FORMATIVE YEARS, *supra* note 1. Cf. Johnson *v. M Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (transfer of land from Indian tribe to private individual invalid unless approved by the United States).

[176],*E.g.*, Treaty with the Winnebagos, Feb. 27, 1855, art. 8, 10 Stat. 1172, 1174 (authorizing congressional regulation of trade and intercourse, particularly liquor traffic), Treaty with the Chippewas, Oct. 4, 1842, art. 2, 7 Stat. 591, 592 (authorizing congressional regulation of trade and intercourse).

[177]*E.g.*, Treaty with the Western Bands of Shoshonees, Oct. 1, 1863, art. 6, 18

lands be ceded to the United States, all claims against the United States be relinquished, or that "their existence, as a nation or tribe, shall terminate and become extinct upon the ratification of this treaty".[178] On the other hands, Treaties authorized tribal representation in Congress.[179]

Most Indian treaties included provisions fixing boundaries.[180] The overriding

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Stat., pt. 3 (Treaties) 689, 690 (authority to remove Indians to reservations within tribal boundaries "whenever the President of the United States shall deem it expedient for them to abandon the roaming life"); Treaty with the Poncas, Mar. 12, 1858, art. 2, 12 Stat. 997 (authority to stop payment of annuities in the event that satisfactory efforts to advance and improve their condition were not made); Treaty with the Med-ay-wa-kan-toan and Wah-pay-koo-tay Bands of Dakotas or Sioux, Aug. 5,1851, art. 7, 10 Stat. 954, 955; Treaty with the See-see-toan and Wah-pay-toan Bands of Dakotas or Sioux, July 23, 1851, art. 6, 10 Stat. 949, 950.64; Treaty with the Creeks, June 29, 1796, art. 3(a), 7 Stat. 56, 57 (authority to establish trading or military posts on the reservation to enforce treaty provisions).

[178]*E.g.*, Treaty with the Wyandots, Apr. 1, 1850, arts. 1, 2, 9 Stat. 987, 989. Later, however, some land was restored to a portion of the Wyandottes as a home, and tribal status was resumed. Treaty with the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Ottawas, and Wyandottes, Feb. 23, 1867, art. 13, 15 Stat. 513, 516. See *Conley v. Ballinger*, 216 U.S. 84, 89-90 (1910).

[179]Treaty with the Cherokees, Nov. 28, 1785, art. 12, 7 Stat. 18, 20 (treaty at Hopewell); Treaty with the Delawares, Sept. 17, 1778, art. 6, 7 Stat. 13, 14,

[180]*E.g.*, Treaty with the Wyandots, Ottawas, Chippawas, Munsees, Delawares, Shawanees, and Pottawatimas, July 4, 1805, art. 2, 7 Stat. 87; Treaty with the Sacs and Foxes, Nov. 3, 1804, art. 2, 7 Stat. 84; Treaty with the Chickasaws, Jan. 10, 1786, art. 3, 7 Stat. 24 (treaty at Hopewell). A few treaties established boundaries

goal of the United States during treaty making was to purchase Indian lands, particularly when they became surrounded by non-Indian settlements. In land cession treaties, however, tribes were often guaranteed special rights in ceded lands, such as the right of taking fish and game[181] The United States likewise reserved the right to pass through unceded Indian territory.[182] Many treaties delegated to the United States the authority to allot tax exempt land to individual Indians within and outside

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between warring tribes. *E.g.*, Treaty with the Sioux, Chippewas, Sacs, Foxes, Menominies, Ioways, Sioux, Winnebagos, and portions of the Ottawas, Chippawas, and Potawattomies, Aug. 19, 1825, 7 Stat. 272; *e.g.*, Treaty with the Winnebagos, Feb. 27, 1855, art. 4, 10 Stat. 1172, 1173, Treaty with the Cherokees, July 8, 1817, art. 8, 7 Stat. 156, 159.

[181] *E.g.*, Treaty with the Nez Perces, June 11, 1855, art.3, 12 Stat. 1172, 1173; Treaty of Medicine Creek, Dec 26, 1854, art. 3, 10 Stat. 1132,1133; Treaty with the Chippeways, June 16, 1820, art. 3, 7 Stat. 206; Treaty with the Chippewas, Sept 24, 1819, art. 5, 7 Stat. 203, 204; Treaty with the Wyaandots, Senecas, Delawares, Shawanese, Potawatomees, Ottawas, and Chippeways, Sept 29, 1817, art 11, 7 Stat 160, 165,

[182] *E.g.*, Treaty with the Ottawas, Chippewas, and Pottawatamies, Aug. 29, 1821, art. 6, 7 Stat. 218, 220; Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatamies, Miamis, Eel-rivers, Weea's, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, art. 3, 7 Stat. 49. See Treaty with the Cherokees, July 8, 1817, art. 9, 7 Stat. 156, 159 (providing for free navigation on all navigable streams on the reservation) or to purchase rights-of-way. *E.g.*, Treaty with the Pottawatomies, Nov. 15, 1861, art. 5,12 Stat. 1191, 1193 (reserving right of railroad company to purchase reservation land); Treaty with the Delawares, May 30, 1860, art. 3, 12 Stat. 1129, 1130 (granting railroad company preference to purchase land through reservation).

reservations.[183]

Treaties frequently called for the delivery of goods and services by the United States to the tribes as part of the exchange for vast amounts of Indian land. Among the goods commonly specified in treaties were those which symbolized differences between the civilizations— cattle, hogs, iron, steel, wagons, plows, and other farming tools.[184] Many treaties contained clauses calling for the payment of annuities or other monies.[185] As a result of such treaty provisions, the Federal government now provides a wide variety of service programs to Indians.

Many treaties dealt with the difficult political and jurisdictional problems

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[183]*E.g.*, Treaty with the Winnebagos, Feb. 27, 1855, art. 4, 10 Stat. 1172, 1173, Treaty with the Cherokees, July 8, 1817, art. 8, 7 Stat. 156, 159. Sometimes allotments were exempted expressly from taxation, levy, sale, or forfeiture. *e.g.*, Treaty with the Kansas, Oct. 5, 1859, art. 3, 12 Stat. 1111, 1112. Treaty allotments were held to be tax exempt in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867). Restrictions on alienation frequently were included. *E.g.*, art. 4, 10 Stat. at 1173; art. 9, 12 Stat. at 1113.

[184]*E.g.*, Treaty with the Shawnees, Nov. 7, 1825, arts. 2, 4, 7 Stat. 284, 285, Treaty with the Great and Little Osages, June 2, 1825, art. 4, 7 Stat. 240, 291; Treaty with the Choctaws, Oct. 18 1820, art. 5, 7 Stat. 210, 212; Treaty with the Chippewas, Sept. 24, 1819, art. 8, 7 Stat. 203, 205.

[185]Treaty with the Miamis, Oct. 23, 1826, art. 6,7 Stat. 300,301; Treaty with the Great and Little Osages, June 2, 1825, art. 3, 7 Stat. 240, 241; Treaty with the Choctaws, Jan. 20, 1825, art. 3, 7 Stat. 234, 235; Treaty with the Cherokees, Mar. 22, 1816, art. 2, 7 Stat. 138, 139. Provisions were **also** commonly made for health and education services. *E.g.*, Treaty with the Miamis, Oct. 23, 1826, art. 6,7 Stat. 300, 301; Treaty with the Great and Little Osages, June 2, 1825, art. 6, 7 Stat. 240, 242; Treaty with the Choctaws, Jan. 20, 1825, art. 2, 7 Stat. 234, 235.

created by the offenses of Indians against non-Indians, or by non-Indians against Indians. The varying jurisdictional provisions of the treaties create a complex jurisdictional pattern. The treaties embodied the premise that tribes are sovereigns possessing the right to govern their own internal affairs. Some treaties adopted a principle commonly found in international treaties between equals: non-Indians who settled in and committed crimes within Indian country were subject to punishment by the Indian tribe.[186] Other treaties, such as the Treaty with the Delawares, provided that neither the United States nor the Delaware Nation would punish offenders who were citizens of the other sovereign; rather, such criminals were to be tried in "a fair and impartial trial [. . .] had by judge or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice [...]."[187]

Some treaties provided, for federal jurisdiction over certain serious offenses committed by Indians against non-lndians in Indian country·[188] Others provided that Indians committing offenses against state or Federal laws outside Indian country were subject to punishment by state or federal courts. Several treaties provided for federal jurisdiction over crimes committed by American citizens in Indian territory, requiring the tribes to deliver such offenders to agents of the Federal government.[189] This is

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[186] *E.g.*, Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-rivers, Weea's, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, art. 6,7 Stat. 49, 52.

[187] Sept. 17, 1778, 7 Stat. 13,(Art. 4, at 14).

[188] *E.g.*, Treaty with the Chickasaws, Jan. 10, 1786, art. 5, 7 Stat. 24, 25 (Treaty at Hopewell) Treaty with the Wiandots, Delawares, Chippawas, and Ottawas, Jan. 21, 1785, art. 9, 7 Stat 16 17 (Treaty at Fort M'Intosh).

[189] *E.g.*, Treaty with the Choctaws, Sept. 27, 1830, arts. 6-8, 7 Stat. 333, 334 (Treaty of Dancing Rabbit Creek). Cf. Treaty with the Comanches, I-on-is, Ana-da-cas, Cadoes, Lepans, Long-whas, Keechys, Tah-wa-carros, Wi-chitas, and

similar to that found in treaties between the United States and some Asian countries.[190] While some treaties conferred authority upon territorial and state governments to punish both Indians and non-Indians committing robbery or murder against persons of the other race, even within tribal territory,[191] others specifically provided for tribal jurisdiction over intratribal crimes committed in Indian country.[192] Interestingly, most treaties contained no express provisions concerning *civil* jurisdiction. A few treaties made explicit the assurance that state laws will not be applied to Indians, however.[193] Some contained specific guarantees against taxation.[194]

Many treaties specifically guaranteed tribal self-government in Indian matters, including jurisdiction over intratribal crimes on the reservation. Most treaty limitations upon the powers of tribal self-government were related in some way to

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Wacoes, May 15,1846, art. 12,9 Stat. 844,846 (any person introducing intoxicating liquors among the Indians "shall be punished according to the laws of the United States").

[190] *E.g.*, Treaty of Peace, Amity, and Commerce, July 3, 1844, United States-China, art. 21, 8 Stat. 592, 596, U.S.T.S. No. 45.

[191] *E.g.*, Treaty with the Wiandots, Delawares, Ottawas, Chippewas, Pattawatimas, and Sacs, Jan. 9, 1789, art. 5,7 Stat. 28,29.

[192] *E.g.*, Treaty with the Creeks and Seminoles, Aug. 7, 1856, art. 15, 11 Stat. 699, 703- Treaty with the Choctaws and Chickasaws, June 22, 1855, art. 7, 11 Stat. 611, 612.

[193] *E.g.*, Treaty with the Creeks, Mar. 24, 1832, art. 14,7 Stat. 366, 368; Treaty with the Senecas and Shawnees, July 20, 1831, art. 11, 7 Stat. 351, 353. Some state organic acts reaffirm these promises.

[194] *E.g.*, Treaty with the Wyandots, Senecas, Delawares, Shawnanese, Potawatomees, Ottowas, and Chippeways, Sept. 29, 1817, art. 15, 7 Stat. 160, 166.

intercourse with non-Indians[195] Several treaties imposed some limitations upon Aboriginal nations in the territory acquired in the War with Mexico, subjecting the internal affairs of the tribes to federal control, but they are exceptions to the general pattern of respect for self-government.[196]

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[195] Treaty provisions authorizing allotment of tribal land to individual Indians list the individuals or define the class of individuals who are to receive allotments. *E.g.*, Treaty with the Wyandots, Senecas, Delawares, Shawanese, Potawatomees, Ottawas, and Chippeways, Sept. 29, 1817, art. 6, 7 Stat. 160, 162, or provide that patents be issued by tribal officials. *E.g.*, Treaty with the Miamis, Nov. 6, 1838, art. 12, 7 Stat. 569, 571. Some early statutes on allotments also defer to the laws of the tribes. **See,** *e.g.*, Act of Mar. 3, 1843, ch. 101, § 4, 5 Stat. 645, 646 (Stockbridge); Act of Mar. 3, 1839, ch. 83, s 4, 5 Stat. 349, 350 (Brothertown).

[196] *E.g.*, Treaty with the Navajos, Sept. 9, 1849, art. 9, 9 Stat. 974, 975, abandoning the long-established distinction between internal and external tribal matters.

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

D. THIRD-PARTY NATION TREATIES.

A few treaties between the United Kingdom, the United States, Mexico contain third part guarantees of Aboriginal rights.

1. Jay Treaty, 1794

In September 1783, the Treaty *of Paris* ended the American Revolution and left an unresolved boundary problem. His Majesty ceded his interests to a vast western boundary, extending to the Mississippi River. This created a new northern boundary between British North America and the United States, which ran through unceded Indian country, roughly along the forty-fifth parallel. The northern border extended to the Sainte Croix River, including what is now called Vermont. In the House of Lords, the Earl of Carisle complained about the Treaty of Paris:

> Twenty-five nations of Indians made over to the United States [and in return] not even that solitary stipulation which our honour should have made us insist upon, [...]a place of refuge for those miserable persons [...], some haven for those shattered barks to have been laid up in quiet.[197]

On both sides of the border the Aboriginal nations and Tribes were deeply disturbed by the international boundary splitting their reserved dominion. The Articles of Confederation of the United States initially placed the management of Indian Affairs in the states, rather than in a central government. Hence, the Eastern Superintendency of Indian Affairs was managed by the State of Massachusetts (Kidder, 1867:313-14), Commissioner Allan, previously the Superintendent of the Eastern District, explained the border was irrelevant to Indian Affairs:

> Indians are not subject to, or amenable to, any power; they have been always viewed as a distinct body, governed by their own customs and

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[197]J, Combs, *The Jay Treaty* 1970:4 citing XXIII *The Parlimentary History of England* 377 (1806-1820).

> manners, nor will they ever tamely submit to any authority different from their own, while they remain in the present uncivilized state. Their mode of life leads them thro' the Territory of different nations, their residence uncertain and changeable, that it can not be known where they really belong except that they were born in such a district and may be called by the name of the Tribe (*ibid.,* at 317-318).

The *1763 Royal Proclamation* was incorporated into the United States law in the 1790 *Trade and Intercourse Act*.[198]

The Aboriginal nations argued that His Majesty had no right to divide their reserved dominion without their consent and without compensating them for their treaty, trade and property losses. For example, The Mohawks, told General Maclean, British commander at Niagara, that His Majesty "had no right Whatever to grant away to the States of America, their Rights or properties without a manifest breach of all justice and Equity, and they would not submit to it."[199] They thought that this issue had been resolved long ago in the controversy surrounding the 1763 *Royal Proclamation*. Sir William Johnson, His Majesty's ambassador to the Haudenosaunee, assured the Houdensaunee leader:

> You are not to believe or even think that by the line which has been described it was meant to deprive you of an extent of your country which the right of the soil which belongs to you and is in yourselves as sole proprietors.[200]

In 1791, the Governor General of North America, Lord Dorchester, told the Deputations of the Confederated Nations in Quebec:

> But Brothers, this line, which the King then marked out between him and the States [...] could never have prejudiced your rights. Brothers, the

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[198]Ch. 33, 1 Stat. 137.

[199]B. Graymont, *The Iroquois in the American Revolution* 1972:260.

[200]W. Mohr, *Federal Indian Relationship* 1774-1788 1933:118.

> King's right with respect to your territory were against the nations of Europe: these he resigned to the States. But the King never had any rights against you, but to such parts of the country as had been fairly ceded by yourself with your own free consent, by public convention and sale. How then can it be said that he gave away your Lands?[201]

The United States and the British Crown responded to the controversy by affirming the special status of Aboriginal nations in their international negotiations. British and American diplomats were devotees of the theories of the British economist Adam Smith, and believed that a prosperous America would make England richer. Understanding that the United States was virtually penniless, the diplomats strove to eliminate any obstacles to trading with the resource wealthy Aboriginal nations.

The first commercial treaty between the Britain Crown and the United States, was signed On November 19, 1794. The Treaty of Amity, Commerce, and Navigation of 1794 established a Joint Commission to settle boundary disputes, restored United States trade with the West Indies, guaranteed British evacuation of the old Northwest and recognized the rights of the Aboriginal nations to cross and trade along the newly created international border. Article III specifically provided:

> It is agreed that it shall at all times be free to...the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America and to navigate all the lakes, rivers, and waters thereof, freely, to carry on trade and commerce with each other. [... N]o duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any import or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall

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[201]S. Bemis, *Jay's Treaty* 1975:158-59. (August 15, 1791).

not be considered as goods belonging bona fide to Indians.[202]

Article XXVIII provided that "the first ten articles of this treaty shall be permanent." This made free commerce and navigation across the boundary line a permanent international right and obligation.

The nature of this treaty obligation was illustrated when the United States and several Western Aboriginal nations concluded a 1795 treaty.[203] Article VIII of this treaty stipulated that all traders residing at any Indian town or hunting camp had to hold a license issued by the United States.[204] His Majesty considered this an infringement of Article III of the 1794 Treaty, since it interfered with the British-Indian fur trade. To show that the United States was not abrogating the 1794 Treaty, the United States and Great Britain entered into an Explanatory Article in 1796[205] which declared

> That *no stipulation in any treaty subsequently concluded by either of the contracting parties* with any other State or Nation, or with any Indian tribe can be understood to derogate in any manner from the rights of free intercourse and commerce secured by the aforesaid third Article of the treaty...to the subjects of his Majesty and to the Citizens of the United

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[202] Treaty of 1794, 12 Bevans 13, (in force on October 28, 1795); 8 Stat. 116; U.S. Treaty Series 105 (U.S. Dept. of State)[often called Jay Treaty].

[203] Treaty with the Wyandots, and Other Indian Tribes, Aug. 3, 1795, United States-Wyandot, Delaware and Other Indian Tribes, 7 Stat. 49.

[204] "Trade shall be opened with the said Indian tribes;[...] but no person, shall be permitted to reside at any of their towns or hunting camps as a trader, who is not furnished with a licence for that purpose, under the hand and seal of the superintendent of the department north-west of the Ohio [...]and if any person shall intrude himself as a trader, without such license, the said Indian shall take and bring him before the superintendent of his deputy, to be dealt with according to law."(7 Stat. at 52).

[205] May 4, 1796, United States-Great Britain, 8 Stat. 130, U.S. Treaty Series No. 106

> States and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons will remain at *full liberty* freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties on either side of the boundary line, and freely to carry on trade and commerce with each other, according to the stipulation of the [1794 Treaty]. [206]

The following year (1796) the British Deputy Superintendent of Indian Affairs for the Northern Department, Alexander McKee, explained this provision to the head of the Putuswakn Confederacy,[207] at Chenail Escarte, Ontario.[208] The Deputy Superintendent stated that, despite the border established by the 1783 Treaty of Paris, their trade and land was protected under His Majesty's 1794 Treaty with the United States:

> The United States have at last fulfilled the Treaty of 1783 and the justice of the King toward all the World, would not suffer him to withhold [your] rights [...]. [His Majesty] has taken the greatest care of the rights and independence of all the Indian nations who by the last Treaty with America, are to be perfectly free and unmolested in their trade and hunting grounds and to pass and repass freely undisturbed to trade with whom they please. [209]

The Putuswakn sent a messenger to the allied nations to convey this message. The Jay Treaty provisions were incorporated into United States law by the Federal tariff acts in 1795.[210]

An *Order of the Governor in Council July 7, 1796* implemented the 1794 Treaty

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[206]*Ibid.*, 8 Stat. at 130-131 (Emphasis added).

[207]**See,** note *122*, infra.

[208]PAC, R.G.10, to the Ojibawayt, Potowatomi, Huron, and Ottawa.

[209]Ibid., cited in Atkey, "Three Nations Three View", *Ontario Indian* 1983:14, 16-17.

[210]I Stat. 116; 8 U.S.C 1395 (1986).

and the 1796 Exploratory Article in British North America. It stated:

> And His Excellency the Governor by and with the advice and consent of the Said Executive Council doth hereby further order, that no Duty of Entry shall be payable or be levied or demanded by any Custom House Officer or other person or persons on any Peltries brought by land or inland Navigation into the said Province, and that Indians passing or repassing with their own proper goods and effects of whatever nature, shall not be liable to pay for such goods and effects, any impost or Duty whatever, unless the same shall be goods in Bales or other large Packages unusual among Indians, which shall not be considered as goods belonging bona fide to Indians or as goods intitled to the foregoing Exemption from Duties and imports.[211]

At the end of the final Anglo-American War, or War of 1812, one of the key British negotiating points was the rights of Aboriginal nations.[212] The British demanded that the United States recognize an independent Indian buffer state in the old Northwest Territory or Ohio. They stated:

> The ceded country was inhabited by numerous tribes and nations of Indians, *who were independent* both of us and of the Americans. They were the real proprietors of the land, and we had no right to transfer to other what did not belong to ourselves. This injustice was greatly aggravated by the consideration, that those Aboriginal nations had been our faithful allies during the whole of the contest, and, yet no stipulation was made in their favour.[213]

When the United States objected, the British negotiators pointed out that the United

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[211]Cited in *R. v. Vincent* (1993) 2 C.N.L.R. 165 (Ont. C.A.).

[212]N. Atcheson, *A Compressed View of the Points to be Discussed in Treating with the United States of America* 1814:5.

[213]*Ibid.* (emphasis in original)

States' treaties with the Aboriginal nations had already created such a buffer zone.[214] Negotiations stalled over this point. After the United States delegation, headed by John Quincy Adams, agreed to affirm and restore the pre-war aboriginal and treaty rights, however, the British yielded this point.

The Treaty of Peace and Amity of 1814 [215] affirmed and restored the tribal rights disturbed by the War of 1812. Article IX of the treaty stipulated that:

> The United States of America engage to put an end [...] to hostilities with all the tribes or nations of Indians respectively, and restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities [...] And His Britannic majesty engages [...] to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities. [216]

As promised in Article IX, the United States negotiated a separate Treaty in 1815, the Treaty of Spring Wells, with the Aboriginal nations involved in the war.[217] It restored all their pre-war "possessions, rights, and privileges" including the "station and property" which their chiefs had held previously to the war.[218]

In 1815, the British Deputy Superintendent General of Indian Affairs, William

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[214]See. S Bemis, *Jay's Treaty* (2 ed.) 1975:160; Barsh and Henderson, *The Road: Indian Tribes and Political Liberty* (1980) at 39-45.

[215]Dec. 24, 1814, 12 Bevans 41 (in force on February 17, 1815); 8 Stat. 218;U.S. Treaty Series 109 (U.S. Dept. of State) [Often called Treaty of Ghent].

[216]*Ibid.*

[217]September 8, 1815, United States–Wayandot, and other Tribes of Indian, 7 Stat. 131.

[218]*Ibid.*, Art II and III.

Claus, explained to the Putuswakn in Burlington Ontario [219] the meaning of article IX of the 1814 Treaty.

> I am further instructed to inform you that in making Peace with the Government of the United States of America, your interests were not neglected nor would Peace have been made with them had they not consented to include you in the Treaty which they at first refused to listen to–I will now repeat to you one of the Articles of the Treaty of Peace which secures you the peaceable possession of all the country which you possessed before the late War, and the Road is now open and free for you to pass and repass it without interruption.[220]

Again, the "peaceable possession of all the country" and the "Road" to free trade was guaranteed to the Aboriginal nations and tribes. It has been affirmed as an international treaty obligation continually since the Treaties of Utrecht (1713).

Though the chiefs at Caughnawaga the Putuswagn described their understanding of the "Road" to the Passamaquoddies in a wampum belt in 1870.

> In answer also to the Wampum which you have set to us in return therefore we send to you ours, specifying our treaty that took place A.D. 1810 [sic]. Therefore, all nations and tribes of Indians from the East and West and from the North and South wherein our Chiefs from every nation and tribe were present, therefore we should bind the good-doing of our ancestors in its treaty of peace. The English and American generals were present having freed all the Indian of Wars incurring between them, and no Boundary line should exist between us Indian Brethren, not any duties, taxes, or customs should be levied on us.[221]

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[219] as well as Hurons, Delawares, Chippewas, Sauks, Creeks, Moravians, and Six Nations.

[220] Atkey 1983:17.

[221] Letter from the Chiefs at Caughwanaga to the Passamaquoddies, Nov. 27,

2. Relations with Mexico

A few treaties between the Aboriginal nations and the United States recognized relations between the tribes and the Republic of Mexico.[222] In addition, the Treaty of Guadelupe Hidalgo (1848) ending the Mexican War, and ceding substantial portions of Mexican territory to the United States, contained guarantees of the right of these Indians who had been citizens of Mexico.[223]

E. THE ANDES AND THE SOUTHERN CONE

There are no published studies on the history of Indian diplomacy in Latin America, and there is only one incomplete compilation of the texts of these treaties (Borelli 1984), limited to Argentina and parts of Paraguay. We obtained considerable additional manuscript material on Argentina and Chile from the Indian Association of the Republic of Argentina (AIRA), which is in the process of preparing a more thorough compilation of treaties pertaining to the Southern Cone, and also from Gaston Lion of the Flemish Working Group on Indigenous Affairs (KWIA), who has been sifting through the Spanish Colonial archives at Seville. Easter Island material was obtained some years ago from the *Consejo de Ancianos de Rapa Nui* (Council of Elders), and includes some unpublished manuscripts.

The Argentine material will be reviewed here in somewhat greater detail than the diplomatic history of other continents, because the treaties themselves are not available in English, many have not been published even in Spanish, and there are no secondary sources for an interested reader to consult. It is still incomplete; AIRA estimates that there are at least three times as many Argentine treaties still to be found in archival

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1870, reprinted in *The Circle* (August 1977).

[222]Treaty with the Kioways, Ka-ta-kas, and Ta-wa-ka-ros, May 26, 1837, art. 9, 7 Stat. 533, 535; Treaty with the Comanches and Witchetaws, Aug. 24, 1835, art. 9, 7 Stat. 474, 475.

[223]9 Stat. 922, U.S. Treaties Series No. 207 (2 February 1848).

collections, judging from references to treaties in other government records. We have included some of the Chilean treaties as well for comparative purposes, but the record there is less complete. There are mentions of treaties in historical accounts from the Andean countries, Nicaragua, Panama, and Brazil, but we have not been able to obtain the texts. One third-party treaty, the 1860 Treaty of Managua between Nicaragua and Great Britain, will be included briefly, because of parallels with the Jay Treaty and Treaty of Ghent in North America.

As early as 1597, King Philip received a formal petition from the hereditary chiefs of Tucumán province, complaining of trespassers and dispossession. The King responded by issuing a decree securing these "chiefs and Indians" the right to "hold, enjoy and occupy" their lands as they had in the past, under the protection of the Crown. Like the Royal Proclamation of 1763 in North America, this decree established a basis for a Crown monopoly over acquiring land from indigenous peoples through treaty. In 1662 a first "treaty of peace" was signed with the Tocagues and Vilos nations on the Rio Parana, who had been devastated by plague a decade earlier. The survivors of these two nations agreed to resettle closer to the city of Santa Fe, on a designated "manor or estate," where they would receive "Christian and secular" instruction the same as "other domestic Indians" under regulations of the Crown–in effect, an Indian reservation. The two nations were allowed to pay taxes rather than be attached as labourers to *encomiendas,* "the better to keep their families together". They acknowledged the religious and secular jurisdiction of the King, and the authority of the governor to adopt laws to implement the treaty, as necessary, "in good faith".

A second treaty of "peace, friendship and alliance" was signed in 1710 with the chief of the "nation" of Malbalas, in the Chaco. It was agreed that the people would relocate to the Rio Valbuena wherever the Spanish governor thought best, and be given instruction for one season in farming and home construction. Malbala chiefs were to retain their authority, one being designated as "principal chief" and magistrate in the name of the King. In the event of any injury done to a Malbala by a Spaniard or Christian

Indian, the chiefs were to report this to the local Spanish authorities, who would to punish the offender "as the case merits," or else answer themselves to the governor. Spain promised to "aid the Malbala nation as good friends and allies, in all occasions, should any other nation make war upon them, without permitting them to harm or oppress anyone." The Malbalas acknowledged themselves "loyal vassals" of the King, and promised to obey the governor and his laws, to regard all enemies of Spain as their own, and not to make alliances with any other indigenous nations of the Chaco. In case of any future disputes with the Spanish, they were not to take revenge, but petition the proper authorities.

At about the same time, the Spanish governor of the Chaco region accepted the offer of the Lules to relocate on one or two reservations and to aid the Spanish in their war against the Mocovis, in exchange for Spanish protection. They agreed to be "free subjects, and direct vassals of the King," without being attached to any *encomienda*, and to make peace with the Malbalas, their old enemies. These three treaties helped Spanish Argentina secure control of its northern frontier with Portuguese Brazil, and were therefore of great strategic importance.[224] Spain next turned its attention to the *pampas* (or prairies) of central Argentina. In 1740, the Jesuit Provincial was dispatched from Buenos Aires with the task of obtaining the Indians' consent to relocation on reservations (*reducciones*). He insisted that 5 conditions be inserted in the accords: no Indians were to be attached to *encomiendas*, their reservations would be at least 40 leagues from the city (to avoid "bad results" from contacts with Spaniards), the Spanish authorities would arm these *indios reducidos* to repel any invasions by other tribes, the Indians would not be put to work except under Church supervision, and the Indians would be instructed to obey

[224]Tucumán is in northwest Argentina, the Chaco in northern Argentina and Paraguay, and the Rio Parana today separates Paraguay from Brazil. The major geographic regions of 19th-century Argentina were the *Chaco Boreal*, a vast forest in the north; *La Pampa*, the prairies southwest of Buenos Aires; and *Patagonia*, a wilderness south of the Rio Negro.

missionaries. A meeting with the chiefs of five *pampas* nations is recorded, but no record exists of their formal agreement.

In 1743, Jesuit officials in the province of Paraguay complained to the King of renewed raids by Chaco Indians, including some like the Lules who had previously been persuaded to move to *reducciones* but had abandoned them. They asked for legal authority to conclude agreements with these hostile peoples promising to leave them on their own lands, and exempt them from the *encomienda* system or other forms of service to the Spaniards, under a Royal guarantee and in accordance with the *Leyes de Indis*. The King granted their request, adding his wish that the Indians be assured of his Royal protection, and that they would always be treated "with the greatest gentleness and moderation". Problems on the northern frontier continued, however, and a further "formal peace" with the chiefs of the Mocovis and other nations of the Chaco was made in 1774. They would never be deprived of their ancestral territories, nor "for any reason or pretext or at any time" enslaved or attached to *encomiendas*, but be treated "like all Spaniards". They would be given teachers of the Catholic faith and Spanish language, and livestock and clothing should they wish to settle in one or more *reducciones* to live as ranchers. As "vassals" of the King, they would be "obedient in all respects" to Spanish laws, which would be translated and explained for them. If injured by Spaniards or *Indios reducidos*, they would refrain from revenge or war, but seek justice from the Governor. The chief of the Pahikens would act as the governor's deputy for this purpose.

Two years later King Carlos III directed the governor of Paraguay to offer terms to the Chaco nations which were still resisting Spanish rule. They were invited to remain in their own territories, where the Spanish would provide them with houses, cattle, a church, agricultural training and an armed garrison to protect them from their enemies. In the future, they would not enter Spanish settlements without a permit, or accompanying a priest; their children were to be baptized, and the sons of their chiefs turned over to the governor to be educated in the Spanish manner. Henceforth they would be "faithful vassals," aid any Christians traveling through their territories, and regard themselves as

the "friends of the friends of the Spaniards, and enemies of their enemies at all times and in all cases".

To put an end to recurrent outbreaks of hostilities in the west, the Spanish authorities entered into a treaty of peace with the Aucas in 1770. The Aucas promised to release all captives, as well as those Christians living voluntarily among them, and provide hostages for the guarantee of their future good behaviour. They moreover agreed not to cross the designated frontier, not to steal cattle or permit any other Indians to steal cattle. A further treaty was made in 1782, after yet another episode of border violence, restating the Aucas' commitment to remain within their own territory, which was enlarged and specified by metes and bounds. Captives and presents were exchanged, and the Aucas agreed to warn the Spanish authorities of the movements of any hostile Indians on the frontier.

As Spanish settlements moved westward into the Andes, there were new conflicts with the Quechua in the region straddling Chile, Bolivia and Peru. A rebellion led by the Inca, Miguel Tupac Amaru, ended in a treaty at Patamanta in 1781, pardoning the Inca and his chiefs, on the conditions that he surrender all his armaments, persuade his people "to obey the King" and Spanish laws, send his soldiers home to till their fields, and not to take up arms again on pain of death. It was agreed that the governor would appoint "suitable persons" as local officials, including Quechua chiefs and headmen, who would "maintain harmony and good correspondence" with the army and government, and ensure that all of the roads through the highlands remained open to the "free passage of Spaniards, mestizos, mulattos and Indians". A second treaty, just one month later at Lampa, made peace between the Inca and the Peruvian provincial army:

> in virtue of which it is promised, in the name of the King, Sr. Don Carlos III (whom God preserve), not to harm or offend any Aboriginal; to keep in the minutist detail the orders of Sr. [Governor] Virrey directed at treating all of the Aboriginals of these provinces with gentleness and mildness, it being well understood that said Aboriginals shall observe the same

> harmony, without causing any injury or extortion to the army which is under my command, or to any Spaniard. [...] At the same time I, the said Tupac Amaru, promises as a true subject, to command, and not allow any Aboriginal to offend the Spaniards; and likewise that they retire to their towns and live with the Spaniards in peace and unity as God wills, and as wishes our Catholic Majesty [...].[225]

In 1820, on the eve of Argentine independence, a major treaty of "fraternity and mutual security" was concluded with the Indians of the southern frontier.[226] After recalling "the peace and good harmony which has existed since time immemorial" between Buenos Aires and the Indian nations, it fixes a "dividing line for both jurisdictions," and forbids any Argentine from intruding into Indian territory. The tribes agreed to respect the property of Argentine landowners already settled along the frontier, while the landowners were to allow Indians free passage for hunting and trade, and all Argentines were to be encouraged to be on their best behaviour in any commercial dealings with these Indians. Tribal chiefs were to supervise the frontier, and report any fugitives hiding in their territory to the Argentine authorities. In the south, then, indigenous nations remained geographically distinct, independent polities into the 19th century, while in the west and north, they were mostly "reduced" to living on reservations, as Spanish "vassals"–save for the still-hostile nations of the Chaco.

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[225] We have used the term "natives" here for the Spanish *naturales*; in other contexts, Spanish draftsmen used *Indios,* or contrasted *barbares* ("barbarians") with *Indios domesticos ("*domestic") or *reducidos* (those who had been "restricted," or subjected to Spanish protection).

[226] An interesting sidelight is the reference, in the second article, to the selection of three Indian negotiators by "public assemblies" of their tribes. The "south," in the context of Argentina's 19th century treaties, is still an area just south of Buenos Aires, in the vicinity of present-day Azul, not the far south of Tierra Del Fuego, which was to remain as isolated as Canada's North until the next century.

Continuing this pattern, a treaty of 1822 with the chiefs of the Albipones, ending yet another frontier conflict in the Chaco, granted a general amnesty, exchanged captives[227] and agreed on "smothering" any rebellious persons. "Signs and countersigns" were specified, to help identify the members of friendly tribes, and the Albipone chiefs were to seize and deliver up any improperly-identified Indian found roaming through their territory. The Chaco was of such strategic value, that a new treaty with all of the principal chiefs was promptly negotiated by the newly-independent Argentine Republic, in 1825. Once again, the parties agreed to an exchange of captives, and the Albipones agreed to withdraw from towns they had recently captured, including reservations of subject Indians. Of far greater importance, the treaty

> recognized the sovereignty and dominion of the Indians over all the lands of the Chaco, having engaged to live in peace and good relations, to trade their products freely, and give respect to the whites traveling through the Chaco [...].

At the same time, the Republic offered to grant land to any Chaqueños desiring to "liquidate" their tribal relationship and settle among the Argentines.

These arrangements finally settled Argentina's northern frontier problems, and facilitated a trade in beef and lumber between Chaqueños and Argentines. More than a generation later, in 1864, the indigenous nations of the Chaco met with officials of the Republic at Corrientes, and agreed for the future to elect one of their chiefs as their deputy in dealings with the Argentine government. They also agreed to terms for the construction of a railroad line through their territory, which included the authority of Argentina to settle farmers and miners along the route, who would remain under Argentine control and protection so long as they "followed a peaceful and hardworking life". Although the parties did not address the *soberania y dominio* of the Chaqueños

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[227] In the original text, the Argentine authorities refer to releasing *chinas e indios*, which may seem strange but for the fact that in Latin American usage, *China* can refer to an Indian girl as well as a Chinese woman!

under the 1825 treaty explicitly, there are hints of a new relationship–for example, in referring to "the Government's disposition to protect them and provide them with the means of livelihood," or of the "loyalty and good faith" of the Republic in its dealings with Indians. Indeed, the Republic apparently tried to mediate a dispute between the Matacos and Tubas, arising from a Toba raid on a Mataco villages, in 1875.

The Argentine Republic also moved quickly to secure its frontier in Córdoba Province, west of Buenos Aires, in an 1825 treaty with some fifty "chiefs and minor chieftains" of the region. The tribal nations recognized the newly-elected Congress as the government of Argentina, promised to keep the peace and help defend Argentina's borders against Indian raids. It was agreed in return that the Indians should travel freely in Argentina, provided they first obtained passports from their chiefs and presented themselves to the nearest border station on entry and exit. While the autonomy of these weaker nations was implied in terms of the agreement, they were also relied on for border defense, a responsibility never entrusted to Chaqueños, and increasingly important as tensions mounted with neighbouring Chile.

Accordingly, in 1871, the Republic entered into a treaty with the Catriels southwest of Buenos Aires, by which the chiefs of this nation chose a Principal Chief and Second Chief to serve as liaisons with the Argentine authorities, and organize their people to assist the army in guarding the frontier, hunting down fugitives and repelling invasions. The Principal Chief promised to employ all of his "moral and material influence" in persuading other tribes to unite under his command, and the Republic undertook to treat any Indians who defied him as "enemies of the government". In an 1875 treaty, it was agreed that the Catriel would be organized into a special frontier unit of the National Guard, with officers selected by the chiefs. The Republic promised that they would be "well fed, well-clothed and well-paid, with habitations they now lack to protect them against the rigors of the climate, and with ownership of their lands guaranteed by the Government". This entailed moving the entire tribe farther west, to new settlements of their own choosing.

Likewise the Ranquelinas, neighbors of the Catriels, declared in an 1869 treaty that they were:

> [...] Argentine subjects, and recognized the dominion and sovereignty of the General Government over all the territory of the Republic, which includes the Eastern Andes all the way to the Strait of Magellan[,]

and disavowed any allegiance to any other Aboriginal chiefs. They agreed, moreover, to relocate to Patagonia and establish an "agricultural and military Colony" under the supervision of the Republic, promising they would accept direction from the superintendent (*Comisario intendente*), priests, and teachers assigned to them for these purposes. They would form a special unit of the National Guard, and pursue any encroaching "Indian bandits or Chileans" as far as "the wilderness". In exchange, they would enjoy all of the usual benefits of military service as well as annual presents of clothing, and be granted ownership of an area of land "sufficient for all of the tribe, where the soil is more suitable for cultivation and stock-raising," together with tools and livestock. In a further treaty of "peace and friendship" in 1878, the Ranquelinas

> [...] pledge true obedience to the Government and faithfulness to the Nation of which they are part, and the Government for its part promises them paternal protection.

They agreed to seize, and turn over to the nearest frontier post, any Christian captives, deserters, fugitives or other persons not carrying legitimate passports from the Argentine authorities, and to assist the Argentine army in case of a war or be deemed traitors to the Republic. For these services, the chiefs were to receive a quarterly stipend of money, horses, sugar, tobacco, grain and *aguardiente*. The Argentines, likewise, agreed to seize any Indian fugitives or robbers, and return them to their chiefs. Indians with proper passports from their chiefs could travel and trade freely among the Christian population, with the same legal rights as "the whole citizenry of Argentina". Finally, the chiefs agreed that should any Indian commit any robbery or injury, his own chief and community would be held responsible for his capture, and appropriate restitution.

During this same period, the Republic entered into an 1873 treaty of peace with the Mapuche chiefs of the southwestern *pampas*, promising "to protect and defend the peaceful and permanent possession, by said chiefs, captains and tribes of the countryside they currently occupy". Settlements in the frontier areas neighbouring Mapuche territory would be permitted only on written instructions from the Republic. On their part the Mapuches agreed on a principal chief, Picen, and "recognized the sovereignty of the Argentine Government over all the territory of the Republic". They would return all captives, capture and return any fugitives, and warn the Argentine authorities of any invasion through their territory, in exchange for a quarterly stipend of horses, sugar, tobacco, clothing, paper, and gin. The Indians would be free to trades with Christian populations provided they obtained passports from their chiefs and reported to border posts upon entry and exit. The Republic promised to punish anyone injuring an Indian, or any Indian committing robbery while traveling among Christians, according to Argentine law. Argentine authorities also agreed to punish any Indians who defied the authority of Picen and his principal chiefs.

The situation of Patagonia was special. Like the Canadian North, Patagonia was long regarded by Euro-Americans as remote, inhospitable, and valueless. It was only in 1863 that the Argentine Republic made a first treaty of "aid and protection" with the chief of the Tehuelches, Saihueque. Indians were given the right to travel and trade freely in the frontier town of Carmen and elsewhere in Argentina, and Argentines the right to travel and trade freely in tribal territory. Saihueque's people moreover agreed to provide guides for Argentine explorations of the Rio Negro, advise Argentines of the movements of "enemy Indians," and participate in joint military operations against them. In return, the Argentine army would defend the tribes in case they were attacked by other Indians, and the Republic would provide Saihueque with money, clothes, sugar, tobacco, and other gifts annually.

A further treaty of 1866 was made with Tehuelche chiefs under the leadership of Casimiro Vigua. They acknowledged their territory to be part of Argentina, declared

themselves Argentine subjects and promised to obey Argentina's provincial officials in Patagonia; moreover, they denied Chile's claims to Puntas Arenas, declaring it was always a part of Argentina. They were agreeable to settling together in a "town or Colony," under the "direction" of Vigua and the Argentine authorities, and guarding the coast in exchange for a semi-annual stipend of money, tea, sugar, flour, tobacco, suet, *aguardiente*, clothing and livestock. In addition the Republic agreed to provide the chiefs with presents of clothes and armaments, and to build wooden houses for them over which, it was agreed, they would always fly the Argentine flag.

The early Spanish Colonization of Chile was strenuously resisted by the Mapuches. According to one contemporary Mapuche organization, the Consejo de Todas las Tierras, 30 treaties or *parlamentos* (parleys) were conducted with Mapuche leaders between 1641 and 1881.[228] In 1641, the Treaty of Quillem accepted the Bio-Bio River as the border between the Spanish settlements and Mapuche territory. Subsequent parlamentos were frequently convened to restore peace after border incidents. One of the most important was held at Negrete in 1793 on instructions from the King with "all of the nations situated on the shores of the great river Bio-Bio" following an all-out war among the Mapuches themselves. Although the Mapuches respected the neutrality of their Spanish neighbors, in accordance with their treaties, Spanish Colonial authorities decided to mediate a general peace.[229] The assembled chiefs promised to "again be friends,

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[228]Similarly, early treaties with the Six Nations (Haudenosaunee) and their allies were frequently referred to as "conferences" by British officials, as they were not so much specific documents, as a series of discussions, gifts, and understandings conducted over several days.

[229]Manuscript, Chili No. 316, Archivo de los Indies, Seville (Spain). Copy provided courtesy of Gaston Lion, KWIA. The transcript indicates that 187 chiefs and over a thousand other Mapuches participated in the *parlamento*, representing all four Mapuche *butalmapus* (provinces and/or regional head chiefs). The discussions refer frequently to the terms of the Treaty of Lonquilmo (1784), which brought the previous

companions and brothers," and to resolve any future dispute peacefully without taking revenge, otherwise the Spanish army would regard them "as rebels" and punish them "with such severity as are punished those vassals who take up arms within the dominion which are reserved to the sole sovereignty of His Majesty". They would also seize any fugitives in their territory, and try to prevent their young men from raiding across the mountains into Argentina. All the nations would henceforth live under the King's "protection," as his "faithful and obedient vassals," and "be prepared at any time" to aid the King's army against his enemies.[230]

Included in the bargain was a "treaty of communication and trade" by which the Spanish authorities agreed to holding fairs on designated dates and places along the Bio-Bio, where Mapuches would receive "fair prices" and honest dealing. In addition, as the Spaniards regarded it inconsistent with Spanish sovereignty for travelers to have to obtain the permission of the chiefs before entering Mapuche territory, it was agreed that anyone bearing a Spanish passport could enter "without any of the formalities which heretofore had been practiced". To encourage a closer relationship between Mapuches and Spaniards, it was moreover agreed that the sons of the leading Mapuches would be educated by the Church. The chiefs promised to explain these commitments to all their peoples and secure their obedience.

Another *parlamento de paz* was convened in 1793 at the *reducción* of Rahue, where the assembled Mapuche leaders agreed to "cedes from this day forever in favour of the King our Lord whatever claim or right they or their successors may have" to the

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frontier war to an end.

[230]There is mention in the transcript of chiefs' ceremonial staffs of office being thrown in the midst of the parlay by one of their number, as a dare to accept the terms offered by the Crown. This indicates that Mapuche chiefs, like the governors of the Pueblos in New Mexico, already had accepted some kind of symbolic relationship with the King.

territory between the Canoa and Damas rivers.[231] They promised to "always be firm friends of the Spaniards and assist them when needed," and to afford free passage and assistance to persons traveling on the King's highway, as well as Spanish traders. In addition, the Mapuche chiefs promised to take up arms against any enemies of the King, including renegade Indians, and:

> Should any Indian give injury to the Spaniards he shall be turned over for his just punishment as well they should advise the Commandant if any Spaniard has given them any offence so that the appropriate punishment can be applied.

They agreed to re-admit missionaries to their territory, provide them with land to build their missions, and ensure that in the future their sons would be baptized and educated by the priests, and married in the Church. Then,

> ... to secure the establishment of the Spaniards in these territories and maintain with them a firm peace, they made a ceremony of burying in the same spot as the meeting a rifle, a spear, and a club, by which they secured this friendship, and placed upon them the [ceremonial] canes of the King, the flag, and the olive-branch of peace, they embraced everyone and shook the hands of the Missionary Fathers and others who were present.

The transcript of this *parlamento* refers to the *dependencias* (fiefs or dependencies) of the chiefs and ceremonial canes of authority they had received from the King. Hence their status had evolved from that of a distinct and independent state, to that of autonomous feudal vassals.

Indeed a report by Ambrosio Higgins Vallemar, president of Chile, on the circumstances of the Negrete treaty refers to the "longstanding practice" of making treaties with "these nations" on the frontiers of the Spanish settlements, and stresses the

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231 Manuscript transcription prepared by the National Archive of Chile and provided by the Consejo de Todas Las Tierras; never published.

importance of reducing them to "vassals" of the Crown.[232] In the past, moreover, these treaties had "confirmed and consolidated the independence which they retained until the war of [17]70". During this period,

> Their internal government conformed in all respects to these ideas; governing without any law but their own wishes and convenience, they made war and peace among themselves, allied themselves with other bands, made incursions into the *pampas* of Buenos Aires and were held responsible for nothing since they were left at liberty to do as they pleased within their lands as long as they did not offend any Spaniards.

Although it would be feasible, Higgins observed, to destroy the tribes by instigating internecine wars among them, the cost would be high and the Colonists stood to gain more by peaceful trade. To achieve this, it would be essential to open roads through Mapuche territory, because in the past "they had been so jealous of their independence" that they forbid any Spaniard to cross the frontier without the consent of their chiefs. It was also important to build missions among them, to break down the authority of their chiefs.

"Arauco," the Mapuche territory south of the Bio-Bio, retained a distinct character even after its partial incorporation into the Crown in 1793, and was the target of an extraordinary French strategic plot a half-century later. Napoleon III was engaging in covert efforts to establish French interests in Latin America. The best-known and most successful (if nonetheless short-lived) attempt involved subsidizing a monarchist *coup* in Mexico, and placing his cousin, the Austrian prince Maximilian, on the Mexican throne. Meanwhile, a petty southern French aristocrat, Orellie-Antoine de Tounens, sailed for Chile, where he met with Mapuche leaders and, after promising them French recognition and support, was proclaimed the "King of Araucania and Patagonia" in 1860 (Magne 1970). He was arrested and deported by the Chilean authorities within a year and died in

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[232]Manuscript, Chile No. 126, Archivo de los Indies, Seville (Spain). Copy provided courtesy of Gaston Lion, KWIA.

1878 still seeking international recognition for an independent Mapuche state.

Chilean treaty practice extended also to the Pacific. The island of *Rapa Nui* (Easter Island), some 2,000 nautical miles west of Chile's coastline, was charted in 1770 by Spanish explorers, who took symbolic possession by erecting three crosses. It was not until 1888, however, when Chile feared Peruvian seizures of the island,[233] that a treaty was made with the chiefs (*ariki*) of the island recognizing Chilean sovereignty. Executed in Spanish and Polynesian, it reads in full (from the Spanish version in Blanco 1988:401):

> The undersigned chiefs of Easter Island declare that we cede forever and unconditionally to the Government of the Republic of Chile the full and complete sovereignty of the said island, at the same time reserving our titles as chiefs with which we are invested, and what we presently enjoy.

The scope of the reservation clause is ambiguous, since it could refer only to preserving the form of the chieftainship, or alternatively the whole system of chiefly land-ownership and governance under Polynesian customary law. Some idea of the parties' real intentions is indicated by the nature of the ceremony celebrating the cession. As the Chilean tricolor was hoisted where the red-and-white Rapanui flag had earlier been, the following exchange took place between the Rapanui head chief and Captain Toro Hurtado, the Chilean commissioner (Blanco 1988:401):

> The Rapanui king, as he watched it flutter, said to Mr. Toro:–your flag can be placed on the same pole as our flag on the lower part. The upper is for ours.
>
> –Very well, let it be–replied the Captain.
>
> The king added:–In raising your flag you do not become the master of the island, because nothing has been sold. We know that Mr. Obispo has

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[233] Peruvian ships had already been raiding the island for slaves; in addition, Chile and Peru were embroiled in a bitter struggle for naval superiority in the southeast Pacific at the time.

> placed the island under the protectorate of Chile, but nothing has been sold.
>
> Captain Toro discretely kept silent after these remarks of the king, and over the Chilean flag was hoisted the Rapanui standard.

Although many of these Argentine and Chilean treaties were aimed at mitigating frontier violence, a major motivation for entering into treaties with indigenous nations was clearly territorial competition between Spain and Portugal (along the Rio Plata and Chaco), and later between Paraguay, Bolivia, and Argentina (again, the Chaco), and Chile and Argentina (the southwestern *pampas* and Patagonia). Indian nations along contested borders were in a strong bargaining position; through treaties with indigenous peoples, nation-states gained legitimacy and military aid in support of their claims. The same kind of competitive situations existed on the frontiers between Chile and Peru, Panama and Colombia, and very recently, Brazil and Venezuela (Prescott 1987:199ff).

Competition was especially intense in the Caribbean, since there were–in addition to Spain or its former colonies–British, French and Dutch interests, and later the U.S. and British footholds included Belize (then British Honduras), and the Indian and Garifuna (Black) villages of the "Mosquito Coast" in present-day Nicaragua. Just as France had explored the possibility of encouraging an Indian state to secede from Chile, Britain tried to establish an Indian client state in Mosquitia. The U.S. intervened, forcing Britain into a compromise with the newly independent Nicaraguan republic. By Articles II and III of the Treaty of Managua (1860),

> There will be assigned to the Miskitu Indians from the territory of the Republic of Nicaragua, a district in perpetuity as stipulated above under the sovereignty of the Republic of Nicaragua. The Miskitu Indians, within the designated district, possess the right to govern themselves and to govern all the persons who are residents within the said district, following their own customs, and conforming to the laws that can from time to time be adopted by them, as long as they are not incompatible with the

> sovereign rights of the Republic of Nicaragua. (Ortiz 1987:209; Hannum 1990:205).

Unfortunately this arrangement was short-lived. Nicaragua invaded and annexed Mosquitia in 1894; and in 1905 Britain relinquished its interests in the territory and people by treaty. Mosquitia has re-emerged, however, as a result of the accords ending Nicaragua's civil war in the 1980s, which restored the Atlantic region's autonomy.

E. THE PACIFIC: AOTEOROA AND HAWAII

1. Maori nation of Aoteoroa

Especially close attention has recently been given to the legal status and enforcement of the Treaty of Waitangi (1840) with the Maori nation of Aoteoroa (New Zealand)–an instrument similar in key aspects to Chile's 1888 treaty with the Rapanui of Easter Island. The treaty contains only three substantive articles, which differ somewhat in the English and Maori texts. The following is from the Maori version (Brownlie 1992:7):

> The Chiefs of the Confederation and all chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land.
>
> The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.
>
> For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

At the time this treaty was negotiated, Her Majesty's Government took the view that, while Maori "title to the soil and to the Sovereignty of New Zealand is indisputable," spontaneous European colonization of the islands threatened Maori survival (*ibid.* 32). In exchange for the sacrifice "of a National independence which they are no longer able to maintain," the Maori would receive the protection of British laws and administration. For greater certainty, Her Majesty's representatives were specifically instructed to disclaim (*ibid.* 33):

> [...] every pretension to seize on the Islands of New Zealand, or to govern them as a part of the Dominion of Great Britain, unless the free and intelligent consent of the Aboriginals, expressed according to their established usages, shall be first obtained.

The Waitangi Tribunal, established by statute in 1975, interprets the treaty as *implying* the creation of "a partnership, exercised with utmost good faith," including the continuing internal authority of the chiefs over natural resources, social and cultural matters, and Crown obligations to ensure Maori safety and subsistence (Brownlie 1992:2021, 96).[234] According to the Tribunal, the treaty requires a compromise between Maori and *Pakeha* (European) interests wherever they conflict, including restitution of lands and resources taken in the past without observing the letter and spirit of the treaty. Professor Brownlie has emphasized that the principle of intertemporal law must be applied to the treaty (*ibid.* 8-9):

> [...] the fact that subsequent developments in international law doctrine denied treaty-making capacity to what were described as 'Aboriginal Chiefs and Peoples' is irrelevant. Facts have to be appreciated according to the principles of international law prevailing at the material time.

He nonetheless contends that the treaty *by its own terms*, merged Maori into the realm,

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[234]On the earlier judicial recognition of Maori title by treaty, **See, e.g.** *Nireaha Tamaki v. Baker* [1901] A.C. 561; *Te Teira Te Paea v, Te Roera Tereha ,* [1902] A.C. 56; *Manu Kapua v. Para Haimona* [1913] A.C. 761.

and extinguished their international legal personality (*ibid.* 26, 50). This overlooks the possibility that the intention and effect of the treaty was to erect Aoteoroa as a distinct Maori entity, under the British Crown–as New Zealand is today, though dominated by Pakeha. In other words, the treaty was breached by the Crown when it permitted its British subjects to take control of the islands from the chiefs, whose "chieftainship" was expressly reserved. This could have been grounds for voiding the protectorate, and returning to the *status quo ante* of Maori independence. The treaty was about a protectorate, not partnership, or condominium.[235] This is exactly the position taken by a growing number of Maori *iwi*.

2. Kingdom of Hawaii

Useful comparisons can also be drawn with the Kingdom of Hawaii, which was widely recognized as a sovereign and independent state prior to its 1897 annexation by the United States. Beginning in 1846 Hawaii entered into 15 treaties of friendship, navigation, and commerce with France, Britain, the U.S., Russia, Spain, Denmark**,** Norway, Sweden, the Hansa League (Germany), Belgium, and Switzerland. Although the United States acknowledged Hawaiian independence and maintained an embassy at the royal court in Honolulu, American settlers (who had purchased land under Hawaiian laws) organized a *coup* in 1887 forcing King Kalakaua to proclaim a new, weaker constitution (the "Bayonet Constitution"). The same all-white "Hawaiian League" organized a second coup, with the aid of U.S. marines, in 1893. They deposed King Kalakaua's successor, and declared a Republic governed by whites (Liliuokalani 1990).

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[235]Even if the intention had been to create a permanent partnership or condominium, of Maori and Pakeha, a question would arise of whether the Maori could withdraw from the arrangement in response to a breach, *i.e.*, the "right of divorce" asserted by some international scholars, and so recently exercised by the former Soviet and Yugoslav republics. Surely, there is no "partnership" in governing the islands as long as the New Zealand parliament retains constitutional supremacy.

Just four years later, this government ceded Hawaii to the U.S. by treaty, *i.e.*, American citizens ceding another people's country over to the American government.[236] The treaty of cession made no provision for the property rights of Aboriginal Hawaiians, which were annulled by U.S. authorities in subsequent laws opening the territory to settlement. Aboriginal Hawaiians argue that the 1897 treaty of cession was void *ab initio*, and did not extinguish the prior recognition of the Hawaiian monarchy by European powers.

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[236] If this appears bizarre, it may be recalled that a similar pretext was used to justify war on Mexico in 1846. Americans who had taken up land in northern Mexico under Mexican laws rebelled, seceded, and then made a treaty ceding the Texas Republic to the U.S.

PART FIVE

EUROPE'S COLONIAL ORDER AS INTERNATIONAL LAW

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

A. CONTEXT

We have seen that, from the 16th to late 19th centuries, European nations did not question the capacity of "pagan" or tribal peoples to enter into binding treaties of alliance, cession or protection–albeit there were sometimes disputes over *which* Aboriginal chief had sovereignty over a particular territory. Based on a thorough historical review of "civilized" governments' practices, Lindley (1928:176) concluded that treaty-making had never been simply a matter of generosity or policy, or "a mere meaningless formality," but the consistent basis upon which Europeans settled their overseas territorial claims among themselves. In their disputes *inter se*, Europeans insisted on genuine and informed consent of the people concerned,[237] and it was understood that a treaty should be honored "in spirit and in substance if the cession is to be a valid one."[238]

It is no coincidence that this shift in European jurisprudence was accompanied by the emergence of "scientific" racism, a school of British and American natural history which claimed to have discovered physical evidence of Caucasian racial superiority (Stanton 1960). The proponents of this view relied on everything from phrenology and

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[237] Thus in the Delagoa Bay dispute, Portugal argued that local chiefs thought a purported treaty of cession was merely a list of presents; Britain argued that the chiefs of Nyassa had no idea of the meaning of Portugal's distribution of flags to them; Britain demanded evidence that the Swazi queen understood her treaty with South Africa, and that the chiefs of the Sulu archipelago understood their treaty with Spain (Lindley 1926:173-174).

[238] Emphasis supplied. Even the 1885 *Berlin Act* purported to establish minimum, not sufficient requirements for the acquisition of territory. European states did not rely on notification and occupation alone, but sought cessions from native rulers (Lindley 1926:176). Although Tunis and Indochina had been forced to accept French protection at gunpoint, and Egypt accepted British protection while under British occupation, Lindley (1926:189, 246) found few examples of the overt use of force.

brain weights to Linnaean-style evolutionary taxonomies of races and peoples to support their views, and had staunch defenders among scholars of Aboriginal American cultures such as John Wesley Powell, the director of the U.S. Bureau of American Ethnology (Barsh 1988). The corollary, in Victorian public policy and jurisprudence, was "social darwinism," or the theory that all peoples necessarily had to pass through certain stages of socio-cultural development before they reached the "highest" Teutonic or Anglo-Saxon level (Hofstadter 1944; MacDougall 1982). If such theories of racial and cultural inferiority have been discredited by social scientists (United Nations 1991), they nonetheless continue to lurk beneath the surface of Anglo-American law.

As the 19th century drew to a close, however, Europeans statesmen fundamentally changed their conceptions of international law and world order. Europeans' global military power made it possible for them to dominate their former allies worldwide, transforming their status from that of "connected and protected" nations and tribes (to borrow the phrase used in the Royal Proclamation of 1763) to that of Colonies, annexed and ruled by European states. By the time Judge Max Huber wrote his opinion in the *Islands of Palmas* arbitration (1928), European jurists were able to deny steadfastly that Europeans had ever regarded tribal societies as states–the anti-historical legal rule stressed by most international scholars.

Until the 1885 Berlin Africa Conference, moreover, the Law of Nations had been regarded as "natural" and universal, applicable by virtue of necessity and the inherent equality of humankind to every nation and people. With the growth of European overseas imperialism, jurists began to espouse a positivist view of international law, in which laws are created by conventions and custom among existing, Eurocentric states. In positivist thinking, statehood is not natural or inherent, but must be recognized, expressly, by the club of imperial states. Recognition becomes *constitutive* in character: a state does not exist until it is admitted to the club.

B. THE CHANGING MEANING OF "PROTECTION".

A pivotal aspect of these changes in world order was the changing meaning of

"protection" under Europeans' treaties with other peoples. In his classic treatise *Six Livres de la Republique* (1577), Jean Bodin characterized Portugal's treaties of protection with Ormuz, Cochin and Ceylon as affecting only the external sovereignty of these three Asian kingdoms. He argued that vassals, tributary princes and protectorates continue to be sovereign as long as they continue to exercise legislative authority.[239] Similarly, Vattel argued in *Droit des Gens*[240] that should the protector exercise any more power than is provided in the treaty, the protected state "may consider the treaty as broken and provide for its safety according to its discretion". Hence protection implied the "transfer of external sovereignty to the Protector leaving the internal sovereignty in the Protected State,"[241] which continued to be a member of the international community (Alexandrowicz 1973:5). It "thus parted with part of its sovereignty without, however, losing the whole of its independence" (Lindley 1926:181). As a consequence, the protectorate was not "part" of its protector, nor automatically bound by its protector's treaties with third states (Alexandrowicz 1973:62), although its citizens might enjoy its protection even when traveling abroad (Lindley 1926:197).

The nature of protection was a central issue in the 1786 trial of Warren Hastings who, when Governor-General of the East India Company, had seized control of Benares because the Raja had refused to pay more taxes than his treaty of protection stipulated. At

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[239]Book I, Chapter IX. G.F. de Martens, compiler of the first great compendium of Europeans' treaties with Asian nations, also concluded that "mere alliances of protection, tribute or vassalage which a State may contract with another do not hinder it from continuing perfectly sovereign" (Alexandrowicz 1967:153).

[240]Book I Chapter XVI. Vattel moreover reasoned that, as sovereignty rests in the populace, not in their ruler, the people reserve a right to revoke an unequal treaty and thus re-assert their natural right to independence.

[241]"The one common element in Protection is prohibition of all foreign relations except those permitted by the protecting State". *The King v. Earl of Crewe* [1910] A.C. 588.

the House of Lords Edmund Burke condemned Hastings' action as an unjustified war, rather than the exercise of viceregal administrative authority, quoting from Vattel (Alexandrowicz 1967:22). Lord Salisbury likewise argued nearly a century later that French protection should not disturb Madagascar's previous commercial commitments to Britain, just as British protection of Zanzibar had left French treaty rights there intact. Citing Vattel he explained (Alexandrowicz 1973:75):

> In both States the Ruler remains in undisturbed possession of the throne, and retains the attributes of internal sovereignty, while the Protecting Power exercises the attributes of external sovereignty. In both the position of foreign Powers should be identical.[242]

In 1815, similarly, Austria, Russia, and Prussia agreed to place the external affairs of the Ionian Islands under British control, with considerable *de facto* British influence over the territory's internal affairs as well, yet the Powers continued to regard the Islands as "*un seul état, libre et independent*" (Lindley 1926:181-182).[243] Brunei was declared "an independent state, under the protection of Great Britain" under an 1888 treaty which relinquished the Sultan's external powers, granted Britain extraterritorial jurisdiction, and authorized British intervention in disputes over succession (*ibid.* 193). Later treaties transferred all civil and criminal jurisdiction to the British Crown, and empowered the

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[242]Thus in the case of the *Tunisian and Moroccan Nationality Decrees*, P.C.I.J. Series 8, No. 4 (1923), at 27, which defined "protection" as an agreed division of powers between the protector and the protected, the court ruled that the effect of French protection on these peoples' prior treaties with third states remained a question of international law. British commercial rights in Tunisia were preserved under French protection until France annexed the territory. When it annexed Korea in 1910, Japan took the precaution of formally abrogating the treaties of its former protectorate, as the U.S. had done in relation to Hawaii in 1898 (Lindley 1926:307-308).

[243]Discussed in *The Ionian Ships* (1855) 2 Spinks 193, Ecc.& Adm. 212. The Islands were later ceded to Greece and annexed.

British Resident to give "advice" to the Sultan, but it was never pretended that Brunei had ceased to exist as a sovereign state, and it has since regained its full independence. In 1909, Siam ceded its suzereinty of Kelantan to Britain, and in 1910 the Rajah of Kelantan placed himself under British protection, relinquished all his external powers, accepted a British Adviser and agreed not to make any leases or cessions without British approval. Nonetheless the Colonial Office advised the House of Lords in 1922 that Kelantan had remained a sovereign state.[244]

Treaties of protection necessarily implied a monopoly of cessions in the protector State, at least for the duration of the protectorate, and often included express terms for the pre-emptive right to purchase land (Lindley 1926:168). Such arrangements were also made by European states among themselves, however, without affecting the sovereignty of the grantor. For instance, Spain granted France pre-emptive rights in the Western Sahara, a right that France subsequently ceded to Germany; Belgium granted France pre-emptive rights in the Congo; Britain and France granted each other reciprocal pre-emptive rights to territories they claimed along the Zambezi River (*ibid.* 225). Similarly, Siam and China both granted rights of pre-emption to European states without a loss of their sovereignty or international personality.[245]

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[244] *Duff Development Co. v. Kelantqn Government*, [1924] A.C. 797. The same issue arose in *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149 and in *Worcester v. Georgia*, 31 U.S.(6 Pet.) 515 (1832). In *Worcester*, it was held protection limits the sovereignty of the protected state only to the extent of the express terms of the relevant treaty.

[245] Territorial rights obtained under a lease or treaty of protection could not be re-assigned or sold without the consent of the original parties. Britain obtained the confirmation of the Sultan of Zanzibar in 1892 for its assignment of the Benadir coast to Italy, for example; Russia obtained the consent of China for its assignment of Port Arthur to Japan in 1905 (Lindley 1926:238-239).

C. PROTECTORATE AND "SPHERE OF INFLUENCE".

Protectorates should be distinguished carefully from "spheres of influence". Spheres of influence can be traced back to the Treaty of Tordesillas between Portugal and Spain (1497), but were only subjected to formal procedural requirements in the *Berlin Act* (1885). These were European conventions. They were created only by agreements among European powers *inter se*, although Aboriginal rulers sometimes acknowledged them in their treaties of protection, or by granting rights of pre-emption to their territories (Lindley 1926: 207). Examples include the 1763 Treaty of Paris, dividing British and French claims in North America; a 1824 British-Dutch treaty dividing claims to Indonesia; Russian agreements to respect British interests in Afghanistan; the 1878 Berlin Convention, dividing the interests of the Great Powers in the disintegrating Ottoman Empire; and subsequent British-German treaties concerning their claims in Africa (*ibid.*, 208-209, 224). Ordinarily, the creation of a sphere of influence affected only the right to assert sovereignty and dominion over the territory, not the right to engage in private commerce with the local population (*ibid.* 211-212).[246]

The creation of a sphere of influence did not directly affect the rights of third States, although their intrusion might be regarded as unfriendly, nor did it affect the rights of the Aboriginal population and local rulers of the territory (Lindley 1926:213-217). Thus, following its 1886 treaty with Portugal concerning East Africa, Germany assured the Sultan of Zanzibar that this did not affect his suzereinty there; Persia continued to function as an independent sovereign State despite British-Russian agreements on

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[246]Protectorates and spheres of influence should be distinguished, in turn, from leases of territory, which confer rights to occupy, use and administer land without affecting the internal *or* external sovereignty of the country as a whole. European Powers leased territory from each other, and from non-European rulers. Britain leased Cyprus "with full powers" from Turkey in 1878, just as it leased the Benadir coast from the Sultan of Zanzibar in 1887-1890, agreeing to continue to govern it under the Sultan's flag (Lindley 1926:238-243).

spheres of interest in Persian territory (*ibid.*,211, 220). When Portugal asserted title to the territory which lay between Angola and Mozambique on the basis of treaties with France and Germany, Britain ignored her claim and made treaties of protection with the Mashona and Matabele in what is now Zimbabwe (*ibid.* 213-214) After Germany, Italy, and Belgium had recognized British interests in the upper Nile by treaty, Britain "leased" a portion of this territory to Belgium's King Leopold, but France argued that Britain had nothing to grant and the Belgians withdrew.[247] Britain invaded Afghanistan and forced a treaty of protection on the Emir in 1879, to prevent him from entering into a treaty with Russia--but restored Afghani independence by a second treaty in 1921 (*ibid.* 201).

A sphere of influence was therefore merely the recognition by European powers, among themselves, of a geographic separation of their activities in an attempt to minimize competitive confrontations. Although clearly this had an effect on non-European nations, since it limited which European powers were willing to deal with them diplomatically and commercially, it could not have affected their sovereignty, under classic principles of international law. Europeans' agreements among themselves on their respective "spheres" fell under the maxim *pacta tertiis nec nocent nec prosunt*—that is, non-binding third-party treaties. To hold otherwise would be to accept the racist doctrine *that Europeans alone* determine the content of international law. But this is exactly what transpired between the mid-19th and early 20th centuries, until it was expressly rejected by the International Court of Justice. [248]

C. FROM PROTECTION TO PARAMOUNTCY.

As Lindley (1926:182) has explained, Europeans gradually changed the classic

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[247]The situation was different in 1898 when British and French troops occupied the countryside around Fashoda, and the two countries agreed by treaty to divide the territory they had "conquered" from the Mahdi.

[248]In its *Western Sahara* advisory opinion, (1975) I.C.J Reports, p. 3, at 56, explaining the limited effect of European treaties creating spheres of influence.

protectorate into a subterfuge for acquiring territory by slow degrees. He described this process in the following terms:

> The sovereignty is to be acquired piecemeal, the external sovereignty first. This is generally patent; but the use of the term 'protectorate,' which still is consistent with the retention of a considerable amount of internal sovereignty by the protected ruler, is calculated to render the first step in the process more palatable to the inhabitants of the territory that is being acquired or controlled, and less obnoxious to opponents of Colonial expansion of the acquiring State.

In relation to Indochina, a French Foreign Minister explained in 1886 that the treaty of protection was merely a foothold, which would lead inevitably to annexation (*ibid.*, 192, authors' translation):

> Later, as our authority grows settled and the influence of our civilization penetrates farther into the country placed under our tutelage, we will be led to the exercise of our powers in some number of fields, in justice, education, taxes, etc. But all of these developments must be achieved gradually, without disturbing or offending the customs of the populations for whom they are destined.

While the end result was henceforth to be absorption, the actual terms of protection treaties continued to vary widely. Britain assumed only the external sovereignty of some Somali tribes in 1886, for instance, but required others to agree to act only on the "advice" of the Crown with respect to "peace, order and good government [...] and the general progress of civilization" (*ibid.* 184). In Western and Southern Africa British protection expressly included authority to settle inter-tribal disputes. Only in very unusual cases, such as the 1890 British treaty with the Nyasa and Wyanasa, was the ultimate object expressed from the outset, that is, the transfer of "all sovereign rights [...] without any reservation whatsoever" (*ibid.* 186).

The closest parallels to the diplomatic history of North America can be found in

India, where more than 600 "Aboriginal states" eventually placed themselves under British protection by treaty (Lindley 1926:196-198). These treaties typically transferred all external sovereignty to the British Crown, together with extraterritorial jurisdiction over British subjects, and authority to intervene in disputes over heirship among Aboriginal rulers. Until the Indian Mutiny suggested the wisdom of a more cautious policy, Britain repeatedly *annexed* these protectorates on various pretexts such as misrule (as in the cases of Coorg in 1834, and Oudh in 1856), or failure of the Aboriginal ruler to produce a proper heir (Sattara in 1849, Nagpore in 1853 and Jhansi in 1834), claiming a kind of right of escheat. British officials began to read all Indian treaties together as a whole, applying the most restrictive clauses to all Aboriginal rulers as a class, regardless of what had been agreed with them individually (*ibid.*,199). Significantly, the *Interpretation Act 1889* replaced the term "alliance" with "suzereinty" in the context of these protectorates, and jurists began to refer to Britain's position as one of "paramount supremacy" rather than protection and defense.[249]

Britain likewise assumed full jurisdiction over persons residing in its African protectorates by an Order in Council, and applied the *Copyright Act* to all of its protectorates in 1911 (Lindley 1926:204205).[250] In Kenya, the Protectorate was placed under the same Governor and Legislative Council as the Colony, inviting a merging of the legal status of the two. Following the Versailles Conference, protectorates were largely treated in practice as part of the protecting States, for example in the 1919 *Air Navigation Convention*.

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[249]**See,** for example, *Stratham v. Stratham and Gackwar of Baroda* , 105 *Law Times* 991, 992.

[250]In a pre-war exchange of notes between Britain and Persia, it was agreed that all prior British-Persian treaties should apply to British protectorates, since (in the view of the Persian government), Britain actually enjoyed extensive internal powers, not merely the possibility of "intervention diplomatique" (Lindley 1926:205).

E. PARAMOUNTCY AND PROPERTY RIGHTS.

During the process of transition, at least, the protected people retained full rights to their property. Referring to Bechuanaland, in *The King v. Earl of Crewe*,[251] Lord Justice Kennedy concluded:

> [...] In this Bechuanaland Protectorate every branch of such government as exists--administrative, executive and judicial–has been created and maintained by Great Britain. What the idea of a Protectorate excludes, and *the idea of annexation* on the other hand would include, is that absolute ownership which was signified by 'dominium' in Roman law, and which, though perhaps no quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country.

Sovereignty in the regulatory sense, but not property, could accrue to the protecting Power gradually by exercise and prescription. However, if sovereignty included the power of adjudication, it could be used to interpret the property laws of the protected country to the benefit of the protector–or even to determine that protected peoples enjoyed no rights of property under their own laws, as the Privy Council reasoned in the case of *In re Southern Rhodesia* in 1919.

In re Southern Rhodesia[252] involved some peculiar facts. The King of Matabeleland and Mashonaland (Zimbabwe) had agreed not to cede any territory without British consent, under an 1888 treaty of protection. When Portugal made conflicting territorial claims backed by France and Germany, the King (then Lobengula) obtained British aid, although the British authorities insisted throughout the affair that Lobengula was an "independent Ruler". Britain subsequently threw off all pretenses of protection, and annexed "Southern Rhodesia" by right of conquest in 1894. To the question of whether individual land rights survived the annexation, the Privy Council was at a loss to

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[251] [1910] A.C. 588, 619. Our emphasis

[252] [1919] A.C. 211.

discover the nature of individual rights under Mashona or Matabele law, although it conceded, significantly, that such rights–"hardly less precise than our own"–did exist under many African legal systems. In Southern Rhodesia, the Crown was simply filling a vacuum with its system of fee-simple grants and Aboriginal reserves, but this might not apply elsewhere. The question of whether such a vacuum actually existed was one of *fact*, not law.

In *Amodu Tijani v. Secretary of State for Nigeria*,[253] the British Privy Council had occasion to interpret an 1861 treaty ceding Lagos to the Crown in an effort to shield it from Dahomeyian slavers. Although the treaty of cession was silent with respect to private property, the Privy Council concluded that its effect was limited to jurisdictional matters. "A mere change of Sovereignty is not to be presumed as meant to disturb the right of private owners." Thus the Crown, which sought to secure lands in Lagos for public purposes, bore the burden of proof that it had obtained title by treaty, and the treaty's silence was to be read against the Crown's claims.

It should also be stressed that the Law of Nations, as recognized by British courts, required *possession* before a change of sovereignty could affect the rights or status of the population concerned. Hence, when Britain restored certain parts of Nova Scotia to France by treaty of cession in 1667, the nationality of the Europeans residing in that territory did not change until French officials arrived and physically took control of the government more than a year later. So ruled Lord Stowell in *The Fama* (1804), 5 C. Rob. 106, 165 E.R.714.

F. FROM VOLUNTARY CHOICE TO "SACRED TRUST".

At the same time that the Great Powers were imposing direct rule on their former protectorates, they began to invoke the principle of a "sacred trust of civilization" to justify their actions. In 1833, the instructions accompanying the *Government of India Act* recommended that the system of criminal laws adopted by the British viceregency should

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[253] [1921] 2 A.C. 399.

"be formed with especial regard to the advantage of the Aboriginals rather than of the new settlers" (Lindley 1926:331). A special Parliamentary committee later recommended applying the same principle to the rest of the British Empire (House of Commons 1836). Trusteeship gained broad support at the Berlin Africa Conference in 1885, and Article 6 of the *Berlin Act* subjected the future development of the Congo Basin to the adoption of measures for "protection of the indigenous populations and the improvement of their moral and material conditions of existence". Britain refused to recognize Belgian territorial claims to the Congo, until it was satisfied that this duty had been met (Lindley 1926:325, 348-350).

Following the Great War, the duty of protection in the Berlin Act was extended to all of Africa by Article 11 of the 1919 Convention of St. Germain-en-Laye (*ibid.* 334; Lugard 1922).[254] It was also implied in the system of mandates established under Article 22 of the Covenant of the League of Nations, which made the "tutelage" of vulnerable peoples a "sacred trust of civilization". League Mandates *per se* were created and defined by agreements between Mandatory Powers and the League, and varied somewhat in their exact terms. Thus, for example, the British Mandate for the Cameroons spoke of "peace, order and good government," respecting Aboriginal rights, and to taking "Aboriginal laws and customs" into account in framing local laws. Mandated territories were conceived as incorporated fully, albeit temporarily, into the administering states, with full powers of sovereignty (*ibid.* 266-267). The termination of a League Mandate would necessitate the consent of both the Mandatory and the League, but not necessarily the peoples living in the territories concerned. The duty of administering States to respect the principle of self-determination by emancipating "non-self-governing territories" was not recognized

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[254] In the same treaty the Principal Allied and Associated Powers also repealed the principle of notification in the Berlin Act, implying (at least) a rejection of the positivist pretence that the Powers had power to dispose of territory without seeking the consent of the inhabitants (Lindley 1926:242).

until 1960.[255]

Although the European Powers placed only a small portion of their Colonies and protectorates under the League's Mandate system, they continued to endorse the general principle of trusteeship, and expanded it in Article 73 of the United Nations Charter. Under Article 73, all Member States recognize that the "the interests of the inhabitants" of all of the territories they control "are paramount," and

> accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement [.]

The International Court of Justice has suggested that this duty takes precedence over any prior, inconsistent treaty obligations or claims; it has risen to the status of *jus cogens*.[256] Unfortunately it has only been applied to territories which Member States

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[255]General Assembly resolution 1514(XV) of 14 December 1960. When he first broached the idea of Mandates, South Africa's General Jan Smuts argued that Mandatory Powers should not be colonial empires and should not benefit from their Mandatory status. Most of the League Mandates were nevertheless given to Britain, France and Belgium; the rest went to South Africa, Japan, Australia and New Zealand (Lindley 1926:247).

[256]*Legal Consequence for States of the Continued Presence of South Africa in*

themselves identify as "non-self-governing". Although other peoples who are "geographically separate and distinct ethnically and/or culturally" from the countries administering them, and suffer from "subordination" in law or in fact, are *prima facie* covered by Article 73,[257] their rights are continually denied by Member States who classify them as *minorities* or *indigenous*, rather than as *peoples* (Barsh 1994; Kingsbury 1992).

G. RECOGNITION IN BRITISH JURISPRUDENCE.

The final step in disenfranchising Colonized peoples was adoption of a constitutive theory of international personality. Under this theory the legal existence of a State was no longer based on objective criteria such as the existence of an effective government or an existing treaty relationship, but on the whim of European Powers. This change can be traced to 19th century British decisions, beginning with *Taylor v. Barclay*,[258] in which the learned judge resolved the question of whether Guatemala was a sovereign independent state, by asking the Foreign Office whether it was recognized as such by Her Majesty's Government. The inconsistency between this approach and the natural-law reasoning of Lord Stowell in *The Helena* (1801) was directly challenged in *The Charkieh* (1873),[259] which held that the Khedive of Egypt was not the ruler of a sovereign state. In the opinion of Her Majesty's Foreign Office, he was merely an Ottoman governor, but the judge in admiralty recalled that, in *The Helena*,

> the Court proceeded upon the principle that a nation with whom we had regular treaties was de facto acknowledged without a formal recognition to have what jurists have termed the right of a political personality.

This implies that judges need not inquire into the origins, form, or character of a

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Namibia, (1971) I.C.J. Reports, p. 16, at 31-32.

[257]Principle IV, General Assembly resolution 1541(XV) of 18 December 1960.

[258] (Ch. 1828), 2 Sim. 213, 57 E.R. 769.

[259](1873), L.R. 4 Adm.&Ecc. 79.

state, but only as to whether in fact it conducts its own foreign relations. Until 1840, Egypt was emerging gradually from under Ottoman control and conducting diplomacy directly with European states. In that year, however, the Great Powers agreed to stabilize the ailing Ottoman Sultanate by, *inter alia*, recognizing its sovereignty over Egypt (*ibid.* at 82-84). *The Charkieh* court believed this fact had stripped Egypt of its statehood, consistent with the advice received from the Foreign Office.

The Charkieh thus stands for the principle that the Great Powers determine, from time to time, who is a state. Historical practice and treaty relationships are no guide. This is underscored by the court's parenthetical comment that "feudal relations," as such, do not prevent the Dukes of Burgundy and Normandy, German Princes, or the King of the Two Sicilies from being treated as independent sovereigns (*ibid.* 77-78). The difference between these European subordinate princes, and the Khedive of Egypt, could only be their recognition by the Great Powers.

This positivist tendency in British jurisprudence became plain in *Foster v. Globe Venture Syndicate Ltd.*,[260] in which Farwell, J. considered it the "proper course" to ask the Foreign Office whether the Suss tribes were part of Morocco or an independent state–and accept the reply as "conclusive". "Sound policy appears to me to require that I should act in unison with the Government on such a point." Likewise in *The Gagara*,[261] Lord Justice Bankes accepted as "conclusive" of the statehood and sovereign immunity of Estonia, a Foreign Office statement that Estonia had been recognized "provisionally" by the Paris Peace Conference.[262] With this the British courts ceased to inquire at all into the actual facts of a claim to international personality, relying entirely on the policy of the government of the day. By this means, nations already recognized by treaties were deprived of their legal status *ex post facto*, because London no longer wished, as a matter

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[260][1900] L R. 1 Ch. 811, 814.

[261][1919] L.R. Prob. 9S, 101-102.

[262]**See also**, *Mighell v. Sulton of Johore*, [1894] 1 Q.B. 149, at 159 to which Lord Bankes referred in judgment.

of policy, to bear the burdens of its former treaty commitments.

H. RACISM AND INTERNATIONAL LAW.

The constitutive theory led to two principal international arbitration decisions upon which Commonwealth jurists now rely to deny the international personality of indigenous peoples. In the *Cayuga Indians (U.S.–Britain) Arbitration*, a binational panel ruled that a "tribe is not a unit of international law".[263] Rather, the panel concluded:

> So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign within whose territory the tribe occupies the land, and so far only as that law recognizes it.

Similarly, in the *Island of Palmas* arbitration, Judge Max Huber ruled that Dutch treaties with the indigenous inhabitants of the Island were ineffective to defeat U.S. title, derived from the Spanish "discovery" of the territory.[264] The Dutch treaties were "not, in the international law sense, treaties or conventions capable of creating rights such as may, in international law, arise out of treaties."

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[263] *Cayuga Indians (U.S.–Britain)* (1926) 6 *Reports of International Arbitral Awards* 173, 179. The issue was whether the United States was obliged to pay annuities under a 1789 treaty to the Cayuga Indians residing in Canada as well as those living in New York. Britain argued that the Cayuga Nation, as a whole, had been recognized by treaty, and the annuities ran in favour of all citizens of the Nation regardless of their residence. The U.S. successfully argued that the treaty was nothing more than a personal promise to those individual Cayugas who remained on the U S. side of the border.

[264] *Island of Palmas* (1928) 2 *Reports of International Arbitral Awards* 831, 856; summarized in *American Journal of International Law* 22:735, 898 (1928). On the legal effects of discovery, **see** *Status of Eastern Greenland*, P.C.I.J. Ser. A/B, No. 53 (1933), at 47.

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

The seminal Canadian ruling, *R. v. Syliboy* [1929][265] is a product of the same era and reflects the same thinking. In 1985, the Supreme Court of Canada directly confronted this decision which stated that

> 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' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it (at 313-14).

Chief Justice Dickson commented:

> It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada (at 399).

The cases destroyed the colonial law's racist foundation for denying the interpretation of treaties. Although the Supreme Court of Canada has now held that Indian treaties are enforceable, and constitutionally entrenched by section 35 of the *Constitution Act, 1982*, it continues to characterize them as "sui generis," rather than treaties in the international law sense.[266] The courts continued to denigration of treaties

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[265][1929], 1 D.L.R. 307. Apart from its racist stereotypes of tribal peoples and application of 19th century law to an 18th century treaty, *Syliboy* was the decision of a county court judge *pro tem,* and scarcely merited the deference it enjoyed from judges and scholars. Similarly, **see** *Pawis v. The Queen* (F.C.C. 1980),102 D.L.R. (3rd) 602, paraphrasing *Syliboy.*

[266] *Simon v. The Queen* [1985] 2 S.C.R. 1025; **also**

as United Kingdom or Canadian treaties, but not international law. This continued the systemic racism as a living legacy of the colonial era.

PART SIX

POST-COLONIAL INTERNATIONAL LAW.

A. JURISPRUDENCE AND POLITICS

If, as Alexandrowicz (1967, 1973) maintained, the secularization and refinement of the Law of Nations in the 16th to 18th centuries can be attributed to Europeans' growing practical experience in diplomacy with the non-Christian world, European experience in the Americas was certainly part of that process. "Indian treaties" contributed to the emergence of an international order based on promises and consent, rather than the order of nature, or religious ideology or ethnicity of peoples. What, then, remains of the supposed distinction between indigenous Americans and other non-European peoples, with respect to the interpretation and significance of their treaties? No such distinctions were made at the time these treaties were negotiated. Treaties of protection were just as widespread in Asia, Africa and the Middle East as in the Americas, the natural response to an onslaught of competing, aggressive European military powers which left most Aboriginal nations with little choice but to attach themselves to one of the antagonists. The price ultimately by the victims of this "protection racket" was a loss of independence, as Europeans used their role as protectors to gain decisive military superiority over their clients.

European military power reached its zenith after the Congress of Vienna (1815) brought the Napoleonic wars to an end, stabilized interstate relations within Europe itself, and thus freed European empires to direct all of their military power outwards towards their overseas claims and possessions. Central to the regional rapprochement was the establishment of a self-appointed club of European states to maintain a peaceful balance of power, and serve as interpreter and enforcer of international law. The institution of the Great Powers was analogous to the formation of Mafia "commissions" in the 1920s, with the purpose of preventing wasteful competitive bloodshed between Mafia "families". The main task of the commission was to allocate territory and business interests among "families," in accordance with their rank and physical power, so that each of them was satisfied with its own share, and saw no gain from attacking the others. Naturally, this relied on frequent renegotiation and occasional "enforcement" actions against dissidents.

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

The community was exclusive and self-defined; newcomers had to fight their way in–literally. Like Mafia commissions, the Vienna club made its profits from selling protection and monopolizing trade, and it all worked as long as membership in the club was valuable and restrictive. It was in this environment that 19th century European jurists began to justify a European hegemony, by denying the capacity of other peoples to join the "club".

Although there were some regional and national differences in the practice of treaty-making, they do not justify excluding any group of peoples from the benefits of legal personality. African rulers rarely sent embassies to Europe or maintained diplomatic bureaucracies, which were comparatively commonplace in the Muslim world and south Asia. As a result, Africans were less able to influence European governments or public opinion directly, and were thus–in practical terms–vulnerable to a greater degree than Asian allies and protectorates. Nonetheless, they made similar treaties, and have re-emerged from Colonialism, just as surely as Asians. Likewise, Portuguese treaties in Africa and Asia were concerned with questions of sovereignty, frequently employing (as did Spain in Latin America) the language of infeudation. By contrast, Britain, France and Holland were preoccupied with trade, and developed their early spheres of influence through parastatal trading companies and strictly commercial treaties (Alexandrowicz 1973:15). Surely, the Old World possessions of Portugal were no more "extinguished" by their treaties, than the possessions of other European powers.

All European powers, everywhere, used treaties as a subterfuge to gain limited admission to foreign territories, while they created strategies to disregard their treaty obligations. The Colonial system, as it existed on the brink of the First World War, had evolved slowly from a system of competing "protection rackets," in which non-European nations were forced to place themselves under one European overlord to shield themselves from the vagaries of the others. Gradually, each of the protected nations found itself more dependent upon, and militarily vulnerable to its "protector". Those that rebelled, like Zimbabwe and Madagascar, were "conquered" and annexed. Those that

suffered without rebellion, were treated by European jurists as if they, too, had been conquered. All were deprived of the *exercise* of internal sovereignty, as a practical matter, by the 1910s. Meanwhile, the club of European states used their dominant military power–soon to be used against one another with devastating results–to redefine public international law as nothing more than *their collective will*. Inconsistent obligations to non-European societies, recorded in nearly a thousand treaties made between the 16th and late 19th centuries, were ignored on the pretext that none of the non-white parties had legal capacity to make them.

As Charles Alexandrowicz (1973:7) has observed, it is ironic that the scramble for African territory was regulated by treaty, at a time when European jurists were increasingly denying the sovereign equality of nations. Europeans rarely claimed rights over Africans by conquest or mere occupation, without some instrument of cession from the Aboriginal rulers (*ibid.* 12) although, as we have seen, this often led to complex questions of the authority of particular rulers to grant concessions. At the same time, the understanding reached in 1885 at Berlin, freeing European powers to annex their Colonies regardless of their underlying treaty commitments, created a profound contradiction and signaled the rise of a new, oligarchic international legal order. Under the former regime, from the 1500s to 1885, treaties created law, and all treaties were legally equal. After Berlin, Europeans arrogated power to define international law through compacts among themselves, disregarding the ancient Roman maxim *pacta tertiis nec nocent nec prosunt*: third-party treaties are neither harmful nor binding.

The explicit justification for this European *coup* was the "sacred trust of civilization," unanimously recognized as a binding obligation by the Berlin Africa Conference itself, then re-embodied in the League of Nations' Mandate system a generation later. Why did Europeans feel the need to justify what they clearly had the *power* to do–and plainly continued to do without regard to the consequences for the peoples who were affected? Perhaps it was the feeble echo of a guilty conscience; perhaps a way of strengthening public support for increasingly costly and bloody

overseas adventures in a period of growing social activism, trade unionism, and questioning of the established aristocratic order; perhaps a reflection of the fact that European Powers' own populations were beginning to demand government accountability and "trust" instead of monarchical or corporate paternalism. Whatever its true cause, the "sacred trust" justification was the basis on which protectorates were annexed unilaterally in violation of treaties, and it may be asked why it has been discharged in some regions of the world but not in others. Since *all* non-white nations and peoples were Colonized under the same pretence of Europeans' superiority, why are only *some* of them entitled to be free? Are some non-white peoples inferior to the others?

B. DECOLONALIZATION OF TREATY LAW

Alexandrowicz (1973:97) characterizes as "absurd" the widespread argument that treaties with African nations were merely personal, not political or international in character. Not only did they contain a variety of provisions relating to sovereignty (war, trade, protection, and jurisdiction), they were in a *form* clearly distinct from private-law deeds to land, easements and mining concessions made to Europeans and European states.

The same conclusions can be drawn in Canada, as appears from even a superficial review of the hundreds of documents contained in *Indian Treaties and Surrender*s. Most of these instruments are deeds that use the familiar common law "give/grant" formula for realty transactions. They must not be confused with treaties securing the protection of the Crown, some of which contain cessions of territory as well. A cession transfers an agreed quotient of sovereignty while deeds, regardless of their authorship, do not affect jurisdiction over the lands concerned. It was quite possible for Canada's first nations to sell land, without relinquishing sovereignty. In Canada, however, the Crown has insisted on having it both ways–interpreting deeds as cessions and cessions as deeds, so Aboriginal people were deemed to have relinquished property and sovereignty in *either* case.

The International Court of Justice's judgment in *Right of Passage over Indian Territory* (1960) case marked the beginning of a new era in international treaty law. Reflecting the post-war decolonization movement, it created post-colonial law. Together with the world court's *Namibia* (1971) and *Western Sahara* (1975) decisions, and the 1970 *Vienna Convention on the Law of Treaties*, it represents the rejection of Eurocentrism in international law in favour of a renewed universalism with respect to legal personality and treaty enforcement. This transformation has not yet been reflected in Canadian domestic practice.

1. The Validity of Indigenous Treaties Affirmed.

Right of Passage over Indian Territory [267] involved India's efforts to isolate three landlocked Portuguese Colonial enclaves, established by the Treaty of Poona (1779) with the Maratha Confederacy. Portugal challenged India's blockade under general principles of international customary law, and under the terms of the treaty itself. A threshold question was the validity of the treaty, which India argued was either invalid under Maratha law,[268] or not a treaty at all. The court ruled:

> that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing on the Indian Peninsula, should not be judged on the basis of practices and procedures which have since developed only gradually.[269]

It was sufficient that the Marathas viewed the treaty as binding upon them when it was originally made. This tacitly rejected Judge Huber's reasoning in the *Island of Palmas* case, insofar as it referred to the system of international law and practice as it existed in 1779, not in the years following the Berlin Africa Conference.

The judges also applied the "principle of intertemporal law" (*lex retro no agit*) to the interpretation of the terms of the Poona treaty. The treaty gave Portugal authority to occupy the enclaves in question, and to put down any revolts. Portugal construed this as a cession of sovereignty and dominion, but the court observed that the Maratha text of the

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267 (1960) I.C.J. Reports, p. 6.

268 India also argued unsuccessfully that the Marathas lacked power to engage in treaties without the consent of the Moghul emperor.

269 *Ibid.* at 37. In a separate opinion, Judge Moreno Quintana defined a treaty as "the expression of a common agreement creating mutual rights and obligations between two legal persons recognized as such in their international relationships," and agreed that the determinative fact was the parties' intention to be bound at the time of the treaty (*ibid.* at 91. There was one dissenter on this point (Fernandes), at 125-126.

treaty used a term (*jagir*) that implied a leasehold or "revenue tenure" rather than full ownership.[270] Portugal's express authority to put down revolts was understandable, the judges observed, because the enclaves were still part of Maratha territory, and Portugal was acting as a Maratha vassal.[271] It was necessary to construe the grant by the Marathas as narrowly as possible, moreover, since "restrictions on the independence of States cannot be presumed".[272] Although the treaty had not granted full sovereignty, the Marathas and, as their successor, the British Raj, had always allowed Portugal free access to the enclaves, hence a right of passage may have accrued by prescription.[273]

In its 1975 advisory opinion on the *Western Sahara*, the International Court of Justice found it unnecessary to rule on "the legal value of agreements between a State and local chiefs".[274] But the court had no difficulty agreeing that an organized tribal people, even if nomadic, enjoyed legal title to its territory, and could not be annexed on the pretence of *terra nullius*.

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[270] *Ibid.*, at 92 (Moreno Quintana).

[271] *Ibid.*, at 38.

[272] *Ibid.*, at 91 (Moreno Quintana), citing *The Lotus*, P.C.I.J Series A, No. 10 (1928), at 18. This is analogous to the rule that ambiguous expressions in a treaty are to be given the narrower of two plausible interpretations. *The Mavrommatis Concessions*, P.C.I.J. Series A, No. 2 (1924), at 19.

[273] This was the main point on which Judge Moreno Quintana disagreed. He argued that subsequent hostilities between India and Portugal had terminated any claims arising from the treaty, in accordance with the *rebus sic stantibus* principle. *Ibid.*, at 93. In any event, he feared that upholding Portugal's claims of access to its colonies would "fly in the face of the United Nations Charter" by protecting colonialism. *Ibid.* at 95.

[274] (1975) I.C.J. Reports, p 3, at 39-40, 43; **also** at 85-86 (separate opinion of Ammoun).

2. The Form and Parties to a Treaties.

The distinction between treaties of a sovereign nature, and those of a supposedly "personal or contractual nature," reflected situations peculiar to the institutions of monarchy. Princes typically enjoyed a dual capacity, as owner of a personal estate, and as "stateholder" for the government of the nation, making it necessary to ascertain whether a particular engagement applied to the estate alone, or to the nation. An alliance was said to be either "real" or "personal," depending upon whether it was made with a royal in one capacity or the other (Wheaton 1836:52-53). Monarchy also made it necessary to specify whether treaty obligations were to be undertaken by the reigning monarch alone, or to extend to his "heirs and successors," which could not be presumed but had to be expressed.

The difficulties inherent in this situation were illustrated by the history of King Leopold, who wore two crowns as the King of Belgium and the King of the Congo. When he left the Congo to Belgium in his will it was annexed–but with an understanding that the King had transferred only what he had, which was sovereignty, not the ownership of the soil (Lindley 1926:167).

It also bears note here that European treaties in Asia and Africa were frequently made in the name of a trading company, or the governor or viceroy of a nearby European settlement, rather than in the name of the European sovereign (Alexandrowicz 1967:165). There was no pattern in this practice, other than the dictates of convenience; if an Asian or African ruler insisted, European negotiators used the name of their king, or obtained explicit plenipotentiary authority before concluding the deal. Like British diplomacy in North America, European diplomacy in Asia typically observed Asian forms and ceremonies (*ibid.* 191-216), which implied reciprocal recognition of Asian states' legal status and rank. Diplomacy with Asian rulers was conducted in Asia, furthermore, either in Asian rulers' capitals or in European outposts; it was rare for Asian rulers to send envoys to European capitols, although typical for them to entertain European embassies at home. In North America as well, British governors entertained Indian leaders at home

in Halifax, Boston, or Ottawa, while few Aboriginal embassies traveled to London (see, however, Bond 1974, and Corkran 1967).

C. TREATY OBLIGATIONS UNDER MUNICIPAL LAW.

Municipal laws are not a defense against treaty obligations, and municipal law is not relevant to determining whether a treaty is valid or in force under international law–unless it goes to the question of the constitutional validity of a party's original consent to be bound (Elias 1974:45).[275] As the International Court of Justice explained in *Elettronica Sicula Sp.*A. (ELSI),[276] international law and municipal law are independent domains, and the latter cannot affect the validity or meaning of obligations created by the former. Thus although municipal legislation may block the municipal execution of a treaty, and deprive the other parties of municipal remedies, it has no power to extinguish rights or remedies in international *fora*.

Article 26 of the 1970 Vienna Convention on the Law of Treaties expresses a fundamental international consensus that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[277] This implies, among other things, the parties' duty to take all necessary steps to give their treaty effect under domestic law. It has long been recognized that a party cannot avail itself of its own wrongful acts to excuse itself from its treaty obligations.[278] If the parties have a duty to

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[275]This rule is also reflected in Article 46 of the Vienna Convention on the Law of Treaties.

[276](1989) I.C.J. Reports, p. 15, at 51.

[277]Emphasis supplied. The requirement of good faith is also found in Article 18. For sources in case law, **see** *The North Atlantic Fisheries Case,* (1910) 9 *Reports of International Arbitral Awards* 188, and *U.S. Nationals in Morocco*, 1952 I.C.J. Reports, at 212.

[278]*Factory at Chorzow* P.C.I.J Series A , No. 9 (1927), at 31. **Also** *see* Articles 61(2) and 62(2)(b) of the Vienna Convention on the Law of Treaties, applying this rule

effectuate their treaties, domestically, it follows logically that their failure to do so constitutes a *breach*, rather than (as Canadian courts have often reasoned) a defense (Elias 1974:45).

It is also appropriate to recall here the maxim *pacta tertiis nec nocent nec prosunt*, concerning the legal effect of subsequent treaties with third parties. Third-party treaties cannot supersede commitments previously made to others, which remain in force, nor can supercession be accomplished by enacting municipal legislation. In North America, for example, the Migratory Birds Convention, NAFTA, and other regional arrangements should not disturb treaties previously made with "Indian" nations, regardless of the express intent of the agreements themselves or of the U.S. and Canadian implementing legislation. Once again, the effect of municipal law may be to deprive the parties of any municipal remedies, but their underlying treaty rights in international law are not extinguished thereby.

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to the defenses of changed circumstances and supervening impossibility of performance.

1. Defenses based on Changed Circumstances.

Contemporary international law recognizes the defense of "changed circumstances" (*Omnis conventio intelligitur rebus sic stantibus*)[279] but regards it with disfavor (Elias 1974:128).[280] A "codification of existing customary law" on this doctrine[281] can be found in Article 62 of the *Vienna Convention on the Law of Treaties*, which states:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a grounds for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

The International Court of Justice has underscored the words, "radical

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[279]"Every treaty contemplates that things will remain as they stand." This principle is also referred to as *clausula rebus sic stantibus*, or "things remaining unchanged clause," because many early writers on the Law of Nations argued that such a clause should be implied in the text of every treaty.

[280]The Permanent Court repeatedly declined to apply this doctrine to treaty disputes. *E.g., Free Zones of Upper Savoy and District of Gex,* P.C.I.J. Series A/B, No. 46 (1932) at 156-158, and Series C, No. 58, at 463-478; *Denunciation of the Sino-Belgium Treaty*, P.C.I.J. Series C, No. 16, vol. 1, at 52; *Tunisian and Moroccan Nationality Decrees*, P.C.I.J. Series C, No. 2 at 187-188.

[281]*Fisheries Jurisdiction (U.K. v. Iceland)* , (1973) I.C.J. Reports, p. 3, at 18 paragraph 36.

transformation".[282] The change must not only go to directly to the aim and purposes of the treaty, but be of so fundamental a character that further implementation of the treaty would have a completely different effect than was originally contemplated. Even then, the parties have only a right to "call for termination," which is a justiciable matter, and by no means automatically granted.[283]

It should be noted that "changed circumstances" ordinarily cannot be invoked in connection with boundary treaties,[284] on the theory that there is a higher purpose to be served by the permanence and security of national frontiers. If a boundary itself cannot be revised, it would seem to follow that the obligations assumed by the parties in exchange for settling their boundary would also be unaffected by later changes in surrounding circumstances. Hence a treaty of cession, transferring a portion of territory and fixing its borders in exchange for aid and protection, may be wholly immune from *rebus sic stantibus* arguments on either side. In this context it is noteworthy that, during the debate on the draft text of the Vienna Convention, some States questioned the exclusion of boundary treaties from *rebus sic stantibus*, because many past territorial treaties had been of an unequal, coercive or Colonial nature contrary to Article 1 of the Charter.[285] Although other States shared this concern, they argued that unequal treaties are simply void *ab initio*, on account of their inequality, and not because of changed circumstances.

2. Impossibility of performance.

Closely related to *clausula rebus sic stantibus* is the defense of supervening

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[282] In the *Fisheries Jurisdiction* case, *ibid.* at 21.

[283] *Ibid.* at 21. **See also** Article 65 of the Vienna Convention.

[284] Article 62(2)(a) of the Vienna Convention; *Temple of Preah Vihar* (1962) I.C.J. Reports, at 34.

[285] *United Nations Conference on the Law of Treaties, Second Session, Official Records*, A/CONF.39/12 (1969), at 117-118.

"impossibility" of performance, expressed in Article 61 of the Vienna Convention as follows:

> 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensible for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

This contemplates situations of physical impossibility, not merely of extreme hardship or expense.[286] It is also noteworthy that the Vienna Conference on the Law of Treaties chose not to refer, in this Article, to the extinction of the legal personality of a party as an example of impossibility, since state succession would ordinarily prevent a lapse in the continued execution of treaties.[287]

As was the case in invoking the defense of municipal law, a party cannot avail itself of its own wrongful acts to avoid its obligations. A party cannot rely on a change of circumstances brought about by its own actions, or on its own destruction of an object essential for the execution of the treaty. [288]

3. Void, Voidable and Unconscionable Treaties.

Under Article 49 of the Vienna Convention on the Law of Treaties, a party may renounce its obligations under a treaty if its consent was originally obtained by *fraud*. Although the Convention itself does not define fraud, the accompanying commentary refers to "false statements, misrepresentations or other deceitful proceedings by which a

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[286] *Serbian and Brazilian Loans*, P.C.I.J. Series A, Nos. 20/21 (1929) at 40; *The Russian Indemnity Case*, (1912) 1 *Reports of International Arbitration Awards* 297,317.

[287] *Yearbook of the International Law Commission 1966*, vol. 2, at 256, General Assembly Official Records, 21st Session, Supplement 9.

[288] See Articles 61(2) and 62(2)(b) of the Vienna Convention.

State is induced to give consent to a treaty which it would not otherwise have given".[289] Fraud not only undermines the validity of consent, but more fundamentally, "destroys the whole basis of mutual confidence between the parties."[290] Similarly, the Convention makes treaties voidable on the grounds of "corruption" of a party's representative (Article 50), and void *ab initio* if "procured by the threat or use of force" against either a State party's representative (Article 51) or the State itself (Article 52).[291] The inadmissibility of the use of force in diplomatic relations, first recognized in the League of Nations Covenant, and now enshrined in Article 2(4) of the United Nations Charter, has become a general peremptory norm of international law (*jus cogens*), and as such a limitation on the enforceability of treaties.[292]

Article 52 of the Vienna Convention does not elaborate the phrase "threat or use of force," but the Final Act of the Conference adopting the Convention included a draft declaration on the prohibition of the use of economic or political coercion in concluding treaties,[293] that has been reflected in subsequent General Assembly resolutions on peace and security.[294] It is a matter of fact that "[a] big power can use force and pressure against a small nation in many ways, even by the very fact of diplomatically insisting on

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[289] *Yearbook of the International Law Commission 1966* , at 73-74.

[290] *United Nations Conference on the Law of Treaties, First Session, Official Records*, at 264-265.

[291] The classic example of this situation was the "protection" treaty forced on Czech officials by invading German forces in 1939. *Yearbook of the International Law Commission 1966*, at 74-75.

[292] *See* the *Corfu Channel case*, (1949) I.C.J. Reports, at 35; *Yearbook of the International Law Commission 1966*, at 76.

[293] U.N. document A/CONF 39/26 (1969), Annex I.

[294] *See* General Assembly resolutions 262S(XXV) of 24 October 1970, and 2734(XXV) of 16 December 1970; **Also**, more recently, General Assembly resolution 47/60 of 9 December 1992, paragraph 4.

having its view recognized and accepted."[295] The Colonial record is replete with "unequal" treaties, signed under economic and political pressure, although not necessarily a direct military threat. [296] The classic example of a dispute over an unequal treaty is the 1898 "lease" for Hong Kong (Wesley-Smith 1983; Hannum 1990:129ff), which has been resolved by restoring the territory to China. Unequal and imposed treaties have generally been denounced promptly by newly-independent States, anxious to shed all the baggage of colonialism.

Under Article 53 of the Vienna Convention on the Law of Treaties, a treaty can also be void if it is incompatible with any "peremptory norm of general international law" (*jus cogens*). Although the Vienna Convention does not offer a definition or catalogue of relevant norms, participants in its negotiation referred to universally-recognized human rights and the principle of self-determination.[297] It would seem reasonable, accordingly, to avoid any interpretation of a treaty which would impair human rights or the self-determination of peoples, and if this result cannot be avoided, to deem the treaty void. Treaties that were already in force *prior* to the emergence of peremptory norms,

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[295] *Fisheries Jurisdiction (Iceland v. U.K.)*, (1973) I.C.J. Reports, at 47 (dissenting opinion of Padilla Nervo).

[296] A treaty was not necessarily "unequal" merely because it had been drafted by the European party. Alexandrowicz (1967:163) observes that it was common, in Asia, for European negotiators to submit a text for review and reply. It was also commonplace to prepare texts in two or more languages. Most Asian languages had a standardized orthography, of course, unlike most of Africa (excepting Muslim nations, which used Arabic), and the Americas (which often used non-orthographic records, such as *quipu* or *wampum*).

[297] *Yearbook of the International Law Commission 1966*, vol. 2, at 77, General Assembly Official Records, 21st Session, Supplement 9; **Also**, *Barcelona Traction, Light and Power Company*, (1970) I.C.J. Reports, at 32 (regarding human rights and inadmissibility of use of force).

such as the principle of self-determination, necessarily became void at the moment these norms arose (Article 64), subject to the parties' duty to attempt to reformulate them in good faith (Article 71). Thus a treaty of "protection" made during the colonial era may, in its origins in acts of coercion or deception, or in its effects on the exercise of the right to self-determination, conflict with the Charter. While it may have been valid when made, it became voidable after 1945.

Since a treaty must conform to emerging international legal norms, its validity and interpretation are evolutionary; it cannot freeze a relationship that is no longer consistent with the international legal order. The International Court of Justice has expressly endorsed this "progressive" approach, which requires balancing treaties' historical meaning (intertemporal law) with their contemporary effects.[298]

A treaty may therefore be voidable if either party relies upon it to subvert the sovereignty and independence of the other. The Emperor of Ethiopia denounced his kingdom's 1889 protection treaty with Italy, for example, on the grounds that "*sous des apparences d'amitie, on n'a en fait cherché qu'à s'emparer de mon pays*" (Lindley 1926:193), which a more contemporary Ethiopian diplomat has described as an application of the principle of *jus cogens* (Elias 1974:161). Thus, the attempt to convert a treaty of alliance and/or protection with Aboriginal peoples into a pretext for subjection would itself be grounds for renunciation.

4. Error.

Apart from any question of fraud or coercion, a party's error as to essential facts may also affect the meaningfulness of its consent, and hence be grounds for considering a treaty void. It has generally been held that such an error must be "excusable," *i.e.*, not the

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[298] *Namibia*, (1971) I.C.J Reports, at 30-31; **Also** South West Africa (1962) I.C.J. Reports at 319, 332-342; *Barcelona Traction, Light and Power Company*, (1970) I.C.J. Reports, at 6; *Competence of the General Assembly*, (1950) I.C.J. Reports, at 23.

fault of the party relying on it to avoid its treaty obligations,[299] and must demonstrably "affect the reality of the consent supposed to have been given."[300] These principles are summarized in Article 48 of the Vienna Convention, which limits the plea of error to mistakes of facts which formed "an essential basis of its consent to be bound by the treaty," and where the party did not contribute, either "by its own conduct" or through negligence, to the error. It follows logically that a *mutual* error or mistake by the parties, as regards their intentions or the underlying situation, undermines the meaningfulness of consent, and should render the treaty voidable, or at least renegotiable (Elias 1974:156).

D. TREATY INTERPRETATION.

1. Treaty Integrity.

If a protectorate is created and limited by treaty, it cannot be construed as a permanent extinction of the protected state's personality. This indeed was the reasoning of the International Court of Justice in the case of *U.S. National in Morocco,* (1952) I.C.J. Reports 176, at 185. In 1836, the United States signed a treaty of peace with the Empire of Morocco, extending most-favoured-nation status to American merchandise (Parry 1977:86.198). In addition, Morocco agreed that:

> ART. 20. If any of the citizens of the United States, or any other persons under their protection, shall have any dispute with each other, the [U.S.] Consul shall decide between the parties; and whenever the Consul shall require any aid, or assistance from our government, to enforce his decisions, it shall be immediately granted to him.
>
> ART. 21. If a citizen of the United States should kill or wound a Moor, or, on the contrary, if a Moor shall kill or wound a citizen of the United

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299 *Legal Status of Eastern Greenland,* P.C.I.J. Series A/B, No. 53 (1933), at 92; **Also**, *Temple of Preah Vihar,* (1961) I.C.J. Reports, at 26 (not excusable if avoidable, or party should have known of it).

300 *Temple of Preah Vihar,* (1961) I.C.J. Reports, at 30.

> States, the law of the Country shall take place, and equal justice shall be rendered, the Consul assisting at the trial; and if any delinquent shall make his escape, the Consul shall not be answerable for him in any manner.

By the 1906 Convention of Algeciras, the Great Powers agreed to respect Moroccan independence, while recognizing French and Spanish zones of influence. When France sent troops to Fez in 1910, Germany protested, but then acknowledged French interests (Lindley 1926:222). This gave France the leverage it needed to force a "Treaty for the Organization of the Protectorate" on the Sultan in 1912 (Parry 1977:216.20). Some terms merit quotation in full because they appear to leave very little of Moroccan statehood [authors' translation from the French original]:

> ART. I. The Government of the French Republic and His Majesty the Sultan agree to establish in Morocco a new regime comprising administrative, judicial, educational, economic, financial and military reforms which the French Government deems useful to introduce in Moroccan territory.
>
> II. His Majesty the Sultan agrees that henceforth the French Government may proceed, after having advised the Makhzen, to establish such military facilities in Moroccan territory as it deems necessary to maintain the order and security of commercial activity, and to exercise all aspects of policing Moroccan lands and waters. [...]
>
> V. The Resident Commissioner-General shall be the sole intermediary between the Sultan and foreign representatives, and in the relations which these representatives entertain with the Moroccan Government. In particular, he shall be entrusted with all questions concerning foreigners in the Sherifian Empire.
>
> He will have the power to approve and promulgate, in the name of the French Government, all decrees made by His Sherifian Majesty.
>
> VI. The diplomatic and consular agents of France shall undertake the

> representation and protection of Moroccan subjects and interests abroad. His Majesty the Sultan engages not to conclude any act of an international character without the prior consent of the Government of the French Republic. [...]
>
> VIII. His Sherifian Majesty is forbidden henceforth to contract, directly or indirectly, with any business public or private or to grant in any form whatsoever any concession without the authorization of the French Government.

Notwithstanding this language, the International Court of Justice concluded that Morocco had "retained its personality as a State under international law," and was still bound by its 1836 commitments to the United States.[301] If state-succession can apply to Morocco under these circumstances, it is difficult to see what distinguishes the situation of Aboriginal North Americans.

This judgment implicitly overruled any contrary implication from the Permanent Court's earlier decision in *Free City of Danzig and ILO*, PCIJ Ser. B, No. 18 (1930), at 13-16. The majority of the court ruled that Danzig could not join the International Labour Organisation (ILO) because its foreign relations had been entrusted to Poland, under the protection of the League of Nations, by the Versailles Treaty. Since Danzig could not force Poland to implement Danzig's obligations under ILO conventions, the City would be incapable of fulfilling its duties as an ILO member. Judge Anzilotti dissented vigorously, noting that self-governing dependencies, while not fully independent in the field of foreign relations, had already joined the ILO, and it is certain that he was thinking of Canada, Australia, and the other British "dominions".[302]

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[301] In the case of *Tunisian and Moroccan Nationality Decrees*, P.C.I.J. Series 8, No. 4 (1923), France had maintained that the 1912 treaty made Morocco "*un territoire étroitement assimilé au territoire français*"-- a legal conclusion implicitly repudiated by *U.S. Nationals in Morocco*.

[302] *Ibid.*, 22. It should be recalled here that the *Statute of Westminster* (1931),

The Vienna Convention recognizes the equal capacity of *all* States to enter into treaties. The Soviet Union insisted upon this wording, on the grounds that the equal capacity of all states had so often been denied by the Colonial powers (United Nations 1968:64, 68). The same delegation was responsible for deleting a proposed clause recognizing the *limited capacity of protectorates* to enter into treaties, arguing that this would have implicitly endorsed the vestiges of Colonialism. Thus the Vienna Conference on the Law of Treaties evidently believed, consistent with the world court's ruling in *U.S. Nationals in Morocco*, that a protectorate retains some residual international personality.

2. Good faith.

Article 31(1) of the Vienna Convention expresses the general rule with respect to the interpretation of treaties:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The emphasis is on the "natural and ordinary meaning" of words, as the International Court of Justice explained in *Admission of States to the United Nations.*[303] The "function and intention" of the treaty provides a semantic context for the task of textual interpretation,[304] but there must be some text to interpret–evidence of intention does not justify inventing terms that do not actually appear in the document.[305] By the same reasoning, the "principle of effectiveness" (*ut res magis valeat quam pereat*) should only be used to choose between competing readings of a text, not to imply terms that do

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which began the emancipation of Canada from British supervision in the field of international affairs, post-dated the court's decision.

[303](1950) I.C.J. Reports, at 8; see **also** *Status of Eastern Greenland*, P.C.I.J. Series A/B, No. 53 (1933), at 49.

[304]*The Chorzow Factory*, P.C.I.J. Series A, No. 9 (1927), at 24.

[305]*Access to the Port of Danzig*, P.C.I.J. Series A/B, No. 43 (1931), at 144.

not appear in the treaty.[306]

If the meaning of words cannot be determined from the text itself and any accompanying or subsequent agreements made by the parties, the interpreter may resort to the historical circumstances of a treaty and its *travaux preparatoires*, as the International Court of Justice found necessary in its Namibia advisory opinion.[307] Article 32 of the Vienna Convention classifies these interpretive tools as "supplemental" since they are to be used only when the text itself is ambiguous, obscure or leads to a "manifestly absurd or unreasonable" result.[308]

The strict application of these general interpretive rules could pose difficulties in situations typical of "indigenous treaties" where the parties lacked a common language of negotiation, the agreement was recorded by only one party, and it was couched in technical vocabulary which was almost certainly unfamiliar to the opposite party.[309] Modest assistance can be derived from Article 31(4) of the Vienna Convention, recognizing the special meanings of words which may be intended by the parties, as well

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[306] *Interpretation of Peace Treaties*, (1950) I.C.J. Reports, at 229.

[307] (1971) I.C.J. Reports, at 34.

[308] ***See,*** *e.g., Polish War Vessels*, P.C.I.J. Series A/B, No. 3 (1931), at 144 (declarations of the parties' intentions made in negotiations, disregarded if inconsistent with the ordinary meaning of the resulting text); *European Commission of the Danube*, P.C.I.J. Series B, No. 14 (1927), at 28-41; *Admission of States to the United Nations*, (1948) I.C.J. Reports at 57, 61-63.

[309] There are a number of examples of bilingual records of indigenous treaties, including the 1752 Treaty of Halifax (Míkmaq-Britain), which was published in English and the original French, and the 1888 Rapanui Treaty with Chile, drafted in Spanish and Polynesian. More commonly, the indigenous party kept its version of the bargain in a non-verbal, or metaphorical record, such as *wampum*. Since these media can be read by experts, there is no reason why they should not serve as bases for later interpretation.

as the principle of intertemporal law, which requires that words be construed as they were understood at the time the treaty was negotiated.[310] This still falls somewhat short of the principle of "liberal construction" of treaties with "Indian tribes" adopted by the United States Supreme Court 150 years ago,[311] and recently borrowed by the Supreme Court of Canada,[312] which requires that doubtful expressions in a treaty be resolved in the Indians' favour, as they would have understood the agreement.

International fora have sometimes taken account of differences in the parties' knowledge of technical vocabulary or geography,[313] as well as political conditions prevailing at the time of the negotiations.[314] There have also been examples of construing the text against the party which drafted it (*contre proferentum*), at least in cases where there were no genuine negotiations, or the wording prepared by one party was simply presented for signature to the other.[315] This arguably could be applied to

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310 Recall the *Right of Passage* case, (1960) I.C.J. Reports, p. 6, at 37, construing the meaning of an 18th-century treaty between Portugal and the Maratha Confederacy by reference to 18th-century Maratha law.

311 *Worcester v. Georgia*, 31 U S.(6 Pet.) 513, at 551-554, 582 (1832); **also** *see Jones v. Meehan*, 175 U.S. 1, at 11 (1899); *Washington State v. Passenger Fishing Vessel Association*, 443 U S. 658, 675-676 (1979).

312 *Simon v. the Queen*, [1985] 2 S.C.R. 387, at 402; and *R. v. Sioui*, [1990] 1 S.C.R. 1025.

313 *E.g. Heirs of Juan Maninat* (1905), 1O *Reports of International Arbitral Awards* 55,77; *Tacna-Arica Question,* (1925), 17 192, 954.

314 *Treaty of Lausanne,* P.C.I.J. Series 8, No. 12 (1925), at 29, which took account of the turbulent conditions of Europe after the War.

315 *Interpretation of the Baden-Baden Agreement* (1934), 3 *Reports of International Arbitral Awards* at l564; *Goldenber v, Roumania* (1928) 2 *Reports of International Arbitral Awards* at 907; *Brazilian Loans*, P.C.I.J. Series A, No. 21

many treaties with indigenous peoples, where there may have been extensive preparatory discussions of the issues, but the document itself was drafted by Europeans–often in advance of the conference–rather than being negotiated line-by-line.

A "liberal construction" of treaties with indigenous and Colonial peoples might also be derived from the traditional presumption against any implied relinquishment of State sovereignty. Restrictions on the sovereignty of either party must be supported by express words in the text.[316] This operates in the favour of a weaker State contending that it has reserved all aspects of sovereignty not explicitly surrendered; for example, that "protection" was limited in time and scope, and thus did not constitute a permanent subordination to the sovereignty of the protecting Power.

Indeed, there is also a compelling practical reason to apply the principle of "liberal construction" to indigenous and Colonial peoples–and it is to avoid the consequences of conceding that these treaties were *unequal*. Inequality can render treaties void *ab initio*, which is a particular embarrassment in the case of boundary or cession treaties. The alternative is curing the inequality, at least in part, by reading the treaty in favour of the weaker party.

3. Remedies for breach of treaties.

Under Article 60 of the Vienna Convention on the Law of Treaties, a party may terminate or suspend its treaty obligations in response to a "material breach," which is defined as repudiation of the treaty by the opposite party, or the violation of a provision "essential to the accomplishment of the object or purpose of the treaty". In any other situation, such as disputes as to the interpretation of the treaty, or the breach of a

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(1929), at 114.

316 *Polish War Vessels*, P.C.I.J. Series A/B, No. 43 (1931) at 142; *The River Oder Commission*, P.C.I.J. Series A, No 23 (1929), at 26; *S.S. "Lotus*," P.C.I.J. Series A, No. 10 (1927), at 18; *Polish Postal Service*, P. C.I.J. Series B, No. 11 (1925), at 39; *S.S. "Wimbledon,"* P.C I J. Series A, No 1 (1923), at 24-25.

non-"essential" provision, the parties are obliged to seek an amicable resolution while the treaty remains in force between them. To the extent possible, the parties must try to reformulate the treaty by good-faith negotiation (Article 71), reflecting respect for the primacy of consent and trust. If enforcement or reformation prove to be impossible, "each party may require the other party to establish as far as possible in their mutual relations the position that would have existed had the [treaty] not been performed" (Article 69.2), that is, to restore the *status quo ante*. This may require the negotiation of a transitional treaty relationship, as in the case of Hong Kong.

An overriding legal question is whether the injured party retains sufficient personality as a State to take recourse under international law. It would seem to be presumed, under the Vienna Convention, that any entity capable of making a treaty, would *ipso facto* have standing to enforce it in international fora. This has not always been true in the case of protectorates and Colonized peoples, however. Despite the ruling in *U.S. National in Morocco*, that protection does not abolish the underlying personality of the protected State, the world court has not opened its doors to treaty-holders which are not Member States of the United Nations.[317] Under Article 36 of the Rules of the court, and Security Council Resolution 9 (1946), all States have the right to use this forum, and the principal authority on the procedures of the court has written that this is a question of fact for the court to determine on application (Rosenne 1965:281-283). No such hearing has ever been held, although the Míkmaq Nation and Six Nations have both sought one.

This is also a concern with respect to third-party treaties, such as the 1794 "Jay

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[317] *U.S. Nationals in Morocco* itself was brought by the United States against France; Morocco was represented in the proceeding by France, its protector, (1952) I.C.J. Reports, at 110; **Also See,** *Minquiers and Erechos*, (1953) I.C.J. Reports, at 47. Protected States have participated in international arbitral proceedings, however, *e.g.*, *Ottoman Public Debt* (1925) 1 *Reports of International Arbitral Awards* 531; *Radio-Orient Company*, (1940) 3 *Reports of International Arbitral Awards* 1873.

Treaty" in North America, because the personality and legal standing of the indigenous beneficiaries are not implied in the treaties themselves. According to Article 36 of the Vienna Convention *a third State* may enforce its rights under a treaty provision intended for its benefit, without having ever formally assented, or acceded, to the treaty concerned. The situation is analogous to that of national minorities, under the system of Minorities Treaties supervised by the League of Nations (Thornberry 1991:38ff). These treaties were adopted by Member States, and guaranteed by the League. Both signatories and the League Council enjoyed standing to seek action from the Permanent Court–and often did–but the protected minorities had only a right to petition the League Council administratively. As a result, the Kurds were parceled out among Iraq, Iran, Turkey and Syria, in violation of the 1923 Treaty of Lausanne, because no signatory would serve as their champion (Hannum 1990:184-185). By contrast, the autonomy of Trieste under the 1946 Austro-Italian peace treaty has been repeatedly pressed by Austria in international fora (*ibid.* 433).

Namibia, which recently gained independence under U.N. sponsorship, offers a potential test case. The German protectorate was established in 1884-85 under treaties by which the indigenous chiefs agreed not to conclude other treaties or cede their territory without the consent of Germany (Alexandrowicz 1973:78). Obviously, this was not subsequently regarded as relinquishment of the inherent sovereignty of the peoples concerned *as a whole*. However the Rehoboth Basters, parties to an 1885 treaty with Germany, recently demanded self-government from Namibia on the grounds that they existed as a state prior to the establishment of the German protectorate.[318] If the various indigenous nations collected under German protection could re-emerge collectively as

[318]These claims were pressed in 1993, at the eleventh session of the U.N. Working Group on Indigenous Populations, and represent a challenge to the *uti posseditis* principle adopted by the Organization of African Unity, *i.e.*, accepting African borders where colonial powers left them regardless of the pre-colonial political geography of the continent.

one state, why not individually? Namibia relies on recognition by the U.N. to overcome these earlier treaty claims. The matter may remain there, unless the Rehoboth people persuade the world court that they are still a state, the U.N.'s special committee on decolonization re-classifies them as a non-self-governing territory, or some legal action is taken by Germany in its capacity as the original Protector State.[319]

Meanwhile, the U.N.'s Working Group on Indigenous Populations has completed its draft "Declaration on the Rights of Indigenous Peoples," which by Article 36 would recognize the right of indigenous peoples to submit treaty disputes to "competent international tribunals".[320] Until such time as the world court relents, and agrees to consider claims by indigenous peoples, or some other mechanism for international standing is established, indigenous and colonized peoples who have purportedly been annexed or absorbed by Member States will remain, in the words of Judge Ammoun, "inarticulate and deprived of freedom of expression".[321]

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[319]As this report was being written the authors learned from counsel for the Rehoboth Basters, Professor Peters, that Namibia's high court has recognized the group's collective legal standing to bring a legal action against the Namibian State on these issues.

[320]E/CN.4/Sub.2/1993/29, Annex I. The draft will be reviewed by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities in August 1994, and then by the Commission of Human Rights beginning at its winter 1995 session.

[321]*Namibia*, (1971) I.C.J. Reports, at 86.

PART SEVEN

CONCLUSIONS

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

A. REMEMBERING THE TREATY ORDER

As early as the 1400s, Europeans had shed their early reluctance to engage in diplomatic relations with non-Christian nations, and were actively constructing a world-system based upon principles of equality and consent. Treaties with Muslim, African, south and southeast Asian, North and South American peoples had similar objects, followed similar forms, and were adapted to local diplomatic formalities. The defense of lack of capacity was invoked only in situations of doubt as to the constitutional authority of individual rulers, under their local laws, or in consequence of their having already accepted conflicting treaty obligations. International order continued to be inclusive for nearly five centuries.

A gradual weakening of respect for treaties traces the historical progress of European mercantilism into world imperialism. As soon as European empires had the power to impose their will on other peoples, they constructed colonial and racist distinctions of "capacity" and "civilization" to excuse themselves from commitments they found no longer convenient. The cynical, *ex post facto* character of imperial jurisprudence has not been lost on the International Court of Justice in the decolonization era. The court has repeatedly stressed the need to evaluate treaties in historical contact (*Right of Passage*), while respecting the new, post-colonial legal order based on the principles of self-determination and human rights (*Western Sahara, Namibia*). Member States have nonetheless helped perpetuate the racist legacy of colonial jurisprudence by reviving the sovereignty of States on only two of the four continents affected by 19th-century arguments of "incapacity". Cultural inferiority was expressly repudiated by the General Assembly in its 1960 declaration on decolonization, the *Convention on the Elimination of Racial Discrimination* and *Human Rights Covenants*, but Africa and Asia were the sole beneficiaries.

A fundamental consideration is the significance of "protection," at the time these treaties were made. Albaharna (1968:61-63) observes that European jurists first borrowed the concept of "suzerainty" from the Ottoman empire–essentially a kind of feudal

relationship parallel to the relationship between 17th-century German princes and the Holy Roman Emperor. This did not deprive vassal states of diplomatic standing, but required coordination with the suzerain and deference to his leadership. In the 18th century, suzerainty gave way to "spheres of influence," which were agreements between empires to eschew contact with each other's clients. Only in the late 18th century did the true "protectorates" emerge, in the sense of nations which, by treaty, gave up temporary control of their external sovereignty, and often a little of their internal sovereignty as well.

During the height of the colonial era, African, Asian and American nations alike submitted to Europeans' "protection" under treaties, and all were subjected to the process of gradual administrative absorption by their protectors, in violation of those same international treaties. In Africa and Asia the reign of "protection" has been a temporary one, a mere suspension of pre-existing international personality. In the Americas, however, no pre-existing nation has re-emerged–and the only "fact" which has been advanced to justify this deviation, *incapacity*, is the same "fact" that has been repudiated elsewhere.[322]

If they are interpreted according to the same canons as treaties made among European states themselves from the 16th to 20th centuries, protecting treaties could not have limited the underlying sovereignty, or completely extinguished the international personality of Aboriginal nations. Like similar treaties in Africa and Asia, these instruments exchanged commercial favors and/or territorial concessions for a duty of defense. The right of the European parties to the territory and extraterritorial jurisdiction

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[322]It must be admitted that throughout Africa and Asia, independence was frequently granted to new ethnic and political combinations which had not existed aboriginally, leaving questions of the status of those peoples who actually conducted pre-colonial diplomacy with Europeans. This is what makes the Rehoboth case important. Self-determination in any event was accorded to the original inhabitants, not to settlers.

so conferred, remains conditional on the faithful execution of the obligations of protection that were assumed. Since 1945, moreover, these treaties must be interpreted consistently with the principles of self-determination, decolonization, inadmissibility of the use of force, and respect for human rights. European Powers may not plead municipal law in their defense, nor socio-political changes they have brought about themselves. However, indigenous peoples may plead fraud and coercion as grounds for termination, suspension or reformation of their treaty relations.

The main consequences of admitting that "Aboriginal" treaties are treaties in the international sense would be (a) the right to recourse in international fora, as opposed to the courts of Canada, and (b) the right to suspend the operation of treaties until Canada complied fully with its treaty obligations–that is, to restore the *status quo ante*.

While direct enforcement of these rights in the International Court of Justice must await progressive developments in the court's procedures, leaving Aboriginal nations' treaty rights under international law, for the time being, "inarticulate," this may change in time. Judge Moreno Quintana observed in the *Right of Passage* case: "As judge of its own law--the United Nations Charter--and judge of its own age–the age of national independence–the International Court of Justice cannot turn its back on the world as it is".[323]

B. RENEWING THE TREATY VISION

We have traced the beginnings and development of treaties as a legal concept in international law, and as part of the law of the British Empire and the United States. A knowledge of legal history and diplomatic practice is essential for the understanding, criticism, and assessment of the current state of the law. Legal history is necessary as an integrating medium in understanding the constitutional, political and economic processes

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[323](1962) I.C.J. Reports, at 95.

that created Canada, and which have their roots in the Treaty Order. Such a comprehensive and decolonized legal history can dispel many commonly held illusions about international law, constitutional law, and the political status of Aboriginal peoples.

When British immigrants ignored the Treaty Order and began unilaterally establishing policy for Aboriginal peoples, they created the context for all the modern-day problems which are now being investigated by the present Royal Commission on Aboriginal Peoples. The Commission should not lose sight of the forest because of the trees. It should not equate healing with "self-government", but with treaty renewal and the re-affirmation of the equal rights and status of peoples.

The Canadian government and its people must understand the causal connection between the social problems of today and the roots of these problems. They must comprehend why these modern problems arose. They must appreciate that the rejection of the Treaty Order created the many problems our people are facing. They must accept that these modern problems are not an inherent part of Aboriginal peoples' human nature.

The basic historical narrative, from our viewpoint, is simple. Treaties formed a sacred vision of human equality and equal dignity, which Aboriginal peoples themselves had held for millennia. When the immigrant's government abandoned treaties, they rejected this sacred vision and replaced it with racism, utilitarianism, and "policy". Where there is no sacred vision, the people's vitality perishes. The values of communal solidarity faded. This undermined the conditions sustaining their moral communion, the foundation of custom and shared beliefs among Aboriginal people. The Aboriginal communion was a shared mental experience of having a view of the world and of the good in which others participates–a worldview whose hold over the people is so strong it need never be spelled out. This worldview enables people to identity "what ought to be" with "what is": the basis of natural law. The rejection of treaties transforms these collective sacred visions into fragmented ideas, moral doubt and estrangement. Self-rejection and self-destruction inevitably follows.

Treaties affirm the communal vision for Aboriginal people. They enfold a view of

life, which is both symbolic and practical. Treaties are the device by which Aboriginal people have codified parts of their histories to create a new map of experience. Treaties value experience more highly than logic, a grounding in reality that permitted desirable and orderly change. The Treaty vision was, and is, at the heart of a humane legal order, built on unalterable truths of revealed principles of ecological law. Agreement was always the means Aboriginal people employed to deal honorably with spiritual forces and strangers. It always provided for a flexible bond incorporating shared goals between different peoples, species, and worlds.

The trust and promises that take the form of a treaty provides coherence and purpose in a new environment. They lift Aboriginal people above the commonplace with assurances of partnership in greater things. They give significance to even the drudgeries of life because no effort, however menial it may appear, is meaningless within the context of a fulfilling sacred vision.

Where there is a Treaty vision of Canada, there is a nation-to-nation relationship. Where there is a Treaty vision, the stranger becomes a guest, the stranger's government and towns become partners in human empowerment. There is no meaningful alternative to this sacred vision within Aboriginal society in North America. Experience, custom, and worldview provides the basis of stability for Aboriginal peoples under the treaties. The treaties are the starting point for renewal and change.

With the repudiation of the sacred vision embedded in treaties, there has been oppression and stagnation. Every family is caught in a ceaseless round of activity for survival that occupies their days and nights, but contributes nothing to a lifetime. Lacking a sacred vision, the people and family wither and die. Political expediency is no substitute for a sacred vision being fulfilled. Modern society cannot ignore Aboriginal sacred heritage and treaties for imaginary and unworkable administrative "self-government" regimes. This is the lesson to be learned from of the tribes in the United States, and the collapse of Soviet Union.

The visions surrounding the spirit and intent of treaties are equal to other spiritual

visions. All visions are commitments to human empowerment. They seek to loosen the stranglehold of fixed and oppressive orders. Among Aboriginal people, the spirit of the treaties is equal to the Mosaic Code of the Israelites, equal to St. Paul's vision of Christianity. The vision of the renewing of Treaties is equal to Mahatma Gandhi's vision of home rule that stirred a sub-continent, began the long climb of Third World nation to dignity, and the decolonization movement in the U.N.. The Treaty vision is similar to Dr. Martin Luther King's dream of individual equality that stirred the dream of African-Americans minorities. Yet, in its context and content, the Treaty vision is a distinctive vision. Its binding force must be polished and renewed. It is a relationship, not just an idea.

INTERNATIONAL CONTEXT OF CROWN-ABORIGINAL TREATIES.

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