The Enforcement of Aboriginal Rights in Customary International Law

*Julie Cassidy**

I. INTRODUCTION

This article considers the viability of utilizing customary international law as a source for the protection of aboriginal minorities' territorial integrity.

The possible existence of a customary international law protecting the territorial rights of aboriginal peoples is canvassed and the materials supporting such a law are outlined. The other major component of the paper lies in a consideration of the enforcement of such rights. This latter component is perhaps as important as the very establishment of the norm, for a right is not really a right unless it can be enforced. In this regard, the options[1] available to aggrieved aboriginal peoples, the problems they may face,[2] and possible solutions to these problems are considered.

An examination of state practice[3] relating to the territorial rights of the indigenous occupants of Australia, the United States, New Zealand, and Canada[4] reveals a uniformity of practice sufficient, it is submitted, to maintain the existence of this norm.

It is also contended that suggested problems[5] facing litigants enforcing this norm are not impassible. Thus, it is submitted, customary international law, enforced in the municipal courts, provides a viable alternative method for protecting the aboriginal title. Aboriginal plaintiffs would no longer have to rely on the whim of their majority

---

1. The forums available for enforcement.

2. For example, that international law can only give Nations rights.

3. "State practice" includes legislation, judicial determinations, and executive practice.

4. These nations share an unfortunate history relating to the treatment of the traditional occupiers. The parallels that can be drawn across governmental policies between the "nature" of the people and their predicament are striking, and justify the use of this particular "class" of countries to provide the basis of this special customary international norm.

5. *See supra*, note 2.

government, nor the doctrine of communal native title[6] to maintain their territorial integrity.

A. *Importance of an Alternative Source*

The existence of an alternative source of protection is particularly important for Australian Aboriginals and Torres Strait Islanders,[7] whose legal right to their traditional lands had until very recently been denied by the municipal courts.[8] While land grants have at times been made by the Australian authorities, these are often framed as acts of benevolence, mere gifts, rather than a recognition of these aboriginal peoples' legitimate enforceable rights.

Comprehensive Australian-wide legislation protecting the territorial rights of these peoples has not as yet been enacted. What legislation does exist is subject to the whim of the governments. The Aboriginal Land Rights (Northern Territory) Act, 1976 for example, could simply be repealed were the federal government to so wish.[9] Thus, for these aboriginal peoples, who lack the political clout necessary to ensure that their governments respect their rights, the establishment of inherent rights enforceable independently of the authorities is crucial to the protection of their aboriginal interests.

If the common law and domestic legislation fail to protect the territorial integrity of the aboriginal peoples of Australia, to where can these people turn for the recognition and protection of their rights? The avenue suggested in this article is customary international law.

B. *Customary International Law*

International law is essentially comprised of two bodies of law: "conventional" international law (treaty-based law) and "customary"

---

6. The doctrine of communal native title was recently recognized by the Australian High Court in *Mabo and Others v. Queensland*, 175 C.L.R. 1 (1992).

7. Significant advancements have been made for the Torres Strait Islanders as a result of the High Court determination in Mabo v. Queensland, 63 A.L.J.R. 84 (1988). Here the Queensland Coast Islands Declaratory Act, 1985 (Queensl.), purporting to extinguish the peoples traditional rights, was held to be inconsistent with the Racial Discrimination Act, 1975 (Austl.) and thus inoperative in accordance with section 109 of the Act. The final determination recently recognized the existence of the traditional aboriginal title. 175 C.L.R. 1 (1992).

8. *Mabo and Others v. Queensland*, 175 C.L.R. 1 (1992).

9. This possibility is not as inconceivable as one may believe. It has recently been alleged, in Northern Land Council v. Commonwealth, 161 C.L.R. 1, that the Commonwealth government threatened to repeal this act if the traditional owners of the subject land refused to sign the Ranger Uranium Agreement.

international law (law based upon state practice).[10] A necessary preliminary to any discussion of customary international law is a consideration of the relationship between these two sources. In particular, when seeking to utilize customary international law, one must overcome the suggestion that this body of law is a "dead letter," surpassed by conventional law.

Some writers, notably former Soviet jurists, have gone so far as to suggest that the regulation of international relations through treaties is so extensive that there is no longer a place in international law for custom. In response to these suggestions, it is necessary to examine the very essence of international obligation and the ultimate source of responsibilities. Through a hierarchical analysis of the sources of international law, the "grund norm"[11] can be established. It is believed this reasoning process maintains the importance of customary international law:

> Why are the terms of legislation incorporating treaties into domestic law binding? Perhaps their authority lies in the sanction of the parent treaty. Why are the terms of the parent treaty binding? The answer lies in a "higher" source of international law, the principle of customary international law providing that parties to treaties must abide by the terms of such treaties. What is the source of the obligation to comply with this custom? The source of this obligation is the international principle Kelsen[12] formulated as "States ought to behave as they have customarily behaved." The source of this obligation is unintelligible.

What does this simple exercise reveal? It shows the "highest" determinable source of international law to be a principle of customary international law, thereby reiterating the importance of custom as a source of international law. It could even be suggested that conventional international law is merely a part of customary international law.

---

10. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 34 (7th ed. 1972), identifies five principle sources of international law: custom, treaties, decisions of judicial or arbitral tribunals, juristic works and decisions or declarations of international institutions. Under Article 38 of the Statute of the International Court of Justice, the court is directed to apply international conventions, international custom, general principles of law recognized by civilized nations, and, as a subsidiary means of determining the law, judicial decisions, and the teachings of the most highly qualified publicists.

11. The "grund norm" is the basic law, or the ultimate source of legal obligation.

12. PRINCIPLES OF INTERNATIONAL LAW 553-88 (2nd ed. 1966).

International instruments and treaties themselves constitute part of state practice, evincing the existence of customary international law.[13]

Having demonstrated the authority of custom as a source of international law, the nature of customary international law and the source of evidence of such norms need to be briefly mentioned. "State practice" is constituted by, *inter alia*,[14] legislation, case law, and the practice of the executive. When these acts are sufficiently uniform[15] across all nations, or in the case of a regional[16] or special[17] customary international law, throughout a particular class of nations,[18] a customary international law can be said to exist.[19] Does such a uniformity of thought and practice exist in the subject nations regarding the territorial rights of aboriginal peoples?

II. THE EXISTENCE OF THIS CUSTOMARY INTERNATIONAL LAW

A comparative study of Australian, Canadian, New Zealand, and United States case law, executive practice, and legislation suggests there is sufficient uniformity of state practice[20] to support the existence of a special customary international law protecting aboriginal territorial integrity. A systematic examination of state practice in each of these nations during three distinct periods, annexation to the 1870s, 1880s to 1970s, and 1980s to 1990, provides strong evidence of the required

---

13. This evidentiary value is reflected in the description of treaties provided by Article 38 of the Statute of the International Court of Justice; *see supra* note 10. It describes treaties as "establishing rules expressly recognized by the contesting States," that is, customary international law. *Id.*

14. As noted above, treaties themselves also constitute a source of state practice.

15. This uniformity must be accompanied by a conscious conviction that the conduct is obligatory as a matter of law, or *opinio juris sive necessitatis*.

16. Anglo Norwegian Fisheries, 1951 I.C.J. 116.

17. Right of Passage over Indian Territory (Portugal - India), 1960 I.C.J. 6; see also the Wimbledon, 1923 P.C.I.J. (ser. A) No. 1, where the court relied upon the practice of a limited number of Nations.

18. The Scotia, 81 U.S. (19 Wall.) 170 (1871). As Justice Strong noted, a principle of customary international law may emerge from legislation, ordinances, and practice of particular nations, as long as it gains the concurrent sanction of the relevant nations.

19. *See* CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 155 (1957).

20. In light of the atrocities committed during the settlement of these nations, it could be suggested that a sufficient commitment did not exist until the twentieth century.

uniformity of practice to support an international norm protecting the aboriginal title.

This is not to deny the atrocities unfortunately typifying the settlement of each of the subject nations. The aboriginal peoples of each of these countries were subjected to what was no less than attempted, and sometimes successful,[21] genocide. Settlers' hunger for land and a convenient ignorance[22] of aboriginal land "ownership" led to the forceful dispossession of these peoples from their traditional lands.

When brought to the courts' notice, however, the sacred nature of the aboriginal title was upheld and acts of dispossession declared unlawful. Thus, it is submitted, these acts of dispossession were not a denial of the existence of this custom, but rather a breach of its terms. As such, they stand apart as contrary to well established principles of law and practice.

A. *Annexation to 1870s*

While history books accurately paint the settlement of the subject nations as a violent time, involving much savagery on the part of settlers, the picture depicted in legal history is somewhat different. The degree of concern for the maintenance of the aboriginal title in this period is quite remarkable. Even in the Australian context,[23] extensive efforts were made to ensure the recognition and protection of the aboriginal title.[24] It is submitted that such practice was sufficiently

---

21. For example, the Australian Aboriginals of Tasmania and Kangaroo Island in South Australia.

22. See Justice Murphy's opinion in Coe v. Commonwealth, 53 A.L.J.R. 403, 412 (1979).

23. Much to the author's surprise.

24. It is submitted that the decisions in Cooper v. Stuart, 14 App. Cas. 286 (1889) and R v. Jack Congo Murrell, [1836] Legge. 72, do not necessarily undermine this assertion. While the decisions have been criticized (for example, by Justice Murphy in Coe v. Commonwealth, 53 A.L.J.R. 403), they can be easily distinguished and/or confined to their facts. Cooper v. Stuart determined that Australia was "settled." This case was, however, only concerned with the consequence of settlement and the reception of laws for the determination of white settlers' rights. There was no consideration of the aboriginal position. Further, the decision in R v. Jack Congo Murrell, providing that Aboriginals were subject to white law, did not amount to a denial of aboriginal rights. The court was at pains to stress that the defendant was not a "traditional" aboriginal, but rather had accepted white society and thus had to be bound by the rules of that society.

uniform and established, at least by the end of this period,[25] to establish a custom protecting aboriginal territorial integrity.

By the time of the settlement of South Australia and New Zealand, anti-slavery groups, the Quakers, the influential Clapham Sect, the Aboriginal Protection Society, and humanitarians in general, exerted much influence upon the formation of the imperial aboriginal policy. These groups were not only effective lobbyists; their membership "infiltrated" government offices, holding influential positions in both Parliament[26] and the Colonial Office.[27] Thus, the Colonial Office and Parliament were not only subjected to strong pressure externally, but also within their ranks.

These men[28] acknowledged the need under international law to recognize the territorial rights of the original occupants. Through the influence of these early advocates, advances were made for indigenous people the world over.[29] As part of these developments, the House of Commons unanimously declared it their duty to protect the civil rights of aboriginal people.[30] The Chancellor of the Exchequer stressed this was not a revolutionary announcement, but rather the recognition of a "principle on which the British Government [had] for a considerable time been disposed to act."[31]

In accordance with this principle, parliamentarians such as Thomas Fowell Buxton continually declared aboriginal peoples to have "a right to their own land." The government, he said, was bound to compensate these people for any "evils" European settlement placed upon them.[32] Buxton's influence is reflected in the report of the Select Committee stating "the native inhabitants of any land have an incontrovertible

---

25. That is, the end of the 1870s. While recognition of the aboriginal title can be found prior to this point, the governments of these Nations at times appeared to have sanctioned the forceful dispossession of the aboriginal peoples. This indicates an absence of the required *opinio juris sive necessitatis*.

26. For example, Thomas Fowell Buxton. HENRY REYNOLDS, THE LAW OF THE LAND 82 (1987).

27. For example, James Stephen. *Id.*

28. Influential positions being held by males.

29. For example, slavery was abolished and the House of Commons officially affirmed the status of indigenous peoples of the Cape Colony as the legal equals of Europeans. REYNOLDS, THE LAW OF THE LAND 83.

30. Colonial Office (C.O.), 323/218 (available in the Deakin University Library System, Australia).

31. British Parliamentary Papers, 5 (1837) (on file with author).

32. R.H. MOTTRAM, BUXTON THE LIBERATOR 108.

right to their own soil: a plain and sacred right which seems not to have been understood."[33]

1. *Australia*

The political influence of the humanitarians reached its zenith in 1835 when Charles Grant became Secretary of State,[34] Sir George Grey was appointed Parliamentary Under-Secretary, and James Stephen became Deputy to the Permanent Head. When the colonization of South Australia was under consideration, these men had full control of the Colonial Office and were determined to protect the rights of the Australian Aboriginals.

Soon after, Lord Glenelg, another prominent humanitarian, replaced Charles Grant as Secretary of State. Not long after taking up his position, Lord Glenelg received a letter from the Governor of Tasmania, Governor Arthur, warning that if South Australia was to avoid the bloodshed which had occurred in his colony, the territorial rights of the Aboriginals had to be recognized. Settlement should only proceed, he implored, if land acquisition was based upon the purchase of those lands the Aboriginals were willing to relinquish.[35] Glenelg sent a copy of the letter to the South Australian Colonization Commissioners, directing these matters to be "regarded as a first important [sic] in the formation of the new settlement."[36]

Aboriginal rights were to be assured in two ways. First, the Chairman of the Commission, Robert Torrens, was to provide for "the appointment of a Colonial Officer to be called Protector of the Aborigines."[37] Second, measures were to be taken for the protection of the aboriginal title and the eventual "[purchase of] the lands of the Natives."[38]

The Protector of Aborigines[39] was to oversee the granting of lands and to determine whether the lands "thus surveyed or any portion of

---

33. British Parliamentary Papers (B.P.P.), 516 (1836), quoted in REYNOLDS, *supra* note 26, at 85.

34. Charles Grant was succeeded by Lord Glenelg.

35. *See* REYNOLDS, *supra* note 26, at 99. *See also* C.O. 280/55 (available in the Deakin University Library System, Australia).

36. *See* REYNOLDS, *supra* note 26. *See also* C.O. 396/1 (available in the Deakin University Library System, Australia).

37. MEMOIRS OF SIR THOMAS FOWELL BUXTON, 364 (C. Buxton, ed. 1926); REYNOLDS, *supra* note 26.

38. *Id.*

39. Similar instructions were given to the Governors of the other Australian colonies. *See, e.g.*, Letter from Glenelg to Gipps, (31 January 1838) HRA, I xix, at 252-55 (on file with author).

them . . . [were in the] occupation or enjoyment of the Natives." If the lands were so occupied, and the traditional owners did not wish to sell, it was the Protector's duty to "secure to the Natives the full and undisturbed occupation or enjoyment of their lands and to afford them legal redress against depredators [and] trespassers."[40]

In regard to the scheme for the purchase of the aboriginal title, it was considered necessary to provide some form of legislative protection of Aboriginal territorial integrity. This protection came in the form of a proviso to the Letters Patent,[41] reserving the Aboriginal's right to any lands in which they were in actual occupation.

The proviso declared:

> [N]othing in these our letters patent contained shall affect or be construed to affect the rights of any aboriginal inhabitants of the said colony . . . to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives.

Any "lands therein now actually occupied or enjoyed by such Natives" could not be alienated to colonists. The proviso, therefore, provided clear evidence that the Crown believed that "the territorial rights of the Natives as owners of the soil, must be recognized and respected."[42] This prerogative assertion confirmed Aboriginal dominion over their traditional lands, setting such lands apart from the area under the legislature's control.[43] Despite the proviso to the Letters Patent[44] and the Commissioners' promise to respect the aboriginal title, the Commissioners proceeded to grant away the Aboriginals' traditional lands.

Importantly, however, the dispossession of the Aboriginal people was not a result of a failure to recognize the aboriginal title. Rather,

---

40. *See* REYNOLDS, *supra* note 26. *See also* C.O. 13/5 (available in Deakin University Library System, Australia).

41. Ultimately passed under the Great Seal of the United Kingdom, establishing South Australia and fixing the boundaries thereof. S. AUSTL. STAT. Vol II, 749.

42. Per Lord Russell with respect to the identical clause in the New Zealand Letters Patent. Letter from Russell to Hobson, (28 January 1841) Parl. Papers (Commons).

43. The Letters Patent is an important document delimiting the scope of the government's dominion.

44. This proviso was used by dispossessed Maoris to bring an action in Scire Facias. R v. Symonds, [1847] N.Z.P.C.C. 387, Nireaha Tamaki v. Baker, [1901] App. Cas. 561.

it was the dishonesty and greed of the Colonization Commissioners that led to the infringement of these rights. Despite the introduction of the above safeguards, white settlers forcibly dispossessed the Aboriginals, declaring these peoples to be too uncivilized to be legally recognized as in "occupation" of their lands. The Commissioners went so far as to say that the Waste Lands Acts[45] prevented them from setting aside reserve land for the Aboriginals.

While the territorial rights of aboriginal peoples were infringed as a matter of law, imperial and colonial state practice in Australia, even at settlement, supported the international protection of the aboriginal title. During this period, such recognition was echoed in each of the subject Nations.

2. *United States*

The United States Supreme Court, led by Chief Justice Marshall, entrenched into its legal system the doctrine of communal native title and the general recognition of aboriginal territorial integrity.[46] The Supreme Court affirmed the principle that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial."[47] The original inhabitants "were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion . . . ."[48]

The determinations of the Court, supported by the actions of the United States Congress, confirmed the need to respect the aboriginal title and the inability to extinguish that title except through consensual purchase. The legislative response was as strong as that of the Supreme Court. As early as 1629 the law of the colony of New Netherland provided that Indian lands could only be acquired by consensual purchase: "The Patroons of New Netherlands, shall be bound to purchase from the Lords Sachems in New Netherlands, the soil where they propose to plant their colonies, and shall acquire such right there unto as they will agree for with the said Sachems."[49]

---

45. Which made no mention of the rights of the original occupants to their lands.

46. *See* in particular, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

47. *Worcester*, 31 U.S. at 559.

48. *Johnson*, 21 U.S. at 574.

49. Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 40 (1947).

Shortly thereafter, similar provisions were adopted in Connecticut, New Jersey, and Rhode Island,[50] and, with time, also became entrenched in United States federal law. Article 3 of the Northwest Ordinance of July 13, 1787 declared:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs done to them, and for preserving peace and friendship with them.[51]

In accordance with this principle, the settlement of the United States proceeded upon a policy of treatying with the Indians for their aboriginal title. In 1794, for example, the United States agreed to pay certain tribes of Indians an annual sum of $4,500 in "clothing, domestic animals, implements of husbandry, and other utensils" for the cession of their land.[52] Similarly, in 1835 the United States paid five million dollars for a tract of Cherokee land.[53] Thus, throughout the history of settlement, considerable sums changed hands in recognition of the aboriginal title.

This is not to deny the existence of unfair and forceful dispossessions. Despite the picture drawn in most history books and traditional "western" television and films, it was the white colonists, not the Indian peoples, who were the "savages." Despite the efforts of the judiciary, in particular, the Indian peoples were massacred by settlers and the survivors herded off their traditional lands towards the center of the country.[54] It has been estimated that Pre-Columbus, the Indian peoples numbered 5 million. By 1890, this had been reduced by disease and gunpowder to a mere 250,000.

While this slaughter and dispossession occurred despite the government's legal recognition of the territorial integrity of the Indian

---

50. *Id.*

51. *Id.* at 41.

52. Treaty Between the United States of America and the Tribes of Indians Called the Six Nations, Nov. 11, 1794, 7 Stat. 44, 45.

53. Treaty with the Cherokees (full title omitted), Dec. 29, 1835, 7 Stat. 478, 479.

54. Settlement began on the eastern coast, proceeding towards the center of the country, eventually stretching to the west coast.

peoples, the magnitude of this breach undermines the existence of this custom at settlement. If this is so, it is submitted, in the later two periods considered, state practice protecting the aboriginal title crystallized into a binding customary international norm.

3. *New Zealand*

Significant support for the customary state practice of the recognition of aboriginal title can be found in the judicial and legislative practice of the New Zealand government. During this period, the New Zealand Court of Appeal entrenched the recognition of aboriginal territorial rights into its domestic legal system.[55] Further, this protection of the aboriginal title was acknowledged to be based on "principles of universal application,"[56] that is, international law and practice. This recognition was confirmed by the Treaty of Waitangi[57] and the Letters Patent, containing a protection clause identical to that in the South Australian Letters Patent.

4. *Canada*

Similarly in Canada, it was acknowledged to be

> beyond the power of the . . . Government of Canada to simply deny the legal viability of [aboriginal] rights. Native rights have a four hundred year history in international law and have been part of the common and statutory law . . . of Canada for well over two centuries. Rights which find their derivation in such a rich history cannot be easily ignored.[58]

While under the control of the French authorities, recognition of the aboriginal title was not well documented and thus possibly doubted. English settlement, on the other hand, proceeded on the basis of established principles of British colonial policy. According to this policy, the rights of the original occupants were to be recognized, and settlement

---

55. *See, e.g.*, R v. Symonds, [1847] N.Z.P.C.C. 387.

56. *Id.* at 398.

57. Signed February 6, 1840. The major concern of the Treaty was to protect the traditional rights of the Maoris. Article II, for example, confirmed these peoples' right to "exclusive and undisturbed possession of their lands and estates . . . ."

58. PETER A. CUMMING AND NEIL H. MICKENBERG, NATIVE RIGHTS IN CANADA 275 (2nd ed. 1972).

was to proceed on the basis of treatying,[59] rather than forceful dispossession.

From the initial date of English settlement and throughout years of expansion, official documentation reveals a strong concern and respect for the territorial integrity of the aboriginal people of Canada. Steps were taken by both the British and local authorities to protect the territorial rights of these peoples and to ensure the undisturbed possession of their traditional lands.

Between 1662 and 1692, for example, a series of treaties was entered into between the Hudson's Bay Company and the aboriginal owners of Rupert's Land. The Royal Proclamations of 1761 and 1763[60] later confirmed this need to respect the aboriginal title.[61] To this end, The Royal Proclamation of 1761 stressed the need to "support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them." As a corollary, the governors of the colonies were strictly enjoined from granting any land "within or adjacent to the Territories possessed or occupied by the said Indians or the Property Possession of which has at any time been reserved or claimed by them." These sentiments were confirmed by The Royal Proclamation of 1763, which was held in *St. Catherine's Milling and Lumber Co v. The Queen*[62] to provide effective protection of the aboriginal title.

Moreover, these practices extended beyond the areas under the protection of the Royal Proclamation of 1763. In Quebec,[63] for example, the applicability of the sentiments reflected in the Royal Proclamation of 1763 was clearly appreciated by the imperial and colonial authorities. Governor Murray, Governor of Quebec in 1763, was told that "any Purchases or Settlements whatever, or Taking Possession of any of the Lands reserved to the several Nations of Indians" was strictly prohibited. He was instructed on no account "to molest or disturb [the Indians] in the Possession of such parts of the said Province, as they

---

59. That is not to say all areas were subject to treaties. In Rupert's Land and the Northwest Territories, however, history reveals a consistent practice of negotiating with the Indians for their land.

60. Reprinted in R.S.C. app. 123, 125 (1970).

61. The proclamation also noted that despite the numerous instructions directing the Governors of the colonies to respect and protect the territorial rights of the Indians, many governors had acted "illegally, fraudulently and surreptitiously" resulting in dispossessions that were illegitimate and contrary to both the legal and moral rights of the Indians.

62. 14 App. Cas. 46 (1888).

63. Outside the perimeters of the "Indian Country" included in the Proclamation of 1763. *Supra* note 60.

at present occupy or possess." This implicit recognition of the aboriginal title outside the perimeters of the Royal Proclamations reinforces the generality of the practice of protecting the aboriginal title.

Despite these assurances, the territorial integrity of these peoples was infringed; pressures for land led to many "tribes" being driven from their land. Such dispossessions were, however, recognized by the government as an infringement of the Indians' pre-existing rights.[64] Consequently, in response to such breaches, prompt action was taken to rectify this disregard for the aboriginal title and to prevent further acts of dispossession.

Thus, at least as a matter of official policy, it is submitted, Canadian settlement was to proceed on the basis of consensual purchase, rather than uncompensated dispossession. All arms of government recognized this policy, and the aboriginal title underlying such, to be a well-established part of international and colonial law and practice.[65]

The above examples are only a small portion of an otherwise vast body of documentation recognizing the aboriginal title in the subject nations between the time of settlement to the 1870's. The uniformity of thought and practice is quite remarkable. The cross-fertilization of ideas from nation to nation and the consequent common threads found in each jurisdiction suggest the existence of a norm requiring the territorial integrity of these traditional peoples be respected.

While, as noted above, many acts of dispossession and cruelty befell the aboriginal peoples in each of these nations, it is submitted these were perceived as being the exception, not the rule. They were breaches of an otherwise entrenched practice in colonial expansion and, as such, were part of customary international law. If, however, these breaches are considered so significant as to undermine the validity of this conclusion, arguably such practice recognizing the aboriginal title not only continued, but strengthened in later periods. Thus, it will be contended that if such a norm did not exist by the 1870s, in subsequent years state practice did crystalize into a binding principle of customary international law.

B. *1880s to 1970s*

1. *Australia*

While it was in the 1970s that the Australian courts rejected the doctrine of communal native title,[66] legislative recognition of aboriginal

---

64. *See, e.g.*, *supra* note 61.

65. Examples include the terms of the Royal Proclamation of 1763 and the decision in St. Catherine's Milling and Lumber Co. v. R, 14 App. Cas. 46 (1888).

66. Milirrpum v. Nabalco Mining Co., 17 F.L.R. 141 (1970). This decision,

interests was notable during this era. The enactment of the unique Aboriginal Land Right (Northern Territory) Act, 1976 in particular, evidenced an acceptance, even in Australia, of the legitimacy of aboriginal claims to their traditional lands.

Unlike other post-colonial Nations,[67] there has been a dearth of authority on the rights of Aboriginals in Australia. During the ninety years that passed between 1890 and 1980, apart from criminal trials, the status of these people and their land was rarely raised in courts of law.

Of the few cases handed down during this period, the decision in *Milirrpum v. Nabalco Pty. Ltd.*[68] appeared to have rung the "death knell" for judicial protection of the aboriginal title in Australia. While this case was only heard by a single judge of the Northern Territory Supreme Court, its rejection of the doctrine of communal native title became entrenched in the Australian legal system. At the close of the 1970s, however, this refusal to recognize the existence of the Aboriginal peoples' inherent right to territorial integrity was no longer indisputable and the courts became increasingly receptive to arguments in favor of the existence of traditional rights to land.

The way was opened by the decision in *Coe v. Commonwealth.*[69] In what were said to be poorly drafted pleadings,[70] the Aboriginal plaintiff claimed certain sovereign and territorial rights.[71] While the High Court remained divided as to the existence of Aboriginal sovereignty[72] and the proper classification of the annexation of the Australian continent,[73] all members of the Court[74] appeared willing to reconsider Milirrpum's case and its denial of the communal native title.

---

it is submitted, was merely a result of the judicial circumstances at the time of the hearing. Judge Blackburn relied on a then-recent decision of the Canadian Court of Appeal where it was held the doctrine of communal native title had no part of the common law. Judge Blackburn could not have predicted that the Court of Appeal's decision would soon be overturned on appeal in Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145 (1973).

67. Except perhaps Canada, where, apart from the decision in St. Catherine's Milling and Lumber Co., 14 App.Cas. 46, the first significant judicial consideration of the aboriginal title had to await the decision in Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145.

68. 17 F.L.R. 141.

69. 53 A.L.J.R. 403.

70. *Id.* at 407 (see the opinion of Justice Gibbs).

71. Including the sovereign title to England. Justice Murphy was highly critical of the frivolous nature of such claims.

72. In accordance with an Austinian type of reasoning whereby the judiciary

Justice Jacobs, for example, declared it open to the plaintiff to argue that the Aboriginal people were entitled to the enjoyment of "the proprietary and possessory rights" they held by reason of their prior occupation of the continent,[75] the Commonwealth's usurpation of Aboriginal "rights, privileges, interests, claims and entitlements in respect of their lands"[76] being unlawful. Justice Murphy stressed that the decisions in *Cooper v. Stuart*[77] and Milirrpum's case[78] were not binding on the Court,[79] stating international law indicated the "settled" classification, and the consequent rejection of the aboriginal title, to be wrong.[80] Judicial pronouncements reinforcing the traditional view of the peaceful "settlement" of Australia were, he said, "made in ignorance or as a convenient falsehood to justify the taking of aborigines' land."[81]

---

derived their authority from the Crown, Justice Jacks did not believe he could consider whether the Australian Crown had properly obtained its sovereign rights. He believed it beyond his jurisdiction to question the power of the body from whence he derived his authority as a Crown instrument.

73. That is, whether Australia was acquired by conquest or, as tradition would have it, by settlement. Justices Jacobs and Murphy believed it open to the plaintiff to argue that Australia was in fact acquired by conquest and therefore enjoyed any consequent benefits. Coe v. Commonwealth, 53 A.L.J.R. 403.

74. Even Justice Gibbs believed it was open to the plaintiff to question the accuracy of the decision in Milirrpum. He further suggested the appropriation of Aboriginal land might be contrary to the free exercise of religion protected by § 116 of the Australian Constitution. In this particular case, however, he felt the subject claimed had not been sufficiently identified. Implicitly, had the land claimed been so identified, it appears even Justice Gibbs would recognize the inherent right of the indigenous peoples to their land.

75. Coe v. Commonwealth, 53 A.L.J.R. at 411.

76. *Id.*

77. Cooper v. Stuart, 14 App. Cas. 286. The Australian continent was stated to have been acquired by settlement.

78. Milirrpum v. Nabalco Pty Ltd., 17 F.L.R. 141.

79. Viro v. R, 52 A.L.J.R. 418 (1978)(Austl.).

80. Quoting the *Western Sahara* case, *translated in*, Reports of Judgments, Advisory Opinions and Orders, 1975 I.C.J., and Professor Starke, INTERNATIONAL LAW 185 (8th ed. 1977). Justice Murphy noted the complexity of the social, political and legal systems of the Aboriginal people and stressed the fact that Australia was not uninhabited, the Aboriginal population being approximately 300,000 in 1788. Nor was Australia taken "'peacefully'; Aboriginal people were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide." Coe v. Commonwealth, 53 A.L.J.R. at 412.

81. 53 A.L.J.R. at 412.

In this way, the decision opened the way to a more thorough questioning of Justice Blackburn's finding.[82] While Australia was for a time out of step with the consistent judicial recognition of the inherent territorial rights of aboriginal peoples in other post-colonial nations, *Coe v. Commonwealth*[83] marked the beginnings of a return to this uniformity of thought.

Consequently, it is submitted Australia's failure to judicially recognize these rights in no way detracted from the strength of state practice affirming the aboriginal right to territorial integrity at this time. This is particularly so in light of Australian legislative responses to Milirrpum's case.[84] During this period, Australia legislatively[85] acknowledged Aboriginal territorial rights and, at least in this way, conformed with international state practice.

During the period between the early 1950s and the early 1980s, land rights legislation was passed in most Australian states. In the face of growing international pressures and increasing Aboriginal activism, the Australian governments appreciated the need to give substance to past promises and to recognize the aboriginal title. Some legislation simply made outright grants of land to individual communities or converted Aboriginal reserves into free-hold lands held by the aboriginal occupants,[86] while others established systems of land claims.[87]

These enactments were based on an acknowledgement of the pre-existing[88] customary title and the need to give these people a degree of independence and/or self government.[89] Steps were also taken to protect Aboriginal sacred sites in a bid to recognize the cultural rights

---

82. *See, e.g.*, Northern Land Council v. The Commonwealth, 161 C.L.R. 1 (1986).

83. 53 A.L.J.R. 403.

84. 17 F.L.R. 141. The Aboriginal Land Rights (Northern Territory) Act, (1976) (Austl.) was enacted in response to this determination.

85. For example, through the enactment of the Aboriginal Land Rights (Northern Territory) Act (1976).

86. Such as the Lands Trusts Act, (1966) (S. Austl.).

87. Such as the Aboriginal Land Rights (N. Terr.) Act (1976).

88. For example, the Aboriginal Land Rights (N. Terr.) Act (1976) centered upon the notion of "traditional lands" and "traditional owners." In this way the legislation indicates this is the recognition of a pre-existing right, not an act of benevolence.

89. In particular, the enactments relating to the Torres Strait Islanders of Queensland conferred upon these peoples a great deal of self government. Torres Strait Islanders Act, (1976) (Queensl.).

of these peoples.[90] Through these enactments the parliaments recognized the inherent rights of Australia's aboriginal peoples and the responsibility to ensure their cultural and territorial integrity. Particularly in the last twenty years, Australian governments have begun to follow more closely the practice of other post-colonial nations, acknowledging their domestic and international responsibilities to the aboriginal peoples of Australia. These movements coincide with a similar intensification of recognition in the other Nations under consideration, providing strong evidence of the existence of a custom protecting indigenous territorial rights.

2. *United States*

In the United States, for example, throughout the nineteenth and twentieth centuries, the Marshall Court's recognition of the Indian title provided the foundations of both law and practice. The already well-established practice of treatying with Indians for their land became officially entrenched in the United States policy of settlement and expansion. As an examination of the records of the Department of the Interior show,[91] relatively large amounts were appropriated each year for the purpose of purchasing Indians lands.

Between the adoption of the United States Constitution and the latter half of the nineteenth century, it is estimated that approximately 393 treaties were signed with Indian peoples.[92] The lands acquired under these treaties, some 581,163,188 acres, had been purchased at a cost of $49,816,344.[93] With the beginning of the twentieth century, this amount multiplied. Cohen[94] has estimated that if commodities, services, and tax exemptions are taken into account, more than 800 million dollars has been paid for title to Indian lands. This figure should be further multiplied given the value of the dollar at the time.[95] While much of the dispossession of the Indian peoples was forcible, these payments of compensation are at least an indirect recognition of the legitimacy of the aboriginal title.

---

90. Such as the Aboriginal Sacred Sites Act (N. Terr.), and the Aboriginal Relics Preservation Act, (1967) (Queensl.).

91. *See, e.g.*, the documents examined in Federal Indian Law, chapter III, "Administration of Indian Affairs" 1966.

92. *Id.* at 230.

93. *Id.*

94. *Supra* note 49, at 36.

95. *Id.* at 38-39. To emphasize the import of this factor, Cohen uses as a

The practice of treatying was supported by strong judicial protection of the aboriginal title. The courts[96] continued to stress throughout the nineteenth and twentieth centuries that, before the government could purport to grant land to the colonists, the aboriginal title had to be extinguished by consensual purchase.[97] The Marshall Court's sentiments were expanded upon and clarified by the twentieth century courts, which vigorously enforced the inherent rights of the Indians against both colonists and the United States authorities.[98]

Thus, in *Holden v. Joy*,[99] the court declared it "[b]eyond doubt the Cherokees were the owners and the occupants of the territory where they resided before the first approach of civilized man . . . deriving their title . . . from the Great Spirit, to whom all the earth belongs, and they were unquestionably the sole and exclusive masters of the territory."[100] The court considered it an established fact that "the Indians . . . have been considered as distinct independent communities, retaining their original, natural rights as the undisputed possessors of the soil since time immemorial . . . ."[101]

An examination of the official executive practice of the United States government, the statutes passed by the legislatures of the country, and the case law as administered by the courts, reveals a uniformity of thought and practice designed to recognize and protect indigenous

---

striking example the sale of Manhattan Island which was said to have been purchased for $24. As he pointed out, were that $24 invested at a mere six per cent per annum, the compound interest would enable the Indians to buy back the Island at current prices and still be left with a sizeable surplus. *Id.*

96. *See, e.g.*, Holden v. Joy, 84 U.S. 211 (1872); Buttz v. Northern Pacific Railroad, U.S. 55 (1886); Jones v. Meehan, 175 U.S. 1 (1899); Cramer et al. v. United States, 261 U.S. 219 (1923); United States v. Shoshone, (1938) 304 U.S. 111 (1938); and United States v. Klamath Indians, 304 U.S. 119 (1938).

97. United States v. Sante Fe Railroad Company, 314 U.S. 339; Gila River Pims - Maricopa Indian Community v. United States, 494 F.2d 1386 (Ct. Cl. 1974); and Narrangansett Tribe of Indians v. Southern Rhode Island Land Development Corporation, 414 U.S. 661 (1976).

98. During this and earlier periods there were occasions when "Indian hating" frontiersmen came to positions of power and influence. These men incited much hatred towards the Indian peoples and were instrumental in the dispossession of Indian communities. It is submitted, however, that the true character of acts such as the illegal theft of the aboriginal title was perceived by the judiciary. Particularly in this later period, this perception of illegality was not confined to the judiciary, but rather held by all branches of government.

99. 84 U.S. 211 (1872).

100. *Id.* at 244.

101. *Id.*

territorial integrity. It was clearly believed by all branches of government that Indian peoples enjoyed certain rights in their traditional lands and a degree of self government.

While these rights were infringed by colonists,[102] it is submitted that such infringements were in violation of accepted United States law and practice. A breach of a law is not a denial of its existence; it is merely a condition which is determined by the law. These breaches do not, therefore, negate the existence of this custom.

3. *Canada*

While there was strong legislative and executive recognition of the aboriginal title in colonial Canada, subsequent eras were marked by a lack of judicial consideration of Canadian aboriginal rights.[103] As late as the 1970s there had been no definitive judicial pronouncement upon the territorial rights of the indigenous people of Canada. It was not until the decision in *Calder v. Attorney-General of British Columbia*[104] that the existence of the aboriginal title and the rights stemming from this title became firmly entrenched in the Canadian common law system.

While the courts[105] were at times divided on certain points, generally they recognized and vigorously enforced Indian and Inuit[106] tenure.[107] In turn this judicial development led to further action at the executive and legislative level. Once these inherent territorial rights were established in the courts, the government recognized the aboriginal title by proceeding to negotiate the settlement of traditional owners' claims. These negotiations, including those relating to the Nishga land claim and the final settlement of the James Bay Claim,[108] the establishment of the Berger Commission into aboriginal rights in the Mackenzie Valley,[109] and the creation of the Indian Commission of Ontario[110] were

---

102. And at times apparently condoned by authorities led by frontiersmen.

103. The Privy Council in St. Catherine's Milling and Lumber Co. v. R, 14 App. Cas. 46, stressed that it was not necessary to determine the nature of the aboriginal title for the purpose of determining the dispute before it.

104. 34 D.L.R.3d 145.

105. See subsequent determinations such as Re Paulette and *Registrar of Titles (No 2)*, 42 D.L.R.3d 8 (1973).

106. *See* Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development, 107 D.L.R.3d 513 (1980).

107. Existing independently of the Royal Proclamation of 1763. Re Paulette, 42 D.L.R.3d 8.

108. The James Bay Settlement Acts being proclaimed by the federal and Québec governments in 1977.

109. The Berger Commission report, presented on 15 April 1977, called for a

also designed to facilitate the resolution of, *inter alia*, land claims.

The decade closed with the federal government's announcement of a proposal for a new Constitution recognizing and protecting these peoples' indigenous rights. This marked the end of a crucial time for the aboriginal peoples of Canada, and the beginning of an era which promised even greater respect for their traditional rights.

4. *New Zealand*

In New Zealand, the turn of the twentieth century was marked by increasing activity by Maori representatives in the New Zealand Parliament. This in turn led to a re-emphasis upon the need to respect the Maoris' cultural, economic, and territorial rights. To ensure that this plea to respect Maori rights would not fall on deaf ears, The Native Representation Act, 1867, was enacted, assuring Maori representation in parliament. In this way, the rights of the Maori people could never be conveniently forgotten. These Maori parliamentarians, with the support of many paakehaas, were able to check purchases of Maori land and to take steps designed to promote Maori rights.[111]

Such rights were in turn vigorously enforced by the courts in accordance with the principles laid down by Chief Justice Martin and Justice Chapman in the earlier case, *R v. Symonds*.[112] Subsequent cases[113] reaffirmed the need to respect traditional Maori titles. The courts stressed that such titles could only be extinguished by consensual purchase. The Maori title was acknowledged to be a pre-existing right stemming from original occupation, which state practice and general principles of international law required imperial and colonial powers to recognize and protect.

Thus, in all the nations under consideration, state practice[114] strongly reaffirmed the sentiments of the Marshall court, recognizing and enforcing the rights of the traditional owners. The courts consistently took

---

ten-year "moratorium" on the construction of the Mackenzie Valley pipeline to allow for the resolution of the claims of the traditional owners.

110. The Commission was established under an agreement between the federal and Québec governments and the Chiefs of Ontario.

111. For example, the Native Lands Acts of 1862 and 1865.

112. R v. Symonds, N.Z.P.C.C. 387.

113. Most importantly, *Nireaha Tamaki*, App. Cas. 561; Wallis and Others v. Solicitor General, [1903] N.Z.P.C.C. 23; and In re the Ninety Mile Beach, [1963] N.Z.L.R. 461.

114. Particularly that of the judiciary.

up the cause of the traditional aboriginal owner, even in the face of what was at times strong executive opposition.

It is submitted that such uniformity of thought and practice evidences a well-established international norm requiring the observance of the legitimate exercise of traditional aboriginal rights.

C. *1989-1990*

In addition to the continuing legislative and judicial support of the aboriginal title, the current period has been characterized by three new distinct developments. With respect to each of these developments, Canada has led the way.

1. *Canada*

First, moves have been made towards the recognition of aboriginal rights through constitutional instruments and other fundamental documents. In 1982 the aboriginal and treaty rights of the indigenous peoples of Canada were entrenched in the Canadian Constitution. The new Constitution Act contained five provisions either recognizing and protecting the special rights of the aboriginal people of Canada or the human rights of Canadians in general. These are:

> Section 15 guarantees the right of equality, while allowing temporary affirmative measures to be taken to support particular categories such as race and sex.
>
> Section 25 ensured that the provisions of the Charter of Rights and Freedoms were not to be taken as affecting "any aboriginal, treaty or other rights of freedoms that pertain to the aboriginal peoples of Canada. . . ."
>
> Section 28 guarantees to all males and females equal enjoyment of the rights and freedoms provided for in the Charter of Rights and Freedoms, notwithstanding anything in the Charter itself.
>
> Most importantly, section 35 recognizes and affirms the existing aboriginal and treaty rights of the indigenous people of Canada.[115]
>
> Section 37 provided for the convening of the Constitution's First Ministers Conference[116] to discuss the definition

115. This expressly included the rights of the Metis even though the federal government lacked legislative power with respect to these peoples.

116. The Conference was to be convened within one year of its enactment.

> of the aboriginal rights to be included in the Constitution. Section 37(2) provides that aboriginal representatives and the governments of the Northwest Territories and Yukon (section 37 (3)) were to be invited to consider matters directly affecting the aboriginal people.[117]

These protections are ensured by section 52 of the Constitution which establishes the Constitution of Canada as the "supreme law of Canada." Any inconsistent law has "no force or effect" to the extent of that inconsistency.

Second, the courts, notably the Canadian Supreme Court in *R v. Guerin*,[118] recognized the respective governments to be subject to a fiduciary obligation to safeguard the rights and interests of the aboriginal occupants. In *R v. Guerin*,[119] the Court declared this fiduciary duty to be "an acknowledgement of the historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which the reserve land is put will not interfere with it. . ."[120] The decision in *Calder v. Attorney General of British Columbia*[121] aside, this is probably the most important determination relating to aboriginal rights in Canada since *St. Catherine's Milling and Lumber Co. v. R.*[122]

A third development is found in Canada's push towards the recognition of aboriginal self-government. In October 1983, the Special Committee on Indian Self-Government released a report, recommending that "the federal government recognize Indian First Nation governments as a distinct order of government within the Canadian federation."[123]

In furtherance of these sentiments, aboriginal representatives were invited to participate in the Canadian First Ministers' conference. The initial First Ministers' conference led to the signing of a constitutional accord, under which working groups were formed to consider, *inter alia,* "aboriginal title and rights, treaties and treaty rights, land and resources, and aboriginal self-government."[124] Participants in the con-

---

117. At the first of these in 1983, the First Ministers agreed to three additional conferences in 1984, 1985, and 1987.

118. 2 S.C.R. 335 (1984).

119. *Id.*

120. *Id.* at 349. See the opinion of Justice Dickson.

121. Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145.

122. 14 App. Cas. 46; *Cf.* Brad Morse, *Canadian Developments*, A.L.B. at 6.

123. Report of the Special Committee on Indian Self-Government in Canada (The Penner Report) 133 (1983).

124. *Id.*

ference proposed various ways self-government could be implemented, including constitutional recognition of the inherent aboriginal right to self government[125] as defined by the First Ministers and other participants.

Steps towards the implementation of self-government were taken, however, independently of the constitutional reform process. In October 1986, the Sechelt Indian Band Self-Government Act was proclaimed. This act was the first self-government legislation to be produced as a result of federal initiatives and negotiations with Indian peoples at the community level. Thus, the Sechelt people of British Columbia have been accorded control of their lands, resources, health and social services, education, and local taxation. Judicial initiatives have also recognized the inherent right to Indian sovereignty, adopting the principles espoused by Chief Justice Marshall in *Worcester v. Georgia*,[126] recognizing aboriginal sovereignty at the date of settlement and confirming its continuing existence even after the Royal Proclamation of 1763.[127]

As noted above, these three new developments were in addition to a continuity of practice recognizing the aboriginal title. The decision in *Calder v. Attorney-General of British Columbia*[128] spurred the renewal of the treaty making process and the development of a new federal aboriginal land claims policy.[129] In August 1973, the Minister of Indian Affairs and Northern Development announced the federal government was to introduce a comprehensive claims settlement policy. This settlement policy acknowledged the existence of the aboriginal title, stemming from traditional occupation, and the absence of any specific legislation taking precedence over such title.[130] The comprehensive claims policy was reaffirmed with a few modifications in 1981 and in December 1986.

Pursuant to this comprehensive claims system, in 1982 the first successful claim against Canada was made by the Indians of British Columbia. The Penticon Band received 14.2 million dollars and 4,855.2 hectares of land in settlement of their "cut-off" lands claim.[131] Inuit

---

125. This inherent right has recently been recognized by the Canadian judiciary. *See infra*, note 127.

126. 31 U.S. 515.

127. *See, e.g.*, R v. Sioui, [1990] Mary 24. For a discussion of this case see R.H. BARTLETT, INHERENT ABORIGINAL SOVEREIGNTY IN CANADA - INDIAN SUMMER 1990 5.

128. Calder v. Attorney-General of British Columbia, 34 D.L.R.3d 145.

129. Department of Northern and Indian Affairs, *Comprehensive Land Claims Policy*, 5 (1973).

130. *Id.* at 8.

131. This was followed by the settlement of the Osoyoos Band's claim for $1

peoples also made a successful claim in this decade. In 1984 the Canadian parliament ratified, through the passage of a special statute, the comprehensive claim of the Inuvialuit of the Western Arctic.

Great advancements were made in the 1980s by the indigenous populations of Canada. Both federal and provincial governments took steps towards the recognition of the territorial integrity of aboriginal owners and their right to self-government and self-management. While such recognition had not been totally absent in earlier decades, it has since taken a different shape, representing a strengthening of the position of these peoples in Canadian state practice.

2. *New Zealand*

Canadian constitutional developments were paralleled in New Zealand through the determination of the New Zealand Court in *New Zealand Maori Council v AG.*[132] In this case, the Court resurrected the Treaty of Waitangi as a legally binding recognition of Maori rights. In determining the rights so protected under the Treaty, the High Court adopted the Maori translation of the instrument, thereby ending a long dispute as to the appropriate translation to be accorded legal force. This decision constitutes the most important act recognizing the indigenous rights of the Maori people in the 1980s, perhaps in the history of New Zealand. It marked the beginning of a new era in land rights in New Zealand, the flood of consequent claims being well documented.

Maori Council v. A.G. was supported by earlier developments designed to give effect to the sentiments of the Treaty of Waitangi. In response to concerns that the Treaty was not adequately reflected in paakehaa legislation and government policies,[133] the Treaty of Waitangi Act, 1975 was enacted in an attempt to give those rights enshrined in the Treaty some practical value.[134] A tribunal which could question the consistency of government actions in relation to the Treaty was established to hear Maori grievances. In the past, grievances could only be addressed through litigation in the paakehaa courts, a system which

---

million and the settlement of the claims of the Wagmatcook Band of Nova Scotia for $1.2 million. A year later the claims of the Clinton Band of British Columbia were settled for $150,000 and the return of almost 70 of the original 90 hectares of reserve land taken in 1916. This was followed by the settlement of the claims of the Oromocto Band of New Brunswick for $2.5 million. These years were therefore marked by the more active pursuit of aboriginal territorial rights and the payment of compensation for past infringements of such rights.

132. Judgement of 29 June 1987, C.A. 54/87 (on file with author).

133. Kenderdine, *Statutory Separateness (2): The Treaty of Waitangi Act, 1975 and the Planning Process*, 1985 N.Z.L.J. 300.

134. *Id.*

was not thought to be entirely satisfactory for the determination of tangata whenue (Maori) rights.

During the 1980s the Tribunal carried out a number of important inquiries into the validity of certain bureaucratic decision-making processes and their impact upon traditional Maori rights.[135] A reaffirmation of the spirit and intent of the Treaty of Waitangi can be identified in these findings, and in the government's swift response to the Tribunal's recommendations. These findings of the tribunal, combined with legislative responses and judicial determinations[136] provide ample evidence of the New Zealand government's belief in a need to respect the traditional rights[137] of the Maori people, thereby supporting the existence of the subject norm.

3. *Australia*

Even in Australia we have seen movements towards the implementation of a treaty between the federal government and the Australian aboriginal peoples. While those sympathetic to the aboriginal cause are always skeptical of the promotion of a treaty or Makaratta as nothing more than an election exercise, such moves at least show that politicians believe they must appear to support the recognition of the aboriginal title.

In the Australian context, it also appears that the High Court[138] will adopt the reasoning in *R v. Guerin*[139] and find the Commonwealth government in breach of its fiduciary obligations owed to the traditional owners. This breach occurred as a consequence of the Ranger Uranium Agreement and the duress the government brought to bear on the traditional owners in forcing them to sign an agreement whose terms were not fully disclosed.

Increasing Aboriginal activism in Australia in the 1980s, coupled with growing international concern for the plight of these people, led

---

135. *See, e.g.*, the Te Atiawa Inquiry; subsequently reaffirmed by the New Zealand Court of Appeal in North Taranaki Environment Protection Association v. Governor-General, 1 N.Z.L.R. 312 (1982). The Sir Charles Bennett Claim, and the Huakina - Te Puha Ki Manuku claim.

136. See Huakina Development Trust v. Waikato Valley Authority, 2 N.Z.L.R. 188 (1987), where the court used the Treaty of Waitangi Act, 1975, 1, and the findings of the Waitangi Tribunal to protect the plaintiffs' spiritual, cultural, and traditional relationship with the waters in dispute.

137. The dispute in Te Weehi v. Regional Fisheries Officer, 1 N.Z.L.R. 680 (1986), involved fishing rights.

138. *Supra* note 7.

139. 2 S.C.R. 335 (1984).

to greater awareness of the plight of indigenous minorities. This change in Australian perceptions is reflected in the development of an official Aboriginal policy geared towards more active preservation of their inherent rights.

Legislation recognizing the land rights of these people was enacted in South Australia,[140] Western Australia, New South Wales, Queensland, and, through a referral process, in Victoria.[141] The judiciary supported land grants under existing legislation [142] and returned significant parts of the Northern Territory to the traditional owners. In this way the Australian government acknowledged the existence of the right to territorial integrity inhering in this indigenous people.

Changes were also evident in judicial practice. After many decades characterized by little judicial consideration of aboriginal rights, there was a resurgence of confidence in the judiciary, spurred by the above-mentioned decision in *Coe v. Commonwealth*.[143] While cases concerning aboriginal rights were still rare outside the criminal law context, more cases were brought before the courts for consideration. The consequent determinations[144] reveal a willingness to support to a greater extent than hitherto, the existence and legitimacy of aboriginal territorial rights.

In this regard, three significant steps were made. First, Milirrpum's case[145] was questioned[146] and the inherent right to traditional land accepted.[147] Second, Australia's international responsibilities to Aboriginals and Torres Strait Islanders[148] were also acknowledged and enforced by the courts. Finally, as noted above, in accordance with Canadian developments, moves were made by the Australian courts towards recognizing the fiduciary responsibilities of the Australian Crown

---

140. *See, e.g.*, The Pitjantjatjara Land Rights Act, 1981, the boundaries of which it is proposed to extend.

141. *See, e.g.*, the Aboriginal Land (Lake Condah and Framlingham Forest) Act and the Aboriginal and Torres Strait Islander Heritage Protection (Amendment) Act.

142. *See* Re Toohey (Aboriginal Commissioner); Ex parte Northern Land Council: The Kembi Land Claim, 56 A.L.J.R. 164 (1981); Re Kearney Ex Parte Northern Land Council (Jawoyn), 52 A.L.R. 1 (1984); Re Kearney Ex parte Japanangka 52 A.L.R. 31 (1984); and Re Kearney Ex parte Jurlama, 52 A.L.R. 24 (1984).

143. 53 A.L.J.R. 403.

144. Such as the findings with respect to the Torres Strait Islander's in Mabo, Passi and Rice v. State of Queensland (82/OB12), S.C. Judge Moynihan 16.11.90, and Northern Land Council v. The Commonwealth, 161 C.L.R. 1.

145. 17 F.L.R. 141.

146. *See* Northern Land Council v. The Commonwealth, 161 C.L.R. 1.

147. *Mabo and Others v. Queensland*, 175 C.L.R. 1 (1992).

148. *See* Koowarta v. Bjelke-Peterson, 39 A.L.R. 47 (1982).

and the correlative rights of Australian aboriginal peoples.[149]

4. *United States*

The United States judiciary continues to stress the need to respect the aboriginal title[150] and other traditional rights.[151] The courts reaffirmed that the government only acquired a bare title to lands and waterways[152] upon discovery, and that the aboriginal title needed to be purchased before a whole title was acquired.

These examples of state practice supporting a customary international norm protecting the inherent right to territorial integrity suggest that, if not fully crystallized into a binding norm in 1788, by the 1980s protection of aboriginal territorial integrity was well entrenched in state practice. This is significant because under the intertemporal rule, the rights and status of the Aboriginal people today will be determined, not by custom in 1788, but rather *opinio juris* as it stands today.

III. INTERNATIONAL PROTECTION OF INDIVIDUALS

The establishment of such uniformity of thought is far from the end of the matter. Once the norm has been established, many possible problems can be suggested. Perhaps the most formidable of these lies in the traditional view that international law only governs nations.

Can international law protect aboriginal minorities? Can minorities enforce and enjoy international rights? Traditionally, international law is seen as concerned exclusively with the rights and duties of nations, seemingly to the exclusion of the individual. The individual is only an "object," not a "subject" of international law.[153] International responsibility is owed to the nation of which the individual is a national, not the individual. Consequently, according to the traditional theory, as it is the nation's and not the individual's right which has been

149. *See* Northern Land Council v. The Commonwealth, 161 C.L.R. 1.

150. *See, e.g.*, County of Oneida, New York, et al. v. Oneida Indian Nation of New York State, 470 U.S. 226 (1984).

151. For example, fishing and hunting rights.

152. This included aboriginal title to river beds and banks; U.S. v. Pend Oreille County Public Utility District No. 1, 585 F. Supp. 606 (E.D. Wa. 1984); and Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983).

153. See the works of Oppenheim, the chief exponent of the traditional theory. He asserts that an "individual human being . . . is never directly a subject of International Law . . . But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations." INTERNATIONAL LAW 344 (1905).

infringed, only the nation may enforce that right in international courts.

Positivists allow no exception to this general rule. They suggest that even in the absence of citizenship, the individual has no legal significance in the international arena.[154] Any rights or obligations international law imposes in such cases are "enjoyed" through the exercise of a right held by the nation, not by virtue of the individual's international status.[155] It appears that positivists believe international law cannot, by its very nature, operate upon entities other than nations.

This position appears to have been adopted by both the Permanent Court of Justice and the International Court of Justice. In the Nottebohm case, the International Court of Justice stated:

> As the Permanent Court of International Justice has said and has repeated, 'by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its rights to ensure, in the person of its subjects, respect for the rules of international law.'[156]

It is the right of the nation, not of the individual, which is pursued.

Thus, according to positivists, any apparent rights or duties individuals seem to have are not truly imposed by international law. Before these rights can be enjoyed by, or are binding upon, individuals, they must be transformed into municipal rights and duties. Further, once these rights and duties have been so "transformed" they are no longer international, but municipal rights and duties. Thus, under traditional international law, individuals and minorities cannot enforce "their" international rights such as those provided under the subject norm.

An examination of the works of ancient international law jurists,[157] and modern state practice, however, reveals an acceptance of the individual as an international entity subject to international rights and duties.[158] Given the extent of modern state practice recognizing human and minority rights, individuals are arguably now considered inter-

---

154. They suggest that even the rights and duties involved in the case of pirates and slaves are technically still the nations', not these individuals'.

155. Under the traditional theory, nationality is a precondition to an exercise of jurisdiction by a court redressing a wrong suffered by an individual.

156. 1955 I.C.J. 4.

157. *See, e.g.*, FRANCISCI DE VITORIA, DE INDIS ET DE JURE BELLI REFLECTIONES (1917) (First published in 1557) and HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (1964).

158. EMER DE VATTEL, LAW OF NATIONS 166-71. Vattel expressly confined the law of nations to relations between sovereigns, not individuals.

national juristic entities possessing enforceable international rights.

International law, like all legal systems, has its background and roots in the society it governs.[159] As the needs and values underlying that society change, so too should the principles which govern that legal system change. Thus, as a corollary of changing concerns in the international community, international law has changed and developed. Two consequent changes relate directly to the place of individuals and minorities in the international arena, extending international rights and obligations to individuals and minorities.

First, it is being appreciated that ultimately, individuals alone are subjects of international law. "The subjects of international law are like the subjects of national law—individual human beings."[160] The "duties and rights of States are only the duties and rights of the men who compose them."[161] This is now being accepted by the courts and tribunals applying international law. As one tribunal noted:

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals . . . [T]hese submissions must be rejected . . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[162]

Second, the interest which all nations have in the observance of international law and the preservation of international peace is being accepted. Increasingly, breaches of international law are seen as directly concerning all nations, not only those physically affected by the violation.[163] As a result of this shared concern with humanity, international law has moved into the so-called "domestic" arena, and with increasing vigor has defended the right of all nations to intervene where international peace is threatened.

It is submitted that these concerns are reflected in the vast body of international documents protecting individuals and minorities.[164] These

---

159. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 1 (1950).

160. KELSEN, *supra* note 12, at 194.

161. 1 THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 78 (L. Oppenheim ed., 1914).

162. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 4 (1950)(quoting the International Military Tribunal, Judgment of 30 September, 1946).

163. In re Piracy Jure Gentium, [1934] App. Cas. 586, 592. *Cf.* HALL, INTERNATIONAL LAW 25 (3d ed. 1889).

164. *See, e.g.*, the Charter of the United Nations; the Universal Declaration of

documents show that international law is not inherently incapable of being directly applicable to individuals and minorities. Thus, it is suggested that there is no reason to conclude that an international norm protecting the aboriginal title cannot be enjoyed and enforced by individuals or minority groups.

In the United States, individuals have enforced both customary and conventional international law in the municipal courts. In *Filartiga v. Pena-Irala*,[165] *Rodriguez - Fernandez v. Wilkinson*[166] and *Forti v. Suarez - Mason*[167] the courts rejected the notion that "the law of Nations extends only to relations between sovereign states."[168] At least in the context of human rights, the courts found that individuals enjoy certain international rights enforceable independently of the State.[169]

The courts, in enforcing international rights,[170] allowed these individual plaintiffs to rely on, *inter alia,* the terms of the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the custom reflected in these instruments.[171] In this way, the suggestion that international law is inherently incapable of affecting individuals was rejected as without foundation.

A. *Forum for the Enforcement of This International Norm?*

A right is, however, merely illusory if it is not enforceable. The enforceability of this special customary international law is, therefore, as crucial as the proof of its existence. Two possible forums exist for the enforcement of this norm: 1) the International Court of Justice, or 2) Municipal Courts.

Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the European Social Charter; the Declaration on the Granting of Independence to Colonia Countries and Peoples; the Declaration of Principles of International Law Concerning Friendly Relations; and the International Convention on the Elimination of all forms of Racial Discrimination.

165. 630 F.2d 876 (2nd Cir. 1980).
166. 505 F. Supp. 787 (D. Kan. 1980).
167. 672 F. Supp. 1531 (N.D. Cal. 1987).
168. *Id.* at 1540.
169. *Id.*
170. *See, e.g.*, Rodriguez - Fernandez v. Wilkinson, 505 F. Supp. 787.
171. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d at 882-85.

1. *Enforcement in the International Court of Justice*

While the view that only nations can have international rights is slowly being discarded as state practice increasingly recognizes individuals and minorities as direct beneficiaries of international rights,[172] these developments have not been incorporated into the jurisdiction of the International Court of Justice. The Statute of the International Court of Justice delineates the jurisdiction of this international court. Article 34, paragraph 1 provides that only "States may be parties before the Court."

Despite the developments made in the recognition of human rights, this constraint prevents individuals and minority groups from enforcing their rights in the International Court of Justice.[173] As only "States" can appear before the International Court of Justice, unless aboriginal minorities can establish they are sovereign States, they cannot bring an action before this international body.

The sovereignty of aboriginal peoples is, therefore, important to the international enforcement of any such custom. An examination of the work of international law jurists reveals a belief that "the aborigines undoubtedly had true dominion in both public and private matters. . ." They believed "their princes . . . could [not] be despoiled of their property on the ground of them not being true owners."[174] Thus, these jurists wrote, it was not only private rights to land which international law required to be respected, but the public or sovereign rights of these peoples also had to be acknowledged.

While some jurists required these peoples to comply with a certain standard of "civility,"[175] generally, the only prerequisite was a degree of governmental authority sufficient to maintain order within the group.[176] Such sovereignty could be exercised by a local community or com-

---

172. *See* Philip C. Jessup, *The Subjects of a Modern Law of Nations*, 45 MICH. L. REV. 403 (1947).

173. That is, unless such groups can establish they constitute a sovereign State within the terms of the statute. Two other alternatives exist. The government might bring an action on behalf of the individual or minority group, or the United Nations may commence proceedings leading to an advisory opinion being given on questions pertinent to the rights and status of these peoples.

174. VITORIA, *supra* note 157.

175. *See* Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW 176 n.14, quoting WESTLAKE, *supra* note 161, at 145, (who required a "native government capable of controlling white men or under which white civilization can exist").

176. *See* CRAWFORD, *supra* note 175.

munities,[177] by a native "king,"[178] by many rulers across the nation,[179] or by small groups jointly exercising co-sovereignty.[180] Many Asian peoples, such as those of the Ottoman Empire, the Maratha Empire of India,[181] Thailand (Siam),[182] Japan, and Korea were recognized as sovereign entities.[183] Similarly, the peoples of Africa[184] and the Pacific[185] were recognized as independent States.

There is, therefore, no reason to deny the sovereignty of the subject aboriginal peoples. As the court pointed out in the Western Sahara case,[186] even nomadic peoples can exercise de facto sovereignty over the lands through which they roam. The nation considered in that case, consisting of nomadic tribes, confederations, and emirates, was found to "jointly exercise co-sovereignty over the Shinguitti country." Similarly, even nomadic bands in Australia, New Zealand, Canada, and the United States could be considered to jointly[187] exercise sovereign rights over these countries.

While international theory provides for the reversion[188] of such sovereignty, to be "States" within the Statute of the International Court of Justice these peoples would need to be recognized as nation-states by the international community. Sovereignty and nationhood may not coincide. Thus, despite the vast body of modern international law recognizing individual and minority rights,[189] in the absence of an amendment to the Statute of the International Court of Justice, the traditional view[190] may still provide a formidable barrier to minorities enforcing their rights in the international arena.

---

177. As in Canada, the United States, and New Guinea.

178. As in New Zealand, Lagos, and Zimbabwe.

179. As in India.

180. For example, the tribes, confederations, and emirates of the Western Sahara.

181. Right of Passage, 1960 I.C.J. 6, 38.

182. Temple, 1962 I.C.J. 6.

183. While these States were not treated identically to the European States, the distinction was not made on the basis of "civility," but through the application of regional customs. CRAWFORD, *supra* note 175, at 176.

184. *See, e.g.*, Western Sahara, 1975 I.C.J (Morocco).

185. Treaty of Waitangi, February 6, 1840, (Parties to Treaty), (Where treaty can be found), (Maoris).

186. Western Sahara, 1975 I.C.J.

187. In conjunction with more settled groups.

188. That is, a resurrection of sovereignty illegally disregarded.

189. A distinction between individual and group rights should be born in mind. Questions of *locus standi* may vary in difficulty depending upon which "type" of right is under consideration.

190. That is, that only States can be the beneficiaries of international rights and obligations.

Given such difficulties, minorities will generally have to rely on the "good nature" of their "Eurocentric" government if they wish to enforce this norm in the international arena.[191] Enforcement, therefore, will depend upon the interests of the government, which is more likely to be the violator than the supporter of these aboriginal territorial rights. It therefore appears necessary to turn to the municipal courts for relief.

2. *Enforcement in the Municipal Courts*

The enforceability of international law in the domestic courts raises a number of issues, *inter alia*:[192]

- Is international law enforceable in the domestic courts?
- Does it require formal incorporation into municipal law before it can be so enforced?
- If international law is not expressly incorporated into national law, what rights do minorities have:
  a. if the government has not passed legislation in relation to this matter?
  b. if municipal law conflicts with international law?
- What obligations are placed on the State to bring municipal law into line with international rules?
- Are municipal tribunals required to apply both municipal and international law? Which must be accorded primacy?

Whether individuals and minorities can enforce their rights in the municipal courts may vary jurisdiction to jurisdiction, depending upon the practice of the domestic courts and whether the national government has incorporated these international rights and obligations into municipal law.

Ultimately, it is suggested, the "monist" theory of law, which sees both international and municipal law as a single body of law, is not only theoretically correct, but reflects judicial practice in the Anglo-American judicial systems. According to this theory, international law automatically flows into and becomes part of the domestic "law of the land," and is thus enforceable in the municipal courts. If this conclusion is accepted, unless the custom protecting aboriginal peoples' territorial integrity is clearly inconsistent with existing municipal law, the national courts must recognize and enforce this international law.

---

191. Alternatively, the United Nations could ask for an Advisory Opinion on behalf of the aboriginal group.

192. A detailed consideration of which is beyond this article.

Moreover, if the national government legislates contrary to this custom, it will be breaching its international obligation to bring domestic law into line with international law. The establishment of this customary international law can, therefore, have a great impact upon the domestic protection of the aboriginal title. The availability of this alternative venue will allow individuals and minorities to avoid the hurdles entrenched in the Statute of the International Court of Justice, and to enforce their rights even against their own government.

a. *Theoretical Position*

There are four theoretical possibilities relating to the relationship between international and municipal law:

1) Monism: This theory sees international and municipal law as one unified legal system. While the opinions of the representative jurists vary significantly, this doctrine generally accords supremacy to international law in both the municipal and international arena. The Anglo-American courts accord supremacy to international law, unless clearly overridden by municipal legislation.
2) Dualism: The chief exponents of this theory are modern positivist writers who uphold the strength of the internal legal sovereignty of nations. They see international and municipal law as separate bodies of law, according primacy to municipal law in the municipal arena.
3) Reverse monism: This theory accords primacy to municipal law in both the international and municipal arenas and finds no support in judicial practice.
4) Theory of harmonization: Under this theory, the two spheres of law[193] are said to deal with different subject matters. Municipal law regulates domestic matters pertaining to the internal order of the State. International law governs matters of international concern, not domestic affairs. Consequently, exponents believe conflicts between international law and municipal law are not possible.

These considerations could be discussed in great detail. However, for the purposes of this article, monism will be the only consideration outlined.

---

193. That is, international and municipal law.

b. *A Unified Legal System*

The most persuasive argument suggesting the applicability of monism stems from a hierarchical analysis of the source of legal force or authority similar to that utilized above with respect to the relationship between custom and conventional international law. Arguably both municipal and international legal systems derive their validity from the same basic norm Kelsen[194] formulates as "States (and thus the individuals who constitute states) ought to behave as they have customarily behaved."[195] The authority of municipal law can be traced back to this international norm:

> From where does a regulation made by a municipal institution derive its authority? This authority stems from the parent act of parliament giving this institution power to make delegated legislation. Where does the act of parliament derive its authority? The government's authority underlying the force of this legislation is dependent upon international law, in particular the recognition of nations and the rule of effectiveness.Where does this international law derive its authority? Its authority stems from customary international law and the rule "States ought to behave as they have customarily behaved."[196]

As noted above, according to Kelsen this norm provides the ultimate basis of legal obligation in both the national and international legal systems.

Both systems have, therefore, a common source of authority. Further, both bodies of law are part of a single unified legal system. Thus, nations and individuals are not regulated by two distinct polaristic legal systems.[197] As part of a single legal system, Monists believe there is nothing preventing municipal courts from applying international law. Aggrieved individuals and minorities can, therefore, rely on customary international law in these courts. Difficulties only arise if national legislation is inconsistent with this international norm.

c. *Question of Primacy*

If conflicting national legislation exists, which is to prevail? Hersch Lauterpacht's[198] skepticism of the State as a vehicle for protecting human

---

194. *Supra* note 12, at 553-88.
195. *Id.* at 564.
196. *Id.*
197. STARKE, *supra* note 10.
198. *See supra*, note 162.

rights led him to accept the supremacy of international law in both the municipal and international arena in cases of inconsistency. This distrust of the State allowed him to detract from the nation's sovereignty without hesitation and to acknowledge international law as the more appropriate and supreme instrument for regulating human affairs. Thus, he believed that international law always prevails in the case of conflict, even in the face of clearly inconsistent municipal law.[199] While Lauterpacht's theory is the most favorable for the protection of the aboriginal title in the municipal arena, a slight variation[200] has found support in judicial practice. While most countries accept international law as part of the "law of the Land," the courts have not found any *a priori* legal reason for giving primacy to either system of law. Primacy is determined by the jurisdictional rules[201] governing the particular court.

Consequently, the effect international law may have in the municipal arena will depend upon judicial practice and the jurisdictional rules having authoritative force in the nations under consideration. These rules of practice are briefly outlined below.

d. *Transformation and Incorporation of International Law*

If it is accepted that international law can be enforced in the municipal arena, it needs to be determined whether such international norms need to be expressly incorporated or automatically flow into the municipal system. Some dualists believe national courts cannot apply international law as such. Before it can be utilized, they suggest it must be transformed into municipal law through an act of the sovereign will. An act of the national legislature must formally allow for the use of international law.

The preferable view, however, is the view of monists, who do not require formal transformation of international law into municipal law. Monists believe a municipal judge can and must utilize any relevant international law when determining a dispute, even if the sovereign has not actually declared that international law to be part of the municipal law. Once a sovereign concludes a treaty or a customary

---

199. A variation of Lauterpacht's theory, monist-naturalism, places paramountly with a third order - natural law. This supreme order determines the respective spheres of operation of international and municipal law. *See* LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 58 (1927). *See also* STARKE, LAW, STATE AND INTERNATIONAL LEGAL ORDER: ESSAYS IN HONOR OF HANS KELSEN at 308-16. This theory has, however, never found support in the courts.

200. Found in Kelsen's works.

201. *Id.* Whether judge-made or statutorily determined.

international law is established, the court may presume it is given a mandate to treat that international law as part of the "law of the land." "The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law."[202]

International law can, however, only confer rights in the domestic arena if they are "recognized as included in the rules of the municipal law."[203] It is, therefore, still possible for higher municipal laws to refuse to recognize, and thus exclude, inconsistent international laws from consideration in municipal courts. In such circumstances municipal courts will be bound to apply this jurisdictional limitation.[204]

In the absence of specific inconsistent national legislation, aboriginal plaintiff's can, therefore, rely on such international norms in the municipal courts of their country. While the jurisprudence supporting this position cannot be detailed here, a few examples are outlined. As early as 1737 and the decision in *Buvot v. Bambuit*,[205] the English judiciary considered "the law of nations to its fullest extent" to be part of the "law of the land" and thus applicable in the British municipal courts.[206] Similarly, in *The Paquete Habana*,[207] the United States Supreme Court declared "[i]nternational law is part of our law, and must be ascertained and administered . . . as often as questions of right depending upon it are duly presented for determination."[208] Thus, in the subject ju-

---

202. "But only so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals . . . ." Chung Chi Cheung v. R, [1939] App. Cas. 160, 167-68.

203. Commercial & Estates Co. of Egypt v. Board of Trade, 1 K.B. 271, 295 (1925). *See also* Lord Wright in Compania Naviera Vascangado v. Steamship Christina, [1938] App. Cas. 485, 502; and In re Ferdinand, Ex-Tsar of Bulgaria, 1 Ch. 107, 137 (1912).

204. Rules of judicial practice, such as canons of construction and rules relating to the proof of law, combine with legislative/constitutional principles especially designed to resolve actual inconsistencies, to minimize cases of inconsistency between international and municipal law. 1 D.P. O'CONNEL, INTERNATIONAL LAW 51-54 (2d ed. 1970).

205. (1735) Cas. T. Talb. 281.

206. The Duke of Montellano v. Christin, 5 M. & S. 503 (1816); The Parliament Belge, 5 P.D. 197 (1879); Hopkins v. De Robeck, 3 T.R. 79 (1789)(diplomatic immunity); Viveash v. Becker, 3 M & S 284 (1814)(consular immunity); Brunswick v. The King of Hanover, 6 Beav. 1 (1844)(sovereign immunity); DeHaber v. The Queen of Portugal, 17 Q.B. 171 (1851)(sovereign immunity); and Magdalena Steam Nav. Co. v. Martin, 2 El. & E 1. 94 (1859)(diplomatic immunity).

207. 175 U.S. 677 (1900).

208. *Id.* at 700.

risdictions, no specific piece of national legislation is considered necessary to incorporate customary international law into the municipal arena.

Originally the English courts tried to justify this practice through various abstract notions relating to the supremacy of parliament. By the nineteenth century, however, the English courts no longer felt any need to resort to English sovereignty to support their use of international law. By this time, the "Blackstonian" adoption theory,[209] deeming customary international law to be automatically[210] incorporated into the common law, was well established[211] and accepted by distinguished common law and equity judges.[212] Thus, Lord Alverstone reaffirmed in *West Rand Central Gold Mining Co. v. R*[213] the principle that, "whatever has received the common consent of civilized nations must have received the assent of our country" and is therefore part of the law of England.

As long as the rule is generally accepted by the international community,[214] it can be used in the domestic arena notwithstanding the absence of legislation specifically "transforming" the rule into domestic law. Similar reasoning exists in many determinations of the United States' courts. While there is still some degree of uncertainty,[215] it

---

209. As Blackstone asserted, "the law of nations, wherever any question arises which is properly the object of its jurisdiction is here adopted in its full extent by the common law, and it is held to be a part of the law of the land."

210. In accordance with the "incorporation" or "adoption" theory.

211. Triquet v. Bath, 3 Burr. 1478 (1764) and Heathfield v. Chilton, 4 Burr. 2015 (1767).

212. Lord Eldon in Dolder v. Huntingfield, 11 Ves. 283 (1805); Lord Ellenborough in Wolff v. Oxholm, 6 M & S 92 (1817); Chief Judge Abbott in Novello v. Toogood, 1 B & C 554 (1823); and Chief Judge Best in De Wutz v. Hendricks, 30 L.J. Ch. 690, 700 (1861).

213. 2 K.B. 391 (1905).

214. As Lord MacMillan stressed in Compania Naviera Vascangado v. Steamship Christina, [1938] App. Cas. 485, 497, "[i]t is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative text-books, practice, and judicial decisions." *See also* West Rand Central Gold Mining Co. v. R, 2 K.B. 391 (1905), Barbuit's case, 4 Burr. 2015 (1767) and Heathfield v. Chilton, 4 Burr. 2015 (1767).

215. In more recent years the term "adoption" has been used ambiguously and it is still uncertain whether the United States government must have "consented to" the relevant international norm before it becomes part of the municipal law of the States. *See, e.g.*, Cook v. United States, 288 U.S. 102 (1933); Santovincenzo v. Egan, 284 U.S. 30 (1931); The Scotia, 81 U.S. (14 Wall.) 170, 177 (1871); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); The Nereida, 13 U.S. (9 Cranch) 388 (1815); United States v. Claus, 63 F. Supp. 433 (W.D.N.Y. 1944); Banco Nacional

appears that customary international law becomes part of the municipal laws of the United States even "in the absence of congressional enactment."[216] As Judge Kaufman explained in *Filartiga v. Pena-Irala*,[217] "[t]he law of nations forms an integral part of the common law brought to America in the colonial years as part of the legal heritage from England" and therefore exists independently of statutory enactment. In *Filartiga*, the court promptly rejected the appellant's suggestion that express incorporation of international law was necessary, reaffirming the law of nations, including principles of international human rights, to be part of the "law of the land."[218]

Yet, in all the subject nations, a clear and valid municipal enactment will always prevail over an inconsistent principle of international law.[219] As the court explained in *R v. Keyn*,[220] whether that legislation was "consistent with the general law of nations or not, [the national laws] would be binding on the tribunals of this county;" the problem of such inconsistency being left to the government to resolve. Lord Dunedin reaffirmed in *Mortensen v. Peters* that:

> [The courts] have nothing to do with the question of whether the Legislature has or has not done what foreign powers may consider an usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is ultra vires as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms.[221]

---

de Cuba v. Sabbatino, 376 U.S. 398 (1964); and Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987). The question is, however, of little practical importance for it is unlikely the courts will try to apply a principle of international law which has not been accepted by Congress. O'CONNELL, *supra* note 204 at 62.

216. Filartiga v. Pena-Irala, 630 F.2d at 886, quoting Chief Justice Marshall in The Nereida, 13 U.S. 388.

217. 630 F.2d at 886, quoting BLACKSTONE, COMMENTARIES, 264 (1765) and quoting Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 27 (1952).

218. 630 F.2d at 886-87.

219. For a United States example see The Over the Top, 5 F.2d 838, 842 (Conn. 1925). For a corresponding precedent in the English context, see The Zamora, 72 App. Cas. 77 (1916). The Prize Courts administer the international law of prize even when it conflicts with an Order in Council. *Id.* It is, however, bound by inconsistent English statutes. *Id.* at 93.

220. [1950] App. Cas. 186.

221. 14 S.L.T. 227 (1906). In March 1907, after protests by Norway, the foreign

Thus, if Parliament's intention to legislate inconsistently with international law is evident from the face of the statute, the municipal court is bound to give effect to its provisions.[222]

The only case[223] where such a clear intention was found was in the unsatisfactory[224] Australian decision in *Polites v. Commonwealth*.[225] The Australian High Court held that the conscription legislation before the court extended to resident aliens who were otherwise immune under international law. This was an extraordinary decision given the strength of the presumption against derogation of international law invoked by the judiciary in Anglo-American legal systems. According to this presumption,[226] legislation is to be construed to avoid conflict with international norms.[227] While originally developed in the early prize courts, this rule of construction is now recognized by the courts of many countries,[228] including the English,[229] Australian,[230] United

---

office acknowledged that the "act of Parliament as interpreted by the High Court of Judiciary is in conflict with international law" (Hansard H.C., vol. 170, col. 472). In 1909, Parliament passed the Trawling in Prohibited Areas Prevention Act prohibiting the landing of trawlers which had caught fish contrary to earlier legislation.

222. The Marianna Flora, 24 U.S. 1 (1826); The Johannes, [1860] Lush. 182; and R v. Keyn, App. Cas. 186.

223. O'CONNELL, *supra* note 204, at 52.

224. *See* Cooperative Committee on Japanese Canadians v. Attorney-General for Canada, [1947] App. Cas. 87,104.

225. 70 C.L.R. 60 (1945).

226. As the court stressed in MacLeod v. U.S., 229 U.S. 416, 434 (1913), "[t]he statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposes to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe, and which were founded upon the principles of international law." *See also* Murry v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

227. "It has also been observed that an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. The Schooner Charming Betsy, 6 U.S. 64 at 118. "In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction accordingly." The Annapolis, [1861] Lush. 295, 306. *See also* Blosam v. Favre, 8 P.D. 101 (1883); Lerous v. Brown, 12 C.B. 801 (1852); Lopez v. Burslem, 4 Moo. 300, 305 (P.C.) (1843); and R v. Dudley, 14 Q.B.D. 273, 284 (1884).

228. *See, e.g.*, the Scottish case Mortensen v. Peters, 14 S.L.T. 227 (1906).

229. R v. Dudley, 14 Q.B.D. 273, and R v. Keyn, App. Cas. 186.

230. Croft v. Dunphy, [1933] App. Cas. 156, and Polites v. Commonwealth, 70 C.L.R. 60.

States[231], and Canadian[232] judiciaries.

The courts are sensitive to the possible embarrassment they may cause the government by interpreting a municipal law contrary to international precepts and try to reconcile the two bodies of law as best they may.[233] Thus, in the absence of inconsistent national legislation, this international norm protecting aboriginal territorial integrity would flow into the municipal arena and could be enforced by aggrieved groups independently of governmental support. To date, national legislation generally supports, rather than detracts from, the existence of this customary international norm; therefore, there should be no problem of inconsistency.

e. *Relationship Between International Obligations and Municipal Law*

If an inconsistent municipal law can prevail over international law in the municipal arena, does this negate any usefulness a customary international law protecting the aboriginal title may provide? Is there anything to discourage a government from simply legislating contrary to this norm?

Nations are prohibited from legislating contrary to international precepts. Moreover, each nation has a duty[234] to bring its municipal law into conformity with customary international law.[235] Thus, the subject governments are obliged to bring their domestic laws into line with this customary international law protecting the aboriginal title and will be in breach of international law if they fail to so act.

---

231. Empresa Case, 372 U.S. 10, 21 (1963).

232. In re Noble & Wolf, 4 D.L.R. 123, 139 (1948).

233. This practice has been particularly important in the context of the protection of human rights. See, for example, the decision in Oyama v. California, 332 U.S. 633 (1948), where Justice Black thought it pertinent to question how the United States could "be faithful to this international pledge" under the United Nations Charter, if state laws contrary to its provisions "are permitted to be enforced?"

234. Certain eminent authorities, such as MCNAIR, LAW OF TREATIES 100 (1961), believe the failure to take positive steps is not in itself a breach of international law. In their eyes, no breach occurs until an individual's rights are infringed through this failure to accommodate and/or incorporate international law. In practice, however, this is not a crucial consideration for it is usually not before an individual's rights have actually been violated that legal action is taken.

235. The court in the Exchange of Greek and Turkish Populations, 1925 P.C.I.J. (Ser. B) No. 10, at 20, believed this duty to exist independently of the Treaty of Lausanne which expressly requires the relevant Nations to bring their law into line with the obligations under the treaty.

Nor can such violating nations rely on the provisions of their own laws or constitutions[236] to avoid their international obligations. Article 13 of the Draft Declaration on Rights and Duties of States 1949[237] provides that "[e]very state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

Numerous judicial and arbitral authorities support this declaration. For example, in the Alabama Claims Arbitration[238] the tribunal held that the lack of constitutional power to legislate with respect to the matter under consideration in that case was no answer to the charge brought against Great Britain. It was stated, "the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed."

Any constitutional restrictions will not, therefore, provide the subject nations with a defense to breaches of this international norm. This principle has consistently been applied by the Permanent Court of Arbitration, the Permanent Court of International Justice,[239] and the International Court of Justice.[240] The government is responsible for the acts of its legislature and cannot evade its obligations by pleading the deficiencies of its municipal law. Thus, the subject custom can be enforced in the municipal courts, and while the domestic government could legislate contrary to its provisions, this would itself amount to a breach of the nation's international obligations.

IV. CONCLUSION

Ultimately, it is submitted that aboriginal peoples need not rely on domestic legislation and the common law doctrine of communal

---

236. As the Court stressed in the Polish Nationals in Danzig 1931 P.C.I.J. (Ser A/B) No. 44, at 24, '[i]t should . . . be observed that . . . a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present Persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig."

237. Y.B.I.L.C., 286, 288 (1949).

238. MOORE 1 INT. ARB. 485, 656. The charge related to the international law regarding neutrals.

239. *See* the Wimbledon, P.C.I.J. (Ser. A) No.1, at 29; Mavrommatis, (Ser. A) No. 5; German Interests in Polish Upper Silesia, 1926 P.C.I.J. (Ser. A) No. 7, at 19; Chorzow Factory, 1928 P.C.I.J (Ser. A) No. 17, at 33-34; Jurisdiction of the Courts of Danzig, 1928 P.C.I.J. (Ser. B) No. 15, at 26; Free Zones, 1929 P.C.I.J. (Ser. A) No. 24, at 12.

240. The leading cases are the Fisheries, 1951 I.C.J. 116, 132 and the Nottebohm, 1955 I.C.J. 4, 20-1. *See also* Guardianship, 1958 I.C.J. 55, 67.

native title to protect their territorial rights. By turning to the international arena, an alternative source of protection may be found, a source which Australia has not as yet tapped.