Section 12:

Administration of Justice and How to Improve it: Applicability and use of International Human Rights Norms

A Paper Submitted to the Commission on First Nations and Métis Peoples and Justice Reform

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Executive Summary

This paper examines whether international human rights norms relevant to Aboriginal peoples in Saskatchewan should be incorporated into the reforms for improving the administration of justice in the province. It concludes that use of these norms is wholly appropriate for this and other matters relating to First Nations and Métis peoples.

Root causes of crime emanate from a wide range of factors that unjustly impact on Aboriginal peoples. The criminal justice system cannot resolve these pressing problems alone. For example, such matters as colonialism, dispossession and racial discrimination, may be considered by some observers as external to the "administration" of justice. Yet they remain central in addressing questions of fairness, honour and justice itself.

In a democratic society, the administration of justice is "the primary guarantor of the protection of human rights." Moreover, the federal, provincial First Nations and Metis governments have a "duty to guarantee respect for human rights". In the context of Indigenous peoples, this requires the use of international human rights norms that reflect the perspectives and values of the peoples concerned. Application of such standards should also respect their legal status as distinct self-determining peoples and their fundamental collective human rights. This proposed approach would seek to ensure reforms that would "better reflect the values and inherent strengths of Aboriginal communities", as called for by the Commission's mandate.

In order to better reflect and reinforce Indigenous values and inherent strengths, it is suggested that it would be critical to ensure respect for both Aboriginal and treaty rights in any framework for the administration of justice. Clearly, human dignity and human rights are essential elements in any framework for ensuring equality, non-discrimination, fairness and justice for First Nations and Metis peoples in Saskatchewan and elsewhere in Canada.

The paper underlines that achieving these objectives is likely to be an ongoing challenge. It requires a human rights culture that is relevant to First Nations and Metis peoples to be entrenched in the administration of justice. It also requires a principled framework that is inclusive of First Nations and Metis peoples, communities and institutions – one that fully accommodates their essential roles in the achievement of a responsive and fair justice system. Effective implementation strategies and concrete measures will be necessary both in the short and longer term.

In ensuring a principled framework, a number of elements are outlined to the Commission. These include the following:

i) self-determination of Aboriginal peoples be a central element for all reforms;

ii) relevant international human rights norms be incorporated in all implementation strategies, with a view to uplifting existing standards;

iii) in relation to Aboriginal and treaty rights, human rights education programmes be devised to promote understanding and sensitize people both within and outside the justice system;

iv) Aboriginal peoples' concerns regarding their treaties and treaty rights be addressed through adequate processes. In addition, the sacred nature and historical and contemporary significance of treaties be an integral part of human rights education; and

v) consistent with the right of self-determination, the full and effective participation of the First Nations and Métis peoples be an integral element in any proposed reforms.

In order to formulate a principled framework that would incorporate the above elements in the overall reforms, it is suggested that a "rights-based" approach is essential.

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Introduction

In regard to "administration of justice" considerations, the Saskatchewan *Commission on First Nations and Métis Peoples and Justice Reform* has a very far-ranging mandate.[1] In particular, the Commission is required to "identify efficient, effective and financially responsible reforms which would improve the administration of justice and would better reflect the values and inherent strengths of Aboriginal communities".[2]

This paper will address the applicability and use of international human rights norms, in the context of improving the administration of justice for First Nations and Métis Peoples. It would appear that constructive reforms would be essential both within and outside the justice system. To some extent, this point was highlighted by the Supreme Court of Canada in R. v. Gladue:[3]

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons.[4]

Root causes of crime emanate from a wide range of factors that unjustly impact on Aboriginal peoples.[5] As the Commission's Interim Report in May 2002 highlights, the criminal justice system cannot resolve these pressing problems alone:

> In his 1994 report submitted to *The Royal Commission on Aboriginal Peoples*, Robert Mitchell, then Saskatchewan Minister of Justice and Attorney General for Saskatchewan wrote:
>
> > One of the complexities of dealing with justice reform for Aboriginal people is that high levels of Aboriginal conflict with the law are in many respects a reflection of wider structural inequities - social, economic and political. The latter beg for solutions which lie beyond the boundaries and mandate of the criminal justice system. To foist responsibility for the resolution of such problems upon the criminal justice system is to assure their continuance. Poverty, unemployment, poor health, family dysfunction, low levels of formal education, substance abuse - these are matters which warrant the attentions of government and civil society at all levels.[6]

[1] Commission on First Nations and Métis Peoples and Justice Reform, "Terms of Reference", available at http://www.justicereformcomm.sk.ca/terms.gov.

[2] *Id.*, at para. 2e.

[3] [1999] 1 S.C. R. 688.

[4] *Id.*, at para. 65.

[5] See, for example, P. Linn, *Report of the Saskatchewan Indian Justice Review Committee*, Saskatchewan Justice, Regina, 1992; and P. Linn, *Report of the Saskatchewan Métis Justice Review Committee*, Saskatchewan Justice, Regina, 1992. These earlier reports cautioned that a number of overarching concerns with direct impact on Aboriginal people and the criminal justice system needed to be addressed and reforms needed to be introduced to improve the social and economic circumstances of Aboriginal people of Saskatchewan. Otherwise, little would be accomplished by implementing the Committees' proposed recommendations. These points are highlighted in Commission on First Nations and Métis Peoples and Justice Reform, "Building on Success, Interim Report – May 30, 2002", Saskatchewan, at pp. 34-35.

[6] Quoted in Commission on First Nations and Métis Peoples and Justice Reform, "Building on Success, Interim Report – May 30, 2002", Saskatchewan, p. 38.

In the coming months, the Implementation Office will likely determine whether it will introduce and use uplifting international standards and, if so, whether such standards will be limited to the justice system or extend to much broader-based reforms. In respect to the administration of justice, there are a growing number of international human rights norms that could prove useful. These relate to such specific aspects as interpreters,[7] juveniles,[8] child prostitution,[9] treatment of prisoners,[10] non-custodial measures,[11] conduct of law enforcement officials,[12] role of lawyers[13] and prosecutors[14], restorative justice,[15] independence of the judiciary,[16] and victims of crime.[17]

As this paper will demonstrate, a compelling case can be made for the Government of Canada and the Saskatchewan government to utilize international human rights norms in a wide range of matters relating to First Nations and Metis peoples. Colonialism,[18] dispossession of lands and resources,[19] failure to honour Treaties

[7] *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966), Art. 14, para. 3(f), *entered into force* March 23, 1976; *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, Art. 40.2(b)(vi); *Indigenous and Tribal Peoples Convention, 1989*, I.L.O. Convention No. 169, I.L.O., 76th Sess., *reprinted in* (1989) 28 I.L.M. 1382, Art. 12; *United Nations Declaration on the Rights of Indigenous Peoples* (Draft), in U.N. Doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, 28 October 1994, at 105-115, *reprinted in* (1995) 34 I.L.M. 541, Art. 14, para. 2.

[8] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990); *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, G.A. res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A) at 201, U.N. Doc. A/45/49 (1990); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The "Beijing Rules")*, G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985).

[9] *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, G.A. res. 54/263, Annex II, U.N. GAOR Supp. (No. 49), U.N. Doc. A/54/49 (2000), entered into force January 18, 2002.

[10] *Standard Minimum Rules for the Treatment of Prisoners*, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977); *Basic Principles for the Treatment of Prisoners*, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

[11] *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, G.A. res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990).

[12] *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990); *Code of Conduct for Law Enforcement Officials*, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979).

[13] *Basic Principles on the Role of Lawyers*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990).

[14] *Guidelines on the Role of Prosecutors*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

[15] *Basic principles on the use of restorative justice programmes in criminal matters*, ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000). "Restorative justice" is described in general terms by the Supreme Court of Canada as "an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender": *R.* v. *Gladue*, [1999] 1 S.C. R. 688, at para. 71.

[16] *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

[17] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. res. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985).

[18] R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, (Tokyo: United Nations Univ. Press, 1990), at 118:

> The subordination of indigenous peoples to the nation-state, their discrimination and marginalization, has historically, in most cases, been the result of colonization and colonialism. Within the framework of politically independent countries, the situation of indigenous and tribal peoples may be described in terms of internal colonialism.

[19] See, *e.g.*, Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N. Doc. E/C.12/1/Add.31, 10 December 1998, para. 18:

> The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by the [Royal Commission on Aboriginal Peoples], and endorses the recommendations of the RCAP that policies which violate Aboriginal treaty obligations and extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party.

and respect Treaty rights,[20] racism and discrimination,[21] forced assimilation,[22] and marginalization continue to have profound adverse impacts on First Nations and Metis peoples in Canada[23] and elsewhere around the globe.[24] Such larger unresolved issues significantly influence First Nations and Metis people within and outside the justice system. These matters may be considered by some observers as external to the "administration" of justice. Yet they remain central in addressing questions of fairness, honour and justice itself.

The following paper is not intended to be a comprehensive examination of the applicability and use of international norms within the domestic context of Saskatchewan or Canada. However, it will provide diverse reasons as to why international norms are highly relevant to First Nations and Metis peoples and the administration of justice. It will also elaborate on why such international considerations should be a significant part of far-ranging reforms.

In particular, the analysis will focus on a number of key elements:

i) Reasons for international human rights norms;

ii) applicability and use of international human rights norms in Canada;

iii) importance of adopting a human rights approach;

iv) significance of the human right of self-determination in the context of s. 35 of the *Constitution Act, 1982*[25]; and

v) Indigenous peoples' treaties as an international concern.

[20] See, *e.g.*, Vice-Chief John McDonald, Prince Albert Tribal Council and Denesuliné First Nations, La Ronge, Saskatchewan, 28 May 1992, quoted in Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(1), at p. 50:

> The sources of the under-development, poverty, disease and dependence within our First Nations can be found in the disregard and violation of our treaties and of Canada's own constitution. Likewise, the seeds of the solutions to the fundamental problems and contradictions can be found in the honouring and faithful implementation of these sacred treaty rights and obligations.

[21] World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, *adopted in* Durban, South Africa, 8 September 2001, para. 14:

> We recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that … indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented.

[22] See generally A. Armitage, *Comparing the Policy of Assimilation: Australia, Canada, and New Zealand* (Vancouver: University of British Columbia Press, 1995). See also Royal Commission on Aboriginal Peoples, note 20, *supra*, vol. 2(1), p. 89:

> … the *Indian Act* was intended to hasten the assimilation, civilization and eventual annihilation of Indian nations as distinct political, social and economic entities. It was not intended as a mechanism for embracing the Indian nations as partners in Confederation or fulfilling the responsibilities of the treaty relationship. Rather, it focused on containment and disempowerment – not by accident or ignorance, but as a matter of conscious policy. The breaking up of Aboriginal and treaty nations into smaller and smaller units was a deliberate step toward assimilation of Aboriginal individuals into larger society.

[23] J. Tully, "The Struggles of Indigenous Peoples for and of Freedom" in D. Ivison, P. Patton, & W. Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge/New York: Cambridge University Press, 2000) 36, at p. 39:

> The long-term effects of [the processes of internal colonisation] for the vast majority of native people in Canada has been to reduce formerly economically self-sufficient and interdependent native societies to tiny overcrowded reserves, inter-generational welfare dependency, sub-standard housing, diet, education and housing facilities, high levels of unemployment, low life expectancy, high rates of death at birth, and predictably, following these conditions on or off reserves that undermine their well-being and self-esteem, high levels of substance abuse, incarceration and suicide for native peoples.

[24] Colonial occupation and dispossession relating to Indigenous peoples' territories were not limited to the Americas but were, and often continue to be, worldwide phenomena. In regard to the highly discriminatory and questionable legal theories used by European states, see A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40 Harv. Int'l L.J. 1.

[25] *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, (U.K.), 1982, c. 11.

I. Why International Human Rights Norms?

In relation to international human rights, the use of the term "norms" in this paper includes such international instruments as conventions, declarations, principles, guidelines and rules. The term also refers to relevant customary international law,[26] including *jus cogens* or peremptory norms.[27]

For example, the prohibition against racial discrimination is considered in international law to be a peremptory norm:

> The major distinguishing feature of such rules [i.e. peremptory norms] is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, *the principle of racial non-discrimination*, crimes against humanity, and the rules prohibiting trade in slaves and piracy.[28] [emphasis added]

Thus, the international peremptory norm prohibiting racial discrimination can serve to reinforce the importance of the same prohibition under the equality provisions of the *Canadian Charter of Rights and Freedoms*.[29] The prohibition against racial discrimination, equality and bias issues are, of course, key concerns in the administration of justice.[30]

In considering whether to use international human rights norms to improve the administration of justice, it is important to underline that States, such as Canada, have a duty to guarantee respect for human rights.[31] This

[26] A. Aust, *Modern Treaty Law and Practice* (New York: Cambridge University Press, 2000), at p. 10: "Treaties and customs are the main sources of international law. Customary law is made up of two elements: (1) a general convergence in the practice of states from which one can extract a norm (standard of conduct), and (2) *opinio juris* – the belief by states that the norm is legally binding on them.

See also G. Slyz, "International Law in National Courts" in T.M. Franck & G.H. Fox, eds., *International Law Decisions in National Courts* (N.Y.: Transnational Publishers, 1996) 71 at pp. 71-72; and B. Simma & P. Alston, "The Sources of Human Rights Law: Custom, Jus Cogens and General Principles" (1992) 12 Aust. Y.B.I.L. 82.

[27] *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969), Art. 53: "A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole … from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[28] I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998), at p. 515.

[29] *Canadian Charter of Rights and Freedoms*, in *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, (U.K.), 1982, c. 11, Part I, s. 15. See also *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, at 1056-1057, per Dickson C.J. for the majority:

> Canada's international human rights obligations should inform not only the interpretation of rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, within customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.

[30] See, generally, Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: November 1998).

[31] The United Nations and member States also have a duty to promote universal respect for human rights. See, *e.g.*, L.B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States" (1982) 32 Am. Univ. L. Rev. 1, at pp. 13-14:

> This constitution of the world [i.e. Charter of the United Nations], the highest instrument in the intertwined hierarchy of international and domestic documents, prevails over all other treaties, and implicitly over all laws, anywhere in the world. … [H]uman rights are of international concern, and … the United Nations has the duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion." [Art. 55(c)] All members of the United Nations … have pledged to "take joint and separate action," [Art. 56] in cooperation with the United Nations for the achievement of these great purposes.

guarantee[32] is provided in the two human rights Covenants,[33] as well as in other international instruments.[34]

Moreover, the duty to guarantee respect for human rights is explicitly applied to the administration of justice. As D. Garcia-Sayan explains:

> The issue of access to justice has been a long-standing concern, reflected in the latter part of the twentieth century by clear provisions concerning the State's so-called "duty to guarantee respect for human rights". This means viewing the administration of justice as a public service and access to it is a basic social right or, in other words, as "the primary human right in a legal system intended to guarantee both individual and collective rights"[35,36]

In the present era of increasing globalization, virtually every major issue in Canada is being addressed in at least some important respect at the international level. This growing trend serves to enhance the significance of international human rights norms for the Canadian domestic context.

As distinct international actors, First Nations and Metis peoples (or Indigenous peoples as they are referred to at the international level) are directly participating in human rights standard-setting processes at the United Nations and other international forums.[37] In particular, after many years of deliberation and preparation involving representatives of States, Indigenous peoples, and U.N. specialized agencies, a *U.N. Declaration on the Rights of Indigenous Peoples*[38] was adopted in 1993 by the Working Group on Indigenous Populations[39] in

[32] This guarantee has also been described as a State obligation to guarantee the enjoyment of human rights: see Committee on the Elimination of Racial Discrimination, *General Recommendation XX (48) concerning Non-discriminatory implementation of rights and freedoms (Article 5)*, 15 March 1996 (contained in document A/51/18), para. 1:

> Article 5 of the Convention contains the obligation of States Parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination. Note should be taken that the rights and freedoms mentioned in article 5 do not constitute an exhaustive list.

[33] International Covenant on Civil and Political Rights, Art. 2:

> 1.Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

See also *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); Can. T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada 19 May 1976), Art. 2.

[34] See, *e.g.*, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, U.N.G.A. Res. 53/144, U.N. Doc. A/RES/53/144, 8 March 1999, Annex, Art. 2:

> 1. Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia*, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.
>
> 2. Each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed.

Canada and other American States are committed to "seek to promote and give effect to" this latter Declaration: see Summit of the Americas, 2001, *Plan of Action*, adopted at the Third Summit of the Americas, Québec City, Canada, heading 2 (Human rights and fundamental freedoms).

[35] J. Méndez, "El acceso a la justicia: un enfoque desde los derechos humanos", *Acceso a la Justicia y Equidad: Estudio en Siete Países de América Latina*, Inter-American Institute of Human Rights/Inter-American Development Bank (San José, Costa Rica, 2000)

[36] D. Garcia-Sayan, *Strengthening the rule of law in building democratic societies: human rights in the administration of justice*, Seminar on the Interdependence Between Democracy and Human Rights, Organized by the Office of the High Commissioner for Human Rights, Geneva, 25 – 26 November 2002, p. 12, para. 26.

[37] R. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?", (1994) 7 Harvard Human Rts. J. 33, at p. 43:

> Several developments over the past ten years have signalled change in the legal personality of indigenous peoples. …
> … [I]ndigenous organizations have been participating in growing numbers in United Nations decisionmaking, and United Nations agencies have increased direct aid and technical support to indigenous communities. These developments can be seen in the implementation of ILO Convention 169, the results of the Rio Summit, activities taken for the Year, and plans for the Decade [regarding indigenous peoples], as well as program initiatives taken by the World Bank, the Organization of American States, and the European Community.

[38] *United Nations Declaration on the Rights of Indigenous Peoples* (Draft), in U.N. Doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, 28 October 1994, at 105-115, *reprinted in* (1995) 34 I.L.M. 541.

[39] The creation of the Working Group on Indigenous Populations was proposed by the Sub Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981. The establishment of WGIP was endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982 and authorized by the Economic and Social Council in its resolution 1982/34 of 7 May 1982.

Geneva. In 1994, this U.N. Declaration was unanimously approved by the *U.N.* Sub-Commission[40] and forwarded to the U.N. Commission on Human Rights (UNCHR). Since 1995, the *U.N. Declaration* has been considered by an open-ended inter-sessional working group established by the UNCHR.[41] The intention is to submit a declaration for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous People.[42]

In addition, in April 2001, the Commission on Human Rights decided to appoint, for a three-year period, a "special rapporteur on the situation of human rights and fundamental freedoms of indigenous people".[43] A major issue being examined by the Special Rapporteur in relation to Indigenous peoples is the administration of justice. We had the honour of hosting Dr. Stavenhagen in an unofficial meeting in Saskatoon on May 3, 2003. We also sent a Commission representative to a Regina conference that was a follow-up to the World Conference Against Racism with Special Rapporteur Rowena Roduta.

All of these developments demonstrate the importance of international human rights norms, especially in relation to Indigenous peoples. Both Canada[44] and the United States[45] recognize generally that domestic and foreign policy are profoundly interrelated and existing distinctions are increasingly blurred.

In light of the significance of international human rights norms, their applicability and use in Canada are examined briefly below.

II. Applicability and Use of International Human Rights Norms in Canada

In regard to the applicability and use of international human rights norms in Canada, there are two principal theories that describe the possible interaction between municipal (i.e. domestic) and international law. As A.F. Bayefsky describes:

> [There are] two general theories about the relationship between municipal law and international law: the adoption and the transformation theories. The adoption theory states that international law is part of domestic law automatically, that is, without an act of incorporation, except where it conflicts with statutory law, or well-established rules of the common law. Transformation theory expresses the view that international law is only part of domestic law when it has been incorporated into domestic law.[46]

While there is no clear statement from the Supreme Court of Canada,[47] it may be strongly argued that the adoption theory applies to customary international law.[48] Therefore, subject to legislative override,[49] customary

[40] The Sub-Commission is the main subsidiary body of the Commission on Human Rights. In 1999 the Economic and Social Council changed the name of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to "Sub-Commission on the Promotion and Protection of Human Rights".

[41] U.N. Commission on Human Rights resolution 1995/32 of 3 March 1995.

[42] The International Decade of the World's Indigenous People commenced on December 10, 1994: see General Assembly resolution 48/163, 21 December 1993. Earlier, the General Assembly had proclaimed 1993 as International Year of the World's Indigenous People: see General Assembly resolution 45/164, 18 December 1990.

[43] U.N. Commission on Human Rights, *Human rights and indigenous issues*, Res. 2001/57, 24 April 2001. The Chairperson of the Commission on Human Rights appointed Mr. Rodolfo Stavenhagen of Mexico as the Special Rapporteur.

[44] Canada, *Canada in the World*, Canadian Foreign Policy Review, 1995 available at http://www.dfait-maeci.gc.ca/foreign_policy/cnd-world/menu-en.asp:
As stated by the Special [Parliamentary] Joint Committee, "Domestic policy is foreign policy ... foreign policy is domestic policy."

[45] U.S. National Security Council, "The National Security Strategy of the United States of America", September 2002, at p. 31: "Today, the distinction between domestic and foreign affairs is diminishing. In a globalized world, events beyond America's borders have a greater impact inside them."

[46] A.F. Bayefsky, International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation (Toronto: Butterworths, 1992), at p. 5.

[47] S.J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 Can. Bar Rev. 534, at p. 536.

[48] M.A. Luz & C.M. Miller, "Globalization and Canadian Federalism: Implications of the NAFTA's Investment Rules" (2002) 47 McGill L.J. 951, at p. 978: "The basic rule is that customary international law is incorporated into Canadian law without enacting legislation unless the customary rule clearly conflicts with existing statutory law or with established principles of common law."

[49] *Suresh* v. *Canada (Minister of Citizenship and Immigration)* (2000), 183 D.L.R. (4th) 629 (F.C.A.) at 659; reversed for other reasons at 2002 SCC 1: "While principles of customary international law may be recognized and applied in Canadian courts as part of the domestic law, this is true only in so far as those principles do not conflict with domestic law."

international law is a part of Canadian domestic law and is enforceable within Canada.[50] However, to our knowledge, there have not been any cases where such a right of action has been explicitly recognized in Canada.[51]

In regard to international treaties or conventions, the rule appears much more clear. These instruments would only be a part of the law of Canada, if implemented by legislation.[52] In other words, the transformation theory would apply.

However, even if an international treaty or convention has not been implemented by legislation in Canada, it may still be used as an interpretive aid in determining existing rights and obligations. As stated by Madame Justice L'Heureux-Dubé in *Baker v. Canada (Minister of Citizenship and Immigration*):

> International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73. …
>
> Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:
>
> > [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.[53]

In regard to First Nations and Metis peoples in Canada, the Supreme Court of Canada and the lower courts are beginning to refer to specific norms in international human rights instruments,[54] even where such instruments have not yet been finally adopted.[55] This approach is consistent with the Report of the *Royal Commission on Aboriginal Peoples* which concludes that "both the draft [U.N.] declaration and [Indigenous and Tribal Peoples] convention 169 are authoritative statements of norms concerning Indigenous peoples, and we urge the

[50] W.A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79 Can. Bar Rev. 174, at p. 182: " … from the standpoint of domestic effect, at common law customary international law has a leg up on conventional law because it does not require implementing legislation. Customary international law is the "law of the land", subject of course to the right of the legislature to override it."

A.F. Bayefsky, note 46, *supra*, at p. 17: " … customary international human rights law can be directly invoked, as part of the law of the land, to itself provide the basis for a remedy. This right of action has not been affected by the Charter. … In other words, in human rights areas where the common law has not been settled, customary international human rights law can continue to fill in the gaps." See also F. Rigaldies and J. Woehrling, "Le juge interne canadien et le droit international" (1980) 21 C. de D. 293, at pp. 308-309 (example of how customary international law fills gaps in the existing legal regime).

[51] A.F. Bayefsky, note 46, *supra*, at p. 17.

[52] *Id*., at p. 25. See also H.M. Kindred *et al*., eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery Publications, 2000), at p. 166: "A good argument may be made … that Canada is adoptionist in respect of customary international law and transformationist in respect of conventional law – the latter clearly springing from following the British tradition that treaties must be enacted into law by Parliament before they will affect private rights."

[53] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, (1999) 174 D.L.R. (4th) 193 (S.C.C.), paras. 69-70. L'Heureux-Dubé J. added at para. 70: "The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries … It is also a critical influence on the interpretation of the scope of the rights included in the Charter: *Slaight Communications*, *supra*; *R*. v. *Keegstra*, [1990] 3 S.C.R. 697.

[54] See, *e.g.*, *Mitchell* v. *Canada (Minister of National Revenue)* [2001] 1 S.C.R. 911, 3 C.N.L.R. 122, para. 82, where reference is made to the *Indigenous and Tribal Peoples Convention, 1989*, Art. 32 (State government obligation "to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields").

[55] *Mitchell* v. *Canada (Minister of National Revenue)*, note 54, *supra* , where reference is made to the draft *U.N. Declaration on the Rights of Indigenous Peoples*, Art. 35 (Indigenous peoples' right to maintain and develop cross-border contacts, etc.). The draft *Declaration* was unanimously adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26, 1994, but has not been adopted by the U.N. General Assembly.

See also *R*. v. *Powley*, [2000] 2 C.N.L.R. 233 (Ont. Sup. Ct. of Justice), para. 58, where reference is made to the draft *U.N. Declaration* in relation to Art. 3 (right of Indigenous peoples to self-determination); Art. 8 (right to "maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such"); and Art. 25 (right to "maintain and strengthen their distinctive spiritual and material relationship with the lands … which they have traditionally owned or otherwise occupied or used").

Government of Canada to protect Aboriginal lands and resources according to these norms.''[56] A similar approach is also being taken by the Inter-American Commission on Human Rights, when considering Indigenous peoples' complaints concerning their lands and other rights.[57]

In regard to First Nations and Metis peoples and treaty rights, reliance upon international concepts is highly appropriate. As underlined by the Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court of Canada, emerging international norms guide both governments and the courts and cannot be ignored:

> Aboriginal rights from the beginning have been shaped by international concepts. … More recently, emerging international norms have guided governments and courts grappling with aboriginal issues. Canada, as a respected member of the international community, cannot ignore these new international norms any more than it could sidestep the colonial norms of the past. Whether we like it or not, aboriginal rights are an international matter.[58]

III. Importance of Adopting a Human Rights Approach

In addition to the above analyses, there are other compelling reasons for adopting a human rights approach – especially one that embraces relevant and uplifting international norms. These additional rationales are described briefly below.

First, it is widely recognized that Indigenous peoples' rights are human rights.[59] As I. Cotler states: ''A ninth category [of human rights], one distinguishably set forth in the Canadian *Charter*—and increasingly recognized in international human rights law—is the category of *aboriginal rights*.''[60]

Like the rights in the various international human rights instruments,[61] Indigenous rights are of a political, economic, social, cultural and spiritual nature. However, Indigenous rights are predominantly ''collective''.[62] Therefore, it is necessary to elaborate Indigenous rights from an Indigenous perspective in new instruments,

[56] Royal Commission on Aboriginal Peoples, note 20, *supra*, vol. 2(2), p. 568. At p. 567, the Report cites S.J. Anaya, ''Canada's Fiduciary Obligation Toward Indigenous Peoples in Quebec under International Law in General'', in Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec (Ottawa: Minister of Supply and Services Canada, 1995), vol. 1, International Dimensions, 9 at p. 24, where Anaya describes the draft *U.N. Declaration* as ''an authoritative statement of norms concerning Indigenous peoples on the basis of generally applicable human rights principles''.

[57] I/A Comm. H.R., *Mary and Carrie Dann v. United States*, Case Nº 11.140, Report No. 113/01, at para. 124:

> … in addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the *evolving rules and principles of human rights law in the Americas and in the international community more broadly*, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that *this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples.* [emphasis added]

[58] B. McLachlin, Chief Justice of Supreme Court of Canada, ''Aboriginal Rights: International Perspectives'', Order of Canada Luncheon, Speech, Canadian Club of Vancouver, Vancouver, British Columbia, February 8, 2002.

[59] Similarly, see also J.Y. Henderson, M.L. Benson & I.M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000) at p. 447: ''Constitutional entrenchment of Aboriginal and treaty rights was intended to ensure that elected representatives, the administrative agencies, and the courts gave due regard and protection to the rights of Aboriginal peoples. It provided a safeguard for their distinct human rights and individual freedoms called 'Aboriginal rights'…''

See also P. Joffe, ''Assessing the Delgamuukw Principles: National Implications and Potential Effects in Québec'', (2000) 45 McGill L.J. 155, at p. 182; C.P. Cohen, ed., Human Rights of Indigenous Peoples (Ardsley, N.Y.: Transnational Publishers, 1998); M.E. Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 Cornell Int'l L. J. 579; R. Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, (1991) 16 Yale J. Int'l L. 127; D. Sanders, *Collective Rights*, (1991) 13 Hum. Rts. Q. 368, at 379-380; and Symposium, *The Human Rights of Indigenous Peoples*, (1982) 36 Colum. J. Int'l Aff. 1-161; B. Hocking, (ed.), *International Law and Aboriginal Human Rights* (Toronto: Carswell, 1988).

[60] I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law: Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 63, at p. 66.

[61] *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), *adopted by* the U.N. General Assembly on December 10, 1948; *International Covenant on Civil and Political Rights*; and *International Covenant on Economic, Social and Cultural Rights*.

[62] The predominately collective nature of Indigenous peoples' rights is clearly recognized in the draft *U.N. Declaration on the Rights of Indigenous Peoples* and in the *Indigenous and Tribal Peoples Convention, 1989* (No. 169).

In Canada, see also *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, (1998) 37 I.L.M. 268, at para. 115: Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation.'' Yet Aboriginal peoples as distinct ''peoples'' have not had their collective human rights recognized as such by Canadian courts. In the absence of this recognition, violations or denials of Aboriginal or treaty rights may be treated too casually.

such as is being done in the *U.N. Declaration on the Rights of Indigenous Peoples*.[63] This is wholly consistent with Indigenous peoples' right to be different[64] and tolerance for difference is a fundamental international value.[65]

Second, as former U.N. Secretary-General Boutros-Ghali highlighted in 1993, human rights constitute a "common language of humanity".[66] In every region of the globe, governments, peoples and individuals are committed to the promotion and respect of human rights. All Member States of the United Nations are legally bound to uphold at all times the Purposes and Principles of the *U.N. Charter*,[67] which include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[68]

Third, a human rights approach should serve to ensure a more coherent and consistent interpretation and treatment of Indigenous peoples' fundamental rights. To date, Canadian courts have not engaged in comprehensive human rights analyses in interpreting Aboriginal and treaty rights. Two U.N. committees concerned with human rights have linked Canada's extinguishment policies to "economic marginalization" and "dispossession".[69] Yet the Supreme Court of Canada continues to apply the discriminatory[70] and anachronistic doctrine of extinguishment to Aboriginal rights,[71] despite far-reaching adverse human rights considerations.[72]

[63] See also J.P. Kastrup, "The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective" (1997) 32 Tex. Int'l L.J. 97 at p. 106:

> "International indigenous rights may be considered as a more specific body of human rights, which target a more defined group of people and are derived from the more general body of human rights principles."

[64] The principle of equality and non-discrimination includes a "right to be different". See draft *United Nations Declaration on the Rights of Indigenous Peoples*, preamble: "... indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such".

In the Canadian context, see *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 171. Quoted with approval by the Supreme Court of Canada in *Lovelace* v. *Ontario*, [2001] 1 S.C.R. 950, para. 94:

> It must be recognized ... that the promotion of equality under s. 15 [of the *Canadian Charter of Rights and Freedoms*] has a much more specific goal than the mere elimination of distinctions. If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a)(freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2) ...

See also P. Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dalhousie L.J. 5, at 46; and D. Greschner, "The Purpose of Canadian Equality Rights" (2002) 6 Rev. Const'l Studies 291, at 321: "Equality rights are ways of accommodating different groups, of making room for everyone and of ensuring that everyone belongs to the Canadian community."

[65] See, *e.g.*,*United Nations Millennium Declaration*, U.N. Doc. A/RES/55/2, 8 September 2000, para. 6, where included among the fundamental values is: "**Tolerance.** Human beings must respect one other, in all their diversity of belief, culture and language. Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted." [emphasis in original]

See also U.N. Secretary-General (K. Annan), "Intolerance – Scourge with Deadly Consequences – Threat to Democracy, Peace, Security, Says Secretary-General on International Day", *Press Release*, SG/SM/9003, OBV/391, 12 November 2003: "Tolerance is much more than peaceful coexistence of different cultures. It is an active and positive attitude, inspired by a recognition of and respect for the rights and freedoms of others. It means that concern for others must prevail over callousness and contempt, and that an effort to know the "other" takes the place of ignorance, blind prejudice and discrimination."

[66] B. Boutros-Ghali, Opening Statement by the United Nations Secretary-General, "Human Rights: The Common Language of Humanity", in World Conference on Human Rights, *The Vienna Declaration and Programme of Action June 1993* UN DPI/1394-39399-August 1993-20 M.

[67] *Charter of the United Nations*, Art. 2, para. 2.

[68] *Id.*, Art. 1, para. 3.

[69] See Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N. Doc. E/C.12/1/Add.31, 10 December 1998, para. 18:

> The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by RCAP [Royal Commission on Aboriginal Peoples], and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the *extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party*. [emphasis added]

See also Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, CERD/C/61/CO/3,23 August 2002, para. 17:

> The Committee views with concern the direct connection between Aboriginal economic marginalisation and the ongoing dispossession of Aboriginal people from their land, as recognized by the Royal Commission. The Committee notes with appreciation the assurance given by the delegation that Canada would no longer require a reference to extinguishment of surrendered land and resources rights in any land claim agreements.

[70] D. Sambo, "Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?", (1993) 3 Transnat'l L. & Contemp. Probs. 13, at p. 31: "The ongoing implementation of state extinguishment policies constitutes a very serious threat to indigenous societies. It is another relic of colonialism. Extinguishment is used to ensure state domination of indigenous peoples and to sever their ancestral ties to their own territories. No other people are pressured to 'extinguish' their rights to lands. This is racial discrimination."

[71] *R.* v. *Powley*, [2003] S.C.J. No. 43 online: QL (S.C.C.), para. 46: "The doctrine of extinguishment applies equally to Métis and to First Nations claims." See P. Joffe & M.E. Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, A study prepared for the Royal Commission on Aboriginal Peoples, vol. 1, 1995, c 3 (Government Extinguishment policies and the Metis), where it is concluded that the government process of extinguishment was invalid.

[72] P. Joffe & M.E. Turpel, note 71, *supra*, vol. 2, c. 8 (Compatibility of Extinguishment with Human Rights and Other Norms), pp. 322 *et seq*.

Fourth, in Canada and internationally,[73] it is well recognized that the principles of democracy, rule of law and respect for human rights are profoundly interrelated.[74] Therefore, a human rights approach is required to ensure balanced and comprehensive legal analyses. Moreover, Canadian values in terms of human rights are rooted in international standards.[75]

In the *Québec Secession Reference*, the Supreme Court of Canada stated that underlying constitutional principles include democracy, constitutionalism and the rule of law, and respect for minority rights.[76] These underlying principles function together and cannot be defined in isolation from one another.[77] The Court also highlighted that the protection of Aboriginal and treaty rights "whether looked at in their own right[78] or as part of the larger concern with minorities, reflects an important underlying constitutional value."[79]

Fifth, the acute poverty facing many First Nations and Metis peoples in Saskatchewan and other parts of Canada is interrelated with the denial of their basic human rights. Such poverty is not happenstance,[80] but is a result of colonialism, dispossession of lands and resources, discrimination and other unacceptable actions.[81]

[73] D. Petrova, *Strengthening the Rule of Law in Building Democratic Societies: Human Rights in the Administration of Justice*, Seminar on the Interdependence Between Democracy and Human Rights, Organized by the Office of the High Commissioner for Human Rights, Geneva, 25 – 26 November 2002, para. 1.3.D:

> … I would describe the relationship between the concepts of democracy, human rights and the rule of law from the point of view of their normative value as follows: **the enjoyment of all human rights by all persons is the ultimate civilisational horizon of democracy. The achievement of high level of human rights protection and promotion is a measure for the success of a democracy. The rule of law in a democratic society is a prerequisite and main vehicle for the protection of human rights.** [bold in original]

[74] P. Joffe, note 59, *supra*, at p. 188. See United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), reprinted in (1993) 32 I.L.M. 1661, Part I, para. 8: "Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing"; and Conference on Security and Co-operation in Europe, *Document of the Copenhagen Meeting on the Human Dimension of the Conference on Security and Co-operation in Europe*, June 29, 1990, (1990) 29 I.L.M. 1305, at p. 1307, preamble: "pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms".

See also the *Inter-American Democratic Charter*, adopted by acclamation by the Hemisphere's Foreign Ministers and signed by the 34 countries of the Americas at the 28th special session of the OAS General Assembly, Lima, Peru, September 11, 2001, Art. 7: "Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence". Art. 2 provides: "The effective exercise of representative democracy is the basis for the rule of law".

[75] S.J. Toope, "Legal and Judicial Reform through Development Assistance: Some Lessons" (2003) 48 McGill L.J. 357 at pp. 387-388:

> It must be emphasized that Canadian legal values concerning human rights are rooted directly in international standards, articulated both in formal treaties and in various plans of action adopted to promote the implementation of treaty rights. In addition, Canadians have taken a leadership role in the articulation of principles of substantive equality within the legal system.

[76] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, (1998) 161 D.L.R. (4th) 385, 228 N.R. 203, *reprinted in* (1998) 37 I.L.M 1342, para. 32.

[77] *Id.*, para. 49: "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."

[78] Of course, Indigenous peoples are distinct peoples and not simply minorities. Therefore, it is more appropriate to treat the protection of Aboriginal and treaty rights as a separate constitutional principle. Similarly, see C.-A. Sheppard, "The Cree Intervention in the Canadian Supreme Court Reference on Québec Secession: A Subjective Assessment" (1999) 23 Vermont L. Rev. 845 at p. 856; and P. Russell, "The Supreme Court Ruling, A Lesson in Democracy", Cité Libre, English ed., vol. 26, no. 4, October-November, 1998, 29 at p. 30.

[79] *Reference re Secession of Québec*, note 76, *supra*, para. 82. In addition, it is worth noting that in *R.* v. *Marshall* (No. 2), [1999] 3 S.C.R. 533, para. 45, the constitutional obligation to protect Aboriginal and treaty rights is referred to as a "national commitment". See also *R.* v. *Powley*, note 71, *supra*, para. 45: "Section 35 reflects a new promise: a constitutional commitment …"

In regard to commitments in treaties relating to Aboriginal peoples, see Royal Commission on Aboriginal Peoples, note 20, *supra*, at p. 37: "Treaty promises were part of the foundation of Canada, and keeping those promises is a challenge to the honour and legitimacy of Canada."

[80] Working Group on Indigenous Populations, "Principle Theme: Indigenous Peoples and the Their Right to Development, Including Their Right to Participate in Development Affecting Them", *Note by the secretariat*, E/CN.4/Sub.2/AC.4/2001/2, 20 June 2001, para. 11:

> What are the causes of indigenous poverty? There are a number of explanations, which are often linked to each other. In some cases, it is the paucity of resources indigenous peoples have at their disposal for their own development processes, and the negative impacts of large-scale development projects on their lives and lands. In other cases it is the marginal role they play in the national development process and the exclusion from the market, which prevents indigenous peoples from enjoying the same opportunities as others. In yet other situations, it is direct discrimination and exclusion from society that keeps indigenous peoples in poverty.

[81] See Introduction of this paper. See also See "Statement of Reconciliation" in Indian Affairs and Northern Development, *Gathering Strength – Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services, 1997), at p. 4:

> Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices … We must acknowledge that *the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations*." [emphasis added.]

Severe poverty can inhibit significantly the enjoyment of human rights.[82] It is well-established that Indigenous peoples and individuals who live in debilitating poverty - even those living in developed countries such as Canada[83] - are precluded from the effective exercise or enjoyment of fundamental human rights.[84]

In Indigenous communities and nations, denials of Indigenous peoples' collective human rights, including self-determination, are root causes and major contributors to deep-seated health[85] and other socio-economic problems.[86] Land and resource dispossessions entail highly serious and far-reaching human rights abuses.[87] They endanger[88] the survival and well-being of distinct Indigenous peoples and cultures.[89] Both peoples and individuals are impacted.

Therefore, eradicating this poverty is in essential ways "a human rights challenge".[90] A human rights approach is especially appropriate for the purpose of effecting broad reforms relating to Aboriginal peoples and improvements to the administration of justice. In the words of D. Garcia-Sayan: "With regard to the interdependence of democracy and human rights, the administration of justice is an essential component of a democratic society as it is the primary guarantor of the protection of human rights."[91]

[82] U.N. Commission on Human Rights, *Human rights and extreme poverty*, Res. 2003/24, 22 April 2003, para. 1(*c*): "The existence of widespread absolute poverty inhibits the full and effective enjoyment of human rights and makes democracy and popular participation fragile …"

See also United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, note 74, *supra*, Part I, para. 14 : "… the existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community."

[83] R. Müllerson, "Reflections on the Future of Civil and Political Rights" in B.H. Weston & S.P. Marks, eds., *The Future of International Human Rights* (Ardsley, New York: Transnational Publishers, 1999) 225, at p. 235: "Existing poverty in some highly developed countries … are among the conditions that make the enjoyment of some civil and political rights for many people impossible, and thus, there still is some room for improvement in civil and political even in rich democratic countries in the sense of making the enjoyment of these rights real to everyone."

[84] Working Group on Indigenous Populations, "Principle Theme: Indigenous Peoples and the Their Right to Development, Including Their Right to Participate in Development Affecting Them", *Note by the secretariat*, E/CN.4/Sub.2/AC.4/2001/2, 20 June 2001, para. 11: "Poverty is a denial of all human rights to an individual and group and erodes civil and political, as well as economic, social and cultural rights. As has been noted by the Working Group on numerous occasions, indigenous peoples form a disproportionately larger share among the poor ".

[85] Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, adopted 11 May 2000, 22nd sess., U.N. Doc. E/C.12/2000/4 (2000), para. 27:

> The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

[86] Royal Commission on Aboriginal Peoples, note 20, *supra*, vol. 3, at p. 5: "Current social problems are in large part a legacy of historical policies of displacement and assimilation, and their resolution lies in recognizing the authority of Aboriginal people to chart their own future within the Canadian federation."

See also American Indian Law Alliance, "Self-Determined Indigenous Children and Youth", Second session of the Permanent Forum on Indigenous Issues, 12-23 May 2003, United Nations Headquarters, New York, preface: "It is crucial to appreciate that the persistent undermining and denial of indigenous peoples' human rights, including the right to self-determination, is a major root cause and contributing factor to the acute health and socio-economic problems in many Indigenous communities and nations. If not reversed, this negative dynamic will continue to severely undermine the integrity of our families, communities and nations."

[87] R.J. Epstein, "The Role of Extinguishment in the Cosmology of Dispossession" in G. Alfredsson & M. Stavropoulou, eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague: Kluwer Law International, 2002) 45, at p. 55: "Indigenous peoples have demonstrated that they have a special relationship with land. Land is a source of identity, but it is also the source of all things needed to survive. Consequently, confiscation of indigenous peoples' land necessarily entails human rights abuses of the most serious and fundamental kind."

[88] R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, note 18, *supra*, at p. 105: "Indigenous peoples are aware of the fact that unless they are able to retain control over their land and territories, *their survival as identifiable, distinct societies and cultures is seriously endangered*." [emphasis added]

[89] Royal Commission on Aboriginal Peoples, note 20, *supra*, vol. 2(2), at p. 557: "Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently, on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction."

[90] United Nations Development Program, *Human Development Report 2000* (Oxford: Oxford University Press, 2000), at p. 73: "… eradicating poverty is more than a major development challenge – it is a human rights challenge".

[91] D. Garcia-Sayan, note 36, *supra*, at p. 13, para. 29.

IV. Right of Self-Determination and s. 35 of the Constitution Act, 1982

Should the Implementation office, established after the *Commission on First Nations and Métis Peoples and Justice Reform*, choose to adopt a human rights approach and incorporate international norms in its recommended reforms, a key aspect should pertain to Indigenous peoples' right of self-determination. In regard to the administration of justice, a central aspect to consider in relation to Indigenous peoples is their right to self-determination *under international law*.[92]

In Australia, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) examined the problems with the administration of justice in relation to Aboriginal peoples. RCIADIC concluded that factors outside the justice system were even more significant than those within:

> … the more fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system but in those factors which bring Aboriginal people into conflict with the criminal justice system in the first place. The view propounded by this report is that the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society-socially, economically and culturally.[93]

As a result, RCIADIC emphasized that "empowerment of Aboriginal society—and associated with it the right to self-determination—is a central issue in the report"[94] and urged measures to eliminate the domination by non-Aboriginal society.[95] Similarly, the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* recommended in a major report that self-determination in relation to juvenile justice issues be implemented through national framework and standards legislation.[96]

Under international law, the right of self-determination is so important that it is the first article in both of the human rights Covenants.[97] The affirmation of the right of self-determination of Indigenous peoples is a core element of the draft *U.N. Declaration on the Rights of Indigenous Peoples* and essential to its integrity.[98] Self-determination is a right of all peoples.[99] In regard to peoples, including Indigenous peoples,[100] the right of self-

[92] It is important to emphasize here that the right of self-determination being referred to is the existing right under the international human rights Covenants. For example, the United States has its own domestic form of self-determination for Indigenous peoples in the U.S. that falls significantly short of the international standard.

[93] Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *National Report* (Elliott Johnston, Commissioner), Vol. 1, (Canberra, Australia: AGPS, 1991), para. 1.7.1.

[94] RCIADIC, note 93, *supra*, para. 1.7.7.

[95] RCIADIC, note 93, *supra*, para. 1.7.6:

> But running through all the proposals that are made for the elimination of these disadvantages is the proposition that Aboriginal people have for two hundred years been dominated to an extraordinary degree by the non-Aboriginal society and that the disadvantage is the product of that domination. The thrust of this report is that the elimination of disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.

[96] Australian Human Rights and Equal Opportunities Commission, *Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney, 1997), Annex 9, Recommendations 43a, b, andc.

[97] See identical Art. 1, para. 1 in both the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[98] Draft *U.N. Declaration on the Rights of Indigenous Peoples*, Art. 3: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[99] R. McCorquodale, "Human Rights and Self-Determination" in M. Sellers, ed., *The New World Order: Sovereignty, Human Rights, and the Self-Determination of Peoples* (Oxford/Washington, D.C.: Berg, 1996) 9, at 9-10: "[The right to self-determination] now applies to all peoples in all territories, not just colonial territories, and to all peoples within a state."

[100] Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government, United Nations Meeting of Experts, Nuuk, Greenland, 24-28 September 1991, U.N. Doc. E/CN.4/1992/42 and Add.1, preamble : "... indigenous peoples constitute distinct peoples and societies, with the right to self-determination, including the right to autonomy, self-government, and self-identification."

determination is an inalienable,[101] collective human right.[102] It is also a "prerequisite" for the enjoyment of *all* other human rights.[103] In addition, self-determination is the "oldest aspect of the democratic entitlement".[104] Denial of this right "is essentially incompatible with true democracy."[105] Furthermore, the right of peoples to self-determination under international law includes natural resource rights.[106] The U.N. Human Rights Committee has explicitly confirmed that Indigenous peoples in Canada possess these resource rights under Article 1 of the *International Covenant on Civil and Political Rights*.[107]

Under both international human rights Covenants, Canada and other States have an affirmative duty to "promote the realization of a right of self-determination … and … respect that right, in conformity with the provisions of the Charter of the United Nations."[108] In 1996, the government of Canada formally declared in United Nations fora in Geneva that it is legally and morally committed to the non-discriminatory application of the right of self-determination to indigenous and non-indigenous Peoples:

> [The right of self-determination] ... is fundamental to the international community, and its inclusion in the UN Charter, and in the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* bears witness to the important role that it plays in the protection of human rights of all peoples. ... Canada is therefore legally and morally committed to the observance and protection of this right. We recognize that this right applies equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law.[109]

[101] Human Rights Committee, General Comment No. 12, Article 1, 21st sess., A/39/40 (1984), para. 2 : "Article 1 [of the International Covenant on Civil and Political Rights] enshrines an inalienable right of all peoples ..."

[102] R. McCorquodale, "Human Rights and Self-Determination", note 99, *supra*, at p. 11: "... it is certain that self-determination is now a human right in international law."

See also I. Shearer, *Starke's International Law*, 11 ed. (London: Butterworths, 1994), at 338: "… a number of important human rights are not rights of individuals, but collective rights, i.e. the rights of groups or of peoples. This is clear so far as concerns the right of self-determination".

[103] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Right to Self-Determination: Implementation of United Nations Resolutions, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980) (H. Gros Espiell, Special Rapporteur) at p. 10, para. 59:

> ... human rights can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a human right and as a prerequisite for the enjoyment of all the other rights and freedoms.

See also K. Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* (New York: St. Martin's Press, 1998), at p. 83:

> … while self-determination is required for the development and enjoyment of human rights, human rights are also a precondition for communal self-determination. They cannot be divorced from each other. In this sense, self-determination is a human right along with civil, political, and economic rights which, taken as a whole, describe and guarantee the rights of human existence.

[104] T. Franck, "The Emerging Right to Democratic Governance", (1992) 86 Am. J. Int'l L. 46 at p. 52.

[105] R. Stavenhagen, "Self-Determination: Right or Demon?" in D. Clark & R. Williamson, eds., Self-Determination: International Perspectives (New York: St. Martin's Press, 1996) 1, at p. 8.

[106] *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, Art. 1, para. 2: "All peoples may, for their own ends, freely dispose of their natural wealth and resources … . In no case may a people be deprived of its own means of subsistence."

In regard to the interpretion of Art. 1, para. 2 of the Covenants, see A. Cassese, "The Self-Determination of Peoples", in L. Henkin, (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), 92 at p. 103: "This paragraph [in Art. 1], however, is not merely a reaffirmation of the right of every state over its own natural resources; it clearly provides that the right over natural wealth belongs to *peoples*. [emphasis in original.]

[107] In regard to Aboriginal peoples, see Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105, 7 April 1999, para. 8: "... the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence."

See also *Ominayak, Chief of the Lubicon Lake Band* v. *Canada* (Communication no. 167/1984), *Official Records of the Human Rights Committee 1989/90*, Vol. II (New York: United Nations, 1995), pp. 381-391. See also Communication no. 167/1984, Decisions of the Human Rights Committee, U.N. Doc. CCPR/C/38/D/167/1984 (1990), para. 13.3: "… the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."

[108] See the identical Art. 1, para. 3 in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

[109] *Statements of the Canadian Delegation*, Commission on Human Rights, 53rd Sess., Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 2nd Sess., Geneva, 21 October - 1 November 1996, cited in *Consultations Between Canadian Aboriginal Organizations and DFAIT in Preparation for the 53rd Session of the U.N. Commission on Human Rights, February 4, 1997* (statement on art. 3, right to self-determination, on October 31, 1996).

With the above context in mind, let us now consider the significance of the right of self-determination to Aboriginal and treaty rights in s. 35 of the Constitution Act, 1982. As a human right, self-determination is interdependent, indivisible and interrelated with all other human rights.[110]

It has already been demonstrated in this paper that Aboriginal rights are human rights.[111] While each treaty should be examined on its own merits, it may at least be generally concluded that, to a large degree, Indigenous peoples' treaty rights are also human rights. Their treaties often entail a wide range of human rights considerations.[112] Whether in general or specific terms, Indigenoous peoples' treaties constitute an elaboration of arrangements relating to the political, economic, social, cultural or spiritual rights and jurisdictions of the Indigenous peoples concerned. These treaties also often include important dimensions relating to the collective and individual security of Indigenous peoples and individuals.

Some might argue that "peace and friendship" treaties do not really entail human rights. However, such treaties address Indigenous peoples' right to security. In forming alliances, Indigenous peoples were also manifesting their right to determine their own relationships,[113] which is an inherent aspect of their right to self-determination. At the very least, "peace" is interrelated and interdependent with human rights[114] and a vital requirement for their enjoyment.[115] "Peace" is also described as "a value and a principle in itself, based on democracy, justice, respect for human rights, solidarity, security, and respect for international law."[116]

Based on the above, Indigenous peoples' human right to self-determination is an essential aspect in the interpretation and exercise of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*. As K. Roach suggests, ""In devising remedies, courts should be sensitive to the purposes of aboriginal rights, including the role of treaty-making and self-determination, while recognizing that they have a duty to enforce aboriginal rights."[117]

[110] *Vienna Declaration and Programme of Action*, note 74, *supra*, Part I, para. 5:
All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

[111] See heading III (Importance of Adopting a Human Rights Approach), *supra*.

[112] For example, Indigenous peoples' disputes relating to land title and rights clearly "encompass distinct human rights considerations": see I/A Comm. H.R., *Mary and Carrie Dann v. United States*, Case Nº 11.140, Report No. 113/01, at para. 124:

> … in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands. Considerations of this nature in turn controvert the State's contention that the Danns' complaint concerns only land title and land use disputes and does not implicate issues of human rights.

In the *Dann* case, the Dann sisters asserted that the title of the Western Shoshone to its ancestral lands is based on both Aboriginal and treaty rights (para. 52). The treaty referred to was the 1863 *Treaty of Ruby Valley*, 18 U.S. Stat. 689, ratified by the United States in 1866 and proclaimed on October 21, 1869.

[113] See, for example, draft *U.N. Declaration on the Rights of Indigenous Peoples*, preamble: "… indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect".

[114] *Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act)*, signed by 35 states (including Canada and the United States) on August 1, 1975, *reprinted in* (1975) 14 I.L.M. 1295, Principle VII (Respect for human rights and fundamental freedoms):

> The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.

[115] See U.N. Commission on Human Rights, *Promotion of peace as a vital requirement for the full enjoyment of all human rights by all*, Res. 2003/61, 24 April 2003, para. 1: "…peace is a vital requirement for the promotion and protection of all human rights for all".

See also Human Rights Committee, *General Comment No. 12, Article 1*, 21st sess., A/39/40 (1984), para. 8: "…history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding."

[116] *Declaration on Security in the Americas*, adopted at the third plenary session of October 28, 2003, Special Conference on Security, Mexico City, OEA/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1, 28 October 2003, para. 3.

[117] K. Roach, *Constitutional Remedies in Canada*, (Aurora, Ontario: Canada Law Book, 2002), at p. 15-1. Professor Roach adds at p. 15-3: "A purposive approach to remedies for aboriginal rights will recognize that both the history and future of aboriginal rights involve elements of self-determination." See also P. Joffe, note 59, *supra*, at pp. 174-181.

It is worth noting that the government of Canada has recognized in a formal policy that the inherent right of Aboriginal peoples to self-government is an existing Aboriginal right under s. 35.[118] Since the right to self-government is a political aspect of the right of self-determination,[119] it would appear that this latter right is included in s. 35.

Further, in the *Québec Secession Reference*, the Supreme Court of Canada suggests that Aboriginal peoples' status and rights have a direct and substantial bearing on the question[120] of self-determination under Canadian and international law. In direct response to this question, the Court stressed "the importance of the submissions made ..., respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples."[121]

Even if Canadian courts were to rule that the right of self-determination under the human rights Covenants has not been incorporated into Canadian law by enactment, courts could still consider this international human right for purposes of interpreting Aboriginal and treaty rights under s. 35.[122] In addition, the right of self-determination is considered to be customary international law (if not also a peremptory norm),[123] which means that it would likely be considered to be a part of Canadian law without legislative enactment.[124] This was the position of the Attorney General of Canada in the *Québec Secession Reference*:

[118] Indian Affairs and Northern Development, *Aboriginal Self- Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Public Works and Government Services Canada,1995) at p. 3:

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nation.

[119] Royal Commission on Aboriginal Peoples, note 20, *supra*, vol. 2(1), p. 175: "Self-government … is one natural outcome of the exercise of the right of self-determination … Self-determination refers to the collective power of choice; self-government is one possible result of that choice."

See also S. J. Anaya, Indigenous Peoples in International Law (Oxford/New York: Oxford University Press, 1996), at p. 109: "Self-government is the overarching political dimension of ongoing self-determination". See also R. McCorquodale, "Self-Determination: A Human Rights Approach" (1994) 43 Int'l & Comp. L.Q. 857, at p. 864; and the draft *U.N. Declaration on the Rights of Indigenous Peoples*, art. 31: "Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government".

[120] The precise text of this Reference question was: "Does international law give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?"

[121] *Reference re Secession of Québec*, note 76, *supra*, para. 139. This aspect of the Court's ruling makes eminent good sense. Since the right of self-determination is a relative right, the right of self-determination of the Québécois would have to be balanced by that of Indigenous peoples in Québec. See, *e.g.*, R. McCorquodale, "Human Rights and Self-Determination", note 99, *supra*, at p. 16: "The right of self-determination is not ... an absolute right without any limitations."

[122] *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 60:

> International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations qua obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.

[123] R. McCorquodale, *Self-Determination: A Human Rights Approach*, note 119, *supra*, at 858: "This right [of self-determination] has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*." See also S.J. Anaya, "Indigenous Rights Norms in Contemporary International Law" (1991) 8 Ariz. J. Int'l & Comp. Law 1 at pp. 29-30: "… self-determination is widely held to be a norm of general or customary international law, and arguably *jus cogens* (a peremptory norm)".

K. Doehring, "Self-Determination" in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 56, at p. 70: "The right of self-determination is overwhelmingly characterized as forming part of the peremptory norms of international law. However, this evaluation is also rejected by some. It can nevertheless be proved that such a qualification is correct." See also A. Cassese, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge: Cambridge University Press, 1995), at 140:

> … it is no coincidence that whenever States have referred to self-determination as belonging to *jus cogens*, they have not specified either the areas of application of self-determination, the means or the methods of its implementation, or the permissible outcome of self-determination. States have generically adverted to the 'principle' … or, more simply, to self-determination. It follows that the whole cluster of legal standards (the general principle and the customary rules) on self-determination should be regarded as belonging to the body of peremptory norms.

[124] At the international level, a similar ruling is found in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, [1986] I.C.J. Rep. 14 (Merits), at pp. 94-95, para. 177:

> ... even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. ... More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.

> [T]he principles of customary law relating to the right of self-determination are applicable in the present case, because they do not conflict with the applicable Canadian domestic law. *Since these principles of customary law can be 'incorporated' into domestic law by Canadian courts, it is respectfully submitted that Canadian courts unquestionably have jurisdiction to apply them*.[125] [emphasis added]

Constitutional rules of interpretation in Canada would further reinforce the application of the right of self-determination to Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*. For example, in the *Québec Secession Reference*, the Supreme Court of Canada applied the "living tree" doctrine[126] to the underlying principles in Canada's Constitution, which include the protection of Aboriginal and treaty rights.[127] This flexible doctrine[128] would enable Aboriginal peoples' rights under the Constitution to be interpreted in a manner consistent with their right to self-determination under international law.

V. Indigenous Peoples' Treaties – An International Concern

If international human rights norms are to be applied to Aboriginal and treaty rights, it is critical that federal and provincial governments in Canada do not seek to seek to restrict or deny Indigenous peoples their status as "peoples", in order to restrict or deny them the human right of self-determination. Such actions would be discriminatory,[129] since *all* peoples including Indigenous peoples have the right of self-determination under international law (see heading IV *supra*).

[125] Reply By the Attorney General of Canada to Questions Posed By the Supreme Court of Canada at para. 8, online: QL (SCQR), in the matter of *Reference re Secession of Québec*, [1998] 2 S.C.R. 217. For a similar approach in the context of the Canadian Charter, see G.V. LaForest, "The Expanding Role of the Supreme Court of Canada in International Issues", (1996) 34 Can. Y. I.L. 89 at p. 97.

[126] *Edwards* v. *A.-G. Canada*, [1930] A.C. 124 (P.C.) at p. 136: "The [*Constitution Act, 1867*] planted in Canada a living tree capable of growth and expansion within its natural limits."

[127] *Reference re Secession of Québec*, note 76, *supra*, at para. 52: "…observance of and respect for these [underlying constitutional] principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree', to invoke the famous description in *Edwards* v. *Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136."

It is worth noting that the Royal Commission on Aboriginal Peoples explicitly proposed that the "living tree" doctrine be applied to Indigenous peoples' treaties. See Royal Commission on Aboriginal Peoples, note 20, *supra*, at p. 53, where RCAP added: "Just as a country's constitution is organic, being shaped and reshaped continually by the evolving circumstances of human society, the principles of treaties made between nations must also be interpreted as the relationship evolves. … Treaty relationships, once established or re-established, must be flexible enough to address new items of concern."

[128] *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at 180: "The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed … The tree is rooted in past and present institutions, but must be capable of growth to meet the future."

See also *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 155: "A constitution ... is drafted with an eye to the future ... Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind."

[129] *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, (1966) 5 I.L.M. 352. *Adopted by* U.N. General Assembly on December 21, 1965, opened for signature on March 7, 1966, and *entered into force* on January 4, 1969, Art. 1:

> … any distinction, *exclusion, restriction* or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing*, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. [emphasis added]

See C. Scott, *Indigenous Self-Determination and Decolonization of the International Imagination: A Plea*, (1996) 18 Human Rts. Q. 814, at 817: "The exclusion of an indigenous people from the status of being a 'people' has at least the effect of creating discriminatory access to the special kind of freedom that other peoples enjoy, namely that of the human right to self-determination." See also *Working Paper on discrimination against indigenous peoples submitted by Mrs. Erica-Irene Daes in accordance with Sub-Commission resolution 1999/20*, E/CN.4/Sub.2/2001/2, 18 August 2001, para. 11:

> … I believe that discrimination and racism are at the heart of the indigenous issue, whether this is expressed in the reluctance of many States to recognize the right of self-determination of indigenous peoples - a right recognized for all other peoples - or in the absurd denial of the use of the term "indigenous peoples", contradicting all logic of language and pretending in so doing that the different indigenous peoples of the world do not have a language, history or culture unique to them …

Similarly, it would be vital to recognize the full status and significance of Indigenous peoples' treaties. The Supreme Court of Canada has acknowledged that Indigenous treaties are "sacred".[130] Failure to respect the status and significance of treaties would be inconsistent with the Crown's fiduciary obligations[131] – as well as with the principles of good faith, honour and trust that are associated with such obligations and with the process of treaty-making itself.[132] Further, Indigenous treaties serve as a benchmark for measuring fairness and justice. If treaty promises remain unfulfilled or ignored, it mars and impedes the good administration of justice. There may be little or no common ground with Indigenous communities/nations for effective partnerships or cooperation.

It is beyond the scope of this paper to examine these and other important aspects relating to Indigenous peoples' treaties. However, it would be useful to briefly comment on two aspects: i) treaties and treaty rights of Indigenous peoples are matters of international concern; and ii) Indigenous peoples' treaties are of international character. Increased understanding, sensitivity and dialogue on these matters could create an improved climate for any future reforms.

Before proceeding with some comments, it is worth noting that both the governments of Canada[133] and the United States,[134] each in their own way, are seeking to restrict Indigenous peoples' treaties as much as possible to a domestic context. These government positions give rise to a host of serious questions that are beyond the scope of this paper. However, the positions appear highly controversial and merit careful attention and response.

[130] *R.* v. *Badger*, [1996] 1 S.C.R. 771, at p. 793 (per Cory J.), [1996] 2 C.N.L.R. 77, at p. 92. See also Royal Commission on Aboriginal Peoples, note 20, *supra*, vol. 2(1), p. 53: "The consistent message emerging from the testimony of treaty nations is that the treaties are sacred and spiritual covenants that cannot be repudiated, any more than the cultures and identities of treaty nations can be repudiated."

[131] See, *e.g.*, L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996), at p. 222: "Both pre- and post-Confederation treaties are independent roots of the Crown's modern fiduciary obligations."

[132] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at p. 1107: "[T]he honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned," quoting *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360 at 367, [1981] 3 C.N.L.R. 114 (C.A.).

J.Y. Henderson, "Interpreting *Sui Generis* Treaties", (1997) 36 Alta. L. Rev. 46, at p. 80: "It makes no difference whether the sharp dealings are in the negotiations or drafting of the treaties, or in the implementation of them. The courts have firmly stated that they do not tolerate or condone such conduct by the Crown".

See also *New Zealand Maori Council* v. *Attorney General*, [1987] 1 N.Z.L.R. 641 (C.A.), at 682, where, in the context of government action under the Treaty of Waitangi of 1840, Richardson J. stated: "The concept of the honour of the Crown also has continuing expression … in the international law doctrine of good faith". The same judge also made reference to the *U.N. Charter*, Art. 2 and the *Vienna Convention on the Law of Treaties*, Arts. 26 (*pacta sunt servanda*) and 31(1) (treaty shall be interpreted in good faith); and *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308 (P.C.), where the Treaty of Waitangi received the same consideration as if it had been an international treaty made between States.

[133] Canada, "Perspective on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples", Background paper, Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, organized by OHCHR, Geneva, 15-17 December 2003, HR/GENEVA/TSIP/SEM/2003/BP.17.

[134] United States of America, "Presentation of the Government of the United States of America", Expert Seminar on treaties, agreements and other constructive arrangements between States and Indigenous Peoples, organized by OHCHR, Geneva, December 17, 2003. The U.S. chose not to participate in this Seminar, but made this presentation. An illustration of the U.S. position on Indigenous peoples' treaties is provided as follows:

> The United States also disagrees with the establishment of a section within the U.N. Treaty Registry which would be charged with locating, compiling, registering, numbering and publishing all treaties concluded between indigenous peoples and States. Indigenous peoples live within the borders of an existing State or States. Treaties between States and the indigenous people located within them have the status of domestic law. The U.N. Treaty Registry's resources are not to be used to record domestic legal instruments, such as treaties between a State and indigenous people living within that State, as has been proposed. We would oppose any expenditure of UN resources on such an activity.

Are treaties and treaty rights of Indigenous peoples matters of international concern?

From the outset, it can be stated that Indigenous peoples' treaties and treaty rights are matters of international concern. Reasons to support this conclusion include the following.

First, it is well-established in international law that human rights issues are of international concern.[135] Therefore, Indigenous peoples' human rights – whether or not such rights are elaborated or reflected in treaties – must be of international concern. Treaties that include human rights considerations relating to Indigenous peoples must also be of international concern.

Second, international complaints mechanisms, such as the U.N. Human Rights Committee and the Inter-American Commission on Human Rights,[136] for years have examined the complaints of Indigenous peoples and non-Indigenous peoples (in accordance with established rules and procedures). In this context, any relevant treaties or treaty rights of Indigenous peoples are also included as matters of international concern.[137]

Third, the treaties and treaty rights of Indigenous peoples are, on an ongoing basis, the subject of standard-setting processes[138] and other international forums.[139] This is yet another indication of legitimate and continuing international concern.

Fourth, aside from relevant human rights aspects, Indigenous peoples[140] and their treaty and other rights are considered as matters of international concern.[141] In this context, it is worth noting that when First Nations,

[135] Conference on Security and Co-operation in Europe, Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, October 3, 1991, (1991) 30 I.L.M. 1670, at 1672, preamble:

> The participating States emphasize that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order.

R. McCorquodale, "Self-Determination: A Human Rights Approach", note 119, *supra*, at 865: "...a State's internal protection of the right of self-determination is now of international concern, which is consistent with the development of international human rights law so that human rights are now a matter not solely within a State's domestic jurisdiction."

United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, note 74, *supra*, Part I, para. 4: "the promotion and protection of all human rights is a legitimate concern of the international community".

[136] See, *e.g.*, I/A Comm. H.R., *Mary and Carrie Dann v. United States*, Case Nº 11.140, Report No. 113/01, where the relevance of rights of the Western Shoshone in the 1863 Treaty of Ruby Valley were part of the overall complaint.

[137] See, *e.g.*, the draft *U.N. Declaration on the Rights of Indigenous Peoples*, Art. 36: "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned."

[138] Examples of international standard-setting processes in Geneva that have addressed or are addressing Indigenous peoples' treaties and treaty rights include: the U.N. Working Group on Indigenous Populations and the open-ended and inter-sessional Working Group of the Commission on Human Rights that is currently considering the draft *U.N. Declaration*.

[139] Other such forums include the U.N. Permanent Forum on Indigenous Issues in New York and the Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, organized by the Office of the High Commissioner of Human Rights, Geneva, 15-17 December 2003.

[140] Establishment of a Permanent Forum on Indigenous Issues, ECOSOC Res. 2000/22, 28 July 2000, para. 2 (a):

> "The Economic and Social Council, …2. Also decides that the Permanent Forum on Indigenous Issues shall serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights; in so doing the Permanent Forum shall: (a) Provide expert advice and recommendations on indigenous issues to the Council …"

See also "Secretary-General Says World's Indigenous Peoples 'Have a Home' at UN", Permanent Forum on Indigenous Issues, First Session, 17th & 18th Meetings, HR/4602, 24 May 2002: "KOFI ANNAN, Secretary-General of the United Nations, terming the first session of the Forum "historic", proclaimed to the world's indigenous peoples, "You have a home at the United Nations." Those peoples, he continued, had hopes, rights and aspirations that must be addressed by the Organization, as well as knowledge and skills that could help the international community in its long sought goals of development and peace.

B. Boutros-Ghali, Statement to U.N. General Assembly, in "Living History: Inauguration of the "International Year of the World's Indigenous People", (1993) 3 Transnat'l L. & Contemp. Probs. 168 at 171: "By respecting [indigenous peoples], by defending them, *by helping them take their place in the community of nations and in international life*, we are protecting the world itself, in the conception we have of the world with all its diversity. And we are protecting each of our cultures, each of our peoples".

[141] *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples*, Adopted by the European Parliament in its plenary session, Strasbourg, February 9, 1994, Eur. Parl. Doc. PV 58(II) (1994), para. F: "noting that certain states have concluded treaties with indigenous peoples in the past and that some of these treaties have been shamelessly violated; whereas in this connection, in the context of increasing impoverishment, indigenous peoples are often the first to be dispossessed of rights, lands and resources."

See also B. McLachlin, Chief Justice of Supreme Court of Canada, "Aboriginal Rights: International Perspectives", Order of Canada Luncheon, Speech, Canadian Club of Vancouver, Vancouver, British Columbia, February 8, 2002: "Aboriginal rights from the beginning have been shaped by international concepts. … Whether we like it or not, aboriginal rights are an international matter."

Metis or Indigenous rights are recognized as matters of international concern, this would also entail treaty rights. In their treaties with the Crown, Indigenous peoples elaborate arrangements relating to their First Nations and Metis rights.

Five, as stated in the preamble of the U.N. Declaration on the Rights of Indigenous Peoples, experts in the Working Group on Indigenous Populations and the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities both concluded that "treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility".

Are Indigenous peoples' treaties of an international character?

First, it is important to underline that since Indigenous peoples and their treaties are matters of international concern, these instruments already have some form of international character. S.J. Anaya reinforces this view in the following terms:

> ...whether or not treaties or agreements with indigenous peoples have the same juridical status as interstate treaties is not in *itself* an issue of much practical importance. What matters is the respect accorded such agreements and the availability of mechanisms to ensure their effectiveness. *Even if not of the same character as interstate treaties, agreements with indigenous peoples increasingly are acknowledged to be matters of international concern and hence, in their own right, can be said to have an international character*.[142] [Emphasis added.]

As described briefly below, this is not to imply in any way that Indigenous peoples' treaties do not have an international character. Rather, it simply suggests that Indigenous peoples and the government of Canada may well have increased ground on which to reach a common understanding that such treaties are of international character. Whether or not parties agree that Indigenous and other treaties are *exactly* the same, this should not prevent acknowledgement that the treaties of Indigenous peoples are of international character.

Second, it must be recognized that – while there may be highly divergent views – some significant judicial[143] and other opinion[144] has concluded that at least some Indigenous treaties are of an international character. As the U.S. Supreme Court ruled in *Worcester* v. *Georgia*:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil, from time immemorial ... *The very term 'nation,' so generally applied to them, means 'a people distinct from the others*.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has

[142] S. J. Anaya, *Indigenous Peoples in International Law* (Oxford/New York: Oxford University Press, 1996), at p. 132.

[143] *U.S.* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), at p. 196:

> From the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations, dependent, it is true, but still capable of making treaties. This was only following the practice of Great Britain before the Revolution. In Worcester v. The State of Georgia, supra, the court say, 'The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well-understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense.'

[144] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations* (M. Alfonso Martínez, Special Rapporteur, Final Report), E/CN.4/Sub.2/1999/20, 22 June 1999, p. 10, para. 57: "the concept and practice of entering into international agreements – that is, compacts between sovereign entities, whether nations, "tribes" or whatever they choose to call themselves - was widespread among indigenous peoples in the Americas, Aotearoa/New Zealand and elsewhere before the arrival of the European colonizer and continues to be so."

See also J. Tully, note 23, *supra*, at 53: "To gain the consent of indigenous peoples, representatives of the Crown are required to enter into negotiations with indigenous peoples as nations equal in status to the Crown. The negotiations are nation to nation, and the treaties that follow from agreement on both sides are, by definition, international treaties."

G. Alfredsson, "The Right of Self-Determination and Indigenous Peoples" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 41, at 47: "These agreements were of an international character until the international status of one of the parties was eliminated by way of unilateral acts of the other party, sometimes by legislation, sometimes by the courts, often by force, and as a rule without indigenous consent."

H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons & J.C. Mohawk, eds., *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution*, 1992, at pp. 126-127:

> ... the specific relationship that each nation initially established with the United States was born of the principles and practices of international law, and was typically defined through the treaty process.
>
> Obviously then, the links between past and present are of central importance to any analysis of indigenous rights.

> adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. *The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning*. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.[145] [Emphasis added.]

Third, if Indigenous peoples or nations were regarded as sovereign entities by States for the purpose of treaty-making, then the State parties to theses treaties could not subsequently alter without Indigenous consent the status of the Indigenous party to the treaty.[146] Nor could such State parties later determine unilaterally that the treaties they signed with Indigenous nations were no longer of international character. Such actions would violate the principles of good faith and *pacta sunt servanda*.[147]

In *R*. v. *Sioui*, the Supreme Court of Canada relied upon the *Worcester* case[148] and historical evidence to conclude that, when the British entered into treaties of alliance with the Indians, ''the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.''[149] Yet Canada's highest court has yet to conclude that the State treaties with the Indigenous nations are of international character. Five years prior to the *Sioui* case, the Supreme Court decided in *R*. v. *Simon*:

> While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.[150]

A *sui generis* characterization may be utilized by courts in order to accommodate Indigenous perspectives and practices. However, it should not serve as a pretext for undermining Indigenous peoples' treaty or Aboriginal rights. Such a characterization should never be used in a manner that would weaken or dilute the basic status and rights of Indigenous peoples.[151]

Although the Supreme Court ruled that ''Indian treaties'' are neither ''created'' nor ''terminated'' according to the rules of international law because of the treaty's *sui generis* nature, this does not mean that international law cannot be applied to the treaty. Rather, the Court indicated that analogizing the principles of international treaty rule may be ''helpful'' in some instances. Thus, the ruling in *Simon* would not appear to preclude characterizing Indigenous treaties as being of ''international character'' or a matter of ''international concern''.

[145] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), at 559 *per* Marshall C.J.

[146] B. Kingsbury, ''Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law'' in P. Alston, ed., *Peoples' Rights* (Oxford: Oxford University Press, 2001) 69, at 100:

> Accounts and memories of an earlier era of political independence are widespread among indigenous peoples. In many cases this independence was initially recognized by the aspiring colonial power. Treaties between indigenous peoples and colonizing or trading states, made over several centuries, were commonly premissed on the capacity of both parties to act. ... The legal basis under which this independence was lost was often not accepted by the indigenous group involved, and even under the legal principles of contemporaneous international law espoused by the colonizers it may have been tainted by illegality.

[147] I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), at pp. 119-120:

> The principle of good faith underlies the most fundamental of all the norms of treaty law – namely, the rule *pacta sunt servanda*. Indeed, Article 26 of the Convention specifically establishes that every treaty in force is binding upon the parties to it and must be performed by them 'in good faith'. If 'good faith' is required of the parties in relation to the observance of treaties, logic demands that 'good faith' be applied to the interpretation of treaties. …
>
> …
>
> The principle of good faith applies to the entire process of interpretation, including the examination of the text, the context and subsequent practice.

See also *New Zealand Maori Council* v. *Attorney General*, [1987] 1 N.Z.L.R. 641 (C.A.), at 682, where, in the context of government action under the Treaty of Waitangi, Richardson J. referred to the international law doctrine of good faith, as well the *U.N. Charter*, Art. 2 (Principles) and the *Vienna Convention on the Law of Treaties*, Arts. 26 (*pacta sunt servanda*) and 31(1) (treaties shall be interpreted in good faith).

[148] *Worcester* v. *Georgia*, note 145, *supra*, at pp. 548-549: ''Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.''

[149] *R*. v. *Sioui*, [1990] 1 S.C.R. 1025, at p. 1053.

[150] *R*. v. *Simon* [1985] 2 S.C.R. 387, at p. 404.

[151] In this context, consider the most recent position of the government of Canada. See Canada, ''Perspective on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples'', note 133, *supra*, p. 16:

> Due to the *sui generis* nature of treaties between states and indigenous groups and the variety and complexity of treaties, agreements and arrangements, international monitoring and dispute resolution is not appropriate.

Fourth, in the event of an ambiguity or doubtful expression, Indigenous treaties should be liberally construed and resolved in favour of the First Nations and Metis signatories.[152] However, unilateral alteration of the international status or character of a treaty – or the status of the Indigenous party concerned – is not a question of ambiguity. Rather, it appears to be a deliberate and unauthorized alteration of the original understanding of the parties.[153] This constitutes an illegitimate modification of the historical or legal context in which the treaty was signed. Such "sharp dealing" is prohibited by Canadian courts[154] and clearly brings dishonour to the Crown.

Fifth, it would be unfair to deprive Indigenous peoples of any international[155] recourse in relation to their treaties and treaty rights, regardless of the circumstances.156 In many instances, domestic remedies may be unfair or otherwise inadequate.[157] Indigenous peoples have the right to an effective remedy,[158] especially when there are human rights issues involved.

Sixth, even if the domestic law in Canada were to undermine or deny the treaty rights of Indigenous peoples, there could still exist international obligations that the Canadian government would be bound to fulfill. According to a long and well-established rule, States cannot invoke their internal law in order to circumvent their obligations under international law.[159]

Seventh, in an era of globalization when a vast range of issues are being regulated or otherwise addressed at the international level, it would make little sense for the government of Canada to seek to contain Indigenous

[152] See, *e.g.*, *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29. See also *R*. v. *Marshall* (No. 1), [1999] 3 S.C.R. 456, para. 78: "Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories".

[153] *Study on treaties, agreements and other constructive arrangements between States and indigenous populations* (M. Alfonso Martínez, Special Rapporteur, Final Report), note 144, *supra*, at p. 43, para. 271: "The Special Rapporteur is of the opinion that those instruments indeed maintain their original status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them (or their successors), who shall implement their provisions in good faith."

[154] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at p. 1107, Dickson C.J.C.: "[T]he honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned," quoting *R*. v. *Taylor and Williams* (1981), 34 O.R. (2d) 360 at 367, [1981] 3 C.N.L.R. 114 (C.A.).

[155] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117*, Forty-eighth session, E/CN.4/Sub.2/1996/17, 24 May 1996, Annex, para. 4:

> Every State shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights have been violated. The right to a remedy against violations of human rights and humanitarian norms includes the right of access to national and international procedures for their protection.

[156] U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, E/CN.4/Sub.2/2001/21, 11 June 2001, p. 17, para. 49:

> The denial of any remedy under international law is inconsistent with the use of treaties as a legal mechanism and with the status of indigenous peoples as subjects of international law. Thus, indigenous peoples appear to be unique in being denied legal remedies for violation of their rights where the State abrogates or violates a treaty between the State and an indigenous nation, tribe or peoples.

[157] R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), at 96: "It becomes unsustainable to regard the treatment of one's own nationals as matters falling essentially within domestic jurisdiction, and thus unreviewable by the international community."

[158] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N.G.A. Res. 53/144, U.N. Doc. A/RES/53/144, 8 March 1999, Annex, Art. 9:

> 1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.

Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity, November 21, 1990, reprinted in (1991) 30 I.L.M. 190: "We will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights."

[159] H.M. Kindred *et al*., eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery Publications, 2000), at p. 111: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith. Furthermore, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

See also Inter-American Court of Human Rights, *International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention* (arts. 1 and 2, American Convention on Human Rights), Advisory Opinion OC-14/94 of December 1994, Series A No. 14, para. 35:

> Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions …

peoples' treaties within the domestic context. Such an approach would run counter to the practice and growing trend in international affairs. It would also be inconsistent with the increased affirmation of Indigenous peoples as international actors and subjects of international law.[160]

Eighth, it cannot be argued that the current definition of "treaty" in the 1969 *Vienna Convention on Treaties* precludes Indigenous peoples' treaties, since the definition refers to international agreements "concluded between States".[161] Art. 4 of the *Convention* makes clear that it applies "only to treaties … concluded by States after the entry into force of the present Convention with regard to such States." In addition, Art. 3 stipulates that the *Convention* does not affect the legal force of international agreements concluded between States and other subjects of international law.[162]

Ninth, in the past, some Indigenous treaties were classified without distinction together with other international treaties.[163] Therefore, it could hardly be argued by Canada that Indigenous treaties were always of a domestic character.

Tenth, if Indigenous treaties are solely of a domestic character, how can one explain why the U.S. Congress adopted a law in 1871 providing: "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty"[164]?

Based on the above considerations, the following position of the government of Canada to in effect "domesticate" Indigenous peoples' treaties must be rejected:

> We cannot re-write history, and in only rare instances can indigenous peoples be restored fully to their situations prior to colonisation or other historic events. It is not therefore helpful to suggest that agreements between indigenous peoples and States can or should be characterized as international treaties in the sense of agreements between sovereign entities. It does not reflect the domestic or international legal or practical realities of those agreements.[165]

[160] *Study on treaties, agreements and other constructive arrangements between States and indigenous populations* (M. Alfonso Martínez, Special Rapporteur, Final Report), note 144, *supra*, at p. 18, para. 112:

> In the course of history, the newcomers then nevertheless attempted to divest indigenous peoples, as pointed out above, of their sovereign attributes, especially jurisdiction over their lands, recognition of their forms of societal organization, and their status as subjects of international law.

Panel, "Are Indigenous Peoples Entitled to International Juridical Personality?" [1985] Proc. A.S.I.L. 189, at 196 (remarks of Hurst Hannum): "… indigenous peoples … without question possess some form of international legal personality."

[161] *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969), Art. 2.1(a): "'treaty'" means an international agreement concluded between States in written form and governed by international law …"

[162] *Study on treaties, agreements and other constructive arrangements between States and indigenous populations* (M. Alfonso Martínez, Special Rapporteur, Final Report), note 144, *supra*, p. 10, para. 55: "… a narrow definition of treaties and treaty-making would impede (or even preclude) any proper account of indigenous views on these issues, simply because of the widely-held rationale that indigenous peoples are not "States" in the current sense of the term in international law, regardless of their generally recognized status as sovereign entities in the era of the Law of Nations."

[163] B. Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" in P. Alston, ed., *Peoples' Rights* (Oxford: Oxford University Press, 2001) 69, at 100: "The Treaty of Waitangi, for instance, was one of many such agreements included in standard nineteenth-century European treaty series." And at p. 100, n. 75: ""Many such treaties [with Indigenous peoples] are collected and printed in a separate section in Clive Parry's *Consolidated Treaty Series* (published in the latter part of the twentieth century), but often the original sources intimated no qualitative distinction of this sort."

See also B. Kingsbury, "The Treaty of Waitangi: some international law aspects" in I. Kawaharu, (ed.), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 121, at p. 149, n. 6:

> It is noteworthy that the semi-official *Index to British Treaties 1101-1968* (ed. Parry and Hopkins – London: HMSO, 1970) makes no distinction as to counterparts – treaties concluded with indigenous peoples are interspersed with treaties with European States. The same is true for British and Foreign Papers, and for the treaty series, Herslet and Martens. Martens was criticized for omitting treaties with indigenous peoples from his first few volumes, and subsequently sought to rectify the omission.

[164] Act of March 3, 1871, embodied in section 2079 of the Revised Statutes. In this regard, see V. Deloria, Jr., "The Application of the Constitution to American Indians", in O. Lyons & J.C. Mohawk, eds., *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution* (Santa Fe: Clear Light Publishers, 1992) 281, at p. 283:

> The American Revolution left three major political competitors in North America: the United States, Great Britain, and Spain. Since the English and Spanish continued to treat Indian nations as nations, the United States had no choice but to accept and recognize the Indian nations as nations capable of entering into treaty relationships.

[165] Canada, "Perspective on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples", note 133, *supra*, p. 14.

While every treaty should be considered on its own merits, it must be concluded that Indigenous peoples' treaties are matters of international concern. Moreover, in light of the status[166] of Indigenous peoples and the other reasons listed above, such treaties can also be viewed as having an international character. Their character need not be identical in every aspect to other international treaties or conventions. However, like numerous other international treaties implemented within States, Indigenous treaties can well possess both an international and domestic character.[167] They are dynamic, living agreements that must be flexibly interpreted. Indigenous peoples and their treaties require both constitutional and international space to thrive.

As the Royal Commission on Aboriginal Peoples describes:

> Treaty relationships will evolve organically, but there must be no expectation that one world view will disappear in the process. On the contrary, treaty making legitimizes and celebrates the distinctiveness of the parties while establishing their bonds of honour and trust.[168]

Conclusions and Recommendations

The overall conclusion of this paper is that international human rights norms relevant to First Nations and Metis peoples in Saskatchewan should be incorporated into the reforms for improving the administration of justice in the province. Use of these norms is wholly appropriate for this vital purpose.

In a democratic society, the administration of justice is "the primary guarantor of the protection of human rights."[169] Moreover, the federal, provincial, First Nations and Metis governments have a "duty to guarantee respect for human rights".[170] In the context of Indigenous peoples, this requires the use of international human rights norms that reflect the perspectives and values of the peoples concerned. Application of such standards should also respect their legal status as distinct self-determining peoples and their fundamental collective[171]

[166] Indigenous peoples are today regaining their rightful status as subjects of international law. As international actors, they are actively participating in standard-setting and other international forums, utilizing international complaints processes, and engaging in international relations with a wide range of governments and Indigenous peoples. They are contributing extensively to international peace and cooperation. These are all positive manifestations of external self-determination. See, *e.g.*, D. Sambo Dorough, "Recognition of the Right to Self-Determination of Indigenous Peoples: The Future" in International Centre for Human Rights and Democratic Development, *Seminar: Right to Self-Determination of Indigenous Peoples* (Montreal: ICHRDD, 2002) 43 at p. 44-45:

> Throughout 1997, … a troubling discussion was prompted by States concerning the notion of "internal" and "external" self-determination. This false dichotomy has been set up by States in order to confine indigenous peoples right to self-determination to one of domestic or State prescription. … We, ourselves, are expressing our worldviews and perspectives on the international plane, and making our voices heard outside of or external to our own communities. And, this is one aspect of the right to self-determination.

In today's complex world, aspects of "internal" and "external" self-determination are increasingly interrelated and interdependent. It makes little sense for States, such as Canada, to limit Indigenous treaties or other Indigenous matters to a domestic context. See also F. Przetacznik, "The Basic Collective Right to Self-Determination of Peoples and Nations as a Pre-Requisite to Peace" (1990) 8 N.Y.L.Sch. J. of H. Rts. 49, at p. 55: "Both the internal and external aspects of the right to self-determination of peoples and nations are constitutive and inseparable elements of this basic collective human right."

[167] B. Slattery, "Making Sense of Aboriginal and Treaty Rights", (2000) 79 Can. Bar Rev. 196, at p. 207:

> This inquiry touches on the much-debated question whether Indian treaties, considered as a class, are international agreements or domestic agreements governed by Canadian law. However, as traditionally framed, this question poses false alternatives. It seems unlikely that all agreements styled "Indian treaties" share exactly the same legal character. A different conclusion is suggested by the widely varying circumstances in which historic treaties were concluded and the disparate purposes they served. In any case, there is reason to think that some treaties constitute *both* international and domestic instruments, producing legal effects at both levels. International law and Canadian law are distinct and potentially overlapping systems of rules. On occasion, both systems may recognize certain transactions as valid and attach legal consequences to them, each within its proper sphere.

[168] Royal Commission on Aboriginal Peoples, note 20, *supra*, vol. 2(1), p. 54.

[169] See text accompanying note 91, *supra*.

[170] See text accompanying note 31, *supra*, and the ensuing discussion.

[171] Emphasis is placed here on collective rights of Aboriginal peoples and nations, since their human rights are predominantly collective. At the same time, the individual rights of their citizens or members would be an integral part of any human rights approach. See, *e.g.*, draft *U.N. Declaration on the Rights of Indigenous Peoples*, Art. 2: "Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity."

See also Race Discrimination Commissioner, "Alcohol Report", Human Rights and Equal Opportunity Commission, 1995, Canberra, Australia, p. 27:

> It is often the case that the protection and promotion of collective rights is a pre-requisite for the exercise and enjoyment of individual rights. The right of an Aboriginal … person to protect and enjoy his or her culture, for example, cannot be exercised if an indigenous culture is struggling to survive within the majority culture and the indigenous community has no right to protect and develop its culture. If rights are not granted collectively to indigenous peoples which enable them to defend their culture, the practice of their religion and the use of their languages, the result is unequal and unjust treatment.

human rights. This proposed approach would seek to ensure reforms that would "better reflect the values and inherent strengths of Aboriginal communities", as called for by the Commission's mandate.

In order to better reflect and reinforce Indigenous values and inherent strengths, it is critical to ensure respect for both Aboriginal and treaty rights in any framework for the administration of justice. Clearly, human dignity and human rights are essential elements in any pathway or framework for ensuring equality, non-discrimination, fairness and justice for Aboriginal peoples in Saskatchewan and elsewhere in Canada.

Achieving these objectives is likely to be an ongoing challenge. It requires a human rights culture that is relevant to Aboriginal peoples to be entrenched in the administration of justice. It also requires a principled framework that is inclusive of Aboriginal peoples, communities and institutions – one that fully accommodates their essential roles in the achievement of a responsive and fair justice system. Effective implementation strategies[172] and concrete measures will be necessary both in the short and longer term.

In ensuring a principled framework, the Commission and the Implementation Vehicle may wish to consider the following elements:

1. **Main pillars for the administration of justice.** In relation to Aboriginal peoples, it would be useful to identify the main pillars for the administration of justice in Saskatchewan (*E.g.*, equality, prevention, inclusion, fairness). This would be accompanied by a broader framework that would include a number of key elements, such as respect for human rights, non-discrimination, human dignity, participation of Aboriginal peoples and communities, training, etc.[173]

2. **Self-determination a central element.** The right of self-determination of First Nations and Métis peoples in Saskatchewan should be a central and core element in the overall reforms relating to the administration of justice. As described in this paper, a similar emphasis was strongly recommended by a Royal Commission and another government-appointed inquiry in Australia.[174] Moreover, in regard to the right of Aboriginal peoples to self-determination, the U.N. Human Rights Committee has urged the government of Canada "to report adequately on implementation of article 1 of the [Civil and Political Rights] Covenant" in its next periodic report.[175]

   A vital aspect of the right of Indigenous peoples to self-determination pertains to natural resources.[176] In this context, the principle of prior, free and informed consent is a crucial

[172] Such an approach is already contemplated in Saskatchewan. See Commission on First Nations and Métis Peoples and Justice Reform, "Terms of Reference", para. 5: "The Commission will recommend short and long-term implementation strategies and identify a vehicle to oversee the implementation of its recommendations."

[173] A similar approach, consistent with and sensitive to the human rights of Indigenous peoples, has recently been recommended in regard to natural resources and sustainable development. See E. Salim, *Striking a Better Balance: The Extractive Industries Review* (World Bank, 2003), Vol. I, p. 11:

> The international community's recent focus on poverty alleviation involves the four main pillars of sustainable development: improved social conditions, environmental protection, economic progress, and good governance. This requires a broader framework of development that has many elements. Among them are the rule of law, respect for and protection of human rights, free access to information about government and business activities, a grievance mechanism, social and environmental considerations in policymaking and project implementation, and provision for the vulnerable of the world—the poorest among us, women, children, and indigenous peoples.

[174] See text accompanying note 94, *supra*, and the ensuing discussion.

[175] Human Rights Committee, note 107, *supra*, para. 7.

[176] T. Moses, "The Right of Self-Determination and Its Significance to the Survival of Indigenous Peoples", in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 2000) 155, at p. 161:

> We have the right to benefit from the resources of the land as an expression of our right of self-determination. We may not be denied a means of subsistence; moreover, we may not be denied our *own* means of subsistence. We have the right to use our lands and waters to live by our own means as we always have, and by whatever means we deem necessary to address contemporary challenges. Self-determination protects our right to subsist, and it protects as well our right to subsist based on our own values and perspectives. In view of the profound relationship we have with our lands, resources and environment, subsistence for indigenous peoples has vital economic, social, cultural, spiritual and political dimensions.

standard. Other commissions examining justice issues relating to Aboriginal peoples have also identified natural resources as a key matter.[177]

3. **Utilization of international human rights norms.** International human rights norms relating to Indigenous peoples should be broadly incorporated on an ongoing basis in implementation strategies concerning, or impacting upon, the administration of justice.[178] Indigenous peoples, through their representatives, are playing an increasingly major role in human rights standard-setting processes at the international level. This ongoing involvement is enhancing the importance and relevance of existing and emerging norms.

   In particular, the *U.N. Declaration on the Rights of Indigenous Peoples* has received the approval of numerous Indigenous and non-Indigenous international human rights experts and others. The *Declaration* should be actively utilized to ensure uplifting norms. Clearly, the incorporation of international norms would only be appropriate if they serve to raise and reinforce existing standards in Canada.[179]

4. **Importance of human rights education.** In implementing a human rights approach, it would be essential to devise and implement human rights education programmes in Saskatchewan. If not already in place, human rights information and education pertaining to Aboriginal peoples would be beneficial for the public and media in general. Special attention should be accorded to police, lawyers, judges, government officials and all those who work in or influence the justice system.[180] Human rights education is also important on an ongoing basis in Aboriginal communities. The great work of the Office of the Treaty Commissioner must be continued in this regard.

   Human rights should be an essential aspect of learning for children in schools.[181] Human rights education, if effective, should serve to promote tolerance, respect and understanding.[182] In

[177] See, for example, Manitoba, Aboriginal Justice Implementation Commission, *Final Report and Recommendations* (Winnipeg: Government of Manitoba, 2001) (Commissioners P. Chartrand & W.J. Whitecloud), Annex, AJIC Recommendation 4.1:

> Any future, major, natural resource developments not proceed, unless and until agreements or treaties are reached with the Aboriginal people and communities in the region, including the Manitoba Metis Federation and its locals and regions, who might be negatively affected by such projects, in order to respect their Aboriginal, treaty, or other rights in the territory concerned.

[178] See also the recommendations of the Royal Commission on Aboriginal Peoples, note 20, *supra*, vol. 2(1), p. 174, where it is proposed, *inter alia*, that: the government of Canada "enact legislation affirming the obligations it has assumed under international human rights instruments … in so far as these obligations pertain to the Aboriginal peoples of Canada"; recognize that its fiduciary relationship with Aboriginal peoples requires it to enact legislation to give Aboriginal peoples access to a remedy in Canadian courts for breach of Canada's international commitments to them"; and "expressly provide in such legislation that resort may be had in Canada's courts to international human rights instruments as an aid to the interpretation of the *Canadian Charter of Rights and Freedoms* and other Canadian law affecting Aboriginal peoples".

[179] *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117*, note 155, *supra*, Annex, para. 3:

> The human rights and humanitarian norms which every State has the duty to respect and to ensure respect for, are defined by international law and must be incorporated and in any event made effective in national law. In the event international and national norms differ, the State shall ensure that the norm providing the higher degree of protection shall be applicable.

[180] "Plan of Action for the United Nations Decade for Human Rights Education, 1995-2004: Human rights education - lessons for life", in *Note by the Secretary-General: Addendum*, A/51/506/Add.1, 12 December 1996, Appendix, para. 24:

> Special attention shall be given to the training of police, prison officials, lawyers, judges, teachers and curriculum developers, the armed forces, international civil servants, development officers and peacekeepers, non-governmental organizations, the media, government officials, parliamentarians and other groups that are in a particular position to effect the realization of human rights.

[181] *Convention on the Rights of the Child*, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/RES/44/49 (1990), adopted by the General Assembly in resolution 44/25 of 20 November 1989 and entering into force on 2 September 1990, Art. 29, para. 1(b):

> 1. States Parties agree that the education of the child shall be directed to:
> …
> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations …

[182] See, *e.g.*, draft *U.N. Declaration on the Rights of Indigenous Peoples*, Art. 16:

> Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.
>
> States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

See also *Indigenous and Tribal Peoples Convention, 1989* (No. 169), Art. 31:

> Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

particular, it is important for people of all ages to appreciate that Aboriginal and treaty rights are human rights that must be respected.

5. **Treaties and treaty rights.** In order to comprehensively address existing treaty concerns of First Nations and Métis peoples in Saskatchewan, it is important to ensure that adequate processes are in place for these purposes. In addition, the sacred nature and historical and contemporary significance of treaties should be an integral part of human rights education. In addition, specific measures would be necessary to ensure that treaties continue to be living and dynamic instruments – respected by governments, corporations and the general public and responsive to changing circumstances.

6. **Indigenous peoples participation.** Consistent with the right of self-determination, the full and effective participation of the First Nations and Métis peoples must be an integral element in any proposed reforms. Such involvement and collaboration is necessary – not only for the administration of justice measures that will be devised and implemented, but also for all of the elements listed above. In addition, from a Canadian constitutional perspective, it should be made clear that the "federal principle"[183] includes Aboriginal peoples and their governments, as well as federal and provincial governments.[184] For a wide range of purposes, Indigenous participation should be based on both the right of self-determination and the federal principle.[185]

   In regard to the nature and use of international human rights norms, there are numerous First Nations and Metis leaders in Canada who have extensive experience and who have actively participated for decades in international forums. Governments should make use of the knowledge and expertise of these individuals.

It is clear from the analyses and conclusions in this paper that a rights-based approach is essential. This would necessarily include international human rights norms. Such a perspective and methodology are viewed as especially appropriate when human rights issues are involved.[186] Based on a rights-based approach, the U.N. High Commissioner for Human Rights describes an adequate national protection system in the following terms:

[183]K.C. Wheare, *Federal Government*, 4th ed., (1963), at p. 10, where the federal principle is described as "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent."

[184] *Reference re Secession of Québec*, note 76, *supra*, para. 57:

> … there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

See also *A.G. Canada* v. *Coon Come*, [1991] R.J.Q. 922 (C.A.), at p. 939 (*per* LeBel J. on behalf of the court), where is indicated that s. 35 of the *Constitution Act, 1982* introduced a third element in the functioning of Canadian federalism; and B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada", (1995) 34 Osgoode Hall L.J. 101 at p. 111:

> ... aboriginal treaties not only contributed in a general way to the evolution of the Constitution, but also supplied part of its federal structure. This situation, sometimes described as %treaty federalism&, has now been formally recognized and consolidated in section 35 of the *Constitution Act, 1982*.

[185] T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (New York: Oxford University Press, 1999), at p. 53: "Indigenous empowerment involves achieving a relationship between peoples founded on the principle of autonomy and interdependence. To accommodate indigenous notions of nationhood and cease its interference in indigenous communities, the state need only refer to the federal principle."

B. Morse, *How Would Quebec's Secession Affect Aboriginal Peoples and Aboriginal Rights?*, (1999) 11 N.J.C.L. 107, at p. 111: "The Supreme Court stated [in the *Québec Secession Reference*] that the federalism principle, in conjunction with the democratic principle, gave rise to a reciprocal obligation placed on all parties to Confederation to negotiate constitutional changes ... The Court stated that *maintaining federalism ensures a balance of power among the federal and provincial governments, as well as arguably the aboriginal peoples*, all of which would be instrumental in participating in negotiations." [emphasis added]

[186]U.N. Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World, E/CN.4/2003/14, 26 February 2003, p. 14, para. 53:

> **The rights-based approach must be the starting point for all our endeavours, whatever our spheres of operation: trade, finance, development, security, in both the public and private sectors. In a sense, this is an approach that involves human rights strategies of governance, namely, that we take the basic human rights as the starting point for governmental programmes and the programmes of national, regional and international institutions. What is at issue is a question of conscience: people matter, and the way we demonstrate this is by upholding the international minimum standards of protection of their human rights. [emphasis in original]**

See also B. McLachlin, "The Supreme Court and the Public Interest" (2001) 64 Sask. L. Rev. 309, at pp. 313-314, where the Supreme Court Chief Justice refers to the "rights-based nature of modern democracy" in Canada; and United Nations Development Program, Human Development Report 2000 (Oxford: Oxford University Press, 2000), at pp. 29-30.

> An adequate national protection system is one in which international human rights norms are reflected in the national constitution and in national legislation; in which the courts can apply international human rights norms and jurisprudence; in which there is human rights education in the schools; in which there are specialized institutions such as human rights commissions or ombudspersons; and in which vulnerable parts of the population are watched over in order to detect and head off problems before they occur.[187]

In our respectful view, the above basic elements would be most appropriate for the Saskatchewan context and the First Nations and Métis peoples concerned.

[187] *U.N. Commission on Human Rights, Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World, note 186, supra, para. 11*

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