CANADIAN INDIGENOUS PEOPLE IN RELATION TO THE EARLY CONCEPTS OF INTERNATIONAL LAW

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TABLE OF CONTENTS

		PAGE
I	Introduction	1
II	Historical View of International Law as it Applied to so-called "heathen", "uncivilized" or "unchristian" people	1
	A. 1. Ancient Writers (13th Centuries)	2
	2. Middle-Century Writers. (15th - 18th) .	5
	3. Modern Writers. (19th Century - to Present). . .	11
	B. Caselaw	
	1. The Denial of International Status . . .	13
	2. The Recognition of International Status .	17
III	The Invented Concept of "Aboriginal" or "Indian" Title	20
IV	Conclusion	21
	Footnotes	22

I Introduction.

International law had its origin within a small number of countries, which were both powerful and "christian." There is therefore a lack of suitable material dealing specifically with indigenous and so-called heathens of unchristian countries. This issue, however, was the topic of considerable debate by a number of writers. Although most do not deal specifically with North American indigenous people, hereafter generally referred to as "native," the same principles would apply. Because of the limited material available at this time, it is only possible to give a limited view of this area. Further work will have to be done. The majority of this paper is based on an unpublished article written by Brian Slattery, entitled, The Indigenous Peoples of Canada in International Law.

This paper will also discuss how the "notion" of "Aboriginal Title" was developed or made up by the colonial powers to justify the stealing of native people's lands. This is a very limited title, as opposed to the sovereignty that Native People had or should have had under the law of nations. To this day, this theory is still being pushed by people who can't bring themselves to admit that their ancestors had wrongfully displaced indigenous peoples.

This paper deals only with the historical position of native people. Another one will have to be done to study the issue in the context of modern Public International Law.

II Historical view of International Law as it applied to so-called "heathen", "uncivilized" or "unchristian" people.

This will be approached by an examination of text writers and caselaw. This is the crucial or important area in the discussion of International Law and its relationship to native peoples. Hopefully, this review will give a good overview of this specific issue.

A. 1. Ancient writers. (13th - 15th Centuries).

This time-frame dealt with International relations upon the basis of "christian" and "non-christian or infidel" peoples and the belief that christian states had a god-given right to take the lands and possessions from the infidels. It was commonly believed that infidel nations were non-states, that their rulers lacked true jurisdiction and that their lands were appropriable without compunction. They also believed that war against the infidels was inherently just and their conversion by the sword a holy duty.

> Medieval writers had taken the view that the heathens were nothing but the proper object of conquest, conversion and subjection, a theory adopted by a number of (Vitoria's) contemporaries .... Vitoria (a 16th Century thinker) was the first to insist that the heathens had legitimate princes, just as the Christians had, and that a war against them was permissible only for a "just cause."[1]

This, however, isn't accurate, as can be noted from Brian Slattery's article.

> Even a limited survey of late medieval doctrine reveals a position substantially different from that suggested by these authors. The question of infidel rights was a controversial one, sparking sharp disagreement among the major canonists and theologians with many of the most respected adopting a stance broadly favourable to the unbeliever.[2]

This controversy lasted for centuries, having had its lines of argument developed by three major thinkers of that time; Aquinas, Innocent IV, Hostiensis.

The major contributor in this area was Thomas Aquinas who was born in 1225. His greatest work, Summa Theologica, was begun in 1265, but remained unfinished at his death in 1274.

Aquinas doesn't deal to any great extent with the rights of the unbelievers to jurisdiction or sovereignty over their lands. What he does do is deal with the question of the authority which unbelievers may have over the faithful. He writes:

> Dominion and authority are institutions of human law, while the distinction between faithful and unbelievers arises from the Divine law. Now the Divine law which is the law of grace, does not do away with human law which is the law of natural reason. Therefore the distinction between faithful and unbelievers, considered in itself, does not do away with dominion and authority of unbelievers over the faithful.[3]

This, then, is authority for the proposition or principle that the legitimacy of dominion does not depend upon the religious beliefs of the party exercising it, and so an infidel's authority is as valid as a Christian's. Aquinas does say however, that the Church has the power to make war against the infidels to liberate the lands of converted peoples. This however doesn't go so far as to state that war can be justly waged against infidels because of their lack of faith alone.

> Among unbelievers there are some who have never received the faith, such as the heathens and the Jews: and these are by no means to be compelled to the faith, in order that they may believe, because to believe depends on the will: nevertheless they should be compelled by the faithful, if it be possible to do so, so that they do not hinder the faith, by their blasphemies, or by their evil persuasions, or even by their open persecutions. It is for this reason that Christ's faithful often wage war with unbelievers, not indeed for the purpose of forcing them to believe, because even if they were to conquer

> them, and take them prisoners, they should still leave them free to believe, if they will, but in order to prevent them from hindering the faith of Christ.[4]

The second major contributor to this line of thought was Innocent IV (1190 - 1254), who expressed these views in more detail.

These two writers prompted Carlyle and Carlyle to conclude, in their History of Medieval Political Theory, that,

> ... it is important to observe that (the) principles of the legitimate nature and moral and of the State are not limited to Christian States, but were represented by the most authoratative writers of the thirteenth century as extending to all States even those of unbelievers.[5]

This however didn't take into account the writer Hostiensis (d. 1271), who held the view that unbelievers didn't have legitimate dominion over their lands; that the coming of Christ had nullified it.[6]

According to Slattery's research, Hostiensis and his followers weren't representative of the majority of thinkers at that time.

> Our conclusions with respect to late medieval European doctrine must of necessity be tentative because comprehensive studies of the period have yet to appear, and the original texts are not easily accessible. But it appears that, with the outstanding exception of Hostiensis and certain others who followed his views on this matter, a goodly number of distinguished canonists, jurists, and theologians of the period recognized that infidel rulers were capable of holding true dominion over their subjects and territories, subordinates perhaps to an asserted superior jurisdiction of the Pope or the Holy Roman Emperor--in the same way as Christian rulers were said to be subordinate--but legitimate nevertheless. Unbelief did not deprive them of

> authority nor could it, in itself, legitimize wars waged against them by Christians.
>
> . . . .
>
> ... still it is a fact, of importance to the law of territorial acquisition, that in the eyes of many authoritative European thinkers from the 13th Century onwards, the lands of unbelieving nations were not terrae nullius, appropriable by Christians at will.[7]

2. Middle-Century Writers. (15th - 18th Centuries).

This period of time gave a new dimension to the arguments as the Americas became known to the colonial powers. The Spaniards in their search for gold and other riches used their advanced military equipment, coupled with the class structure of the native populations first encountered, to completely destroy and conquer the indigenous societies. These intrusions were marked with ruthless brutality and complete disrespect for the rights of the native inhabitants. This was so, even though these native societies were highly structured and politically developed.

> At the time of the Spanish conquest, the area of the New World which is now Mexico was inhabited in the main by American Indians who had achieved the cultural level of a great civilization. Only in the northern part of the country were there simple hunting and gathering tribesmen. In the central and southern parts of the country lived the Aztecs, the Tlaxcaltecans, ... and other highly civilized peoples. These people were divided into a series of native states often at war with each other, and at least one hundred twenty-five different languages were spoken throughout the area. There was considerable cultural diversity from one native state to another but everywhere their complex cultures were based upon a system of hoe agriculture which produced maize, beans, squash, and other aboriginal American

> crops. Trade was highly developed. A system of writing and an efficient numerical system were widely used. These peoples had a calendric system based in part on the solar year. They had an organized government and a priesthood which administered their elaborate religion. They constructed pyramids, temples, fortresses, and palaces. Their stone and metal work was marked by a high degree of artistic refinement. Their society was divided into classes of nobility, commoners, and slaves. While the majority of the people in these native states were rural farmers, there existed great cities such as Tenochitlan and Texcoco, both in the Valley of Mexico, which together had populations of almost a half million. In these cities there were busy markets that rivaled anything in Spain at the time. The central and southern areas of Mexico had an aboriginal population that numbered at least four million people, and perhaps as many as nine million, in 1521.
>
> In 1519, 600 Spaniards landed on the Mexican coast. Within a few years they had dominated these millions of native peoples. How this was accomplished is a fascinating story, too complex to be related here. Briefly, the Spanish conquistadors were quickly able to capture and crush the ruling classes of native society, and they were aided in their conquest by conflicts between the various native states.[8]

The views expressed by Hostiensis were still used by those who wished to make profits, that is, they could plunder and enslave people in the name of Christianity. This view however was no longer accepted by noted writers and European thinkers of the 16th - 18th centuries. They believed that indigenous Americans and infidel peoples in general, were capable of possessing true dominion and ownership of their lands and good. They rejected the idea that their religious outlook, culture, customs or level of

technological achievement took this away.

Thomas de Cajetan, (1469 - 1534), an Italian theologian, forcibily adopted the reasoning or viewpoint previously expressed by Aquinas. According to de Cajetan,

> There are some infidels who are neither in law nor in fact under the temporal jurisdiction of Christian princes; just as there were pagans who were never subjects of the Roman Empire, and yet who inhabit lands where the name of Christ was never heard. Now their rulers, though heathen, are legitimate rulers, whether the people live under a monarchical or a democratic regime. They are not to be deprived of sovereignty over their possessions because of their unbelief, since sovereignty is a matter of positive law, and unbelief is a matter of divine law, which cannot annul positive law, as has been argued above. In fact, I know of no law against such unbelievers as regards their temporal possessions. Against them no King, no Emperor, not even the Roman Church, can declare war for the purpose of accupying their lands, or of subjecting them to temporal sway.[9]

Francisco de Vitoria (1480 - 1546), a Spanish theologian was probably the greatest defender of the rights of native Americans and other unchristian peoples in general. He was in fact, on December 23, 1933, acclaimed by the Seventh Pan-American Conference as the man who established the foundations of modern international law.[10]

This defence of Indian rights was contained in 2 lectures delivered by de Vitoria at the University of Salamanca around the year 1532, entitled De Indis. Here Vitoria asks the question as to whether or not the indigenous Americans "were true owners in both private and public law before the arrival of the Spaniards; that is, whether they were true owners of private property and possessions and also whether there were among them any who were the true princes and overlords of others."[11] Vitoria then goes on

to examine and demolish a number of arguments denying dominion and ownership to the American Indians on the grounds that they were so-called sinners, unbelievers, unsound of mind or slaves by nature.

> The upshot of all the preceding is, then, that the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners.[12]

To do so, says Vitoria, would be "theft and robbery no less than if it were done to Christians."[13]

Alberico Gentili (1552 - 1608) wrote about the right of ambassadors and argued that non-Christian states have the right to send and received ambassadors, being "very strongly of the opinion that the rights of embassy ought not to be disturbed on account of religious differences," on the grounds that "the law of religion does not exist between man and man but between man and God."[14]

The Jesuit philosopher and theologian Francisco Suarez (1548 - 1617) rejects as "vain inventions" the contentions that Christians have supreme temporal dominion and that unbelievers are not true owners of their possessions. If they make war on such grounds,

> ... the infidels will think that our faith gives us the privilege of violating the ius gentium, and even the law of nature, by our seizure of the property of others against the will of the owners, and by our waging of war without any just grounds ....[15]

Hugo Grotuis, (1583 - 1645) also viewed as the founder of the European school of international law, gave expression to the sovereignty of infidel rulers. This appears in his work De Jure Belli ac Pacis Libri Tres, in 1625. "For the exercise of ownership," he wrote,

> ... neither moral nor religious virtue, nor intellectual excellence is a requirement; except that the view seems defensible that, if there exist any peoples wholly deprived of the use of reason, these cannot have ownership .... (He adds:) ... if any of this sort are to be found, which I very much doubt.[16]

In an earlier publication, Mare Liberum (1608), Grotius expressed his views in a more controversial manner with respect to the Eastern nations. "These Indians of the East," he wrote,

> ... on the arrival of the Portuguese, although some of them were idolators, and some Mohammedans, and therefore sunk in grievous sin, had nonetheless perfect public and private ownership of their goods and possessions, from which they could not be dispossessed without just cause .... for religious belief, as Thomas Aquinas rightly observes, does not do away with either natural or human law from which sovereignty is derived. Surely it is a heresy to believe that infidels are not masters of their own property; consequently, to take from them their possessions on account of their religious belief is no less theft and robbery than it would be in the case of Christians.[17]

Although not specifically referring to indigenous peoples, Christian Wolff (1679 - 1754) has perhaps given the best coverage to the problem that they faced. "By nature", he states, "all nations are equal the one to the other", adding that "it is not the number of men coming together into a state that makes a nation, but the bond by which the individuals are united ..."[18] He further contends that a nation is a nation regardless of its degree of civilization and its religious belief. "Barbarism and uncultivated manners give you no right against a nation .... Therefore a war is unjust which is begun on this pretext." He also emphasizes that, "punitive war is legal for no nation

against another because it professes atheism or Idism, or is idolatrous." The same rule applies to separate families living together in a certain territory or wandering hither and thither, who have not been united into a nation. They have ownership of the lands which they possess or which are subject to their use and none has the right to usurp them in their possession.[19] Moreover, says Wolff, no nation has the right to impose sovereignty upon such stateless societies without their consent, not even on the pretext that they would become civilized and be better provided for.[20]

Vattel (1714 - 1767) is also a leading authority on International Law and is considered by many to be at least equal to, if not greater than Grotius. Vattel's opinions closely resemble those of Wolff. This is not surprising for in his preface to Le Droit des Gens, Vattel states that it is largely derived and adopted from Wolff's Synopis Juris Gentium.[21] Vattel is of the belief that "nature has established a perfect equality of rights among independent Nations. In consequence, no one of them may justly claim to be superior to the others."[22] As no nation can take upon itself the right to judge the manner in which another sovereign governs his country,

> ... the Spaniards acted contrary to all rules when they set themselves up as judges of Inca Atahualpa. If that Prince had violated the law of Nations in their regard they would have been right in punishing him. But they accused him of having put to death certain of his own subjects, of having had several wives, etc., things for which he was not responsible to them; and, as the crowning point of their injustice, they condemned him by the laws of Spain.[23]

For Vattel "the conquest of the civilized Empires of Peru and Mexico was a notorious usurpation ..." for it is unlawful to reduce another nation to subjection.[24] But the

same considerations apply to societies composed of several independent families, such as "the savage tribes of North America."[25] Of these, Vattel writes:

> ... when several independent families are settled in a country they have the free ownership of their individual possessions, but without the rights of sovereignty over the whole, because they do not form a political society. No one may lay claim to sovereignty over that country, for this would be to subject those families against their will, and no man has the right to rule over persons born free unless they subject voluntarily to him.[26]

In essence, Vattel was of the view that civilizations of Mexico and Peru constituted sovereign nations but that groups of independent families which do not form political societies do not possess sovereignty, but nevertheless would have ownership of their possessions. Even though this last group is not sovereign, they could not be deprived of their lands nor could they be subjected to the sovereignty of another nation without their consent. Vattel further made a distinction between settled agricultural peoples and pastoral or hunting peoples. The former own the property they actually occupy. The latter own lands of which they are making "present and continuous use", but they cannot claim more land than they actually need, and certainly not large tracts of territory over which they merely wander. Vattel is concerned with restricting the geographical extent of these rights, not with asserting their temporary or inferior character.

3. Modern Writers. (19th Century - to Present)

This period witnesses an expansion of imperialism of the major European powers and was accompanied by a revival by some European authors of the notion that non-Christian peoples, or "uncivilized" peoples lacked status

in international law, that their lands were territorium nullius and their treaties were worth nothing but the paper they were written upon. This view, however, was resisted by a good number of writers, who are discussed by Lindley.[27]

Lindley appears to be the greatest modern authority on this question, but he would appear to be presenting a somewhat conservative version of the prevailing view:

> Now the progress of ethnography has shown that the distinction between civilized and uncivilized is not one that can be drawn with accuracy in practice. The proper distinction is not between civilization and no civilization, but between one kind of civilization and another, or one stage of development and another. Many of the so-called "savage" races--or, as Ratzel called them, "natural" races--possess organized institutions of government, and it cannot be truly said that the territory inhabited by such races is not under any sovereignty. Such sovereignty as is exercised there may be of a crude and rudimentary kind, but, so long as there is some kind of authorative control of a political nature which has not been assumed for some merely temporary purpose, such as a war, so long as the people are under some permanent form of government, the territory should not, it would seem, be said to be unoccupied.[28]

In discussing the situation after the indigenous peoples lost control of their lands, Lindley states that they in fact had sovereignty prior to this having occurred.

> No doubt the right of occupancy which was allowed to the Indians after the sovereignty over their territory had been acquired was considered in the main to be in the nature of a property right, ... The point which it is desired to bring out here is that, along with or merged with

> rights which in a more settled community took on the nature of rights of property, the aboriginal inhabitants of the American continent at the time of its colonization were in fact exercising rights which American jurists recognized to be extinguishable only by conquest or cession, and which can only be regarded as in the nature of rights of sovereignty.[29]

Other modern authors have criticised the earlier spokesmen for European imperial interests. One of these is O'Connell, who wrote, re: Afro-Asians;

> It was only the invention by the late 19th century English authors of the doctrine that uncivilized peoples have no capacity in international law that led to the characterization of their territories as terrae nullius, and to resort to the doctrine of occupatio to explain title .... It is not only a typical piece of late 19th century arrogance, this denial of juristic capacity in native chiefs, but it leads to the absurd and morally reprehensible conclusion that the colonial authorities, having gone through the motions of good faith, could then without a pang of conscious tear up their solemn legal acts as being void. In fact, the supposed doctrine that only civilized people may treat was never more than an academic one ....[30]

B. Caselaw.

1. The denial of International Status.

Caselaw at the international level has given the once common European viewpoint in respect of American Indians and non-European peoples in general a chance to be expressed. By way of obiter, this was done in the Island of Palmas case,

> As regards contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties.[31]

This reference to "native" princes or chiefs not being recognized as "members of the community of nations" does not really say whether or not some may be recognized as belonging to the family of nations. If this is the correct interpretation, it doesn't give any criteria as to which peoples would fit into this category. If the correct interpretation is that all "native" princes or chiefs are not capable of belonging to the community of nations, this would then be only based upon the basis of race or skin colour.

A similar view was expressed in a North American situation in the Cayuga Indians Claim. This involved the provisions of certain 18th century agreements between the State of New York and the Cayuga people. The arbitrators stated that:

> The 'Cayuga Nation', an Indian Tribe... is not a legal unit of international law. The American Indians have never been so regarded. From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied. They have been said to be 'domestic, dependent nations' or 'states in a certain domestic sense and for certain municipal purposes.' The power which held sovereignty over the land has always been held the sole judge of its relations within its domain. The rights in this respect acquired by discovery have been held exclusive.[32]

This passage refers to a generalized statement that upon discovery the Indian tribes have been treated as under the sovereignty of the power that by discovery, conquest or cession held the land which they occupied. From our review of the writers above, it was seen that discovery was never a recognized mode of territorial acquisition even among European states. It was stated that the land "discovered" had to be unoccupied, territorium nullius, or inhabited by people lacking international status. Therefore if the inhabitants were sovereign and independent, this would not change by mere discovery. This case doesn't determine or look at the issue of the sovereignty or independence of the Cayuga Nation before the coming of the European. This is a reflection of the sweeping statements of tribunals or courts, without reference to the specific case before them or to important issues to the "native" people concerned.

The rulings of tribunals of this sort are generally not questioned and are referred to as authority or precedents for future relations or litigation. In reference to the Cayuga Claims Case and the Island of Palmas Case, Professor of International Law, L. C. Green, stated;

> In fact, since these people are not recognized as members of the community of nations they have, strictly speaking, no rights in international law whatever. This became clear in the Eastern Greenland Case[33] in which the Permanent Court of International Justice held that even when the indigenous inhabitants, in this case the Eskimos of the area, managed to exterminate the settlers and destroy their settlements this did not destroy the title of the settling power. "Conquest only operates as a cause of loss of sovereignty when there is war between two states and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious state."[34]

Canadian Caselaw in this area is virtually non-existent. The most elaborate treatment or reference to this aspect of the law, is to be found in a decision of an Acting County Court Justice of Nova Scotia in 1928. The issue here was the effect of a treaty signed in 1752 between the Governor of Nova Scotia and the Chief of the Micmac people. The court held:

> 'Treaties are unconstrained acts of independant powers.' But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized.[35]

This statement was similar to that in the Cayuga Claims case. It however went further and denied the Indian peoples any form of international recognition, even prior to the coming of the Europeans. Their lands are terratorium nullius, and may be acquired by discovery alone. Fortunately this is one of the lowest courts of the land! According to Slattery, this sort of legal reasoning certainly doesn't do justice to "Indian" peoples.

> One also notes the absence of any concrete analysis of the societies considered, the failure in particular to differentiate one American Indian people from another. We are told that all Indian political units lacked international status. Whether this is intended to cover at one and the same time the highly organized states of Central America, the Confederation of Iroquois nations, and the simple hunting groups of the Naskapi is not explained. This lumping together of political units varying considerably in size, organization, culture and degree of technological development merely because of racial affinity and geographical contiguity strikes one as poor history and bad law.[36]

2. The recognition of International Status.

Whatever the merits or deficiencies of the approach as outlined above, it has never really won the favor of the courts. They have generally preferred to take a more practical approach and have dealt with sovereignty on a case by case basis, avoiding the doubtful and unsavoury criteria as "civilization", religion and race. This is evidenced in the early English case, The Helena (1801) 165. E.R. 515, where it was argued that the title to a ship bought from a dey (chief) of Algiers who had captured it, could not be valid as against the original owner, as the Algerians were pirates and therefore this was theft. The court rejected this argument. "Certain it is," agreed the court, "that the African states were so considered many years ago, but they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states."

Closer to home, in the United States of America, the well known case of Worchester v. Georgia (1832) 6 Peters 515, gives a similar wish to respect the realities of the situation being litigated, by the use of preconceived criteria relating to the community of nations. In issue was the right of the State of Georgia to pass legislation governing the Cherokee Nation, with whom the U.S.A. had entered into a number of treaties. Chief Justice Marshall of the U.S. Supreme Court after reviewing the treaties, concluded:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer.... The very

> term "nation", so generally applied to them, means "a people distinct from others." The Constitution... has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language... having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense.

The Chief Justice however, falls into the same situation as discussed earlier, i.e., even though he is discussing the status of the Cherokee people in particular, he does wander into the mistake of viewing the "Indian nations" as a whole, which is a bad approach because each Indian nation is different. This aside, his conclusion is praiseworthy: "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force..." This therefore, outlines the basic criteria for determining the status of a political community, that is, the Cherokee nation has a population, territory and effective administration.

At the beginning of this century, the Judicial Committee of the Privy Council, which was the Highest Court of Appeal for Canada until 1949, had an opportunity to review the sovereignty and independence of communities organized on tribal lines. This was the reference case of In re Southern Rhodesia (1919) A.C. 211, in which the court was considering the validity of certain land claims made by the British South Africa Company in an area held by the British Crown. This claim was based on a grant by the former ruler, King Lobengula, then the paramount chief. Although not impressed with the customs of these peoples, the court nevertheless

gave recognition to Lobengula as an independent sovereign. They concluded: "Lobengula's sovereignty over what is now Southern Rhodesia is therefore the starting point of the history of the land question here."

In another African case, the Court of Appeal for Eastern Africa in Ol le Njogo v. A. G. of the East Africa Protectorate (1913 - 14) 5 East Africa Protectorate Law Reports 70, had an opportunity to review the issue as to whether certain agreements entered into between the Crown and the Masai, a nomadic and pastoral people, were treaties or civil contracts. They held that they were treaties on the basis that the Masai were a nation or people with sufficient sovereignty or "dominion" at the relevant times to enter into treaties. Bonham-Carter, J. wrote: "The constitution of the Masai tribe is not one familiar to European ideas and was not a very rigid one, and owing to the nomad and truculent nature of the race the central authority had not a very great power; the main power rested with the warriors, who gave utterance to their wishes through their elected chiefs ... whatever the interior economy of the Masai was they were the de facto rulers and occupiers of a large tract of country and were sovereign over all the tracts of land included in the documents of this case." King Farlow, J. took a more analytical approach: "A treaty is defined by Wharton as 'a compact between nations' and a nation is defined as 'a people distinguished from another people, generally by their language, origin or Government' ... It is an act of state entered into between parties possessing sovereign rights ... I am ... of the opinion that the Masai are a nation within the definition I have quoted above." This decision of King Farlow, J., is especially important as it deals with the actual exercise of independent rule by the Masai, regardless of the fact that, as a nomadic people, the boundaries of their domains

were necessarily somewhat fluid, i.e., not fixed of definite.

There were also a number of cases heard by an Arbitral Tribunal set up in 1910 to resolve certain claims between Great Britain and the United States. In George Rodney Burt (U.S.) v. Great Britain (1923) 6. U.N.R.I.A.A. 93, the tribunal recognized the original sovereignty and capacity to treat of the King of Fiji, in executing the peaceful cession of the islands to Great Britain.

> It stands without dispute that the solemn and consequential act affecting land and sovereignty in the islands was performed on the theory that the chiefs had the power to act. The British authorities of the day did not proceed hastily in the momentous transaction; they took advice on this point. They had before them the conflicting theories and deliberately adopted the view that the chiefs were competent to act.

It has been noted that this recognition of sovereignty for small or under-developed societies may have been prompted by the desire for empirial expansion. This, however, is beside the point as it is now legal doctrine and cannot at this time be rejected by those colonial states who had recognized it.

III The Concept of "Aboriginal" or "Indian" Title as Applied by Europeans.

As seen from the discussions above, there certainly was ample room within the context of the early Law of Nations to recognize and respect Indian sovereignty to their lands. This of course was said to depend on the specific circumstances of the Nation or peoples involved. This would be disputed today by Indian Nations, as all of them would consider themselves, or their ancestors, to have been sovereign units or nations.

However, because of greed and lack of respect for people not professing the Christian faith, the colonial

powers, especially for expansionist reasons, completely disregarded this sovereignty and exploited the human and material resources of the indigenous nations. Because of prevailing opinions by persons not concerned with exploitation, the Colonial powers, in order to justify this illegal intrusion, fabricated the concept of "Aboriginal" title which greatly limited the rights of the people. This was used to placate the spokesmen for Indian rights, as well as the Indians themselves. This is the form of Indian rights that has survived in the Courts and in political institutions. The incidents or the meaning of this limited right has never yet been defined.

IV Conclusion

It is safe to assume, as a basic premise, that before the arrival of the whiteman, the indigenous populations existed within a state of sovereignty, which was capable of recognition.

FOOTNOTES

1. Nassbaum, A Concise History, p. 84, emphasis added.

2. Slattery, The Indigenous Peoples of Canada in International Law, 1973, at page 10. This paper is in AMNSIS Documents.

3. Thomas Aquinas, Summa Theologica. (Slattery Paper)

4. Ibid.

5. R. W. Carlyle and A. J. Carlyle, A History of Medieval Political Theory in the West (London: Blackwood and Sons), Vol. 3, p. 33. (Slattery Paper)

6. Michel Villey, La Croisade (Paris: Librairie Philosophique J. Vren, 1942), p.p. 30 - 31. (Slattery Paper)

7. Supra, note 2, at page 15.

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