ABORIGINAL SELF-DETERMINATION WITHIN CANADA: RECENT DEVELOPMENTS IN INTERNATIONAL HUMAN RIGHTS LAW

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The Government of Canada has declared that it is Canada's duty, as a nation which sees itself as a leader in the area of human rights, to set an example for other nations by complying with its obligations under the *International Covenant on Economic, Social and Cultural Rights*[1] and the *International Covenant on Civil and Political Rights*.[2] It has stated that:[3]

> Canada does not expect other governments to respect standards which it does not apply itself. As a signatory of all the principal UN treaties on international human rights, Canada regularly submits its human rights record to review by UN monitoring bodies. . . . These undertakings strengthen Canada's reputation as a guarantor of its citizens' rights and enhance our credentials to urge other governments to respect international standards.

It is significant, then, that two key international treaty monitoring bodies have recently declared that a foundation of Canadian law and policy on Aboriginal peoples breaches Canada's international human rights obligations.

In December 1998 and March 1999, the UN Committee on Economic, Social and Cultural Rights (CESCR) and the UN Human Rights Committee (HRC) judged Canada on its compliance with its human rights obligations as a signatory to the *ICESCR* and *ICCPR* . This is not the first occasion that Canada's human rights record has been put before these committees and found wanting. In past reviews, the government has been chastised for the appalling economic and social conditions of Aboriginal peoples in Canada. As observed by the CESCR, there is a "gross disparity between Aboriginal people and the majority of Canadians with respect to the enjoyment of Covenant rights."[4] The "shortage in adequate housing, the endemic mass unemployment and the high rate of suicide" in Aboriginal communities, among other indicators, were cited by the CESCR as evidence.[5]

The two UN committees' human rights analyses, however, have typically not proceeded beyond criticizing Canada in general terms for the conditions facing Aboriginal peoples; they have not previously identified or addressed the causes of these conditions. In contrast, the two recent rulings by these committees undertook a causal analysis and, what is more, identified Canada's lack of respect for Article 1 of the two Covenants, which guarantees the right of self-determination to all peoples, as the primary cause of these unacceptable economic and political conditions. In response to the facts put before them by the Government of Canada and various non-governmental organizations, the committees condemned Canada for the ongoing systemic dispossession of Aboriginal peoples, which, as is made clear in their rulings, threatens Aboriginal survival and the effective enjoyment of all Covenant rights by Aboriginal peoples in Canada.

The purpose of this comment is to highlight the far-reaching nature of the two committees' rulings on Article 1 of the two Covenants and their potential impact on the legal and policy approaches to Aboriginal peoples in Canada. By calling into question the very foundation of governmental and judicial approaches to Aboriginal peoples in Canada, the committees' substantiation of the

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1 16 December 1966, UN Doc. A/6316 (1966) 993 U.N.T.S. 3 (entered into forced 3 January 1976) [hereinafter *ICESCR*].

2 19 December 1966, UN Doc. ST/DPI/246, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter *ICCPR*].
The *ICCPR* and *ICESCR* are two pillars of the *International Bill of Rights*, which is comprised of these two instruments and the *Universal Declaration of Human Rights*. The government of Canada ratified the *ICCPR* and *ICESCR* in 1976.

3 Canada, "Human Rights and Canadian Foreign Policy," online: Department of Foreign Affairs and International Trade <http://www.dfait-maeci.gc.ca/human-rights/forpol-e.asp> (accessed 1 December 1999).

4 Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, 57th Session, UN Doc. E/C.12/1/Add.3.1 (4 December 1998) at para. 17 [hereinafter CESCR *CO*] online: <http://www.pch.gc.ca/ddp-hrd/ENGLISH/covenant.htm) (accessed 1 December 1999).

5 *Ibid.* at para. 17.

right of Aboriginal peoples to self-determination constitutes a legal and political turning point. The interpretation of the international law of self-determination by the HRC and the CESCR demands that the Government of Canada and the courts abandon the model of colonization and dispossession that has always been and continues to be the basis of Canadian Aboriginal law and policy.[6]

ARTICLE 1 OF THE *ICCPR* AND *ICESCR*: THE RIGHT OF SELF-DETERMINATION

Article 1 of both the *ICCPR* and the *ICESCR* provides that "all peoples" have a right of self-determination and that by virtue of that right, all peoples have a right to freely determine their political status and freely pursue their economic, social and cultural development. Article 1 of the *ICCPR* and *ICESCR* also provides that all peoples "may, for their own ends, freely dispose of their natural wealth and resources" and that "in no case may a people be deprived of its own means of subsistence." Clearly, the right to subsistence is framed in absolute terms.

The prominence of self-determination as the first article in the two Covenants and the fact that the strong language of Article 1 is repeated in both Covenants reflects the interdependent nature and sweeping scope of the right: "it encompasses all aspects of human development and interaction, cultural, social, political and economic."[7] These international bill of rights instruments recognize that for "all peoples" the right of self-determination is a necessary prerequisite to the exercise of all of the other human rights and freedoms guaranteed by the Covenants. This fundamental nature of the right of self-determination has been widely recognized. As one United Nations study has noted with respect to indigenous peoples: "Self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future."[8]

The committees' primary attention to this "core" right of Aboriginal peoples in Canada, therefore, was an appropriate response to evidence of the chronically inferior and discriminatory political, social and economic conditions endured by Aboriginal peoples in Canada in almost every area of their lives.

THE *CONCLUDING OBSERVATIONS*

In arriving at their findings (as outlined in their *Concluding Observations*) on Canada's compliance with its Article 1 treaty obligations, the two committees analyzed the necessary connection between the conditions of endemic poverty and political marginalization of Aboriginal peoples in Canada on the one hand, and the failure by the government to meaningfully respect and protect the Aboriginal right of self-determination on the other. In particular, both committees took seriously the prediction of the Royal Commission on Aboriginal Peoples (RCAP) that:[9]

> [A]boriginal peoples need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the land and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure their 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. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.

Adopting this ominous warning from the RCAP, the two committees made findings directed at both the physical and legal barriers to Aboriginal peoples' meaningful exercise of their right of self-determination within Canada: the physical dispossession of Aboriginal peoples of their

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[6] See generally, Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996) [hereinafter *RRCAP*]; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 383; Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95; and M. E. Turpell, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell International Law Journal 579: "Indigenous peoples, especially in the Americas, have yet to witness political decolonization" (at 579).

[7] Stated by Dr. Ted Moses, Ambassador to the United Nations, Grand Council of the Crees (Eeyou Istchee) at a workshop in Finland on the Right of Indigenous Peoples to Self-Determination (17 June 1999).

[8] Study of the Special Rapporteur, Jose R. Martinez Cobo, UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7, Add. 4 at para. 579. For a detailed discussion of the fundamental nature of the right, see Grand Council of the Crees, *Sovereign Injustice* (Nemaska: Grand Council of the Crees, 1995) and sources cited therein.

[9] *RRCAP*, vol. 2, *supra* note 6 at 557.

lands and resources and, as part of this process, the dispossession of Aboriginal status and rights in law through ongoing "extinguishment" of their inherent and constitutional Aboriginal rights and title. The HRC and CESCR concluded that Canada's continued dispossession of Aboriginal peoples through policies and practices of extinguishment violates international human rights law under Article 1 of the Covenants.

The strong language of the *Concluding Observations* of the HRC and CESCR concerning the right of Aboriginal peoples to self-determination in Canada justifies their reproduction here in full:

> The Committee notes that, as the State Party acknowledged, the situation of the Aboriginal peoples remains "the most pressing human rights issue facing Canadians." In this connection, the Committee is particularly concerned that the State Party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). *With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of Aboriginal self-government will fail, the Committee recommends 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 (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. *The Committee also recommends that the practice of extinguishing inherent Aboriginal rights be abandoned as incompatible with article 1 of the Covenant.*[10]
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> 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 RCAP, 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.* Certainty of treaty relations alone cannot justify such policies. The Committee is greatly concerned that the recommendations of the RCAP have not yet been implemented in spite of the urgency of the situation.[11]
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> The Committee calls upon the State Party to act urgently with respect to the recommendations of the RCAP. The Committee also calls upon the State Party to take concrete and urgent steps to ensure respect for Aboriginal economic land and resource base rights adequate to achieve sustainable Aboriginal economies and cultures.[12]

IMPLICATIONS AND IMPACTS

The Recognition of the Right of Aboriginal Peoples in Canada to Self-Determination

The *Concluding Observations* of the HRC and CESCR are important in at least two ways. First, for over a decade, numerous state parties at the international level insisted that Aboriginal peoples are not "peoples" under international law and, accordingly, are not beneficiaries of the right of self-determination. The mere application by the HRC and CESCR of Article 1 to Aboriginal peoples as "peoples," therefore, is a significant affirmation of Aboriginal rights under international law. Second, state parties at the international level have argued that the right of self-determination cannot be applied to indigenous peoples since the right is non-justiciable and too uncertain. The recent rulings of the HRC and the CESCR demonstrate the fallacy of this argument. The committees concretely interpreted and applied Article 1 in the context of the facts presented to them by the Government of Canada and nongovernmental organizations. The

[10] Human Rights Committee, *Concluding Observations on Canada*, 65th Session, CCPR/C/79/Add.105 (7 April 1999) [emphasis added] [hereinafter HRC *CO*] online: <http://www.pch.gc.ca/ddp-hrd/ENGLISH/cesc/concobs.htm> (accessed 1 December 1999). The Human Rights Committee made many other observations which are relevant to the rights of Aboriginal peoples, for example: at para. 4 noting the final report of the RCAP and the professed commitment of the federal government to working in partnership with Aboriginal peoples to address the reforms recommended by the RCAP, at para. 5 commending the Government of Canada on the Nunavut land and governance agreement; at para. 7 criticizing the Government of Canada for failing altogether to report on its implementation of Article 1 of the Covenant; at para. 11 condemning the state party for failing to hold a thorough public inquiry into the 1995 police killing of Aboriginal protestor Dudley George; and at para. 19 expressing concern about the status of descendants of Aboriginal women under Bill C-31.

[11] CESCR *CO*, *supra* note 4 at para. 18 [emphasis added].

[12] *Ibid.* The CESCR made other observations relevant to the rights of Aboriginal peoples: see para. 7, Committee notes the appointment of the RCAP in response to the "serious issues affecting Aboriginal peoples in Canada;" para. 17, the Committee expresses "great concern" at the "gross disparity" between the standard of living of Aboriginal peoples as compared to Canadians overall; and at para. 29, the Committee notes the lack of protection of property for Aboriginal women living on reserve on marriage breakdown.

committees reviewed the Aboriginal policies and practices of the federal government, including the land claims process, and determined that current programs, policies and practices fail to fulfill Canada's obligations under Article 1 of the Covenants, insisting that "urgent" and significantly different governmental action is required.

It is perhaps surprising that, within Canada, the *Concluding Observations* should be significant simply for the very fact that the right of self-determination was applied to Aboriginal peoples. Unlike other state parties, the Canadian federal government has recently formally accepted the right of Aboriginal peoples to self-determination, both internationally and domestically. Internationally, the Government of Canada has made statements to the United Nations that it "accepts a right to self-determination for indigenous peoples" and that it is "legally and morally committed to the observance and protection of this right."[13] Domestically, the federal government's "Inherent Self-Government Policy," its claims that it is accepting and implementing the recommendations of the Royal Commission on Aboriginal Peoples,[14] and its statements to the Canadian public through its Department of Foreign Affairs that "indigenous peoples worldwide are entitled to the full enjoyment of human rights and fundamental freedoms, on the same basis as other citizens and *peoples* without discrimination,"[15] would all suggest that the protection and pursuit of Aboriginal self-determination is an uncontroversial part of Canadian domestic policy.

In reality, the Government of Canada has resisted the recognition of the right, let alone its implementation with broad remedial effect in Canada. A recent example of this resistance was the refusal by the Government of Canada to acknowledge and include a discussion of the right of Aboriginal peoples to self-determination in its arguments to the Supreme Court of Canada in *Reference re Secession of Québec*.[16] In that case, the Federal Government took the position that the rights of Aboriginal peoples living in Québec were not relevant to a determination under domestic and international law of the right of Québec to unilaterally secede from Canada. This meant that, according to the federal government, the Aboriginal, treaty and international rights of the Aboriginal peoples whose traditional lands fall within the current boundaries of the province of Québec play no part in a determination of whether these territories can be removed from Canada. In other words, the federal government appeared to hold that, once again, Aboriginal peoples could "pass with the land," in direct contravention of their domestic and international rights.[17]

In the context of the government's express acceptance, but actual resistance to the meaningful recognition of the right of Aboriginal peoples under Article 1 of the Covenants, the committees' rulings are important for their authoritative contribution to the jurisprudence and literature that confirms that Aboriginal peoples in Canada are beneficiaries of this fundamental human right.

Lands, Resources and Natural Wealth

On the question of the distribution of lands and resources in Canada, both committees condemned the Government of Canada for dispossessing Aboriginal peoples of an adequate land and resource base. Significantly, the committees found Canada in breach of this aspect of Article 1, notwithstanding having just been presented with evidence by federal representatives of "modern" land claims agreements, including the recent land and governance agreement of the eastern Arctic which established the territory of Nunavut.

While commending the Nunavut Agreement, the committees appear not to have been persuaded that the "modern" land claims agreements give effect to Article 1 of the Covenants. As submitted by the Grand Council of the Crees to the two committees, the past twenty-five years of treaty negotiations undermine any arguments by federal authorities that the purpose and effect of the lands claims process has been to achieve a viable land and resource base for self-sufficient Aboriginal nations.

In the case of the James Bay Crees, for example, while their "modern" agreement (*The James Bay and Northern Québec Agreement, 1975*)[18] provided them with many important compensatory and social-program benefits, it left the James Bay Cree Nation with very

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[13] Commission on Human Rights, 53rd Session, *Statements of the Canadian Delegation* (31 October 1996). Statement on Article 3, the right to self-determination.

[14] Canada, *Gathering Strength — Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services Canada, 1998), online: <http://www. inac.gc.ca/ strength/change.html> (accessed 1 December 1999).

[15] See statements online: Canadian Department of Foreign Affairs and International Trade Homepage <http://www. dfait-maeci. gc.ca/human-rights/indigen-e.asp> [emphasis added] (accessed 1 December 1999).

[16] [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385.

[17] For a more detailed discussion of the impact of *Reference re Secession of Québec* on Aboriginal peoples, see the article by the authors, "The Aboriginal Argument: the Requirement of Aboriginal Consent" and by Paul Joffe, "Québec Secession and Aboriginal Peoples: Important Signals from the Supreme Court" in David Schneiderman, ed., *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: Lorimer & Co. Ltd., 1999).

[18] Canada, Québec, *The James Bay and Northern Québec Agreement, 1975* (Québec: Editeur Officiel du Québec, 1976).

limited benefit from, and meaningful control over, *less than 2 per cent* of their traditional lands. As a result, the James Bay Crees have been left, for all intents and purposes, economically dependent on two other orders of government which extract billions of dollars of resources and revenue from the Crees' traditional lands every year.

More generally, although Canada is one of the largest and richest countries in the world,[19] Aboriginal peoples in Canada control and are in a position to extract — *qua* Aboriginal peoples — collective benefit from less than one-half a per cent of the Canadian land mass south of the sixtieth parallel.[20] Moreover, much of the lands reserved by the Government of Canada for Aboriginal peoples are marginal and depleted of resources. As noted by the RCAP:[21]

> Aboriginal peoples have had great difficulty maintaining their lands and livelihoods in the face of massive encroachment. This encroachment is not ancient history. In addition to the devastating impact of settlement and development on traditional land use areas, the actual reserve community land base of Aboriginal people has shrunk by almost two-thirds since Confederation, and on-reserve resources have largely vanished . . . . As a result, Aboriginal people have been impoverished, deprived of the tools necessary for self-sufficiency and self-reliance.

In their admonishment of the Government of Canada in spite of "ongoing" treaty negotiations, the two committees have confirmed that Canada's past and present approaches and policies that leave Aboriginal peoples with minimal and economically unproductive lands and resources have more to do with neo-colonialism than respect for fundamental human rights. Accordingly, the committees issued their strongly worded recommendations "urging" the government to take "decisive," "concrete" and "urgent" action to implement the recommendations of the RCAP to ensure an adequate land and resource base for Aboriginal peoples. By these strong words, the committees are clearly stating that, as a matter of international law and respect for fundamental human rights — after over two hundred years of treaty-making and twenty-five years of "modern" treaty negotiations which continue to require (explicitly or in effect) the extinguishment of Aboriginal rights — the government's approach must be fundamentally transformed.

In this way, the rulings of the committees set an important standard for the interpretation of modern land agreements. The Government of Canada can no longer use its involvement in scores of self-government negotiations and specific claims and comprehensive claims negotiations as *prima facie* evidence that it is complying with its international human rights obligations. Nor can the Government of Canada assure itself, its citizens or other states that it respects and promotes the rights enshrined in the Covenants simply because it has signed "modern" land agreements with particular Aboriginal peoples. In order to satisfy international human rights standards, the question that must be answered in the affirmative is:

> Do the land or self-government dispensations concerning Aboriginal peoples in Canada secure effective access to and control over a land and resource base of adequate quality and quantity to ensure the overall political, economic, social and cultural viability of Aboriginal peoples in Canada?

The two committees have signalled to Canadians that the right of self-determination and the issue of lands and resources must be translated, urgently and decisively, into concrete reforms with overall effect. The *Concluding Observations* repeat and give international force to the alarms sounded by the Royal Commission on Aboriginal Peoples that the only way to redress and resolve "the most pressing human rights issue facing Canadians"[22] is to achieve a "fundamental reallocation of lands and resources" in this country.[23]

Extinguishment of Aboriginal Rights and Title

Directly related to the committees' findings on lands and resources are the committees' pronouncements that the practice of "extinguishment" of Aboriginal rights and title, by any name or means, violates the right of self-determination.

The doctrine of extinguishment — the "destruction or cancellation"[24] of Aboriginal rights or title — arose historically in the context of treaty negotiation and formation between the Crown and Aboriginal peoples. From the perspective of the Crown, treaties with Aboriginal peoples effected the formal cession, surrender, release or blanket extinguishment by the Aboriginal party of its inherent Aboriginal title to land in exchange for

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[19] Year after year, Canada has been ranked at the top of the United Nations Human Development Index.

[20] *RRCAP, supra* note 6, vol. 2 at 422.

[21] *Ibid.* at 425.

[22] Canadian Human Rights Commission, *Annual Report 1994* (Ottawa: Minister of Public Works and Government Services, 1995).

[23] *RRCAP, supra* note 6, vol. 5 at 3.

[24] Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence* (Ottawa: Minister of Supply and Services Canada, 1995) at 5.

reserve land and a limited set of benefits conferred on the Aboriginal people by the Crown under the treaty. This practice of extinguishment in treaty formation has continued from the "historic treaties" to the present. In the past thirty years of treaty negotiations, the government parties have insisted on the extinguishment of Aboriginal rights as a precondition to entering into the negotiation process.

It is widely understood among Aboriginal peoples and expert commentators and bodies that the purpose of the "legal" tool of extinguishment, when used by the Government of Canada or any state party in treaty or other negotiations, is and always has been to dispossess Aboriginal peoples of their lands and resources:[25]

> The ongoing implementation of state extinguishment policies constitute 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.

Given its colonial purpose, it is perhaps not surprising that the discredited foundations of the concept of extinguishment have not been explored or adverted to in any way by the Canadian government or courts. This silence conceals that the doctrine of extinguishment is implicitly rooted in notions of racial inferiority — notions which are anathema to our national legal and political culture of equality before the law, the rule of law and respect for human rights. The doctrine of extinguishment is built on the bald assertion of sovereignty by the Crown over Aboriginal lands. This assertion of sovereignty — particularly in the face of nation-to-nation treaties between the Crown and Aboriginal peoples in Canada to *share* the land on the basis of co-occupation — was justified by the (purported) inferiority of Aboriginal governance, societies and title to land. As well, the doctrine of extinguishment is related to the corollary notion of *terra nullius* which justified colonization on the basis of "discovery" of land, despite the obvious presence of organized indigenous societies on the land "discovered."

While the Supreme Court of Canada in *Delgamuukw* v. *British Columbia*[26] may have at last begun to expunge the concept of *terra nullius* from the legal and political landscape in Canada, it continued to affirm the racially discriminatory doctrine of extinguishment. The Court's plea at the end of its judgment for negotiated resolutions between Aboriginal peoples and governments in Canada, therefore, remains a plea that Aboriginal peoples subject themselves to negotiations which take place — by definition — under conditions of disadvantage and duress. The legal inferiority of Aboriginal peoples entrenched in Canadian law by the doctrine of extinguishment is a primary (though not exclusive) cause of this disadvantage and duress.[27] The UN committees' rulings starkly expose the doctrine of extinguishment, as pursued by the Government of Canada as a basis of treaty negotiations and implicitly permitted by our highest court, as fundamentally incompatible with international human rights norms.

While it may yet be difficult for Aboriginal peoples to go directly to Canadian courts to enforce the committees' determinations that the practice of extinguishment violates Article 1 of the covenants, the *Concluding Observations* nevertheless present our courts and governments with a serious legal and moral conundrum. The Supreme Court of Canada has repeatedly recognized the "important role of international human rights law as an aid in interpreting domestic law,"[28] including interpretation of the common law, statutes and the constitution. No doubt the two *Concluding Observations*, which clearly and unequivocally hold that any doctrine resulting in the extinguishment — or unalterable expunging or destruction —of Aboriginal rights is contrary to fundamental human rights norms, will eventually be put before the Supreme Court of Canada. Most likely, the *Concluding Observations* will be used to challenge the Supreme Court of Canada's rulings that section 35 of the *Constitution Act, 1982* permits the extinguishment of Aboriginal rights, provided a series of "justificatory" steps and conditions are met. The Supreme Court of Canada can now only pursue this analysis in express contravention of international human rights law as articulated by the HRC and CESCR and, more specifically, in contravention of an area of international

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[25] Dalee Sambo, "Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?" (1993) 3 Transnat'l L. & Contemp. Probs 13 at 31–2 as cited in Paul Joffe and Mary Ellen Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, research submission prepared for the Royal Commission on Aboriginal Peoples (June, 1995) at 255.

[26] [1997] 3 S.C.R. 1010.

[27] The duress experienced by Aboriginal peoples in treaty negotiation is also caused by the conditions of individual and collective poverty due to centuries of dispossession, by extraordinary inequality of bargaining power, by dependence on the Crown for access to legal counsel, by a jurisprudence forged in their absence and by negotiation contexts in which third parties are at the same time being granted interest in or occupation of traditional lands without the consent of the Aboriginal party.

[28] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 25823 at para. 70. See also *Reference Re Public Service Employees Relations Act* (1987), 38 D.L.R. (4th) 161 (S.C.C.), *Davidson* v. *Slaight Communications* (1989), 59 D.L.R. (4th) 416 (S.C.C.), and the decision of Justice L'Heureux Dubé in *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330 at para.73.

human rights law — the right of self-determination — that the Supreme Court of Canada has accepted as a "general principle of international law" applicable within Canada.[29]

While some are still sceptical about the normative force of international human rights law, in this era of international consciousness and assertion of human rights values, governmental practice and the common law can and do in fact change to reflect developments in human rights norms. The High Court of Australia in *Mabo* v. *Queensland*,[30] for example, altered centuries of discrimination by recognizing the land title of the Torres Strait Islanders on the basis that:[31]

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, unjust and discriminatory doctrine of that kind can no longer be accepted . . . . The opening up of international remedies to individuals *pursuant to Australia's accession to the Optional Protocol to the* International Covenant on Civil and Political Rights *brings to bear on the common law the powerful influence of the Covenant and the international law standards it imports. The common law does not necessarily conform with the international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.* A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule. . . .

Similarly, the Government and courts of Canada are surely now forced to choose whether to perpetuate a discriminatory and infamous colonial practice in overt contravention of international human rights law, or at long last, to genuinely reconsider and eliminate in real terms all forms of extinguishment of Aboriginal rights.[32]

The Draft Declaration on the Rights of Indigenous Peoples

Finally, the committees' reliance on Article 1 should carry significant weight in the drafting and adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*.[33] The most heated and political battle in the drafting of the current text of the Declaration concerned the inclusion of the right of self-determination as a right guaranteed to Indigenous peoples. Many state party delegates, including for many years the delegation from Canada, opposed the inclusion of the right. While the draft *Declaration* presently contains a right of self-determination under Article 3, with language that closely mirrors Article 1 of the *ICCPR* and *ICESCR*, there likely remains a long and difficult road ahead.

The draft *Declaration* is now before a newly constituted and open-ended working group of the United Nations Commission on Human Rights (CHR working group). The CHR Working Group has been established "for the sole purpose of *elaborating* a draft declaration" based on the draft *Declaration* developed and adopted by the Subcommission Working Group on Indigenous Peoples.[34] This broad mandate enables the CHR Working Group to focus on drafting a new text rather than commenting on and reviewing the existing draft *Declaration*. It is almost certain, therefore, that the battle over the inclusion of the right of self-determination and the recognition of Aboriginal peoples as "peoples" will have to be fought all over again.

The recent confirmation by the HRC and CESCR that Aboriginal peoples are beneficiaries of all aspects of the right of self-determination under Article 1, including the right to fully dispose of natural wealth and resources and the right to their own means of subsistence, must now remove any "uncertainties" concerning the application at international law of the right of self-determination to Aboriginal peoples and any basis for refusing to include the right in a final draft *Declaration* proposed by the CHR Working Group.

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[29] *Reference re Secession of Québec, supra* note 17 at paras. 23 and 114.

[30] (1992), 175 C.L.R. 1.

[31] *Ibid.* at 42 [emphasis added].

[32] The Government of Canada has recently begun to assert that it is pursuing "certainty" through the full and final settlement of claims and the "conversion" of Aboriginal rights to other rights. The legal effect being sought would appear to be extinguishment of Aboriginal title.

[33] *Declaration on the Rights of Indigenous Peoples*, UN Docs E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 /. This document is presently only in draft form [hereinafter the *Declaration*].

[34] Commission on Human Rights, *Report on the 51st Session*, HRC Res. 1995/32, UN Doc. E/1995/23 [emphasis added].

CONCLUSION

The recent rulings of the two United Nations committees have significant normative force, if not the force of binding law. But how best to ensure their practical effect in Canada?

The *Concluding Observations* are, at the very least, an authoritative source of legitimacy for Aboriginal peoples' efforts to achieve recognition in Canada of their right of self-determination and end the gross economic and social disparities they endure. For example, the Government of Canada is obligated under the treaties and by the ruling of the CESCR to widely disseminate the *Concluding Observations*. In the face of governmental non compliance, however, it is ultimately for advocates to place these rulings, and Canada's professed commitment to adhere to them, before the government and courts as frequently and forcefully as possible.

It took at least ten years of pressure before the Government of Canada abandoned its opposition to recognizing Aboriginal peoples as "peoples" under domestic and international law. How long will it take before the government — and courts — abandon the doctrine of extinguishment and its recent surrogates such as "conversion" of Aboriginal rights? How long will it be before the Government of Canada meaningfully achieves a viable land and resource base for Aboriginal peoples on a foundation of co-occupation and sharing rather than displacement?

The Federal Government has promised to achieve its goal of "certainty" in treaty relations without extinguishment. Until this promise translates into concrete results, however, these rulings should be applied to make the extinguishment of Aboriginal rights an increasingly unpalatable and untenable legal tool.

Similarly, these rulings can and ought to be used to repeatedly remind the government and the courts of the growing international and domestic view that Canada's international human rights reputation and integrity will be undermined unless an adequate Aboriginal land and resource base is achieved in fact and law. As noted by the Canadian Human Rights Commission in 1994:[35]

> It . . . remains the position of our Commission that the plight of native Canadians is *by far the most pressing human rights problem in Canada*, and that failure to achieve a more global solution can only continue to tarnish Canada's reputation and accomplishments.

The HRC and CESCR have now given Canada a clear and direct message as to where those global solutions must start.

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[35] Annual Report, *supra* note 22 [emphasis added].