

Domination in relation to Indigenous ('dominated') Peoples in international law

Steven Newcomb

This chapter is an effort to make explicit an underlying feature of the language that scholars typically use when writing about the body of ideas known as international law and the relations between 'states' and peoples termed 'Indigenous'.¹ This feature of the language of international law² is a

- 1 Steven Newcomb, 'The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination' (2011) *Griffith University Law Review* 578, 588. The few working definitions of the term 'Indigenous Peoples' at the United Nations begin with the implicit image that distinct nations or peoples were existing free and independent of foreign domination in a particular place when a secondary and invading group invasively entered the scene and 'through conquest, settlement, or other means' established dominance over them. Those termed 'Indigenous' are then regarded as living *under* that state or condition of 'domination'. The use of the term 'dominance' by the United Nations in this context seems designed to create a euphemistic gloss so as to avoid using the word 'domination'. A process of colonisation creates the 'Indigenous' condition of existing *under domination* or *dominance*. Colonisation is accurately defined as a form of domination resulting from a nation or empire sending agents forth to a foreign geographical area to use violence to take over a distant territory by inserting its own people. This is done in an effort to dominate and control the original nations and peoples already existing in that place. Samuel Morison called this the process whereby 'Europeans began that amazing expansion of trade and settlement which resulted in world dominion'. Samuel Morison, *The Oxford History of the American People* (Oxford University Press, 1965) 34. This forms the context for the use of the term 'Indigenous' in international law. Indigenous Nations and Peoples are accurately re-expressed as distinct peoples that have been made to exist under the claimed dominion (domination) of a colonising or dominating power.
- 2 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 310. Anghie points out that what is typically called international law is a product of colonisation and the colonial encounter. That encounter, which is a violent clash between the invading power and the original nations and peoples, results in a situation in which nations and peoples that were existing free from domination have been forced to exist under some form of foreign and colonising system of domination.

metaphorical pattern of domination³ and subordination,⁴ which generally remains below the level of conscious awareness in discussions about peoples called 'Indigenous' and their rights.⁵ In this chapter, I will focus on some of the metaphorical patterns of domination that are typically found in scholarly writings about international law and 'Indigenous' Peoples in an effort to heighten awareness about a theme that has not been typically raised in international law scholarship.

As Glenn Morris has observed:

The historical operation of a system of legal norms and standards, ordained by a handful of states, and imposed upon the overwhelming majority of the world's peoples without their consent or input, is considered perverse and unjust by most indigenous peoples.⁶

In that one succinct sentence, Professor Morris sums up the issue – which I identify as 'domination' – which is manifested as 'states' imposing standards, concepts and norms of their design and choosing on the original nations and peoples of a geographical area without their consent. This behaviour emerges from the origin of what is termed 'the state'. In *Our Enemy the State*, Albert J Nock quotes German scholar Franz Oppenheimer, who succinctly sums up the pattern of domination I will be drawing attention to in this chapter. This following pattern has resulted in certain nations and peoples being termed 'Indigenous'. As Nock puts it:

[Franz] Oppenheimer defines the State, in respect to its origin, as an institution 'forced on a defeated group by a conquering group, with a view only to systematizing the domination of the conquered by the conquerors, and safeguarding itself against insurrection from within and attack from without. *This domination* had no other final purpose than the economic exploitation of the conquered group by the victorious group.'⁷

The patterns of domination made explicit in the above quotation are important for gaining insight into the nature of 'the state', and into the relations

- 3 Claus Mueller, *The Politics of Communication: A Study in the Political Sociology of Language, Socialization and Legitimation* (Oxford University Press, 1977). Domination is evident when one nation or people exercises daily control over another nation or people external to its will, or when one nation or people is made to live in subjection to the will of another nation or people.
- 4 Subordination is the corollary of domination.
- 5 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (adopted 13 September 2007).
- 6 Glenn Morris, 'International Law and Politics: Toward a Right of Self-Determination for Indigenous Peoples' in Annette Jaimes (ed), *The State of Native America: Genocide, Colonization and Resistance* (South End Press, 1992) 55, 55.
- 7 Albert Nock, *Our Enemy the State* (Caxton Printers, 1946) 45 (emphasis added).

between 'the state' and 'Indigenous Peoples' in international law, which is a system of standards used by 'states' in their interactions with each other. Above, Oppenheimer characterises those termed 'the conquerors' (dominators) as having successfully created and 'systematised' the domination they have managed to achieve over those referred to as 'the conquered'. What Oppenheimer calls 'an institution that has been forced on a defeated group' is accurately phrased as 'a domination' that has been imposed on the group being dominated. Oppenheimer makes the pattern perfectly clear when he calls the pattern '[t]his domination'.

Metaphors of domination and international law

In *A Clearing in the Forest*, Steven L Winter points out that metaphors are 'our imaginative way of having a reality'.⁸ It follows that metaphors of domination are the imaginative (cognitive) means by which a dominating society is able to constitute and maintain a reality of domination and subordination over nations and peoples being dominated.⁹ C A Bowers says that metaphors carry forward and maintain the biases and misconceptions of the past.¹⁰ International law serves as an excellent example of what Bowers calls 'the linguistic colonization of the present by the past'.¹¹ He points out that 'colonization involved taking for granted analogs [analogies] settled upon in the distant past which is part of how the metaphorical language of the dominant cultures represented the West as a civilization and the indigenous cultures as 'inferior and subordinate 'tribes'.¹²

The above ideas provide an important insight: the systematic use of metaphors of domination, both mentally and linguistically, is a means by which polities called 'states' carry forward and maintain, from generation to generation, a reality of domination and dehumanisation, especially in relation to nations and peoples termed 'Indigenous'. By means of such a system of ideas and behaviours, one nation or people is able to *claim* to have 'conquered' another nation or people, and then additionally to claim on that basis *a right* to maintain a controlling will over that other nation or people, and over the lands, territories and vital resources (such as water) of the nation or people being dominated. The 'inter'

8 Steven Winter, *A Clearing in the Forest: Law, Life and Mind* (University of Chicago Press, 2001) 68.

9 Steven Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Fulcrum Publishing, 2008).

10 Chet Bowers, 'Chet Bowers: Part 1: Linguistic Roots of the Ecological Crisis', *YouTube*, 14 September 2015, <<https://www.youtube.com/watch?v=OOYSPtPnNio>>; Chet Bowers, *The Way Forward: Educational Reforms that Focus on the Cultural Commons and the Linguistic Roots of the Ecological/Cultural Crisis* (Eco-Justice Press, 2012) 70–105.

11 Email from Chet Bowers to Steven Newcomb, 27 February 2016.

12 *Ibid.*

'relations' that *states of domination* have established between each other, and now maintain, are generally termed 'foreign relations' and 'international law'. Given this context, a shift to the viewpoint of those being dominated reveals a phenomenon that I call 'the domination of Indigenous Peoples by states'.

As the result of a process of reification,¹³ a colonising nation or people will tend not to interpret or characterise its political system as one of domination. The descendants of those who managed to impose their political system forcibly on nations and peoples now termed 'Indigenous' will choose not to see the end result as a system of domination. Those who have inherited that system would no doubt defensively say that the system which their ancestors constructed on top of 'Indigenous' Peoples, and that is now being maintained by the current generation 'around' and 'on top of' those peoples, has nothing at all to do with 'domination'. There will be a tendency to engage in this denial because 'domination' suggests invalidity and illegitimacy. The successors of the system will undoubtedly prefer to frame that system in terms of 'democracy'¹⁴ and 'civilisation'.¹⁵ They are likely to say that their system was founded on the sanctity of 'property'.¹⁶ Ironically, however, in keeping with the imperial Greco-Roman tradition, 'democracy', 'civilisation' and 'property' are all terms of domination.¹⁷

During the course of many centuries, systems of domination have been globalised under the terminology of the international system of 'states'.¹⁸ From this perspective, 'states' is shorthand for 'states of domination'. A single state is shorthand for 'a state of domination'. In the context of the metaphors typically used in the United Nations, and in international law, the phrase 'Indigenous Peoples' is accurately re-expressed as 'dominated peoples'. Dominated ('Indigenous') nations and peoples are generally regarded as having been 'subjected' to 'conquest' by an invading and dominating nation at some time in the past.¹⁹

- 13 Peter Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise on the Sociology of Knowledge* (Anchor Books, 1967) 89–92.
- 14 US State Department, 'Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples' (2011) <<http://www.state.gov/documents/organization/184099.pdf>>.
- 15 *Webster's Third New International Dictionary* (1993): 'The act of civilizing; *esp.* the forcing of a foreign cultural pattern on a population to which it is foreign.'
- 16 Gottfried Dietze, *In Defense of Property* (John Hopkins University Press, 1971). See also Charles Haar and Lance Liebman, *Property and Law* (Little, Brown, 1985) 1: 'If property starts with the first establishment of socially approved physical domination over some part of the natural world, then the nature of that domination – often called "occupancy" or "possession" – is important.'
- 17 Eli Sagan, *The Honey and the Hemlock: Democracy and Paranoia in Ancient Athens and Modern America* (Basic Books, 1991) 13–56.
- 18 Max Weber, *From Max Weber: Essays in Sociology* (Hans Gerth and C Wright Mills ed and trans, Oxford University Press, 1946) 78.
- 19 Karen Engle, *The Elusive Promise of Indigenous Development: Culture, Rights, Strategy* (Duke University Press, 2010) 73–99.

The metaphor and concept of 'conquest' is generally associated with the idea of some kind of military victory or triumph, as expressed above by Oppenheimer, by claiming to have 'won' or 'acquired' a foreign territory by force of arms or by other means.²⁰ However, when the perspective is switched from the viewpoint of those characterised as 'the conquering' nation or people, to the nations or peoples said to have been 'conquered', the words 'conquest' and 'conquered' are accurately re-expressed as *domination*.²¹ As a mental exercise, think of the different understandings and associated inferences that would emerge if every time we were to see the word 'conquest' we were to reframe and re-express it as 'domination'. Use of that specific word by nations and peoples said to have been 'conquered' by the West is one means by which Indigenous Nations and Peoples can begin challenging this very idea by pointing out that 'conquest' serves as a cover word for domination.

Another approach can also be taken: make explicit the metaphors of domination and subordination, and refuse passively to accept and operate from the colonisers' perspective. For example, 'the conquest'²² is a phrase accurately replaced with 'the domination'. As an exercise, reflect on the difference in connotation that would have arisen if Patricia Seed had chosen as a title for her book *Ceremonies of Possession in Europe's Domination of the New World 1492–1640*, instead of *Ceremonies of Possession in Europe's Conquest of the New World 1492–1640*.²³

Dominated peoples and international law

The domination which states have constructed, maintained and used against colonised peoples for centuries has resulted in the phenomenon of 'dominated ("Indigenous") peoples'. Yet this specific issue generally remains out of focus when the word 'domination' is not used. The issue of domination has very long and very old roots indeed.²⁴ James Crawford, in his foreword to Antony Anghie's book *Imperialism, Sovereignty, and International Law*, has pinpointed the issue of domination that Anghie has identified in his research into the origins of international law. Crawford notes that Anghie 'examines a series of episodes in the legal history of the relations between the West and non-Western polities'.²⁵ Anghie, says Crawford, argues that these episodes have

20 The Compact Edition of the *Oxford English Dictionary* (1971) vol 1.

21 Richard Brown, *A Poetic for Sociology: Toward a Logic of Discovery for the Human Sciences* (Cambridge University Press, 1977) 47.

22 'Conquest' is often used by historians and scholars of international law, which suggests a victory or triumph rather than a form of domination.

23 Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World 1492–1640* (Cambridge University Press, 1995).

24 Frances G Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (Carnegie Institution of Washington, 1917).

25 James Crawford, 'Foreword' in Anghie, above n 2, xi.

been 'reproducing at different epochs and in different ways an underlying pattern of domination and subordination'.²⁶ From its beginning, international law was not 'exclusively concerned with the relations between states', Crawford notes, 'but, and more importantly, with the relations between civilizations and peoples'. 'Moreover', says Crawford, 'these were relations of *domination*'.²⁷

Professor Anghie, in his chapter 'Francisco de Vitoria and the Colonial Origins of International Law', examines in detail Vitoria's discourse and arguments, and Vitoria's view that 'Indians were excluded from the realm of sovereignty'.²⁸ As Anghie concludes:

ultimately, the one distinction which Vitoria insists upon and which he elaborates in considerable detail is the distinction between the sovereign Spanish and the non-sovereign Indians. Vitoria bases his conclusions that the Indians are not sovereign on the simple assertion that *they are pagans*.²⁹

Given Jonathon Havercroft's acknowledgement that major critiques of sovereignty find it to be 'an unjust form of political domination that limits human freedom',³⁰ concluding that the Indians were not sovereign because they were not Christian left the 'Indians' wide open to a forcibly imposed unjust system of political domination by 'the sovereign Spanish', 'the all-powerful sovereign who administers this law' of *jus gentium*.³¹ Anghie argues that the 'sovereignty doctrine was not developed in the West and then transferred to the non-European world'.³² Rather, the 'sovereignty doctrine acquired its character through the colonial encounter'³³ because, Anghie contends, 'sovereignty [domination] was constituted through colonialism'.³⁴

Then, as a more recent example, Anghie provides a detailed account of the positivist school of international law in the nineteenth century. He uses a wide number of synonyms for domination and dehumanisation, while explaining how 'Positivists developed an elaborate vocabulary for denigrating non-European people, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission discharging the white man's burden'.³⁵ Synonyms for domination and dehumanisation in that one sentence include 'denigrating', 'objects for conquest', 'extreme violence' and 'civilizing mission'. The average

26 Ibid.

27 Ibid (original emphasis).

28 Anghie, above n 2, 26.

29 Ibid 29 (emphasis added).

30 Jonathan Havercroft, *Captives of Sovereignty* (Cambridge University Press, 2011) 34.

31 Anghie, above n 2, 29.

32 Ibid 29.

33 Ibid.

34 Ibid 38.

35 Ibid.

reader may not recognise the phrase 'civilizing mission' as expressing the theme of domination. The connection is found in *Webster's Third New International Dictionary* (unabridged), which defines 'civilization' as 'the process of civilizing', for example '*the forcing* of a particular cultural pattern on a population to which it [the cultural pattern] is foreign' (emphasis added).

Forcing free and independent nations and peoples to undergo a politically coercive, dominating and multi-generational process of subjection to 'a foreign cultural pattern', purportedly in keeping with international law between 'states', has resulted in a trauma-inducing history for peoples now called 'Indigenous'. Thomas R Berger's book *A Long and Terrible Shadow* provides numerous example of the pattern of domination, subordination and dehumanisation that historically contextualises the relationship between nations and peoples termed 'Indigenous' and polities called 'states' in international law. In the following paragraph of 84 words, for instance, Berger provides at least ten examples of domination and dehumanisation, which I highlight using additions in brackets:

The Spaniards came first to [invade] the West Indies; they waged a series of campaigns of extermination [domination] against the Indians of Hispaniola. On horseback, accompanied by infantry and bloodhounds [to hunt down the Indians] [domination], the *conquistadores* [dominators] destroyed almost at will [domination] the hunting and gathering tribes of the island. They raped [domination] and murdered [domination], sparing neither women nor children [domination]. Resistance [to Spanish domination] by the Indians was put down mercilessly [by means of domination]. By 1496, the Spaniards were in complete control of [had achieved complete domination over] the island of Hispaniola. Similar assaults [campaigns of domination] were made on Cuba and other islands of the Caribbean.³⁶

Innumerable volumes of this sort of dark history illustrate the conceptual and behavioural roots of what Anghie calls 'the relationship between international law and the colonial confrontation', and the roots of what he terms 'sovereignty doctrine'.³⁷ Given that colonialism is simply another synonym for imperialism and domination,³⁸ Anghie's focus on 'the relationship between international law and the colonial confrontation' provides much-needed insight into what is seldom explicitly written about, namely, the domination of nations and peoples now commonly called Indigenous.³⁹

36 Thomas Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas since 1492* (University of Washington Press, 1967) 3.

37 Anghie, above n 2, 37.

38 Rene Maunier, *The Sociology of Colonies: An Introduction to the Study of Race Contact* (Routledge, 1949) 29–36.

39 Newcomb, 'UN Declaration', above n 1.

Some of the most basic vocabulary found in writings about Indigenous Peoples in the context of international law include 'state',⁴⁰ 'civilization',⁴¹ 'Indigenous',⁴² 'sovereignty',⁴³ 'symbolic acts of possession',⁴⁴ 'conquest',⁴⁵ and 'property'.⁴⁶ Each of these words, and all of them together when viewed as a single gestalt or paradigm, leads to the idea and pattern of domination. A deeper examination of these metaphors, their interpretation and the various contexts in which they are typically used provide us with an important insight: the idea system of international law has been used by the agents of politics called 'states' as a means of constituting and maintaining, on a seemingly permanent basis, a linguistic and behavioural reality of domination for nations and peoples called 'Indigenous'.⁴⁷ Yet scholars of international law tend to write as if there is no such thing as *the domination of Indigenous Peoples by states*.⁴⁸

Indigenous Peoples are not part of an 'objective' physical reality

The idea of certain peoples being classified as 'Indigenous' is not part of an 'objective reality' *physically* existing in the world *independent of the human mind*. It is the human mind, and, more specifically, the western or occidental mind, that came up with the metaphorical idea of certain peoples being termed and categorised as 'Indigenous'. The category was developed based on particular characteristics or properties ascribed to 'Indigenous' Peoples in a dominating context of empire and colonialism, or in the contemporary context of a given 'state' of domination.⁴⁹ Peoples called 'Indigenous' in international law, for

40 Weber, above n 18. See Max Weber's definition of 'the state': 'Like the political institutions historically preceding it, the state is a relation of men dominating men, a relation supported by means of legitimate (i.e. considered to be legitimate) violence. If the state is to exist, *the dominated* must obey the authority claimed by the powers that be': *ibid* 78 (emphasis added).

41 See above n 15.

42 Newcomb, 'UN Declaration', above n 1, 588–9.

43 Havercroft, above n 30, 34. Eminent political philosophers such as Arendt, Foucault, Hardt and Negri, and Agamben agree in their assessment that 'sovereignty' constitutes 'an unjust form of political domination that limits human freedom'.

44 Seed, above n 23.

45 *Ibid*.

46 Dietze, above n 16.

47 Newcomb, *Pagans in the Promised Land*, above n 9.

48 The so-called 'conquest' has, from the perspective of those said to have been 'conquered', resulted in the imposition of an unjust form of political domination, which, ironically, is a definition of 'sovereignty' provided in Havercroft's *Captives of Sovereignty*, above n 30, based on his reading of a number of political philosophers.

49 United Nations Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, UN Doc ST/ESA/328 (2009) 6: 'The concept of indigenous peoples emerged from the colonial experience, whereby the aboriginal peoples of

example, are typically framed in terms of metaphors of hierarchy, and thus are characterised as 'occupying' a 'lower' order or 'subordinate' 'space' 'beneath' the political authority of 'polities' called 'states'.⁵⁰ The metaphorical imagery of Indigenous Peoples existing 'in' or 'within' the state, or being 'subject to' and 'under' the authority of 'the state', certainly serves this purpose.⁵¹ The metaphor of a 'subordinate' position or status is sometimes stated in the United Nations as such peoples being 'non-dominant'.⁵² This only makes sense in relation to the correlative of another people, society or state which is regarded as being dominant or dominating.

English philosopher Adam Smith mentioned this kind of pattern in his *Essay on Colonies* when he said that, during 'the course of many centuries among savage and barbarous nations', the colonisers carried with them 'the habit of subordination'.⁵³ This is accurately interpreted to mean that the colonisers (dominators) had a habit of using subordinating and dehumanising metaphors such as 'savage', 'barbarous' and 'uncivilised' (undominated) against the free nations and peoples living in the lands being colonised. Stated differently, the colonisers carried with them a mental habit of using metaphors of domination as part of the process of 'colonisation', which Samuel Eliot Morison defines as 'a form of conquest in which a nation takes over a distant territory, thrusts in its own people, and controls or eliminates the native inhabitants'.⁵⁴

It would be difficult to devise a more perfect picture of domination than the one Morison provides in the above sentence, which goes well with Claus Mueller's definition of domination. In *The Politics of Communication*, Mueller defines domination as 'the control' by 'a limited number of individuals over the material resources of society', and 'over access to positions of political [decision-making] power'.⁵⁵ International law is one means by which such control has been achieved over nations and peoples termed 'Indigenous'. Through the centuries, a limited number of colonisers in leadership positions of power have mentally projected metaphors of domination and subordination

a given land were marginalized after being invaded by colonial powers, whose peoples *are now dominant* over the earlier occupants' (emphasis added). The phrase 'now dominant' is followed later in the same paragraph with an explicit mention of 'Domination and displacement of peoples'. The nations and peoples being dominated end up in 'a state of domination' by a given 'state' of domination.

50 Newcomb, *Pagans in the Promised Land*, above n 9.

51 Ibid.

52 Jose R Martinez Cobo, UN Special Rapporteur on the Problem of Discrimination Against Indigenous Populations, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7/Add 4 (1986) para 379: 'They form at present non-dominant sectors of society ...'

53 Adam Smith, *Essay on Colonies* (M Walter Dunne, 1901) 12.

54 Morison, above n 1, 34.

55 Mueller, above n 3, 129.

onto the nations and peoples that were originally living free of those mental projections, and of the dominating behaviours that follow from them.

Given this fact, peoples now called 'Indigenous' are the ones who have been both mentally and physically subjected, or dominated, by those engaged in the enterprise of colonialism and imperialism, or, in contemporary times, by those carrying out the role of 'the state'. Colonisation involves a given system of domination (for example, a 'state', 'kingdom' or 'monarchy') sending human beings forth as agents who are assigned the task of transporting a mental and physical system of domination into a 'newly located' ('discovered') geographical area where that system was not yet existing. They are expected to engage in the long and violent process of constituting that system over and on top of the original nations that were previously existing in that place free from a violently imposed and foreign domination. This forcible process of imposition is what has sometimes been 'the civilising mission',⁵⁶ as mentioned previously.

That the concept 'Indigenous Peoples' is metaphorically ensconced in an overall semantic context of domination generally goes unmentioned. This is somewhat remarkable given that the domination–subordination conceptual pattern is central to the working definition of what it means to be considered 'Indigenous' in both international law and the United Nations.⁵⁷ Metaphorically depicting such peoples as living a lower-order, dominated existence in relation to polities called 'states' seems to be a requisite of the idea system that elite humans of the West have developed and maintained as international law.⁵⁸ When Indigenous Nations and Peoples express the desire to free themselves from being dominated by a particular system ('state') of domination, some scholars typically frame this as 'talk of secession'.⁵⁹

Such scholars frame the matter in this way even though it seems senseless for Indigenous Nations and Peoples to be characterised as attempting to 'secede' from a linguistic, metaphorical and behavioural system of domination imposed on them against their will, a system of domination to which they have not freely acceded. Scholars who engage in this inapt use of political terminology ought to be reminded that a desire by peoples who have been and are still being dominated to be freed from that ongoing and chronic predicament is not a desire for secession; it is a desire for liberation from an

56 Anghie, above n 2, 3–4.

57 United Nations Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, UN Doc ST/ESA/328 (2009).

58 Ibid.

59 Engle, above n 19, 73–99. See also Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Fulcrum, 2013) 44: 'Self-determination in the indigenous context does not include a right to succeed [sic] from states that recognize human rights, because the Declaration disclaims intent to dismember the territorial integrity or political unity of states.'

imposed system that constructs and maintains a mental, physical and trauma-inducing reality of domination on an ongoing and intergenerational basis.⁶⁰

UN Declaration on the Rights of Indigenous ('dominated') Peoples

On 13 September 2007, the United Nations General Assembly adopted the UN *Declaration on the Rights of Indigenous Peoples*. In the years since the declaration's adoption, it has been typical to hear some Indigenous Peoples' advocates speak as if a sea change is on the horizon with regard to the treatment of the rights of Indigenous Peoples in international law. Indigenous Peoples' representatives who express this view seemed not to notice that the newly adopted UN declaration is not designed to end the relationship of domination between polities called 'states' and peoples termed 'Indigenous'. Nor does that document fundamentally change the manner in which that dominating relationship is written about in the idea system of international law. In the international arena and in the adopted text of the UN declaration, for example, the word 'States' is still spelled with the honorific capital 'S', and the word 'indigenous' is still spelled with a symbolically subordinate *lower* case 'i'.⁶¹ This is both symbolic and constitutive of the domination system of 'the state' and of 'states'.⁶²

Given the adoption of the UN *Declaration on the Rights of Indigenous Peoples* in 2007, it is common to hear the claim put forth that the idea system and

60 Eduardo Duran, Bonnie Duran, Maria Yellow Horse-Brave Heart and Susan Yellow Horse-Davis, 'Healing the American Indian Soul Wound' in Russell Thornton (ed), *Studying Native America: Problems and Prospects* (University of Wisconsin Press, 1998) 60.

61 US Statement to UN ECOSOC, E/CN4/Gr1987/7/Add12 (30 September 1987). The Office of Legal Affairs of the US Department of State's upper case/lower case stylistic technique resulted in the State Department violating the ordinary rule for capitalising the first letter of a proper noun, such as 'Indian'. In a response to complaints by the traditional Hopi Kikmongwis to the United Nations, the State Department wrote in an official US intervention about Felix Cohen 'considered by many to be the preeminent authority on federal indian [sic] law, in his Handbook of Federal Indian Law ...'.

62 Ibid:

It is clear that the concept of tribal sovereignty has been recognized by the United States Supreme Court as derived from international law subject to modification by the Congress of the United States ... [T]reaties and statutes of Congress have been looked to by the [US] courts as limitations upon original tribal powers, or, at most evidence of recognition of such powers, rather than as the direct source of tribal powers. This is but an application of the general principle that 'it is only by positive enactments, even in the case of conquered [dominated] and subdued [dominated] nations, that their laws are changed by the conqueror [dominator]'.

standards of international law are developing new norms.⁶³ Evidence of this supposed development of international law standards pursuant to the UN *Declaration on the Rights of Indigenous Peoples* is said to be found in the fact that peoples called 'Indigenous' are deemed to have the right *to aspire towards* the attainment of certain rights *beneath* or 'under' state sovereignty (domination).⁶⁴ State governments seem to be saying to Indigenous Peoples, 'So long as you agree not to tamper with or contest the state's claim of sovereignty (domination) over your existence, you may aspire to one day, in some distant and indeterminate future, achieve certain rights *under* and *within* the system of state sovereignty (domination).'

How Indigenous Peoples' advocates will be able eventually to persuade state actors to recognise Indigenous Peoples as possessing such rights is not at all clear. However, Indigenous Peoples are considered by states to be more than welcome to make the effort *eventually* to achieve certain '*rights*' *under* state sovereignty (domination), just so long as they do not aspire to free themselves from the imposition of state sovereignty (domination).

Importantly, the UN *Declaration on the Rights of Indigenous Peoples* has resulted in no call for the United Nations' working definitions of the term 'Indigenous Peoples' to be refashioned. The idea of Indigenous Peoples is still being defined in the exact same manner after the adoption of the UN declaration as it had been before its adoption by the United Nations General Assembly. The relationship of domination between states and Indigenous Peoples is not explicitly addressed in the UN *Declaration on the Rights of Indigenous Peoples* let alone modified or ended by that document's adoption.

During the decades that Indigenous Peoples' advocates had been working towards reform in the international arena and in international law relative to Indigenous Peoples, the word 'domination' was only occasionally mentioned in relation to Indigenous Peoples' issues. On closer reflection, this seems odd given the specific working definition of peoples termed 'Indigenous' in international law. One definition was published in a 1986 report by the UN Special Rapporteur on the Problem of Discrimination Against Indigenous Populations. It includes tell-tale phrases that identify the pattern of domination: 'pre-invasion', 'pre-colonial', 'distinct from other sectors of the societies now prevailing' and 'non-dominant sectors of society'.⁶⁵ Oddly, the above phrases are not associated with the idea of domination in the mind of the average English language speaker. It is only upon reflection that the dominating nature of words such as 'invasion', 'colonial' and 'prevailing' become noticeable.

63 Echo-Hawk, above n 59, 39–40.

64 Ibid: 'indigenous self-determination runs parallel to state sovereignty [domination] and takes place within [ie "under"] the body of the state'.

65 Martinez Cobo, above n 52, para 379.

An aspiration to end the domination

As mentioned above, the UN *Declaration on the Rights of Indigenous Peoples* is designed to accord ‘dominated’ (‘Indigenous’) peoples the right to *aspire* to achieve certain rights *under, beneath, or within a state-run system of domination*. An important feature of that system is called ‘the territorial integrity of the states’. Article 46 of the UN *Declaration on the Rights of Indigenous Peoples* specifically declares that peoples called ‘Indigenous’ may not question the existence of states, or their territorial integrity. This gives the impression that dominated peoples may not question or challenge the political existence and polity of their dominators. From the viewpoint of the international system of states, Article 46 seems to suggest that nations and peoples termed ‘Indigenous’ may not question the territorial domination that the states have claimed over the lands and territories of the original nations of the continent based on a claimed right of Christian discovery and domination.⁶⁶

Most scholars of international law never focus on the domination of Indigenous Nations and Peoples by states, and thus never advocate ending such domination. They seem to suggest it is possible to maintain the domination system in relation to Indigenous Nations and Peoples, and at the same time eventually achieve a ‘peaceful’ coexistence between peoples called ‘Indigenous’ and states of domination.⁶⁷ Such scholars seem to envision a future in which the nations and peoples being dominated by states will have learned to ‘reconcile’ themselves to living *within* and *under* a given ‘state of domination’.⁶⁸ At least one Indigenous scholar has said that the UN *Declaration on the Rights of Indigenous Peoples* is intended to ‘incorporate Indigenous peoples into the body politic’ of the state.⁶⁹ This view seems to coincide with the findings of the Truth and Reconciliation Commission of Canada.⁷⁰ From the viewpoint of states, efforts must be made to keep dominated peoples pacified and conciliated through a process of ‘reconciliation’ so they will not fundamentally question or challenge the state system of domination, or the violent basis upon which that system came into existence to begin with, as illustrated by the quotation from Oppenheimer above.⁷¹

The UN *Declaration on the Rights of Indigenous Peoples* is being treated by some scholars as a framework for achieving peaceful equilibrium between states of domination and peoples called ‘Indigenous’ without ‘the domination

66 Echo-Hawk, above n 59, 45; Steven Newcomb, ‘The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v M’Intosh* and Plenary Power’ (1993) 20 *New York University Review of Law and Social Change* 303.

67 Echo-Hawk, above n 59, 99–132.

68 *Ibid.*

69 *Ibid.* 125–6.

70 Truth and Reconciliation Commission of Canada, *Honoring the Truth, Reconciling the Future* (2015) <<http://www.trc.ca/websites/trcinstitution/index.php?p=890>>.

71 Nock, above n 7.

of Indigenous Peoples by the state' ever becoming a focus of attention. The document itself is being characterised as 'aspirational' in keeping with the view that states are willing to take note of the fact that peoples called 'Indigenous' have certain aspirations for a more desirable future. No surprise there.

Neither state actors nor most representatives of Indigenous Peoples seem to be arguing that the UN declaration provides a means for liberating Indigenous Peoples from a given state of domination. Article 46 of the declaration, which refers to 'the territorial integrity of states', was apparently written from the statist viewpoint that the UN *Declaration on the Rights of Indigenous Peoples* may not be used by peoples called 'Indigenous' in an effort to challenge the state's system of domination exerted over and used against them.

Imperial states and original nations

The system of domination expressed through the language of international law makes it seem imprecise, from the viewpoint of states, to apply the term 'nation' to peoples termed 'Indigenous' in the international context, and in the general parlance of 'states'. A principle of international law which 'states' never apply to peoples termed 'Indigenous' was expressed by Chief Justice John Marshall in the US Supreme Court decision *Church v Hubbart* in 1804: 'The authority of a nation within its own territory is absolute and exclusive.'⁷² Applying this principle of absolute and exclusive territorial authority to original Native Nations, as against the United States for example, would have very likely created a permanent barrier to the domination–subordination system of the United States in relation to original nations and in relation to the lands, territories and resources of original nations.

Article 46 of the UN *Declaration on the Rights of Indigenous Peoples* is predicated on this principle of exclusive 'state' territoriality. Article 46(1) of the UN declaration says that nothing is to be 'construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity, or political unity of sovereign and independent States'. When we consider the point that 'sovereignty' is 'an unjust form of political domination that limits human freedom',⁷³ and Oppenheimer's point about 'the state' resulting from the systematising of domination by one nation or people over another,⁷⁴ as well as Weber's point that 'the state' is the result of 'the relation of men dominating men',⁷⁵ a question arises: will Article 46 of the UN declaration be interpreted by 'states' to mean that Indigenous Nations and Peoples may not focus on 'states', or on a particular state, as systems of domination? Will Article 46 be interpreted by states as meaning

⁷² *Church v Hubbart* 6 US 187, 234 (1804).

⁷³ Havercroft, above n 30.

⁷⁴ Nock, above n 7.

⁷⁵ Weber, above n 18.

that Indigenous Nations and Peoples may not directly challenge the domination of Indigenous Peoples by states because such a challenge might threaten 'to impair the territorial integrity' and 'political unity' of 'states' of domination?

The fourth preambular paragraph of the UN *Declaration on the Rights of Indigenous Peoples* affirms 'that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust'. US federal Indian law and policy are predicated on US claims of 'ascendancy'⁷⁶ (domination) and superiority on the basis of national origin, as well as on the basis of 'racial, religious, ethnic and cultural differences' between the society of the United States and the original nations of the continent. Justice Joseph Story demonstrated the religious argument the United States has used as a basis for claiming a right of domination over the original nations of the continent, and for refusing to apply the above-mentioned doctrine of territorial exclusivity to any original nation.⁷⁷

Story said of the original nations: 'As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations.'⁷⁸ This matches Francisco de Vitoria's conclusion mentioned above that Indians, as 'pagans', were not 'sovereign'.⁷⁹ Major thinkers of western Christendom regarded non-Christians as being disqualified from having a right to be deemed fully 'sovereign' and to remain independent of Christian European domination.

When Chief Justice John Marshall for a unanimous US Supreme Court said the United States had adopted the principle of 'Christian people' applying the 'right of discovery' to lands that were inhabited by 'heathens',⁸⁰ he, the Supreme Court as a whole and the United States government thereby applied a biblical context and form of reasoning against our nations and peoples. This biblical pattern of reasoning about non-Christian 'heathen' nations only having a right of 'occupancy' and a 'diminished' independence became an established precedent of the US Supreme Court as result of the *Johnson v M'Intosh* ruling,⁸¹ which the United States first began imposing on our nations 194 years ago, as of 2017.

The conceptual system of US domination, and Native ('Indigenous') Nation subordination on the basis of Christian and biblical patterns of thought, is designed to prevent nations termed 'Indigenous' from being able effectively to exclude the United States from the territory of any original nation, while at

76 *Johnson & Graham's Lessee v M'Intosh* 21 US (8 Wheat) 543, 573 (1823).

77 Joseph Story, *Commentary on the Constitution of the United States Volume III* (Hilliard, Gray and Company, 1833) 5 § 1.

78 *Ibid* 135 § 152.

79 See Anghie, above n 2.

80 *Johnson v M'Intosh* 21 US (8 Wheat) 543, 576–7 (1823).

81 *Ibid*.

the same time making certain that every such 'Indigenous' Nation is regarded as 'subject to' the political and legal jurisdiction of the United States. The fact that religious categorisations serve as the starting point of this system of ideas has been well concealed for nearly two hundred years, in part because legal scholars replace 'Christian' with the word 'European'.⁸² The United States claims to possess an absolute territorial exclusivity, based on international law, while arguing, based on international law, that Indian 'Nations' ('tribes') do not possess the prerogative of such territorial exclusivity.

On what basis does the United States assume, for example, that the original nations of the North American continent do not possess territorial integrity and territorial exclusivity? Because, centuries ago, the Christian nations of Europe claimed to have 'discovered' non-Christian Indian lands.⁸³ Politics called 'states', such as the United States and Canada, demand acknowledgement of what they presuppose to be their 'territorial integrity', but they reject out of hand the idea that territorial integrity and exclusivity are characteristics of original nations and peoples termed 'Indigenous'. Both the United States and Canada are to this day still using the metaphors of the ancient Christian law of nations against nations termed 'Indigenous'. They are doing so as a covert means of maintaining a 'state' system of domination over and against such nations, which the United States typically calls 'tribes'.

States such as the United States and Canada do, however, use the word 'nation' politically to communicate the sense of a 'domestic' and 'subordinate' nation, which is metaphorically characterised as existing 'within' or 'internal to' the territorial 'homeland' of a given state, such as the United States or Canada.⁸⁴ On that basis, Indigenous Nations that were originally existing free from domination are now deemed 'domesticated' 'nations' that are considered *subject to*⁸⁵ the domination system ('sovereignty') of a given 'state'. Because internationally recognised 'states' typically apply the term 'nation' to themselves, the term 'nation' is a cardinal feature of the lexicon of international law and of the lexicon used at the United Nations as applied to 'states'.⁸⁶ Indeed,

82 Robert Williams, *The American Indian in Western Legal Thought* (Oxford University Press, 1990) 317.

83 Edward Dumbauld, 'John Marshall and the Law of Nations' (1955) 104 *University of Pennsylvania Law Review* 38.

84 See, eg, Susana Mas, 'Trudeau Lays Out Plan for New Relationship with Indigenous People', *CBC News*, 8 December 2015 <<http://www.cbc.ca/news/politics/justin-trudeau-afn-indigenous-aboriginal-people-1.3354747>>. Notice that the Canadian Broadcasting Corporation editors declined to place an 's' on the word 'people', thereby avoiding the idea that Canada as a country is dealing with distinct nations termed 'peoples' with an 's'.

85 *The Compact Edition of the Oxford English Dictionary* (Oxford University Press, 1971): 'To make (persons, a nation or country) subject *to* a conquering or sovereign power; to bring into subjection *to* a superior; to subjugate [ie to dominate].'

86 Echo-Hawk, above n 59, 4–6, characterises 'Indigenous Peoples' as 'beyond the reach' of certain rights, and further says that 'Indigenous Peoples' have been not

‘inter’ and ‘national’ are obviously combined to indicate relations existing between nations, meaning between states. This terminology is considered to have nothing to do, however, with ‘Indigenous’ Nations which are regarded as falling into a domestic category of ‘interior’ or ‘internal’ affairs of the state. The UN *Declaration on the Rights of Indigenous Peoples* was drafted in keeping with this framework.

In typical writings about international law and the UN *Declaration on the Rights of Indigenous Peoples*, the words ‘nation’ and ‘national’ seem reserved solely as a synonym for polities called states.⁸⁷ In the official language of the United Nations, the terms ‘nation’ and ‘national’ are *never* used as an international law category for peoples called ‘Indigenous’. Few if any non-Indigenous scholars who write about international law *ever* seem to express the view that peoples termed ‘Indigenous’ are rightfully distinct *nations* with a fundamental right to exist and live free and independent of some state’s domination (‘sovereignty’). Even the word ‘peoples’ (with an ‘s’) is only applied grudgingly and cautiously,⁸⁸ if at all, to peoples called ‘Indigenous’ in the international arena. The reason is simple. Adding the letter ‘s’ to ‘people’ denotes many entire peoples, which suggests that they are also *nations* and therefore potentially in competition with the dominationhood claimed by states in relation to a specific territory.

Does the domination of Indigenous Peoples by states violate their rights?

Question: Do Indigenous Nations and Peoples have the right to live free from the dominationhood of states? Dealing with this question requires that we focus on the category ‘the rights of Indigenous Peoples’. If we think of that category as a list of rights which peoples called ‘Indigenous’ are considered to possess, another question arises: does that list of rights include ‘the right to live free from domination by states’? If, on the basis of some rationale, one answers, ‘yes it does’, then it stands to reason that the current domination of the existence of ‘Indigenous’ Peoples by states is in violation of their right to

distinct nations in their own right, but ‘vulnerable minorities captive to hostile or indifferent domestic forums in their own nations’. Thus, strangely, in a most colonising manner, Echo-Hawk has characterised the governments of ‘states of domination’ as being the Indigenous Peoples’ ‘own nations’, rather than their own original nations being their own nations.

87 Asia-Pacific Forum of National Human Rights Institutions and UN Office of the High Commissioner for Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (2013) v. This extensive report uses the word ‘national’ only with regard to ‘states’, as in, eg, ‘National Human Rights Institutions’ and ‘national implementation of the Declaration’. It only focuses on ‘states’ as ‘nations’, and *never* refers to ‘Indigenous Peoples’ as nations.

88 US State Department, above n 14.

live free from state domination. If, however, on the basis of some other rationale, one answers 'no, Indigenous Peoples do not have the right to live free from the domination of the state', then it follows that 'Indigenous' Peoples are presumed to be obligated, on the basis of some rationale, to continue living under the domination of a given state.⁸⁹ In this scenario, it is a sensible task to identify the rationale being used by states to presume that peoples termed 'Indigenous' are obligated to continue living under state domination.

Such a rationale for the domination of the original nations of the continent was expressed by US Supreme Court Justice Joseph Story in the early nineteenth century based on the *Johnson v M'Intosh* ruling: (1) the ancestors of the original nations were not Christians when the Christian nations of Europe invasively arrived, and (2) the Christians would not allow the original nations to possess the prerogatives belonging to absolute, sovereign and independent nations. Why is this? The answer is simple. The Christians used the power of the human mind to frame the original nations of the continent metaphorically as 'infidels, heathens and savages'. The Christians deemed the original nations to be disqualified from the category of 'absolute, sovereign and independent nations' based on Christian mental projections onto the original nations. Domination has a powerful mental dimension.

Story's rationale brings to mind another related point: The *domination of Indigenous Peoples by states* cannot be brought into focus without using the specific phrase 'the domination of Indigenous Peoples by states'. *Without that specific wording*, it is not possible for this issue to become a feature of our conscious awareness. Alternatively, *armed with that specific wording*, it then becomes possible to ask a question that heretofore has not yet been asked and addressed: 'Does the domination of Indigenous Peoples by states violate the rights of Indigenous Peoples?'⁹⁰ This leads to a related question: 'Does the list of rights for peoples termed "Indigenous" include the right to live free from domination by states, generally, or by any given state?' Again, whether we say 'yes, the rights of peoples termed "Indigenous" does include a right to live

89 Henry Wheaton, *Elements of International Law* (B Fellowes, 1836) 220: 'the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes that claim of every other'. Logic would suggest that the long and uninterrupted possession of territory by the original *nations* of the North American continent and American hemisphere would exclude the claims of a right of domination asserted by all other invading and colonising nations. However, the principle of prescription expressed by Wheaton was deemed by the powers of Christendom only to apply to Christian nations, and was therefore deemed to be inapplicable to 'heathen', 'infidel' or 'barbarous' nations. See BA Hinsdale, 'Right of Discovery' (1888) 2(3) *Ohio Archaeological and Historical Quarterly* 363.

90 This way of framing the matter presupposes that 'the domination of Indigenous Peoples by states' does indeed exist. Some might say that this presupposition is being presented here as a taken-for-granted truth without proof.

free from domination by states', or if we say that the list does not include such a right, it is necessary to identify the rationale being used to answer the question. Since the issue is never typically raised, the rationale for either answer is not readily identified.

Given the above ideas, another question arises that has not yet been posed in international law literature with regard to the UN *Declaration on the Rights of Indigenous Peoples*: is it possible for the 'right' of Indigenous Peoples to live free from domination to be realised or 'respected' while those peoples are still existing under the pattern and system of domination of a given state? Because international law scholars have not specifically focused on domination as a problem to be addressed with regard to Indigenous Peoples, there has been no call by those scholars to regard *the domination of Indigenous Peoples by states* as a violation of the right of Indigenous Peoples. It would seem that state actors have been silently making the assumption that states have an unquestionable right to maintain domination over 'Indigenous' Peoples. Then, again, it is possible that by pretending such domination does not even exist states have treated the domination of 'Indigenous' Peoples as something that does not need to be addressed.

Conclusion

Domination and dehumanisation are useful categories of analysis in the field of international law with regard to dominated nations and peoples termed 'Indigenous'. If our goal is the emancipation of original *nations* and peoples from systems of domination, then it seems certain that the UN *Declaration on the Rights of Indigenous Peoples* is *not* the document that will enable us to accomplish this aim. This is especially true given Article 46 of the declaration, and a statist interpretation of that document designed to maintain the reign of 'states of domination' over original nations.⁹¹ What is worse is the number

91 Eg on 16 October 2006, the governments of Australia, New Zealand and the United States made a joint intervention at the United Nations opposing the UN declaration. Among other points made in the document, we find:

There is no definition of 'indigenous peoples' in the text. The lack of definition or scope of application within the Chair's text means that separatist or minority groups, with traditional connection to the territory where they live – in all regions of the globe – could seek to exploit this declaration to claim the right to self-determination, including exclusive control of their territorial resources. And this text would allow them to wrongly claim international endorsement for exercising such rights.

'Statement by NZ Ambassador Rosemary Banks on Behalf of Australia, New Zealand and the United States on the Declaration on the Rights of the Indigenous Peoples' (USUN Press Release No 294(06), 16 October 2006) 2. (This document is on file with the author.)

of Indigenous Peoples' representatives who insist on interpreting the UN *Declaration on the Rights of Indigenous Peoples* in a manner that only serves to reinforce and maintain existing patterns of state domination, while altogether ignoring the need to call for an end to the domination of Indigenous Peoples by states.