

THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND THE PARADIGM OF DOMINATION

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This article argues that the term 'Indigenous peoples' is correctly interpreted as 'dominated peoples'. It is contended that the need for the UN Declaration on the Rights of Indigenous Peoples – adopted by the UN General Assembly on 13 September 2007 – was a direct consequence of (1) a tradition of states defining Indigenous peoples as 'less-than-human' and (2) states constructing and institutionalising in law and policy a framework of domination against Indigenous peoples. However, far from being a remedy to these issues, not one of the 46 Articles of the UN Declaration addresses the issue of domination and Indigenous peoples. A critical examination of the UN Declaration must account for the fact that state actors involved in foreign and international affairs are intent on maintaining the status quo and are quite cognisant of the social construction of reality. In the United States in particular, the framework of domination that constitutes US Indian federal Indian law and policy is traced to arguments found in Vatican documents and Royal colonial charters of England that a discovering 'Christian prince or people', 'Christian state' or 'Christian power' had the right to assume an 'ultimate dominion' (right of domination) as against original non-Christian ('heathen' and 'infidel') nations and peoples. It was the issues of lands, resources and self-determination that arose from this Christian European system of categorisation which drove American Indian elders, spiritual and ceremonial leaders, scholars and activists into the international arena in 1977, and eventually resulted in the UN Declaration being adopted 30 years later in 2007. It remains an open question as to whether the UN Declaration provides a means of overturning the dual tradition of domination and dehumanisation that the United States and other states have built and maintained for more than two centuries. In the case of the United States, such a reform on the basis of the UN Declaration seems highly unlikely, given the unwillingness of the US government, including the US Supreme Court, to disavow or discontinue using its system of dominating categories against Indian nations and peoples.

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When, on 13 September 2007, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (the Declaration), it is fair to say that, with some exceptions, most Indigenous peoples' representatives saw that document as a framework containing the potential means to solve the problems that Indigenous peoples face throughout the world. This article argues that the root cause of those problems is a paradigm of domination and dehumanisation.

A standard for challenging the paradigm of domination is found in the preamble to the UN Declaration, which reads as follows:

Affirming further that all doctrines, policies and practices based on or advocating superiority of people 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.

In his book *Imperialism, Sovereignty, and the Making of International Law*,¹ Professor Antony Anghie reveals through his analysis of the lectures of Francisco de Vitoria, that the very origin of modern international law is predicated on imperialism and colonialism, as well as racial, religious and cultural superiority.

This has a profound implication for the international framework of 'states', and state claims of authority *over* peoples termed 'Indigenous'. Given that domination based on doctrines advocating superiority of one people over another is 'legally invalid, morally condemnable and socially unjust', and given that the working definition of 'Indigenous peoples' involves the presumption that they exist *under* the 'dominance' of 'states' – a 'dominance' that is historically rooted in doctrines of racial, ethnic, cultural and other forms of superiority – the inescapable conclusion is that 'state' claims of dominance over peoples termed 'Indigenous' are illegitimate and must end.

This article will demonstrate that a paradigm of 'domination' is intrinsic to the structure of the category 'Indigenous' as found in a commonly used international 'working definition' of that term. Indeed, based on that working definition, a synonym for 'Indigenous peoples' that is seldom noticed and thus not mentioned is 'dominated peoples'. The phrase 'paradigm of domination' refers here to a systematic use of concepts and categories that construct and maintain 'an order' of domination (often called 'civilisation')² within which nations and peoples termed 'Indigenous' are deemed by the dominating society to exist.

Thinking in terms of 'Indigenous peoples' existing *within* a conceptual framework of domination involves metaphorically thinking of ideas and conceptions *as if* they were some sort of 'container'. To think of a set of ideas as 'a container' is to also conceive of those ideas *as if* they were 'an

¹ Anghie (2004).

² Diamond (1974), p. 1. 'Civilization originates in conquest abroad and repression at home.'

object'.³ The fact remains, however, that the ideas used to construct and maintain such patterns of domination are not a *physical* container, nor a *physical* object; they are nothing more than mental processes. The paradigm of domination is, first and foremost, a product of the mind.⁴

An additional factor that comes into play with regard to 'Indigenous' peoples is a mental structure of domination and subordination. This structure can be expressed as up/down, above/below, and over/under. From the root of domination, a tremendous number of English words emerge that have been used against our originally free and independent peoples:

invade	domination
slavery	domination
empire	domination
capture	domination
conquer	domination
colonialism	domination
vanquish	domination
conquest	domination
government	domination
subdue	domination
subjugate	domination
governments	dominations
reduce	domination
subordinate	domination
lord	dominator

After decades of research, the paradigmatic pattern has become clear.⁵

³ Winter (2001), p 4. 'The conventional understanding of law confronts an insuperable paradox. It is the essence of our concept of law that it operates as an external constraint, much like the impenetrable vegetation of the forest. Yet this very conception already places law in the domain of metaphor and imagination, which is to say in the *internal* realm of the human mind. We cannot even talk about law without metaphorically treating it as an OBJECT.'

⁴ Winter (2001), p 331. 'law is always ideological in the sense that it enforces (and reinforces) the *dominant* normative views of the culture.' For our purposes here, his sentence ought to read: 'enforces (and reinforces) the *dominant* normative views of the [dominating] culture.' (emphasis added). From an Indigenous peoples' perspective imposed non-Indigenous systems of law are more precisely termed 'their law' rather than the universalising phrase 'the law.'

⁵ Anghie (2004). In the Foreword to *Imperialism, Sovereignty, and the Making of International Law*, James Crawford explains that 'Dr Anghie examines a period of episodes in the history of the relations between the West and non-Western polities. He argues that they possess common features, reproducing at different epochs and in different ways an *underlying pattern of domination and subordination ...*' (emphasis added). Crawford further characterises Anghie's argument as follows: 'From the beginning, international law was not exclusively concerned with the relations between states but, and more importantly, with the relations between civilizations and peoples. Moreover, these were relations of *domination*.' p 1 (original emphasis).

The term 'empire' provides an excellent example of this underlying theme of domination: 'an extended territory usu. comprising a group of nations, states, or peoples *under the control or domination* of a single sovereign power: as (1) a state comprising a *dominating conquering* people and the conquered people *dominated*' (emphasis added); 'the territories or peoples under such control or *domination*'⁶ (emphasis added). In keeping with the above paradigm and associated patterns of thought, from the perspective of those who provide embodiment to 'the state', 'the state' is *always and permanently* regarded as being in the dominating ('superior' or 'sovereign') position relative to the 'subordinate' ('inferior') position of Indigenous peoples. The peoples termed 'Indigenous' are regarded, from the perspective of 'the state,' to *always and permanently* have a 'sub' or 'lower' order existence relative to 'the state'. *Webster's Third New International Dictionary Unabridged* provides: 'Civilization: "the process of becoming civilized ..." "the act of civilizing; esp the *forcing* of a particular cultural pattern on a population to whom it is foreign"' (emphasis added). The pattern of domination is found in the word 'forcing'.

Given this, time will tell whether the UN Declaration on the Rights of Indigenous Peoples is adequate to end the use of the dehumanising paradigm of domination against nations and peoples termed 'Indigenous', especially given that the text of the Declaration uses the term 'States' with a capital 'S', which symbolises the dominance of member states of the United Nations relative to those nations and peoples categorised as 'Indigenous'. From the perspective of a desire to end the paradigm of domination, two additional questions arise: Does the UN Declaration on the Rights of Indigenous Peoples provide the means of liberating nations and peoples termed 'Indigenous' from the paradigm of domination? And if not, what additional steps beyond the adoption of the UN Declaration will be necessary in order to end the domination to which peoples categorised as 'Indigenous' have been and continue to be subjected?

Colonial Peoples and the Proposal for a Democratic Colonial Charter

In 1943, during World War II, University of Chicago anthropologist Laura Thompson wrote a remarkable monograph entitled 'Steps Toward Colonial Freedom: Some Long-range Planning Principles for a Peaceful World Order'.⁷ In it, Thompson called the world of Indigenous Peoples 'the

⁶ *Webster's Third New International Dictionary* (1993).

⁷ Thompson (1943), p 1. Laura Thompson was at that time Coordinator of Research on the Indian Education Committee on Human Development at the University of Chicago. The paper was issued by the International Secretariat, Institute of Pacific Relations in New York City. See also, Jacob Viner, 'Memorandum on: The United States and the "Colonial Problem"' 24 June 1944 (at the time 'Strictly Confidential') issued by the Council on Foreign Relations as part of its Economic and Financial Series ('Studies of American Interests in Peace and War').

colonial world',⁸ and called Indigenous peoples 'colonial peoples'.⁹ Thompson said that 'throughout the United Nations there is a growing realization of the need for international agreement on concerted colonial policy'.¹⁰ As she states:

Of course, the colonial issue cannot be considered out of the context of the whole postwar world problem; and since it involves about 500 million people, that is, over one fourth of the world's population, it is actually at the very core of that problem. This means that any progress that is to be made among the United Nations toward agreement on a wise and peaceful program in the colonial sphere will undoubtedly weigh the scales in favor of agreement in other spheres. The point is that we can and must do something active about the colonial problem now, whereas concerted action in regard to many other equally vital issues cannot be taken until after the war is won.¹¹

Thompson explained that she was approaching the problem of 'colonial peoples' as an 'applied anthropologist, attempting to utilize systematically the findings of science – chiefly social anthropology and psychology – and the experiences of [colonial] administrators in many parts of the world, especially among the natives of Oceania and Africa and the American Indians'.¹² This was an explicit acknowledgment that American Indians, Aborigines of the continent of Australia, Maori of Aotearoa and peoples in Africa, such as the Masai, were classified during World War II as 'colonial peoples' because there was 'assumed to exist a dominating conflict of interest between ruling powers and the peoples of their colonies'. In other

⁸ Thompson (1943), p 1. The following is of particular note: 'The memorandum is written on the assumption that American official policy, in principle, supports the following propositions, most of which have been subscribed to in more or less explicit terms in official American statements.' The first proposition is: '1. Every regionally-segregated people with the political capacity for self-government should be given the right of self-determination.' The fifth proposition states in part: 'Although the United States has, throughout most of its independent history been one of the most expansionist of nations territorially, like Russia it has been able to expand into contiguous empty or sparsely-populated spaces, which it has proceeded to settle with its own stock and to incorporate as integral parts of its own political system. While from almost its very beginning as a separate nation, the United States has had what would in other countries be regarded as colonial possessions (e.g. Louisiana, Florida, the various continental "Territories," Alaska, Hawaii, the Philippines, Puerto Rico), the fact that as a matter of both official and of unofficial usage it has carefully avoided the "colonial" terminology and the fact that the continental acquisitions were quickly settled by people of the same stocks as the original states and incorporated on an equal basis into the federal Union have served to keep the American people from acquiring awareness of its "imperial" character, especially with respect to its continental territories.' The author of the memorandum went on to state that the American people were only vaguely 'conscious of our possession of "colonies".'

⁹ Thompson (1943).

¹⁰ Thompson (1943).

¹¹ Thompson (1943).

¹² Thompson (1943).

words, such peoples were considered to be existing under regimes of colonialism.

Thompson's assessment of the colonial situation for American Indians was later supported in her book *Culture in Crisis*, published in 1950. In a foreword to the book, former US Commissioner of Indian Affairs John Collier acknowledged that the US 'Indian service' was an aspect of colonial administration globally. He wrote:

When in 1941, Harold L Ickes, then Secretary of the Interior, and I, then Indian Commissioner, and Willard W Beatty, then as now Director of Indian Education, solicited the research of which this book is one of the products, we were viewing the [US] government's Indian Service as just one among the many enterprises of colonial administration, trusteeship, service to dependencies and minorities, in the world as a whole.¹³

In her 1943 report, Thompson said she had examined 'many different kinds of studies of administration and leadership in colonial and other non-industrial groups, in education, in industry, in artificially induced "social climates" and elsewhere' in order to 'throw light on this exceedingly complex problem'.¹⁴ As she stated: 'On the basis of these studies, I submit for consideration the following positive principles as being some of the essentials for a democratic colonial charter.'¹⁵ She expressed the framework of the problem in terms of the categories 'colonial peoples', 'governing nations' and politically powerful economic interests (corporations).¹⁶ She wrote her paper as part of an effort towards 'the development of an international colonial charter'.¹⁷ Yet nowhere in her paper did she call for an end to colonialism or to emancipate 'colonial' or 'subject' peoples from domination. Rather, her essay was geared towards making the colonial or subject condition of such peoples more 'democratic', within a context of a colonial order – or what she referred to as 'the successful democratic colonial future within a world order'.¹⁸

Only 34 years had elapsed between the publication of Thompson's essay and the time when representatives of American Indian nations entered the international arena in 1977 in an effort to advocate for their fundamental rights and for a redress of their grievances with regard to the political and legal systems of, for example, Canada and the United States.¹⁹ By the late

¹³ Thompson (1950).

¹⁴ Thompson (1943).

¹⁵ Thompson (1943), p 6.

¹⁶ Thompson (1943).

¹⁷ Thompson (1943).

¹⁸ Thompson (1943), p 33.

¹⁹ Deloria (1974). Vine Deloria's classic *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* was published just one year after the armed conflict between the Oglala Lakota Nation and the United States at Wounded Knee on the Pine Ridge Indian Reservation. Although Deloria published *Behind the Trail* three years before the

1970s, the colonial terminology that had been used during World War II to describe the political and legal systems of 'states' relative to peoples termed 'Indigenous' was still apt. And the fundamental nature of that dominating 'colonial' relationship had not changed by 2007 when the UN Declaration on the Rights of Indigenous Peoples was adopted. Perhaps that would explain why Canada, Australia, New Zealand and the United States (CANZUS states)²⁰ voted against the Declaration.

Today, nearly seven decades after Thompson wrote her report for the US military, it remains an open question whether the UN Declaration on the Rights of Indigenous Peoples will provide the means to end the domination of the original nations and peoples termed 'Indigenous' that is endemic to the political and legal systems of the CANZUS states. International parlance may have shifted from 'colonial peoples' to 'Indigenous peoples', but the problematic context of the domination of Indigenous peoples by 'governing nations' and 'corporations' remains unabated. The relationship between 'states' (working hand in glove with multinational and transnational corporations) and Indigenous peoples remains one of domination and subordination.²¹

Yet the fact remains that the UN Declaration on the Rights of Indigenous Peoples does not explicitly address the manner in which the *categorisation* of 'peoples' as 'Indigenous' works to construct and maintain a reality of domination for such nations and peoples. This lack of an explicit challenge in the UN Declaration to the systemic use of categories of domination and subordination in the international arena, and in existing 'state' law systems, creates the tacit and wrongful impression that such dominating patterns of categorisation, in terms of 'states' and 'Indigenous peoples', are legitimate and thus not in need of reform or dissolution.

Reality Construction and the UN Declaration

In 1996, I attended the Inter-sessional Working Group on the UN Draft Declaration on the Rights of Indigenous Peoples in Geneva, Switzerland. At one point, I asked the US delegation the following question: 'Assuming that one day the Draft Declaration on the Rights of Indigenous Peoples is adopted by the United Nations General Assembly, of what practical significance will it be to Indigenous Nations and Peoples throughout the world?' One of the US representatives, a man who worked as a 'political

1977 event in Geneva, Switzerland, it provides an excellent sense of the mood at the time and the forethought that was being demonstrated by the most politically astute and cutting edge thinker in 'Indian Country'.

²⁰ CANZUS is a common acronym for the bloc consisting of Canada, Australia, New Zealand and the United States; these countries originated in British imperialism and colonialism and thus are, in one sense or another, political successors of the British Empire.

²¹ See 'Special Rapporteur Highlights "Negative, Even Catastrophic" Impact of Extractive Industries on Rights of Indigenous Peoples, in Third Committee Statement', www.galdu.org/web/index.php?odas=5388&giella1=eng.

counsel' to the Permanent US Mission to the United Nations in Geneva, responded as follows: 'Well, to the extent that words have meaning, and to the extent that meanings configure reality, the Draft Declaration has importance.'²²

Having studied the sociology of knowledge in two courses taught by CA Bowers at the University of Oregon, I recognised that the US delegate's response was worded in 'social construction of reality' terminology.²³ I interpreted his response to mean that the US government was cognisant of the fact that once the UN Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly, it potentially could provide Indigenous peoples with the means to reconfigure reality for the benefit of peoples termed 'Indigenous'. However, although the UN General Assembly now has the Declaration, its potential to 'configure reality' remains indeterminate. This is partly because of the qualifications put forward by many states at the time of the 2007 vote on the UN Declaration and because, for example, the United States has explicitly refused to recognise the document as an expression of international law.²⁴

Given the above anecdote, we may presume that state representatives working in the area of foreign or external affairs are clearly aware of the world-changing potential of the UN Declaration. And it is undoubtedly for this reason that the CANZUS state representatives seem wary of the Declaration and all that it entails. State actors working in the field of foreign or external affairs – the domain of international law and human rights – are masters of linguistic subtlety and nuance. They comprehend that even a minute shift in wording (concepts and categories) has the potential to shift the construction of reality.²⁵

Take, for example, the difference between the distinct realities constituted by the words 'people' and 'peoples'.²⁶ The only difference

²² Morris (2003), p 119, n 146.

²³ See generally Berger and Luckman (1966).

²⁴ See also the US government statement issued 13 September 2007 as an example of the kind of concerns by the four states that cast 'no' votes (Canada, Australia, New Zealand, and the United States). The 2007 US document is available at www.state.gov/p/io. The Statement issued by Canada announcing that it would be voting against the UN Declaration can be found at www.ainc-inac.gc.ca/ai/mr/nr/s-d2007/2-2936-eng.asp.

²⁵ This is the reason there was such a fight over placing the letter 's' on the word 'people'. 'Peoples' has great significance in international law because of the language of the Human Rights Covenants.

²⁶ See 'International Tobacco Accord Advances Over US Objections', *San Diego Union-Tribune*, 2 March 2003. The Associated Press article focuses on US health attaché David Hohman, who was part of the US delegation that was attending international talks working towards a treaty 'aimed at curbing the spread of tobacco'. According to the article, Mr Hohman said that 'the United States could not agree to the section of the [treaty] text that expresses concern about high smoking levels in "Indigenous peoples"'. The article went on to explain: 'Washington fears that the use of "peoples" rather than "people" could imply sovereignty and would send a wrong signal to native American Indians.' This was a

between the two words is the letter 's', yet semantically they are worlds apart: The word 'people' entails a reality of 'individuals', while 'peoples' entails more than one *nation* in the sense that a people may be deemed a nation, such as the Cree, the Oglala Lakota, the Kumeyaay, the Shawnee, the Haudenosaunee (comprising six nations or peoples) and so forth. Each people (nation) was originally free and independent of and from the domination of an invading Christian European world, and each people (nation) had, at the time of Christian European invasion, its own traditional territory, its language, culture, decision-making processes, population and economic patterns. At a certain point, however, invading forces claimed on the basis of symbolic and ritualised acts to create rights of domination ('rights of sovereignty') over the territories, and by implication over the lives of the original free nations.²⁷

State actors are using their considerable power and influence to make certain that the UN Declaration does not disrupt what is, from this article's perspective, the 'state of domination' that has proven to be politically and economically beneficial to 'the state'. It was this 'state of domination' that drove Indigenous nations and peoples into the international arena beginning in the 1920s during the League of Nations, and then later, starting in 1977.²⁸

The four states that voted against the UN Declaration (Canada, Australia, New Zealand and the United States) have now expressed some level of endorsement or support for the document.²⁹ However, there is every reason to believe that for reasons of reality construction and maintenance, a

candid admission by the United States regarding why it opposed in the international arena the application of the status of 'peoples' to American Indian nations.

²⁷ Keller, Lissitzyn and Mann (1938). This work, *Creation of Rights of Sovereignty Through Symbolic Acts*, was published just five years prior to Thompson's monograph. The authors were inspired to write the book by their professors at Columbia University, men who were prominent scholars of international law: Lindsay Rogers, Joseph P Chamberlain, Charles Cheney Hyde and Philip C Jessup. The authors say the book 'is a study of the endeavors of the leading European maritime states in the period 1400–1800, to acquire dominion [domination] over *terra nullius*'. Elsewhere, they state: 'By the term *terra nullius* is meant land not under any sovereignty [domination]. The presence of a savage population, of aborigines, or of nomadic tribes engaged in hunting and fishing, was generally disregarded by Europeans. For the purpose of this volume, therefore, insofar as any status of sovereignty is concerned, the existence of such a population will not exclude these lands from our definition of *terra nullius*.'

²⁸ That first effort in Geneva, Switzerland occurred just four years after the Declaration of Continuing Independence was issued at an event at Standing Rock organised by the International Indian Treaty Council. The Declaration is available at www.republicoflakotah.com/2009/1974-declaration-of-independence.

²⁹ New Zealand stated support for the UN Declaration in 2010 during the Ninth Session of the UN Permanent Forum on Indigenous Issues at the UN Headquarters in New York. The government of Australia expressed support for the UN Declaration in 2009. On 3 March, in the Speech from the Throne, the Governor General of Canada said that Canada was moving towards an endorsement of the Declaration. Then, on 12 November 2010, Canada officially endorsed its interpretation of the UN Declaration.

great deal of semantic acumen is being used by states such as the United States to make it seem that they are expressing endorsement or support for the UN Declaration, when in fact they are merely endorsing or supporting their own very constrained state-centred *interpretation* of the document. Anyone who doubts this need only take a copy of the statement issued by the US Department of State on 16 December 2010 and compare it with the 13 September 2007 statement made by the United States when it voted 'no' in the UN General Assembly on the adoption of the Declaration on the Rights of Indigenous Peoples. There is no appreciable difference between the two statements.³⁰

Because state actors in the international arena are formidable rhetoricians, Indigenous nations and peoples need to be hyper-vigilant when it comes to analysing the language issued by states in their statements about the UN Declaration. It is important to focus on the differences between the contexts, perspectives and interpretations of Indigenous nations and peoples, and those of states. On one side of this divide, peoples termed 'Indigenous' seek to be liberated (freed) from frameworks and institutions of domination and dehumanisation. The 'states' of the world, on the other hand, seek to maintain the empowering and wealth-accumulating reality to which they have grown accustomed, by building their economies for centuries on from our Indigenous lands, territories and resources. The result, of course, has been the impoverishment, dispossession and ill-health of Indigenous peoples.³¹

With regard to the desire of peoples termed 'Indigenous' to live free from domination and to be fully self-determining,³² it is ironic that non-dominance is one dimension of what it means to be 'Indigenous'.³³ This presumes that 'states' occupy a perpetual position of *dominance* (domination) *over* those presumed to exist in a position of 'Indigenous' 'non-dominance'. It is in this context, as mentioned above, that 'Indigenous peoples' means 'dominated peoples'. Yet the UN Declaration on the Rights of Indigenous Peoples does not address this fact explicitly; its text is silent regarding the correlation between the words 'Indigenous' and 'dominated'. The next section more closely examines the issue of domination in the working definition of Indigenous peoples.

³⁰ See United Nations *The State of the World's Indigenous Peoples* (2009) ST/ESA/328. A detailed entry on Wikipedia mentions that the US mission in 2007 'issued a floor document, "Observations of the United States with Respect to the Declaration on the Rights of Indigenous Peoples" setting out its objections to the Declaration'. See http://en.wikipedia.org/wiki/UnitedNationsDeclaration_on_the_Rights_of_Indigenous_Peoples. The document 'Observations of the United States' is on file with the author. It can be found at www.state.gov/p/io.

³¹ See United Nations, *The State of the World's Indigenous Peoples* (2009) ST/ESA/328.

³² Article 3 of the UN Declaration, www.un.org/esa/socdev/unpfii/en/drip.html.

³³ Khan and bin Talal (1987), pp 5–8.

Indigenous Peoples and the Paradigm of Domination

In *Indigenous Peoples: A Global Quest for Justice*, the authors say that 'what constitutes an Indigenous people and an ethnic group is very difficult to draw'.³⁴ They continue:

There are four major elements in the definition of Indigenous peoples: pre-existence (i.e. the population is descendent of those inhabiting an area prior to the arrival of another population); non-dominance; cultural difference; and self-identification as Indigenous.³⁵

Domination is the frame that contextualises and makes sense of these four major elements, which may be accurately rephrased as follows: pre-dominance, non-dominance, culturally different from the invading (dominating) population, and self-identification as dominated. In other words, pre-dominance, dominated, culturally different than the dominators, and self-acknowledgement as being dominated.

The authors of the report also state: 'Although there is no universally accepted definition of Indigenous peoples, the United Nations uses a working definition, developed by a Special Rapporteur on the Problem of Discrimination against Indigenous Populations for the United Nations Sub-Commission on Prevention and Discrimination and Protection of Minorities.' They then provide the following language:

Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origins arrived there from other parts of the world, overcame them and, by conquest, settlement or other means reduced them to a non-dominant or colonial situation ...³⁶

The authors refer to the 'existing descendants' of those peoples who were already living in a given place when 'persons of a different culture or ethnic origin arrived overcame them, and, by conquest settlement or other means *reduced them* to a non-dominant or colonial situation' (emphasis added). Thus, 'the universally accepted definition of Indigenous peoples' is based on a mental (cognitive) model of an invading population having 'reduced' an original people from a free and therefore non-dominated state of existence to an un-free dominated state of existence. Each new generation of the peoples said to have been 'overcome' and 'reduced' is thus tacitly considered to have been born into a state of domination. This imposed 'under a state of domination' status is treated by 'states' as if it had been inherited. In a sense, it has been because of the way that the dominating and

³⁴ Khan and bin Talal (1987).

³⁵ Khan and bin Talal (1987).

³⁶ Khan and bin Talal (1987), p 7.

subordinating system of categorisation is replicated from one generation to the next.

Given this scenario, from the invaders' perspective the free existence of the first, original peoples is considered to have been merely temporary.³⁷ The state of domination, again from the invaders' perspective, is considered to be permanent. The resulting 'state of domination' is expressed more concisely as, 'the State,' with a capital 'S' to metaphorically denote a 'higher' or 'dominant' state of existence' over or above the 'Indigenous peoples'. The invaders consider the original peoples to have forever lost their right to a free existence, an assumption this article refutes.

The original state of free existence is treated metaphorically by 'the state' as if that existence were an original 'home' that has been destroyed like the Indian villages that were burned after the Indian people themselves had been rounded up by the Spanish soldiers and forced to undergo a process of '*reducción*' (reduction, which is 'domestication' and domination).³⁸ We as originally free peoples are deemed by the invaders to have no 'right of return' to that original existence of our ancestors, free from domination.

Further Deconstructing the Concept of Indigenous

In *Webster's Dictionary*, the term 'Indigenous' is traced to Old Latin: *indu* and *endu*, meaning 'in, within (akin to L[atin] *in* and L[atin] *de down* + L[atin] *gignere* to beget)'. Thus the word 'Indigenous' is constructed by combining Latin terms meaning variously 'in', 'down' and 'beget' (procreation, sire, cause). Structurally, dominance is 'up' and non-dominance is 'down', which obviously signifies an existence under 'the dominant, or dominating'.³⁹

The same dictionary defines 'domestic' as meaning variously 'Indigenous', 'living near or about the habitations of man', 'domesticated' and 'tame'.⁴⁰ Characterising 'domestic' as meaning both 'Indigenous' and 'living near or about the habitations of man' suggests that in this context 'Indigenous' and 'man' comprise two separate categories. This in turn further suggests that the realm of Indigenous peoples exists somewhere 'outside' but in the surrounding area of the realm of 'man' or 'mankind'.

³⁷ Story (1833). An example of this is found in a quote from US Associate Supreme Court Justice Joseph Story's mention of the Indians' 'temporary and fugitive purposes': pp 135–36, para 152. 'As infidels, heathen, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign and independent nations. The territory, over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to Christians, deemed, as if it were inhabited only by brute animals.' (emphasis added)

³⁸ Pagden (1982), pp 34–35. In the Papal Bull of 4 May 1493, this is expressed by the Latin term *deprimantur*.

³⁹ See *deprimo* as the root for *deprimantur*: see www.archives.nd.edu/cgi-bin/lookup.pl?stem=depri&ending=mantur.

⁴⁰ *Webster's Seventh New Collegiate Dictionary* (1965).

Given that the phrase 'domestic animals' refers to animals that live 'near or about the habitations of man', one could easily infer that this suggests a connection between the concepts 'domestic' and 'Indigenous'. The application of the term 'domestic' to American Indian nations – as found in the phrase 'domestic dependent nations', commonly ascribed to Indian nations in US law⁴¹ – is a direct consequence of originally free and independent Indian nations being categorised as existing *on the same conceptual level*, and the same distance from 'man' or from 'humans', as wild animals that have been domesticated or tamed.⁴² This analysis points to the conceptual roots of dehumanisation in the international working definition of the term 'Indigenous', which is what makes working towards the realisation of human rights necessary for peoples termed 'Indigenous'.⁴³

The semantic nuances mentioned above are no small matter. They provide a deeper and troubling context for the UN Declaration on the Rights of Indigenous Peoples. Such problematic conceptions point to a centuries-long tradition of categorising certain peoples as being outside but near the classification of 'human beings'. These conceptions cut to the heart of what is at stake in the present-day semantic struggle between Indigenous peoples and states regarding the interpretation of the UN Declaration on the Rights of Indigenous Peoples. For what is at stake is nothing less than the nature of the reality that Indigenous peoples have *the right* to create on the basis of the individual and collective human rights expressed in the UN Declaration, or even beyond the Declaration on the basis of their original free existence.

For American Indian nations and peoples, the Declaration needs to be read in the historical context of the dehumanising reality that was carefully constructed by Christian Europeans, a destructive reality that has existed for more than five centuries. From the vantage point of that context, the

⁴¹ *Cherokee Nation v Georgia* 30 US 1 (1831).

⁴² See Rosenstand (2000), p 249. 'At the time when [Emmanuel] Kant lived [1724–1804], human beings were often treated as things, tools and stepping-stones for the needs or convenience of others. This idea was a legitimate part of public policy in many places throughout the world, and the moral statement that a thinking being should never be reduced to being merely a tool for someone else became part of the worldwide quest for human rights – rights that still have not been universally implemented.'

⁴³ Rosenstand (2000), p 257. Rosenstand makes a similar point with regard to women: 'In the past, women's rights have followed a course similar to that of animals and children. Women had very few rights until the late nineteenth century – no right to hold property, no right to vote, no right over their own person. This went hand in hand with the common assumption that women were not capable of moral consistency and thus were not responsible (mention of women and children in the same breath was no coincidence).' Rosenstand also mentions John Stuart Mill's argument 'that the right to self-determination should extend universally *provided* that the individuals in question have been educated properly, in the British sense, so that they know what to do with self-determination. Until then, they are incapable of making responsible decisions and should be "protected" – children by their guardians and colonial inhabitants by the British.' (original emphasis) Notice that this only deals with the self-determination of 'individuals', and not with the collective self-determination of 'peoples'.

Declaration on the Rights of Indigenous Peoples points in the direction of what might be termed *corrective* human rights as well as collective human rights – that is, the right to correct the wrongs that have been institutionalised in the form of racism, colonisation, domination and dehumanisation. In *The Fall of Natural Man*, Anthony Pagden observes that during the Age of Discovery:

The early chroniclers and natural historians of the Americas ... were not committed to an accurate description 'out there'. They were attempting to bring within their intellectual grasp phenomena which they recognized as new and which they could only make familiar, and hence intelligible, in terms of an anthropology made authoritative precisely by the fact that its sources ran back to the Greeks.⁴⁴

In 'sixteenth-century Europe', for example, the Europeans 'had very little knowledge and still less understanding of the peoples beyond its borders', and 'there were very few terms with which to classify men'.⁴⁵ 'In European eyes most non-Europeans and certainly all non-Christians ... were classified as barbarians.'⁴⁶ Pagden traced the roots of this thinking back to the ancient Greeks:

Non-Greek speakers ... lived, by definition, outside the Greek family of man ... and thus had no share in the collective cultural values of the Hellenic community. The *oikumene*, was, of course, a closed world, access to which was, in reality, only by accident of birth; but for the Greeks, for whom birth could never be a matter of accident, it was also a superior world, the only world, indeed, in which it was possible to be truly human.⁴⁷

Because the peoples of Western Christendom classified our Indigenous ancestors as 'barbarians' (barbarous peoples),⁴⁸ based on a system of thought traced back to the ancient Greeks, this meant that our peoples were categorised as 'not truly human'. The relatively few categories that the Western Europeans had at their disposal made it a foregone conclusion that our peoples would be categorised and treated as less than human, because the *only* categories they possessed for dealing with non-Christian European peoples were dehumanising ones: 'savage', 'heathen', 'pagan', 'infidel', 'uncivilised' and so forth.⁴⁹ As Pagden notes:

For most Europeans in the sixteenth and seventeenth centuries the image of the 'natural man' was very different ... he was clearly someone who had chosen to live *outside the human community*. And

⁴⁴ Pagden (1982), p 6.

⁴⁵ Pagden (1982).

⁴⁶ Pagden (1982).

⁴⁷ Pagden (1982), p 16.

⁴⁸ See the papal bulls of 1493 in Davenport (1967).

⁴⁹ Williams, (2005).

all such society-less creatures, unless they were saints, were thought of as something less than human, having cut themselves off from the means which God had granted to every man that he might achieve his end, his *telos* as a man. (emphasis added)⁵⁰

Conceiving of our peoples as outside the human community and thus 'less than human' has continued up to the present through the dominating and dehumanising system of categorisation institutionalised in law and policy. For centuries, Christian European jurists, legislators and other governmental officials used mental processes that conceived of our peoples as if they were 'other than' or 'less than' human. Those conceptions became habitualised and institutionalised in the form of systems of categorisation that came to be regarded as legitimate 'legal systems'. To this day, dominating and dehumanising thought processes from previous centuries remain written into documents (case law and statutes), and are accepted as valid by the dominating society despite the passage of time.⁵¹

It is this destructive legacy of dehumanisation (and its corollary, domination) that has caused peoples termed 'Indigenous' to work toward the development of a *human* rights document such as the UN Declaration on the Rights of Indigenous Peoples. However, at this point we have no way of knowing whether the UN Declaration provides the means to end the centuries-long tradition of dehumanisation and domination against Indigenous peoples in state law and policy. After all, the UN Declaration does not alter the fact that the conception and operation of 'the state' relative to nations and peoples termed 'Indigenous' is a framework of domination and dehumanisation in relation to those nations and peoples. A case in point is the United States and its federal Indian law and policy, the premise of which will be explored below.

Before delving into the premise of US federal Indian law and policy, it is important to acknowledge that different cultural backgrounds result in differences in context and perspective for 'states', and for those nations and peoples termed 'Indigenous'. When originally free nations and peoples known as 'American Indians' entered into the international arena in the late 1970s and early 1980s, they did so in part because their oral history reminded them of their original free existence prior to Christian European invasion, domination and dehumanisation. Those representatives were able to recall that our nations and peoples had lived for thousands and thousands of years perfectly independently of any Christian European state or condition of domination.

Those Elders and spiritual leaders had experienced growing up with their grandmothers and grandfathers, who remembered in story, song and ceremony their original free existence, a time we might call BC (Before Colonisation). They also recalled that invading states had made treaties with

⁵⁰ Pagden (1982), pp 8–9.

⁵¹ See Winter and Lakoff (1999), pp 139–53.

our original free nations because of our original independence.⁵² This perspective is also important when it comes to interpreting the UN Declaration on the Rights of Indigenous Peoples.

Legitimacy, Domination and US Federal Indian Law

In his book *The Politics of Communication*, Claus Mueller discusses the issue of 'Legitimacy in Modern Society'.⁵³ Under the heading 'Legitimacy as the Basis of Domination and Authority', he writes:

Domination, to recapitulate, designates the control of a limited number of individuals over the material resources of society and over access to positions of political power. Legitimacy confers authority on a system of domination, making its decisions regarding policies, priorities, or the allocation of resources rightful. Legitimizing rationales, necessary to any system of domination, are effective only if their underlying principles have been internalized by the public, that is, collectively accepted as normative and thus as binding.⁵⁴

Mueller further points out that: 'Legitimacy, once established, serves as the most effective justification for the manner in which political power is exercised.'⁵⁵ In the context of the United States, where do we find an explanation of the legitimating rationale of the system of domination known as 'US federal Indian law and policy?' The most succinct answer is found in the US Supreme Court ruling *Johnson v M'Intosh*.⁵⁶ In the *Johnson* ruling,

⁵² Some of us today, as scholars and activists, and scholar-activists, still carry that flame of understanding of our original free existence, a pre-domination age.

⁵³ Mueller (1973).

⁵⁴ Mueller (1973), p 129.

⁵⁵ Mueller (1973).

⁵⁶ *Johnson & Graham's Lessee v M'Intosh* 21 US 8 Wheat 543 (1823). See generally Robertson (2008). Robertson documents that the *Johnson* decision was the result of a feigned case; the attorneys for the plaintiff land companies that had received their land titles through direct purchases from Indian nations went looking for a defendant who would agree to help them advance their lawsuit to win recognition of those land titles obtained from Indian nations. The land companies eventually found an amenable 'defendant' in William M'Intosh. The attorneys for the plaintiff land company also paid for M'Intosh's legal counsel. Isaac (1995) notes that *Johnson & Graham's Lessee v M'Intosh* and *Worcester v Georgia* (1832) 31 US 530 (USS Ct) 'have been frequently cited by Canadian courts, including the Supreme Court of Canada'. He tacitly acknowledges the paradigm of domination with the following language: 'Interestingly, both decisions struggled with the issue of how the [British] Crown assumed sovereignty over North America and seem to conclude that conquest or discovery forms a sound basis to limit Aboriginal title as a burden on the Crown's title': p 2. The phrase 'assumed sovereignty over' is accurately rephrased as 'assumed a right of domination over North America'. It is important to note that the paradigm of domination also forms the context for the words 'aborigine' and 'aboriginal'. *Webster's Third New International Dictionary* provides the following: "'aborigine" "ab origine from the beginning" 1: an indigenous inhabitant of a country: one of the native people esp as contrasted with an invading or

Chief Justice John Marshall, for a unanimous court, followed the pattern of thinking found in our earlier discussion of the concept 'Indigenous'.⁵⁷ The element of 'pre-existence' is what Marshall termed the Indians' 'rights to complete sovereignty, as independent nations'. But the court claimed that this original independence had been 'necessarily diminished, by the original fundamental principle, that discovery gave title to those who made it [discovery]'.⁵⁸

Since 1823, the US government has used the above sentence from *Johnson v M'Intosh* to argue that as soon as 'Christian people' arrived to North America, American Indian nations – presumably as if by magic – no longer possessed 'rights to complete sovereignty, as independent nations'.⁵⁹ In other words, the United States' central argument claims that Indian rights to complete sovereignty as independent nations were 'reduced' ('diminished') and thus permanently ended by the 'principle of discovery', and by the arrival of 'Christian people' as distinguished from 'heathens'.⁶⁰

colonizing people' (emphasis added). Another way of stating this is 'as contrasted with a dominating people'. Aboriginal is, of course, simply the adjectival form of 'aborigine'. Thus invasion, colonisation and domination provide the background context for the 'Crown's 'assumed sovereignty' and for the concept of 'aboriginal title'.

⁵⁷ Isaac (1995), p 4.

⁵⁸ *Johnson & Graham's Lessee v M'Intosh* 21 US 8 Wheat 543 (1823) and *Worcester v Georgia* (1832) 31 US 530 (USS Ct) at 574.

⁵⁹ In *Oliphant v Suquamish Indian Tribe* 435 U S 191, 98 S Ct 1011, 55 L Ed 2d 209 (1978), Chief Justice William Rehnquist stated for the majority: "Indian reservations are 'a part of the territory of the United States' *United States v Rogers*, 4 How 567, 571, 11 L Ed 1105 (1846). Indian tribes 'hold and occupy [the reservations] with the assent of the United States and under their authority' at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir rights to complete sovereignty, as independent nations [are] necessarily diminished' *Johnson v. M'Intosh* 8 Wheat 543, 574, 5 L Ed 681 (1823)." The original language from the *Johnson* ruling reads: "Their rights, to complete sovereignty, as independent nations *were* necessarily diminished...by the original fundamental principle that discovery gave title to those who made it [the discovery]" p 574 (emphasis added). Rehnquist changed the word 'were' to 'are' thereby implying that the supposed 'diminishment' of the original independence of Indian nations is ongoing, present tense, and perpetual. Chief Justice Rehnquist used the term 'overriding sovereignty' nine times in his relatively short ruling for the majority.

⁶⁰ At a 'Native Leadership Forum' (2-3 June 2011) on the Pechanga Indian Reservation in Southern California, law professor David Getches said that the US Supreme Court acknowledged in *Worcester v Georgia* that 'something was taken from them [the Indians] but what it is, is limited'. What Mr Getches did not provide his audience, however, was the rationale or basis upon which 'something' was supposedly 'taken' from the Indians. Nor did he say what *it* was that has been purportedly 'taken away' from American Indians. This discussion of *Johnson v M'Intosh* points out that the unstated 'it' was 'their rights to complete sovereignty, as independent nations'. According to the US Supreme Court in *Johnson*, it was the Christian discovery of non-Christian lands that supposedly caused those Indian 'rights' of original independence to be 'diminished'.

This, then, is a central and religiously premised 'domination' in US law and policy.

In a 1997 law review article,⁶¹ Professor Lindsay Robertson claims that the Supreme Court 'had no choice' but to turn to 'discovery'. Robertson says: 'Britain had asserted the doctrine [of discovery] as a constituent part of crown colonial policy during the whole of the colonial period and contemporaneous land titles traced to this assertion.'⁶² He then quotes *Johnson v M'Intosh* as follows: 'However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted and afterwards sustained it becomes the law of the land and cannot be questioned.'⁶³ Below, we will see that Marshall's use of 'pretension' demonstrates that the Supreme Court was talking about a rhetorical (persuasive) technique of *pretending* to convert into conquest (a claimed right domination) the *Christian* discovery of *non-Christian* lands in North America.

Robertson maintains that the language from the charters of England was the 'evidence' provided by Chief Justice Marshall to support the court's contention about the *pretension* of converting the discovery of an inhabited country into conquest (domination). As Robertson puts it:

As his principal proof, Marshall offered the terms of nine documents ... The first of these, the 1496 British crown commission to John and Sebastian Cabot authorized them 'to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England.' According to Marshall, this evidenced the Crown's 'complete recognition of the principle which has been mentioned,' in that the [royal] commission 'assert[ed] a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and at the same time, admitting the prior title of any Christian people who may have made a previous discovery.' In 1498, the Court found, Cabot, acting under this commission, 'discovered the continent of North America, along which he sailed as far as Virginia. To this discovery,' Marshall stated, 'the English trace their title.' In 1578, the Crown by charter similarly authorized Sir Humphrey Gilbert 'to discover and take possession of such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people.' This charter was renewed to Sir Walter Raleigh, the Court notes 'in nearly the same terms.' In 1606, the Crown by charter granted to Sir Thomas Gates and others specified territories 'which either belonged to [King James I] or were not then possessed by any other Christian prince or people.' Three years later, a new and enlarged charter granted a portion of the grantees 'in absolute property' the lands later comprising Virginia.⁶⁴

⁶¹ Robertson (1997), pp 759–77.

⁶² Robertson (1997), p 761.

⁶³ Robertson (1997), p 761.

⁶⁴ Robertson (1997), pp 762–63.

Clearly, what the court claimed had 'diminished' Indian rights to complete sovereignty as independent nations – and provided the basis for the pretension that 'discovery' is 'conquest' – was the self-proclaimed 'right' of Christian monarchs to *pretend* to have 'taken possession' of lands 'then unknown to Christian people', or lands 'not then possessed by any other Christian prince or people' – in other words, the claimed right to take possession of and dominate lands inhabited by our free and independent non-Christian ancestors, the traditional territories of our nations and peoples.⁶⁵

In 1824, just a year after his judgment in *Johnson v M'Intosh*, Chief Justice Marshall published his *History of the American Colonies*, in which he further explained the Royal Charter issued by England's King Henry VII that had been issued in March 1495 to John Cabot and his sons. In his *History*, Marshall pointed to the same framework that Joseph Story would end up explicating ten years later in his *Commentaries on the Constitution of the United States*. Marshall used the Cabot Charter to explain the rule of 'discovery' that he said had been adopted and advanced by the English monarch. He said King Henry VII of England had 'granted a commission to John Cabot ... in order to discover countries *unoccupied by any Christian state*, and to take possession of them in his [the king's] name.' (emphasis added)⁶⁶

Justice Story and the Domination–Subordination Structure

In his *Commentaries on the Constitution of the United States*, Associate Justice Joseph Story⁶⁷ provided his own explanation of the John Cabot charter that concurred with Chief Justice Marshall's religious language in the *Johnson* ruling:

The ambition of Henry the Seventh was roused by the communications of Columbus, and in 1495 he granted a commission to John Cabot, an enterprising Venetian, then settled in England, to proceed on a voyage of discovery, and to subdue and take possession

⁶⁵ See generally Keller et al (1938). The strength and persistence of such 'pretensions' is demonstrated in the Kumeyaay territory, which is now designated by the dominating society as 'San Diego County' and 'Imperial County' in California. Each year, the US Naval Base Point Loma at Point Loma, California opens to the public for a re-enactment of the ceremonial and symbolic act of possession of the Kumeyaay territory by conquistador Juan Cabrillo in 1542. The US military is represented at the event by US naval officers.

⁶⁶ Marshall (1824), p 12. In *Creation of Rights of Sovereignty Through Symbolic Acts*, the authors say that the 'customary phrase in the instructions' to various English and French 'discoverers authorized them to annex, in the name of their sovereign, any lands "not previously possessed by any *Christian prince*"': p 10 (original emphasis).

⁶⁷ Because Justice Joseph Story was seated on the US Supreme Court at the time of the *Johnson* ruling, his later writings provide important insight into the basis of that decision.

of any lands unoccupied by any Christian Power, in the name and for the benefit of the British Crown.⁶⁸

In § 2, Story continues:

Such is the origin of the British title to the territory composing these United States. That title was founded on the right of discovery, a right, which was held among the European nations a just and sufficient foundation to rest their respective claims to the American continent.⁶⁹

He also writes:

§ 5. The European nations found little difficulty in reconciling themselves to the adoption of any principle, which gave ample scope to their ambition, and employed little reasoning to support it. They were content to take counsel of their interests, their prejudices, and their passions, and felt no necessity of vindicating their conduct before cabinets, which were already eager to recognise its justice and its policy. The Indians were a savage race, sunk in the depths of ignorance and heathenism. If they might not be extirpated for their want of religion and just morals, they might be reclaimed from their errors. They were bound to yield to the superior genius of Europe, and in exchanging their wild and debasing habits for civilization and Christianity they were deemed to gain more than an equivalent for every sacrifice and suffering. The Papal authority, too, was brought in aid of these great designs; and for the purpose of overthrowing heathenism, and propagating the Catholic religion. Alexander the Sixth, by a Bull issued in 1493, granted to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince.⁷⁰

Story's accompanying footnote reads: '*Ut fides Catholica, et Christiana Religio nostris praesertim temporibus exaltetur, &c., ac barbarae nationes deprimantur, et ad fidem ipsam reducantur*' is the language of the Bull. 1 Haz. Coll. 3.⁷¹ The Latin '*ac barbarae nationes deprimantur*' translates as follows: 'and that barbarous nations be subjugated [dominated]'.⁷² *Deprimantur* also means 'to sink, to press down, or depress' – in other words, 'to dominate'.⁷³ The context for these ideas is more fully revealed in a Latin sentence from the Inter Caetera bull of 3 May 1493, '*sub dominio actuali temporali aliquorum dominorum christianorum constitute non sint*',

⁶⁸ Story (1833), p 3.

⁶⁹ Story (1833), p 4.

⁷⁰ Story (1833), p 7.

⁷¹ Story (1833).

⁷² Story (1833).

⁷³ *Deprimantur* is translated at www.archives.nd.edu/cgi-bin/wordz.pl?keyword=deprimantur.

which refers to 'lands not under the actual temporal domination of any Christian dominator'.

In § 6 of his Commentaries, Joseph Story provides the following interpretation of the above language:

It may be asked, what was the effect of this principle of discovery in respect to the rights of the natives themselves. In the view of the Europeans, it created a peculiar relation between themselves and the aboriginal inhabitants. The latter were admitted to possess a present right of occupancy, or use in the soil, which was subordinate to the ultimate dominion of the discoverer.

Here, then, we see Story explicitly deploying the domination-subordination system of categorisation. He premises the classifications of 'dominion' (domination) and 'subordination' on the distinction between the religious categories 'Christian state' (or 'Christian Power' or 'Christian prince') and 'heathen' (non-Christian) Indians.⁷⁴

The combination of the above excerpts from the writings of Marshall and Story, both of whom were architects of *Johnson v M'Intosh*, enables us to more accurately contextualise the US Supreme Court's pretension of conquest in that Supreme Court decision: A Christian 'discovery' of 'lands unoccupied by any Christian state' (Marshall), or a Christian discovery of lands 'not possessed by any Christian prince' (Story) supposedly diminished (reduced) Indian rights to complete sovereignty as independent nations. This was the assertion of a right to exert Christian domination ('ultimate dominion', '*dominorum Christianorum*') over non-Christian lands. To this day, this doctrine of Christian domination is regarded as the supreme law of the land in the United States, and it is on this basis of Christian claims to rights of discovery and domination that American Indian nations are categorised in US law as 'domestic dependent nations'.⁷⁵

Given that US federal Indian law is premised on the Christian discovery of non-Christian lands, the question becomes: 'Does the UN Declaration on the Rights of Indigenous Peoples provide a means of bringing an end to the

⁷⁴ Anghie (2004), p 29. 'Vitoria bases his conclusions that the Indians are not sovereign on the simple assertion that they are pagans. In so doing he resorts to exactly the same crude reasoning which he had previously refuted when denying the validity of the Church's claim that the Indians lack rights under divine law because they are heathens.' By using a framework of *jus gentium* rather than divine law, Vitoria reached the same conclusion with regard to Indian sovereignty. On this point, Anghie states: 'Thus all the Christian practices which Vitoria dismissed earlier as being religiously based, as limited in their scope to the Christian world and therefore inapplicable to the Indians, are now reintroduced into his system as universal rules. This astonishing metamorphosis of rules, condemned by Vitoria himself as particular and relevant only to Christian peoples, into universal rules endorsed by *jus gentium* is achieved simply recharacterizing these rules as originating in the realm of *jus gentium*. Now, Indian resistance to conversion is a cause for war, not because it violates divine law, but the *jus gentium* administered by the sovereign.' p 23.

⁷⁵ *Cherokee Nation v Georgia* 30 US 1 (1831).

Paradigm of Christian Discovery and Domination in US law and policy?' A powerful tool that can be used towards that end is found in the third paragraph of the Declaration's preamble:

Affirming further that all doctrines, policies and practices based on or advocating superiority of people 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.

This standard is an indictment of the premise of US federal Indian law and policy, and the doctrines of Christian discovery and domination in US law. This is especially so given that US federal Indian law and policy originated in notions of religious and racial superiority, as well as in imperialism and colonialism.

Efforts by States to Maintain a Status Quo of Domination

The most effective way for states such as the United States to maintain the status quo of domination and subordination relative to our nations and peoples is by making certain that the concepts and categories, myths and metaphors, interpretations and cultural models that work to constitute state dominance continue to be the officially accepted basis for reality construction and maintenance. To the extent that the UN Declaration on the Rights of Indigenous Peoples is capable of inverting that order, states will resist its implementation, or will work to interpret its text so as to further maintain state dominance.

However, as nations and peoples now living under a present-day dominance traced back to ritual acts of possession, Vatican Papal Bulls and Christian Royal Charters, we face a strange paradox. We now live within the context of the language system of the dominating society, and that language system exists *within us* as a neuro-semantic network and as one means of constructing and interacting with the world.⁷⁶ This means that we are attempting to challenge a dominating reality by using a language that, in ways we seldom notice, inadvertently constructs and sustains the very dominating reality we are attempting to challenge.

The dominating society's networks of interpretation – such as, for example, US federal Indian law and policy – automatically reinforce the status quo that many of us are working to challenge in order to liberate our nations and peoples from illegitimate domination. Nonetheless, despite many difficulties, the language of the dominant society remains one of the most powerful means that we as Indigenous peoples have to shift, and even transform, to end the dominating paradigm of the colonising, non-Indigenous world. Time will show the extent to which the UN Declaration on the Rights of Indigenous Peoples will serve as a means of affecting that liberating transformation.

⁷⁶ See Newcomb (2011).

At the same time, we can be certain that state representatives will interpret the UN Declaration on the Rights of Indigenous Peoples so as to maintain the conceptual structure of domination and subordination. Predictably, state actors will reject any pro-Indigenous peoples' interpretations of the UN Declaration that attempt to question the presumed supremacy or dominance of states relative to Indigenous nations and peoples. Any efforts by Indigenous peoples to openly question and challenge the dominance of the states will likely be dismissed out of hand. Article 46, the very last article of the UN Declaration, will undoubtedly be used by states to maintain state dominance relative to nations and peoples termed 'Indigenous'. According to Article 46, nothing in the Declaration 'may be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political entity of sovereign and independent States'.⁷⁷

Thus one argument most immediately available to state actors and anti-Indigenous forces on the basis of Article 46 is that pro-Indigenous interpretations of the UN Declaration, particularly with regard to the rights of 'self-determination'⁷⁸ and 'sovereignty over natural resources', have the potential to harm the security interests and territorial integrity of states.⁷⁹ These days, the scope of the category 'security interests of the state' is ever expanding. This means that efforts by Indigenous nations and peoples to alter the status quo by asserting our 'collective human rights', or by attempting to raise the political status of Indigenous nations and peoples above the lower level of a 'domestic dependent nation' or 'tribe', are likely to be interpreted by state actors as efforts to 'subvert the state of dominance' and thus as evidence of 'Indigenous insurgency'.⁸⁰

According to such judgments by state actors, it is evidently considered impermissible for peoples termed 'Indigenous' to work towards ending the

⁷⁷ United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly 13 September 2007, A/RES/61/295, Article 46.

⁷⁸ United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly 13 September 2007, A/RES/61/295, Article 3. 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

⁷⁹ Indigenous peoples' issues have been treated as 'national security' matters by the United States at least since 1996 during the Clinton Administration. See 'US National Security Council, Position on Indigenous Peoples', 18 January 2001, www1.edu/humanrts/usdocs/Indigenousdoc.html. Human Rights Library 01/12/02. Comment by State Department official at 1996 Indigenous gathering at Fort Laramie Wyoming, location of the signing of the 1851 and 1868 Fort Laramie Treaties between the Great Sioux Nation and the United States. The official was from the State Department's office of Democracy, Human Rights and Labor.

⁸⁰ See 'What Wikileaks Reveals about Canadian and US Efforts in Suppression of and Surveillance of Indigenous Communities' 29 June 2011, <http://wikileaksaustraliancitizensurveillance.net/2011/07/03/what-wikileaks-reveals-about-canadian-and-u-s-efforts-in-suppression-and-surveillance-of-Indigenous-communities>.

tradition and legacy of domination and dehumanisation. In other words, it is highly predictable that state actors will premise their interpretation of the UN Declaration on the position that 'tribal' people and 'populations' (individuals) need to 'know their place, and stay there' by forever accepting without question as 'the law' the subordinate (sub-order) status that 'states of domination' have worked to impose on our originally free nations and peoples.

A 'construction of reality' framework enables us to more effectively discuss the potential that Indigenous peoples have – even beyond the context of the UN Declaration on the basis of our original free existence – to construct a reality of political liberation, economic benefit, cultural and spiritual revitalisation, and healing. Of equal importance, however, is the potential of the global Indigenous peoples' movement to use our own traditional concepts, values and laws to create a paradigm shift on the planet, away from conceptual and behavioral patterns of domination and greed.⁸¹

Metaphors and Liberation

As Richard Brown notes, 'all knowledge is perspectival and hence metaphoric'.⁸² He further points out that 'the study of anything is always the study of it from the viewpoint of something else'.⁸³ Thus, for example, as the original peoples of North America and other continents, we typically 'know' ourselves as 'Indians' (*as if* we were peoples who were living in 'the Indies' during Columbus's time). As humans, we engage in metaphoric thinking whenever we think of one thing in terms of another, or when we think of something unfamiliar in terms of something familiar. Such processes are intrinsic to human thought.⁸⁴

Much of what we assume to be objective *physical fact* is really a metaphoric experience. Is it *physically* or *metaphorically* true, for example, that our peoples *are* 'Indians', and that we are divided into 'tribes'? Such concepts and categories are the result of our ancestors having been thought of from a European perspective since the time of Columbus *as if* they were from 'the Indies' and *as if* they were divided into 'tribes'. These categories are 'true' from within the world-view used by Christian Europeans to conceptualise and categorise our nations and peoples during the so-called 'Age of Discovery' and afterwards.

This leads to a key point: most of what we experience is mediated through the language we use to construct and experience reality. This occurs in the course of our ongoing and unceasing human interactions. In fact, most

⁸¹ This article rejects the concept of 'reconciliation.' It is a buzzword with its history in the Spanish Catholic Inquisition, with residual meanings that include 'to bring back into submission' and 'to bring back into the church': http://indiancountrytodaymedianetwork.com/ict_sbc/a-critique-of-a-doctrine-of-reconciliation.

⁸² Brown (1977), p 77.

⁸³ Brown (1977), p 47.

⁸⁴ Winter (2001).

of what we consider to be 'solid', 'physical' reality is the result of linguistic patterns that involve metaphor and other mental processes.⁸⁵ So powerful are metaphors and other mental processes that they hold the potential to liberate us, or to hold us 'captive' within a figurative 'prison' constructed by our own minds.⁸⁶ This is an important perspective to maintain as we work to interpret and implement the UN Declaration on the Rights of Indigenous Peoples.

A heightened awareness of metaphor is useful for the global Indigenous peoples' movement because it enables us to more fully awaken to the importance of the point mentioned by the US representative in Geneva in 1996: words, and the meanings we ascribe to them, are one of most effective means of constructing reality. Learning to deploy those semantic tools in the most empowering, effective and liberating manner is a critical part of the challenge to which we must rise as Indigenous peoples, in the face of continued opposition by the agents and institutions of 'the state'.

A greater appreciation of the role that language and metaphor play in the construction of reality enables us to understand that the words contained in the UN Declaration 'generate important beliefs that are uncritically and unconsciously taken for granted', such as a belief in the supremacy of 'the state'.⁸⁷ The UN Declaration helps to shape our *perception* of the human rights of Indigenous peoples. As Murray Edelman states: 'Perception involves categorization. To place an object in one class of things rather than another establishes its central characteristics and creates assumptions about matters that are not seen.'⁸⁸ This applies, for example, to whether Indigenous peoples' rights will be classified as 'human rights' or as a mere 'aspiration' to *eventually* possess human rights as 'peoples'.

Clearly, there is a political dimension to the question of how 'the rights of Indigenous peoples shall be categorised'. As Edelman further notes: 'Linguistic categorization evokes a large part of one's political world ... because categorizations give meaning to what is observed and to what is assumed.'⁸⁹ For example, to be categorised as 'Indian' or 'Native American' or 'Indigenous', as compared with 'the state', involves much more than mere 'definitions', for these categories and the relationships between them evoke an entire political and legal 'world' that contains what seems to be an

⁸⁵ Winter (2001), p 341. Citing just one example, Winter calls the 'reification, in which we treat our own [mental] projection as an external reality, "the ontological fallacy"'. He further explains that 'the external constraint of the law turns out to be a mental artifact – i.e. the product of a mental projection'.

⁸⁶ Richard Brown (1977) concludes his book by saying that 'a poetic for sociology – is an attempt to provide an epistemic self-consciousness for sociological thought'. He refers to 'a form of discourse' the 'methodological self-consciousness' of which 'could also constitute a *method of* self-consciousness for sociologists, and *for peoples, in their struggles for emancipation*': p 234 (emphasis added).

⁸⁷ Edelman (1977), p 35.

⁸⁸ Edelman (1977), p 35.

⁸⁹ Edelman (1977), p. 35.

inflexible and unquestionable hierarchical structure of domination and subordination. Within the world of and from the perspective of 'states', every 'state' is deemed to 'exist' on a 'higher' level than the 'lower' level attributed to peoples termed 'Indigenous'.

This sense of a 'higher' and 'lower' order status, however, is not a feature of some independent reality in nature. Rather, it is the result of a mental metaphorical construction that has been internalised by humans on a mass scale; it is a product of the human imagination, of meanings shared through human interaction within a given social and cultural milieu. The hierarchical structure is the result of a construction that, from the viewpoint of 'states', is not to be questioned, as if the metaphorically constructed 'higher level' position of 'the state of domination' had been 'handed down' from 'the gods'.

Through a process of reification,⁹⁰ the concepts and categories used to construct the worlds or 'states of domination' begin to appear as if they are something other than human constructions and thus immutable. When this happens, the metaphorical projections of the human mind are no longer noticed as such. Such projections begin to *seem* to us *as if* they have a *physical* existence. When carried far enough, reified human constructions can take on the appearance of being 'laws of nature', and irreversible for all time.⁹¹

As peoples living under imposed systems of domination, a key part of our process of liberation and decolonisation will be achieved through a heightened sense of the metaphorical nature of human thought. This is particularly true if our awareness of metaphor and other mental processes enables us to read and interpret with much greater skill documents issued by state actors – documents that often say one thing while intending an opposite meaning that, if not discerned, will remain carefully hidden or disguised. Such awareness also lends itself to the ability to speak and write in an empowering and decolonising (de-dominating) manner.

Root metaphors are also important to the discussion of the UN Declaration. Brown defines 'root metaphors' as 'those sets of assumptions, usually implicit, about what sorts of things make up the world, how they act, how they hang together, and, usually by implication, how they may be known'.⁹² He further says that 'root metaphors constitute the ultimate presuppositions or frame of reference for discourse on the world or any domain within it'.⁹³ Brown notes that 'root metaphors' are 'characteristically [operating] below the level of conscious awareness'.⁹⁴

Similarly, the UN Declaration on the Rights of Indigenous Peoples, taken in its entirety, rests on many assumptions – often implicit – 'about

⁹⁰ Berger and Luckmann (1966), p 89.

⁹¹ As a woman in the office of the Clerk of the US Supreme Court cryptically said to me some years ago: 'No one can speak beyond the law.'

⁹² Brown (1977), p 125.

⁹³ Brown (1977), p 125.

⁹⁴ Brown (1977), p 126.

what sorts of things make up the world, how they act, how they hang together' and 'by implication, how they may be known'. One might add that the UN Declaration contains many presumptions about how Indigenous peoples ought to be treated and related to by states, as well as how peoples termed 'Indigenous' ought to behave towards states.

One might say that, ideally, the UN Declaration is predicated on a 'picture of the forms of human association that are right and realistic'⁹⁵ for Indigenous peoples in relationship with states.⁹⁶ Yet the persistence of the framework of domination and subordination leads to a strange question: What forms of human association are 'right' between dominator states and those peoples being dominated? And from whose perspective shall this question be answered – that of the dominators or that of the dominated? This line of inquiry leads to a further question: What is the means of altogether ending the system of domination and subordination, and the means of ending the ongoing domination of peoples termed 'Indigenous'?

In the most ideal sense, from an Indigenous peoples' perspective, the UN Declaration on the Rights of Indigenous Peoples is meant to be prescriptive. It is probable that most Indigenous peoples' representatives see the articles expressed in the Declaration as providing the means of solving problems for Indigenous peoples on the basis of 'human rights' from here on forward. The unfortunate and little-noticed truth, however, is that as illustrated in Article 46, the Declaration leaves the underlying structure and context of domination and subordination untouched and intact.⁹⁷ Thus yet another question arises: If the Declaration is not the means of ending the dominated political condition of Indigenous nations and peoples, and of solving the chronic problems that our nations and peoples face on a daily basis, then what is the next step beyond the Declaration?

Conclusion: The UN Declaration and Human Aspirations

President Barack Obama and the Obama State Department have characterised the UN Declaration on the Rights of Indigenous Peoples as a document that is 'aspirational', albeit with 'moral and political force'. In its 16 December 2010 statement of 'lending support' to the UN Declaration, the US Department of State said that the UN Declaration 'expresses both the aspirations of Indigenous peoples around the world and those of States in seeking to improve their relations with Indigenous peoples'.⁹⁸

To aspire is 'to be ambitious: to yearn, long; seek to attain or accomplish something, especially something high or great.' An aspiration is

⁹⁵ Winter, (2000), p 200.

⁹⁶ Winter (2001).

⁹⁷ Anghie (2004), p 254. 'Human rights law is revolutionary because it purports to regulate the behavior of a sovereign within its own territory.'

⁹⁸ US Department of State document 16 December 2011, www.state.gov/documents/organization/153223.pdf.

'a strong desire for realization (as of ambitions, ideals, or accomplishment) ... an end or goal aspired to'.⁹⁹

What would be the consequence of assuming that the United States' position on the UN Declaration on the Rights of Indigenous Peoples is correct, that it ought to be treated as an expression of a set of 'aspirations' rather than as 'human rights' of Indigenous Peoples? It would necessarily follow that the articles and provisions in the UN Declaration merely *point to* human rights that do not *yet* exist for Indigenous peoples. However, by continuing to aspire toward those human rights, they might one day be realised or accomplished *in the future* if the world community can be persuaded that such human rights for Indigenous peoples *ought* to exist.

Such a position, in other words, is equivalent to going back to square one in the struggle for Indigenous peoples' human rights. In effect, the United States seems to be saying to Indigenous peoples: 'You have the right to one day have the human rights that you do not *yet* have.' After 30 years of effort, the US government is now apparently willing to acknowledge that peoples categorised as 'Indigenous' have the right to work towards overcoming dehumanisation by aspiring to eventually possess the rights that all human beings and all peoples are said to already possess under the Human Rights Covenants.

We as Indigenous peoples are coming to terms with the fact that the present-day problems we are trying to rectify are a direct consequence of many centuries of dehumanisation by non-Indigenous thought and behaviour, which has been manifested in imperial and colonial 'laws' and 'policies'. The UN Declaration on the Rights of Indigenous Peoples signals that it is time for a fundamental reform of non-Indigenous thought and behaviour. It makes no sense, in the name of so-called 'aspirations' or reform, to maintain the same system of non-Indigenous thinking (concepts, categories and metaphors) that has produced and will continue to produce the problems of domination we are trying to rectify. To call efforts by the United States to maintain the status quo 'reform' is to debase the English language by saying one thing and meaning the exact opposite.

The dominating thoughts and behaviours that need to be addressed include the invasion and occupation of Indigenous lands and territories; the theft of Indigenous lands, territories and resources – particularly water; exploitation; dehumanisation; empire-building; colonialism and colonisation; and policies intended to kill thousands of years of Indigenous linguistic, cultural, spiritual, intellectual evolution, and even our entire existences and ways of life as Indigenous nations and peoples.

As work continues to interpret and implement the UN Declaration, we run a great risk if we fail to take the most comprehensive view possible of the system of domination we now face as Indigenous nations and peoples. It is imperative that we trace that system back to its conceptual origin in the doctrines of Christian discovery and domination (*dominorum*

⁹⁹ Webster's Third New International Dictionary (1993).

Christianorum).¹⁰⁰ Otherwise, we risk allowing the non-Indigenous world, with our implied consent, to continue to colonise and dominate our Indigenous present with the thoughts and behaviours that were first developed by their colonising and dominating ancestors in the past. The clear intention of those colonisers was to control, contain and, if possible, destroy our Indigenous ancestors and our traditional free ways of life, while profiting from our lands, territories, waters and other resources. We are now living with the inter-generational aftermath of that legacy.

We as Indigenous peoples cannot sensibly use the same non-Indigenous mindset and world-view of domination and dehumanisation that created the problems we now face as a means of solving those problems. In short, we must make certain that we do not fall into the trap of working with, interpreting and implementing the UN Declaration on the Rights of Indigenous Peoples on the basis of short-term colonised thinking that does not question and challenge the appearance of legitimacy that undergirds existing doctrines and institutions of domination. A long-term goal is to one day be recognised not as 'Indigenous' (dominated) peoples, but as original human nations and peoples with an innate right and desire to exist, flourish, thrive and be free through the exercise of our full and actualised rights of individual and collective self-determination, in keeping with the original free and independent existence of our ancestors.

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