SOVEREIGNTY AND INDIGENOUS PEOPLES IN NORTH AMERICA

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ABSTRACT

This article examines the concept of sovereignty and its application in the context of European colonization of North America. It seeks to define sovereignty so as to avoid Eurocentric notions that denied sovereignty to Indigenous peoples. The article does this by distinguishing between de facto and de jure sovereignty: the former depends on actual possession and control of a territory, whereas the latter depends on the application of a particular legal system. Unlike de facto sovereignty, which is empirical, de jure sovereignty depends on a choice of law. Because more than one legal system can be applied to territories occupied by Indigenous peoples, de jure sovereignty is relative. European claims to sovereignty might thus be valid in the European law of nations, but not in the legal systems of the Indigenous peoples whose territories were being colonized. To avoid Eurocentric notions that denied sovereignty to Indigenous peoples, the article argues that claims to sovereignty in North America need to be assessed by a de facto standard that can be applied objectively and universally.

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I. INTRODUCTION

European nation-states proceeded to colonize North America by making grandiose territorial claims on the basis of discovery, papal bulls, symbolic acts of possession, royal charters, and settlement, as though the continent was juridically vacant and the Indigenous peoples living there did not have sovereignty. To the extent that these claims extended beyond the areas controlled by Europeans at the time – which was almost invariably the case – they cannot have been based on factual possession or the actual exercise of jurisdiction. Instead, they had to be based on law. In other words, they were claims to *de jure* rather than *de facto* sovereignty. The validity of these claims therefore depends on a choice of law that involves a question of legitimacy: Which system or systems of law *should* be applied in assessing these claims? Denial of the sovereignty of the Indigenous peoples who were in fact in possession and control of most of the continent also raises legal issues that can only be assessed in the context of specific legal systems. *De jure* sovereignty is thus relative: it might be valid under one system of law, such as the European law of nations or the law of the colonizing European power, but not under the law of the Indigenous people whose territory was being claimed. Moreover, just because a claim to *de jure* sovereignty might be valid in one system of law does not mean it is legitimate.

This article attempts to provide a conceptual framework for assessing claims to sovereignty in North America, both by the Indigenous peoples and the colonizing European powers. In subsequent work, I will apply this framework to selected areas of North America and assess the validity and legitimacy of particular claims to *de facto* and *de jure* sovereignty. But before proceeding further, we need some understanding of the elusive concept of sovereignty.

II. DEFINING SOVEREIGNTY

The meaning of sovereignty has been debated by jurists and political theorists for centuries, revealing that the understanding of the concept changes over time and varies with context.[1] While this makes it exceedingly

[1] *See, e.g.,* HAROLD J. LASKI, STUDIES IN THE PROBLEM OF SOVEREIGNTY (Yale University Press 1917); W.J. STANKIEWICZ, ED., IN DEFENSE OF SOVEREIGNTY (Oxford University Press 1969); CHARLES E. MERRIAM, JR., HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU (Garland Publishing 1972); F.H. HINSLEY, SOVEREIGNTY (2nd ed. 1986); Ruth Lapidoth, *Sovereignty in Transition* 45 JOURNAL OF INTERNATIONAL AFFAIRS 325 (1992); HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS: AN ANALYSIS OF SYSTEMS CHANGE (Princeton University Press 1994); MICHAEL ROSS FOWLER AND JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY (Pennsylvania State University Press 1995); JOHN HOFFMAN, SOVEREIGNTY (University of Minnesota Press 1998); HIDEAKI SHINODA,

difficult to define,[2] some understanding of sovereignty's essence is nonetheless essential for any assessment to be made of claims to sovereignty in North America during the colonial period. Much of the difficulty lies in formulating a definition that avoids Eurocentric notions of sovereignty that were used in the past, and are still relied upon today[3] to deny sovereignty to Indigenous peoples and justify European colonization of the territories occupied by them.[4] As Taiaiake Alfred has observed, "[t]he challenge before us is to detach the notion of sovereignty from its current legal meaning and use in the context of the Western understanding of power and relationships. We need to create a meaning for 'sovereignty' that respects the understanding of power in indigenous cultures. . .".[5] Stating this

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RE-EXAMINING SOVEREIGNTY: FROM CLASSICAL THEORY TO THE GLOBAL AGE (St. Martin's Press 2000); STEPHEN D. KRASNER, ED., PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES (Columbia University Press 2001); STÉPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW: THE WORD SOVEREIGNTY IN BODIN AND VATTEL AND THE MYTH OF WESTPHALIA 1-4 (Martinus Nijhoff Publishers 2004); JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES 45-70 (Princeton University Press 2005); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., University of Chicago Press 2005) (1922); LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400-1900 (Cambridge University Press 2010); JULIE EVANS ET AL., EDS., SOVEREIGNTY: FRONTIERS OF POSSIBILITY (University of Hawai'i Press 2013); Damian Chalmers, *European Restatements of Sovereignty* (LSE Legal Studies Working Paper No. 10, 2013), *available at* http://ssrn.com/abstract=2263689; JENS BARTELSON, SOVEREIGNTY AS SYMBOLIC FORM (Routledge 2014).

[2] In A TEXTBOOK OF INTERNATIONAL LAW – GENERAL Part 34 (Longmans, Green 1947), Alf Ross wrote, without much hyperbole, that "there are almost as many definitions of 'sovereignty' as there are authors."

[3] *E.g. see* Michael Asch and Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow* 29 ALBERTA LAW REVIEW 498 (1991); Julie Cassidy, *Sovereignty of Aboriginal Peoples* 9 INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW 65 (1998); John Borrows, *Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia* 37 OSGOODE HALL LAW JOURNAL 537 (1999); PATRICK MACKLEM, INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA 107-19 (University of Toronto Press 2001).

[4] *See* M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW (Longmans, Green & Co. 1926); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law* 40 HARVARD INTERNATIONAL LAW JOURNAL 1 (1999); Evans et al., *supra* note 1 at 19; S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 19-31 (2nd ed., 2004); Brett Bowden, *The Colonial Origins of International Law, European Expansion and the Classical Standard of Civilization* 7 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 1 (2005).

[5] TAIAIAKE ALFRED, PEACE, POWER, AND RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 54 (Oxford University Press 1999). *See also idem*, *Sovereignty*, *in* SOVEREIGNTY MATTERS: LOCATIONS OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION 33 (Joanne Barker ed., University of Nebraska Press 2005); JOHN

challenge more generally, what is required is a definition of sovereignty that is as objective and universal as possible, so that it can be applied to any society at any given period of time without stumbling into the pitfalls of ethnocentricity.[6]

A definition of sovereignty that stems from a particular culture or legal order cannot be objective, nor can it be universal. It lacks objectivity because it is rooted in the subjective worldview of the culture in question, a worldview that comes from a particular people's geographical location, historical experience, value system, creation story, spiritual beliefs, and so on. To the extent that a people's conception of sovereignty is jural, it operates within the context of a particular legal order that is largely (if not entirely) a cultural and social construct.[7] It would not necessarily be shared by, and could not apply to, peoples of diverse cultures with different worldviews.[8] Any claim it might make to universality would be pretentious

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BIRD, LORRAINE LAND, AND MURRAY MACADAM, EDS., NATION-TO-NATION: ABORIGINAL SOVEREIGNTY AND THE FUTURE OF CANADA, NEW ED'N (Irwin Publishing 2002); DALE TURNER, THIS IS NOT A PEACE PIPE: TOWARDS A CRITICAL INDIGENOUS PHILOSOPHY 66-70 (University of Toronto Press, 2006); SANDRA TOMSONS AND LORRAINE MAYER, EDS., PHILOSOPHY AND ABORIGINAL RIGHTS: CRITICAL DIALOGUES PART III (Oxford University Press 2013).

[6] I acknowledge that even use of the English word "sovereignty" entails an element of ethnocentricity, in part because the term itself may not be translatable into many non-European languages. I regard this as an inevitable linguistic impediment that cannot be entirely avoided, but that can be countered to some extent by focussing on concepts rather than words. On the limitations and power of words generally, and of "sovereignty" in particular, *see* Beaulac, *supra* note 1, at 2-3.

[7] On law as a social construct, *see* H.L.A. HART, THE CONCEPT OF LAW (Clarendon Press 1961); C.K. ALLEN, LAW IN THE MAKING (Oxford University Press 7th ed., 1964); DENNIS LLOYD, THE IDEA OF LAW 22, 326-27 (Penguin Books 1964); ALLAN HUTCHINSON, THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED 10-16 (Oxford University Press 2008). Although natural law theorists would base some laws on universal principles, they would still have to admit that legal definitions of sovereignty depend on particular legal orders, as is evident from the fact that de jure sovereignty can be accorded by one body of law and denied by another: see text accompanying notes 60-72 below.

[8] On the fundamental differences between the worldviews and legal orders of Euro-American and North American Indigenous societies, *see* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence* 1986 WISCONSIN LAW REVIEW 219; Mary Ellen Turpel, *Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences* 6 CANADIAN HUMAN RIGHTS YEARBOOK 3 (1989-90); Alfred, *supra* note 5; DAN RUSSELL, A PEOPLE'S DREAM: ABORIGINAL SELF-GOVERNMENT IN CANADA (UBC Press 2000); JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW (University of Toronto Press 2002); *idem*, CANADA'S INDIGENOUS CONSTITUTION (University of Toronto Press 2010); James Youngblood [Sákéj] Henderson, *Post-Colonial Indigenous Legal Consciousness* 1 INDIGENOUS LAW JOURNAL 1 (2002); *idem*, FIRST NATIONS JURISPRUDENCE AND ABORIGINAL RIGHTS: DEFINING THE JUST SOCIETY (Native Law Centre of Canada 2006); Turner, *supra* note 5; Gordon Christie, *Indigenous Legal Theory: Some Initial*

and illusory.[9]

This is not to say that a conception of sovereignty cannot be shared by a community of peoples who have similar worldviews or who interact with one another on a continuing basis. As we shall see, in Western Europe a conception of sovereignty gradually emerged out of the medieval period, receiving support from the writings of jurists and the consequent development of the law of nations. Similarly in other parts of the world, including North America,[10] peoples interacted with one another and developed shared understandings of power and relationships that coalesced into diplomatic protocols and legal norms.[11]

European theorists, however, went further, claiming that the fundamental features of their law of nations were universal because they were based on "natural law".[12] This presumption of universality could not

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Considerations, *in* INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES 195 (Benjamin J. Richardson, Shin Imai and Kent McNeil eds., Hart Publishing 2009).

[9] EMMERICH DE VATTEL, in his classic work, THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS 3-9 (Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (1758), while expressing the view that the fundamental principles of the law of nations are universal because they are based on natural law, acknowledged that the conventional (treaty-based) and customary (practice-based) law of nations depend respectively on the express and tacit consent of participating nations, and so cannot be universal. *See also* the quotation from WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW (8th ed. 1924), accompanying note 15 below.

[10] *See* Mary Druke Becker, *Linking Arms: The Structure of Iroquois Intertribal Diplomacy* and Richard L. Haan, *Covenant and Consensus: Iroquois and English, 1676-1760*, *in* BEYOND THE COVENANT CHAIN: THE IROQUOIS AND THEIR NEIGHBORS IN INDIAN NORTH AMERICA, 1600-1800, 29-40, 41-60 (Daniel K. Richter & James H. Merrell eds., Syracuse University Press 1987); ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (Oxford University Press 1997); Alfred, *supra* note 5; Borrows, *supra* note 8; THEODORE BINNEMA, COMMON AND CONTESTED GROUND: A HUMAN AND ENVIRONMENTAL HISTORY OF THE NORTHWESTERN PLAINS (University of Oklahoma Press 2001); JAMES YOUNGBLOOD [SÁKÉJ] HENDERSON, TREATY RIGHTS IN THE CONSTITUTION OF CANADA 11-12 (Carswell 2007).

[11] *See, e.g.,* C.H. ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES: (16TH, 17TH AND 18TH CENTURIES) (Clarendon Press 1967).

[12] *See, e.g.,* FRANCISCO DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES (J. Bate trans., Carnegie Institution 1917) (1557); HUGO GROTIUS, THE LAW OF WAR AND PEACE (Francis W. Kelsey trans., Clarendon Press 1925) (1625); SAMUEL PUFENDORF, ON THE LAW OF NATURE AND NATIONS (C.H. and W.A. Oldfather trans., Clarendon Press 1934) (1672); Vattel, *supra* note 9, at 3-9 (Intro., §§ 1-28). *See also* E.B.F. MIDGLEY, THE NATURAL LAW TRADITION AND THE THEORY OF INTERNATIONAL RELATIONS (Paul Elek 1975); Alfred Verdross and Heribert Franz Koeck, *Natural Law: The Tradition of Universal Reason and Authority*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 17 (R. St. J. Macdonald and Douglas M. Johnston eds., Martinus Nijhoff Publishers 1986); Thomas Behme, *Pufendorf's Doctrine of Sovereignty and*

be sustained: it broke down in the eighteenth and nineteenth centuries as European positivists turned increasingly to state practice and agreement (treaties and conventions) to develop a more pragmatic (and less principled) approach to what became known as international law.[13] Political societies that did not meet European criteria for "states" were not admitted into the exclusive club to which international law applied.[14] As long as these societies remained outside its scope, this Eurocentric body of law could not claim to be universal. William Edward Hall, a prominent English jurist and leading positivist, found this to be obvious:

> "It is scarcely necessary to point out that as international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilized, such states only can be presumed to be subject to it as are the inheritors of that civilization."[15]

Only after the whole inhabited world came under the control of nation-

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its Natural Law Foundations, and Peter Schroder, *Natural Law, Sovereignty and International Law: A Comparative Perspective*, *in* NATURAL LAW AND CIVIL SOCIETY: MORAL RIGHT AND STATE AUTHORITY IN EARLY MODERN POLITICAL THOUGHT 43 & 204 (Ian Hunter & David Saunders eds., Palgrave Macmillan 2002).

[13] *See, e.g.,* G.F. (GEORG FRIEDRICH) DE MARTENS, SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE 2-5 (William Cobbett trans., Thomas Bradford 1795); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (Richard Henry Dana ed., Little, Brown 1866); SIR ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW (3rd ed., Butterworths 1879); Hall, *supra* note 9; SIR TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES (New ed., Clarendon Press 1884). *See generally* DAVID J. BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 2-8 (University of Georgia Press 2002); MALCOLM N. SHAW, INTERNATIONAL LAW 18-21 (7th ed., Cambridge University Press 2014). Jeremy Bentham, a leading positivist, is generally given credit for the terminological shift from "law of nations" to "international law": *see* THOMAS ALFRED WALKER, I A HISTORY OF THE LAW OF NATIONS 1 (Cambridge University Press 1899).

[14] "States solely and exclusively are the subjects of International Law". Lassa Oppenheim, I INTERNATIONAL LAW: A TREATISE 18 (Longmans, Green 1905). *See also* H. Lauterpacht, *International Law*, *in* II BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 489 (E. Lauterpacht ed., Cambridge University Press 1975). Turkey, for example, was only admitted into this club by express acceptance in the *1856 Treaty of Paris, Art. 17*, *in* 114 THE CONSOLIDATED TREATY SERIES 409-20 (Clive Parry ed., Oceana Publications 1969), vol. 114 (1969); *see* Hugh McKinnon Wood, *The Treaty of Paris and Turkey's Status in International Law*, 37 AMERICAN JOURNAL OF INTERNATIONAL LAW 262, 262-63 (1943).

[15] Hall, *supra* note 9, at 47. Hall nonetheless stated that "there is no reason why even a wandering tribe or society should not feel itself bound as stringently as a settled community by definite rules of conduct towards other communities," thus envisaging intersocietal law among tribal societies. *Id.* at 18-19.

states that are recognized as such by the United Nations did international law become universal in its territorial application. However, its denial of sovereignty to many Indigenous peoples continues to be problematic.[16] Moreover, despite the fact that modern international law has been extended throughout the world (largely as a consequence of European colonialism), in recent years it has had more and more difficulty maintaining a statist conception of sovereignty that is universal in its application.[17]

To avoid the pitfalls of ethnocentricity, we need to be cognizant of the fact that there are major differences among societies in the ways in which political authority is exercised, collective decisions are made, and respect for community norms is generated and maintained. We need to avoid definitions of sovereignty that can only be applied to political societies, like those of Western Europe, whose power structures are hierarchical and whose legal norms are maintained by coercive force. We also need to avoid definitions that arise from particular legal systems that accord legal personality to some entities but not others, such as the system of international law that accords legal personality and sovereignty to nation-states but denies these to Indigenous peoples. Our project involves conceptualizing sovereignty in an objective, factual manner that avoids, as much as possible, the subjective worldviews of particular cultures and particular legal orders. A better understanding of the broad differences between western European and Indigenous North American understandings of political authority will assist in this task.

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[16] *See* PAUL KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES: THE MORAL BACKWARDNESS OF INTERNATIONAL LAW (Cambridge University Press 2003); Anaya, *supra* note 4; Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples* 42 TEXAS INTERNATIONAL LAW JOURNAL 155, 163-66 (2006); Symposium: Lands, Liberties and Legacies: Indigenous Peoples and International Law 31:2 AMERICAN INDIAN LAW REVIEW 253 (2006-2007); THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 83-92 (Oxford University Press 2008); Claire Charters, *Indigenous Peoples and International Law and Policy*, *in* Richardson, Imai and McNeil, *supra* note 8, at 161.

[17] *See* Lapidoth, *supra* note 1; DAVID J. ELKINS, BEYOND SOVEREIGNTY: TERRITORY AND POLITICAL ECONOMY IN THE TWENTY-FIRST CENTURY (University of Toronto Press 1995); MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE 336-421 (Cambridge University Press 1999); Stephen D. Krasner, *Abiding Sovereignty* 22:3 INTERNATIONAL POLITICAL SCIENCE REVIEW 229 (2001); GERARD KREIJEN, ED., STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE (Oxford University Press 2002); JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND THE CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 57-70 (Cambridge University Press 2006).

III. POLITICAL AUTHORITY IN WESTERN EUROPE AND INDIGENOUS NORTH AMERICA

A. Western Europe

By the time lasting European colonization of North America (north of present-day Mexico) began early in the seventeenth century, the medieval political authority of the pope, holy roman emperor and feudal lords had been largely replaced in England, France, and Spain by state structures.[18] Jean Bodin's influential The Six Bookes of a Commonweale,[19] published in 1576, reflected this change, and provided a conception of sovereignty that gained wide currency because it suited the emerging nation-states of Europe.[20] According to Bodin, a political community needs a supreme authority – a sovereign – that can impose its will on all members of the community so that order and stability can be maintained.[21] Political communities that lacked a supreme authority were thus not sovereign in the Bodinian sense.[22] This conception of sovereignty underlay the Westphalian model of the state that became dominant in Europe in the seventeenth century.[23] Applied both internally within states and externally in their relations with one another, it envisaged a world of equal, independent

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[18] *See* SIDNEY PAINTER, THE RISE OF THE FEUDAL MONARCHIES (Cornell University Press 1951); MARTIN WIGHT, SYSTEMS OF STATES 110-20 (Hedley Bull ed., University of Leicester Press 1977); Spruyt, *supra* note 1, at 34-57; van Creveld, *supra* note 17, at 118-25; BENNO TESCHKE, THE MYTH OF 1648: CLASS, GEOPOLITICS, AND THE MAKING OF MODERN INTERNATIONAL RELATIONS 102-9, 168-70, 189-93 (Verso 2003).

[19] JEAN BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE (Richard Knolles trans., Kenneth Douglas McRae ed., Harvard University Press 1962) (1606).

[20] On Bodin's influence, *see* HERAUSGEGEBEN VON HORST DENZER ED., JEAN BODIN (Verlag C.H. Beck 1973); JULIAN H. FRANKLIN, JEAN BODIN AND THE SIXTEENTH CENTURY REVOLUTION IN THE METHODOLOGY OF LAW AND HISTORY (Columbia University Press 1963); Julian H. Franklin, *Sovereignty and the Mixed Constitution: Bodin and his Critics*, *in* THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700 298-328 (J.H. Burns ed., Cambridge University Press 1991). On his influence in England, *see* G.L. Mosse, *The Influence of Jean Bodin's République on English Political Thought* 5 MEDIEVALIA ET HUMANISTICA 73 (1948); Rabkin, *supra* note 1, at 57-61.

[21] *See also* THOMAS HOBBES, LEVIATHAN 109-18 (Edwin Curley ed., Hackett Publishing 1994) (1651); JACQUES MARITAIN, MAN AND THE STATE 28-53 (University of Chicago Press 1951); D.E.C. Yale, *Hobbes and Hale on Law, Legislation and the Sovereign* 31 Cambridge Law Journal 121, 134-40 (1972).

[22] *See* Bodin, *supra* note 19, at 9-10.

[23] *See* Leo Gross, *The Peace of Westphalia, 1648-1948* 42 AMERICAN JOURNAL OF INTERNATIONAL LAW 20 (1948); Bruce Bueno de Mesquita, *Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty* 2:2 International Studies Review 93 (2000); James A. Caporaso, *Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty* 2:2 International Studies Review 1 (2000). *Compare* Teschke, *supra* note 18, at 215-48.

political units, each with absolute authority within its territorial limits and not subject to any external temporal power.[24]

The territorial dimensions of this statist conception of sovereignty did not entirely replace medieval power structures that were built on personal feudal relationships between lord and vassal, formalized by homage and fealty.[25] The personal relationship with the ruler, expressed by allegiance, has been maintained even in modern times in some states, including the United Kingdom and Canada; serious violations of it, regardless of where, still constitute treason.[26] Conversely, the territorial aspect of state sovereignty provides the ruler with authority over virtually everyone within the ruler's territory, including aliens who do not owe allegiance.[27]

Bodin's conception of sovereignty supported the emerging European law of nations, a body of rules designed to govern relations among states.[28] Originally rationalized, as mentioned earlier, by an appeal to natural law, by the second half of the eighteenth century this body of rules began to succumb to the influence of positivism. The positivist approach to law reinforced the nineteenth and twentieth century juridical notion that states are the sole subjects of international law.[29] Recognized state status and sovereignty thus went hand-in-hand,[30] a connection that, although weakened,

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[24] Sovereignty's external aspect was explicated by Vattel in 1758 in his very influential book, *supra* note 9; *see* Beaulac, *supra* note 1, at 127-83. On divine and natural law limitations on the sovereign's authority in Bodin and earlier theorists, *see* KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION 276-83 (University of California Press 1993).

[25] *See* G.W.S. BARROW, FEUDAL BRITAIN: THE COMPLETION OF THE MEDIEVAL KINGDOMS 1066-1314, 42-54 (Edward Arnold Ltd., 1956); Spruyt, *supra* note 1, at 34-58; Teschke, *supra* note 18, at 61-67.

[26] *See, e.g.,* the Treason Act, 1351, 25 Edw. 3, stat. 5 (Eng.); Treason Act, 1814, 54 Geo. 3, c.146 (U.K.), amended by the Crime and Disorder Act 1998, c.37, s.36(4) (U.K.), to replace the penalty of death by hanging with life imprisonment; Criminal Code, R.S.C. 1985, c. C-46, s. 46(3). On allegiance, see Calvin's Case (1608), 7 Co. R. 1a (K.B.).

[27] Other sovereigns and their diplomatic representatives do, however, enjoy certain immunities: *see Vienna Convention on Diplomatic Relations*, *in* 500 TREATY SERIES 95 (United Nations 1961); Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences, [1943] S.C.R. 208 (Can.).

[28] *See* Hinsley, *supra* note 1, at 179-80.

[29] On the erosion of this approach in the second half of the twentieth century, *see* Janneke Nijman, *Sovereignty and Personality: A Process of Inclusion*, *in* Kreijen, *supra* note 17, at 109.

[30] *See* Henry Sumner Maine, *The Conception of Sovereignty, and Its Importance in International Law* 1 PAPERS READ BEFORE THE JURIDICAL SOCIETY 26, 27-28, 33 (1855); Charles H. Alexandrowicz, *New and Original States: The Issue of Reversion to Sovereignty* 45 INTERNATIONAL AFFAIRS 465 (1969); ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY (Allen & Unwin 1986); Öyvind Österud, *The Narrow Gate: Entry to the Club of Sovereign States* 23 REVIEW OF INTERNATIONAL STUDIES 167 (1997); Anghie, *supra* note 4; Anaya, *supra* note 4, at 19-31. On the debate over whether new states

persists today. It continues to cause tensions in international relations when the principles of state sovereignty and non-intervention in the internal affairs of other states come into conflict with self-determination and humanitarian concerns.[31]

B. Indigenous North America

Turning to North America, there was undoubtedly more variety in the political organization of the Indigenous peoples than there was in Europe during the period of colonization.[32] Generally speaking, however, the

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can emerge without recognition by other states if they meet the other criteria of international law for state status, *see* H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (Cambridge University Press 1947); Herbert W. Briggs, *Recognition of States: Some Reflections on Doctrine and Practice* 43 AMERICAN JOURNAL OF INTERNATIONAL LAW 113 (1949); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 19-28 (Clarendon Press 1979); Zaim M. Nedjati, *Acts of Unrecognized Governments* 30 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 388 (1981); Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments* 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 545 (1999); Shaw, *supra* note 13, at 321-51.

[31] *See* Alexis Heraclides, *Secessionist Minorities and External Involvement* 44:3 INTERNATIONAL ORGANIZATION 341 (1990); Christopher M. Ryan, *Sovereignty, Intervention and the Law: A Tenuous Relationship of Competing Principles* 26 MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES 77 (1997); Oliver P. Richmond, *States of Sovereignty, Sovereign States, and Ethnic Claims for International Status* 28 REVIEW OF INTERNATIONAL STUDIES 381 (2002); LUKE GLANVILLE, SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: A NEW HISTORY (University of Chicago Press 2014).

[32] On particular Indigenous systems of governance, *see* Edwin T. Denig, *Indian Tribes of the Upper Missouri*, *in* FORTY-SIXTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION, 1928-29 375 at 430-56 (J.N.B. Hewitt ed., United States Government Printing Office 1930), *reprinted in* The Assiniboine (Regina: Canadian Plains Research Center, 2000), 36-62; 1 GEORGE BIRD GRINNELL, THE CHEYENNE INDIANS: THEIR HISTORY AND WAYS OF LIFE 336-58 (University of Nebraska Press, 1972) (1923); KARL N. LLEWELLYN AND E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (University of Oklahoma Press 1941); Anthony F.C. Wallace, *Political Organization and Land Tenure Among Northeastern Indians, 1600-1830* 13 SOUTHWESTERN JOURNAL OF ANTHROPOLOGY 301 (1957); Mary Shepardson, *The Traditional Authority System of the Navajos*, *in* COMPARATIVE POLITICAL SYSTEMS: STUDIES IN THE POLITICS OF PRE-INDUSTRIAL SOCIETIES 143 (Ronald Cohen and John Middleton eds., Natural History Press 1967); RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 10-39 (University of Oklahoma Press 1975); DAVID G. MANDELBAUM, THE PLAINS CREE: AN ETHNOGRAPHIC, HISTORICAL, AND COMPARATIVE STUDY 105-24 (Canadian Plains Research Center 1979); Oren Lyons, *Traditional Native Philosophies Relating to Aboriginal Rights*, *in* THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS 19 (Menno Boldt and J. Anthony Long eds., University of Toronto Press 1985); SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 17-32 (University of Oklahoma Press 1989); DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEES, THE CHOCTAWS, THE CHICKASAW, AND THE CREEK (Stanford

political authority of the Indigenous peoples appears to have been more personal than territorial.[33] Kinship and clan affiliation were usually prominent features of social and political organization.[34] This does not, however, mean that the Indigenous peoples had no concept of territory, or that they did not exercise control over specific geographical areas.[35] On the contrary, territoriality was of fundamental importance, as much for mobile hunter-gatherer societies as for agriculturalists and town-dwellers.[36] Indigenous diplomacy and warfare often related to territory and access to the natural resources necessary for life.[37] Moreover, land had – and continues to

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University Press 1992); DANIEL N. PAUL, WE WERE NOT SAVAGES: A MICMAC PERSPECTIVE ON THE COLLISION OF EUROPEAN AND ABORIGINAL CIVILIZATIONS 5-8 (Nimbus Publishers Ltd. 1993).

[33] *See* Menno Boldt and J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians* 17 CANADIAN JOURNAL OF POLITICAL SCIENCE 537, 546-47 (1984).

[34] *See* Binnema, *supra* note 10, at 11-13; Janet E. Chute, *Algonquians/Eastern Woodlands*, *in* 38 ABORIGINAL PEOPLES OF CANADA: A SHORT INTRODUCTION 61-67 (Paul Robert Magocsi ed., University of Toronto Press 2002); DAVID E. WILKINS AND HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 55 (3rd ed., Rowman & Littlefield 2011); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §4.04[1] (Nell Jessup Newton ed., LexisNexis 2012); Henderson, *supra* note 10, at 151-55.

[35] For judicially-determined Indian territories in the United States, see the map in Judith Royster, *Indian Land Claims*, *in* INDIANS IN CONTEMPORARY SOCIETY, 2 HANDBOOK OF NORTH AMERICAN INDIANS 28, at 32-33 (Garrick A. Bailey ed., William C. Sturtevant, gen. ed., Smithsonian Institution 2008).

[36] *See* Wallace, *supra* note 32; FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST 67-71 (W.W. Norton 1976); Charles A. Bishop, *Territorial Groups Before 1821: Cree and Ojibwa*, and Beryl C. Gillespie, *Territorial Groups Before 1821: Athapaskans of the Shield and the Mackenzie Drainage*, *in* SUBARCTIC, 6 HANDBOOK OF NORTH AMERICAN INDIANS (June Helm ed.), *supra* note 35, at 158 and 161; IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS (Imre Sutton ed., University of New Mexico Press 1985); OLIVE P. DICKASON, CANADA'S FIRST NATIONS: A HISTORY OF FOUNDING PEOPLES (McLelland and Stewart 1992); THE NATIVE AMERICANS: AN ILLUSTRATED HISTORY (Betty Ballantine and Ian Ballantine eds., Turner Publishing 1993); MICHEL MORIN, L'USURPATION DE LA SOUVERAINETÉ AUTOCHTONE: LE CAS DES PEUPLES DE LA NOUVELLE-FRANCE ET DES COLONIES ANGLAISES DE L'AMÉRIQUE DU NORD 27-28 (Boréal 1997); GILLES HAVARD, EMPIRE ET MÉTISSAGES: INDIENS ET FRANÇAIS DANS LE PAYS D'EN HAUT 1660-1715 (Septentrion 2003); ALAN D. MCMILLAN AND ELDON YELLOWHORN, FIRST PEOPLES IN CANADA (Douglas & McIntyre 2004). *See generally* CARLETON S. COON, THE HUNTING PEOPLES 190-99 (Jonathan Cape Ltd. 1972); Rada Dyson-Hudson and Eric Alden Smith, *Human Territoriality: An Ecological Reassessment* 80 AMERICAN ANTHROPOLOGIST 21 (1978); DAVID RICHES, NORTHERN NOMADIC HUNTER-GATHERERS: A HUMANISTIC APPROACH 107-33 (Academic Press 1982).

[37] JOHN S. MILLOY, THE PLAINS CREE: TRADE, DIPLOMACY AND WAR, 1790 TO 1870 (University of Manitoba Press 1988); HAROLD CARDINAL AND WALTER HILDEBRANDT, TREATY ELDERS OF SASKATCHEWAN: OUR DREAM IS THAT OUR PEOPLES WILL ONE DAY BE CLEARLY RECOGNIZED AS NATIONS 39 (University of Calgary Press 2000); COLIN G.

have – deep cultural and spiritual significance for Indigenous peoples.[38]

Significant differences, however, generally existed between the ways political authority was exercised in European compared to Indigenous societies.[39] Unlike European political systems, which were hierarchical and relied on coercive authority, Indigenous systems typically functioned on a participatory and consensual basis.[40] Individual members retained considerable personal autonomy, and societal norms were usually maintained by persuasion and social pressure rather than force.[41] Physical confinement was generally not used, though some societies did resort to corporal and even capital punishment in some circumstances.[42]

If the Bodinian conception of sovereignty were to be applied to the Indigenous peoples of North America during the period of European colonization, one would likely conclude that most of them were not sovereign because they lacked a supreme authority.[43] This perception lay

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CALLOWAY, ONE VAST WINTER COUNT: THE NATIVE AMERICAN WEST BEFORE LEWIS AND CLARK 90-91 & 108-110 (University of Nebraska Press 2003).; Binnema, *supra* note 10, at 55-59 & 72-94.

[38] *See* CHIEF JOHN SNOW, THESE MOUNTAINS ARE OUR SACRED PLACES: THE STORY OF THE STONEY INDIANS 2-13 (Samuel Stevens 1977); Leroy Little Bear, *Aboriginal Rights and the Canadian 'Grundnorm'*, *in* ARDUOUS JOURNEY: CANADIAN INDIANS AND DECOLONIZATION 243 (J. Rick Ponting ed., McClelland and Stewart 1986); EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT 7-8 (HarperCollins 1991); RESTRUCTURING THE RELATIONSHIP, 2 REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 421-64 (Minister of Supply and Services Canada 1996); SACRED LANDS: ABORIGINAL WORLD VIEWS, CLAIMS AND CONFLICTS (Jill Oakes et al. eds., Canadian Circumpolar Institute Press 1998); Cardinal and Hildebrandt, *supra* note 37, at 10-12.

[39] *See* Robert H. Lowie, *Some Aspects of Political Organization among the American Aborigines*, *in* Cohen and Middleton, *supra* note 32, at 63; Boldt and Long, *supra* note 33; Russel Lawrence Barsh, *The Nature and Spirit of North American Political Systems* 10 AMERICAN INDIAN QUARTERLY 181 (1986); PIERRE CLASTRES, SOCIETY AGAINST THE STATE: ESSAYS IN POLITICAL ANTHROPOLOGY 189-218 (Zone Books 1987).

[40] *See* Lowie, *supra* note 39; Boldt and Long, *supra* note 33, at 541-43; Barsh, *supra* note 39, at 184-87; O'Brien, *supra* note 32, at 14-17; Binnema, *supra* note 10, at 11-12.

[41] *See* Llewellyn and Hoebel, *supra* note 32, at 239-69; Edward T. Dozier, *Hano: A Tewa Indian Community in Arizona*, *in* 5 NATIVE NORTH AMERICAN CULTURES: FOUR CASES 76-79 (George and Louise Spindler eds., Holt, Rinehart and Winston 1977); Boldt and Long, *supra* note 33, at 543-45; A.C. HAMILTON & C.M. SINCLAIR, THE JUSTICE SYSTEM AND ABORIGINAL PEOPLE, I REPORT OF THE ABORIGINAL JUSTICE INQUIRY OF MANITOBA 17-39 (Queen's Printer 1991); PAUL H. CARLSON, THE PLAINS INDIANS 75 (Texas A & M University Press 1998).

[42] *See* Denig, *supra* note 32, at 445; Llewellyn and Hoebel, *supra* note 32, at 112, 115, 123; ROBERT H. LOWIE, INDIANS OF THE PLAINS 114 (University of Nebraska Press 1982) (1954); GEORGE BIRD GRINNELL, BLACKFOOT LODGE TALES: THE STORY OF A PEOPLE 220 (University of Nebraska Press 1962); Cohen's Handbook of Federal Indian Law, *supra* note 34, at § 4.01[1][a].

[43] This is not a matter of size, as Bodin thought that as few as three families could unite

behind the nineteenth and twentieth century view that these peoples were not sovereign states in the post-Westphalian, European sense. This view has been remarkably tenacious. To give just one modern example, F.H. Hinsley, in the 1986 edition of his book, Sovereignty, stated that "the rise of state forms is a necessary condition of the notion of sovereignty, of the idea that there is a final and absolute political authority in the community."[44] He distinguished states, where political authority is exercised by a ruler or government that is separate from the community that is ruled or governed, from stateless societies, where

> ". . . authority relies on psychological and moral coercion rather than on force; if it resorts to force it does so because the rules and customs of the society demand this. The moral coercion and the force, if force is used, may be exercised by elders or other leaders but the structure of command invariably emanates directly from the community. It is the will of the community that it exerts, the custom of the community that it upholds, and it is the structure of seniority for non-political as well as for political purposes."[45]

Although the political systems of North American Indigenous societies varied from one society to another, Hinsley's general description of stateless societies probably comes close to fitting many of them.[46] Applying the post-Westphalian European conception of sovereignty to these societies would therefore deny them sovereignty as a matter of definition.[47]

But why should a conception of sovereignty that was developed in Western Europe to meet *that* region's political needs during a *certain* historical period apply to Indigenous peoples in North America?[48] John

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under a sovereign; instead, it depends on the existence of a sovereign who exercises supreme authority over the people in question: Bodin, *supra* note 19, at 9-10.

[44] Hinsley, *supra* note 1, at 17. *See also* Rabkin, *supra* note 1, at 45-58.

[45] Hinsley, *supra* note 1, at 16. *See also* SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY 115-53 (Penguin Books 1979); Boldt and Long, *supra* note 33, at 545-46.

[46] *See supra* notes 32 and 39.

[47] *See also* JAMES TULLEY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 70-78 (Cambridge University Press 1995), commenting on John Locke's views on political societies and the Indigenous peoples of North America in THE SECOND TREATISE OF GOVERNMENT (1689), *reprinted in* JOHN LOCKE: POLITICAL WRITINGS 261 (David Wootton ed., Hackett Publishing 2003). *See generally* JULIAN FRANKLIN, JOHN LOCKE AND THE THEORY OF SOVEREIGNTY (Cambridge University Press 1978).

[48] On Bodin's modification of his concept of sovereignty to address concerns arising from the political situation in France (specifically, the St. Bartholomew's Day Massacre of the Huguenots in 1572), *see* JULIAN H. FRANKLIN, JEAN BODIN AND THE RISE OF ABSOLUTIST THEORY 41-53 (Cambridge University Press 1973).

Hoffman, in his book, Sovereignty, takes issue with Hinsley's "statist" definition of sovereignty,[49] arguing instead for a conception of sovereignty that can also be applied to stateless societies that do not rely on force to maintain order.[50] Such an approach would attribute sovereignty to any society that functions as an independent political entity, regardless of the way it governs itself or the manner in which it enforces compliance with societal norms. This approach to sovereignty is based on factual criteria, and is more objective than the legalistic conception of sovereignty formulated by the European jurists who constructed the law of nations. It stems from the fundamental distinction between de facto and de jure sovereignty.

IV. DE FACTO VERSUS DE JURE SOVEREIGNTY

We have seen that the notion that sovereignty is only attributable to states was embraced by European jurists and became a fundamental tenet of international law. Although leading seventeenth and eighteenth century jurists, such as Hugo Grotius, Samuel Pufendorf, and Emmerich de Vattel, tried to make the law of nations universal by appealing to natural law,[51] by the nineteenth century most jurists acknowledged the positive sources and limited scope of international law: it was made by and applied only to states recognized as such by the existing circle of European states.[52] For these legal positivists, sovereignty could not be vested in political entities, such as Indigenous peoples, that were not states as defined and acknowledged by international law.[53]

Although nineteenth century international law appears to have denied

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[49] Hoffman, *supra* note 1, at 50.

[50] *See also* David Easton, *Political Anthropology*, *in* 1 Biennial Review of Anthropology 210, at 218-19 (B.J. Siegel ed., Stanford University Press 1959), rejecting the "ethnocentric" notion that political organization necessarily entails the use of force.

[51] Grotius, *supra* note 12; Pufendorf, *supra* note 12; Vattel, *supra* note 9. *See* Behme, *supra* note 12; Schroder, *supra* note 12.

[52] *See* Hall, *supra* note 9, at 17-20, 47-48. Earlier jurists who relied on natural law tended to be more inclusive. *E.g.* Vattel, *supra* note 9, at 11, wrote: "Every nation which governs itself, under whatever form, and which does not depend on any other Nation, is a *sovereign State*" (emphasis in original). *See also* Martens, *supra* note 13, at 23-24. *See generally* Alexandrowicz, *supra* note 30; Morin, *supra* note 36, at 31-62.

[53] *See, e.g.,* JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 136-45 (Cambridge University Press 1894); Oppenheim, *supra* note 14, at 18. *Compare* Western Sahara, Advisory Opinion, 1975 I.C.J.R. 12 (Oct. 16), where the Court rejected the notion that territories occupied by socially and politically organized Indigenous peoples were terra nullius. Relying on state practice in the latter half of the 19th century, the Court concluded that European states could not acquire sovereignty over such territories by occupation, as if they were vacant; instead, derivative acquisition, such as cession by treaty, was required.

state status and thus sovereignty to Indigenous peoples, it would be a mistake to conclude from this (as some jurists have[54]) that these peoples were not sovereign. Instead, the only conclusion that should be reached from this denial is that, by some time in the nineteenth century, this body of law did not acknowledge that they were sovereign. In this context, it is essential to distinguish between de facto and de jure sovereignty.[55]

Sovereignty in international law is de jure – it involves acknowledgement of sovereign status by a particular body of legally-recognized participants according to particular legal rules. When based on effective occupation of a territory by a political entity that functions as a state, this acknowledgement has a factual foundation. In other instances, however, sovereignty is accorded or denied in international law with much less regard to the facts. The decolonization of Africa, for example, led to the admission of new states into the international community, some of which would not have qualified had prior international law standards of effective occupation been applied.[56] More recently, Somalia effectively ceased to function as a state after the collapse of civil government there in 1991, and yet has continued to be acknowledged as a sovereign state by the international community and by international law.[57] On the other end of the

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[54] *See, e.g.,* HENRI BRUN, LE TERRITOIRE DU QUÉBEC: SIX ÉTUDES JURIDIQUES 37-53 (Presses de l'Université Laval 1974); L.C. Green, *Claims to Territory in Colonial America*, *in* THE LAW OF NATIONS AND THE NEW WORLD 1, 125 (L.C. Green and Olive P. Dickason, University of Alberta Press 1989).

[55] *See generally* Thomas Baty, *So-Called 'De Facto' Recognition* 31 YALE LAW JOURNAL 469 (1922); Janice E. Thomson, *State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research* 39:2 INTERNATIONAL STUDIES QUARTERLY 213 (1995); SCOTT PEGG, INTERNATIONAL SOCIETY AND THE DE FACTO STATE (Ashgate Publishing 1998); DE FACTO STATES: THE QUEST FOR SOVEREIGNTY (Tozun Bahcheli, Barry Bartmann, and Henry Srebrnik eds., Routledge 2004). Note the distinction, however, between *de jure* and *de facto* states on the one hand (our present concern), and *de jure* and *de facto* governments on the other. On the latter, *see* C.G. Fenwick, *The Recognition of New Governments Instituted by Force* 38 AMERICAN JOURNAL OF INTERNATIONAL LAW 448 (1944); A.M. Honoré, *Allegiance and the Usurper* 25 Cambridge Law Journal 214 (1967); 1 OPPENHEIM'S INTERNATIONAL LAW 154-57 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed., Longman 1992); STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 44-111 (Clarendon Press 1998); Stefan Talmon, *Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, *in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 499 (Guy S. Goodwin-Gill and Stefan Talmon eds., Clarendon Press 1999).

[56] *See* R.H. Jackson and C.G. Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood* 35 WORLD POLITICS 1 (1982); R.H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (Cambridge University Press 1990); Gerard Kreijen, *The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood*, *in* Kreijen, *supra* note 17, at 45.

[57] *See* Kreijen, *supra* note 56, at 98-100.

spectrum, Rhodesia effectively functioned as an independent state for about fifteen years after the Smith regime's Unilateral Declaration of Independence (UDI) in 1965, without international recognition and without being accorded sovereignty in international law.[58] While these are twentieth century examples, they illustrate the fundamental distinction between de jure sovereignty in international law and de facto sovereignty on the ground.[59] Clearly, the former can exist without the latter, and vice versa.[60]

To determine whether any given political entity has de jure sovereignty,

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[58] *See* D.J. Devine, *The Status of Rhodesia in International Law* 1973 ACTA JURIDICA 1; Isaak I. Dore, *Recognition of Rhodesia and Traditional International Law: Some Conceptual Problems* 13 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 25 (1980); James, *supra* note 30, at 153-60; JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 90-98 (Grotius Publications Limited 1987). *Compare* CHRIS N. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY 81-105 (Rotterdam University Press 1974) concluding at 104-5 that "unrecognized states are states" and so "Rhodesia [in 1974] ranks among the entities which are endowed with statehood under international law." The text of the Rhodesian UDI is reproduced in DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY 243-45 (Harvard University Press 2007).

[59] The distinction between *de jure* and *de facto* "sovereignty" (if one can apply the term to the period without being too anachronistic) actually pre-dated the development of the law of nations, in the context of the contrast between the asserted jurisdiction of the pope and the holy roman emperor and their lack of actual control over most of medieval Europe: *see* Hinsley, *supra* note 1, at 80-81; JOHN A.F. THOMSON, POPES AND PRINCES, 1417-1517: POLITICS AND POLITY IN THE LATE MEDIEVAL CHURCH 31 (George Allen & Unwin 1980); Pennington, *supra* note 24, at 32-37; JAMES MULDOON, EMPIRE AND ORDER: THE CONCEPT OF EMPIRE, 800-1800, at 71, 88, 95 (Macmillan Press 1999).

[60] *See also* Veffer v. Canada (Minister of Foreign Affairs), 283 D.L.R. 671 (2007, Can.) (leave to appeal dismissed, S.C.C., 14 February 2008), where the Canadian Federal Court of Appeal acknowledged Israel's *de facto* control over western Jerusalem, but denied that any part of the city is Israeli territory *de jure*, as the United Nations and Canada do not acknowledge Israel's *de jure* sovereignty over Jerusalem. On the international status of Jerusalem, *see* E.L.M. BURNS, BETWEEN ARAB AND ISRAELI 23, 29-30, 56 (Clark, Irwin & Co. 1962); DAVID NEWMAN, POPULATION, SETTLEMENT AND CONFLICT: ISRAEL AND THE WEST BANK 7 (Cambridge University Press 1991); GEOFFREY ARONSON, CREATING FACTS: ISRAEL, PALESTINIANS AND THE WEST BANK 10-15, 152-53, 274 (Institute for Palestinian Studies, 1987); HENRY CATTAN, PALESTINE AND INTERNATIONAL LAW: THE LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT 180-83 (Longman 1976); Jennings and Watts, *supra* note 55, at 196; Antonio Cassese, *Legal Considerations on the International Status of Jerusalem* 3 PALESTINE YEARBOOK OF INTERNATIONAL LAW 13, 28-32 (1986); SAMIH K. FARSOUN, PALESTINE AND THE PALESTINIANS 217-18, 337-38 (Westview Press 1997); Anthony D'Amato, *Israel's Borders under International Law* (Northwestern University School of Law Public Law and Legal Theory Series No. 06-34, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956143. United Nations Security Council Resolution No. 298 on Jerusalem, 25 September 1971, S.C. Res. 298, U.N.Doc.S/RES/298, *available at* http://www.jewishvirtuallibrary.org/jsource/UN/unres298.html, confirmed that "all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem … are totally invalid".

one first has to decide which body of law applies. There will usually be more than one body of law to choose from, and the answer to the sovereignty question will vary in some instances, depending on which body of law is applied. The example of Rhodesia after the UDI in 1965 can be used to illustrate this. Although unrecognized by the international community, there can be little doubt that the white-minority regime of Ian Smith, though racist and undemocratic, exercised the effective control required for de facto sovereignty.[61] Turning to the matter of de jure sovereignty, in international law Rhodesia was clearly not a sovereign state from 1965 to 1980, as the international community did not generally acknowledge Rhodesia's independence and the Smith regime was illegal by international standards.[62] Likewise, in English law Rhodesia was not accorded de jure sovereignty because Rhodesian independence was rejected by the British government,[63] and British courts decided that the UDI was illegal.[64] Within Rhodesia, however, the courts, after some prevarication, did recognize the Constitution of 1965 and hence the legality of the Smith government, and so accorded de jure sovereignty to Rhodesia.[65]

The Declaration of Independence by the United States in 1776 provides a North American example that is closer in time to European colonization of this part of the world. By it, thirteen British colonies declared that they, the "United Colonies are, and of Right ought to be, Free and Independent States; . . . and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."[66] Relying on "the Laws of Nature and of Nature's God" and the "unalienable

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[61] *See* Devine, *supra* note 58, at 78-89; Dore, *supra* note 58, at 33-38; Dugard, *supra* note 58, at 91.

[62] *See* Dore, *supra* note 58; Dugard, *supra* note 58, at 90-98. *Compare* Devine, *supra* note 58, at 70-78, (opining that the Rhodesian UDI and the situation resulting from it were not "illegal", but "extra-legal").

[63] *E.g.*, by the Southern Rhodesia Constitution Order 1965, S.I. 1965, No. 1952.

[64] *See* Madzimbamuto v. Lardner-Burke and Another, (1968) 3 All E.R. 561 (P.C.); Adams v. Adams, (1970) 3 All E.R. 572 (P.D.A.).

[65] *See* Madzimbamuto v. Lardner-Burke N.O., 1968 (2) S.A.L.R. 284 and 457 (R.A.D.); Dhlamini and Others v. Carter N.O., 1968 (2) S.A.L.R. 445 and 464 (R.A.D.); Dhlamini and Another v. Carter N.O., 1968 (2) S.A.L.R. 467 (R.A.D.); R. v. Ndhlovu, 1968 (4) S.A.L.R. 515 (R.S.A.). For commentary, *see* Dugard, *supra* note 58, at 90; Claire Palley, *The Judicial Process: U.D.I. and the Southern Rhodesia Judiciary* 30 MODERN LAW REVIEW 263 (1967); S.A. de Smith, *Constitutional Lawyers in Revolutionary Situations* 7 WESTERN ONTARIO LAW REVIEW 93 (1968); F.M. Brookfield, *The Courts, Kelsen, and the Rhodesian Revolution* 19 UNIVERSITY OF TORONTO LAW JOURNAL 326 (1969).

[66] A Declaration by the Representatives of the United States of America, in General Congress Assembled, July 4, 1776, in Armitage, *supra* note 58, at 170-71.

Rights" that have been "endowed [on Men] by their Creator",[67] the United Colonies thus declared themselves to be members of the community of states that were acknowledged as such by the law of nations.[68] However, it took several years of war for them to repel the British army and establish unchallenged control over their territories that amounted to de facto sovereignty. Their sovereignty was recognized by Great Britain in the Treaty of Paris in 1783,[69] and acknowledged by other European states when they entered into diplomatic relations with the United States. These acts of recognition by subjects of the law of nations resulted in acknowledgement of the de jure sovereignty of the United States in that legal system. However, courts in the rebellious colonies and Britain were compelled to determine whether the United Colonies, in the interval between the Declaration of Independence and the Treaty of Paris, were sovereign entities for the purposes of domestic law. As in the case of Rhodesia, local courts decided they were,[70] whereas English courts were inclined to decide they were not.[71] De jure sovereignty was thus acknowledged in the domestic laws of the newly-declared United States, but generally denied in English domestic law.

It is therefore apparent that a political entity can have de jure sovereignty in one legal system, and yet be denied de jure sovereignty in

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[67] Id. at 165. On the natural law foundations for the Declaration of Independence, *see* Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law* 42 HARVARD LAW REVIEW 149, 365 (1928-1929) *reprinted in* EDWARD S. CORWIN, THE 'HIGHER LAW' BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (2008); CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (rev. ed., Knopf 1942); ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY AND THEOLOGY (University Press of Kentucky 1998).

[68] *See* Armitage, *supra* note 58, at 10-41. Note, however, that debate has ensued over whether the former colonies were, at that point, declaring themselves to be thirteen sovereign states, or one sovereign state, the United States of America: *see* Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study* 12 AMERICAN HISTORICAL REVIEW 529 (1907); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 354-63 (University of North Carolina Press 1969); Rabkin, *supra* note 1, at 62-70. The American concept of popular sovereignty, vested in the people, has been integral to this debate: *see* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198-229 (Belknap Press 1967); MICHAEL KAMMEN, SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE 11-32 (University of Wisconsin Press 1988).

[69] Definitive Treaty of Peace between Great Britain and the United States, signed at Paris, September 3, 1783, in Parry, *supra* note 14, at 487-95.

[70] *See* Ware v. Hylton, 3 U.S. 199 (1796); Kilham v. Ward, 2 Mass. 236 (S.C. Mass. 1806); Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. 99 (1830).

[71] *See* Folliot v. Ogden, (1790) 3 Term Rep. 726 (K.B.). *Compare* Wright v. Nutt, (1789) H. Black. Rep. 137 (Ch.). *See also* JOHN O'BRIEN, INTERNATIONAL LAW 641-42 (Routledge-Cavendish 2001).

another.[72] Unlike de facto sovereignty, de jure sovereignty is thus a relative matter. It exists only in relation to other entities that have legal personality within a particular system of law. In international law, it exists vis-à-vis other subjects that are accorded legal personality as states.[73] A political entity is generally accorded de jure sovereignty in international law after it has been treated as a state by other states that are the subjects of that body of law.[74] Within domestic law, acknowledgement of de jure sovereignty by the courts of a particular jurisdiction gives legal force to the exercise of sovereignty by the government whose authority is acknowledged. De jure sovereignty therefore has legal effect only in relation to the legal entities that are recognized by and are subject to the body of law acknowledging sovereignty. In positivist international law, these are states. In domestic law, they are the natural persons, corporations, and other entities that enjoy legal personality.[75] Entities that are not subject to a particular body of law are not bound by its acknowledgement of the de jure sovereignty of the political entity in question. In the Rhodesian context, this means that acknowledgement of de jure sovereignty by Rhodesian courts would not have bound legal persons (e.g., natural persons and corporations outside Rhodesia) and political entities (e.g., states) that were not subject to Rhodesian law. Conversely, the refusal of international law and English law to acknowledge Rhodesian de jure sovereignty could not be relied upon by legal persons within Rhodesia to avoid the exercise of jurisdiction by the government in power after the de jure sovereignty of Rhodesia had been

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[72] Jerusalem is another example, as Israeli sovereignty over the city (especially the western part that was occupied by Israel in 1967) has not been recognized by the international community or international law, but has been recognized by Israeli law: *see supra* note 60; HCJ 5016/96 Horev v. Minister of Transportation [1997] (Isr.); HCJ 9098/01 Ganis v. Ministry of Building and Housing [2004] (Isr.).

[73] *See* Vattel, *supra* note 9, at 12: "The Law of Nations is the law of sovereigns; free and independent States are moral persons"; *see also* Alexandrowicz, *supra* note 30, at 466-67; Shaw, *supra* note 13, at 141-42.

[74] *See* Shaw, *supra* note 13, at 144-50; Nijman, *supra* note 29, at 109-10; *supra* note 30.

[75] *See* DENNIS LLOYD, THE LAW RELATING TO UNINCORPORATED ASSOCIATIONS (Sweet & Maxwell 1938); HAROLD A.J. FORD, UNINCORPORATED NON-PROFIT ASSOCIATIONS: THEIR PROPERTY AND THEIR LIABILITY (Clarendon Press 1959); S.J. STOLJAR, GROUPS AND ENTITIES: AN ENQUIRY INTO CORPORATE THEORY (Australian National University Press 1973); JEAN WARBURTON, UNINCORPORATED ASSOCIATIONS: LAW AND PRACTICE (Sweet & Maxwell 1986). In Canadian law, natural persons, corporations, and apparently Indigenous nations all have legal personality: *see* Kent McNeil, *The Post-Delgamuukw Nature and Content of Aboriginal Title*, *in* EMERGING JUSTICE? ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA 102, at 122-27 (University of Saskatchewan Native Law Center 2001). Legal personality can also be acknowledged or conferred by treaties with Indigenous peoples and statutes: *see, e.g.*, the Nisga'a Final Agreement, initialed August 4, 1998, c. 11, s. 5, given statutory force by the Nisga'a Final Agreement Act, S.B.C. 1999, c. 2, and the Nisga'a Final Agreement Act, S.C. 2000, c. 7.

accepted by domestic courts.

Turning to North America during the period of colonization, any attempt to answer the question of whether Indigenous or European nations were sovereign at any particular time and place must take into account the distinction between de facto and de jure sovereignty. De facto sovereignty can be determined by the application of reasonably objective criteria that are as culturally neutral as possible, whereas de jure sovereignty depends on meeting the subjective criteria of a specific legal order, created within the context of a particular culture (or cultures) and designed to suit the needs of a particular political society (or societies). Because it does not stem from a specific cultural milieu and does not depend on the existence of a particular legal order, the de facto approach can be applied universally. By contrast, de jure sovereignty cannot be universal in the absence of a universally applicable body of laws.

In North America during the course of European colonization, there were a number of legal orders under which de jure sovereignty might have been claimed: the law of particular Indigenous nations, inter-nation law that Indigenous nations developed to govern their relations with one another, the domestic law of colonizing European nation-states, the European law of nations (international law), and in some instances inter-societal law arising out of relations, including treaty relations, between Indigenous and European nations.[76] I will undertake assessment of the applicability of these bodies of law in subsequent work. I will conclude this article, which as mentioned earlier is designed to create a conceptual framework for assessing claims to sovereignty in North America, by providing a clearer notion of what de facto sovereignty means.

V. DEFINING DE FACTO SOVEREIGNTY

By de facto sovereignty I mean the actual exercise of political authority by a ruling entity or community over an independent group of people (personal authority) or, more commonly, over a people and a geographical area (personal and territorial authority).[77] This excludes what some writers,

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[76] For discussion, *see* Kent McNeil, *Indigenous Nations and the Legality of European Claims to Sovereignty over Canada*, *in* PHILOSOPHY AND ABORIGINAL RIGHTS: CRITICAL DIALOGUES 242 (Sandra Tomsons and Lorraine Mayer eds., Oxford University Press 2013). On treaty relations, *see* Williams, *supra* note 10; Henderson, *supra* note 10; NATION TO NATION: TREATIES BETWEEN THE UNITED STATES & AMERICAN INDIAN NATIONS (Suzan Shown Harjo, ed., National Museum of the American Indian and Smithsonian Books 2014).

[77] On the territorial dimensions of political authority, *see* Thomas Baldwin, *The Territorial State*, *in* JURISPRUDENCE: CAMBRIDGE ESSAYS 207-30 (Hyman Gross and Ross Harrison eds., Clarendon Press 1992). Baldwin agrees with W.W. WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 64-65, 310 (MacMillan 1924), that the area of land of a "tribal society" that is not part of another state's territory should be regarded "as the

especially political economists, refer to as individual sovereignty. Individual sovereignty is the freedom or liberty of individuals to act, a freedom that is invariably constrained to some extent by the society in which they live.[78] While not placing any lower limit on the size of a community that can exercise de facto sovereignty, the authority exercised by small units such as single nuclear families might not be regarded as political, and thus would not amount to sovereignty.[79] Our focus is therefore on communities that are independent and large enough to exercise actual authority that is political in nature. I refer to these communities as sovereign polities.

A more complete understanding of de facto sovereignty requires clarification of the terms "independent" and "political authority". This involves distinguishing between internal and external sovereignty.[80] Internal sovereignty is the authority a polity exercises over its members, or over its members and the territory it occupies. External sovereignty is the authority the polity exercises in relation to other sovereign polities. Internal sovereignty can be exercised in a wide variety of ways: autocratically by an absolute monarch or dictator; in an elitist manner by an oligarchy or theocracy; democratically by the people as a whole or through a representative body or bodies; and so on. The way in which authority is exercised within the polity is irrelevant insofar as the existence of de facto sovereignty is concerned – what matters is that political authority is actually exercised.[81] Moreover, internal sovereignty can be divided jurisdictionally, as it is in federal systems such as the United States and Canada.[82] It can also

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territory of the society in question in so far as we regard the tribal society as constituting a state at all": *id.* at 208. For me, however, the question is not whether we regard the society as a "state" (inviting ethnocentric assessment), but whether it actually exercises independent political authority. On the distinction between personal and territorial sovereignty, *see* Richard Pennell, *Sovereignty Negotiated from Below and Above: Native Personalities and European Law*, *in* Evans et al., *supra* note 1, at 136.

[78] *See* Hoffman, *supra* note 1, at 85-95; Jennifer Roback, *Exchange, Sovereignty, and Indian-Anglo Relations*, *in* 5 PROPERTY RIGHTS AND INDIAN ECONOMIES 5-6 (Terry L. Anderson ed., Rowman & Littlefield Publishers 1992); JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN (University of Chicago Press 1975).

[79] Recall that Bodin thought as few as three families could unite under a sovereign: *see supra* note 43.

[80] *See* T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 39 (Macmillan 1895); Wight, *supra* note 18, at 129-30; Beaulac, *supra* note 1, at 189-93.

[81] *See* Vattel, *supra* note 9 at 11, 17; Hall, *supra* note 9, at 21; ROBERT H. LOWIE, THE ORIGIN OF THE STATE 218 (Harcourt, Brace and Co. 1927); Easton *supra* note 50, at 219; SASKIA SASSEN, TERRITORY · AUTHORITY · RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (updated ed., Princeton University Press 2008).

[82] In the United States, internal sovereignty is in fact divided among the federal government, the fifty states of the union, the Indian nations, and (according to some) the people: *see* VINE DELORIA, JR., AND CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 1-27 (Pantheon Books 1984); CHARLES F.

be divided by function, for example into legislative (law-making), executive (policy and administrative), and judicial (dispute-resolution) functions, as it is in polities based on European models.

External sovereignty and independence go hand in hand.[83] A polity exercises external sovereignty by asserting and maintaining its independence from other sovereign polities. It is free to choose to enter into friendly relations with them by forming alliances or negotiating treaties of peace or commerce. It can also engage in war to protect its people, its territory, and other interests against other polities. This does not mean it has to be as large or as powerful as other sovereign polities. But to have and maintain de facto sovereignty, it must act independently of other polities and not be subject to their authority. As a general rule, it would also need to act as a single unit or entity in its relations with other polities.[84] As a consequence, external sovereignty, unlike internal sovereignty, is generally undivided.

Political authority, in its internal manifestations, involves the exercise of power by a polity over its members, or over its members and the territory it occupies. Bearing in mind the challenge posed by Taiaiake Alfred in the quotation near the beginning of this article, we have to understand that power can be exercised in diverse ways in different societies and cultures. As mentioned earlier, many Indigenous societies in North America avoided the use of coercion (except in extreme circumstances) to maintain societal norms. This does not mean, however, that power was not exercised. Other sanctions, such as ridicule and ostracism, could be just as effective as coercion for exerting pressure on individuals to conform to community standards. What counts, therefore, is not the use of coercion, but the existence of standards that are generally agreed upon and followed in the community.

Internal political authority also involves mechanisms for making community decisions and resolving internal disputes. While it is unlikely that any polity could remain intact without such mechanisms, their form can vary greatly. In modern polities based on European models, community

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WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 53-63 (Yale University Press 1987); Kammen, *supra* note 68. In Canada, in theory internal sovereignty is vested in a single entity, the Crown, but in practice it is divided among the Canadian government, the provinces, and the Aboriginal peoples: *see* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 10.1 (Looseleaf ed., 2007) (1977); KENT MCNEIL, THE JURISDICTION OF INHERENT RIGHT ABORIGINAL GOVERNMENTS (National Centre for First Nations Governance 2007), *available at* http://fngovernance.org/ncfng_research/kent_mcneil.pdf.

[83] *See* Vattel, *supra* note 9, at 3, 6-8, 11-12, 126; Wight, *supra* note 18, at 130; James Crawford, *Israel (1948-1949) and Palestine (1898-1999): Two Studies in the Creation of States*, *in* Goodwin-Gill and Talmon, *supra* note 55 at 95, 113.

[84] *See* Vattel, *supra* note 9, at 21, 126.

decisions are generally made by representative bodies such as legislatures and by an executive or executives, and courts resolve legal disputes that cannot be otherwise settled. But many Indigenous polities have functioned very well without European-style legislatures or courts, by vesting decision-making authority and dispute-resolution capacity in individuals or groups that are responsible for different aspects of the collective life of the community.[85] Again, to determine whether a community has de facto sovereignty, what matters is the existence, not the form, of mechanisms for making community decisions and resolving disputes.

External political authority involves a polity's capacity to act collectively and independently vis-à-vis other sovereign polities.[86] Assessment of this aspect of de facto sovereignty therefore entails looking for evidence that a polity has acted collectively by defending itself against other polities, entering into treaty relations, and so on. As with internal authority, empirical evidence of actual exercise of this kind of authority is what counts.

VI. CONCLUSION

In subsequent work, I will examine evidence of the exercise of political authority by Indigenous polities in particular geographical regions, focusing on the northern plains of what are now the United States and Canada.[87] This will make it possible to determine what polities had de facto sovereignty there during specific historical periods. We have seen, however, that de facto sovereignty is not the same as de jure sovereignty, and one can exist without the other. Moreover, a community can have de jure sovereignty under one legal order and lack it under another. Determining *de facto* sovereignty is therefore only the first step, after which one has to assess the validity of claims to *de jure* sovereignty. This involves examination of the various legal orders relevant to the North American context. However, in this context legality is not the same as legitimacy,[88] an ethical and political

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[85] *See, e.g.,* Denig, *supra* note 32, at 430-56; Llewellyn and Hoebel, *supra* note 32; O'Brien *supra* note 32, at 17-32; The Harvard Project on American Indian Economic Development, *supra* note 16, at 20.

[86] *See* Vattel, *supra* note 9, at 7, 12, and *supra* note 79.

[87] *See, e.g.,* Kent McNeil, Indian and American Sovereignty over the Missouri Watershed at the Time of the Lewis and Clark Expedition (30 Jan. 2016) (unpublished draft paper) (on file with author).

[88] *See* WIGHT, *supra* note 18, at 155-73; Mark D. Walters, *The Morality of Aboriginal Law* 31 QUEEN'S LAW JOURNAL 470 (2006); BURKE A. HENDRIX, OWNERSHIP, AUTHORITY, AND SELF-DETERMINATION: MORAL PRINCIPLES AND INDIGENOUS RIGHTS CLAIMS (Pennsylvania State University Press 2008); Shiri Pasternak, *Jurisdiction and Settler Colonialism: Where Do Laws Meet?* 29:2 CANADIAN JOURNAL OF LAW AND SOCIETY/REVUE CANADIENNE DROIT ET SOCIÉTÉ 145 (2014); Kent McNeil, Indigenous and Crown

issue rooted in justice as a moral imperative that takes us to the choice of law question inherent in assessing *de jure* sovereignty. The approach I am proposing, and plan to apply in subsequent work, therefore involves a three-step process: (1) determining *de facto* sovereignty in a particular region; (2) assessing the validity of claims to *de jure* sovereignty in that region under applicable bodies of law; and (3) evaluating the legitimacy of those claims based on principles of justice. The current article provides a conceptual framework for addressing these matters in the North American context and, I would hope, in other parts of the world as well.

Sovereignty in Canada (Nov. 2015) (unpublished draft paper) (on file with author).