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„Indigenous peoples and international law in  
Quebec: About the difference a human rights  
regime can(not) make.“

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## I. Introduction

Although Christopher Columbus was not the first traveller between Europe and the Americas, it is fair to say that the story of transcontinental relations between Europeans and Native Americans (and in fact also of what we call today globalization) began in 1492. It was the beginning of an age where the four continents of North America, South America, Africa, and Europe merged to form a transcontinental complex of extremely violent, hierarchical, and racist economical and cultural relations. The “discovery” of large parts of the world and the consciousness that we are one humanity with different forms of cultural expression was also the booster for the Enlightenment, a philosophy that eventually brought an end to slavery.<sup>1</sup> The philosophy of Enlightenment also served as the foundation for today’s understanding of human rights and ultimately contributed to the decolonization movement in the 1960s/70s. However, if we take the rhetoric of decolonization and human rights seriously, we must conclude that decolonization is today far from being a *fait accompli*. Whereas only a minority of territories now count as dependent colonies and although the UN Trusteeship Council has halted its work since 1994, the majority of the world’s approximately 370 million indigenous people in over 90 countries still live under a relationship with the state that can be characterized as colonial rule.<sup>2</sup>

Although it is one of the wealthiest countries on earth with a record of internationally being a “Human rights good guy”, the statement above is equally true for Canada and its native population. The *Premières nations* in the eastern province of Quebec, who are the subject of research of this paper, comprise a small minority of only about 1,1 % of the population that mostly lives in rural areas, is socio-economically marginalized, and barely has any political or economical power. Their lives, as we will see, are controlled by the state in a system of tutelage that directly stems from the age of colonialism.

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<sup>1</sup> Hall 2003: 3-7

<sup>2</sup> ECOSOC 2009: 1

At the same time, there exists an ensemble of international institutions, laws, and practices that aim at improving the living conditions and foster the political sovereignty of indigenous peoples. I will speak of this ensemble as the *regime* of indigenous peoples' human rights. In the light of the almost universal marginalization of indigenous peoples worldwide, it seems reasonable to ask, if this regime actually makes any difference for the better. In fact, it is a widely held point of criticism vis-à-vis human rights law, that it is toothless and often ignored by states who pursue their self-interest if breaches do not lead to sanctions.

Taking the example of Quebec's First Nations, this paper will try to critically examine this prejudice against human rights law in general and the regime of indigenous peoples' rights in particular. Is it really true that human rights are merely paper tigers if they cannot be enforced by compulsory measures under the UN Charter?<sup>3</sup> The discussions in this paper will therefore be guided by the research question: What are the effects of the international regime of indigenous peoples' human rights?

The scope of this research question is of course very broad. In order not to lose the focus of my analysis, the effects will be analysed along the three thematic axes of (1) the relationship between indigenous peoples and the state in consultation processes, (2) the conception of indigenous peoples as being part of a sovereign nation state, and (3) the influence of the regime on the political self-conception of indigenous peoples. I am furthermore interested in the mechanisms of functioning of the regime. As a sub-question, I will therefore investigate how the regime has an impact in its role as an actor, a resource, and a forum.<sup>4</sup> Moreover, I will ask the question what the theoretical implications of the empirical example of the First Nations of Quebec for the study of international regimes are.

The Canadian province of Quebec constitutes the regional focus of this paper. My personal interest for the research subject stems from my preceding scientific work on questions of land rights and international law in southern Africa. After I had been granted a scholarship at the Université de Montréal, I decided to evaluate the human rights law concerning indigenous peoples with the example

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<sup>3</sup> In particular UN Charter Chapter VII, Art. 39, 41, 42

<sup>4</sup> cf. Hurd 2010: 15-37

of the First Nations of Quebec. My year in the field between 2012 and 2013 proved to be an ideal opportunity to gather empirical data for this thesis. Nevertheless, the regional focus on Quebec is not always upheld in this paper. This is primarily due to two reasons: First, the areas that were traditionally inhabited by the native peoples of Quebec do not correspond, of course, to the provincial borders of Canada today, wherefore the political organization of – for example – the Cree or the Algonquin does not end at the provincial border. Second, Quebec's First Nations are directly subject to federal and to provincial legislation as well as indirectly to international law. These other legal contexts will therefore also be discussed in this paper.

Although there exists already some theoretical literature on the recently adopted UN Declaration on the Rights of Indigenous Peoples, the effects of the regime that recently underwent several transformations have barely been studied empirically. Thus, this paper tries to fill this gap. The matter seems to me also very interesting from the point of view of a sociological study of law. Many fundamental philosophical questions in this field, such as the opposition between collective and individual rights, religion and spirituality versus rationality as the source of law, multiculturalism, or legal pluralism, are reflected in the study of indigenous peoples' rights.

When I speak of the international *regime* of indigenous peoples' human rights, I am applying a concept that has been theorized by different paradigms in international relations. At the beginning of this paper (Chapter II) I will make transparent my *a priori* assumptions about the international system that are mainly rooted in liberal institutionalism's conception of regimes. I will however critically examine if liberalism provides the right "toolkit" for the study of the regime of indigenous peoples' rights, or if it needs to be adapted to be analytically useful. Although the main theory I am referring to is a classical theory of political science, this paper tries to develop a common scheme of reflection across disciplinary boundaries. The concepts I am applying and the sources I cite are to a large extent situated on the disciplinary boundaries of political science, anthropology, and international legal studies since the very nature of my research object makes an interdisciplinary approach necessary.

The subsequent chapter treats theoretical and practical considerations of the empirical part of this paper. In order to saturate my theoretical knowledge of the research object, I have conducted a series of expert interviews and participant observations in diverse contexts during my stay in Quebec. This part of the study serves as the foundation for the analytical. A large part of my empirical data covers empirical events that have not been processed scientifically in an exhaustive manner.

In the two following chapters (IV & V), I will approach the actual object of research. In Chapter IV, I will summarize the history of indigenous peoples in international relations, explain the controversial issues of indigenous peoples' human rights, and present the architecture of the current international regime of indigenous peoples' rights. Chapter V deals with the local context of Quebec and Canada respectively. I will discuss the history of indigenous-state relations in Canada and the history of legal relations and relevant Supreme Court rulings.

Chapter VI will treat three current examples for conflictual issues regarding indigenous peoples' rights in Quebec today. These three issues are for the most part based on my empirical research and they correspond with the three axes of analysis for the study of the impact of the regime that I have mentioned above. They are: consultation processes in the context of the *Plan Nord* (VI.1.), the conception of indigenous peoples in a multicultural confederation (VI.2.), and the recently emerged grassroots movement *Idle No More* (IV.3.). In the final part of the paper (Chapter VII), I will confront the empirical data with the preceding theoretical, historical, and legal discussions. The result are 3 x 3 theses on (1) the impact of the regime in Quebec, (2) the mechanisms by which the regime functions, and (3) theoretical implications of the empirical discussion.

Finally, I would like to express my gratitude to all the experts who participated in this study by dedicating their time to an interview as well as all the people I have spoken to informally in reservations, at conferences, in universities, and at demonstrations and political actions in Quebec and Ontario. These conversations are an indispensable part of this thesis. I would also like to thank my supervisor Professor Ulrich Brand as well as Professor Marie-Pierre Bousquet at the Université de Montréal for their extensive and very helpful support.



## II. A Theoretical Approach to the Study of an Unconventional International Regime

Before I treat practical questions about the influence of international human rights law concerning indigenous peoples in the main body of this paper, this chapter is going to make transparent the theoretical assumptions with which I approached my research object. In principle, my research concepts come from liberal institutionalism's understanding of international regimes. This paradigm of international relations will therefore be discussed in the first section of this chapter with regards to the implications that it holds for my topic. Since I deem regime theory not to be fully capable to grasp what is happening in the field of indigenous peoples' rights, which is a field marked by interrelations of different political and legal scales, I will conclude the first section with a critical examination of some of regime theory's assumptions and a discussion of cosmopolitan values as a motivation for the development of international law.

The second section presents concepts that have developed in other theoretical contexts, but that are nevertheless necessary to discuss given the specificities of the field of indigenous peoples in international law. These specificities concern the already mentioned different interrelated scales that best need to be conceived as a field of transnational law. Subsequently, we are dealing with a situation of de-centralized and partly de-formalized legal and political processes. This is why the concepts of governance and legal pluralism also briefly need to be discussed. Finally, the topic of this research is human rights law of indigenous peoples – a field that is not only marked by political and legal pluralism, but also by different cultures and thus different sources of law and justice. The last section discusses the problems of the notion of universalistic human rights.

### II.1. Indigenous Peoples' Rights as a Regime

This section discusses the conception of the system of indigenous peoples' human rights as an international regime in the sense of liberal institutionalism. I

will show how this theory will be helpful in understanding what is happening in the field of research and where the theory of international regimes fails to provide us with the necessary tools to understand certain processes.

I chose the approach of liberal institutionalism because the human rights system of indigenous peoples perfectly corresponds with Krasner's definition of a regime:

Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.<sup>5</sup>

They guarantee compliance to its rules "by formulating, communicating, administering, enforcing, interpreting, legitimating, and adapting them"<sup>6</sup>. In the example of indigenous peoples' human rights, the components constituting the regime range from different international laws to the institutions in the context of the United Nations (UNPFII, Special Rapporteur on the Rights of Indigenous Peoples, UNMRIP), to regional and supra-national institutions such as the Inter-American Commission on human rights. An interest I share with theorists of liberal institutionalism is the question "Under what conditions will cooperation emerge in a world of egoists without central authority?"<sup>7</sup>. I agree with scholars such as Robert Keohane that international cooperation needs to be explained if we assume a certain degree of rationality (in an economic sense) and self-interest in the actions of actors in international politics.<sup>8</sup>

The emergence of a regime for the rights of indigenous peoples has been marked by numerous victories of relatively powerless actors and deliberate concessions by states that resulted in a limited range of action on the national level (for example via the recognition of land rights and collective political rights) for state actors. These events call again into question, why actors on the international

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<sup>5</sup> Krasner 1982: 186

<sup>6</sup> *ibid*

<sup>7</sup> Axelrod 1984: 3

<sup>8</sup> cf. Keohane 1982

level act how they act and how it is possible for powerless actors to successfully push their interests. International organizations and international law shall be analysed in their threefold potential role as independent actor, forum, or political resource.<sup>9</sup>

What sets liberalism in international relations apart from other approaches, is most notably its conception of the actors in the international system. An interest-based approach conceives international organizations as relatively strong actors. In contrast to realism, which only allows for relative power gains between states, liberalism sees international organizations as a vehicle in the fulfillment of a common interest.<sup>10</sup> Although international regimes consist of institutions, they are not synonymous with international organizations. Regimes are to be distinguished from institutions because a regime cannot be an actor, and a regime is always issue-specific. The contrary is true for international organizations.<sup>11</sup> Keohane consequently advises to regard regimes as contracts, and not as quasi-governments.<sup>12</sup> He provides us with a simplified definition of regimes that does not consist of the four elements (principles, norms, rules, decision-making procedures) that are crucial in Krasner's definition, which – according to Keohane – is not capable of explaining the interrelations between the four elements:

Regimes are institutions with explicit rules, agreed upon by governments that pertain to particular sets of issues in international relations.<sup>13</sup>

This very lean definition condenses Krasner's four elements to the notion of rules, which constitute the fabric of international regimes. Institutions are understood as clusters of socially accepted roles that regulate the relations between the actors in a given field. The effectiveness of a regime can be measured according to the compliance of its members to these roles (although a regime is not dependent on an absolute compliance in order to survive and to be

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<sup>9</sup> cf. Hurd 2010: 15-37

<sup>10</sup> Hasenclever et.al. 1997: 1-5

<sup>11</sup> *ibid.*: 9-13

<sup>12</sup> Keohane 1982: 327-330

<sup>13</sup> Keohane 1993: 28

effective).<sup>14</sup> The following sub-section critically analyses these aspects of regime theory and its conceptions of the actors in international relations.

Certain expectations vis-à-vis the regime of indigenous peoples' rights follow from the preceding theoretical discussion. Keohane writes: "In general, we expect states to join those regimes in which they expect the benefits of membership to outweigh the costs"<sup>15</sup>. I will extend this merely economical view in the next section, but what we are thus looking for is a setting that allows for powerful actors such as states to cooperate with relatively powerless actors such as indigenous peoples. If we follow Keohane, we can thus uphold the following four expectations for regimes<sup>16</sup>:

1. Cooperative regimes facilitate the achievement of common goals.
2. Actors profit from the participation in regimes by minimizing transaction costs and information deficits.
3. The higher the issue-density of existing regimes and the better they work, the higher gets the demand for regimes in new areas.
4. Regime theory thus questions if hegemony is a prerequisite for a stable international system.

### *II.1.1. Critical Remarks on Institutionalism's Conception of Rationality and of Actors in the International System*

Nevertheless, the analytical toolkit provided by the theory of regimes is not sufficient for the questions that are asked in this paper. In response to the reductionist point of view of realism, which only takes state actors and their will to power into account, liberal institutionalism includes international organizations as independent actors in its analysis.<sup>17</sup> Still, liberal institutionalism fundamentally asks for the reasons why states cooperate with each other on the international level. The range of actors that are included in the analysis must be extended in order to understand the reasons for success and failure of

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<sup>14</sup> Hasenclever et.al.: 14-22

<sup>15</sup> Keohane 1982: 331

<sup>16</sup> *ibid*: 354-355

<sup>17</sup> Mearsheimer 1994: 47-49

cooperation in an international system that is increasingly configured by non-state actors such as indigenous peoples. The following section will discuss how research can be designed in a field of transnational legal pluralism. An approach that is narrowly focused on states and international institutions and that is blind to small organizations, individual actors, and changing coalitions would fail to choose the fitting aperture to observe the events and processes this research seeks to analyze.

My second point of criticism about the liberal theory of regimes concerns its understanding of the logic of rationality that motivates action. In spite of liberal institutionalism having been formulated as a critical response to realism, these two theories of international relations share the same assumption about the motivations for action. They are both grounded in economically rational choice.<sup>18</sup> However, since international cooperation is undoubtedly a fact, classical realism, which believes in zero-sum struggles for power between states, is confronted with an ontological problem.<sup>19</sup> Keohane defines two assumptions on which regime theory rests:

First, the actors whose behavior we analyze act, in general, as rational utility maximizers in that they display consistent tendencies to adjust to external changes in ways that are calculated to increase the expected value of outcomes to them. Second, the international regimes with which we are concerned are devices to facilitate the making of agreements among these actors. From these assumptions it follows that the demand for international regimes at any given price will vary directly with the desirability of agreements to states and with the ability of international regimes actually to facilitate the making of such agreements.<sup>20</sup>

Contrary to Hobbesian political philosophy, Robert Axelrod showed – drawing from the example of the behaviour of US Senators – how individuals who pursue their selfish purpose establish a system of cooperation because (basically in all examples of international cooperation that are invoked by institutionalists)

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<sup>18</sup> Indeed, the recourse on rational choice is not the only point that liberalism and realism have in common. Both theories share the theoretical assumption that the international system is structurally anarchic and that there is no central authority in international politics; cf. Keohane 1982: 332-336

<sup>19</sup> Keohane 1982: 325-327

<sup>20</sup> *ibid*: 335-336

cooperation is not a zero-sum game and all actors win in certain constellations of cooperation.<sup>21</sup> It has to be noted that even early institutionalists such as Axelrod did not act on the assumption of perfectly informed actors that is made by model-kind rational choice theory. Actors rather act according to “standard operating procedures, rules of thumb, instincts, habits, or imitation”<sup>22</sup>, or simply stereotypes based on labels such as skin color, sex, age, race, or dress style.<sup>23</sup> Without rejecting the idea of economical considerations in decision-making procedures on the international level entirely, I would like to broaden the perspective on motivations for the purpose of my analysis.

Especially in the field of human rights law, which is an aspirational regime (and is thus idealistic *per se*), choice and the position of actors in the field cannot be understood simply in economical terms. By its nature, human rights law is a teleological process that pursues the Kantian goal of developing mankind from the state of barbarism to civilization. It always has a temporal component where the past informs the present and the future serves as an ideal for the present.<sup>24</sup>

In the following, I want to argue how we can arrive at defining measures for international morality without referring to the ethnocentric notion of Kantian rationalism. This paper thus joins the criticism on postmodern styles in the social sciences which – despite their contributions to deconstruct the implicit ethnocentrism of scientific thinking – fails to provide any norms that would allow social science to critically examine a social fact and to uphold criteria for social justice.<sup>25</sup> “Zur Selbsttherapie verdünnt, übersieht die intersubjektive Harmoniesuche die Macht-, Herrschafts- und Gewaltverhältnisse in der postkolonialen sozialen Realität.”<sup>26</sup> The remainder of this chapter tries to conceptualize a cosmopolitan understanding of norms for justice in order to enable a scientific analysis that tries to change the social facts it criticizes.

An explanatory track that I wish to explore in this paper is that of cosmopolitan norms as sources of international law. On the one hand I want to take

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<sup>21</sup> Axelrod 1984: 3-24; Axelrod demonstrates this fact with the well-known example of the Prisoner Dilemma taken from game theory

<sup>22</sup> *ibid.*: 18

<sup>23</sup> *ibid.*: 145-147

<sup>24</sup> cf. Koskeniemi 2012

<sup>25</sup> cf. Zips 2002: 133-141

<sup>26</sup> *ibid.*: 173

cosmopolitan morality into account in the search for the motivations of actors in the field of human rights law (along with economical considerations). On the other hand, I would like to elaborate on this idea in order to develop normative standards for a critical analysis in this paper. I agree with Jürgen Habermas that a world with growing interrelations needs to be regulated by law. In the absence of a world government, such law needs a democratic legitimation. This law must not be a mirror for existing international power relations. The institutional setting must allow for individual actors to be the source of law in a communicative process. These individuals would have at the same time an identity as cosmopolitan citizens, and as national citizens.<sup>27</sup> It might be added in the context of this research, that actors in international law can also have para-national allegiances such as indigenous peoples.

Although the idea of a source of international law that is not culturally biased connects to “Kant’s idea of the cosmopolitan constitution”<sup>28</sup>, the conception of rationality I follow here is founded on discourse theory. Habermas thus moves the notion of rationality from absolute terms into the medium of language. A discursive process, where all actors that are affected by a decision are involved on an equal footing and that is open to new information thus bears a deliberative potential.<sup>29</sup> In the light of the complexity and the sheer number of actors in international law, this standard is to be regarded as an ideal type, as a utopian vision. It is nevertheless useful for the analytical process in this paper because it provides us with a standard to judge the legitimacy of law: “Nur jene Normen dürfen Geltung beanspruchen, die die Zustimmung aller Beteiligten eines rationalen Diskurses finden.”<sup>30</sup> Legitimacy is thus founded in the law’s creation process. This is not to be misunderstood as the principle of legality, which only takes the formalistic creation process into account (and is thus tautological). A legitimate rule must have been created in a process of communicative rationality.<sup>31</sup>

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<sup>27</sup> cf. Habermas 2008

<sup>28</sup> *ibid.*: 444

<sup>29</sup> Zips 2002: 192-193

<sup>30</sup> *ibid.*: 202

<sup>31</sup> *ibid.*: 203-204; For this reason, the creation process of international law concerning indigenous peoples will also briefly be discussed in this paper (see Chapter IV.3.2.).

Seyla Benhabib's conception of cosmopolitanism connects to these ideas. It is constituted by the commitment to found one's actions against another party on reason based on a universalistic ethic. These cosmopolitan values should emerge by a process of democratic iteration from the local to the global level and be legitimized by "the power of democratic forces within global civil society"<sup>32</sup>. From this point of view, this research is critical about the democratic and emancipatory potential of an international system, which is designed as a not democratically legitimated technocracy. If a cosmopolitan civil society, which would be necessary for the installation of a system of global governance, should emerge one day, this process will most likely happen as a bottom-up movement that is guided by transnationally shared social, ecological and economical problems.<sup>33</sup> I will subsequently keep in mind the role of the global indigenous movement in this process.

## II.2. Indigenous Peoples' Human Rights as a Situation of Transnational Legal Pluralism

An analysis of the impact of law has to make explicit its conception of law as a social institution. For a sociological paper, this is crucial since different approaches to law make fundamentally different assumptions about the interrelations of society and legal norms. Positivist notions of legal theory have particularly been challenged by contemporary social transformations in the course of globalization which contest the role of the nation state as the sole producer of law which makes and implements norms in a top-down-approach.<sup>34</sup> For the purpose of this paper, globalization shall be conceived as follows:

Globalisierung bedeutet in diesem Kontext [of legal theory; A.H.] nicht eine singuläre Bedingung oder einen linearen Prozess, sondern beschreibt ein differenziertes und multi-dimensionales Phänomen, das sich in verschiedenen gesellschaftlichen Teilsystemen wie Wirtschaft, Militär, Politik, Technologie oder eben auch im Rechtssystem nachweisen lässt und das eine weltweite Verknüpfung

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<sup>32</sup> Benhabib 2007a: 71; cf. Benhabib 2007b

<sup>33</sup> cf. Ecker-Ehrhardt 2012

<sup>34</sup> Buckel et.al. 2009: XII-XIII



und Vernetzung ökonomischer, ökologischer, sozialer und politischer Prozesse beinhaltet. Einerseits können scheinbar lokale Ereignisse globale Auswirkungen hervorrufen und andererseits sind weit entfernt stattfindende Ereignisse in der Lage, lokale Ereignisse auszulösen.<sup>35</sup>

A hierarchical sequence of different legal levels and a convergence of state and society cannot be sustained in a global era of growing interdependences and a dissolution of traditionally state-run institutions.<sup>36</sup> These points of criticism are especially true for the field of indigenous peoples' human rights. An approach such as liberalism, which is focussed on states and major institutions, must thus be broadened by an approach to the study of international relations that (1) takes different legal and political levels and their interrelations into account, (2) includes a multitude of actors that go beyond the limited inventory of actors of classic liberalism.

The field of indigenous peoples' human rights has some features that need to be taken into consideration in the development of a theoretical approach, which is suitable for an evaluation of its impact on the local level. These are most notably: (1) The creation of indigenous peoples' human rights law is mostly a bottom-up process that is nevertheless structured by a pre-existing institutional setup. (2) The field is best characterized as one of transnational law because it surpasses national borders and rests on the actions of states as well as non-state actors. (3) Not only are there various different actors in our field, it is also marked by a multiplicity of decision making processes and normative orders. The impact of human rights regarding indigenous peoples will therefore be discussed in the context of the concepts of governance and legal pluralism, in other words the political and judicial aspects of plurality. At the end of this chapter, I will write about theoretical considerations of a decolonized study of human rights in the international system.

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<sup>35</sup> Hanschmann 2009: 378

<sup>36</sup> Buckel et.al. 2009: XIV-XV

### *II.2.1. Transnational Legal Processes, Legal Pluralism, and International Governance*

Although the human rights of indigenous peoples fall into the category of what is generally known as international law, this concept does not adequately characterize what is actually happening. First, a common set of rules for indigenous peoples' rights is a product of transnationally shared problems as a consequence of globalization. It is a process that blurs the absolute role of the nation state within its own borders as well as in international law and that involves indigenous peoples and NGOs in the role as lawmakers along with nation states. The notions of territoriality and personality of national law as well as Kelsen's concept of international law as the product of the interaction of nation states cannot be upheld in their ideal typical conceptions.<sup>37</sup> Second, the claims of indigenous peoples in Canada to self-determination, self-government, and territorial sovereignty are subject to the influence of legal systems on the provincial, federal, and international law. They are influenced by norms that are politically institutionalized on the national level, case law, and international law. The latter has been partly created by nation states and indigenous peoples in collaboration. Customary international law and traditional local legal practices play a role as well as written national law. These different levels and phenomena are not clearly set in a hierarchical order and they influence each other.

Indigenous peoples' human rights are thus best conceived as a transnational legal process. Indigenous peoples are in a manner of speaking what Hanschmann calls "hybride, d.h. weder klar privatrechtlich noch völkerrechtlich zuzuordnende Akteure, die einen massiven Normenbedarf entwickeln"<sup>38</sup>. An analysis of transnational legal processes regards law making as a dynamic process that includes many different actors that are not part of classical theories of international law such as NGOs, interest groups, labor unions, civil society and grassroots movements, or indigenous peoples. The broadening of the range of actors that are analyzed results in an approach that is fundamentally non-etatistic and – from a normative point of view – calls for more participatory law

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<sup>37</sup> Hanschmann 2009: 378-379; for questions regarding the Westphalian system in the context of indigenous peoples' rights see Otis & Motard 2009

<sup>38</sup> Hanschmann 2009: 380

making processes. Law making is conceived as a cognitive compression of repeated social interactions.<sup>39</sup> Although this approach serves the demands of a field such as ours better than state-centered theories of international law, the interactionist view of the study of transnational legal processes neglects the normative-idealistic character of law, especially in the field of human rights. It must therefore not be forgotten, that legal rules are not only reflections of social interaction, but that they also have an emancipatory and deliberative potential. This paper tries to avoid an apolitical and ahistorical approach which may result in a lack of “soziale Plausibilität”<sup>40</sup> in the analysis of legal phenomena.

The impact of the regime of indigenous peoples’ rights shall also be evaluated in the context of processes of indigenous governance, that is to say the trend that promotes a transfer of decision-making processes to non-state actors and the development of participatory processes on the local as well as on the international level. In the course of the updraft of indigenous peoples’ rights, states tend to enlarge the spheres where (presumably) traditional authorities have a say:

While the standard view has been that chiefs are an historic burden on the road to modernity, they are now widely seen as the prime movers in the fields of development and natural resource management who can preserve a reasonably inclusive and equitable system.<sup>41</sup>

Since the aim of this paper is not to discuss different concepts and definitions of governance (such a discussion could easily fill several volumes), this section will limit itself to highlight some *caveats* in the critical application of the concept of governance. First and foremost, a discourse on participatory decision-making processes bears the risk of covering up political inequalities of power – a factor that is particularly noteworthy in the relations between indigenous peoples and the state. Especially in the context of development projects, the language of governance and participation is often invoked to cover up an imperial and hegemonic agenda.<sup>42</sup> Governance is thus not *per se* to be regarded as a desirable and potentially deliberative process. It is the task of a critical research on

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<sup>39</sup> *ibid*: 385-391

<sup>40</sup> *ibid*: 397

<sup>41</sup> Ubink 2011: 81

<sup>42</sup> Zips & Weilenmann 2011: 7-10

governance to expose normative and hegemonic projects as well as historically grown structures of dominance in processes of governance. A project that stands the test of being really inclusive and emancipatory must have its roots in the group of those who are affected by a certain project. Its practical logic must be (co-)determined by the affected population.<sup>43</sup>

Legal pluralism constitutes the judicial side of a multiplicity of actors and phenomena in the international system. Both phenomena are rooted in a multiplication of actors in the field of international politics. They are not identical in their meanings and implications but they developed simultaneously.<sup>44</sup> This theoretical section cannot retrace the various conceptual debates on legal pluralism. Instead it tries to sharpen the understanding of the term as it is applied in this paper.

Founded on Max Weber's broad conception of a *legal order*, legal pluralism does not equate law with (western) state law, but describes a state where various normative systems exercise influence in a social context.<sup>45</sup> The rejection of what Griffiths calls "the ideology of legal centralism"<sup>46</sup> (viz. legal positivism) became the cornerstone of the analysis of legal pluralism. If any normative system with coercive measures (be it that they rely on direct force or on more symbolic forms of sanctions) is analytically regarded as law, it is no question *if* there is legal pluralism in a given context, but only how this pluralism functions and what its consequences are.<sup>47</sup>

The context that is treated here is undoubtedly one of legal pluralism. The land rights and political rights of indigenous peoples in Quebec are determined by four sources of law: International law, federal law (British common law), provincial law (continental civil law) and traditional law. The situation is equally complex regarding the institutions of jurisprudence and law making. These

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<sup>43</sup> *ibid*: 15-19

<sup>44</sup> *ibid*

<sup>45</sup> Benda-Beckmann 2002: 52-53

<sup>46</sup> Griffiths 1986: 3

<sup>47</sup> Woodman 1998: 28-32; The question if any kind of normative order can be treated as law and thus as a factor in a legally pluralist society has been the issue of the fiercest debates about legal pluralism. For the purpose of this paper, I strongly reject the notion of a necessary link between the modern state and law. While not every norm shall be considered as law, any coherent *system* of norms shall be treated analytically like state law. For the debate on legal pluralism see Fuller 1994

different institutions and legal ideologies act on different legal levels and influence each other. Writing about a situation of legal pluralism thus means, that an analysis must not treat any legal sphere as isolated but it must always consider external influences and power relations of other legal spheres. Such a view on multiple layers of law permits to trace back the origins of ideas and interventions and thus to disclose influential parties and power relations.

### *II.2.2. Universal Human Rights?*

A theoretical discussion would be incomplete without a section on the mechanisms of human rights law and a critique of the notion of universal and acultural human rights. First we have to note that most human rights laws (especially laws concerning indigenous peoples) are instruments of soft law such as principles and declarations. Contrary to obligatory laws whose breach can be sanctioned, its impact is often indirect and “based on custom, social pressure, collaboration, and negotiations among parties to develop rules and resolve conflicts”<sup>48</sup>. Sally Engle Merry continues on the potential of human rights law:

Law empowers powerful groups to construct normative orders that enhance their control over resources and people, but also provides to less privileged people avenues for protest and resistance.<sup>49</sup>

Human rights thus have a dual nature. They can be at the same time deliberative and hegemonic. An approach that is critical of power relations always has to bear in mind, that human rights rhetoric can often be invoked to support the hegemony of certain discourses. Law serves in such cases as a “vehicle by which different parties attempt to gain and maintain control and legitimation of a given social unit”<sup>50</sup>.

When we are speaking about hegemonic processes in international law, we must also address the question of implicit (western) values that are inherent in human rights law. Opponents of the notion of universal human rights criticize, that the founding document of modern human rights, the Universal Declaration of Human Rights (UDHR) is based on fundamentally western concepts such as the

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<sup>48</sup> Merry 2006a: 101

<sup>49</sup> *ibid*: 109

<sup>50</sup> Nader 2002: 117

rule of law, the construction of an international system that is constituted by state actors, or the primacy of the liberty of thought and expression.<sup>51</sup> At the same time, the principle of human rights states that they are valid “without distinction of any kind”<sup>52</sup>.

The notion of universality and of human rights as an a-cultural space is rooted in Enlightenment’s conception of human rationality, which has been criticized by postmodernism for its implicit eurocentrism.<sup>53</sup> First, there is *per definitionem* no such notion as an a-cultural space. Enlightenment as an occidental philosophy is also rooted in culturally situated Judeo-Christian discourses. Second, human rights are in fact an abstract construction but they inevitably become “culturalized” when they are applied on the ground. Sally Engle Merry speaks of a *vernacularization* of international law.<sup>54</sup> It has to be noted that social anthropologists have uttered the strongest critique of the universality of human rights, since the anthropological paradigm of cultural relativism is fundamentally opposed to the cornerstones of human rights.<sup>55</sup>

Despite the well-justified concerns by cultural relativists and exponents of a critique of hegemonic processes, this paper is not opposed to the idea of human rights that are valid for humanity as a whole. Generally, there are numerous success stories where human rights served as an important resource for citizens living under repressive governmental regimes. From an aspirational point of view, human rights would also be a precondition for the establishment of a universal human solidarity beyond national or ethnic frontiers. If we maintain the notion of universality, we still need a universal measure of rationality. In my opinion, the debate between relativists and universalists should be resolved by taking recourse to Habermas’ criteria for discursive rationality that have been discussed in section II.1.1. A decolonized social science thus has not the role of judging, whether the content of human rights is acceptable, but it should

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<sup>51</sup> UDHR Preamble, Art. 1

<sup>52</sup> UDHR Art.2; Of course we have to bear in mind that the UDHR had been framed with the crimes of an ideology in mind that described members of certain “races” as *lebensunwertes Leben*. It is thus undoubtedly to be seen as a form of human progress. This does not mean however that the UDHR should be seen as a quasi-biblical document and that it cannot be developed according to recent challenges of globalization.

<sup>53</sup> Moore 2004: 55-63

<sup>54</sup> cf. Merry 2006b

<sup>55</sup> Riles 2006: 61

critically observe the circumstances and power relations in which it is formulated.

Finally, I would like to mention the economic dimension of states' positions in the human rights discourse. Traditionally, discussions on human rights have been marked by the great divide between capitalist countries, which favoured civil and political rights, and socialist and so-called developing countries, which prioritized economical, social, and cultural rights. Even today after the decline of the bipolar world system, this divide between "western" and "developing" countries still exists.<sup>56</sup> The position of actors in the field of international human rights is thus to be regarded as biased partly because of global economical inequalities.

This theoretical discussion served the purpose to elucidate the concepts that will be applied in the empirical part of this paper, the reasons why I chose them, and the assumptions I make vis-à-vis the international system. Foremost, I will refer to the concept of regimes and their components and the question about the circumstances of cooperation for the achievement of common goals. I have explained why I do not expect economical considerations to be the sole driver of cooperation, but that a cosmopolitan notion of justice must be considered to constitute an idealistic component of cooperation. This discursively legitimated justice shall also serve as a standard of critique in this paper.

The second section of this theoretical chapter further explained some contexts that are relevant in our research field. Globalized law that operates at multiple levels needs to be discussed in the context of governance and legal pluralism. Also, the concepts of international law and transnational legal processes have been demarcated. I concluded this chapter with some critical remarks on the study of presumably universal human rights.

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<sup>56</sup> Merry 2006a: 104-106

### III. Methodological Considerations

In order to answer the research question I have posed in the beginning, I utilized a combination of empirical studies and a review of the relevant literature on Quebec's First Nations and the human rights concerning indigenous peoples. This literature will be discussed in detail in the chapters IV (on the international regime) and V (on the Canadian context). This chapter discusses my research methods with respect to the empirical part of the study as well as the process of drawing conclusions.

The empirical research for this paper serves the purpose to confront the theoretical literature with topical data. Also, my research concerns an issue that is under constant development. Aspirations held by the international institutions and indigenous groups shall thus be evaluated according to the three strands described in chapter VI.

The heart of my empirical research consists of a series of expert interviews, which will be discussed in the first section of this chapter. I want to write about methodological considerations on the method of expert interviews as well as giving a reflection about my personal experiences during the process of data collection.

The empirical data I want to present in chapter VI and analyze in chapter VII secondarily rest on observations I have conducted during my year "in the field". These data comprise films, pamphlets, reports, newspaper articles, as well as field notes from demonstrations, actions, and scientific conferences. These documents served to give me a more profound understanding of the legal and political situation of Quebec's indigenous population. Given the very diverse nature of these documents and the rather casual and unsystematical nature of their collection, they have not been analyzed according to scientific standards of text analysis. This chapter thus contains no further methodological discussion of these sources.

The second section of this chapter concerns the methodical considerations according to which I drew my conclusions in chapter VII. Finally, because the aim



of this paper is an evaluation of the human rights regime of indigenous peoples, I will discuss the criteria for this evaluation in the last section of this chapter.

### III.1. Expert Interviews

Between February and May 2013, I conducted a series of nine qualitative interviews with experts who are working in the field of indigenous people's human rights and have knowledge about the international dimension of this issue. The interviews had a length of 50 to 80 minutes and they were held either in French (6 interviews) or in English (3). The target group were representatives of the government, of indigenous organizations, NGOs working in the field of human rights, politicians, and scientists. I aimed at having expert opinions of a diverse as possible range of informants. The expert informants partly provided my research with complementary context knowledge to the perspective of the literature I had studied, partly they were saturating my knowledge of the issue by giving deeper insights into their practical professional experience.<sup>57</sup>

To conduct the interviews, an approval by the ethics council of the Université de Montréal had been necessary which had been granted on the 18 February 2013. The research was not only designed to be in accordance with the ethics policy of the UdeM<sup>58</sup>, but also with the research protocol of the Assembly of First Nations of Quebec and Labrador<sup>59</sup>, a guideline that is developed by the official representation of the province's First Nations.

Prospective participants were initially contacted via email or phone call and were sent a declaration of consent that informed them about the framework, benefits, risks, and rules of confidentiality of the research (see. Appendix IX.7.). The declaration had to be signed before the interview by the interviewer and the interviewee. Participants had the right to withdraw from the study at any time and to be anonymized in the paper (this last option was chosen by one

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<sup>57</sup> cf. Meuser & Nagel 2005: 75 for the distinction between experts as the objects of a study and as providers of complimentary knowledge; *ibid*: 76 for the distinction between the more practical *Betriebswissen* and *Kontextwissen*, which is rather focused on assessments and opinions based on expert knowledge.

<sup>58</sup> <http://www.recherche.umontreal.ca/ethique-de-la-recherche/les-instances/le-comite-universitaire-dethique-de-la-recherche-cuer/>, 13 June 2013

<sup>59</sup> AFNQL 2005

participant). The research participants authorized all quotes that were taken from the interviews.

I have chosen the method of an expert interview because the answers to my research question, given the continuously evolving nature of my research field, were not to be found solely in a study of scientific literature or documents. What I needed was the practical professional experience as well as assessments of the current situation by experts (or *Betriebswissen* and *Kontextwissen*<sup>60</sup>). It seemed to me that a method that consists of a relatively open form of interviews where the interviewee is of interest not because of their individual life story, but as a *pars pro toto* for a certain perspective, would be ideally suited to meet these goals.

Im Unterschied zu anderen Formen des offenen Interviews bildet bei ExpertInneninterviews *nicht* die Gesamtperson den Gegenstand der Analyse [...]. Der Kontext, um den es hier geht, ist ein organisatorischer oder institutioneller Zusammenhang, der mit dem Lebenszusammenhang der darin agierenden Personen gerade nicht identisch ist und in dem sie nur einen Faktor darstellen.<sup>61</sup>

Although expert interviews differ fundamentally from structured survey-type interviews, my interview design was based on an outline. This outline did not consist of pre-formulated questions, but of pre-formulated topics that had to be treated during the interview. This structuring was necessary in order to enable a systematic comparison of the different interviews in the analysis. Nevertheless, the interview was always open for topics to be introduced by the interviewee. With regards to my interview strategy, I tried not to influence the participant's answers with my own assumptions. Therefore, I first asked questions with a broader scope that did not contain implicit suggestions that international law would be an important factor for the legal situation of indigenous peoples. The topics I covered in the interviews were:

- Personal History of involvement in indigenous peoples' rights (brief narrative part)
- Main turning points in the situation of indigenous peoples' rights since the interviewee had been involved in these questions

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<sup>60</sup> Meuser & Nagel 2005: 76

<sup>61</sup> *ibid*: 72-63

- Role of international law on the local level and developments since the adoption of the UN Declaration on the Rights of Indigenous Peoples
- Personal assessment of the movement *Idle No More*
- Consultation processes in the course of Canada's / Quebec's northern development projects
- The specific situation of Quebec's First Nations in a constitutional setting of coexistence of different cultures (anglo-Canadian, *québécois*, recent immigrants, and Natives)

Before conducting the interviews, I tried to anticipate possible problems according to the literature on expert interviews. Particularly, I tried to avoid asking leading questions and sticking too closely to the interview outline.<sup>62</sup> The suggestive leading of interviewees should be avoided by the alignment and the open nature of the questions. It must also be noted that the topics of interest noted above had partly been revised and developed based on the focus of the answers in the first interviews that I conducted. The research was thus always open to adjustment according to a new state of information.

In order to meet the standards of a transparent and reflexive study, I want to mention some practical challenges that I have encountered in the course of the empirical research. The accessibility of potential participants depended largely on their position and the institutional setting they were working in. Informants with a scientific background, even if they did not work in a university context at the moment of the interview, were more accessible than people who held a professional position in an association or government agency. This last problem was presumably due to the fact that press relations officers often were not capable of providing me with the information that I needed and the real experts in an association or public institution were not authorized to speak on behalf of the organization or government body. The majority of the research participants were recruited according to a pyramid scheme, whereas direct contacts only provided a return of approximately 30 %. During the interviews I had to find a compromise between the principle of neutrality and the urge not to lead the interviewee's answers and the establishment of an atmosphere of mutual trust.

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<sup>62</sup> cf. Hopf 2009: 359

In order to get easier access to the required information, my role occasionally oscillated between one of a neutral interviewer and one of a discussion partner. In some cases it seemed to be necessary to prove my knowledge of indigenous peoples' rights in international law and in Canada.

### III.2. Method of Analysis

The analytical method that I will apply in chapter VII can be classified as a qualitative content analysis because it approaches the analysis of qualitative data in a systematic manner without quantifying them.<sup>63</sup> The systematic classification of the empirical data will however not be done according to theoretical assumptions, but along thematic lines. Therefore, I will apply thematic categories to the collected data that I have developed based on the raw data itself in a first step.<sup>64</sup> The aim of this step is to reduce the complexity of the data, filter unnecessary information, and to establish case overviews. Mayring refers to this step as a *zusammenfassende Inhaltsanalyse*.<sup>65</sup>

The results of this reduction are the three cases after which chapter VI is structured. In a further analytical step, the empirical data of the interviews and the documents will be connected with accounts from the secondary literature. The result of this step is a detailed account of the three cases described above (see Chapter VI). In a final step, the case analysis, these cases will be confronted with the theoretical assumptions discussed in Chapter II.<sup>66</sup> The results of this critical evaluation are my 9 theses on the regime of indigenous peoples' human rights. The criteria for this evaluation will be presented in the following section.

### III.3. Evaluation Criteria

The aim of this paper is to evaluate the impact of the regime of indigenous peoples' human rights with the methods of qualitative social science. Before I

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<sup>63</sup> Mayring 2009: 469

<sup>64</sup> Schmidt 2009: 447

<sup>65</sup> Mayring 2009: 472

<sup>66</sup> cf. Schmidt 2009 for a five-step-approach to the analysis of semi-structured interviews according to which I have structured the analytical method in this paper

will describe my criteria for evaluation in this section, the questions need to be discussed, why and for whom an international regime must be evaluated. The need for an evaluation comes from the fact that we are dealing with a relatively new and aspirational regime of human rights, where a quantitative analysis would not provide useful data for a policy evaluation. An explorative qualitative paper with a regional focus can thus provide the actors in the field – indigenous groups, NGOs, administrations, international organizations – with information that enables them to take actions that are based on scientific results. This point leads us to the question of the addressees of this evaluation. Especially in the Anglo-American scientific tradition, policy evaluations always rather had the character of an applied science that served the interest of the researcher's sponsor.<sup>67</sup> The evaluation standards of this paper want to go further than that. A scientific evaluation with a regional focus must define evaluation criteria that, firstly, allow for a comparison of the results in similarly designed studies with a different regional focus, and, secondly, produce data with a significance that outlasts changes in the legal and political context (which are to be expected).

Evaluation criteria thus serve the purpose to make results comparable and to enable to a certain degree the scientific judgement about success or failure of the regime. I also want to present and analyze data that are significant outside of their temporal and local context. Lüders speaks of providing the *ökologische Validität* of given data.<sup>68</sup> A re-contextualization of the data thus happens in the step of the analysis, that is to say that the data that were assembled into our three case examples are again met in the context of the production of these data.<sup>69</sup> The study thus has to ask where certain information comes from, how the producers of accounts are politically situated, and what this means for the reliability and the judging of data.

In the difficult normative question of developing criteria for judging the regime's success, I want to orient this research on two goals that broadly underlie the regime's institutions and laws. First, it is generally recognized in the regime, that political and territorial self-determination are preconditions for the realization

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<sup>67</sup> Lüders 2006: 451-452

<sup>68</sup> *ibid.*: 456

<sup>69</sup> *ibid.*: 453-455 for the process of de-contextualization and re-contextualization

of indigenous peoples' human rights. Second, the regime aims at a re-definition of the relationship between indigenous peoples and the state – a relationship that is harmonious and marked by partnership and mutual respect.<sup>70</sup> The evaluation criteria in this paper are thus defined in analogy to these two aims. Since it is evident that the regime wants to provide legal support for the improvement of indigenous peoples' social situation and their position in their respective host nations, I will evaluate if the instruments of international law really back indigenous peoples' claims. The second axis of evaluation concerns the relationship between indigenous peoples and the state. I will therefore analyze if the regime really contributes to a re-definition of indigenous-state relations and if potential changes really take the form of a harmonic partnership.

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<sup>70</sup> Youngblood Henderson 2008: 74-89, UNDRIPS Preamble

## IV. The Regime of Indigenous Peoples' Human Rights

The aim of this chapter is to provide a description with an analytical depth of the international institutions and laws concerned with indigenous peoples today. To understand the regime's patchwork-like architecture, we will first try to conceive the history of indigenous and tribal populations in international law. Before I describe the current regime in the framework of international organizations in section 3, I want to discuss the main points of conflict between indigenous peoples and states. I will put special emphasis on the right to self-determination of peoples in this section because I deem it to be the cornerstone of indigenous peoples' human rights.

### IV.1. A Brief History of Indigenous Peoples in International Relations

In the first section of this chapter, I want to reconstruct historically how indigenous peoples came into being as subjects of international law. The principle of self-determination, which will be explained in the context of current legal questions in section 2.1., is the cornerstone of the history of indigenous peoples in international law.

Early positivist international law only recognized self-determining nation states as independent actors in international politics. A close link between a centralized ethno-nationalist nation state of the European model had been assumed as the basis for having the right to self-determination.<sup>71</sup> In this ideology, self-determination was conceived as a right that existed between nation states, and not as a collective right of a group vis-à-vis the state.<sup>72</sup> Contrary to conceptions of divine or natural law, this eurocentric conception of international law of the late 19<sup>th</sup> / early 20<sup>th</sup> century clearly excluded indigenous peoples as equivalent actors in international relations. Indigenous peoples were *a priori* deprived of the right to self-determination since independent actors could have only been recognized by nations that already held the status of self-determination and that

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<sup>71</sup> Anaya 2004: 98-99

<sup>72</sup> Barker 2005: 1-4

defined the criteria for being “civilized enough” to claim political independence.<sup>73</sup> With regards to indigenous peoples, international law served primarily as a justification for territorial dispossessions. It served as the argumentative foundation for the doctrine of *terra nullius*, according to which conquest or cession of lands was not a necessary prerequisite for the acquisition of indigenous lands because uncultivated land that was inhabited by nomad people without political structures that resembled the western nation state was to be regarded as uninhabited.<sup>74</sup>

In particular, US president Woodrow Wilson (but also the Austrian Chancellor Karl Renner) further tied the concept of self-determination to ethno-nationalist notions after the World War I. After the downfall of Austria-Hungary, Prussia and the Ottoman Empire, Europe’s borders were to be redrawn according to the conceptions of self-determination at that time.<sup>75</sup>

The world – especially Europe – lay in ruins in 1945 and the political status of many territories and collectives of people remained undetermined or stayed under direct colonial rule. At the same time, most parts of Africa, South-East Asia, India and the Caribbean were still colonized. The self-determination of peoples was thus anything but a *fait accompli* at this time. The foundation of the United Nations rested largely on the aspiration to realize the right to self-determination for the peoples of the earth.<sup>76</sup> The end of the dependent status of large parts of the earth’s territories was seen as one of the major challenges for the newly founded UNO. In this spirit, the General Assembly of the United Nations adopted resolution 1514 in 1960 with the goal of ending all forms of colonialism. The resolution disqualifies colonialism as a denial of fundamental rights and reaffirms the right to self-determination. Furthermore, the General Assembly affirmed that any kind of “under-development” must not be used as a reason to deprive a people from its right to self-determination.<sup>77</sup> This resolution

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<sup>73</sup> Anaya 2004: 26-31; The “test” for a civilized notion primarily consisted of having a sedentary lifestyle and a state structure that is similar to the model of the western nation state

<sup>74</sup> *ibid*

<sup>75</sup> *ibid*:187-189; cf. Otis 2006: 790-796; After World War I, the concept of self-determination had also been exploited by other political discourses. Lenin and Stalin had argued the justification for the liberation of the classes on the grounds of the principle of self-determination as well.

<sup>76</sup> UN Charter Chapter 1 Art. 1(2), Art. 2(1)

<sup>77</sup> UN A/RES/15/1514 Art. 1-3



also carries important implications for the struggle for self-determination of indigenous peoples and their status as subjects of international law today, which will be discussed later in this chapter.<sup>78</sup>

The process of decolonization from the 1950s to the 1970s gave the discourse of self-determination a direction that was not always favourable to the concerns of indigenous peoples. First, decolonization<sup>79</sup> was primarily conceived as a question of territorial independence.<sup>80</sup> In this discussion (that has primarily been held in a forum of independent nation states), the free choice of the form of government within the borders of a nation state was seen as the most qualified and also as the only form of self-determination.<sup>81</sup> This choice could have been realized in the form of a confederation with another existing state, or as a region with sovereign rights within the borders of an existing state, but most often, self-determination has been realized in the form of secession from a colonial centre.<sup>82</sup> Secondly, decolonization was a regime of historically founded claims, that is to say that international law tackled historical questions that happened well before the creation of this law.<sup>83</sup> We will see later on that this point will have great importance for the claims of indigenous peoples. Finally, the processes of secession during decolonization were projects that were undertaken in the spirit of nationalism. Anyhow, notions of a unity of *Staatsvolk* and *Staatsgebiet* were applied imprudently wherefore the creation of a national unity was problematic in the decolonized countries.<sup>84</sup> In general, indigenous people were not taken into account or consulted in the creation of the newly independent states, which – from a liberal-democratic point of view – calls their legitimacy into question:

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<sup>78</sup> cf. Anaya 2004: 53-56, Anaya 2009: 184-185

<sup>79</sup> I critically examine in this paper the dominant ideology of decolonization with regards to possible negative effects for the self-determination of indigenous peoples. My critique shall however not be interpreted as an opposition against the process of undoing or recompensing colonialism as such.

<sup>80</sup> Otis 2006: 797-800

<sup>81</sup> Anaya 2004: 89-99; Anaya 2009: 189; Merry 2006a: 104-106

<sup>82</sup> Moore 2003: 89-94

<sup>83</sup> Anaya 2004: 105-110, 189

<sup>84</sup> *ibid*: 53-56

If the exercise of legitimate authority is based on the principles of democratic consent and the sovereignty of the people, then the current state does not exercise legitimate authority over them.<sup>85</sup>

The emergence of indigenous peoples in international politics as independent actors who speak for themselves and who articulate their claims is a relatively recent phenomenon. The first official contact of indigenous peoples with the international system had been established by the Maori chief Kayuga Deskaheh from Aotearoa / New Zealand in 1923. He addressed a complaint to the League of Nations but was denied the right to speak because his band was not recognized as a subject of international law.<sup>86</sup> The first international law that is exclusively concerned with indigenous peoples is Convention 107, which had been adopted by the International Labour Organization (ILO) in 1957. Although it was not drafted with the participation of indigenous peoples, it is still important because it defines indigenous peoples as subjects of international law for the first time. ILO 107 aims explicitly at the assimilation of indigenous peoples into the mainstream of society.<sup>87</sup> The project of assimilating indigenous peoples can be seen as a part of the project of decolonization that tried to artificially create a culturally homogenous nation state where such a thing did not exist. Furthermore, it must be noted that the convention applies to “members of a tribal population”<sup>88</sup>. This wording implies that it does not recognize collective rights of indigenous peoples. ILO Convention 107 had been replaced by Convention 169 in 1989. Because ILO 169 is part of the current regime of indigenous peoples’ human rights, it will be discussed in section 3 of this chapter.

## IV.2. Components of Indigenous Peoples’ Human Rights

After briefly introducing the history of indigenous peoples in international law, I want to examine the most crucial debates about indigenous peoples’ human rights during the last (roughly) 25 years since the beginning of the negotiations

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<sup>85</sup> Moore 2003: 101

<sup>86</sup> Montes & Torres Cisneros 2009: 138-139

<sup>87</sup> Anaya 2004: 53-56

<sup>88</sup> ILO 107 Art. 1

for a UN Declaration on the Rights of Indigenous Peoples (in the following either “the Declaration” or “UNDRIPS”). I regrouped these issues according to the political dimension (viz. the right to self-determination), the right to land and resources, development and consultations, and finally the cultural dimension of indigenous peoples’ rights and the question if their claims for collective human rights are justified. I will conclude with definitional questions of indigeneity and the cultural politics of international law.

#### *IV.2.1. Self-Determination*

The right to self-determination forms one of the cornerstones of human rights in general and it can be seen as a preliminary condition for the fulfilment of other basic rights in the context of indigenous peoples. For this reason, the specificities of self-determination in the context of this paper will be discussed more extensively on the next pages.

The right to self-determination is of paramount importance for international human rights because of its position at the beginning of the two covenants that set the foundation for the modern system of human rights. Moreover, the human rights covenants are binding international law. The beginning of the International Covenant on Civil and Political Rights as well as of the International Covenant on Economic, Social, and Cultural Rights goes as follows:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>89</sup>

One of the major concerns of state representatives in the negotiations about international law concerning indigenous peoples was the fear that indigenous groups could claim a right to territorial secession and fully qualified national sovereignty if they were to be granted the right to self-determination in terms of the human rights covenants.<sup>90</sup> ILO Convention 169 (Art. 3) and the UN Declaration on the Rights of Indigenous Peoples (Art.46), which will be discussed in section three in more detail, thus contain further qualifications to the right to

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<sup>89</sup> ICCPR, ICESCR Art. 1(1)

<sup>90</sup> Youngblood Henderson 2008: 74-89

self-determination of indigenous peoples in order to guarantee the territorial integrity of nation states. This thinking is obviously rooted in the mentality of the age of decolonization, which assumes an inevitable link between self-determination and national sovereignty. This notion has been strongly contested by indigenous activists and NGOs who argue that the vast majority of indigenous peoples who aspire to political self-determination do not intend to become sovereign nation-states – an undertaking that would hardly be achievable in most cases because of the small size of indigenous nations.<sup>91</sup>

The claims to self-determination of indigenous peoples also contest liberal assumptions about the state and citizenship. Whereas the liberal argument of the equality of all citizens before the law basically supports indigenous peoples' rights, this way of thinking does not make a difference between indigenous peoples and national minorities or immigrant groups. Thus, liberalism neglects the historical dimension of indigenous peoples' claims and the importance of colonialism in this regard.<sup>92</sup>

It is true that the claims of national minorities (like the Scots in the United Kingdom, the Catalans in Spain or the *québécois* in Canada) might share some concerns and claims with indigenous peoples. It is disputed on the international level if the Declaration should also be interpreted as having implications for the rights of minorities. Currently, there is a "firewall" in international customary law that prevents the application of indigenous peoples' rights on minorities. Despite the similarities of their claims to self-determination and cultural integrity, national minorities lack the experience of being colonized and marginalized by an imperial centre in the way indigenous peoples have been affected by colonialism. Indigenous activists on the international level are especially keen to stress the distinctiveness of their claims as opposed to the rights of national minorities in order to prevent a broadening of the application of indigenous peoples' rights, which might diminish its vigour.<sup>93</sup> The role of indigenous peoples in international law can rather be seen in analogy to formerly colonized countries with regards to the historical aspect of their claims.

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<sup>91</sup> Anaya 2004: 58-61

<sup>92</sup> Moore 2003: 89-94

<sup>93</sup> Kymlicka 2011a: 183-188

I see the main difference between indigenous peoples and colonies in the size and distribution of their respective population. This fact calls for a realization of the right to self-determination that is different from secession and the foundation of a new nation state according to the classical model of decolonization.

To be able to think of new ways of fulfilling self-determination, we must first of all deconstruct the link between self-determination and national sovereignty. This notion does not do indigenous peoples a great service in their claims. Basically we can distinguish between internal and external self-determination. The right to internal self-determination encompasses the right to self-governance, which is to say to freely choose the procedures of decision-making concerning internal affairs of the community. This right is not *per se* questioned in international law by representatives of nation states and it is also consistent with the Westphalian principle of sovereignty, according to which members of ethnic or religious minorities have the right to be judged according to their traditional laws, irrespective of the principle of territoriality.<sup>94</sup> The right to external self-determination is the right to freely determine the political status of a people and its territory in international relations. Indigenous peoples' right to external self-determination has always been called into question by state representatives.<sup>95</sup> Current international law, especially before the rise of indigenous peoples' rights, does not dispose of sufficiently nuanced models for the political status of a people. In the case of indigenous peoples, international law seeks to develop graduations between a dependent and externally controlled territory and an independent nation-state.

Another important dichotomy in the context of the historicity of indigenous peoples' claims is the difference between the constituting and the continuing aspects of self-determination. The constituting aspect of self-determination can be described as the right of a people to freely choose its own government. But self-determination also has a continuing aspect, that is to say that a people has the right to freely develop over time its political life on the grounds of a freely

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<sup>94</sup> cf. Otis & Motard 2009

<sup>95</sup> Quane 2011: 259-263

chosen government.<sup>96</sup> Even though the constituting aspect of self-determination might be fulfilled for indigenous peoples in certain constitutional settings, it is evident that the right to continuing self-determination has been fundamentally violated in the era of colonialism. A regime that addresses indigenous peoples' claims thus must not only guarantee the right to govern oneself, but it must also contain compensation for historical injustices.

This discussion of self-determination in the indigenous context wants to show that national sovereignty is not a cogent consequence of self-determination. It seems to be more important to strip down the right to self-determination to its core values and to try to realize this right within the scope of existing national constitutions. According to Anaya, these core-values are non-discrimination (legal, cultural, and social), cultural integrity, land rights, social well being, the freedom to choose one's own path of development, as well as governmental autonomy.<sup>97</sup> The following two sections will explore other important features of indigenous peoples' claims, namely land rights and questions of cultural distinctness and indigenous identity.

#### *IV.2.2. Land Rights and Natural Resources*

Land and resource rights are also at the heart of indigenous peoples' claims. They are often seen as a preliminary condition for enjoying political rights and they are thus central in current legal documents on indigenous peoples' rights. A spiritual relationship to the land that goes beyond a strictly economical logic is one aspect that sets indigenous peoples apart from ethnic minorities (particularly in the rather complex case of indigeneity in Africa<sup>98</sup>). These special ties to the land are regarded as a mythical or religious significance for many indigenous peoples. Moreover, subsistence economy – mainly in the form of hunting and foraging – often plays an important role for indigenous peoples. These economical practices may serve the purpose of maintaining one's cultural

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<sup>96</sup> Anaya 2004: 104-110

<sup>97</sup> *ibid.*: 129-156

<sup>98</sup> see Suzman 2001 for the challenges of indigenous peoples' land rights in African

survival, or to meet economical necessities.<sup>99</sup> The upcoming section on indigenous identity and law will discuss the problematic aspects of an essentialist view on the specific relationship of indigenous peoples to the land. Questions of the consultation of indigenous peoples in the course of development or industrial projects on their lands (or what is claimed to be their lands) are closely linked to land and resource rights. In this context, international law concerning indigenous peoples has developed the norm of Free, Prior, and Informed Consent (FPIC) in the 1980s, which is firstly prescribed in ILO convention 169, the Declaration on the Rights of Indigenous Peoples and the Extractive Industries Review of the World Bank. Debates in international law circle around the question, if this norm is to be interpreted as a veto right for indigenous peoples or a mere obligation to governments and corporations to inform affected populations, or something in-between.<sup>100</sup> The empirical part of this paper will also concern itself with the question of how this norm is interpreted differently on the local level by indigenous peoples and the government respectively.

#### *IV.2.3. Indigenous Culture and Definitions of Indigeneity*

The discourse on indigenous peoples' land rights is closely linked to an often-cited "special" relationship to their ancestral lands. This section will discuss questions of cultural integrity and the collective nature of indigenous peoples' rights. I will ask the question "Who is indigenous?" in terms of international law, and I will point out problems that are connected to an essentialist view on indigenous culture and their rights to land.

In the context of cultural rights, it is worth noting that institutions of the international system, which initially served to dispossess indigenous peoples from their traditional lands via the justification of concepts such as *terra nullius*, now widely recognize the necessity of the regulation of land rights in order to enable indigenous peoples to enjoy their cultural rights as a group.<sup>101</sup> In fact, it

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<sup>99</sup> Zips-Mairitsch 2009: 50-52; cf. Gilbert & Doyle 2011

<sup>100</sup> cf. Lebuis & King-Ruel 2010

<sup>101</sup> Gilbert & Doyle 2011: 291-296; Such a notion has to date been approved of by the Declaration (Art.25), the UN Permanent Forum on Indigenous Issues and the African Commission

has always been one of the major concerns of states (particularly Great Britain and France) in the negotiations on indigenous peoples' human rights, if human rights can have a collective nature or if they are *a priori* individual rights. According to the point of view of indigenous representatives, rights such as the right to culture, but also the political right to self-determination and land rights, cannot be enjoyed as an individual and the notion of indigenous rights that can be enjoyed exclusively on an individual basis would render its impact virtually meaningless.<sup>102</sup> The negotiations about the existence of collective human rights also made the classical divide between western countries and socialist and so-called developing countries visible. While the former favoured (individual) civil and political rights, the latter rather sponsor economic, cultural and social rights with their inherently collective nature.<sup>103</sup> The strongest opposition to the adoption of legal documents concerning indigenous peoples thus always came from western countries with a colonial past (particularly the USA, Canada, Great Britain, France, Australia, and New Zealand).

Who exactly is defined as an indigenous person or a people in terms of international law? This question has not yet finally been resolved. ILO Convention 169 (see Chapter IV.3.1.) defines indigenous peoples as follows:

(a) tribal peoples [...] whose social, cultural and economic conditions *distinguish them from other sections of the national community*, and whose status is regulated wholly or partially by their own *customs or traditions* or by special laws or regulations;

(b) peoples [...] who are regarded as indigenous on account of their descent from the populations which inhabited the country [...] at the time of conquest or colonisation or the establishment of present state boundaries and who [...] *retain* some or all of their own social, economic, cultural and political institutions.<sup>104</sup>

Founded on the *Martinez-Cobo-Report*<sup>105</sup>, the Working Group on Indigenous Peoples of the United Nations (see chapter IV.3.1.2.) issued this definition:

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on Human and Peoples' Rights. The UN Committee on the Elimination of Racial Discrimination, the OSCE and the European Council also explicitly regard the maintenance of cultural integrity as a precondition for the fulfilment of the principle of non-discrimination; cf. Anaya 2004: 131-141

<sup>102</sup> Ibid: 296-326

<sup>103</sup> Merry 2006a: 104-106

<sup>104</sup> ILO 169 Art. 1 1.a-b; italics AH

<sup>105</sup> The report of special rapporteur Jose Martinez Cobo to the Economic and Social Council (ECOSOC) in 1986 (E/CN.4/Sub.2/1986/87) is up to date the most frequently invoked definition



WGIP defines people as indigenous according to their descent from groups [...] with *different cultures* and ethnic origins, who due to their *isolation* from other sectors of the society have *retained the customs and traditions of their ancestors virtually intact*, traditions which are similar to those *considered to be indigenous*.<sup>106</sup>

The UN Declaration on the Rights of Indigenous Peoples does not contain a definition. This is due to objections by indigenous representatives who feared that a too narrow definition could weaken their legal status and finally exclude certain groups that should be beneficiaries of the Declaration. Instead, the Declaration grants indigenous peoples the right to define membership in their respective nation themselves:

Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.<sup>107</sup>

What Sylvain says about the status of the San in Namibia is generally true for the situation of all indigenous peoples: A definition that regards indigenous peoples in the role of keepers of cultural anachronisms (assigning them a status similar to Amish people so to speak) denies the dynamic that is inherent in any living culture.<sup>108</sup> The definitional approaches cited above can be understood as antitheses to former assimilationist approaches, but they actually construct a cultural heteronomy that is absolutely contrary to the aim of self-determination. If we understand the right to development also as the right to conceive development differently than the global mainstream, indigenous peoples must have the right to understand development in a culturally conservative, progressive, or even globalist way.

The notions of prior occupation and of specific links to ancestral territories are problematic for three reasons: First, it is often difficult for indigenous peoples to prove that they have inhabited a certain territory in pre-colonial times,

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of indigenous peoples. Generally, his definition rests on the four criteria of (1) a primordial inhabitation, (2) the will to continue specific cultural traits, (3) self-denomination, and (4) having a marginalized status in the society.

<sup>106</sup> Montes & Torres Cisneros 2009: 153; italics AH

<sup>107</sup> UNDRIPS Art. 33(1)

<sup>108</sup> cf. Sylvain 2005

especially if the people in question does not possess written documents.<sup>109</sup> Even if such a proof can be presented, it runs contrary to the idea of self-determination to force indigenous peoples to inhabit exactly the same lands where their ancestors used to live several centuries ago. Second, the notion of the necessity of territories for a subsistence-based economy also limits the free determination of indigenous peoples' economic status and thus inhibits their right to develop freely. There are several examples in Canada where indigenous peoples have been denied their rights to hunt and fish by the courts because their lifestyle was considered to be too "modernized".<sup>110</sup> Third, a definition that rests on a spiritual connection to ancestral lands excludes indigenous urban dwellers.<sup>111</sup> All these aspects indicate that essentialist versions of indigeneity construct a cultural heteronomy and establish limits to cultural autonomy.

Finally, some indigenous activists have proposed self-denomination as a solution to the definitional problem. All implications of this approach cannot be discussed in this paper, but studies in materialist anthropology on the commodification of ethnicity warn about possible abuses of indigenous identity, for example in the form of Native American casinos in the USA.<sup>112</sup> Currently, we have to accept that there is neither a test for indigeneity, nor that we can leave allegiance to an indigenous group open to self-definition, but that a group's status as an indigenous people is the result of a discursive process that depends on the respective context.

### IV.3. The Current Institutional and Legal Setting

The third section of this chapter will draw a picture of the current ensemble of institutions and laws on the international level that is occupied with the rights of indigenous peoples. The logic of the overview I give follows the organizational setting. A structure according to the different international laws that affect indigenous peoples would be equally possible and legitimate. I chose to focus on

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<sup>109</sup> In Canada, this problem has particular relevance since the so called Calder Case, which will be discussed in chapter V.2.3.; see also Godlewska & Webber 2007

<sup>110</sup> cf. Miller 2005

<sup>111</sup> Otis 2006: 797-807

<sup>112</sup> cf. Comaroff & Comaroff 2009: 60-85

organizations because my research question is rooted in political science. Thus, it also looks at the effects of the architecture of a regime on the micro-level. From the point of view of international law, this chapter undoubtedly is incomplete. Particularly since the Earth Summit 1992 in Rio de Janeiro, the international community acknowledged the human rights dimension of climate change and other ecological questions. International law such as the Convention on Biological Diversity, the Convention on Climate Change, and the “Agenda 21”, the final document of Rio '92, are thus further important international laws that affect indigenous peoples.<sup>113</sup> Because of a lack of space, these documents cannot be in this chapter.

#### *IV.3.1. International Labour Organization*

It might not be instantly obvious why standards of international law concerning indigenous peoples first developed in the context of the International Labour Organization. However, a view at the history of this institution, which was founded in 1919, shows that the ILO always was one of the most progressive proponents on the international level regarding economic and social rights. Many norms in international law (such as protection of the rights of children or women) trace back to ILO initiatives and indigenous peoples' rights are no exception.<sup>114</sup> It is important to understand that conventions adopted by the ILO are binding international law, which makes them comparatively powerful tools of international law. On the other hand, conventions are only binding to member-states, which decide to ratify them. If a member state violates a ratified convention, the consequences do not go beyond an investigation by the Governing Body of the ILO and finally the issuing of a report.<sup>115</sup> The real power of the ILO thus rather lies in its capacity to define certain terms in international law and in its use as an international forum for negotiations and debates on economic, social, and cultural rights. Its immediate authority is however rather weak.

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<sup>113</sup> Zips-Mairitsch 2009: 33-36

<sup>114</sup> *ibid*: 30-31

<sup>115</sup> Hurd 2010: 161-168

As said above, ILO Convention 107 of 1957 has had two features that were fundamentally against today's conception of indigenous peoples' rights: First, it regarded indigenous peoples as a passing phenomenon. In the nationalist spirit of decolonization they were to be integrated (presumably in their own interest) into the mainstream culture and economy of their respective home country. Second, Convention 107 was drafted without any participation of the populations affected by it. In 1989, ILO 107 had been revised by ILO 169.<sup>116</sup>

ILO 169 was the first major international law, which was developed with the participation of indigenous peoples. As a compromise between indigenous peoples and state representatives, it grants indigenous peoples the right to self-determination but limits the use of the term *peoples* in Art. 3 in terms of the self-determination of peoples, as it is commonly understood in international law. This qualification was a necessary concession to state representatives who demanded a guarantee that ILO 169 would not threaten the integrity of existing national boundaries. As a novel aspect, ILO 169 acknowledges indigenous peoples as collective entities that shall establish permanent links to states, and not as cultural relics that are to be overcome by means of cultural assimilation.<sup>117</sup>

The clear weakness of ILO 169 is its small number of ratifications. To date – 24 years after its adoption – only 22 countries have ratified the Convention. The vast majority of these countries are in Latin America with Norway being the only western country with a notable indigenous population that has ratified it. Its practical influence outside of Middle and South America thus lies primarily in serving as the conceptual foundation for the UN Declaration on the Rights of Indigenous Peoples that will be discussed in the following section.<sup>118</sup>

#### *IV.3.2. United Nations*

From an institutional point of view, today's human rights system of indigenous peoples in the framework of the United Nations consists of the United Nations

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<sup>116</sup> Anaya 2004: 58-61

<sup>117</sup> Zips-Mairitsch 2009: 31

<sup>118</sup> *ibid*: 32-33

Permanent Forum on Indigenous Issues (UNPFII), the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), and the Special Rapporteur on the Rights of Indigenous Peoples. This section will briefly present the work and responsibilities of these institutions and will then in more detail examine the content of the UN Declaration on the Rights of Indigenous Peoples that was drafted by the Working Group on Indigenous Populations (UNWGIP), which was the predecessor of the Expert Mechanism.

The UNWGIP had been founded in 1982 as a sub-body to the UN Commission on Human rights with the mandate to draft a declaration on indigenous peoples' rights. In 1993, such a draft declaration had been presented by the WGIP. However, it was only in 1996 that indigenous representatives had been granted a place at the table and a right to take part in the negotiations.<sup>119</sup> Because of a strong resistance on the part of, whose reasons will be discussed in the following sub-section, there were still 14 years between the drafting of the Declaration and its adoption by the General Assembly. After the successful adoption of the Declaration in 2007 and the transformation of the Commission on Human Rights into the Human Rights Council, the Working Group was abandoned and replaced by the Expert Mechanism on the Rights of Indigenous Peoples. This body, which is seated in Geneva, has the mandate to observe and to develop human rights law concerning indigenous peoples. The EMRIP is a subordinate body to the Human Rights Council and it reports directly to the UNHRC.

The UN Permanent Forum on Indigenous Issues (UNPFII) is an advisory body to the ECOSOC and it is not directly involved in the monitoring, development, and formulation of international law. Its foundation traces back to the First International Decade of Indigenous Peoples. The Permanent Forum holds its sessions once a year in New York on different thematic foci and its board equally represents governments as well as indigenous representatives. It has been mandated by the General Assembly to follow-up on and to evaluate the impact of the Declaration.<sup>120</sup>

A third important element in the system of indigenous peoples' human rights is the UN Special Rapporteur (UNSR) on the Rights of Indigenous Peoples, who was

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<sup>119</sup> Deer 2010: 18-23

<sup>120</sup> Stavenhagen 2011: 155-156

installed in 2001. Special Rapporteurs are independent experts who report directly to the Human Rights Council. They have the right to conduct fact-finding missions in member states, send communications to countries, and to co-author the annual report of the HRC.<sup>121</sup> The first UNSR on the Rights of Indigenous Peoples was the Mexican sociologist Rodolfo Stavenhagen who was succeeded by S. James Anaya in 2008.<sup>122</sup>

#### IV.3.2.1. The Declaration on the Rights of Indigenous Peoples

After the Martinez-Cobo report on the situation of indigenous peoples and the foundation of the WGIP in 1982, the process to draft a Declaration on the Rights of Indigenous Peoples was under way. In sum, the negotiations took about 25 years until the adoption of the Declaration in 2007. The (largely) unqualified right of indigenous peoples to self-determination is arguably the cornerstone of the Declaration but it is also one of the reasons why the negotiations took such an enormous amount of time.<sup>123</sup> To acknowledge the right to self-determination was a *condition sine qua non* for the indigenous representatives. At the same time, states' representatives wanted to do everything in order to prevent the possibility of a separationist movement amongst indigenous peoples.<sup>124</sup> Since the Declaration would not have had the support of the indigenous groups without the affirmation of the right to self-determination (which it would not need to be adopted, but the endorsement of indigenous representatives was necessary for the legitimacy of the Declaration), the Declaration was only specifically qualified in Article 46:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.<sup>125</sup>

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<sup>121</sup> <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>, 9 June 2013

<sup>122</sup> <http://www2.ohchr.org/english/issues/indigenous/rapporteur/index.htm>, 9 June 2013

<sup>123</sup> Deer 2010: 18-27

<sup>124</sup> Quane 2011: 264-269

<sup>125</sup> UNDRIPS Art. 46(1); Many indigenous activists and Human rights NGOs argue that the nature of this article is discriminatory because it is the only instance in international law (with the

The right to self-determination in the Declaration shows that it is a truly innovative instrument of human rights and that it does not merely reconfirm already existing standards of international law. From a conceptual point of view, the Declaration sees the right to self-determination of indigenous peoples as already intact since the time before the colonial conquest by the Europeans. The Declaration does not limit this right to people who have been subject to a regime of settler colonialism, but it applies to all (formerly) colonized indigenous peoples.<sup>126</sup> Different from the discourse of decolonization, the Declaration conceptualizes a right to self-determination that can be exercised in coexistence with a nation state. The right to internal self-determination is to be realized by governmental autonomy and the right to external self-determination is to be achieved by the inclusion of indigenous peoples in all decisions by whom they are affected according to the principle of Free, Prior, and Informed Consent.<sup>127</sup>

Apart from states' concerns about the possible option of complete national separation, which were primarily held by the USA, Canada, Australia, New Zealand, and (to a lesser extent) also Russia, the representatives of France and Great Britain contested the notion of collective human rights in the negotiations after the issuing of the Draft Declaration in 1993. These countries argued that Human rights are by their nature something that can only be enjoyed on an individual basis. The final text of the Declaration follows the argumentation of indigenous representatives who see particularly rights to land, culture, and language as something that can only be enjoyed as a group. After all, one cannot be an indigenous person "all alone" but only via membership in an indigenous collective.<sup>128</sup>

Another point of concern was the norm of Free, Prior, and Informed Consent (FPIC). This principle is mentioned in several articles of the Declaration<sup>129</sup> and

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exception of ILO 169 which also concerns indigenous peoples) where the right to self-determination of a people is qualified.

<sup>126</sup> Zips-Mairitsch 2009: 64-71; I use the term *settler colonialism* in contrast to forms of exploitation colonialism, such as the plantation colonies in the Caribbean, where a white minority with aims that were more of an economical than of a territorial nature, ruled an indigenous majority.

<sup>127</sup> Carmen 2010: 120-121, Montes & Torres Cisneros 2009: 154-157; see below for the principle of FPIC

<sup>128</sup> Gilbert & Doyle 2011: 296-326

<sup>129</sup> UNDRIPS Art. 10, 11(2), 19, 28(1), 29(2)

was thought to set the standard for consultation processes of indigenous peoples in the course of development projects. The notion was primarily contested by Canada in the later part of the negotiations. Their concerns were based on the fear, that a veto right of indigenous peoples could be deducted from the principle of FPIC. Finally, the principle was included in the Declaration. Since the conditions of FPIC are not defined legally, the concept is rather hazy and needs to be interpreted at the local level.<sup>130</sup>

It is furthermore noteworthy that the Declaration is directed to the present in that it aims at eliminating today's almost universal marginalization of indigenous peoples, and at the same time includes parts that seek compensation for historical injustices of colonialism. The Declaration not only wants to establish equality before the law, but it also envisions reparations for the crimes committed under colonial rule.<sup>131</sup> Ultimately, the vision of the Declaration is to establish a new kind of relationship between indigenous peoples and the state. This relationship shall be one that is marked by a rapport that is more peaceful and mutually respectful.<sup>132</sup>

The Declaration understands self-determination as something that is a precondition for the fulfillment of other human rights and at the same time is derived from other rights. This is particularly true for land rights, the right to FPIC, the right to live, the right to health, the right to cultural integrity, and the right to free development.<sup>133</sup> This latter right should not only be conceived as the right to take part in the globalist project of development, but also as the right to refuse the notion of development or to re-conceptualize it.<sup>134</sup> In conclusion, it can be said that the Declaration would not have the same legal value without the conception of the right to self-determination as it is expressed in Article 3, which uses the same wording as the two human rights Covenants.

The UN Human Rights Council adopted the Declaration on June 29 2006 with two votes against. It was then forwarded to the General Assembly, which

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<sup>130</sup> Deer 2010: 24-27; The objections of Canada against the Declaration will be discussed in the upcoming section. In chapter VI.1., I will write about the problems on the ground with a concept of international law such as FPIC when it is not well-defined.

<sup>131</sup> Anaya 2004: 110-115, Montes & Torres Cisneros 2009: 154-157

<sup>132</sup> Montes & Torres Cisneros 2009: 154-157, cf. UNDRIPS Art. 15(2)

<sup>133</sup> Carmen 2010: 120-121, Youngblood Henderson 2008: 74-89

<sup>134</sup> Gilbert & Doyle 2011: 296-326



adopted the Declaration in its September session in 2007 with 4 votes against (Australia, Canada, New Zealand, USA) and 11 abstentions (among them the Russian Federation, which was also sceptical about the text in the course of the negotiations).<sup>135</sup>

#### IV.3.2.2. Canada and the regime of indigenous peoples' rights

Along with Norway and many Latin American countries, Canada had always been one of the most supportive countries in the course of the negotiations and it lobbied in fact for other country representatives to endorse the founding principles of the Declaration. However, Canada voted against the Declaration in the Human Rights Council as well as in the General Assembly. Even an open letter by over a hundred Canadian legal scholars who tried to persuade the Canadian government, as well as a petition of the three opposition parties in the Canadian parliament, did not cause a turn in the government's position.<sup>136</sup> This 180-degree turn is presumably due to the change in government that happened only a few months before the vote in the Human Rights Council. In February 2006, the Conservative Party of Canada under Stephen Harper had replaced the liberal government lead by Paul Martin. This government has subsequently been accused by indigenous representatives and human rights groups of failing to grant indigenous peoples' rights any priority in national policies. Canada's main points of concern were:<sup>137</sup>

- The Declaration does not *balance* between the *rights* of indigenous peoples and the mainstream of the society as well as between individual and collective rights.
- The Declaration would be in conflict with the *Canadian Charter of Rights and Freedoms*. Because it gives indigenous peoples rights by virtue of their indigeneity, the Declaration would discriminate against the non-indigenous majority.

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<sup>135</sup> Deer 2010: 24-27;

[http://www.un.org/apps/news/story.asp?newsid=19056&cr=righ#.UbY7kvYZO\\_I](http://www.un.org/apps/news/story.asp?newsid=19056&cr=righ#.UbY7kvYZO_I), 10 June 2013

<sup>136</sup> Deer 2010: 24-27; Joffe 2010: 83; Saganash 2009: 254

<sup>137</sup> Joffe 2010: 75-82

- Because Article 30 bans *military activity* on indigenous territories, the government said it was concerned that it would not be able to provide emergency management in case of natural disasters.
- *Treaties* that had been made with First Nations in the course of the last 200 years could be overruled by the Declaration.
- The notion of the *right to lands* that indigenous peoples “have traditionally owned, occupied or otherwise used or acquired”<sup>138</sup> could grant indigenous peoples the exclusive right to all lands they occupied before European conquest.
- The government opposed the legal notion of the existence of control and protection of intangible *heritage* and *cultural property*.
- The right to *Free, Prior, and Informed Consent* could be interpreted as a veto right for indigenous peoples.
- There was also opposition against the reference to the *UN Convention on Climate Change*. Canada refused the notion that the fight against climate change also has a dimension of Human rights.

These concerns have never been brought forward by Canada during the over 25 years of negotiations. Canada never engaged in negotiations with indigenous representatives about its doubts and it also failed to support its claims with a legal expertise.<sup>139</sup> However, the Canadian government – still led by the Conservative Party – endorsed the Declaration in November 2010.<sup>140</sup> Human rights NGOs such as Amnesty International criticize that the government only endorsed the Declaration under the condition that its provisions must be consistent with existing national laws.<sup>141</sup> It can thus be concluded, that Canada quite radically changed its role on the international level since the change of government in 2006. Chapter V will examine in greater detail the Canadian way of dealing with the “Indian question”.

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<sup>138</sup> UNDRIPS Art. 26(1)

<sup>139</sup> Joffe 2010: 83

<sup>140</sup> <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>, 10 June 2013

<sup>141</sup> <http://www.amnesty.ca/get-involved/take-action-now/un-declaration-on-rights-of-indigenous-peoples-canada-must-fully-support>, 10 June 2013

#### *IV.3.3. Inter-American Commission on Human Rights*

Besides the globally acting international organizations, supranational regional organizations often have their own human rights institutions and are thus also important for the legal and political situation of indigenous peoples. In the case of Canada's First Nations, the relevant organization is the Inter-American Commission on Human Rights (IACHR), a sub-body of the Organization of American States (OAS), which was founded in 1960. Its idea of Human Rights was inspired by the evolving human rights system of the United Nations and the conception of a regional supranational body was oriented towards the Council of Europe. Its initial mandate was to promote and to monitor human rights on the American continent.<sup>142</sup>

Since 1978, the IACHR has the mandate to observe and to enforce the American Convention on Human Rights. The Convention contains a very detailed catalogue of civil and political rights but it remains vague and very general with regards to economic and social (and thus also to collective) human rights.<sup>143</sup> With the entry into force of the Convention, the Inter-American Court of Human Rights was established. The court has the right to declare actions in member states of the Conventions as violations of human rights. The Court also has consulting rights that enable it to issue recommendations for member states in human rights questions. The Court is open to individual as well as to collective complaints.<sup>144</sup> Besides the power of the Court, the influence of the IACHR is limited to information campaigns on human rights, individual as well as collective petitions, it serves as a forum for human rights issues in the Americas, and it is a consultant to other international organizations and sub-organizations of the OAS.<sup>145</sup>

Like the UN, the OAS maintains a system of thematic special rapporteurs. In 1990, a rapporteurship for the rights of indigenous peoples was created. The Special Rapporteur has a similar role to his pendant at the UN in New York. S/he can do country visits, issues thematic reports, disclose human rights violations

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<sup>142</sup> Santoscoy 1995: 7-10

<sup>143</sup> *ibid*: 20-22

<sup>144</sup> *ibid*: 45-48

<sup>145</sup> *ibid*: 34-44

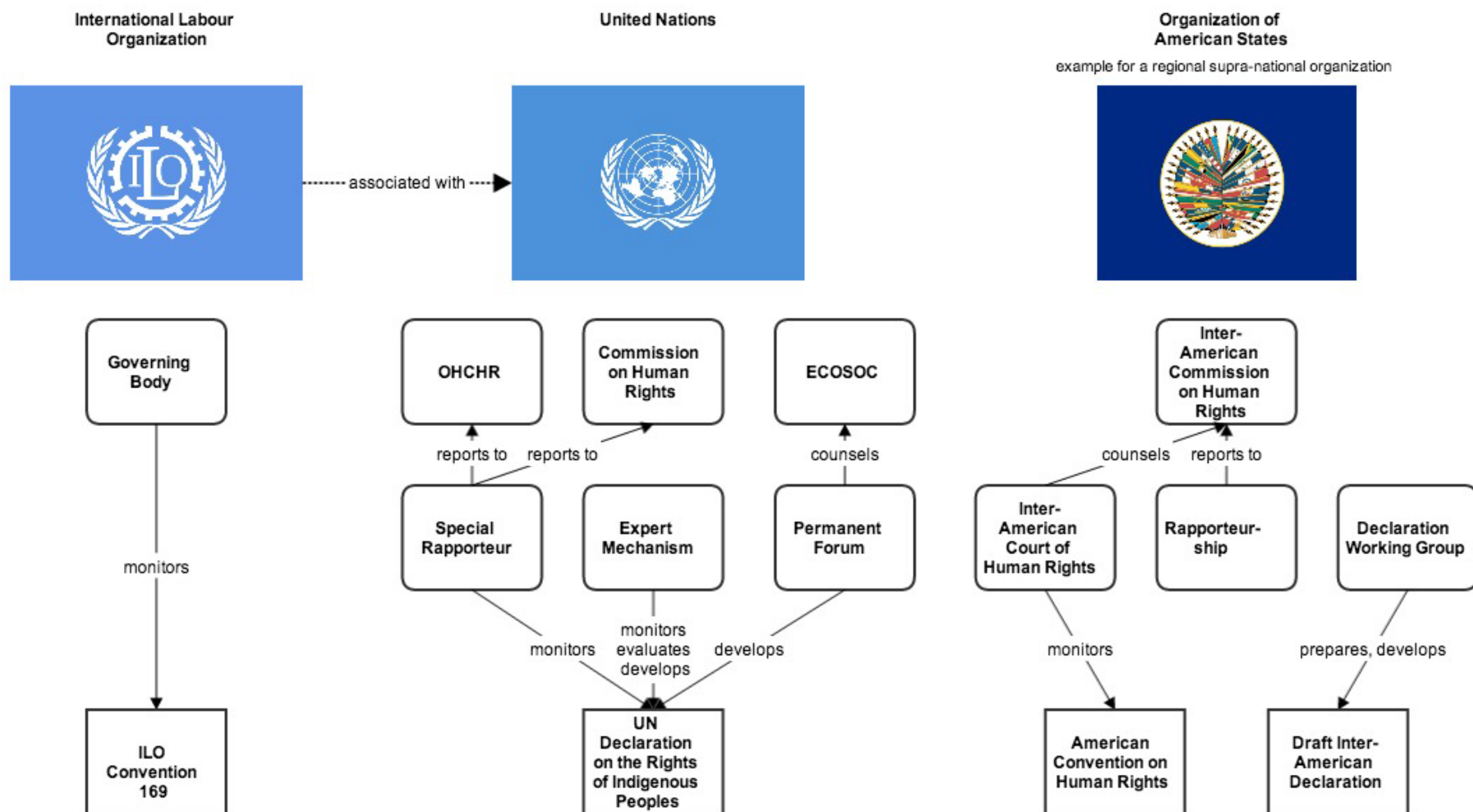
that s/he observes to the IACHR, and serves as an ombudsman for individual or collective complaints by indigenous peoples. Currently, a working group is tasked with the elaboration of a Draft American Declaration on the Rights of Indigenous Peoples. The group was installed in 1997.<sup>146</sup> The IACHR only serves as an example for the work of a regional supranational human rights institution. Similar institutions in other parts of the world are for example the Council of Europe or the African Commission on Human and Peoples' Rights in the framework of the African Union. Because of the regional focus of this paper, I will nevertheless omit institutions that are largely irrelevant in the American context.

This overview of the international regime of indigenous peoples' rights demonstrates the complexity of the construct we are dealing with. It is evident that this system has grown and that it was not conceptualized in this form. There are different fora that are more or less accessible to indigenous peoples. There are furthermore different international laws whose legal validity on the national level is often contested by governments. Their use as a resource for the fulfillment of indigenous peoples' claims shall be evaluated in the analytical part of this paper. The following chart serves to visualize the most important institutions and international laws in the context of the indigenous peoples of Canada. Because of lack of space and in order to provide a good overview, I have to admit that this scheme as well as the preceding chapter is of course incomplete and many other international institutions, conventions, and UN declarations<sup>147</sup> might be relevant in certain contexts.

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<sup>146</sup> <http://www.oas.org/en/iachr/indigenous/default.asp>, 11 June 2013

<sup>147</sup> Particularly those dealing with the rights of women, children's rights, and economic rights such as the right to food; see Chapters V and VI for practical examples



**Figure 1:** The international regime for the Human rights of Indigenous Peoples

## V. First Nations and the State in Quebec

This chapter has the very ambitious intention to explain the historical and legal context of the discussion of the current struggles of indigenous peoples in Quebec. About 500 years of relations between Native Americans and Europeans must be summarized radically in order not to go beyond the scope of this paper. The following chapter will thus focus on the most important events and on those instances that are important for the analytical part of this paper. Although the regional focus of this paper lies on the province of Quebec, this focus cannot be upheld entirely in this chapter. From an historical point of view, Quebec is too much of a recent construction to be a suitable framework. Although the First Nations of Canada still live across provincial and sometimes national borders (such as the Mohawk or the Dakota), I will nevertheless concentrate on the history of those First Nations that live within the borders of Quebec today. Moreover, we will see that despite all cultural differences between the Indian nations there is something like a shared experience of North America's native peoples. From a legal point of view, a radical focus on Quebec would not make sense. In a system of common law, Quebec's First Nations are equally affected by court decisions that concern tribes in British Columbia. Furthermore, the so-called "Indian question" is exclusively treated on the federal level.

### V.1. History of First Nations in Quebec

The following section will give a demographical and a historical overview of Quebec's First Nations. Although the principal interest of this paper lies on the interplay between the institutional setting on the international level and events on the local level, this part is necessary to understand the legal and social situation of First Nations and their political claims today, which have an underlying historical dimension that goes far beyond the generations that are alive today.<sup>148</sup> Given the ethnic diversity of First Nations of Quebec (not to speak of the whole country of Canada), it is evident that such an overview can only give

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<sup>148</sup> cf. Boudreault 2003: 24

a rough orientation on the development of indigenous-state relations. This focus will change in section 3 where land tenure systems of the Algonquin of central and western Quebec are discussed. This excursus will give an exemplary insight on the transformation of the system of land tenure of a semi-nomadic people as a result of interactions with the state.

#### *V.1.1. Demographics*

The indigenous population of Quebec consists of 11 distinct nations. These nations in turn belong to three language families: Eskimo-Aleut (Inuit), Iroquois (Mohawk, Huron-Wendat), and Algonquin (all other nations). Although each nation is culturally distinct from other nations, their culture can also be regrouped according to these three language families.<sup>149</sup> Besides these indigenous languages, almost half of Quebec's First Nations speaks English (particularly the Cree and Iroquois) and the other half French as a first or second language. Because of the language policy of Quebec's government, French is on the rise in the last decades.<sup>150</sup>

According to the latest census, there are 87.251 people who are officially recognized as First Nations in Quebec.<sup>151</sup> 1,1 % of Quebec's population are thus status Indians. With 48 % of the indigenous population being under 30 years of age, the First Nations are also much younger and have a much higher birth rate than the national average.<sup>152</sup>

The communities are governed by elected band councils, which will be explained in section 2.1.. Their economic situation is in general far below the national average according to almost all indicators of development. By and large, those communities are better off, which are in the proximity of urban centers and that have access to transportation and schooling.<sup>153</sup> This explains why there is a steep gap between the economic and social situation in the Inuit communities in

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<sup>149</sup> Lepage 2009: 69

<sup>150</sup> Boudreault 2003: 158-159

<sup>151</sup> Lepage 2009: 72; This number is comprised of 76.787 Indians and 10.464 Inuit. Although they are recognized by the Canadian constitution, there are officially no Métis in Quebec.

<sup>152</sup> [http://www.autochtones.gouv.qc.ca/relations\\_autochtones/profils\\_nations/profil.htm](http://www.autochtones.gouv.qc.ca/relations_autochtones/profils_nations/profil.htm), 21 June 2013

<sup>153</sup> *ibid*; Boudreault 2003: 161

the north and southern communities such as Wendake (near Quebec City) or Kahnawake (near Montreal).

Despite these communities that are a bit better off than their counterparts in the north, almost all socio-economic indicators are worse for First Nations than for the rest of the population. In 2000, life expectancy was 6,9 years lower for indigenous peoples than for Canadians. So-called lifestyle diseases such as diabetes are much more prevalent among American Indians. Fewer indigenous persons accomplish secondary or tertiary education and their unemployment rate is about three times as high as the national average.<sup>154</sup> Also, indigenous persons have continuously been over-represented in Canada's prisons since the end of World War II.<sup>155</sup> All these figures show that indigenous peoples almost without exception belong to one of the poorest and most vulnerable groups in Canadian society.

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<sup>154</sup> ECOSOC 2009: 24

<sup>155</sup> cf. Piron 1994



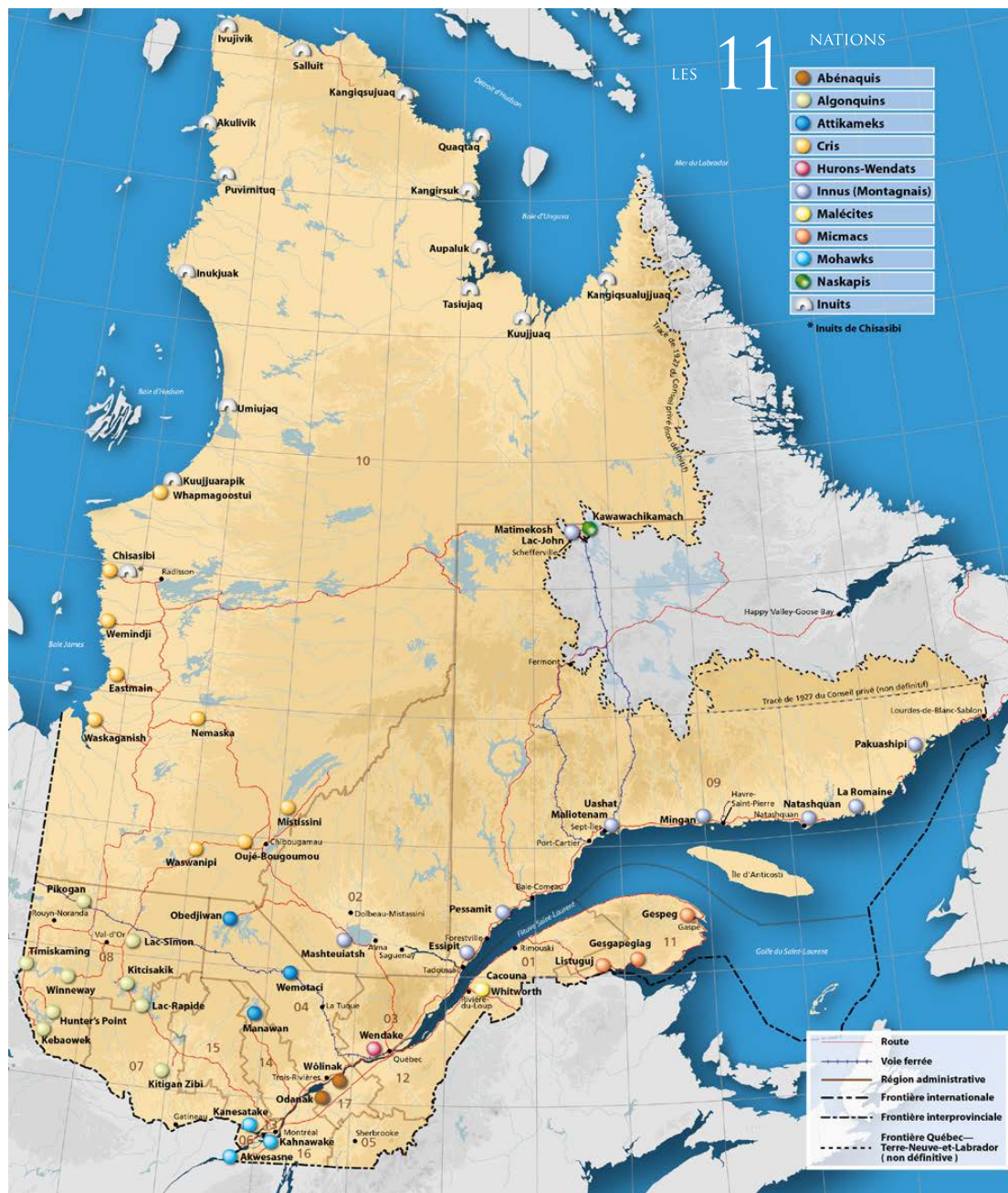


Figure 2: The First Nations communities in Quebec today<sup>156</sup>

### V.1.2. The History of Indigenous-State Relations in Canada

The beginning of the “international relations” between the peoples living in the territory that is today Canada and the Europeans can be identified with the first settlements in the bay of St Lawrence River led by Jacques Cartier in 1534/35.<sup>157</sup>

<sup>156</sup> <http://www.autochtones.gouv.qc.ca/nations/cartes/carte-8x11.pdf>, 9 July 2013

<sup>157</sup> By beginning to tell the history of Quebec’s First Nations with the so-called “discovery” by the French, I do not intend to carry on the colonialist doctrine of discovery, which implies the ahistorical nature of the American natives. However, in a paper on the relationship between indigenous peoples and the state, an anthropological and archaeological discussion of Canada’s First Nations cannot be undertaken.

Because history had always been transmitted orally among North America's First Nations, many facts about pre-Columbian times are hardly restorable today. It is believed that the whole of what is today Canada counted about 500.000 inhabitants at the time of the arrival of the first European settlers. The shores of the St Lawrence River were however populated more densely by First Nations at this time, than they today.<sup>158</sup> The peoples living alongside the St Lawrence River (above all Huron-Wendat, Mohawk, Attikamekw, and Algonquin) thus had the most intense contacts with the French colonists since the beginning of the 17<sup>th</sup> century while most peoples who settle(d) further north (Inuit, Innu, Cree) did not have any contact with the Europeans until the beginning of the fur trade (even then, contacts with certain northern peoples were rare and on an irregular basis). From an economical point of view, it can roughly be generalized that Quebec's First Nations did not practice agriculture (mostly for climatic reason) until the 16<sup>th</sup> century. The people in the area of the Great Lakes however had trade relations with people from the south who practiced horticulture. Most nations relied entirely or mostly on hunting and gathering for their livelihood. These peoples generally lived a semi-sedentary lifestyle (i.e. living in temporary communities during summer and in small hunting bands during winter).<sup>159</sup>

Two processes primarily characterized these first inter-national contacts: First, French Jesuits settled in Quebec from around 1625. They also established missions with the aim of evangelizing and promoting settlement among the "savage" Indians.<sup>160</sup> Second, before economical relations emerged between indigenous Americans and Europeans, their alliances were of a military nature. In the 17<sup>th</sup> century, the territory around the St Lawrence River was disputed between France and Great Britain. Furthermore, there were military conflicts with the League of the Iroquois in the area of the Great Lakes. Since there were much fewer French settlers than there were Britons, it can be stated that the military power of *la Nouvelle France* depended on the alliances it had with the Indian nations that lived along the St Lawrence River.<sup>161</sup>

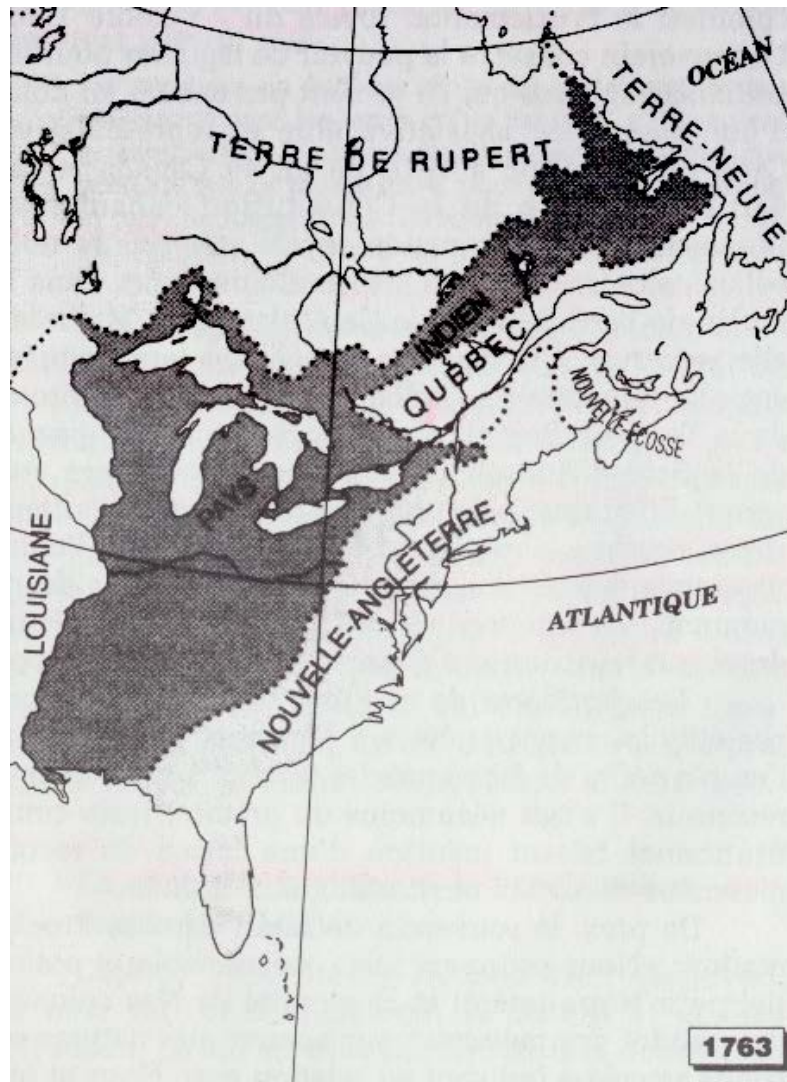
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<sup>158</sup> Dupuis 1991: 11-12

<sup>159</sup> McMillan & Yellowhorn 2004: 108-115

<sup>160</sup> Dupuis 1991: 12

<sup>161</sup> Delâge 1996



**Figure 3:** North America after the *Royal Proclamation* of 1763<sup>162</sup>

These wars did not profoundly change the indigenous peoples' economy, their social organization, and their relationship with the colonial state. The beginning of the fur trade (in Quebec under the direction of the Hudson's Bay Company) has had a much more profound impact. From the late 16<sup>th</sup> century onwards (but more intensely since the mid 17<sup>th</sup> century), beaver furs were in high demand for exportation to Europe.<sup>163</sup> The bands that were involved in the fur trade were prior to this largely independent from trade relations and not integrated in capitalistic commercial relations. They quickly became dependent on European processed goods, the practice of trapping became much more important than big

<sup>162</sup> Dupuis 1991: 16

<sup>163</sup> Wolf 1997: 158-161

game hunting, and the indigenous peoples' lives revolved around the trade posts of the HBC.<sup>164</sup> The historian Eric Wolf concludes on the effects of the fur trade: Wherever it went, the fur trade brought with it contagious illness and increased warfare. Many native groups were destroyed, and disappeared entirely [...] Access to European goods and gifts soon altered patterns of interaction both within and between groups. [...] Such exchanges played an important part in the formation of new groups and in the development of wider-ranging ethnic identities. [...] Thus, the history of these supposedly history-less people is in fact a part of the history of European expansion itself.<sup>165</sup>

The trade posts of the HBC also were the beginning of the forced sedentarization of First Nations in Quebec. From 1830 onwards, it became the official Canadian policy to settle indigenous people in rural villages with cultivatable land. Each of these villages had to host at least one missionary and one government official. They served as the basis for what are today the reservations.<sup>166</sup> The first eleven reservations were established in Quebec around 1850.<sup>167</sup> This number has grown to 55 reservations and 14 northern communities<sup>168</sup> of 11 different nations today.<sup>169</sup> However, the process of sedentarization and the imposition of a modern, western economy, religion, and social organization took over 120 years. While the first villages of the Ojibway in the south have already been established in the 1830s, some bands in the far north were not sedentarized until the 1970s.<sup>170</sup> In fact, it was only due to the assimilation policy in the boarding schools (and during the discussion about the White Paper on Indian Policy that will be discussed in section 2 of this chapter), where, from the 1950s, Indian children from all nations were stolen from their families to assimilate them to western culture, that something as a common bond between the Canadian

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<sup>164</sup> McMillan & Yellowhorn 2004: 120-123

<sup>165</sup> Wolf 1997: 193-194

<sup>166</sup> In most cases, reservations can thus not be regarded as the traditional habitat of a tribe in terms of the area it inhabited in pre-colonial times. The location of most reservations is actually a product of interactions between indigenous peoples and the state in modern times.

<sup>167</sup> Boudreault 2003: 32-34

<sup>168</sup> Northern communities are the villages inhabited by the Inuit. They are regular municipalities and their status is not regulated by the Indian Act.

<sup>169</sup> [http://www.autochtones.gouv.qc.ca/relations\\_autochtones/profils\\_nations/profil.htm](http://www.autochtones.gouv.qc.ca/rerelations_autochtones/profils_nations/profil.htm), 21 June 2013

<sup>170</sup> McMillan & Yellowhorn 2004: 123-128

Indians beyond their national affiliation as Micmac, Mohawk, or Innu began to emerge.<sup>171</sup>

Many of the severe social problems in the communities today can be traced back to this project of forced sedentarization and civilization. Although no Canadian citizen can be legally denied the right to live a nomad lifestyle, compulsory schooling and dependence on social welfare *de facto* constitute a compulsory settlement. The structural disadvantages in many communities (especially in those of northern Quebec) and the resulting huge unemployment rates are often held responsible for the drastic problems of public (mental and physical) health, alcoholism, drug abuse, and violence in the aboriginal communities.<sup>172</sup> Section 2 of this chapter will demonstrate how a legal system that is based on tutelage structured the field for today's disputes about land rights and aboriginal self-government.

### *V.1.3. Transformations in the Algonquian System of Land Tenure*

The aim of this brief excursus cannot be an exhaustive ethnohistoric discussion of cultural transformations of “the” First Nations of Quebec after their diverse contacts with the Europeans. I will focus in this subsection on transformations of ideas of land tenure of the Algonquin-speaking tribes in order to demonstrate a few contextual factors in the struggle for land rights today. First, western occupation and trade clearly had an enormous impact on the relationship of First Nations to the land. Second, in the light of this fact, the notion of “traditional” forms of land tenure becomes problematic because it is based on a static and passive conception of culture. Because of the similarities in the economy of the Algonquin with other formerly semi-sedentary hunter-gatherers, the processes described here happened similarly among other First Nations in Quebec.

According to ethnographic sources, the Algonquin lived together in small groups (that were not identical with our conception of the nuclear family though) for the most part of the year. These small groups had their own small hunting

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<sup>171</sup> Ottawa 2010: 29

<sup>172</sup> McMillan & Yellowhorn 2004: 123-128; Boudreault 2003: 154

territories. The tribes only gathered in summertime.<sup>173</sup> Eleanor Leacock argues that the Algonquin lived in egalitarian societies where the concept of land as private property was unknown. This conception had been contested by researchers who presented evidence for the existence of an external demarcation of band territories and a certain degree of centralized power on the band level (but not in the hunting group).<sup>174</sup> So although Leacock's idea according to which social hierarchies and the notion of property were a merely European import might be *outré*, we can conclude based on archaeological and ethnographical sources that power was much more dispersed in pre-colonial times and that there is no evidence that individuals have had the possibility of owning land in an exclusive manner in terms of an allodial title.

I agree with Eleanor Leacock, that the fur trade by the HBC with all its consequences have had an immense impact on Algonquian systems of land tenure. Because the first detailed anthropological sources on the Algonquin stem from the late 19<sup>th</sup> / early 20<sup>th</sup> century, it is highly likely that these anthropologists did not describe the "traditional" ways of Algonquian land tenure, but rather an artefact of the fur trade.<sup>175</sup> The exact modes of life and ideas of territoriality of pre-Columbian times cannot be reconstructed, but I follow authors such as Adrian Tanner who assume that the forms of land tenure in a society of self-sufficient hunter-gatherers (which had not been observed by anthropologists) and a society of trappers and traders (which had been observed by scientists such as Frank Speck) is extremely unlikely to be identical.<sup>176</sup>

This section wants to demonstrate the implications of the cultural argument in legal conflicts. A view into history shows that there is no such thing as an original state of affairs that could be reconstructed. The historical dimensions of Indian claims must thus be viewed as historically backed reparations of the damages done during the age of classical colonial imperialism<sup>177</sup>, and not as a regime with the aim of reconstructing a distant cultural past.

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<sup>173</sup> cf. Hallowell 1949

<sup>174</sup> Bishop 1986: 38-43; McMillan & Yellowhorn 2004: 108-115

<sup>175</sup> cf. Speck 1915 for the classic work on presumably traditional Algonquian land tenure

<sup>176</sup> cf. Tanner 1983

<sup>177</sup>As opposed to modern patterns of colonialism. The distinction is necessary because I reject the notion of colonialism as a thing of the past.



## V.2. First Nations in Quebec as Subjects of Western Law

After examining the history of indigenous peoples in Canada and Quebec and their relationship with the state, this section will speak about the history of legal relations between First Nations and European settlers. We will see that – unlike the history of the relationship between Natives and Europeans in the USA – violence and control were not exercised by direct force in Canada, but via the law. The following chapter will examine the Canadian Indian Act and its changes over time, the regulation of land rights in Canada and in Quebec, and modern case law concerning claims for land rights and the duty to conduct consultations in development projects.

### *V.2.1. The Federal Competency of Indian Affairs and the Indian Act*

Even though the actions of the European settlers make it highly implausible that their intentions ever were to establish a peaceful coexistence with the native population of America, the nation-to-nation-approach in Indian-European relations formally only ended with the Royal Proclamation of 1763, which had been issued after the conquest of the French territories in America by the British troops. According to the Royal Proclamation, individuals did not have the right to forcefully dispossess, buy, or otherwise acquire lands inhabited by Natives. Such an act needed the approval of the British Crown. The Proclamation followed a need for regimentation of spatial expansion after the colonialists' interests lay more in settling than in commerce after the decline of the demand for furs in Europe.<sup>178</sup> We see that questions of land rights were in the center of indigenous-state relations from the beginning. It has to be noted though, that the Royal Proclamation fulfilled the purpose of protecting indigenous territories against arbitrary dispossessions.

The next major change of the status of First Nations in Canada came with the Act for the Gradual Civilization of the Indian of 1857. This first federal law governing a broad range of Indian affairs primarily brought two changes: First, Indian affairs were defined as a federal issue (as opposed to a provincial one). Second,

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<sup>178</sup> Grammond 1993: 3-8

the goal of assimilating the native population was legally established (although such a policy had already been pursued by Christian missionaries with the approval of government officials).<sup>179</sup> This act served as the foundation of the Indian Act of 1876, an omnibus bill on Indian affairs that is still in force today. It defined who is an Indian, and attached to this status a special kind of citizenship.<sup>180</sup>

The primary aim of the Indian Act was the gradual assimilation of all Indians into the Canadian society. Until the mid-twentieth century, Article 109 of the Indian Act allowed thus for Indians to enfranchise themselves from their Indian status if they were 1) literate in either English or French, 2) adequately educated by a western institution, and 3) free of debt.<sup>181</sup> Therefore, neither the Indian Act nor the federal ministry of Indian affairs were ever designed to exist forever, but they were supposed to become obsolete one day when all Indians were assimilated. In general, the enfranchisement policy did not have the intended effects.<sup>182</sup> The underlying ideology of this assimilation policy was that the native cultures were incapable of surviving in a competitive, capitalist, European-style economy that was to be established on the continent, wherefore a gradual assimilation had to be undertaken in order to allow for the physical survival of indigenous people (however *not* for the survival of indigenous peoples as distinct entities).<sup>183</sup>

The Indian Act is a highly complex bill that affects numerous very diverse areas. The following aspects are the aspects of the Indian Act (before its reforms after World War II) that are the most striking for the lives of indigenous peoples and the most important for our research interest:<sup>184</sup>

- A *registry* of all Indians, administered by the federal Department of Indian Affairs, was introduced which served as the basis for the inheritance of the *Indian status* until today. Who is an Indian is thus decided by the federal registry and is not a question of self-definition. Until 1985, a

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<sup>179</sup> Boudreault 2003: 37

<sup>180</sup> Lepage 2009: 21

<sup>181</sup> cf. Brownlie 2006

<sup>182</sup> Lepage 2009: 23; Brownlie (2006: 34) shows for the province of Ontario that until 1939, only 2 % of the aboriginal population deliberately chose to become enfranchised.

<sup>183</sup> Friederes 1988: 25-31

<sup>184</sup> Dupuis 1991: 42-58; Grammond 2006: 120-121



female Indian lost her status when she married a non-Indian, whereas a male Indian kept his status after a marriage to a non-Indian woman.

- The *political organization* of the bands was standardized. In order to have a political representative for the ministry of Indian affairs at hand, each community had to elect a band council that also holds a certain decision-making capacity concerning the internal affairs of the band. Although the Indian Act allows for election procedures to be held according to traditional forms of political organization, the institution of the council as such is a western invention.
- The status of the *reservations* was created. Reservations are demarcated lands for the exclusive use of a certain band. They are federal enclaves within the provinces. Only the federal government has the right to install reservations. Their lands are usually very small and more suitable for a sedentary lifestyle with an economy based on agriculture, and not for a semi-nomadic hunter-gatherer economy.
- All economical activity, salaries, sales, and communally held property on the reservations are *exempt from taxes*. This exemption, which is still in force, originally was argued by the fact that the obligation to pay taxes went along with having full citizen rights, which had not been the case until First Nations had been given the *right to vote* in 1960.
- Several other clauses regulated diverse aspects of indigenous peoples' lives. The consumption of alcohol was generally forbidden, as was the practice of traditional rituals such as the Potlatch or the Sun Dance.

It becomes evident that the Indian Act regulated indigenous peoples' lives in Canada from cradle to grave and that the legislators' conception of First Nations was one of childlike people that were incapable to survive without the tutelage of the federal government. Two phenomena of the post World War II era brought improvements for aboriginal peoples' rights: First, indigenous peoples began to slowly woke up from their political lethargy and certain provisions of the Indian Act (such as the prohibition of traditional rituals, the prohibition to drink alcohol, or the denial of the right to vote) were reformed or discarded. Second, the post-war, fordist welfare state launched development projects and introduced country-wide compulsory school attendance, which was the end for

the last semi-nomadic nations and lead the First Nations to their uneven path to western modernity.<sup>185</sup> The agenda of gradual assimilation however had not been ceded by the federal government despite these changes.

The dynamics of legal indigenous-state relations in Canada experienced a somewhat unexpected turn in 1969, when the federal government led by Pierre Trudeau presented the White Paper on Indian Affairs which envisioned the abolition of the Indian Act, and thus of the legal existence of First Nations, as well as the liquidation of all land treaties (see following section) within the consecutive five years. For the first time in national history, Canada's First Nations forcibly resisted a policy by bringing an aboriginal issue to the front pages of the nation's newspapers. It had been suspected by indigenous peoples that the White Paper would lead to a rapid deculturalization and dispossession of Indian lands. Finally, the government dismissed the White Paper.<sup>186</sup> This first public discussion of Indian affairs in Canada was the beginning of a discourse among indigenous peoples that demands not the abolition of the Indian Act, but its replacement by a new statute that recognizes the distinct nature of Indian culture and their specific needs and claims.<sup>187</sup>

The next major change in aboriginal peoples' legal status came with the patriation of the Canadian constitution in 1982. Concerning indigenous peoples it states:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.<sup>188</sup>

The constitution of 1982 thus officially recognizes aboriginal peoples as distinct subjects of national law. Métis and Inuit, who were not subject to the Indian Act, also became recognized as First Nations of Canada. Furthermore, land rights that were guaranteed to indigenous peoples via treaties with the state became a constitutional right.<sup>189</sup> A deletion of indigenous peoples' rights to land and their

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<sup>185</sup> Dyck 1991: 104-107

<sup>186</sup> *ibid*: 108-109

<sup>187</sup> Picard 2010: 31

<sup>188</sup> Constitution Act 1982: Art. 35(1-2)

<sup>189</sup> Asch 1984: 1-2

political status – as Trudeau envisioned it in the White Paper – became thus unconstitutional and legally infeasible.<sup>190</sup>

### *V.2.2. Territorial Rights and Land Treaties*

In the 19<sup>th</sup> century, Canada's interest in trade with the First Nations, let alone in political or military alliances, faded away and the establishment of territorial sovereignty became a priority. In accordance with the Royal Proclamation, the federal government concluded several land treaties with the First Nations between 1871 and 1923.<sup>191</sup>

Although there were minor differences, all federal treaties were similar. Aboriginal People agreed to “cede, release, surrender, and yield up” their rights to the land in exchange for reserves, small cash payments [...], annual payments to each band member and promises of continued hunting and fishing rights.<sup>192</sup>

The so-called “numbered treaties” covered almost all of the land that was traditionally inhabited by Canada's First Nations.<sup>193</sup> The exceptions were indigenous lands in Quebec, British Columbia, and what is today the territory of Nunavut. Peace treaties were concluded with the First Nations of the Atlantic Maritime provinces, but these treaties had no direct implications for the ownership of the land. In Quebec, there never was a formal cession of native lands, nor had there been any solution of land issues. During the aforementioned political awakening of First Nations in the 1960s and the modernization of Quebec in the course of the quiet revolution, these unresolved problems led to a crisis. With the rapidly growing need for hydropower and resources, the formerly virtually untouched *Grand nord* was to be equipped with modern infrastructure. In 1975 the Cree of the James Bay halted a project of Hydro-Québec that threatened to flood their traditional hunting grounds.<sup>194</sup> The

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<sup>190</sup> Boudreault 2003: 41

<sup>191</sup> McMillan & Yellowhorn 2004: 320

<sup>192</sup> *ibid*

<sup>193</sup> On various argumentative grounds, indigenous scholars today question the legitimacy of these treaties. Since there was no notion of private property of land, such a right could not have been ceded in a treaty. Because there was neither a military conquest (such as in parts of the USA), the numbered treaties are rather to be interpreted as an agreement of shared use of the lands. Cf. Little Bear 1986

<sup>194</sup> McMillan & Yellowhorn 2004: 125

consequence of this conflict was the adoption of the first land treaty since 1923. In 1975, the Cree and Inuit of northern Quebec signed the *Convention de la Baie James et du Nord québécois* with the federal government, the provincial government, and Hydro-Québec. In 1978, the Naskapi of Kawawachikamach signed a similar treaty under the name *Convention du Nord-Est québécois*.<sup>195</sup> The two treaties concern about two thirds of Quebec's landmass, which is more than the area of Ontario.<sup>196</sup>

The *Convention de la Baie James et du Nord québécois* regulated the territorial claims made by the Cree and Inuit. For their agreement, the indigenous signatories received a payment of CAD 225 million over the following twenty years.<sup>197</sup> The Cree and Inuit ceded 84,3 % of their land claims in return but still held special fishing and hunting rights on these lands. Only 15,7 % of the area of Quebec's north was for the exclusive use of First Nations. These lands (with the exception of the reservations themselves) can nevertheless be rededicated by the provincial government for development projects.<sup>198</sup>

The two modern treaties encompass 14.040 km<sup>2</sup> of the 14.786 km<sup>2</sup> that are owned by Quebec's First Nations exclusively or on a shared basis. That is to say that the Cree, Inuit, and (to a lesser extent) Naskapi momentarily dispose of 95 % of indigenous territories in Quebec.<sup>199</sup> The land rights of the majority of Quebec's First Nations remain nevertheless unresolved and their exclusive territorial rights are limited to the reservations themselves, which normally do not comprise enough space for hunting and fishing. This situation is further complicated by the fact that these southern nations live for the most part near more densely populated and developed areas where land claims are much harder to fulfill than in the virtually uninhabited north.

Even after the conclusion of the two treaties, the relationship between the signatories (most notably the Cree) and the state remained tense in the following decades. During the projected hydroelectric development of the Great Whale River, the Cree succeeded in stopping the project and forcing Hydro-Québec to

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<sup>195</sup> *ibid*

<sup>196</sup> Lepage 2009: 55

<sup>197</sup> McMillan & Yellowhorn 2004: 125

<sup>198</sup> Lepage 2009: 55-56

<sup>199</sup> Boudreault 2003: 152

rearrange its plans. In 2002, Quebec and the Cree made an agreement that became known as the *Paix des braves*, in which the Cree dismiss their resistance to development projects for further payments and concessions in the granting of political autonomy.<sup>200</sup> Leading indigenous politicians in Quebec expressed approval for the cooperative approach of this agreement. It is said to come close to the nation-to-nation approach that is also envisaged in the UN Declaration on the Rights of Indigenous Peoples.<sup>201</sup> The current examples in chapter VI of the conflicts in the course of Quebec's northern development will however show that the conflicts between indigenous peoples and the state are far from being settled in Quebec.

### V.2.3. Case Law

Having a system of common law, the status of Canada's First Nations in the federation and their relationship to the state has not only been determined by politicians, but also by court decisions. The following section will discuss in a chronological order the most important decisions and their impact on the legal situation of Canada's aboriginal population.<sup>202</sup> As mentioned above, the land rights situation in British Columbia had been as unresolved in recent times as it was in Quebec. Many of the cases discussed here thus stem from legal conflicts that began in British Columbia but became important for all of Canada's First Nations after they were brought to the Supreme Court. I will also briefly discuss the Oka crisis. Although this is a political rather than a legal event, it needs to be discussed because it has had a profound impact on the position of Canada's aboriginal people in the society.

The foundations for the legal treatment of indigenous land claims are set in the cases *St. Catherine's Milling and Lumber Company v. The Queen* of 1888 and in the so-called "Nisga'a case" *Calder v. British Columbia* which was decided by the Canadian Supreme Court in 1973. In the former case, which had to decide on the nature of indigenous land rights in Treaty 3, it had been ruled that indigenous

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<sup>200</sup> McMillan & Yellowhorn 2004: 126

<sup>201</sup> Picard 2010: 29; Saganash: 252

<sup>202</sup> The prioritization and structuring of events are based on personal conversations with Professor Jean Leclair of the Université de Montréal.

peoples only had usufruct rights to their land and their right to dispose of the lands depended on the goodwill of the state.<sup>203</sup> The Calder case, which was held in the aftermath of Trudeau's failed project to extinguish the aboriginal title, had to decide on the basis of a land claim by the Nisga'a nation, if such a thing as an aboriginal title existed and if it had been extinguished by western occupation. Although the Nisga'a lost their trial, the judges of the Supreme Court nevertheless acknowledged the existence of an aboriginal title, which became henceforth part of Canadian common law.<sup>204</sup> Following the analysis of Little Bear, these two earlier court decisions had the following implications for indigenous peoples' rights in Canada:

1. Aboriginal title is a personal and usufructuary interest, recognizable in Canadian law.
2. Its existence can be traced either to the Royal Proclamation of 1763 or it can be based on possession from time immemorial.
3. Its continuing existence is at the goodwill of the Sovereign, and Aboriginal title can be extinguished at the whim of the Sovereign.
4. The Sovereign is not necessarily obligated to pay compensation for the extinguishment of aboriginal title.<sup>205</sup>

The right to self-government was not a question in the Calder case. It still was politically as well as judicially undecided if political sovereignty was an inherent right of indigenous peoples, or if a continuing sovereignty since pre-colonial times had to be proven.<sup>206</sup> The first Supreme Court ruling on the legal nature of aboriginal rights after they were acknowledged by the Canadian constitution in 1982 was the case *R. v. Sparrow* (1990). In this case on fishing rights, the Supreme Court decided that aboriginal rights had to be actively extinguished in order to be invalid. The Court ruled that aboriginal rights claims were different from other rights because they date back to a time when the Canadian legal system not yet existed.<sup>207</sup> According to the "Sparrow test", Canadian legislation can only infringe on indigenous legislation when a common national interest is threatened.

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<sup>203</sup> Little Bear 1986: 252-253

<sup>204</sup> Godlewska & Webber 2007: 3-7

<sup>205</sup> Little Bear 1986: 255

<sup>206</sup> McNeil 2007: 150-152

<sup>207</sup> Forest & Rodon 1995: 38

Despite the court's acknowledgement of the existence of aboriginal rights, the town of Oka (several kilometers west of Montreal), decided to extend a golf course onto a territory that was claimed to be an ancient Mohawk graveyard by the inhabitants of neighbouring Kanesatake. This led to the so-called Oka crisis between July 11 and September 26 1990. After their land claim had been refused, the Mohawks of Kanesatake blocked the roads to Oka, which provoked the government of Quebec to deploy the *Sûreté du Québec*. After a corporal of the SQ died in a firefight, Quebec called the Canadian army for help.<sup>208</sup> The events in Oka showed that indigenous peoples and the state had fundamentally different notions of land rights and the consultation of indigenous peoples. It furthermore demonstrated the dangerous potential of the government's refusal to regulate these issues politically and to leave these questions to the Courts.

In *R. v. Van der Peet* (1996), the question, which kinds of rights had the character of aboriginal rights, and thus can potentially overrule federal and provincial law, was decided. Following the Sparrow case, the Supreme Court decided that fishing rights have the character of ancestral rights, but not the right to sell the fish that had been caught, because selling fish was not regarded as a traditional practice. The "Van der Peet test" thus determines if a claimed right has the character of an ancestral right by determining if a right is integral to the culture of a nation. It must also be proved that the claimed aboriginal right had been practiced in pre-Colombian times.

One year later, the Supreme Court ruled in *Delgamuukw v. British Columbia* that Article 35(1) of the constitution not only protects an aboriginal title to culture and traditional practices, but also to land. Aboriginal peoples' land claims thus encompass the exclusive collective possession of these rights, and not only the right to use federally or provincially owned lands for traditional activities.<sup>209</sup>

[...] the *Delgamuukw* decision has reshaped the legal landscape for cases involving Aboriginal title. Its ongoing legacy is that Aboriginal oral traditions must now be given equal weight with other types of legal evidence, and that First Nations must

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<sup>208</sup> Leroux-Chartré 2010: 23-24

<sup>209</sup> McMillan & Yellowhorn 2004: 230

be consulted and their interests taken into account when governments make decisions involving Crown lands.<sup>210</sup>

Finally, the Supreme Court decided in a ruling in 2004 (*Haida v. British Columbia*) that an obligation to consult aboriginal peoples exists for the state and private actors alike. Following the Haida decision, if a claim for land rights as aboriginal title are made, the First Nation in question must be consulted and building activities must be halted for the duration of the consultations.

#### *V.2.4. Legal Challenges for Indigenous Self-Government*

Even though there are still political conflicts, which will be discussed in the following chapter, this chapter on the Canadian context showed that the trend in Indian state relations goes towards a realization of indigenous self-government. Nevertheless, the legal regime that was established in the course of the last three centuries is one of tutelage that rules virtually every aspect of an Indian's life. Aside from the political challenge to eliminate all remnants of this legal treatment of indigenous peoples, several generations under governmental paternalism profoundly changed Canada's First Nations: "Not only has it structured inequality, poverty, and under-achievement among Natives, but it has seriously encroached upon the personal freedom, morale, and well-being of Native people."<sup>211</sup>

Furthermore, there is no consensus amongst the indigenous peoples on the kind of self-government that is to be established in lieu of the *status quo*. While conservative politicians favour a transformation of reservations into small municipalities that are embedded in the current federal system (which would be the equivalent of the realization of Trudeau's White Paper), indigenous activists and certain legal scholars favour the establishment of indigenous peoples as a third pillar of federalism along with the federal government and the provinces, or the complete national autonomy within the borders of Canada based on a nation-to-nation approach.<sup>212</sup> Self-governing Indian nations (no matter which way self-government would be realized) would also need to become fiscally

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<sup>210</sup> *ibid*

<sup>211</sup> Friederes 1988: 37

<sup>212</sup> Abele & Prince 2006: 572-583



independent from the federal government. Given the extreme economic diversity of indigenous nations, redistributive measures and a central authority to organize this redistribution would become a necessity.<sup>213</sup> As Gibbins puts it: “The price of self-government may well be the surrender of self-government to new and larger Indian governments”<sup>214</sup>. These challenges need to be kept in mind for the discussion of current conflicts between First Nations and the state, which will be the subject of the next chapter.

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<sup>213</sup> Abele & Prince 2005: 254-258

<sup>214</sup> Gibbins 1986: 372

## VI. Current Conflicts between First Nations and the State in Quebec

After discussing the legal, political, and historical background of the regime of indigenous peoples' human rights and of the relationship between indigenous peoples and the state in Quebec and Canada, this chapter will establish the connection between the local and the international level. I will discuss these interrelations by means of the three examples of (VI.1.) northern development and consultation of indigenous peoples, (VI.2.) the role of indigenous peoples in a contested multicultural confederation, and (VI.3.) the grassroots movement Idle No More. Each section of this chapter serves as an illustration of fundamental questions in international human rights law concerning indigenous peoples. These important implications will be explained at the beginning of each section. Given the very broad scope of my research question, a selective focus on certain issues was necessary in order to avoid a superficial analysis. The sources of this chapter are to a large extent the expert interviews that I have conducted in early 2013. Where my conclusions are borrowed from or inspired by my interlocutors, this is mentioned in a footnote.

### VI.1. Quebec's Northern Development: The Contested Responsibility to Consult

The development of the country's far north is an important economical and political issue in Canada and Quebec since the 1970s. Great development projects break down the question of the relationship between indigenous peoples and the state from a conceptual to a highly tangible sphere. Unlike the country's south along the border of the United States, where indigenous peoples constitute only a small minority of the population, about two thirds of the population in the vast regions of Nord-du-Québec and Côte-Nord are status

Indians.<sup>215</sup> These administrative regions (along with Abitibi-Témiscamingue, where only 5 % of the population are members of First Nations) are the main targets of Quebec's northern development. In these regions, the province and the federal government exercise political sovereignty in an environment with a population that is by the majority indigenous.<sup>216</sup> The legal and political questions that are raised in this context are the kinds of conflicts that the human rights regime seeks to resolve. We will see that the big questions in indigenous-state relations in the context of the *Plan Nord* concern the right to traditional lands and resources, the states' duty to conduct consultation processes for construction projects, as well as the right to participate in development. The examples in this chapter are thus ideally suited to inspect if international human rights law really has an impact in this context.

The discussion on the development of indigenous peoples' rights in Quebec already showed how questions of economic development (mostly the construction of dams for power generation) always were the main points of conflict between indigenous people and the state. In fact, if it was not for the hydroelectric development projects in the 1960s and 1970s, it is unlikely that the land treaties *Convention de la Baie James et du Nord québécois* (CBJNQ) or the *Convention du Nord-Est Québécois* would have been signed. Other great projects such as a projected dam at Great Whale River further fuelled the conflict between indigenous peoples and the state but also led to new agreements.<sup>217</sup> In 2011, the government of Quebec launched the *Plan Nord* in order to develop the scarcely populated north that for the most part lacks the modern infrastructure of the province's south.<sup>218</sup>

Despite its sparse population, the area affected by the *Plan Nord* comprises 72 % of Quebec's surface, which is inhabited by only 120.000 people.<sup>219</sup> The majority of the lands claimed by indigenous peoples that are affected by it are covered by one of the two conventions mentioned above. The First Nations that are

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<sup>215</sup> <http://www12.statcan.gc.ca/census-recensement/index-eng.cfm>, 2 July 2013

<sup>216</sup> This demographical situation is similar in the three territories of Yukon, Nunavut, and the Northwest Territories, which are targeted by the Northern Strategy of the federal government.

<sup>217</sup> Mercier & Ritchot 1997

<sup>218</sup> Quebec 2012

<sup>219</sup> Chalifoux 2011: 53

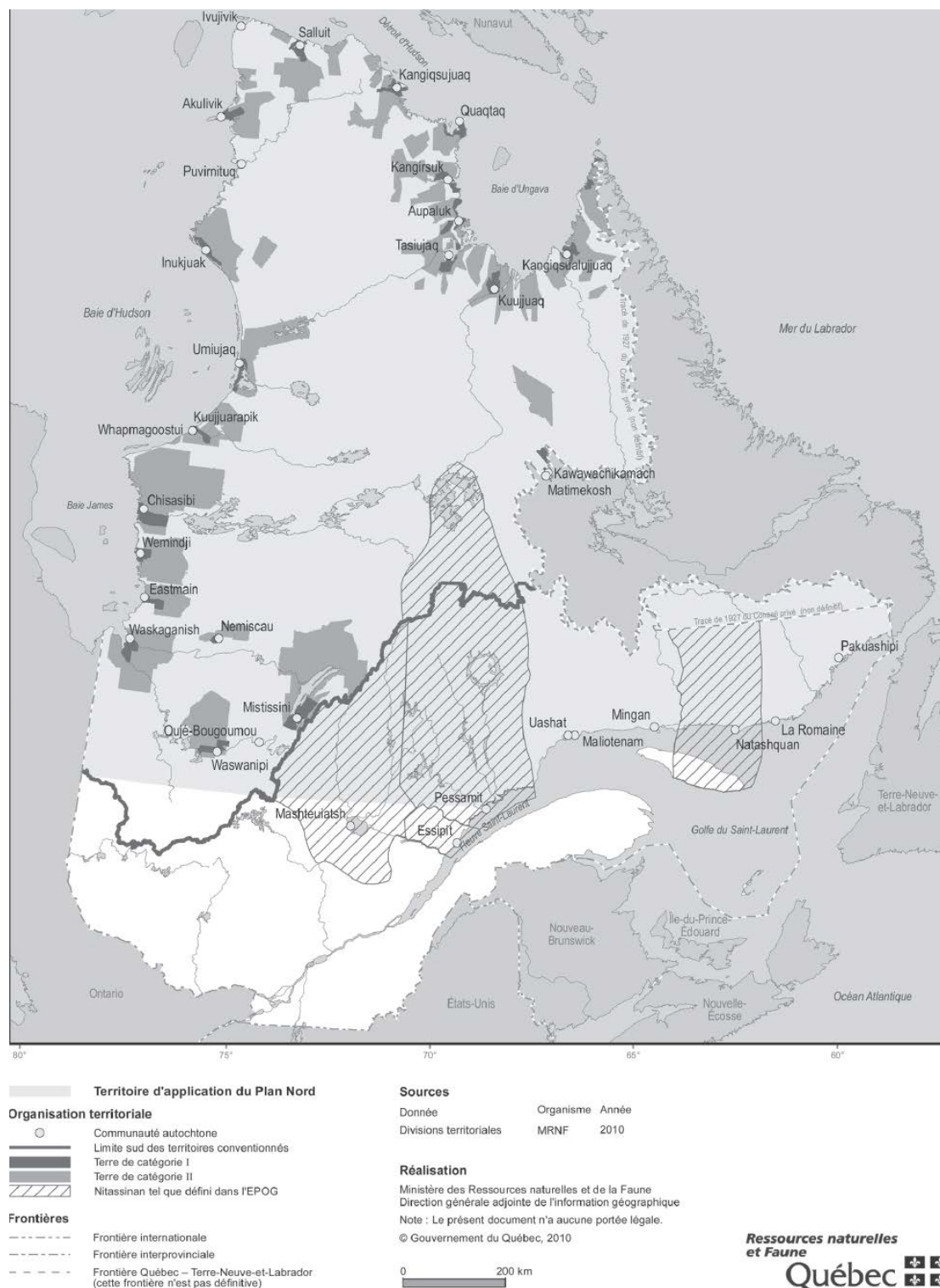
primarily touched by northern development are the Inuit, Cree, Naskapi, and Innu.<sup>220</sup> The plan consists of strategic public investments over the course of the next 25 years that aim at promoting mining, resource extraction, and hydroelectric development and thereby also the development of infrastructure and employment opportunities in the province's north. Its actions are directed by the *Sécretariat au développement nordique*, which is a provincial ministry.<sup>221</sup> According to the CBJNQ, indigenous peoples do not have any right to object to development projects in the majority of the lands of category III, for which they have been financially compensated. Only lands of category II (neighbouring the actual reservations), where the government of Quebec has to compensate indigenous peoples in case it dispossesses the land for development purposes, or lands of category I (the reservations), where indigenous peoples have a formal right to the lands including its resources, can be subject to consultation processes if projects are to be realized on these lands.<sup>222</sup>

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<sup>220</sup> *ibid*: 35

<sup>221</sup> <http://www.nord.gouv.qc.ca/potentiel/index.asp>, 2 July 2013

<sup>222</sup> cf. CBJNQ Art. 5.1-5.3; The corresponding provisions in the *Convention du Nord-Est québécois* are the same as in the CBJNQ



**Figure 4:** The area affected by the *Plan Nord*, lands of category I (dark grey), and category II (grey). The reservations from Mashteuiatsh to Pakuashipi in the east of Quebec are inhabited by the Innu. Their territorial claims are not regulated in land treaties with the state.<sup>223</sup>

<sup>223</sup> Quebec 2010

The two land rights conventions are protected by Article 35(1) of the Constitution, which guarantees traditional and treaty rights to aboriginal peoples. This fact gives the three nations that are signatories to the conventions a relatively strong position in negotiations with the government of Quebec. Nevertheless, the constitutional status of treaty rights does not make them absolute, since they can still be weighed against other national interests. After the *Delgamuukw* decision, such interests may also include the exploitation of forests and mineral resources.<sup>224</sup>

Since the north of Quebec is also populated by First Nations that did not sign a land rights treaty with the state (particularly the Innu<sup>225</sup> of north-eastern Quebec), the current legal reality leads to a divided strategy of indigenous peoples in their negotiations with the government.<sup>226</sup> The *Plan Nunavik*, published by the Kativik Government in 2012, serves as a good example for this divided strategy. The study, which envisions a sustainable development of the north that respect aboriginal rights in diverse fields from housing over mining and energy to transportation and communication infrastructure, largely rests on the treaty rights according to the CBJNQ and aims at measures that would be thus of no help for the Innu of northern Quebec.<sup>227</sup> As a consequence of the Supreme Court decision *Van der Peet*, proof for traditional ownership of a territory has to be made by demonstrating that a given band exclusively owned a certain territory. Because large parts of the land were shared and borders of hunting grounds often changed in semi-nomadic societies, today's indigenous peoples in the north often argue against historical facts and – eventually – against each other's claims.<sup>228</sup> First Nations whose land rights are not (yet) fixed in a treaty now find themselves in the situation of having certain rights to consultations derived from case law to make their claims against the violation of traditional rights. At the same time, the mining policy in Quebec is still based on

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<sup>224</sup> Leclair 2012: 2-4

<sup>225</sup> In other sources, the Innu are often called *Montagnais* after the denomination they have been given by the French colonists. In this paper however, I prefer to use the term Innu, which is the vernacular term for "people".

<sup>226</sup> *ibid*: 10

<sup>227</sup> cf. Kativik Regional Government & Makivik Corporation 2012

<sup>228</sup> Leclair 2012: 11; Consequently, it is a widely held prejudice against indigenous peoples' land claims, that they would affect an overlapping territory that corresponds to roughly 120 % of the surface of Quebec; Claude Brochard, personal communication

the 19<sup>th</sup> century principle of *free entry mining*, which “permet aux individus et aux entreprises minières d’accéder librement aux terres publiques ou privées afin de prospector les ressources minérales appartenant à l’État”<sup>229</sup>. This principle is clearly inconsistent with the legal obligation of the state to consult indigenous peoples. The government thus finds itself caught in a conflict between *free mining* and environmental as well as aboriginal rights.<sup>230</sup>

Given the legal and political land rights of Quebec’s indigenous peoples described above, negotiations about development projects in the north always imply the following actors: (1) The indigenous group, either represented by a band council or an indigenous umbrella organization such as the Grand Council of the Crees. (2) The federal government, often represented by the ministry of Aboriginal Affairs and Northern Development. (3) The province. In the case of Quebec, the appropriate bodies are the *Sécretariat aux affaires autochtones* and the *Sécretariat au développement nordique*. (4) Depending on the province and the development project, private or state-owned corporations (such as Hydro-Québec) are also part of the formal consultation process.

In this setting of actors, the federal and the provincial governments might share some interests the perception of their role by the indigenous peoples is however very ambiguous. While the legislative power, the *imperium*, is with the federal government, the *dominium*, the control of the public property (i.e. lands and resources) is at the provincial level. It follows that federal laws affecting indigenous peoples (particularly the Indian Act) and thus the redistribution of wealth are a federal competency whereas the province’s interest is to maintain the *dominium* over the land.<sup>231</sup> Consequently, the relationship between indigenous peoples and the provincial government is much more tense in conflicts over land rights, than the relationship between indigenous peoples and the federal government.

In the absence of politically standardized consultation processes for development projects, consultations differ strongly from province to province and even from project to project. One of the most serious points of criticism of

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<sup>229</sup> Thériault 2010: 224

<sup>230</sup> *ibid*: 244-245

<sup>231</sup> Jean Leclair, personal communication

the parliamentary opposition against the conservative government in the question of consultation is the transfer of the duty to consult either to private corporations, or to the National Energy Board (as it is the case in the course of the construction of the Northern Gateway Pipeline in Alberta and British Columbia). Particularly the NDP opposition criticizes the potential conflicts of interest if these actors consult in the lieu of the federal and provincial bodies.<sup>232</sup> As for Quebec and the *Plan Nord*, the *Sécretariat aux affaires autochtones* tries to differentiate itself from the approach of the western provinces where the governmental institutions only approve of the results of consultations held by third parties. The consultation of First Nations is rather seen as a governmental responsibility in Quebec.<sup>233</sup> The role of the most important actor in the northern development, Hydro-Québec, is nevertheless not entirely clear. It is questionable if it can be assumed that Hydro-Québec acts in the common interest like a governmental body, although it is entirely owned by the province.

With regards to a direct impact on politics or jurisprudence, international law plays a marginal role at best in the consultation of aboriginal peoples. All the interlocutors in my interviews agreed that instruments such as the Declaration on the Rights of Indigenous Peoples are very rarely cited as a source of law by provincial and national courts. Since a dual legal system such as the Canadian law does not have automatisms for the implementation of non-obligatory international law, the implementation of norms regarding consultation processes remains a political question.<sup>234</sup> Despite its formal endorsement of the Declaration in 2010, the Canadian government clarified that the Declaration's provisions will remain subject to national legislation.<sup>235</sup> From a legal point of view, the Declaration thus does not provide a leverage effect in power relations in favour of indigenous peoples.

The impact of human rights law concerning indigenous peoples much rather lies in its influence on the weighting of norms for consultation processes by the judges. They are well aware of the norms developed in international law and the body of scientific literature that developed around them. In an indirect way,

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<sup>232</sup> Jean Crowder, personal communication

<sup>233</sup> Claude Brochard, personal communication

<sup>234</sup> Jean Leclair, personal communication

<sup>235</sup> <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>, 4 July 2013



international law structures the way in which consultations are conceptualized.<sup>236</sup> In a system of common law, where laws are often made by judges, non-binding international law thus influences national law without having a formally superior status. When the terms of the discourse on consultation processes are defined in the international regime and <by international law, the regime finally could have the potential of balancing unequal power relations between indigenous peoples and the state by means of a formalization of the process. In this set of actors, the judiciary is thus indirectly influenced by the progressive standards of international law. Since the government has generally appealed all legal decisions since the adoption of the Declaration, the field is now marked by an opposition between the executive government and the judiciary.<sup>237</sup>

The most important norm that was cited by virtually all of my interlocutors in the context of consultations for development projects is the notion of Free, Prior, and Informed Consent (FPIC). This norm is mentioned in several articles of the Declaration and had been developed based on the wording of “free and informed consent” as a prerequisite for the exceptional relocation of indigenous peoples in ILO 169.<sup>238</sup> The definition of a consent that is based on a free decision by an actor who had been adequately informed beforehand as a basis for consultations has an important effect in the structuring of the debate. It distinguished fair consultation processes on an equal footing from the mere information of indigenous peoples about development projects.<sup>239</sup> The mere information of indigenous peoples is harder to be justified as a sufficient form of consultation in the light of this norm taken from international law. Not only the executive and judiciary powers, but also aboriginal peoples are influenced by norms formulated in international law:

It shifted somehow the nature of the debate and I think especially today, now that we have the Declaration, I see a really significant change in the way that aboriginal peoples are framing and naming their demand.<sup>240</sup>

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<sup>236</sup> Jean Leclair, personal communication

<sup>237</sup> Jean Crowder, personal communication

<sup>238</sup> UNDRIPS Art. 10, 11(2), 19, 28(1), 29(2), 32(2); ILO 169 Art. 16(2)

<sup>239</sup> Jean Leclair, personal communication

<sup>240</sup> Craig Benjamin, personal communication

If we draw a continuum between the noncommittal information of indigenous peoples and the ideal type of FPIC, that is to say open-ended negotiations between equally valuated parties that imply a deliberative communicative process, it is questionable how close Quebec gets to this ideal with its consultation practices in the course of the *Plan nord*. The majority of my interlocutors with a human rights, indigenous, or critical academic background, criticized the government (in particular the federal government since the coming to power of Stephen Harper), for its neglect of the notion of FPIC. Particularly Amnesty International criticizes that consultation processes in Canada do not even meet the standards that were developed by Canadian courts.<sup>241</sup> However, even the representative of the *S cretariat* I spoke to, although the government position is that a direct implementation of the Declaration's wording might result in a veto right for indigenous peoples, admits that Quebec's consultation policy "pour nous c'est un peu une reponse   cette norme [of FPIC] finalement"<sup>242</sup>. So even though the critical approach towards the Declaration by the *S cretariat* differs little from the federal government's criticism cited above, the ideal towards its consultation policy is nevertheless oriented towards a norm developed in international law.

## VI.2. Indigenous Peoples in a Contested Multicultural Confederation

The construction of a Canadian nationality is a recent and rather conflict-laden process. Canada's former Prime Minister Pierre E. Trudeau, an icon of national unity, said:

The die is cast in Canada: there are two ethnic and linguistic groups; each is too strong and too deeply rooted in the past, too firmly bound to a mother culture, to be able to swamp the other. But if the two will collaborate inside of a truly pluralist state, Canada could become a privileged place where the federalist form of government, which is the government of tomorrow's world, will be perfected.<sup>243</sup>

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<sup>241</sup> Craig Benjamin, personal communication

<sup>242</sup> Claude Brochard, personal communication

<sup>243</sup> <http://canadianstudies.fatih.edu.tr/?quotes&printable=1>, 2 July 2013

This quote primarily illustrates two things: First, almost thirty years after Trudeau had to resign as Prime Minister of Canada, the national unity across the language and cultural border of French and English Canadians is far from being a social reality. Second, the classical narrative of the foundations of the Canadian state is one of two roots (English and French) where the contributions of First Nations to the existence of the federation (and in fact their mere existence and their primordiality) are ignored. Even though Canada prides itself on being an example for a multicultural society, the questions of the place of French Canadians (particularly of Quebecers) and of indigenous peoples in the confederation remain unanswered in the 21<sup>st</sup> century.

Slowly but surely, indigenous people become a part of the discussion about the political status of Quebec. Proponents of a national sovereignty of Quebec and supporters of today's Canadian bicultural confederation can no longer pretend that Canada had only two cultural roots. The discussion of the role of indigenous peoples in debates about the national sovereignty of Quebec shall serve as an illustration for a highly contentious question in international law regarding indigenous peoples. We will see an example for an ongoing discussion process that circles around the question about the character of indigenous-state relations. Is this relationship to be treated merely like one between a state and its individual citizens? Is it comparable to the specific claims of religious or ethnic minorities? Or should a sovereign state treat First Nations as nations and thus acknowledge their political sovereignty? We will see how these questions contest the liberal notion of the equality of citizens as well as the individual character of human rights.

Even though mainstream historians in Canada are split between French and English speaking scientists, the history of the foundation of what is today the Canadian federation is being told similarly. These foundations lie in the provinces of Upper Canada and Lower Canada, which were created after the defeat of the French on the American continent and the treaty of Paris of 1763. The two provinces roughly correspond to what are today Ontario and Quebec. According to the white version of history, the cradle of Canada thus lies on the one hand around the Great Lakes with an English speaking, protestant population, and on the other hand alongside the Saint Lawrence River with a

catholic and French speaking population.<sup>244</sup> Today, the national unity of the French and the English Canada is politically contested in Quebec. After two failed referenda about the national independence of Quebec in 1980 and 1995, the *québécois* are split between post-sovereignists, who opt for a strong national unity within the framework of the Canadian state, confederationists, and separatists. Analogous to the (post-)sovereignist discourse that is dominant in Quebec and the proponents of a culturally diverse federation are the two approaches to cultural integration of *interculturalism* and *multiculturalism*. While the intercultural approach of Quebec is based on the idea of a French-Quebec culture in the center that is in dialogue with other cultures but that expects immigrants and Anglophones to converge to this cultural center, the multicultural model rejects the idea of a cultural center and places all ethnic and religious cultural backgrounds on the same normative level.<sup>245</sup>

However, both the Anglo-Canadian and the French-Canadian approach to a culturally diverse country fail to acknowledge the prior occupancy of the Canadian territory by First Nations, let alone to admit a special status to their culture. At best, aboriginal culture is seen as one minority culture among others, which is also not very numerous. As mentioned above, the Indian Act envisaged the opportunity to “enfranchise”, that is to say to formally acculturate, indigenous peoples until World War II. Indian culture was thus regarded as a passing phenomenon that would soon have been history. The state’s duty was thus considered to be supporting indigenous peoples in their cultural assimilation.<sup>246</sup> Although the possibility to get rid of one’s Indian status by proving cultural assimilation had eventually been abolished, the dominant ideology regarding the place of Indian culture in the confederation did not change in post-war Canada. From the 1950s onwards, Indian affairs were (quite ironically) handled by the federal Department of Citizenship and Immigration,

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<sup>244</sup> Laforest & Cagnon 2009: 21-24

<sup>245</sup> *ibid*: 31-35; An example for the idea of multiculturalism is that Tagalog is now slowly being introduced as the second official language in Winnipeg (MB) after it surpassed French as the most important language after English, cf. <http://www.cbc.ca/news/canada/manitoba/story/2012/10/24/mb-census-tagalog-language-winnipeg.html>, 3 July 2013

<sup>246</sup> cf. Brownlie 2006; This view on so-called primitive culture was far from being a Canadian specialty, but much rather in accordance with the paradigm of cultural evolutionism that still had been taught in anthropology in the first half of the 20<sup>th</sup> century.

that made indigenous peoples subject to the same integration programmes as immigrant newcomers until 1966.<sup>247</sup> Moreover, the practice of sending aboriginal children to boarding schools where they were not allowed to speak their traditional language, practice their culture, or to be in contact with their families on the reservations was only fully abolished in 1990.<sup>248</sup> Thus we see that until very recently, the Canadian federal government followed a cultural policy that does not accept a distinct aboriginal culture as a vital, dynamic, and (above all) independent element of the Canadian society.

The example of Quebec and of its indigenous peoples shows how far the nation is from Trudeau's multicultural dream with bicultural roots. As Will Kymlicka shows, the identification with the Canadian state is at about the same low level amongst indigenous peoples as it is amongst Quebecers. Their allegiance to the Canadian nation is anyhow lower than the average allegiance of first generation immigrants in English speaking Canada.<sup>249</sup> The following quote by Ghislain Picard, Grand Chief of the Assembly of First Nations of Quebec and Labrador, is exemplary for the strong denial of any allegiance to the Canadian mainstream by indigenous leaders:

Nous ne sommes pas des Canadiens, nous ne sommes pas des Québécois, nous sommes des Abénaquis, des Algonquins, des Atikamekw, des Cris, des Innu, des Malécites, des Mi'gmaq, des Mohawks, des Naskapis et des Wendat. Cette affirmation nationale et identitaire est fondamentale, tout comme l'est le projet de reconstruction des Premières Nations.<sup>250</sup>

This accentuation of distinctiveness is also important in distinguishing indigenous peoples from national minorities – a label that is claimed by (post-)sovereignist Quebecers. First of all, there are certainly commonalities between national minorities and indigenous peoples:

Like indigenous peoples, these are culturally distinct groups living on their traditional territory, who think of themselves as a distinct people or nation, and show a deep attachment to their cultural distinctiveness and their homeland,

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<sup>247</sup> Bohaker & Iacovetta 2009: 428-431

<sup>248</sup> Ottawa 2010: 19

<sup>249</sup> Kymlicka 2011b: 284

<sup>250</sup> Picard 2010: 32-33

which they have struggled to maintain despite being incorporated (often involuntarily) into a larger state.<sup>251</sup>

Anyhow, in the self-conception of indigenous peoples as well as on the international level, the parallels between indigenous peoples and national minorities are highly contested. Particularly, indigenous peoples are distinguished by the brutality of the colonial experience, foreign rule by an empire, and the vulnerability caused by the size of their communities.<sup>252</sup> Although the claims of indigenous peoples and of separatist Quebecers both have a historical dimension, these aspects are not comparable. Despite all similarities, their claims are situated in a different legal and political framework.

An event that made the relationship between a *québécois* nationalism and indigenous peoples visible was the referendum about the independence of Quebec in 1995. During the first referendum about a free association with the Canadian confederation in 1980, the First Nation leaders still followed a policy of non-participation in Canadian politics, called their band members to abstain, and thus did not appear as relevant political actors.<sup>253</sup> This situation changed radically with the referendum of 1995, that failed only narrowly with 50,58 % of Quebec's citizens voting against national independence. Again, the Cree and the Inuit (both signatories and rights holders of the CBJNQ) were the strongest opponents of Quebec's independence. The Cree and Inuit therefore held their own referenda before the official vote, in which 95 % (Cree) and 96% (Inuit) voted for maintaining the *status quo* in the Canadian confederation. Consequently, all Indian chiefs (with the exception of the Mohawks of Kahnawake and Kanesatake) advised their band members to vote against national independence.<sup>254</sup> Given that the decision in the 1995 referendum was decided by only 27.144 votes, it can be said that indigenous peoples were the decisive factor in the decision about Quebec's political status.

The discourse of indigenous peoples around the referendum showed that a national allegiance exists neither to Quebec nor to Canada. Their relationship to

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<sup>251</sup> Kymlicka 2011a: 184

<sup>252</sup> *ibid*: 199-208

<sup>253</sup> Trudel 1995: 64-66

<sup>254</sup> Wherret 1996: 2-9

national symbols such as the flag, citizenship, or the Canadian Charter of Rights and Freedoms is pragmatic at best. In other words:

Overall, the preceding catalogue of either opposition or half-hearted allegiance to the major institutions of the constitutional order adds up to a First Nations political culture of alienation/distrust/suspicion.<sup>255</sup>

Indigenous peoples' positioning in the discussion about the order of the confederation is thus clearly neither motivated by a loyalty to Quebec, nor to Canada, but rather by the perceived advantages for the own nation. Existing treaties such as the CBJNQ are viewed as potential points of departure for the establishment of political sovereignty.

Among the experts I have consulted during this study, the opinions on whether the notion of a distinct *québécois* culture really has an impact on the discourse of the place of indigenous peoples in the confederation were extremely divided. Those interviewees who hold a political position quite strongly denied such a connection. Interestingly, my two interlocutors from English speaking Canada, MP Crowder and Craig Benjamin of Amnesty International, praised the general progressiveness of Quebec's politics in general and its comparably generous and fair dealing with indigenous peoples (a view that had not been shared by any of my interlocutors from Quebec). Other factors that set Quebec aside from other provinces (particularly in the plains) that are independent from cultural issues are the absence of land treaties until the 1970s and the relatively small number of indigenous peoples, which gives them – particularly in the south of the province – an even more marginal position in the society.

There are certainly resemblances between the identity question of Quebecers and of First Nations. According to Karine Gentelet of Amnesty International Quebec, this historical experience of having been the "*Nègres blancs de l'Amérique*", which is the title of the autobiography of the author and activist Pierre Vallières, does not necessarily result in solidarity between the *québécois* and indigenous peoples, but rather in the sentiment of a threat to their distinct identity:

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<sup>255</sup> Cairns 2005: 30

Un peuple qui a lutté, un peuple qui a souffert, c'est difficile pour lui de regarder ce qu'il fait à un autre peuple. Les québécois ont souffert, mais ce qu'ils font aux autochtones, c'est le tabou ultime.<sup>256</sup>

The self-consciousness of a collective guilt of the white population against indigenous peoples is a cultural factor that is far more present in the political culture of English speaking Canada, than of that in Quebec:

Pour les juristes francophones au Québec, la question est plus complexe parce que nous avons été colonisateurs, mais nous avons été colonisés aussi par la Couronne britannique. Ça rend un peu plus ambivalente l'expérience historique de notre rapport au phénomène colonial. Au Canada, vous avez une mauvaise conscience claire, un sentiment de culpabilité clair à l'égard des autochtones, une telle mauvaise conscience n'existe pas du tout à l'égard du traitement réservé aux francophones et au Québec.<sup>257</sup>

Despite these differences in the political cultures of Canada, the observers of the situation of indigenous peoples' human rights in Quebec I spoke to agreed unanimously that a government that is led by the *Parti Québécois*, a party that ultimately aims at the separation of Quebec, is more open towards the demands of indigenous peoples than a confederationist government such as the *Parti libéral* government that was in power from 2003 to 2012. Since the PQ (together with its federal ally, the *Bloc Québécois*) traditionally fights for the minority rights of Quebecers and French Canadians in Ottawa, it can be expected that this political position would force the provincial government to be more open towards the claims of its own discriminated minorities.

Regarding a possible national separation of Quebec, my interviewees judged its effects on the rights of indigenous peoples rather as an opportunity than as a threat to existing rights. Following the argumentation of the Cree and Inuit before the referendum of 1995, my interlocutors with a legal background agreed that a national separation would necessarily lead to a new negotiation of land rights and that the extinction of the two land right treaties would not comply with international law. According to Jean Leclair, many of the successful political negotiations held by the Cree since 1995 are due to the fact that Quebec aims to build a self-image vis-à-vis the federal government of a province that respects

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<sup>256</sup> Karine Gentelet, personal communication

<sup>257</sup> Ghislain Otis, personal communication



the rights of its minorities. In the case of a separation, this pressure would be exercised by the international community and a newly founded nation of Quebec could not afford to have the reputation of a country that treats its aboriginal population badly.<sup>258</sup> The stark opposition to the national project of Quebec by indigenous peoples in 1995 and their presumably decisive role in the outcome of the referendum also shows the necessity to conceptualize a *nationalisme québécois* that exceeds the idea of a single French-American cultural center. All these factors would give the indigenous peoples of Quebec, a numerical minority of 1,1 % of the population with little to no economical power, a historically unique position to establish balanced power relations in the re-negotiation of indigenous peoples' rights.<sup>259</sup>

A precondition for a "new deal" in indigenous peoples' rights in Quebec would be public support for such a measure, which is currently not given in a society that largely sees its own history as a people of victims of foreign rule, and not also as foreign rulers over formerly sovereign Indian nations. At this point the international level comes into play. The nationalist narrative of the history of Quebec is based on the above-mentioned ideology of *terra nullius* and the "doctrine of discovery". It is at the level of the Permanent Forum on Indigenous Issues that discourses to deconstruct concepts that inhibit the realization of indigenous peoples' rights are held.<sup>260</sup> Via instruments of international law such as the Declaration, anti-colonial discourses become codified and thus have a different normative status than academic discourses. Accordingly, the fourth paragraph of the Declaration's preamble reads as follows:

[The General Assembly] *Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.<sup>261</sup>

In the discussion about the role of indigenous peoples in a pluricultural Canada we get another hint how the regime of indigenous peoples' human rights does make an impact on the ground without directly exercising political or legal force.

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<sup>258</sup> Jean Leclair, personal communication

<sup>259</sup> Ghislain Otis, personal communication

<sup>260</sup> cf. ECOSOC 2012

<sup>261</sup> UNDRIPS Preamble

We must not forget that the classic idea of decolonization also had its roots in social movements and in academic discourses and became formalized in international law before it became a political reality. With regards to indigenous peoples, we see a similar process happening at the international level with the development of a concept of internal self-determination that does not depend on national secession. Furthermore, we see an emerging nation-to-nation relationship in the rapport between indigenous peoples and the state. One example is the above-mentioned *Paix des braves* or the *Approche commune* in the current negotiations between the Innu, Quebec, and Canada about a third land rights treaty in Quebec.<sup>262</sup> The idea of two nations negotiating with each other on an equal footing without questioning the legitimacy of the framework of a sovereign nation state was born in international human rights law and now leads to new approaches on the conception of the role of indigenous peoples as sovereign bearers of collective rights (another innovation from international law) within the province of Quebec.

### VI.3. Idle No More

On November 4 2012, the indigenous activist Jessica P. Gordon wrote on the social network Twitter:

@shawnatleo [Chief of the AFN] wuts being done w #billc45 evry1 wasting time talking about Gwen stefani wth!? #indianact #wheresthedemocracy #IdleNoMore<sup>263</sup>

What started as a critique on National Chief Shawn A-in-chut Atleo, and later became a trending hashtag on Twitter, soon became the biggest grassroots movement of Native people in North America since the Red Power movement<sup>264</sup> of the 1960s and 1970s. Since Idle No More proved not to be just a flash in the pan, but rather to continue as a label for a new indigenous self-confidence, this paper does not aim to give an answer to the question what Idle No More is or

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<sup>262</sup> [http://www.versuntraite.gouv.qc.ca/documentation/publications/approche\\_commune.pdf](http://www.versuntraite.gouv.qc.ca/documentation/publications/approche_commune.pdf), 5 July 2013

<sup>263</sup> <http://www.cbc.ca/news/canada/story/2013/01/04/f-idlenomore-faq.html>, 2 July 2013

<sup>264</sup> In analogy to the Black Power movement, the political awakening of Native Americans in the USA from 1969 had been dubbed “Red Power”. This movement, however, created little or no political dynamic amongst the First Nations of Canada; cf. Wilkes 2006

what its deliberative potential may be. Nevertheless, I want to discuss at this point what was happening between November 2012 and June 2013. After this short summary of the movement Idle No More, I will show the (indirect) links between the international level and the grassroots level. The discussion of Idle No More serves the purpose to exemplify how something as abstract as human rights law can shape the discourse and the dynamics at the level of ordinary citizens. In addition, this part on Idle No More will further clarify the core of indigenous peoples' claims and how an international network of indigenous peoples is about to arise.

The point of departure of Idle No More was the omnibus bill C-45. This budgetary law had been introduced in the federal parliament on October 18 2012 and was decided on December 12 2012. This law, which affected a very broad range of policy fields, changed the legal situation of indigenous peoples in three ways: The Indian Act was amended so the quorum necessary for decisions about the lease of First Nation's territories was lowered. According to Idle No More activists, this change would facilitate the dispossession of lands that were granted in the treaties. Second, the Navigable Waters Protection Act was amended in a way that allowed for the construction of pipelines and dams along formerly protected waterways. Third, the Canadian Environmental Assessment Act was changed so environmental reviews could be processed quicker and would be required in fewer cases.<sup>265</sup>

Although the changes, most notably those to the Indian Act, were no cataclysms, the response in the First Nations community was enormous. In fact, indigenous activists rather criticized the way the government was dealing with aboriginal peoples rights, than the changes themselves. The activism was further fuelled by a hunger strike of Chief Theresa Spence of the community of Attawapiskat (ON). Spence's protest initially was not directed against bill C-45, but was intended to raise attention for the terrible living conditions of indigenous peoples in the northern communities.<sup>266</sup> After bill C-45 was passed in parliament without further review and indigenous peoples' protests were blatantly ignored by the

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<sup>265</sup> *ibid*

<sup>266</sup> <http://www.afn.ca/index.php/en/news-media/latest-news/afn-supports-call-for-meeting-between-first-nations-and-crown>, 3 July 2013

government, the Twitter hashtag #IdleNoMore quickly became the name of a grassroots movement that launched numerous acts of peaceful protest since December 2012.<sup>267</sup>

After several days of protest in front of the national parliament in Ottawa, Prime Minister Stephen Harper called the leaders of the First Nations to an official meeting to discuss the claims of the movement. The absence of the Governor General – the representative of the Queen in Canada – and the general distrust against the conservative government led to a split between the majority of the protesters and the Chiefs (most notably National Chief Shawn Atleo), who decided to negotiate with the government.<sup>268</sup> After the legitimacy of the leaders to speak for Idle No More had been questioned, it became clear that Idle No More was to become the first nationwide grassroots movement of indigenous peoples. It is a movement that not only criticizes the federal government, but also the First Nations' chiefs. According to its manifesto, the movement primarily aims at two things: Establishing a nation-to-nation relationship with the Canadian state and improving social and economical conditions of indigenous peoples.<sup>269</sup>

However, the question for the common motives and claims of the movement are not easily answered since there is not one voice within Idle No More. This is especially due to the fact that the issues of the movement vary from province to province. Whereas the Northern Gateway Pipeline is the hot issue in British Columbia, Idle No More is primarily concerned with the mining project "Ring of Fire" in Ontario and with questions of indigenous autonomy rights to education in Saskatchewan.<sup>270</sup> However, there are nevertheless commonalities in the points of critique uttered by activists within Idle No More. Primarily, the movement is opposed to a unilateral relationship between passive and victimized indigenous peoples and an omnipotent state. This kind of relationship is still alive since colonial times and has, despite above-mentioned progresses on the legal and political level, not changed fundamentally despite the formal end of

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<sup>267</sup> <http://www.cbc.ca/news/canada/story/2013/01/04/f-idlenomore-faq.html>, 2 July 2013

<sup>268</sup> <http://www.cbc.ca/news/canada/story/2013/01/10/pol-first-nations-chiefs-day-before-pm-meeting.html>, 3 July 2013

<sup>269</sup> <http://www.idlenomore.ca/manifesto>, 3 July 2013

<sup>270</sup> Jean Crwoder, personal communication

the age of colonialism.<sup>271</sup> The *S cretariat aux affaires autochtones* confirms this point of view:

La question de fond, c'est toujours la relation entre le gouvernement f d ral ou provincial et les autochtones.  a touche beaucoup la connaissance des droits, la propri t  du territoire, l'exploitation et le partage des ressources naturelles, la question, quels sont les propri taires des ressources naturelles,  galement toutes les questions de d veloppement socio- conomique.<sup>272</sup>

Events such as the budgetary bill C-45 or the hunger strike of chief Theresa Spence of Attawapiskat are thus rather to be interpreted as catalysts, than as singular causes of the emergence of the movement. What these two events that instigated Idle No More also have in common is that besides the actual content of the respective conflict, it was the attitude of the state that further provoked indigenous resistance. In the case of bill C-45, the government passed an omnibus bill on numerous different political issues, which are not interrelated, without being open for public protests that demanded to unlace this package. As for Chief Spence, who went on a hunger strike to protest against the devastating social and economical conditions in the reservation of Attawapiskat, the government issued an audit on alleged financial mismanagement in the community at the peak of her hunger strike.<sup>273</sup>

In view of these facts, the emergence of Idle No More can neither be viewed as a coincidence, nor as the product of single events. It is to be seen as the continuing of a colonial relationship in post-colonial times, which became more unequal in the eyes of many indigenous peoples during the government of Stephen Harper's Conservative Party.<sup>274</sup> An agglomerated paternalism evidently caused an enormous distrust against the state. For example, when the federal government amended some details to the First Nations Contribution Agreements 2013-14 without consulting indigenous leaders, protest against them spread rapidly across the highly efficient social media channels established by the activists of Idle No More. We see that – even concerning comparably little legal measures –

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<sup>271</sup> Doris Farget, personal communication

<sup>272</sup> Claude Brochard, personal communication

<sup>273</sup> <http://www.cbc.ca/news/politics/story/2013/01/07/pol-attawapiskat-audit-monday.html>, 7 July 2013

<sup>274</sup> Paul Joffe, personal communication

the government does not have the possibility anymore to overrule the voice of indigenous peoples without facing resistance:

Nobody trusts what the government is doing when they changed the agreement. So it's the activism in the communities that brought the media on and brought attention to a wording change in a legal document, which has never happened before.<sup>275</sup>

Besides these political factors, there are also reasons of social change why Idle No More became possible. The movement is primarily being led by indigenous women with a higher education. In Quebec, Idle No More protests were likewise primarily organized by indigenous women of the *Femmes autochtones du Québec*. This is particularly remarkable because indigenous women are reckoned to be the most vulnerable social group of Canada. But it is this new class of indigenous women, who live at the same time in the reservation and in the cities and often have a higher education, which carries the protest against the government's system of tutelage and paternalism.<sup>276</sup> Furthermore, Idle No More can be seen in the context of global dynamics of resistance that started in 2010/2011 with the Arab Spring and with Occupy Wall Street, and which found their way to Quebec in 2012 with the student protests against the raise of the tuition fees and the *Loi 78*<sup>277</sup> as planned by the liberal government of Jean Charest. Although all of these movements have their unique issues and reasons of being, they have their challenging of existing power relations that favour the financial capital vis-à-vis the claims of the populace in common.<sup>278</sup>

Although the connection might not be a direct one, there is also a strong influence of the international level on the emergence of the biggest grassroots movement of indigenous peoples in the Canadian history. With the formalization of indigenous peoples' rights in the form of (non-obligatory) international law and institutions, the consciousness of First Nations changed from being solicitors to being holders of certain human rights that they have been deprived of:

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<sup>275</sup> Jean Crwoder, personal communication

<sup>276</sup> Karine Gentelet, personal communication

<sup>277</sup> According to *Loi 78* the student's right to strike was limited and public demonstrations of more than 50 persons needed official approval. The law was dismissed by the *Parti québécois* after their coming to power in September 2012.

<sup>278</sup> Karine Gentelet, personal communication

With things like the apology [by PM Harper for the Indian residential schools] and the Declaration of the Rights of Indigenous Peoples, we see that there is a mobilization at the grassroots level, demanding those rights under these international conventions.<sup>279</sup>

In the legal and political struggles for land rights, my interlocutors observed that international law is almost exclusively (but very often) invoked by indigenous peoples:

Elle [the Declaration] a un impact, il y a un potentiel et je pense qu'elle est utilisée par la société civil et par certaines organisations internationales qui ont été créés par les États à la base mais qui s'autonomise aussi de la volonté des États.<sup>280</sup>

My interlocutor at the *Sécretariat* likewise confirmed that international law enters the work of the government primarily through indigenous peoples. He also observes how the international level effectively structures the human rights discourse amongst indigenous peoples.<sup>281</sup>

The movement Idle No More had equally been fostered on the international level through the role of international organizations as fora. In this function, the UNWIP or the Inter-American Commission on Human rights served as a space for the networking of indigenous peoples all around the world and the discovery of the resemblance of their problems.<sup>282</sup> It was also at the international level that extensive networking with non-indigenous NGOs happened and also transformed the understanding of the nature of human rights held by NGOs like Amnesty International.<sup>283</sup> It is thus partly due to the international fora for indigenous peoples' human rights, that a movement such as Idle No More apparently is able to unify diverse voices on the grounds of shared problems and historical experiences.

In conclusion, it can be observed that it might be civil society that is about to change the power relations and the grounds for negotiations between indigenous peoples and the state. Many of the activists' actions are not only directed against the provincial and federal government, but also against the

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<sup>279</sup> Jean Crowder, personal communication

<sup>280</sup> Doris Farget, personal communication

<sup>281</sup> Claude Brochard, personal communication

<sup>282</sup> Doris Farget, personal communication

<sup>283</sup> Craig Benjamin, personal communication

Assembly of First Nations and the band councils, which are not traditional institutions but rather installed by the Indian Act. The band councils are therefore often seen as being part of the government system and their approval of development projects is often much higher than that of the populace.<sup>284</sup>

Given the above-mentioned influence of the international level on the self-conception of indigenous peoples, we observe now – 5 years after the adoption of the Declaration – a radicalisation of the rapport between indigenous peoples and the state. So contrary to the Declaration's intention to “enhance harmonious and cooperative relations between the State and indigenous peoples”<sup>285</sup>, the example of Idle No More shows how the international human rights regime of indigenous peoples – at least in the medium term – leads to more frequent and more intense conflicts caused by a re-awakening of indigenous peoples' consciousness of having rights to land and political self-determination. Once more, Idle No More also exemplifies how the effectiveness of international law must not be measured exclusively on the grounds of its direct legal impact according to the positivist conception of law in liberal regime theory.

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<sup>284</sup> Karine Gentelet, personal communication

<sup>285</sup> UNDRIPS preamble



## VII. 3 x 3 Theses on Indigenous Peoples' Rights

In this final chapter, I will present the theses I am making based on the confrontation of the empirical and historical discussions in chapters IV-VI with the theoretical assumptions that I have made in chapter II. My theses are presented on three different levels that follow the logic of issue-specific conclusions over general statements on the regime to theoretical implications. Accordingly, I will follow the three research questions I have formulated at the beginning of this paper. Section 1 will summarize and condense the conclusions drawn from the discussion of the three empirical examples of chapter VI. I will formulate my view of the mechanisms whereby the regime of indigenous peoples' Human rights work in section 2.

This analysis follows Hurd's classification of international organizations as resources, fora, and actors.<sup>286</sup> I consider that this perspective is not only to be applied to international organizations, but to regimes as well. I assume that the statements made in this section are truly independent from the context of Quebec's First Nations and that they apply to the functioning of the regime in general. Following the logic of going from the particular to the general, I will discuss implications of my empirical example for liberal institutionalism's assumptions about international regimes in section 3. These theses are indeed to be understood as points of critique of institutionalism's perspective on processes in international relations, which proved to have blind spots for new transnational phenomena such as the regime of indigenous peoples' human rights. Anyhow, I do not reject the way of viewing inter- and transnational processes in terms of regimes, but I rather argue that my points of critique must be kept in mind in a study of international relations in an unconventional context.

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<sup>286</sup> Hurd 2011: 17-24

## VII.1. The Impact of International Law on First Nations' Rights in Quebec

**Norms and principles of international law must be substantiated at the national level in order to become legally effective.** The discussion about the role of a norm of international law such as FPIC in the development of Quebec's far north showed that developments at the international level do not go unheard at the national level. At the same time, its impact cannot be measured in classical legal terms but rather with respect to the way it structures the modes of reasoning of indigenous peoples, judges, and legal scholars alike. Currently there are no standard procedures or criteria for just and equitable consultation processes set by the government. The existing standards were all decided upon by the Supreme Court.

Given the broad range of contexts affected by international declarations and conventions, it is evident that human rights law has to apply a rather vague terminology and that it cannot define terms as precisely as national law. Its rules, norms, and principles thus need to be adapted to local contexts. The implementation process, whereby human rights become further culturally biased, needs to be vernacularized under collaboration of the affected peoples in order to serve those people that the regime wants to support.<sup>287</sup> If the government refuses the task to politically implement international law it has endorsed or ratified, this function is (sooner or later and independently from political intentions) taken by the courts. The result is a conflict between the above-mentioned influence of international norms on court rulings and Canada's decision to treat the Declaration subordinate to national legislation.

The example of FPIC showed that international law might have an impact on the local level on the predominant discourses, but also indirectly on the legal sphere, even if it is not actively implemented by the government. Anyhow, the conflict-laden relationship between indigenous peoples and the state during the past four decades of northern development show, that a standardized implementation, which is a political act, could serve to foster the predictability of

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<sup>287</sup> cf. Merry 2006b for a discussion of the cultural challenges of the implementation of human rights law on the national level.

legal decisions in development projects, ensure transparency in public ventures, and fulfill claims of indigenous self-government.

**International law contributes to establish a new notion of para-national sovereignty.** The historical overview of indigenous peoples in international law in chapter IV.I. showed how the liberation from colonial rule had been closely linked to national sovereignty and a synchrony of internal and external self-determination in the course of the decolonization movement of the 1960s and 1970s had been assumed. The resistance of the four western countries with indigenous populations that eventually voted against the Declaration (USA, Canada, Australia, New Zealand) might be to a large extent due to the fear that an affirmation of indigenous peoples' right to self-determination might result in the legality of the national secession of territories that are claimed by indigenous peoples. Furthermore we have seen in the discussion of the position of indigenous culture in today's Quebec, that even policies in recent times were based on the doctrine of discovery and the concept of *terra nullius*. In the mainstream of Canadian history, there is no conception of a politically sovereign rule over the territory before European arrival and Canada's territorial sovereignty on aboriginal lands is being taken for granted, even if there had been no act of purchase, forceful conquest, or other form of acquisition of indigenous lands in most cases.

International law has the inevitable flaw of being vague because it applies to extremely diverse contexts. The international regime of indigenous peoples' rights therefore does not provide us with a roadmap to indigenous self-determination, even if this right is affirmed in the Declaration.<sup>288</sup> But a close reading of the Declaration and of the intentions of its authors shows that it envisages the establishment of a new form of self-determination within and in coexistence with a nation state.

In fact, none of the constituents of the right to self-determination (non-discrimination, cultural integrity, land rights, development and self-government<sup>289</sup>) would *per se* be contrary to the continuation of the self-

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<sup>288</sup> UNDRIPS Art.3

<sup>289</sup> Anaya 2004: 129-156

determination and territorial integrity of the Canadian state. All these rights can be fulfilled and political sovereignty established within the present national framework. As it is envisioned in the Declaration, self-government must be thought as a dual right of, firstly, political autonomy in internal affairs (or the right to internal self-determination), and secondly, as the right to participate in the politics of the nation state and to be consulted by it on a nation-to-nation approach.<sup>290</sup> To allow for such an approach, Canada and particularly Quebec must let go of the conception of an ethnic, cultural, legal, and political homogeneity within its borders and (constitutionally) recognize not only the multicultural, but also the plurinational reality.<sup>291</sup> A strong version of indigenous self-government as a treaty-based nation-to-nation approach could even be established within the framework of the existing Canadian constitution. Without limiting the external self-determination of Canada, the nation would consist in this model of two confederations, whereas the legitimation of the aboriginal confederation would rest on the priority of settlement. This second confederation could have governmental institutions that would be independent from the Canadian state.<sup>292</sup>

**International law has the potential to alter the self-conception of indigenous peoples and can thus become an instrument of empowerment.**

A grassroots movement like Idle No More is a novelty in Canada and it is not comparable with prior pan-Indian movements such as Red Power or the movement against the White Paper on Indian Policy. It is a movement that is driven by the people (and not by indigenous politicians) and that seeks to establish a new relationship with the state. It is no coincidence that such a movement comes into being after international law acknowledged the existence of a collective right to land and culture of indigenous peoples and affirmed the indigenous peoples' right to self-determination. It is furthermore no coincidence

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<sup>290</sup> *ibid*: 152-156

<sup>291</sup> A constitutional recognition of a plurinational state has already been made in the reformed constitution of Bolivia. On a conceptual level, this step can be seen as a model for other states with indigenous populations. Actually it might be too early to judge whether the Bolivian constitution really leads to improved political and social rights of indigenous peoples. Ghislain Otis, personal communication

<sup>292</sup> Abele & Prince 2006: 579-583

that the protests by Idle No More complain of the breach of rights such as FPIC and “the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”<sup>293</sup>. For the emergence of a social movement it is of importance if it is founded on political claims that are contested by the state, or on internationally acknowledged human rights that Canada is obliged to respect (even if there are no sanctions for the violation of these rights). Idle No More thus showed how the awareness of having specific human rights as indigenous peoples can influence the self-conception and also the political self-esteem of First Nations in Quebec. The international regime of indigenous peoples’ human rights thus proved its potential of empowering aboriginal people to be aware of violations of their fundamental rights and also to raise their voice and speak for themselves in national politics.

## VII.2. The Regime’s Mechanisms of Functioning

**The regime is strong as a discursive and as a political *resource*, but relatively weak as a legal resource.** First of all it has to be admitted, that the direct legal impact of non-obligatory international law (or in the case of ILO 169 of obligatory law that has not been ratified by Canada) is very limited. If the impact of a regime as a resource is only understood in terms of legal positivism, the conclusion must be that the regime has only little real impact.

But the notion of a regime as a resource must be conceptualized more broadly. On the one hand, we have seen in chapter VI how international law can be invoked as a political resource. If Canada (presumably) violates indigenous peoples’ human rights, it can indeed not be held responsible in legal terms, but the violation of a certain right serves as a political resource in the argumentation of aboriginal activists and politicians.

Furthermore we have seen how the discourse on indigenous peoples’ rights among First Nations, but also within the government, strongly corresponds with discourses that are held on the international level and that are formalized as

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<sup>293</sup> UNDRIPS Art. 26(1)

human rights law. These discourses generally support indigenous peoples' rights and thus pre-structure discourses that are held on the national level in favour of indigenous peoples. The regime's discursive impact has profoundly and rapidly influenced the self-conception of First Nations in Quebec. The predominant self-conception nowadays amongst First Nations in Quebec is one of having inalienable rights that have already been granted (such as the right to political self-determination or right to land and resources), but that are disregarded by the state (in contrast to discourses whereupon such issues are not rights, but political claims).

Even in legal terms we have seen how the discourse on the international level structures the legal reasoning on the national level. It is astonishing how decisions made by the Canadian Supreme Court reflect developments and discussions at the international level. Of course it has to be admitted, that regarding the political discourse as well as regarding the legal discourse, the direction of discursive influence and the nature of the interrelations of the different levels cannot be clearly identified with the methods applied in this paper. Further research applying methods of discourse analysis could be occupied with this highly interesting question.

**The regime has a strong impact as a transnational *forum* for indigenous peoples.** The three decades since the UN Working Group on Indigenous Populations has started its work have not only witnessed the emergence of a pan-Indian political consciousness in Canada, but also that of a transnational movement of indigenous peoples. This development is not only due to revolutions in communication and transportation technologies that generally facilitate the emergence of transnational political networks in a globalized world, but also to the existence of fora at the international level, primarily in the context of the United Nations.<sup>294</sup> Although The WGIP had been installed as a subordinate human rights body to draft and negotiate a UN declaration, it also served as a forum for the transnational networking of indigenous peoples. International institutions not only served as a forum for different indigenous peoples, it also established a strong bond between indigenous peoples and human rights NGOs.

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<sup>294</sup> cf. Morgan 2007

It is a product of dialogues at the international level that NGOs such as Amnesty International rethought their rather liberal and individualistic notion of human rights and at the other hand that indigenous peoples nowadays conceive their human rights as interconnected with questions of climate change and resource extractivism.

In today's institutional setting in the regime, the Expert Mechanism on the Rights of Indigenous Peoples succeeded the WGIP and serves as a meeting point of indigenous politicians and (indigenous as well as non-indigenous) scholars in the field of Human rights. The Permanent Forum on Indigenous Issues has a much more open and participatory character and condenses also discourses of the civil society. Even if the PFII's only mandate is to report to the ECOSOC, its role as an open forum must not be underestimated. Each year's special theme (such as the Doctrine of Discovery in 2012<sup>295</sup>) reflects and amplifies discourses that are being held on the regional and the national level. In an indirect way, the PFII thus has the potential to decolonize the conceptions of history at the national level as well as laws that are based on such conceptions. These institutions of the regime of indigenous peoples' rights constitute a unique and irreplaceable interface between the civil society, politics, law, and scientific discourses. Although these institutions have only limited competences because of existing power relations, they already proved to be able to amplify discourses of muted social groups.

**The regime is decentralized and thus barely has an impact as an actor.** The regime of indigenous peoples' Human rights certainly has the least impact in its role as an independent actor. This is primarily due to the institutional architecture of the regime. There is no single institution within the UN family that is concerned with the rights of indigenous peoples. Instead, the issue is treated within the realm of economical, social and cultural rights (UNPFII as a sub-commission to the ECOSOC), the Human Rights Commission (EMRIP & Special Rapporteur), and the International Labour Organization (ILO 169). There are no formal processes of information exchange or other interactions between the supranational-regional level (e.g. the Inter-American Commission on Human Rights) and the international level. Consequently there is of course no General

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<sup>295</sup> cf. ECOSOC 2012

Secretariat of an international organization that deals with the rights of indigenous peoples that would be able to act as a politically independent body or to coordinate the action of the above-mentioned institutions according to a common international strategy on indigenous peoples' rights.

The only entities within the regime that can be said to have a certain capacity of independent action are the Special Rapporteurs on Indigenous Peoples within the framework of the United Nations and the Inter-American Commission on Human rights. Although the Special Rapporteur of the United Nations does have a certain form of soft power in his competence to make country visits and to issue reports on the situation of indigenous peoples' rights in the member states, this influence depends on the willingness of the member states to cooperate with the Special Rapporteur. In the case of Canada, Special Rapporteur S. James Anaya had been repeatedly denied the right to go on an official fact-finding mission by the conservative government.<sup>296</sup> It can be concluded that the regime's power as an actor depends on the power it is given by the member states and that the regime's institutions do not dispose of instruments to balance this inequality of power.

### VII.3. Implications for the Theory of International Regimes

**International regimes are a useful concept for the analysis of the issues at question in this paper. Some of its preconceptions need to be reformulated in order to meet the characteristics of my field of research.** First of all, we need to get back to the definitional question of how the phenomenon of a regime is to be grasped. The discussion in this paper showed that in the conflict between Keohane's lean definition of regimes as only being constituted by rules, and Krasner's definition based on the four components of "principles, norms, rules, and decision making procedures"<sup>297</sup>, the latter conception seems to be more suitable for my subject of interest. Of course, the critique on Krasner's classic definition is not wholly unjustified. Krasner does not provide us with an

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<sup>296</sup> <http://aptn.ca/pages/news/2013/03/13/ottawa-still-blocking-un-indigenous-peoples-rapporteur-from-landing-in-canada-on-official-visit>, 12 July 2013

<sup>297</sup> Krasner 1982: 186



explanation of the interrelations of the elements of a regime and the four key-elements tend to overlap and they are not defined with adequate precision.<sup>298</sup> A structuralist perception that conceives an international system as consisting of the three components of “the organizing principle [...], the functional differentiation of its units, and the configuration of power among them”<sup>299</sup> has the advantage of including the question of power relations, but nevertheless fails to differentiate between the different normative procedures within a regime. The example in this paper showed, that a regime can at the same time have an impact through its formal rules, but also by the development of principles and norms that become standards for the making of rules (viz. laws) at the national and regional levels. A definition of regimes for our research context must thus integrate the diverse nature of a normative system and at the same time it must be able to apprehend internal and external power relations.

In light of the mechanisms of functioning discussed in the preceding section, the ideal of compliance also needs to be reviewed. Whereas liberal institutionalism tries to measure the effectiveness of a regime according to states’ compliance to its rules, we have seen that a regime can also have an impact in more indirect ways. A simple comparison of the state of affairs of indigenous peoples’ human rights and the texts of international law would probably lead to the conclusion that the impact of the regime is extremely limited. I applied a broader view on the impact of the regime in this paper, which is necessary to grasp all the phenomena I wanted to observe. I will return to the critique of legal positivism further below. We have also seen in the preceding section that the regime largely lacks the capacity of an actor and particularly an institution in the center of the regime that would be capable to elaborate a common strategy for indigenous peoples worldwide.

The focus of this paper lay not on the interactions on the international level and my data are not sufficient for making clear conclusions about the motivation of actors in the international system. Although self-interest and economically rational considerations undoubtedly play a role in the motivation of state actors, the Declaration, one of the most important elements of the regime, would not

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<sup>298</sup> Hasenclever et.al. 1997: 10-14

<sup>299</sup> Ruggie 1989: 23

have come into being without the support from state actors.<sup>300</sup> The influence of cosmopolitan values on the action of states in the international system must thus be considered.

**Institutionalism's positivist approach to law is unable to perceive the diverse interactions between the international and the local level.** The preceding analysis demonstrated so far that – paradoxically – international law is most effective in non-legal terms. Norms and principles developed on the international level constitute a formalized discourse of values. Via political and scientific discourses, the non-obligatory law finds its way on the regional and national levels and develops a certain normative impact. The broad perspective on normative systems of discourses on legal pluralism helped to grasp the multiple ways in which law can be effective. A research approach to a legally plural situation must thus not only be open to the simultaneous existence of different legal orders, but also to multiple ways in which one legal order makes a difference.

We have also seen in this paper, that, although different legal levels have different ranges in their applicability, they cannot be put in a hierarchical order. In a transnational legal field, law cannot be understood as a top-down process and the different legal levels cannot be ordered hierarchically. In a globalized world, the local and the global always influence each other in interactions that are indeed marked by power relations, but that are no one-way road though. Institutionalism narrowly conceives states as atoms of the international system and institutions as elements structuring the field for state actors.<sup>301</sup> This approach proves to be unable to display the complex transnational interactions in the regime of indigenous peoples' human rights. Although it ultimately depends on majority votes by states to pass international laws or to install international institutions concerning indigenous peoples, these laws and institutions would have never come into being at all without the contributions by non-state actors such as NGOs and indigenous peoples themselves. In short, in a

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<sup>300</sup> Craig Benjamin, personal communication; throughout the negotiations in the UNWGIP, these supportive states were primarily Norway and Denmark.

<sup>301</sup> Wendt & Duvall 1989: 55

field of transnational legal pluralism, the impact of law proved to need a sociological analysis, and not an exclusively legal one.

**Even in a field that is not structured in a favourable way for relatively powerless actors, human rights possess a deliberative potential.** In a system of international organizations, where power relations are ultimately defined by state actors and the discourse of human rights has a strong occidental cultural bias, we would expect this field not to be a favourable arena for indigenous peoples' claims. However this is not the case. At the beginning of this paper, I have discussed the criteria for rational and legitimate laws based on Habermas' concept of democracy as a deliberative form of communication. Looking at the evolution of the developing processes of international law concerning indigenous peoples from ILO 107 to the Declaration, we see a progress from law that had been dictated in a top-down approach by powerful state actors, to a communicative process that is open to make the voices of those, who are affected by the respective set of rules, be heard.

If we take the Declaration as the most recent, most progressive and the most universal document of law concerning indigenous peoples as an example, we see how the regime challenges fundamental assumptions about human rights. The Declaration acknowledges "that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples"<sup>302</sup> and thus formally recognizes the dual nature of human rights as individual as well as collective rights. By granting indigenous peoples "the right to maintain and strengthen their distinct [...] legal [...] institutions while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State"<sup>303</sup>, the Declaration refuses the "ideology of legal centralism"<sup>304</sup> and accepts legal pluralism as a social reality. Furthermore, the granting of the right to self-determination with the limitation of national secession makes a conception of political sovereignty possible that

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<sup>302</sup> UNDRIPS Preamble

<sup>303</sup> UNDRIPS Art.5

<sup>304</sup> Griffiths 1986: 3

does not have full territorial independence as a precondition.<sup>305</sup> All in all, these novel notions in international law render possible the idea of indigenous peoples as politically sovereign entities on an infra-national level.

Human rights thus bear the potential of being a leverage factor in the power relations between indigenous peoples and the state and moreover to decolonize the inherently western and only notionally universal construction of human rights. Existing power relations must however be taken into account in order not to idealize the picture and thus to overestimate the impact of human rights. The example of Canada's opposition against progresses in indigenous peoples' rights at the international level – be it in the form of its vote against the Declaration in the General Assembly of the UN, in the statement that it will only endorse the Declaration within the borders of national legislation, or its denial of country visits to the Special Rapporteur – shows that in most cases, the regime is only as effective as it is wanted to be by national governments.

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<sup>305</sup> UNDRIPS Art. 3, 46

## VIII. Conclusion

This paper tried to evaluate the impact of the regime of indigenous peoples' human rights on the local level, the mechanisms of functioning of the regime, and its theoretical implications. The regime as it is outlined in chapter IV is a relatively young construction in the international system and it underwent a dynamic development within the past 30 years. Particularly in the light of the very recent adoption of the Declaration on the Rights of Indigenous Peoples in 2007, I have to admit that any such analysis has to a certain extent the character of a snapshot. Indigenous Peoples' rights have become an important part of international human rights law and it is to be expected that its importance and its impact on the local level will grow further in the near future.

I have analysed in this paper the ways in which the regime already has made an impact and where it could potentially increase its effects. With regards to its impact "on the ground", I can largely confirm what Forest & Rodon already wrote about the effects of the international activities of Canada's indigenous peoples in 1995:

Ont-ils [Canada's indigenous peoples] changé quelque chose à l'ordre mondial? Oui, si l'on réfléchit en politologues, car toute redistribution du pouvoir entre les acteurs de la société internationale est une source de renouvellement des «régimes» qui encadrent leurs interactions et leurs décisions. [...] Non, si l'on pense en juristes, car le droit international autochtone ne parvient toujours pas à dépasser le niveau des symboles ou des victoires morales.<sup>306</sup>

Despite the limited direct legal impact of the regime, we have seen that it bears the potential to empower indigenous people to take actions for the realization of their claims into their own hands. The regime has an important impact on the structure of the discourses on indigenous peoples' claims and their position in the society – both amongst indigenous peoples as well as in scientific and judicial discourses. Thereby, it changes the (self-)conception of indigenous peoples as distinct nations within a nation state who claim their inherent rights to lands and political sovereignty. Furthermore, the regime showed its potential to bring an

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<sup>306</sup> Forest & Rodon 1995: 57

end to colonial relations in a supposedly post-colonial world. What is left to be done is to negotiate – on the national as well as on the international level – the exact terms of a decolonization of the “fourth world”<sup>307</sup>, to borrow an expression invoked by Anthony Hall for the still dependent indigenous peoples of the world. Although the existing corpus of international law concerning indigenous peoples is too vague to conclusively define these terms, the regime of indigenous peoples’ human rights can play an important role in this next phase of decolonization as a political resource, or as a forum for negotiations. So far the regime rather contributes to a more conflictual relationship between indigenous peoples and the state, than to a more harmonious one.

We have also seen that the regime has implications that go far beyond the regional example of Quebec’s First Nations and even beyond the issue of indigenous peoples rights in general. The theoretical implications I have discussed in this paper concern on the one hand institutionalism’s approach to international regimes, and on the other hand the basic assumptions about Human rights. With regards to the conception of human rights, we have seen that law concerning indigenous peoples has the potential to deconstruct some ethnocentric basic notions of international human rights law. This point has been exemplified on the basis of collectives as bearers of rights, of human rights law as a regime of reparations, and of a conception of sovereignty without secession. With regards to the theoretical approach to the study of regimes, it became evident that an approach that is based on an economical rational choice, a narrow conception of relevant actors on the international level, and a positivist approach to the role of law has too many blind spots to conceive what is happening in the field of indigenous peoples’ rights. Without letting go of the concept of regimes entirely, a study of regimes in a globalized world marked by transnational interrelations needs a broader approach that applies a sociological approach to the effects of international law.

Of course this study also has its blind spots. For one, I have discussed the regime by means of the example of the First Nations of Quebec and in so doing I have been drawing conclusions from the particular to the general. Although I consider it plausible that my conclusions can be generalized for other regional contexts,

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<sup>307</sup> cf. Hall 2003

this assumption has to be proved in further evaluations of a similar kind in different regional contexts.

In addition, I have written on the interrelations of the different legal and political levels and how in a globalized world the local can influence the global and vice versa. Although it can be observed that the different levels and fields do influence each other, rather than being in a hierarchical order, the focus of this paper is too broad to understand the interactions and relations of the different levels. Thus it cannot be understood where ideas originate from, at which level they are developed, enforced, nurtured, and at which level they become effective and further influence other discourses. A study applying the method of discourse analysis on the legal and political discourses on indigenous peoples' rights at the national and at the international level thus seems to be a worthwhile endeavour. Finally, we see that there is still a long way to go for the realization of the right to self-determination for indigenous peoples in Quebec. The international regime of indigenous peoples' human rights already plays and certainly will play an important role in the fight of the American Natives. In order not only to gain equal rights, but also justice (to borrow an idea from the Jamaican singer Peter Tosh), this fight has to have a twofold goal, one that is more practical, and one that is more intellectual: First, indigenous peoples' claims must lead to improved socio-economic living conditions since only the freedom from discrimination and marginalization make a real cultural and political self-determination possible. Second, the fight for indigenous peoples' rights must be understood as the completion of the end of the age of colonialism. The underlying motivation of a movement for indigenous peoples' rights can neither be driven exclusively by socio-economic motives, nor can it aim at re-establishing the *status quo ante* of 1492 / 1534. There needs to be a re-negotiation of the relationship between indigenous peoples and the state in Quebec with the colonial history in mind where all nations would meet at a level playing field for the first time in human history. Similar problems exist in many different countries of the world so it is expectable and also desirable that these problems will be treated and hopefully resolved at the international level.

## IX. Appendix

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### International Labour Organization

1957 ILO Convention No. 107 on indigenous and tribal populations. Adopted by the International Labour Conference on June 26 1957

1989 ILO Convention No. 169 on indigenous and tribal peoples. Adopted by the International Labour Conference on June 27 1989

### Quebec

1998 Convention de la Baie-James et du Nord québécois et conventions complémentaires. Sainte-Foy: Les publications du Québec

### United Nations

1945 Charter of the United Nations. Adopted on June 26 1945

1948 Universal Declaration of Human rights. Adopted by the UNO on December 10 1948

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1966b International Covenant on Economic, Social and Cultural Rights. Adopted by the General Assembly of the United Nations on December 16 1966

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### IX.3. Interviews

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Brochard, Claude<sup>308</sup>, Secrétariat aux affaires autochtones du Québec, on March 12 2013 in Québec (QC)

Crowder, Jean, Member of Parliament for the New Democratic Party, on April 15 2013 in Ottawa (ON)

Farget, Doris, McGill University, on March 21 2013 in Montreal (QC)

Gentelet, Karine, Amnesty International, on March 18 2013 in Montreal (QC)

Joffe, Paul, Grand Council of the Crees, on April 24 2013 in Brossard (QC)

Leclair, Jean, Université de Montréal on February 22 2013 in Montreal (QC)

Otis, Ghislain, University of Ottawa, on March 6 2013 in Ottawa (ON)

### IX.4. Court decisions

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2004 Haida Nation v. British Columbia (Minister of Forests). Case Number 29419, [2004] 3 S.C.R. 511

### IX.5. List of Figures

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Figure 2: The First Nations communities in Quebec today; Image source: <http://www.autochtones.gouv.qc.ca/nations/cartes/carte-8x11.pdf>, 9 July 2013

Figure 3: North America after the Royal Proclamation of 1763; Image source: Dupuis 1991: 16

Figure 4: The area affected by the *Plan nord*; Image source: Quebec 2010

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<sup>308</sup> Pseudonym

## IX.6. Declaration of Consent

**Title of research project:** An evaluation of the international human rights regime of indigenous peoples using the example of the First Nations of Quebec

**Researcher:** Alexander Huber, M.A. student in political science, University of Vienna

**Research director:** Marie-Pierre Bousquet, associate professor at the department of anthropology of the University of Montreal

### A) INFORMATION FOR PARTICIPANTS

#### 1. Research Objectives

This research project aims at developing a better understanding of the local impacts of international law on the rights of indigenous people in Quebec. A special focus of the research lies on rights to land and resources.

#### 2. Research participation

Your participation in this project consists of an interview with the researcher, who will ask you questions about your expertise and personal experience in the field of indigenous peoples' human rights and international law. With your permission, this interview will be recorded on audio in order to facilitate later transcription and should take about 75 minutes. The place and time of the interview will be determined with the interviewer, depending on your availability.

#### 3. Confidentiality

The personal information you provide will remain confidential. On your request, the information given by you in this interview will be anonymised and no information that can identify you will be published. The data will be kept in a safe place and the transcripts of the recordings as well as any personal information will be destroyed seven years after completion of the project. Only data that does not allow to identify you will be kept after this time.

#### 4. Advantages and disadvantages

With your participation you can contribute to a better understanding of the impacts of international law on indigenous peoples at the local level. There is no particular risk to participate in this project. It is possible, however, that some questions may bring on



memories of an unpleasant experience. You can at any time refuse to answer a question or even terminate the interview.

## **5. Right of withdrawal**

Your participation in this project is entirely voluntary and you can withdraw at any time by a simple verbal notice and without having to justify your decision. If you decide to withdraw from the research after the interview, you may contact the researcher at the phone number indicated below. At your request, the information that has been collected until your withdrawal will also be destroyed.

## **B) CONSENT**

I have read the above information and I have no further questions about this project and my participation.

I freely consent to participate in this research and I know that I can withdraw at any time without having to justify my decision.

<i>I agree to be mentioned by name in this study</i>	<b>Yes</b>	<b>No</b>
<i>I agree to be recorded on audio during the interview</i>	<b>Yes</b>	<b>No</b>
<i>I agree to be contacted in the future for further questions:</i>	<b>Yes</b>	<b>No</b>

☐☐Tel.: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Surname: \_\_\_\_\_ First Name : \_\_\_\_\_

I declare that I explained the purpose, nature, advantages and disadvantages of the study and answered to the best of my knowledge to the questions asked by the participant.

Researcher: \_\_\_\_\_ Date: \_\_\_\_\_

Surname: \_\_\_\_\_ First Name: \_\_\_\_\_

For any questions about the study or to withdraw from the research, please contact Alexander Huber: 514-449-8007 or via e-mail: alexander.huber@umontreal.ca

Any complaints about your participation in this research may be addressed to the Ombudsman of the University of Montreal: 514-343-2100 or via e-mail: ombudsman@umontreal.ca (this number accepts collect calls)

## IX.7. List of Abbreviations

AFN	Assembly of First Nations
AFNQL	Assembly of First Nations of Quebec and Labrador
CBJNQ	<i>Convention de la Baie-James et du Nord québécois</i> (James Bay and Northern Quebec Agreement)
ECOSOC	United Nations Economic and Social Council
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
FPIC	Free, prior, and informed consent
HRC	Human Rights Council
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
NGO	Non-governmental organization
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
PQ	Parti Québécois
UdeM	Université de Montréal
UN	United Nations
UNDRIPS	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Issues
UNSR	United Nations Special Rapporteur
UNWGIP	United Nations Working Group on Indigenous Peoples

## IX.8. Abstract

Im Laufe der vergangenen 30 Jahre entwickelte sich ein Ensemble von internationalen Organisationen und Völkerrechtsinstrumenten zu den Menschenrechten indigener Völker. Da diese Organisationen und Rechtsinstrumente bei Verstößen gegen ihre Regeln zumeist nicht über Sanktionen verfügen, ist ihre Wirksamkeit umstritten. Diese Arbeit evaluiert die Auswirkungen des Regimes anhand der Ureinwohner Quebecs. Die Studie fußt auf einer kritischen Bestandsaufnahme des Regimes der Rechte indigener Völker auf der internationalen Ebene und der Beziehung zwischen indigenen Völkern und dem Staat in Kanada, sowie auf einer Serie von Interviews mit Experten im Feld der indigenen Rechte im internationalen System. Das Regime (im Sinne des Regimebegriffes des liberalen Institutionalismus) hat tatsächlich einen Einfluss auf der lokalen Ebene, indem es die ideellen Rahmenbedingungen des Diskurses um die Rechte indigener Völker strukturiert. Sein unmittelbarer Einfluss erwies sich jedoch als relativ schwach. Die Studie beinhaltet ferner theoretische Implikationen für das Studium internationaler Regime in einem Kontext des Rechtspluralismus in transnationalen Rechtsprozessen.

Over the course of the past 30 years, a set of laws and organizations about the human rights of indigenous peoples evolved in international politics. Because these laws and organizations often do not dispose of sanctions against violations of its rules, it is being questioned whether they have any impact on the local level. This paper evaluates the effects of the regime of indigenous peoples' human rights with the example of the First Nations of Quebec. The study is based on a critical examination of the regime at the international level and of the history of the relationship between indigenous peoples and the state in Canada, as well as on a series of expert interviews. The regime (in the sense of liberal institutionalism's conception of regimes) does have an impact in its influence on discourses and the ideational structuring of the field on the local level, despite its immediate impact indeed proves to be rather weak. The study also has theoretical implications for the study of regimes in a context of legal pluralism in a transnational legal field.

## IX.9. Curriculum Vitae

### Alexander Huber, BA

11. 7. 1986	Geboren in Saarbrücken (Deutschland)
Juni 2005	Matura am GRG XIX Billrothstraße 26-30, Wien
Oktober 2007 – Februar 2011	<p>Bachelorstudium der Kultur- und Sozialanthropologie an der Universität Wien</p> <ul style="list-style-type: none"><li>• Studienschwerpunkte: Menschenrechte, Organisationsanthropologie</li><li>• Erweiterungscurriculum: eTutorInnen und Knowledge Experts</li><li>• Publikation in Brigitte Kossek / Charlotte Zwiauer: Universität in Zeiten von Bologna. Wien: V&amp;R Unipress</li><li>• Abschluss mit ausgezeichnetem Erfolg</li></ul>
Oktober 2011 – Herbst 2013	<p>Masterstudium der Politikwissenschaft an der Universität Wien</p> <ul style="list-style-type: none"><li>• Studienschwerpunkte: Internationale Politik, Policy- und Governanceanalyse</li><li>• Einjähriger Studienaufenthalt an der Université de Montréal (Kanada) im Rahmen des Joint-Study-Stipendiums</li></ul>