INTRODUCTION[*]

Sákéj Henderson[**]

This documentary history of the Santé Mawiómi complaint to the United Nations Human Rights Committee is dedicated to the memory of Grand Captain (Jigap'ten) Alexander Denny and his vision of justice for the Míkmaw people.

In the mid 1970s, when the Míkmaq elders initially asked me to take their troubled relations with Canada to the United Nations, the idea struck me as absurd. It was not the first time that the assumptions of my educated vision of legal possibilities contradicted the elders' vision and values. Being educated through a different vision of society, the elders of the *Santé Mawiómi wjit Míkmaq* (Grand Council of Míkmaq) had a different vision of law and its possibilities. Instead of an unreflective pursuit of power, they were thinking about respect, integrity, and dignity. As they were working on the translation of the Universal Declaration of Human Rights[1] for the United Nations (UN), the idea of self-determination and human rights impressed them. These human rights covenants appeal to them more than the battles for sovereignty, nationhood, and other Eurocentric power ideas. They admired its inspirational vision of peace and human rights.

The simple request of the Míkmaw for the UN Human Rights Committee to apply the right of self-determination to them forced Canada and the Committee to enter the dark deep structure of Eurocentric colonizing consciousness and challenged us to create postcolonial legal thought. The Míkmaq visions of using the Human Rights *Covenants* would directly challenge the Eurocentric vision of individualism, subjective values, and rule of impartial law in the UN, just as it has in Canadian law. On the other hand, I was concerned with the powerlessness of the Human Rights decisions, and the absence of an enforcement mechanism. Additionally, I was uncomfortable in entering the unfamiliar and unchartered legal regime, where without educational training, I was asked to enter and seek to become competent. Without being aware of it, my legal education and practice had taught me only the diversities within the Eurocentric vision of society. Explicit in that vision was the idea that law is universal and neutral, and without any ideological foundation. Also, it taught me that legal issues focused on comfort and power. Implicit in this view was the need to obtain a fairer share of economic resources.

In 1978, when Canada decided to end their colonial status in the United Kingdom, the *Santé Mawiómi* decided to go to the UN to complain about how the Canadian governments were

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[*] Source: Sákéj Henderson, "The United Nations and Aboriginal Peoples" in Sylvie Léger, ed., *Linguistic Rights in Canada: Collusions or Collisions? Proceedings of the First Conference, University of Ottawa, November 1993.* (Ottawa: Canadian Centre for Linguistic Rights, Faculty of Law, University of Ottawa, December 1995), pp. 616-630.

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[1] *UN GAOR Res. 217 (III) (10 December 1948), reprinted in L. HENKIN* et al., Basic Documents Supplement to International Law Cases and Materials*, 2d ed. (St. Paul, Minn.: West Publishing, 1987) at 381-386 [hereinafter Basic Documents).*

ignoring their unique prerogative law in the constitutional process. Like most Indigenous people, they could not confine their claims to an international or national context. Yet the breakdown of a national mechanism led them back to their original international context. The elders and leaders felt that their people were trapped between customary international law, British colonization, and national law. They feared the Canada was continuing its attempt to terminate their Aboriginal and treaty rights. The elders' strategy was very simple: it was that if you want to herd some moose or deer into a trap, you cannot do it from one side — you have to have two sides. In Canada and the United Kingdom, they determined that the governments were violating and dishonouring their treaties, in fact both were attempting to terminate their legal existence. So they decided to start a two-front dialogue about their self-determination and human rights under their treaties. One dialogue had to be with the international community through the UN Human Rights Committee and the other with the Canadian governments. The international dialogue was important to the *Mawiómi* because they were the grandfathers of the immigrants. They should know what their grandchildren are doing to them just as well as anyone else in the world.

ORIGINAL COMMUNICATION TO THE UN HUMAN RIGHTS COMMITTEE

The International Covenants on Human Rights are legally binding on all countries that have ratified them.[2] Under the federal principle of Canada, this accession is valid only for peoples under federal jurisdiction such as Indians,[3] and Indians, Métis and Inuit in the Northern Territories.[4] Since there is no expressed reservation in Canada's accession to the Covenants excluding Indians, Métis or Inuit, these human rights can apply to Aboriginal peoples if they voluntarily choose to accept them. No valid justification exists for the federal government to refuse to apply the Human Rights Covenants to Aboriginal peoples, especially those living on lands reserved for Indians and federal territories. They are the only peoples that the federal government has an exclusive and continuing constitutional obligation to serve. This is consistent with the purposes of the Covenants and the court's interpretation of the implementation of the *Migratory Birds Convention* on existing Aboriginal treaties[5] and on the treaty of Marine pollution.[6]

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[2] *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200 (XI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A6316 at 490,993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (entered into international force on 3 January 1976), and *International Covenant on Civil and Political Rights*, GA Res. 2200 (XI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 at 52,999 U.N.T.S. 171, 6 1L.M. 368 (1967) (entered into international force on 23 March 1976) [hereinafter *Covenant*, and *Covenants* when referring to both instruments]. Canada acceded to these covenants on 19 May 1976. *The Optional Protocol to the Covenant on Civil and Political* Rights, GA Res. 2200, UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 at 59, 999 U.N.T.S. 171, 6 I.L.M. 383 (1967) (entered into international force on 23 March 1976) [hereinafter *Optional Protocol*], and was acceded to by Canada. See H. KINDRED et al., *International Law Chiefly as Interpreted and Applied in Canada*, 4th ed. (Toronto: Emond Montgomery, 1987) at 635-682.

[3] *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c.3 (formerly the *British North America Act, 1867*), s.91(24).

[4] *Reference as to Whether "Indians" in s. 91(24) of the B.N.A. Act Includes Eskimo Inhabitants of the Province of Quebec*, [1939] S.C.R. 104.

[5] See *R. v. George,* [1966] S.C.R. 267 (regarding *Migratory Birds Convention Act*, R.S.C. 1952, c.179); *Daniels v. The Queen,* [1968] S.C.R. 517 at 521, Cartwright C.J.; and *R. v. Eninew* (1984), 10 D.L.R. (4th) 137 at 139 (Sask. C.A.). But see *R. v. Arcand*, [1989] 3 W.W.R. 635 (Alta. Q.B.) and *R. v. Flett,* [1989] 6 W.W.R. 166 (Man. Q.B.).

[6] See *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 where federal legislation implementing an international treaty under the peace, order and good government power was examined.

The UN Human Rights Committee consists of eighteen legal experts elected by the countries, which have ratified the covenants and optional protocols.[7] It meets several times yearly in Geneva and New York to review complaints made by victims of human rights abuses and communications submitted by the governments. Under Canada's full and informed consent, the *Mawiómi* asked that the Committee translate the international preemptive norms of human rights and principles in the Míkmaq situation.

In the fall of 1980, Grand Captain Denny initiated the *Mawiómi*'s original communication to the Human Rights Committee of the United Nations. Their communication under the *Optional Protocol to the Covenant on Civil and Political Rights* addressed Canada's denial of self-determination in Canada, which included its rejection of their land claims. They stated the purposes in their cover letter to the Human Rights Committee:

> The *Jigap'ten* of *Santeoi Mawaio'mi* of the *Mi'kmaq Nationimuow* has the honour to address you as well as the sadness to communicate the substance of our grievances against the Dominion of Canada. The people of our tribal society are victims of violations of fundamental freedoms and human rights by the government of Canada: Canada has and continues to deny our right to self-determination; Canada has and continues to involuntary confiscate our territory despite the terms of our treaties; Canada has and continues to deprive our people of its own means of subsistence; and Canada has and continues to enact and enforce laws and policies destructive of our family life and inimical to the proper education of our children.
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> We speak plainly, so that there is no misunderstanding. For three centuries, we have honoured and lived by our Treaty of protection and free association with the British Crown. We have remained at peace with British subjects everywhere, and our young men have given their lives, as we had promised, in defense of British lives in foreign wars. As the original government of the *Mi'kmaq Nationimuow* from time out of mind, and as signatories and keepers of the great chain of union and association with Great Britain, we, the *Mawai'omi,* have guided our people in spiritual and secular affairs in freedom and dignity, in our own way, without compulsion or injustice.
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> Now, there is a great and terrible idea in this land. The government of Canada claims that, by virtue of its charter of self-government from Great Britain, the British North America Act, it has succeeded to the Crown in our Treaty. Furthermore, and in frank violation of the law of nations, the government of Canada claims power and right to ignore our Treaty at pleasure, and to seize our ancient lands, substitute, supervise, or abolish our government, remove our children to schools of its choosing, rather than ours, prevent us from farming and fishing for our subsistence, and scatter our homes and families. They tell us we no longer are a protected State, but a minority group of "Indians", subject absolutely to their discretion and control, exercising the rights of property, self-determination, and family life only at their will. They offer our people political peonage and the destiny of dependence upon financial relief.
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> This we cannot accept. Under the *Optional Protocol to the International Covenant on Civil and Political Rights*, acceded to by Canada on 19 May 1976, we submit this to the Committee on Human Rights.[8]

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7 *Supra* note 2.

8 Communication of 30 September 1980. UN G/SO 215/51 CANA (18) Reference R. 19/78 (Human Rights Centre, Geneva).

The *Santé Mawiómi* asked the Human Rights Committee to declare its right of self-determination under their prerogative treaties and the *Royal Proclamation of 1763*[9] to the possession of all the territory reserved as our "Hunting Grounds".

UN HUMAN RIGHTS COMMITTEE'S RESPONSE

The Human Rights Committee has been very uncomfortable in addressing these claims. On 29 October 1980, in its interim decision on standing of the communication, the Committee requested clarification of the Grand Captain's standing under articles 1 and 2 of the *Optional Protocol*. These articles provided that communications submitted to and received by the Committee should emanate from individuals claiming to be victims of violations of the *Covenants*. They also asked the Grand Captain to clarify whether in his view "in addition to article 1 of the *Covenant*, articles 23 and 27 or any other articles of the *Covenant* have allegedly been violated."[10] In his response Grand Captain Denny explained that his position was that almost all of the provisions of the Covenants had been violated, but the most important was their right of self-determination under Article 1; he also rejected being characterized as a minority under Articles 23 and 27. Article I of the *Covenants* declare that" all peoples have the right of self-determination [and the right to] freely determine their political status".

The Human Rights Committee accepted jurisdiction over the communication, and the Secretary-General of the UN requested from the Canadian Government, information and observations concerning a communication about the question of admissibility of the communication, particularly in so far as it may raise issues under Article 1 of the Covenant.[11] In particular the Secretary-General requested Canada to respond to the allegation that

> Canada has violated our rights as a State, as a people, and as individuals by depriving us of our territory, our destiny, and our families under colour of colonial laws (prior to 1867), Provincial legislation, and federal legislation such as the '*Indian Act*'. Great Britain has violated our rights by failing to defend us from the unlawful actions of Canada, as provided by our Treaty of 1752.[12]

Moreover, the Secretary-General asked Canada to respond to the requested remedies:

> a) obtaining answers to questions supposedly not answered by Canada regarding their existence as a separate government, the possession by Canadian citizens of unceded territory, their deprivation of subsistence, educational opportunity, security of their children in a Canadian way without their consent;
> b) a declaration to the effect that their tribal society is a parallel State to Canada, because the two States have their own distinct treaty of protection with Great Britain. Nevertheless, Canada could represent them in the arena of foreign affairs;
> c) a declaration to the effect that they are sole possessors of the lands not settled by British subjects prior to 1752 in conformity to a treaty passed with Great Britain in 1752;
> d) an order to be given to Canada for executing fully its responsibilities of protection and defense in respect of the treaty of 1752 as well as for assisting the tribal society to restore its self sufficiency and enjoy a reasonable standard of health and education, and/or

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9 Reprinted in R.S.C. 1985, App. II, No. 1.

10 Interim Decision of Human Rights Committee, 29 October 1980, *supra* note 8.

11 Secretary-General of the United Nations note, UN G/SO 215/51 CANA (18) Reference R. 19/78, 22 May 1981.

12 *Ibid.,* citing page 21 of Mr. Denny's communication of 30 September 1980.

> that responsibilities for their tribal society be transferred to the United Nations Trusteeship Council.

Thus, began the longest running battle on the meaning of self-determination in the history of the Human Rights Committee.

RESPECTIVE POSITION OF THE PARTIES AND THE CASE LAW

On 21 July 1981, the Government of Canada challenged the jurisdiction of the Human Rights Committee to hear the *Mawiómi*'s communication under the *Optional Protocol*. Canada argued that the communication was inadmissible on three grounds. First, the communication was inadmissible because the communication affects the national unity and territorial integrity of Canada.[13] In effect, the recognition of the self-determination of Aboriginal peoples under the British treaties would destroy the national unity and territorial integrity of Canada. This came as a surprise to the *Mawiómi* and myself. The Míkmaq were so powerless within Canada, this conclusion appeared ridiculous. Nonetheless, we attempted to answer Canada's concern. We answered that Canada's response was inappropriate because it assumes a disputed fact, *namely* whether the reserved territory of the Treaties between 1726-1773 and recognized as reserved Hunting Land by the *Proclamation of 1763* ever lawfully became part of the territory of Canada or whether the imperial Crown held it for us. We also noted that if Canada was the holder of any territorial integrity, it was through our treaties and other treaties with Aboriginal peoples. Canada's territorial integrity was derivative of our Aboriginal tenure. In all its supplemental communications, Canada reaffirmed its position that recognition of our self-determination and human rights was destructive to its national unity and territorial integrity, thus inadmissible.

Second, Canada argued that treaties with North American Native peoples are not valid international or national documents. In other words, they were blank paper. At this time, Canadian judicial decisions did not admit that there were any treaties with the Míkmaq because we were savages.[14] Four years later, the Supreme Court of Canada in *Simon v. The Queen* overruled this position[15] and asserted the treaties had continuing authority.

Ironically, Canada's position on treaties attempted to contaminate human rights law with colonial law, but Human Rights Covenants were the cures to colonial laws. In *Right of Passage over Indian Territory*, the International Court of Justice held that Indigenous treaties are part of the law of nations and established the rule of construction for these treaties.[16] This case involved India's efforts to isolate three landlocked Portuguese colonial enclaves established by the *Treaty of Poona* (1779) with the Aboriginal Maratha Confederacy. Portugal challenged India's blockade under general principles of international customary law and under the terms of the treaty itself. A

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13 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXXV) (24 October 1970), reprinted in HENKIN et al., *Basic Documents, supra* note 1 at 77-83.

14 *R. v. Syliboy* (1929), 1 D.L.R. 307 at 313, 65 C.C.C. (2d) 233 (N.S. Co. Ct.).

15 *Simon v. R.,* [1985] 2 S.C.R. 387. Chief Justice Dickson, speaking for an unanimous Court, overruled a colonial precedent that held "[t]he savages' right of sovereignty even of ownership were never recognized" by the Crown or international law, *R. v. Syliboy, ibid.* at 313, as biases and prejudices of another era in Canadian law inconsistent with a growing sensitivity to native rights in Canada and substantively unconvincing at 399.

16 [1960] I.C.J. Rep. 6. See generally C.H. ALEXANDROWICZ, *An Introduction to the History of the law of Nation in the East Indies* (l6th. 17th and 18th Centuries) (Oxford: Clarendon Press, 1967) at 4-13.

threshold question was the validity of the treaty, which India argued was either invalid under Maratha law or not a treaty at all. India also argued unsuccessfully that the Marathas lacked power to engage in treaties without the consent of the Moghul Emperor. The court ruled:

> that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing on the Indian Peninsula, should not be judged on the basis of practices and procedures which have since developed only gradually.[17]

In a separate opinion, Judge Moreno Quintana defined a treaty as "the expression of a common agreement creating mutual rights and obligations between two legal persons recognized as such in their international relationships", and agreed that the determinative fact was the parties' intention to be bound at the time of the treaty.[18]

The Court had also explained the right of self-determination in relation to colonized Aboriginal peoples in advisory opinions for the UN General Assembly in the *Namibia*[19] and *Western Sahara*[20] cases. In the *Namibia* case, the Court held that the principle of self-determination in the *United Nations Charter*[21] is applicable to non-self-governing territories.[22] In the *Western Sahara* case, the Court stated that the rights of self-determination is recognized as a legal right under the *Charter*, *Colonial Declaration to Resolution 541 (XV) and the 1970 Declaration on Principles of International Law*,[23] and is the basis for the process of decolonization.

Thirdly, Canada argued that asserting Aboriginal and treaty rights protected in sections 24, 34, 36 and 55(c) of the Constitutional Resolution tabled in the House of Common of 24 April 1981 resolved the issue of Aboriginal and treaty rights with Canadian law. On 11 November, the *Mawiómi* informed the Human Rights Committee that Canada's Prime Minister and seven of Canada's ten provincial Premiers agreed to delete provisions for "aboriginal and treaty rights" from the draft Constitution before placing the draft before Parliament. Accordingly, the *Mawiómi* respectfully suggested that the Committee strike and disregard the third part of Canada's 21 July response, since it was based on proposals that Canada has since withdrawn.

In response to the *Mawiómi*, on 17 May 1982, the Government of Canada attempted to prevent the application of Human Rights to the Míkmaq on three new grounds. First, the right of self-determination, as recognized by Article 1 of the *Covenant*, is not applicable in the present case since it is incompatible with the provisions of the *Covenant* because Canada is not a colonial state. It stated that in its view the principle of self-determination is not applicable to the case of ethnic, religious or linguistic minorities in non-colonial states. It is only applicable in a colonial situation. The protection of the rights of minorities in non-colonial states, such as Canada, rests on other provisions of treaties or customary international law, such as article 27 of the *Covenant*. Secondly, individuals can only make communications under the *Optional Protocol* and must

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17 *Ibid.* at 37. These rules of construction are consistent with the Supreme Court of Canada decisions in *Simon v. R.*, *supra* note 15 and *Quebec (A. G.) v. Sioui*, [1990] 1 S.C.R. 1025. The context and terms of a treaty cannot be interpreted from modem treaty law. They must be understood from their specific historical context without colonial nostalgia.

18 *Ibid.* at 91.

19 [1971] I.CJ. Rep.

20 [1975] I.CJ. Rep.

21 *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7, 59 Stat. 1031, U.K.F.S. 805 (entered into force 24 October 1945).

22 *Supra* note 19 at 16 and 31.

23 *Supra* note 20 at 12, 32-34 and 121-122.

relate to the breach of a right conferred on individuals. The present communication relates to a collective right and should, therefore, be found inadmissible because it is contrary to Articles 1 and 2 of the *Protocol*. Finally, the Committee, under the *Protocol*, can only give its "views as to breaches of the rights protected by the Covenant". By asking it to pronounce itself on the statehood of the Míkmaq tribe, the communicant is asking the Committee to exceed its jurisdiction, something that it has no authority to do. For the communicant to make such a request constitutes an abuse of process that should result in his communication being found inadmissible, as regards allegations pertaining to a breach of the right to self-determination, under article 3 of the *Optional Protocol*.[24]

The *Mawiómi* responded to the powerful irony of Canada's argument that self-determination of the Míkmaq would threaten Canadian unity and integrity as a state. This question depends on whether the Míkmaq Nationimouw is proposing to "separate" from Canada that depends upon whether it was ever lawfully "part" of Canada in the colonial law of Great Britain. The Míkmaq has never ceded its territory or agreed to become incorporated in Canada, or in its predecessor the United Kingdom. Canada's governmental presence in our territory is the result of aggression and lawless annexation directed against a neighbouring people, and it was a violation of our territorial integrity as the original inhabitants and recognized government of the place by the imperial Crown. We thought the burden of proof should rest on Canada to show how it (or the United Kingdom) acquired half of North America from the original inhabitants, rather than have Canada's unsupported articulation of its presumption that the continent is theirs. Indeed, all that is now Canada was until recently a colony or dominion of the United Kingdom, and this no one will deny. Did the United Kingdom in granting self-rule to its immigrant colonists in North America award them permission to deprive the Aboriginals of their right to self-determination?

Canada's description of itself as a "non-colonial state" was an intriguing fiction. Where do Canadians come from? Are they of North American origin? Are they not predominantly peoples of Europe, and do they not speak predominantly two European languages? Were they not, until the *Constitution Act, 1982*,[25] governing themselves under the legislation of the United Kingdom, which is a European state? When peoples of one continent are found in control of lands and peoples on another continent, is it not to be suspected that a colonial situation exists until they produce specific evidence to the contrary?

The *Mawiómi* rejected Canada's self-assumed status as a non-colonial nation. We pointed out that Canada had not responded to a single historical fact we have advanced to show that Canada is colonizing our territory and that the *Mawiómi* have not chosen to become Canadians by any means accepted by United Nations law. Instead, Canada asked the Committee to accept its characterization of itself as a non-colonial state on mere assertion. This process is a simple way for states to perpetuate colonial situations: deny that they exist, and thereby render Protocol communications inadmissible. Canada routinely calls us a "national minority". We object to this as a legal conclusion unsupported by historical evidence of Canada's acquisition of our territory or allegiance. Whether we are a people entitled to self-determination, or a minority, was the question before the Committee.

Moreover, Canada's argument that the principle of self-determination is not applicable to the case of ethnic, religious or linguistic minorities in non-colonial states was also assumptive. *If* a state has acquired no territory by unilateral annexation, aggression of colonization, and if it is

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[24] 17 May 1982 response of the Government of Canada respecting two further communications dated 3 October 1981 and 11 November 1981 from Mr. Alexander Denny to the Human Rights Committee.

[25] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982. c.11.

composed entirely of peoples who have chosen freely to incorporate themselves as one multiethnic state, then in the current view of international law secession is unacceptable. However, this is not an accurate description of Canada. We suggested to the Human Rights Committee that Canada's assertion of territorial integrity is a legal fiction invoked to deflect a substantive examination of the historical basis for Canadian claims to our territory.

In response to the vexing problem that the *Covenant* and *Protocol* do not distinguish between individual and collective rights, we pointed out that the controlling terms of the *Covenant* and *Protocol* is between individual and State party communications. The classification goes to the identity of the communicant, not to the scope or nature of the rights that may be included in the communication. Article 1 of the *Protocol* is very explicit when it refers to "communications from individuals … who claim to be victims of a violation … *of any of the rights* set forth in the Covenant".[26] It cannot be an "abuse of the right of submission" (as Canada contended) for an individual to base his communication on any of the rights enumerated in the *Covenant*, including the right enumerated in Article 1. Even if there were a distinction, as Canada proposes, requiring individuals to limit their communications to "individual" rights, we could not find any authority that in the human rights context that self-determination is not an "individual" right.

These communications unraveled an unsettling discourse. It witnessed a huge difference between the black letter law of the Covenants and the Canadian interpretation of whom these applied to and how one gets the rule-appliers to implement them. Should not the term "peoples" in the *Universal Declaration of Human Rights* and *Covenants* also cover "Indigenous people"? Are these not really peoples who have the right of self-determination? Why cannot self-determination be both collective and individual?

Despite the purpose and wording of the Human Rights *Covenants*, Canada was relying on colonial theory and racism. We had an implicit burden to prove that we were human, had a personhood, and were entitled to all the rights, including the right to self-determination. These issues emerged us into a humiliating dialogue with Eurocentric diffusionism. Although surrounded by a new context, the Canadian approach to human rights returned us to the fifteenth century. We were forced to reconstruct the arguments of Las Casas and Victoria in Spain under the international Holy Roman Empire and the birth of human rights movements.[27] While the context had changed from Catholic norms to Human Rights, we were being forced into proving our humanity and personhood[28] because we wanted to assert a right to self-determination.

With the repatriation of Aboriginal and treaty rights in section 35 of *Constitution Act, 1982*, the issue of self-determination was rendered moot. Sections 35 and 52 provided:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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26 Emphasis added.

27 See generally ALEXANDROWICZ, *An Introduction to the History of the Law of Nation in the East Indies*, *supra* note 16.

28 The definition of a "people" has never been settled in UN law. The International Court of Justice has defined it as "A group of persons living in a given country or locality, having a race, religion, language, and traditions of their own and united by the identity of race, religion, language and traditions in a sentiment of solidarity, with a view of preserving their traditions, maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other." *Indian Rights Human Rights. A Handbook for Indians on International Human Rights Complaint Procedures (*Washington, D.C.: Indian Law Resource Centre, 1984) at 14.

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.[29]

Section 37.1 provided for at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces to be convened by the Prime Minister of Canada, with each conference having on its agenda "constitutional matters that directly affect the aboriginal peoples of Canada". The section required that the "Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item."[30] Also, it stated: "Nothing in [section 37.1] shall be construed so as to derogate from subsection 35(1)."[31]

SUPPLEMENTAL *MAWIÓMI* COMMUNICATION TO THE HUMAN RIGHTS COMMITTEE (*MÍKMAQ V. CANADA*, 1986)

When the Prime Minister rejected giving the Míkmaq a seat at these constitutional conferences, the *Mawiómi* took this new issue back to the Human Rights Committee along with the older issues. All the executive members of the *Mawiómi* — Grand Chief Donald Marshall, Grand Captain Denny, and Putus Simon Marshall — alleged that this refusal was not only inconsistent with their renewed constitutional rights but also with their fundamental human right to self-determination. This also resolved the issue of collective and individual rights in the Human Rights Committee. The *Mawiómi* argued that the First Minister's Constitutional Conferences on Aboriginal Peoples' Rights had refused to conform to either existing Aboriginal and treaty rights or the Míkmaq right of self-determination under the federally-ratified *International Covenant on Civil and Political Rights*. They argued that the Prime Minister's refusal to seat representatives to the constitutional conferences on the basis of their stand on Aboriginal and treaty rights had violated their right of self-determination. Canada's choice of representatives had affirmatively prevented the Míkmaq from choosing their own representatives and determining their political relationship and destiny in Canada. They had been prevented from articulating their distinct cultural vision of treaty federalism in a multicultural Canada, prevented from planning their own affairs to the fullest practicable extent. They felt they were denied their constitutional right to express freely their own consciousness and aspirations.

The *Mawiómi* argued that any change in the Míkmaq's legal status within the Imperial Crown requires the consent of the *Mawiómi* and the Míkmaq people; any other external change would be a violation of their Aboriginal rights, treaty rights and human rights. The *Mawiómi* requested that the United Nations Human Rights Committee force Canada to recognize and implement their fundamental human rights, and the right to have their relations with Canada based on their free and informed consent and cooperation. The *Mawiómi* refused to tolerate any more colonial or racist standards or acts by the Canadian government or the immigrants; they rejected the notion that mere consultation and participation by a few unorganized Aboriginal people is consistent with their right of self-determination, their treaty rights or their human right to take part in the conduct of public affairs.

On 25 July 1990, after the end of the constitutional conferences in 1987, the United Nations Human Rights Committee accepted in principle the *Mawiómi* complaint. After reviewing the

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[29] Sections 35(1) and 52(1), *Constitution Act, 1982*, *supra* note 25. Section 35 is contained in Part II, entitled "Rights of the Aboriginal Peoples of Canada."

[30] Section 37.1(1) and (2), *ibid*. Section 37.1 was contained in Part IV.1 "Constitutional Conferences." Part IV.1 was repealed on April 18, 1987.

[31] *Ibid*., at 37.1(4)

legal arguments, it held that the supplemental *Mawiómi* communication was admissible. They determined that the issue of self-determination, a collective right, was not permitted by the *Optional Protocol*, thus beyond its jurisdiction. However, its decision, affirmed that article 25 of the *International Covenant on Civil and Political Rights* guaranteed the Míkmaq society the right to "take part in the conduct of public affairs" in Canada. The Committee explained that, in light of Míkmaq legal history, this could mean the right as a distinct society to have a direct voice in any constitutional decisions affecting their rights.

Having accepted the legal principle as applied to the Míkmaq context and hearing the response of Canada, the Committee decided that Canada's action did not violate our rights to take part in the conduct of public affairs. They determined that the Prime Ministers could invite a federally funded organization, which has no aboriginal or treaty rights, to represent the people who held aboriginal land treaty rights. In reality, the constitutional conferences were over and the issue was moot. The *Mawiómi* appealed this decision, and await decision on their rights of self-determination in their communication.

The human right issues of self-determination and the right to participate in constitutional conventions after their aboriginal or treaty rights raised by the *Mawiómi* still wait resolution. Section 35.1 of the *Constitution Act, 1982*, states hat the government of Canada and the provincial governments are "committed to the principle that, before any amendment" is made to section 91(24) of the *Constitution Act, 1867*, to section 25 of the *Canadian Charter of Rights and Freedoms* or to section 35,

> (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
>
> (*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

The *Mawiómi* communications confront the Human Rights Committee's outward fidelity to the *Covenants* and the continuing inward estrangement the Committee exhibits in applying them. The right of self-determination is as important to the colonized Treaty First Nations as they are to the colonizers. While Canada's ratification of the Covenants generated an obligation to promote the realization of the right of self-determination to people within its jurisdiction, and to respect these human rights in conformity with the *Charter*,[32] yet Canada was doing everything to prevent the realization of the right of self-determination for Treaty First Nations in Canada. Even in national litigation, the denial of treaty rights and self-determination of the Míkmaw would be a difficult position for Canada to maintain.[33] The Human Rights Committee continues to have conceptual difficulties under the Optional Protocol with the several First Nation cases that relied on the right of self determination to protect its cultural or its natural resources.[34]

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32 Article 1, section 3, *supra* note 1.

33 See, *Simon*, *supra* note 15 (Treaty hunting); *R. v. Denny* (1990), 55 C.C.C. (3d) 322 (Aboriginal right to fish); and *R. v. Marshall*, [1999] 3 S.C.R. 456 (treaty right to commercial fishery).

34 *Lovelace v. Canada* 1 UN Human Rights Committee - Selected Decisions under the Optional Protocol (1985) at 83; *Lubicon Lake Band (Ominiyak) v. Canada* (1990) Report of the Human Rights Committee, UN Doc. A/45/4O, vol. II, para. 32.1 at 27; UN GAOR, 45th Sess., Supp. No. 40; *R.L. et al. v. Canada* (1992) Report of the Human Rights Committee, UN Doc. A/47/4O, UN GAOR, 47th Sess., Supp. No. 40 at 366374. See M.E. Turpel, "Indigenous Peoples' Right of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l L.J. 579.

Meanwhile the Canadian courts have affirmed the multilateral treaties of the UN that Canada has ratified are part of the constitutional principles of Canada. In the *Quebec Secession Case*, the Court stated: "the Constitution of Canada includes the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state."[35] These global rules and principles qualify and provide guidance in filling the gaps of the treaties.[36] In particular, the principles of self-determination and human rights have been ratified by Canada and are consistent with the unfinished constitutional amendment process in Canada.[37] They are part of the pluralistic legal structure of Canada. As such, the reviewing courts must favor a treaty interpretation that conforms to other multilateral treaties,[38] especially the human rights covenants.

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[35] *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec,* [1998] 2 S.C.R. 217 at para. 32.

[36] *Ibid*.

[37] See *supra* note 2.

[38] *Daniels v. The Queen, supra* note 5 at 541 ('this is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law").