Before the leaves fall:
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United Nations Human Rights Committee
Palais des Nations (Room 231)
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Me taleyn.

I have the honour to comment on Canada's 21 July response to our communication under the Optional Protocol to the International Covenants on Human Rights, which you transmitted to us by your 8 September letter.

Since the government of Canada has chosen to be brief with us, we will be brief in reply. Canada contends that the violations we allege are inadmissible. Canada's arguments are three:

> (1) "Article I of the International Covenant on Civil and Political Rights cannot affect the national unity and territorial integrity of Canada. . . . (The) right of self-determination was . . . not intended to support secessionist movements within sovereign states."
>
> (2) "International, American and Canadian law do not recognize treaties with North American Native People as international documents confirming the existence of these tribal societies as independent and sovereign states."
>
> (3) "Representatives of the Indians, Inuit and Metis people are assured to be involved in the present constitutional review process."

We will comment on each of these arguments in turn. It is our belief that Canada's first argument begs the question of whether the Mikmaq people are or ever have been "within" Canada; that the second argument asserts a racist doctrine to bar human rights inquiry into the condition of "In-de-ans"; and that the third argument is premature and misleading, since as yet the Mikmaq people have been accorded no recognition in Canada's draft constitution.

newt: on territorial integrity

Canada's first objection is inappropriate because it assumes a disputed fact, viz. whether the territory of the Mikmaq Nationimouw ever lawfully became part of the territory of Canada. We have shown that no part of the Mikmaq people's territory ever was ceded to Canada or to its parent state, Great Britain. We have shown that no part of the Mikmaq territory ever was surrendered to Canada or to Great Britain as the consequence of a just war. How, then, did we become part of Canada, in accordance with international law? Unless Canada can show affirmatively when and how it lawfully acquired sovereignty over us, we are not part of Canada, nor can we be proposing to secede from a state from which we always have been separate. Treaties and surrenders are the things that unite states in law, not the lines drawn by mapmakers.

If the Human Rights Committee accepts Canada's objection, no unlawful annexation, colonization, or extermination of one people by another will be subject to human rights discipline. The aggressor need only argue that the annexed or colonized people have become domestic concerns beyond this Committee's mandate. The very act of violating a people's human rights will be used to defeat international intervention on the side of the victims. This would be an absurdity.

Canada answers its own argument by quoting at length from the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Resolution 2625(XXV), 24 October 1970, where it provides expressly that the defense of territorial integrity can be claimed only by states "conducting themselves in compliance with the principles of equal rights and self-determination of peoples." Hence a finding of respect for self-determination is a condition precedent for the cloak of national unity to apply to individual human rights complaints. Why, indeed, was the right of self-determination included in the very first Article of the Covenants, if it was not intended to be included in the enforcement mechanism provided for all other rights? Why was it not set apart explicitly?

It is our belief that the right of peoples to self-determination is the most fundamental of all human rights and merits the most vigorous protection, because it confers on peoples of one heart and spirit the freedom to preserve all of the other rights of individuals and families, through institutions of their own choosing.

We find great meaning in Canada's intimation that its representatives did not contemplate a complaint such as ours when they acceded to the Covenants and the Optional Protocol. The Covenants are a treaty among states for the protection of the rights of all peoples. Our 1752 Treaty of Halifax was a treaty with Great Britain for the protection of our own separate territorial and political rights. In our communication we indicated that Canada interprets our treaty according to expedience rather than expressed intent or law, hiding behind the fiction of what was not written but supposedly intended by Great Britain. Canada now tells the community of nations that it did not intend to respect the

right of self-determination when it acceded to the Covenants, for while the right is expressed plainly in that instrument, Canada now finds it inexpedient to comply. As they did to us, so now they do to the world.

Finally we say, by what right does Canada allege to be an "independent sovereign state"? Canada is not independent. It is a creature of Great Britain, a colony still in the process of emancipation from its parent state. Its "constitution" is a British statute that cannot, by its own express terms, be amended except by the consent of Great Britain. If Canada is an independent sovereign state, then surely so are we. Our constitution is older than that of Canada or of Great Britain, and it comes from God and our own free will, not from any foreign potentate. We are not a colony but an original people in their own land. We regard Her Majesty the Queen as our protector and ally under treaty, but so is she also Queen of Canada, Australia, and other states. If Canada may sit in the assembly of nations notwithstanding it is only a small fragment of an empire, so may we; and if Canada may assert a "sovereign" right to territory and unity, we too may claim such a right, but with greater justice.

tapu: on treaties and lies

Canada contends that agreements negotiated in the manner of treaties and styled "treaties" on their face, nevertheless are not treaties at law and have no obligatory force because they were made with "In-de-ans." This racist argument should not be admitted to bar a communication that alleges racism; it does not dispute, but rather proves what we have alleged. No matter how many times the courts of the United States or of Canada declare that treaties made with "In-de-ans" are not treaties, this remains at odds with jus cogens and the instruments of international law to which Canada has so recently acceded. Why did Canada accede to the International Convention on the Elimination of All Forms of Racial Discrimination, if it still refuses to acknowledge that states of one race are capable of entering into binding treaties? Why did Canada accede to the Vienna Convention on the Law of Treaties, if it still maintains that the competency of a state to make treaties can be questioned after treaties have been made and relied upon?

If our Treaty of Halifax is not a treaty, why is it called a treaty in its caption? Why was it made in the form of a treaty? Why did Great Britain's representatives call it a treaty when they renewed it with our several districts? If a state can ratify a "treaty" and subsequently escape its obligatory force merely by calling it not a treaty, no treaty ever made is secure.

But Canada points to "law" in support of its racist position. None of the decisions cited properly can be used to construe subsequent instruments of peremptory international law to which Canada since has acceded, i.e. the Covenants. An earlier ruling cannot interpret later legislation. Nor are Canada's citations authoritative.

The American decision, Cherokee Nation v. Georgia, 30 U.S. 1 (1831), upon which Canada so heavily relies, was overruled one year later by Worcester v. Georgia, 31 U.S. 515 (1831). In particular, Worcester

rejected the notion that "In-de-an tribes" lack sovereign character, observing of their treaties with Great Britain that "a weak power does not surrender its independence--its right to self-government, by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government and ceasing to be a state." 31 U.S. at 542-46, 559, 561; R. Barsh and J. Henderson, The Road: Indian Tribes and Political Liberty (1980), c. 5. Canada's reliance on Cherokee Nation therefore is misplaced, for even in the United States its major principle was respected for only a year.

Canada also relies on Rex v. Sylliboy (1929), 1 D.L.R. 307, a candidly racist decision that refers expressly to "In-de-ans" as "savages." It was only the opinion of a temporary local judge, but even if it had come from the highest court of Canada is it proper for a state's own laws to be dispositive of whether it has violated human rights? If it were so, a repressive nation need only declare through its administrators and courts that its treatment of persons is indeed just, and they will be just for the world. The international human rights process would be wholly superfluous.

Indeed, we cannot think it proper to admit the laws of either the United States or of Canada to measure the human rights of "In-de-ans," since both states are the subject of human rights complaints alleging that their laws discriminate against "In-de-ans" systematically.

Canada also identifies international decisions in support of its position that treaties with "In-de-ans" lack obligatory force. The 1926 Cayuga arbitration is of limited precedental value. Self-determination of the Cayuga Nation was not at issue, but only whether Great Britain remained responsible for land purchase payments to the Cayugas after the territory they had ceded to Britain was ceded in turn to the United States. The remarks quoted by Canada are obiter dictum. The arbitration merely decided that the United States, as successor to the land, was successor also to the obligation to pay the purchase price. In any case, the arbitrator was speaking only of the particular Cayuga treaty at issue there, not of all treaties with indigenous nations of North America. Our Treaty of Halifax was of an explicitly different character--neither a contract of sale nor a cession of land, but a compact of alliance and protection.

Lastly Canada refers to the decision of the Permanent Court of International Justice in Legal Status of Eastern Greenland, (1933) PCIJ ser. A/B No. 53, alleging that it "demonstrates clearly that these Native Peoples are not recognized as a sovereign State in the community of Nations." Where, we ask, does this notion appear in the opinion of that learned court? It does not. Greenland was a contest between two European states, not between a European state and an indigenous state. Greenland held nothing more than that settlement--even if interrupted by war--confers a stronger claim to putatively uninhabited or unclaimed territory than does mere discovery.

The International Court of Justice's subsequent decision in Western Sahara (Advisory Opinion), ICJ Reports 1975, holds clearly that neither discovery nor settlement establishes a claim to inhabited territory as against the original, indigenous proprietors. We have cited Sahara in

our communication and Canada does not distinguish it. By what reasoning does an earlier decision overrule a subsequent one? Canada's reliance on the discredited theory of terra nullius not only misconstrues Greenland but contravenes the more recent Convention on the Elimination of all Forms of Racial Discrimination and the ruling in Sahara.

Canada makes one more argument on treaties, and it is this argument that troubles us most. Canada says that our treaty of 1752 was a "contract between a sovereign and a group of its subjects." We ask, by what means did we become subjects of Canada (not yet even a dream) or of Great Britain prior to 1752? We had not yet even seen their faces, except in war. We had made no agreement with them, nor had we surrendered to them in the wake of conflict. If we were subjects already in 1752, moreover, for what reason did the British king sue for peace, and offer us peace and protection in the form and style of a treaty, if we should become his allies and not disturb his possessions? If we were subjects already in 1752 why was this instrument styled a "treaty" signed in the names of our own governors, the officers of our Grand Council? Canada's argument is neither history nor law, but it is very imaginative.

sist: on false hopes

Canada suggests that our complaint should be disregarded because we "are assured to be involved" in Canada's current efforts to revise and amend its "constitution," the British North America Act. Since this revised constitution has not yet been adopted and is not yet in force, what it contains can be of no legal significance here. We have alleged past and continuing violations of our rights. Canada's assertion that it may make some provision for our remaining rights, if any, in the future is poor cause for this Committee to give Canada free hand with us until that day, if ever, comes. Assuming that Canada is sincere in its interest to accomodate us in its destiny, it is more appropriate that this Committee recommend continuing review and supervision of Canada's constitutional amendment process than simply disregard our grievances. Should a state ever be permitted to divert a human rights inquiry merely by alleging that it will do something about the problem in the unspecified future?

Our "involvement" in Canada's constitutional revision process has been far from meaningful. We have had nothing more than an opportunity to make suggestions directly to officials of that government. Bare opportunity to propose means nothing unless proposals are realized. None of our proposals have been accepted by Canada, and we have been given to understand that we will have no voice in whether the amended constitution is adopted. Adoption will be by agreement of the Parliaments of Canada and Great Britain, and in neither do we enjoy a voice or vote.

Canada advances several provisions of its proposed constitution as evidence that our rights will be protected if the amendments are made. No provision assures us of self-determination or self-government, however. The terms "treaty rights" and "aboriginal rights" as used in the draft are undefined, hence will be left for construction and interpretation by Canadian courts. They in turn must look to the travaux preparatoires of Canada's constitutional draftsmen, and to Canadian case law, in which the Sylliboy case is considered central.

In a 1980 briefing paper Canada's Department of Indian Affairs recommended that the following principles be incorporated in the revised constitution:

> Indian institutions of self-government have no legal authority save that given to them pursuant to section 91(24) (of the British North America Act and the Indian Act).
>
> Through the exercise of section 91(24) the Canadian government has clearly asserted its sovereignty with respect to Indians and this position has been supported by judicial decisions. Indian tribes are subject to the laws passed by parliament and in certain circumstances laws passed by provincial legislatures. The power exercised by Indian governments are considered as delegations of powers from a law making authority.
>
> It is the present federal view that treaties extinguished all Indian interests and rights (political, economic and social) arising from original occupancy and gave back, in their stead, some very specific guarantees of annuities, hunting and fishing rights, etc.

A copy of this paper and corroborative internal documentation of Canada will be furnished to the Committee as requested. All reflect the same philosophy as Canada's response to our communication, i.e. that any rights we may have had as peoples or as states party to treaties are terminated and/or subordinate to Canadian legislation. Of what use to us will it be to preserve this status quo constitutionally? How will a declaration that our current "rights" under Canadian law be affirmed alter our oppression, assuming it is made at all?

conclusion

We have told you plainly why we consider Canada's 21 July answer to our communication unresponsive and unpersuasive on the issue of admissibility under Article I of the International Covenant on Civil and Political Rights. We have shown that Canada relies on racist theories: that "In-de-ans" cannot make treaties and cannot be states because of their race. Even if we have not convinced you, we beg to point out that our communication alleges violations of other Articles of the International Covenants on Human Rights, particularly those respecting security of the family, freedom of worship, security of property, and education. The admissibility of these issues has not been denied by Canada and therefore should be taken as admitted. We rest confident that we are entitled to a substantive review of these matters irrespective of the Committee's action with respect to Article I.

But also we must tell you, from the hearts of one of the oldest free nations on earth, and one that only recently has learned to be ashamed under the demands of a foreign aggressor, that the final refuge of human rights is and always will be the power of men and women to form

societies freely and peaceably for their common welfare, love and happiness. Freedom flows from love and respect, love and respect from kinship and cooperation, and from love and kinship flow true government. So it has been with us. This is the secret we will tell when the world ends; we can be destroyed but it cannot be taken from us.

DATED the third day of October 1981 at München among the Canadians' older Eurochristian brothers.

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