Sovereignty and Indigenous Peoples in North America

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SOVEREIGNTY AND INDIGENOUS PEOPLES IN NORTH AMERICA

Kent McNeil*

I. INTRODUCTION ........................................... 82
II. DEFINING SOVEREIGNTY ..................................... 82
III. POLITICAL AUTHORITY IN WESTERN EUROPE AND INDIGENOUS NORTH AMERICA .................................. 88
   A. Western Europe ........................................ 88
   B. Indigenous North America ................................ 90
IV. DE FACTO VERSUS DE JURE SOVEREIGNTY ......................... 94
V. DEFINING DE FACTO SOVEREIGNTY ................................ 100
VI. CONCLUSION ............................................ 103

ABSTRACT

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

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I. INTRODUCTION

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

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

II. DEFINING SOVEREIGNTY

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

\(^1\) See, e.g., HAROLD J. LASKI, STUDIES IN THE PROBLEM OF SOVEREIGNTY (Yale University Press 1917); W.J. STANKIEWICZ, ED., IN DEFENSE OF SOVEREIGNTY (Oxford University Press 1969); CHARLES E. MERRIAM, JR., HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU (Garland Publishing 1972); F.H. HINSLEY, SOVEREIGNTY (2nd ed. 1986); Ruth Lapidoth, SOVEREIGNTY IN TRANSITION 45 JOURNAL OF INTERNATIONAL AFFAIRS 325 (1992); HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS: AN ANALYSIS OF SYSTEMS CHANGE (Princeton University Press 1994); MICHAEL ROSS FOWLER AND JULIE MARIE BUNC, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY (Pennsylvania State University Press 1995); JOHN HOFFMAN, SOVEREIGNTY (University of Minnesota Press 1998); HIKEAKI SHINODA,
difficult to define, some understanding of sovereignty's essence is nonetheless essential for any assessment to be made of claims to sovereignty in North America during the colonial period. Much of the difficulty lies in formulating a definition that avoids Eurocentric notions of sovereignty that were used in the past, and are still relied upon today to deny sovereignty to Indigenous peoples and justify European colonization of the territories occupied by them. As Taiaiake Alfred has observed, "[t]he challenge before us is to detach the notion of sovereignty from its current legal meaning and use in the context of the Western understanding of power and relationships. We need to create a meaning for 'sovereignty' that respects the understanding of power in indigenous cultures...". Stating this
challenge more generally, what is required is a definition of sovereignty that is as objective and universal as possible, so that it can be applied to any society at any given period of time without stumbling into the pitfalls of ethnocentricity.\(^6\)

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

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

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

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

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

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


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


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

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

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

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


III. POLITICAL AUTHORITY IN WESTERN EUROPE AND INDIGENOUS NORTH AMERICA

A. Western Europe

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

22 See Bodin, supra note 19, at 9-10.
political units, each with absolute authority within its territorial limits and not subject to any external temporal power.²⁴

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

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

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

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

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

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

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

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

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

\section*{B. Indigenous North America}

Turning to North America, there was undoubtedly more variety in the political organization of the Indigenous peoples than there was in Europe during the period of colonization.\(^{32}\) Generally speaking, however, the

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

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


have – deep cultural and spiritual significance for Indigenous peoples.\(^{38}\)

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

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

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\(^{40}\) See Lowie, supra note 39; Boldt and Long, supra note 33, at 541-43; Barsh, supra note 39, at 184-87; O’Brien, supra note 32, at 14-17; Binnema, supra note 10, at 11-12.


\(^{42}\) See Denig, supra note 32, at 445; Llewellyn and Hoebel, supra note 32, at 112, 115, 123; Robert H. Lowie, Indians of the Plains 114 (University of Nebraska Press 1982) (1954); George Bird Grinnell, Blackfoot Lodge Tales: The Story of a People 220 (University of Nebraska Press 1962); Cohen’s Handbook of Federal Indian Law, supra note 34, at § 4.01[b][b].

\(^{43}\) This is not a matter of size, as Bodin thought that as few as three families could unite
behind the nineteenth and twentieth century view that these peoples were not sovereign states in the post-Westphalian, European sense. This view has been remarkably tenacious. To give just one modern example, F.H. Hinsley, in the 1986 edition of his book, Sovereignty, stated that "the rise of state forms is a necessary condition of the notion of sovereignty, of the idea that there is a final and absolute political authority in the community." He distinguished states, where political authority is exercised by a ruler or government that is separate from the community that is ruled or governed, from stateless societies, where

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

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

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

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

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

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

46 See supra notes 32 and 39.


48 On Bodin’s modification of his concept of sovereignty to address concerns arising from the political situation in France (specifically, the St. Bartholomew’s Day Massacre of the Huguenots in 1572), see JULIAN H. FRANKLIN, JEAN BODIN AND THE RISE OF ABSOLUTIST THEORY 41-53 (Cambridge University Press 1973).
Hoffman, in his book, Sovereignty, takes issue with Hinsley’s “ statist” definition of sovereignty, arguing instead for a conception of sovereignty that can also be applied to stateless societies that do not rely on force to maintain order. Such an approach would attribute sovereignty to any society that functions as an independent political entity, regardless of the way it governs itself or the manner in which it enforces compliance with societal norms. This approach to sovereignty is based on factual criteria, and is more objective than the legalistic conception of sovereignty formulated by the European jurists who constructed the law of nations. It stems from the fundamental distinction between de facto and de jure sovereignty.

IV. DE FACTO VERSUS DE JURE SOVEREIGNTY

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

Although nineteenth century international law appears to have denied

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49 Hoffman, supra note 1, at 50.
50 See also David Easton, Political Anthropology, in 1 Biennial Review of Anthropology 210, at 218-19 (B.J. Siegel ed., Stanford University Press 1959), rejecting the “ethnocentric” notion that political organization necessarily entails the use of force.
51 Grotius, supra note 12; Pufendorf, supra note 12; Vattel, supra note 9. See Behme, supra note 12; Schroder, supra note 12.
52 See Hall, supra note 9, at 17-20, 47-48. Earlier jurists who relied on natural law tended to be more inclusive. E.g. Vattel, supra note 9, at 11, wrote: “Every nation which governs itself, under whatever form, and which does not depend on any other Nation, is a sovereign State” (emphasis in original). See also Martens, supra note 13, at 23-24. See generally Alexandrowicz, supra note 30; Morin, supra note 36, at 31-62.
53 See, e.g., JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 136-45 (Cambridge University Press 1894); Oppenheim, supra note 14, at 18. Compare Western Sahara, Advisory Opinion, 1975 I.C.J.R. 12 (Oct. 16), where the Court rejected the notion that territories occupied by socially and politically organized Indigenous peoples were terra nullius. Relying on state practice in the latter half of the 19th century, the Court concluded that European states could not acquire sovereignty over such territories by occupation, as if they were vacant; instead, derivative acquisition, such as cession by treaty, was required.
state status and thus sovereignty to Indigenous peoples, it would be a mistake to conclude from this (as some jurists have\(^{54}\)) that these peoples were not sovereign. Instead, the only conclusion that should be reached from this denial is that, by some time in the nineteenth century, this body of law did not acknowledge that they were sovereign. In this context, it is essential to distinguish between de facto and de jure sovereignty.\(^{55}\)

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


\(^{57}\) See Kreijen, supra note 56, at 98-100.
spectrum, Rhodesia effectively functioned as an independent state for about fifteen years after the Smith regime’s Unilateral Declaration of Independence (UDI) in 1965, without international recognition and without being accorded sovereignty in international law.\(^{58}\) While these are twentieth century examples, they illustrate the fundamental distinction between de jure sovereignty in international law and de facto sovereignty on the ground.\(^{59}\) Clearly, the former can exist without the latter, and vice versa.\(^{60}\)

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

The Declaration of Independence by the United States in 1776 provides a North American example that is closer in time to European colonization of this part of the world. By it, thirteen British colonies declared that they, the “United Colonies are, and of Right ought to be, Free and Independent States; ... and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.” Relying on “the Laws of Nature and of Nature’s God” and the “unalienable rights of mankind,” the American colonists asserted their right to revolution and self-determination, embodying their belief in the natural law of freedom and independence.

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61 See Devine, supra note 58, at 78-89; Dore, supra note 58, at 33-38; Dugard, supra note 58, at 91.
62 See Dore, supra note 58; Dugard, supra note 58, at 90-98. Compare Devine, supra note 58, at 70-78, (opining that the Rhodesian UDI and the situation resulting from it were not “illegal”, but “extra-legal”).
66 A Declaration by the Representatives of the United States of America, in General Congress Assembled, July 4, 1776, in Armitage, supra note 58, at 170-71.
Rights" that have been "endowed [on Men] by their Creator", the United Colonies thus declared themselves to be members of the community of states that were acknowledged as such by the law of nations. However, it took several years of war for them to repel the British army and establish unchallenged control over their territories that amounted to de facto sovereignty. Their sovereignty was recognized by Great Britain in the Treaty of Paris in 1783 and acknowledged by other European states when they entered into diplomatic relations with the United States. These acts of recognition by subjects of the law of nations resulted in acknowledgement of the de jure sovereignty of the United States in that legal system. However, courts in the rebellious colonies and Britain were compelled to determine whether the United Colonies, in the interval between the Declaration of Independence and the Treaty of Paris, were sovereign entities for the purposes of domestic law. As in the case of Rhodesia, local courts decided they were, whereas English courts were inclined to decide they were not. De jure sovereignty was thus acknowledged in the domestic laws of the newly-declared United States, but generally denied in English domestic law.

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

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


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

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

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

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

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

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

In North America during the course of European colonization, there were a number of legal orders under which de jure sovereignty might have been claimed: the law of particular Indigenous nations, inter-nation law that Indigenous nations developed to govern their relations with one another, the domestic law of colonizing European nation-states, the European law of nations (international law), and in some instances inter-societal law arising out of relations, including treaty relations, between Indigenous and European nations.\(^7\) I will undertake assessment of the applicability of these bodies of law in subsequent work. I will conclude this article, which as mentioned earlier is designed to create a conceptual framework for assessing claims to sovereignty in North America, by providing a clearer notion of what de facto sovereignty means.

V. DEFINING DE FACTO SOVEREIGNTY

By de facto sovereignty I mean the actual exercise of political authority by a ruling entity or community over an independent group of people (personal authority) or, more commonly, over a people and a geographical area (personal and territorial authority).\(^7\) This excludes what some writers,

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77 On the territorial dimensions of political authority, see Thomas Baldwin, The Territorial State, in JURISPRUDENCE: CAMBRIDGE ESSAYS 207-30 (Hyman Gross and Ross Harrison eds., Clarendon Press 1992). Baldwin agrees with W.W. Willoughby, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 64-65, 310 (MacMillan 1924), that the area of land of a “tribal society” that is not part of another state’s territory should be regarded “as the
especially political economists, refer to as individual sovereignty. Individual sovereignty is the freedom or liberty of individuals to act, a freedom that is invariably constrained to some extent by the society in which they live. While not placing any lower limit on the size of a community that can exercise de facto sovereignty, the authority exercised by small units such as single nuclear families might not be regarded as political, and thus would not amount to sovereignty. Our focus is therefore on communities that are independent and large enough to exercise actual authority that is political in nature. I refer to these communities as sovereign polities.

A more complete understanding of de facto sovereignty requires clarification of the terms “independent” and “political authority”. This involves distinguishing between internal and external sovereignty. Internal sovereignty is the authority a polity exercises over its members, or over its members and the territory it occupies. External sovereignty is the authority the polity exercises in relation to other sovereign polities. Internal sovereignty can be exercised in a wide variety of ways: autocratically by an absolute monarch or dictator; in an elitist manner by an oligarchy or theocracy; democratically by the people as a whole or through a representative body or bodies; and so on. The way in which authority is exercised within the polity is irrelevant insofar as the existence of de facto sovereign is concerned — what matters is that political authority is actually exercised. Moreover, internal sovereignty can be divided jurisdictionally, as it is in federal systems such as the United States and Canada. It can also
be divided by function, for example into legislative (law-making), executive (policy and administrative), and judicial (dispute-resolution) functions, as it is in polities based on European models.

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

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

Internal political authority also involves mechanisms for making community decisions and resolving internal disputes. While it is unlikely that any polity could remain intact without such mechanisms, their form can vary greatly. In modern polities based on European models, community
decisions are generally made by representative bodies such as legislatures and by an executive or executives, and courts resolve legal disputes that cannot be otherwise settled. But many Indigenous polities have functioned very well without European-style legislatures or courts, by vesting decision-making authority and dispute-resolution capacity in individuals or groups that are responsible for different aspects of the collective life of the community. Again, to determine whether a community has de facto sovereignty, what matters is the existence, not the form, of mechanisms for making community decisions and resolving disputes.

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

VI. CONCLUSION

In subsequent work, I will examine evidence of the exercise of political authority by Indigenous polities in particular geographical regions, focusing on the northern plains of what are now the United States and Canada. This will make it possible to determine what polities had de facto sovereignty there during specific historical periods. We have seen, however, that de facto sovereignty is not the same as de jure sovereignty, and one can exist without the other. Moreover, a community can have de jure sovereignty under one legal order and lack it under another. Determining de facto sovereignty is therefore only the first step, after which one has to assess the validity of claims to de jure sovereignty. This involves examination of the various legal orders relevant to the North American context. However, in this context legality is not the same as legitimacy, an ethical and political
issue rooted in justice as a moral imperative that takes us to the choice of law question inherent in assessing *de jure* sovereignty. The approach I am proposing, and plan to apply in subsequent work, therefore involves a three-step process: (1) determining *de facto* sovereignty in a particular region; (2) assessing the validity of claims to *de jure* sovereignty in that region under applicable bodies of law; and (3) evaluating the legitimacy of those claims based on principles of justice. The current article provides a conceptual framework for addressing these matters in the North American context and, I would hope, in other parts of the world as well.