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International Law/Intercultural Relations

Matthew S. R. Palmer *

New Zealand Government is a great place to work if you're interested in public policy. Our Westminster system of government means that it is generally possible to get things done in a more coherent, less "adulterated" form than in the U.S. system.¹ The career public service position of Deputy Secretary for Justice (Public Law) in the New Zealand Ministry of Justice is an especially stimulating one. It gives me an opportunity to advise Ministers on a wide range of policy areas² and to put to work whatever it was I learned in studying law, economics, and public policy at Yale Law School.

Of all the policy issues I have dealt with, those involving indigenous peoples have been consistently the most challenging. The indigenous Maori people of New Zealand comprise a growing 15 percent of the population and are disadvantaged economically and socially. The complexity of the issues is startling—those involving Maori are usually steeped in history or at the cutting edge of political alienation and economic disadvantage. They often involve consideration of likely judicial decisions with little guiding precedent, and are always delicately poised in the political ether. Their far-reaching implications touch virtually all areas of Government policy, including our unwritten constitution. Having studied and observed the federal Canadian and U.S. governments grappling with similar issues with respect to their First Nations and Native Americans, I can say that at least the same degree of complexity exists in those countries.

In this first issue of an important new journal about international law, I offer a

* B.A. (University of Canterbury), LLB (Hons) (Victoria University of Wellington), LL.M., JSD (Yale Law School). Deputy Secretary for Justice, New Zealand Ministry of Justice. The development of the thoughts outlined here was materially assisted by a period as a John M. Olin Fellow at the University of Chicago Law School in Fall 1998. The author thanks to Ruth Wilkie, Patricia Sarr, and Paul Barker for their comments and suggestions. Nothing in this note should be taken to represent the views of the New Zealand Ministry of Justice or the New Zealand Government.

1. See Matthew S. R. Palmer, *Constitutional Design and Law: The Political Economy of Cabinet and Congressional Government* (unpublished JSD dissertation, Yale Law School, 1993).
2. My job involves identifying existing law and policy, analyzing public policy arguments, and operating within a political and bureaucratic environment. I am responsible for policy advice to Ministers regarding: constitutional and electoral issues, the Treaty of Waitangi and rights of indigenous peoples, the New Zealand Bill of Rights Act, human rights, privacy, censorship, medico-legal issues (including abortion and assisted reproductive technology), judicial independence and accountability, general court structures and processes, liquor law, and family, commercial and property law reform.

perspective of these three liberal democratic states' relationships with indigenous peoples. I argue that the dynamics in these relationships—and the norms that govern them—are similar to those between sovereign states. By extension, as the world becomes more complex, “international” law seems on its way to both losing its conventional identity (as rules that are primarily accessed through the keyhole of Westphalian nationhood), and acquiring a new, more universal character (as norms that govern interactions between individuals and groups on a global basis). International law is no longer either *international* or *law*.

I. INDIGENOUS PEOPLES AND TREATY SETTLEMENTS IN NEW ZEALAND

The Treaty of Waitangi, signed by the British Crown with representatives of Maori tribes in 1840 granted sovereignty (or *kawanatanga*) to the Crown while guaranteeing protection of *te rangatiratanga* (or chieftainship) of Maori which also extended to them the rights and privileges of British citizens. The Treaty has never been formally incorporated into domestic New Zealand law *per se*. But it has acquired increasing political and legal weight since the 1980s. A number of statutes refer to it; successive Governments have promised to honor it; and, the general courts and a specialist tribunal have decided that where it is incorporated into law its meaning is somewhat more constraining than Government tended to believe.³

As a Treasury official in 1994-95, I was one of the leading advisers to Ministers of the New Zealand Crown on the first major settlement of an historical grievance—with the Waikato-Tainui tribe. In 1865, the settler Government had invaded the land of Waikato-Tainui, conducted a military campaign, and confiscated 1.2 million acres of prime land. Successive generations of Tainui leaders had kept alive the grievance against this unjust behavior that had breached the Treaty of Waitangi. In 1994, they still wanted their land back: *I riro whenua atu, me hoki whenua mai*—as land has been taken, so it should be returned.

In 1994, a constellation of influences were pressing the conservative (National Party) administration to resolve outstanding historical grievances with Maori. Negotiations with Waikato-Tainui crystallized when both sides realized that there existed a way to accommodate Tainui concerns (to have much of the land returned that the Crown still controlled) as well as Government concerns to manage the fiscal risk of settlement within affordable boundaries. A “Heads of Agreement” was signed in December 1994; a binding Deed of Settlement in May 1995; and, the Waikato-Tainui Raupatu Claims Settlement Act 1995 was passed in late 1995. The deal involved several key elements:

- ❖ an apology by the Crown, that was incorporated into the Preamble of the legislation which was later signed by Queen Elizabeth II in right of New Zealand;
- ❖ the transfer of land owned by the Crown and associated entities within the

3. For general discussion, see Sir Geoffrey W.R. Palmer and Dr. Matthew Palmer, *Bridled Power: New Zealand Government under MMP* ch 16 (Oxford 3d ed 1997).

traditional Tainui tribal boundaries (with a lease back of some land to particular entities, such as the University of Waikato);

- ❖ if the land transferred was valued at less than NZ\$170 million, cash payments would be made for the additional amount;

- ❖ Waikato-Tainui would have the right of first refusal to buy other Crown lands that become available for sale in the Waikato area;

- ❖ the Waitangi Tribunal would no longer have jurisdiction to make certain mandatory orders to force Crown redress for this breach of the Treaty of Waitangi; and,

- ❖ a guarantee that the relative size of the settlement compared to future settlements of other historic breaches of the Treaty with other tribes.

This settlement is generally perceived by both Crown and Maori to be “successful.” The claimants generally viewed this as fair,⁴ as it resolved a grievance over historical injustice that had caused generations of rancor, resentment, and alienation in one of the largest Maori tribes. It endowed a tribe of over 20,000 members, many socially and economically disadvantaged, with an asset base avowedly intended for use for investment and development of the tribe’s economic base, cultural activities, and educational opportunities. It mitigated a fiscal risk to the Crown by removing legal encumbrances over state-owned enterprise land and Crown forestry assets. Perhaps most importantly, it suggested that settlement of what had seemed intractable historical grievances was possible. There have since been more settlements—including one with Ngai Tahu of equal fiscal significance, but incorporating redress relating to power over natural resources.

II. COMPARISONS WITH CANADA AND THE US

Circumstances in Canada and the United States with respect to indigenous peoples are different from New Zealand and from each other in a number of ways. But there are eerie parallels.

The ways in which Canada and the U.S. approach their First Nations and American Indian peoples differ from New Zealand in four key ways:

- ❖ Maori form a markedly larger proportion of New Zealand’s population (15 percent) than do aboriginal people in Canada (4 percent) or the United States (1 percent), and are a more homogenous group, with one language and one overarching cultural identity;

- ❖ Half of the American Indian population and a third of aboriginal peoples in Canada live in geographically defined reservation areas. There have never been reservations in the same sense for Maori whose ancestors signed a single Treaty, rather than many. Most Maori identify with one or more iwi or hapu (tribes or

4. Two-thirds of enrolled tribal members voted in favor of the settlement in a postal ballot, as did thirty-one of thirty-four hapu (sub-tribes).

sub-tribes), but Maori are highly urbanized and integrated with other “pakeha” New Zealanders;

❖ New Zealand is a unitary rather than federal state, with no written constitution or judicial power to strike down legislation made by a small unicameral legislature; and,

❖ Maori political and legal power derives from their numerical strength at the ballot box, especially since New Zealand adopted proportional representation in 1996, from the moral power of the Treaty of Waitangi in legitimating New Zealand Government, and from a patchwork of statutory references to the Treaty.

But there are also striking similarities—most particularly between New Zealand and Canada, where officials from either country working in the other’s government feel very much at home.

III. A MATTER OF CULTURE AND RELATIONSHIPS

To a government official, perhaps the most gripping similarity between what goes on in New Zealand, U.S., and Canadian Government regarding indigenous peoples is also what most distinguishes these policy issues from most others. These are issues of enormous raw emotional power.

Dealing with an indigenous group is not the same as dealing with just another interest group. Yes, indigenous people can and do engage in hard-headed, commercially motivated negotiations with teams of lawyers and merchant bankers in attendance. Yes, legal loopholes you leave can and will be exploited. But there is always a sense that these are people with an underlying difference of world view from your own white Anglo culture. The Waikato-Tainui deal with the Crown was most effectively sealed by the emotional reaction to the surprise return of the korotangi, an ancient *taonga* or tribal “treasure” of a stone carving of a bird. The difference is one of culture, and it is deeply rooted.

Maori culture, like that of North American First Nations and Native Americans, is organized around tribal communities of various sizes. Maori have a more holistic view of public policy issues than does a rationalist western government. They stress interrelationships and complexity, rather than fragmenting categorization. And central to all interrelationships is their spiritual belief structure. This poses problems for any Government organized on the basis of Anglo culture. For Maori, health policy cannot be divorced from policies on housing, employment, education, and economics more generally. Indeed, it cannot be divorced from Maori cultural survival and their constitutional aspiration of self-determination. Eeek! Where does the poor bureaucrat begin?

The first thing to notice is that the most powerful wellspring of indigenous political, economic, and social demands is that of cultural survival. Contrary to other minorities, if the culture of a people disappears from its indigenous home, it

disappears from the earth. Individuals, in their physical manifestation, needn't disappear. But the essence of humanity lies in an individual's interaction with his or her social context, particularly culture. Arguments based on international legal strictures against genocide and other crimes against humanity can shade into legal and moral arguments for the protection of a people on the basis of their indigenous nature.

The second point is that whatever the form of a "settlement" of a historical grievance—and whether it is sourced in a Treaty, a common law doctrine, or pure politics—it is not a one-off transaction. This is a point often made by indigenous peoples in New Zealand and North America, and often instinctively resisted by the white population. I am not saying that these deals can or should be relitigated over and over—which is a fear of Governments and conservative commentators.⁵ Rather, the point is that an indigenous people located within the boundaries of a nation state will always require some sort of ongoing relationship with that state. Like the state itself, a culturally healthy people have undying existence. They may not have the economic and political clout of a state, but their ongoing existence as a collective entity requires a vibrant culture comprising a coherent set of interlocking behavioral and obligational social norms. In Oliver Williamson's terms,⁶ the governance of an indigenous tribe's interactions with "its" nation state is at the relational end of the spectrum that ranges between ongoing relationships and simple market transactions.

There is at least one modern example of a colonized indigenous people, historically dispossessed of their land, using a strategy of conscious concentration of population, political activism, and violence to regain control of their tribal homeland and form a nation state: Israel. But a nation state does not usually treat an indigenous people as having equivalent status, as the very terminology of *international law* suggests.

Nation states recognize that they have ongoing relationships with other nation states. They organize departments to deal with other states, across the whole range of policy issues. Whether these dealings are concerned with resolving a past grievance or charting a new path to cooperation, they are viewed in the context of the relationship, and the nature of that relationship itself is a matter of government policy. Relationships with indigenous peoples are the same.⁷

The relationship between the U.S. and New Zealand governments is a historically friendly one. They have fought wars together, signed documents of mutual defense, and coordinated their policies on relationships with other nations. There

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5. Richard A. Epstein, *The Treaty of Waitangi: A Plain Meaning Interpretation*, (New Zealand Business Roundtable 1999), available online at <<http://www.nzbr.org.nz/pdf-library.html>> (visited Mar 4, 2000) (contrary to the approach in this note, Epstein appears to presume transactional rather than relational interactions between the Government and Maori).
 6. Oliver E. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (Free Press 1985).
 7. See Ken S. Coates and P. G. McHugh, *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria 1998); Matthew S.R. Palmer, *The International Practice* ch 5, in Alison Quentin-Baxter, ed, *Recognising the Rights of Indigenous Peoples* (Inst of Pol Stud 1998).

have been disagreements—the U.S. resented New Zealand's anti-nuclear stance adopted in the mid-1980s and New Zealand has resented various U.S. trade policies that restrict the access of New Zealand agricultural products to the U.S. market. The underlying dynamic of the relationship is one of mutual respect as separate collective entities that subscribe to liberal democratic ideals, although there is an obvious power imbalance in military, economic, and political terms.

The same sort of parameters, with different content, could be developed with respect to the relationship of any indigenous tribe with "its" nation state government. The relationship will be influenced by historical patterns, by the interests of each entity, and by their underlying cultural basis. The relationship between the New Zealand government and the leadership of the Waikato-Tainui people has varied between mutual tolerance, outright war, dominance, or resentment, to being allies in war, and perhaps evolving into modern respect and reconciliation.

Remarkably, I suspect that the relationships between the governments of, for example, New Zealand and Canada are based on a more closely shared mutual ideological worldview than that between either government and "their" indigenous peoples. An example of this in practice occurs at the international negotiations over the Draft Declaration of the Rights of Indigenous Peoples in Geneva each year. The indigenous peoples are recognized and have a voice in this process distinct from the state governments that are supposed to be negotiating. New Zealand government officials attending these sessions have a special national affinity with Maori delegates; but, in a different way, they have more in common in their cultural worldview with officials from Canada, Australia, and the United States (the CANZUS nations).

IV. IMPLICATIONS FOR INTERNATIONAL LAW

The above thoughts about the importance of relationships and culture in the interactions of states and indigenous peoples are simple, but have far-reaching practical implications for those in Western democratic government. These include implications about how a government should organize itself in its relationship with indigenous peoples and the long-term nature of the view that should be taken of policy issues involving indigenous peoples. These implications are relevant not only to states' relationships with indigenous peoples, but also, though in different ways, to other long-term established groups of citizens in a society.⁸ And with this in mind, in this journal, I want to draw an implication for the nature of international law.

For a Western government official in the year 2000, it is clear that international law is no longer about relationships between unitary Westphalian states. In the age of easy global communication and increasingly global values of democracy and human rights, international law must encompass the interests and aspirations of those groups

8. See A. Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 31 *Ariz St L J* 539 (1999) (arguing that at-risk communities have a legitimate basis to be protected from markets that threaten to destroy a unique culture).

of people who are politically significant enough, domestically or internationally, to elbow their way into the fora of international organizations, whether the United Nations or the World Trade Organization. Indigenous peoples have the institutionalized attention of the Working Group on Indigenous Peoples; unions and employers have special status at International Labour Organization gatherings; nongovernmental organizations are recognized at U.N. human rights conferences.

The ultimately authoritative third-party enforcer of rules, whose absence has always worried those reluctant to call international relations "law," is still absent. The very existence of such a monopolist of organized coercion owes its conception to the notion of sovereign states. Since even this notion is now dissolving, we can expect an organized world government to remain absent.⁹ International "law," like constitutional "law," is not and will not be "enforceable" in the same way as ordinary domestic law.¹⁰

Rather, international law, like constitutional law, derives its force from the older, and still more fundamental source of coercive authority in a (now global) society: social and cultural norms.¹¹ The status and content of international law is intimately bound up with its practice. It evolves through the interaction of increasingly diverse actors in the international law, in the commentary of thoughtful observers, and by explicit agreements. It is enforced by reputational incentives, negotiation, and shifting coalitions of national, supranational, and sub-national interests. Only in a legal realist's sense does international law increasingly constitute "law": it resides in the actions of officials.

Increasingly, in a technological world of democratic values, "international law" derives from and influences the relationships between all those individuals and groups who are politically significant, as well as nation states. It is not *international* and it is not *law*. It is *intercultural* and it is about *relationships* and the norms that govern them. Fundamentally, international law represents an evolving set of global social norms. ♪

9. See Jeffrey L. Dunoff and Joel P. Trachtman, *Economic Analysis of International Law*, 24 Yale J Intl L 1 (1999).

10. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L J 2599 (1997).

11. Regarding social norm theory, see Robert C. Ellickson, *Law and Economics Discovers Social Norms* 27 J Legal Stud 537 (1998).



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