reached the United States. The United Indian Nations asked for peace, but threatened war. The white Americans saw it as a bluff. They chose to delay their answer to the appeal. The Congress, at that time under the Articles of Confederation, knew that at Philadelphia a convention was meeting to reform their own society into a stronger confederacy. The rhetoric of the proclamation of the United Indian Nations awaited the test of arms.

The United Indian Nations restructured itself almost annually, but won victories in Ohio until 1794. Among these victories was the most devastating defeat an American army would ever suffer at the hands of any Indian army, and in proportion to the number of soldiers engaged, the most catastrophic defeat of an American army in any war. On 4 November 1791, near the Wabash River, General Arthur St. Clair lost 630 men in an army of 1,400 men (by contrast, George Armstrong Custer lost 216). But by 1794, the United States, centralized under its new Constitution, was ready to move in force. More importantly, the United States had secured the neutrality of the Iroquois Confederacy by conceding major political issues of sovereignty to the Iroquois in negotiations which culminated at the 1794 Treaty of Canadigua.

The Iroquois did not choose a political reformation or reorganization. Eventually, after 1799, they undertook a renaissance driven by a synthesis of old and new religious beliefs as related by the teacher Handsome Lake. In this way the Iroquois perpetuated their old political system.

Overall, however, in the race to define a new unity among confederated nations, the United States had won. The Thirteen Fires were now one. That single federal flame burned more brightly than the thirteen separate ones, and in a little over a century it would consume the continent.
In August 1987, in the midst of the celebration of two hundred years of constitutional government in the United States, representatives of American Indian nations traveled to Geneva, Switzerland, to join other indigenous peoples seeking United Nations recognition of their right to self-determination. To those unfamiliar with the deep and continuous roots of these aspirations, such claims to nationhood frequently appear abstract and ahistorical. Indeed, most historical writing in the United States, including legal history, has been strikingly silent on this question, emphasizing instead the evolution of federal power in the arena of Indian relations.

This conjuncture of events, constitutional bicentennial with United Nations action, however, invites reconsideration of the fundamental nature of these relations. The silent spaces of history raise the most profound questions, not only for historiography but for law, where the continuity of Indian nationhood remains vulnerable to the exercise of power. What was the nature of indigenous nationhood from first European contact well into the nineteenth century? What role did American Indian nations play in international relations in North America? How did relations with Indian nations affect the United States’ own struggle for definition and consolidation in its formative era? To what degree did treaties between Indian nations and European states, and the United States, evidence the international personality of the Indian parties? To what degree do the treaties continue to form a legal basis for consensual, self-determined relationships with the United States?

Each of these questions reflects the fact that the original relationships between Indian nations and other sovereigns were of a decidedly international character. War, peace, intersocietal friendship, and commerce together formed the dynamics of international relations in North America as elsewhere. Before European contact, Indian nations and confederacies were fully independent and self-determined societies. Some Indian nations such as the Six Nations Iroquois Confederacy (Haudenosaunee) had lengthy diplomatic histories with European states by 1776; others had their first sustained encounter with the United States in the nineteenth century during a period in which the American government increasingly was able to dictate the terms of the relationship. In either case, however, the specific relationship that each nation initially established with the United States was born of the principles and practices of international law, and was typically defined through the treaty process.

Obviously then, the links between past and present are of central importance to any analysis of indigenous rights. In both United States law and international law, however, the connections between pre-colonial indigenous self-determination and contemporary status and rights have been clouded by racial and legal concepts of the colonial era. The Eurocentric arrogance and social Darwinism of the late nineteenth and early twentieth centuries effectively erased the memory of a centuries-old historical record of indigenous peoples functioning on the international plane, and of a definite if grudging recognition of indigenous rights in principle and state practice. Although these colonial categories have long been repudiated in virtually every other context, they have continued to exert a curious degree of influence on the debate on indigenous rights in the United States, other countries, and at the international level.

The purpose of this chapter is to begin a reexamination of these historical linkages by exploring the international legal personality and treaty process of American Indian nations in North America from the first significant establishment of relations with European nations to the American Revolution—a period of over one hundred fifty years. This undertaking is necessarily preliminary and limited in geographical scope. Accordingly, it will focus on international relationships in the region encompassing much of the northeastern quadrant of the United States extending into that part of contemporary Canada immediately north of the St. Lawrence River and Great Lakes. This area has been chosen because it was the scene of the most widespread and intense diplomatic activity on the continent, involving four European and numerous Indian nations.

My approach follows the process of analysis employed by the International Court of Justice (World Court) in its 1975 Advisory Opinion on Western Sahara. In that opinion, the Court applied the doctrine of “inter-temporal law” in determining the international status of the indigenous peoples of the Western Sahara at certain relevant points in history. In international legal analysis, the doctrine of intertemporal law requires that the legal status of an entity or event in the past must be interpreted according to the law of the period in question. It thus provides a counterweight to the tendency of twentieth-century literature to read nineteenth-century legal concepts back into history. The doctrine is particularly significant for the question of the status of indigenous treaty-making, where the legal discourse has been heavily influenced by the nature of North American power relations in the late nineteenth century. Moreover, in analyzing the legal relations of the Saharan peoples in the late nineteenth century, the Court set aside the conceptual structures of
European colonial jurisprudence to directly scrutinize the actual state practice in the region. Similarly, this article examines the actual practice of the era in question in North America as it reflected and established international law.

The International Legal Context

At the outset of the American War of Independence, Indian sovereignty was fully reflected in the practice of European states. Despite the religious intolerance and cultural antagonisms that had permeated European attitudes toward other peoples for centuries, European states were compelled to recognize and engage Indian nations as political actors in their diplomatic activities on the continent. Each successive European state seeking to establish commercial or settler colonies necessarily as a matter of course entered into treaty relations with indigenous nations concerning territorial cessions, peace and non-aggression, military alliance, and the course of trade. In North America as elsewhere, the treaty-making process was based on a recognition of the mutuality of legal capacity and specific interests of the parties to the agreement.

In the early stages of colonization, these agreements and the continuing relationships they created were frequently decisive to the survival as well as the success of the European project. For Britain and France in particular, political alliances with Indian nations determined the balance of power between their North American enterprises and formed the major part of their economic interests. With the exception of coastal and riverine areas where European populations and military forces were concentrated and European power was gradually imposed, Indian relations required skillful and continuous diplomacy.

Unfortunately, we are left with an asymmetrical record of these transactions. Documentary sources are limited to the state papers of the European parties and occasional memoirs of European participants. As a result, one must be cautious in interpreting a fundamentally bilateral relationship or history of relations solely from the quite interested internal memoranda of one side. Nevertheless, if we cannot always be certain about the accuracy of what was said, we can see with considerably more clarity what was done. For purposes of international legal analysis, the conduct of the parties and the relationship of that conduct to contemporary international life are of primary relevance. From that vantage point, the documents show a remarkably consistent pattern for nearly two hundred years.

In the first instance, the records are treaty records. Peaceful relations were established and maintained by mutual consent throughout the period. Structurally, treaty-making included the same elements as in Europe—two or more territorially defined independent political entities bargained the terms of a relationship. Negotiations were at arms length and were conducted on behalf of distinct peoples. Although the power equation between the parties varied according to time and place, it was by no means always in favor of the European side. In many treaty conferences, the European entity gave "pretexts" that if not forms of tribute were at least inducements to preserve peace. In the absence of peaceful relations, Indian and European nations confronted each other in conditions of active or passive hostility. In either case, in peace or war, these relationships were of an international rather than internal character. Expressly or de facto, wars and treaties evidenced European recognition of the political personality and territorial sovereignty of Indian nations.

Indian-European alliances were gradually integrated into the fabric of North American affairs. Indian allies protected European colonies from rival European forces and hostile Indian nations. European arms and other assistance were similarly utilized by Indian allies against their own enemies, European or Indigenous. European vulnerability was not limited to warfare, however. Particularly in the early period, the major European motivation for being in much of North America was the fur trade, not colonial expansion per se. Trade required agreements relating to access to (or monopoly of) Indigenous markets, continuous sources of furs, relative valuation of goods, networks of supply and distribution, and defense of trade routes. Treaty-making and stable relations were essential for all of these purposes.

International Legal Personality

Some preliminary consideration of the international legal personality of Indian nations is in order before beginning an assessment of state practice in North America during these centuries. In the first instance, the most cursory examination of the primary source material of period diplomacy reveals that treaty-making and other elements of international relations were interactive in nature. Rather than a unilateral exercise of European prerogative, intersocietal relations were conducted on a bilateral and multilateral basis between and among distinct peoples over a lengthy span of time. Agreements between European and Indian nations, including those negotiated under the pressure of events, were consensual in an international law sense, representing a mutual accommodation of individual definitions and interests. Looking at the diversity of these relationships over time, from a structural perspective it is clear that Indian nations were territorially defined political entities functioning in the international legal system as a whole.
consequence that the friendship and alliance of the Six Nations [Haudenosaunee] is to all His Majesty's Colonies and Plantations in America. The lords of trade observed that "we consider that this friendship and alliance is only to be gain'd and preserved by making presents to them at proper times and upon proper occasions and by an inviolable observance of all our engagements with them." (Emphasis added.)

Aftermath

French-Haudenosaunee-British triangular relations ended only with the cession to Britain of the French colony of Canada in the 1763 Treaty of Paris at the close of the Seven Years' War. The withdrawal of France from the geographical region of Haudenosaunee international relations had inevitable consequences for the bilateral relationship between the Confederacy and Britain, but did not transform the international character of that relationship. Great Britain and the Haudenosaunee continued to organize their mutual affairs through the treaty process. Rather than purport to incorporate Indian nations, Britain continued to establish and maintain relations through treaty-making.

Indeed, the transition from French to British influence in the western country was by no means effected by the conquest of New France or by the Treaty of Paris. Indian nations allied with France and led by the Ottawa chief, Pontiac, continued hostilities against British forces attempting to place themselves in frontier forts and trading houses formerly controlled by the French. The Indian war, which peaked in intensity during 1763 and 1764, ended in stages as Britain successfully negotiated for peace and trading rights in a series of treaties culminating with an agreement with Pontiac in 1766. Consistent with the French experience in those regions, Britain was able to ensure its presence only through a consensual process shaped by a combination of diplomacy, military action, and inducements of trade.

Almost simultaneously, Britain began to respond to the new international situation in North America by negotiating boundary treaties with Indian nations and confederacies contiguous to British colonies from Florida to Canada, including the Haudenosaunee. Unquestionably, the end of balance of power considerations in British North American diplomacy produced a shift of strength to the advantage of Britain. Each of the boundary treaties, for example, involved territorial cessions. Nevertheless, these treaties resulted from an imperative to clarify the distribution of recognized territorial sovereignty between Indian nations and the settler colonies, and reflected the continuity of the British practice of maintaining relations with those nations through the treaty process.

Despite the defeat and expulsion of France, Britain remained acutely sensitive to the possibility of a large-scale alliance of the Indian nations.
Sir William Johnson, superintendent of Indian relations in the northern colonies, gave perhaps the most candid and accurate British description of the reality of the status of the Haudenosaunee and other nations in nearly a century:

The Indians of the Ottawa Confederacy . . . and also the Six Nations, however their sentiments may have been misrepresented, all along considered the Northern parts of North America, as their sole property from the beginning; and although the conveniences of trade (with fair speeches and promises) induced them to afford both, us and the French settlements in their Country, yet they have never understood such settlement as a Dominion, especially as neither we, nor the French ever made a conquest of them; they have even repeatedly said at several conferences in my presence, that “they were amused by both parties with stories of their upright intentions, and that they made War for the protection of the Indians’ Rights,” but that they plainly found, it was carried on, to see who would become masters of what was the property of neither one nor the other. . . .

The ultimate accuracy of that description was underscored in 1775 when the Confederacy entered into treaty relations with the “Twelve United Colonies” (before they had acquired broadly recognized international legal personality), promising neutrality in the coming conflagration with the old ally.

Although Anglo-Haudenosaunee relations varied over time according to needs, interests, and historical circumstances, Britain’s diplomatic claims that the Confederacy was subject, vassal, or protectorate were transparent fictions. Evidence does not even support the existence of a consistent alliance in any full sense during the century of relations prior to the French defeat. The Haudenosaunee and the British were active military allies only during periods of the 1680s and 1790s—at most one and a half decades of qualified coordination.

Despite the frequent quest for a more substantive alliance, Britain was content to live with the Haudenosaunee as a strategic buffer, potential military ally, and important contributor to the economic well-being of New York and the imperial center. Indeed, the strongest case can be made for an economic alliance as the root of the relationship—a fact frequently brought home by Confederacy envoys during negotiations with the British. From this perspective, the Covenant Chain emerges as a regional order of close international cooperation, promoting peace and stability in intersocietal economic and political relations among its participants.

Conclusion

During the nearly two centuries of European presence in North America preceding the American War of Independence, a public order of a decidedly international character evolved among Indian and European nations. The nature of that order was determined by the cooperation and conflict of distinct nations seeking to adjust their relations and defend their respective interests—the essence of an international legal regime. Situations, of course, varied according to time and place. At times, European imperial actions produced conquest, forcible dispossession, or voluntary migration of indigenous societies. With the more populous and powerful Indian nations and confederacies in interior regions, however, European states were obliged to respect Indian sovereignty and utilize the practice of diplomacy to form consensual relations. The hallmark of the epoch was the treaty process. 244 Seventeenth- and eighteenth-century treaties, in the aggregate, bear compelling witness to the presence of Indian nations as independent actors on the international plane.

When the United States came into being, it joined a political reality and a received tradition that determined the practice of its relations with Indian nations. In seeking to consolidate its own political existence, one of the first imperatives for the United States was the negotiation of treaties of peace with many of the same Indian nations that had been actively involved in European diplomacy and whose hostility posed a serious threat to the stability of the new state. 245 Indeed, many of those same Indian nations continued to maintain independent relations with European powers until the end of the Napoleonic era, despite United States claims to territorial sovereignty. 246

The internal structural reorganization of the United States from a confederation to a federal state, brought about by the adoption of the Constitution in 1789, did not alter the fundamental dynamics of international relations with Indian nations. Under the Constitution, the new federal government continued to negotiate treaties through the foreign affairs process of the state. From 1789 until 1795, with the exception of one consular agreement with France, all of the treaties receiving the consent of the Senate for ratification were made with Indian nations. 247

Writing in 1832, four decades after the advent of constitutional government in the United States, Chief Justice John Marshall had this to say about the status of Indian nations:

The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as
the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentates than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term “nation,” so generally applied to them, means “a people distinct from others.” The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.  

Despite the reference to his “doctrine of discovery,” Marshall’s words remain a powerful expression of the inherent rights of the original nations of the continent.

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United States—Indian Relations: The Constitutional Basis

Curtis G. Berkey