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# **International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation**

**Galit A. Sarfaty<sup>†</sup>**

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## **INTRODUCTION**

Over 1000 people from across the globe convene in Geneva, Switzerland every summer to voice their concerns on indigenous rights. This pilgrimage to the week-long United Nations (U.N.) Working Group on Indigenous Populations has taken place every year since its inception in 1982, when only about thirty people attended. The increasingly global nature of political activism among indigenous peoples is evident in the growing number of participants at the Working Group,<sup>1</sup> the U.N.'s recent creation of a Permanent Forum on Indigenous Issues to advise its Economic and Social Council,<sup>2</sup> and the adoption of the U.N. Draft Declaration on the Rights of Indigenous Peoples by the Human Rights Council in 2006.<sup>3</sup> The language of human rights has become a platform for

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<sup>1</sup> See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996); Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993*, 16 *HUM. RTS. Q.* 1 (1994).

<sup>2</sup> The U.N. Economic and Social Council (ECOSOC) created the Permanent Forum on Indigenous Issues on July 28, 2000. According to ECOSOC Resolution 2000/22, the Permanent Forum “shall serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights.” U.N. Doc. E/RES/2000/22 (July 28, 2000). See also John Carey & Siegfried Wiessner, *A New United Nations Subsidiary Organ: The Permanent Forum on Indigenous Issues*, *AM. SOC. INT'L L. INSIGHT* 67 (2001), available at <http://www.asil.org/insights/insigh67.htm>.

<sup>3</sup> On June 29, 2006, the U.N. Human Rights Council passed a resolution recommending that the General Assembly adopt the U.N. Draft Declaration on the Rights of Indigenous Peoples, which was finalized in 1994. While the declaration would not be binding on states, it could serve as a tool for pressuring states to protect indigenous rights. U.N. Doc. A/HRC/1/L.10 (June 30, 2006).

organizing the international indigenous movement. Its rhetoric has enabled indigenous peoples to claim legitimacy for their campaigns for political, economic, and cultural autonomy. Political mobilization around rights claims has publicized the plight of indigenous peoples, from the Kayapó of Brazil to the Maori of New Zealand, and has given them a common voice with which to unite on a global level and lobby for domestic policy change.

Yet, what happens when these indigenous peoples return to their communities after having learned, employed, and even influenced international norms? Do they adapt local laws in relation to the international norms that they have internalized? For many decades, local communities like indigenous groups have been using the moral authority and persuasive power of international law as leverage against states. They have appropriated the global legal discourse of human rights as a tool for empowerment. But local groups do not just absorb international norms or redeploy them against states; they are also transformed by these norms in a variety of ways, particularly, in their laws and governing institutions. The issue is: *How* are localities transformed by their contact with international norms? When an indigenous community is exposed to international human rights law (e.g., through a local NGO or their own participation in an international campaign), how does that affect its local customs and laws, including its negotiation with states? Ethnographic studies of local law-making within communities are needed to examine the micro-level mediation process among local, state, and international law.

Scholars have analyzed the diffusion of international norms across borders, but they tend to focus on states rather than localities. There is a gap in the legal scholarship on how norms are translated on the local level. International legal scholars have described the transnational legal process whereby transnational actors interact and cause international norms to become internalized into domestic structures.<sup>4</sup> They have also analyzed how international law changes state behavior, through legal means like treaty ratification or social forces like acculturation.<sup>5</sup> Political scientists have explained how transnational advocacy networks use international law to pressure states, and thus create a boomerang effect towards domestic policy change.<sup>6</sup> They have also described how state

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<sup>4</sup> See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (review essay).

<sup>5</sup> See Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

<sup>6</sup> See MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

governments become socialized to conform to international human rights norms.<sup>7</sup> But what happens on the local level, when international norms become internalized in local legal systems? That is, how do communities give meaning to international norms in relation to state and local laws?

In an effort to address these inquiries, this Article examines the process of international norm diffusion on the ground—where international law is shaping how local actors construct their laws and legal institutions. Based on empirical evidence, I analyze how international norms can become embedded in an indigenous community and influence its law-making in a way that mediates between state and local laws. International norms can provide a mechanism not just for domestic reform, but also for local reform. Local actors may design innovative governing structures that borrow from state and international law while also adapting cultural norms.

I elaborate on this process of legal mediation by presenting a case study of the Pimicikamak Cree Nation (pronounced “Pi-mi-chi-ca-mak”), an indigenous people living in Cross Lake, a small town in Manitoba, Canada. This study is based on my ethnographic field research at the Cree reservation in 1999 and 2000, as well as follow-up research in the years since that time.<sup>8</sup> Having suffered from the destructive effects of a hydroelectric dam constructed in the 1970s, the Cree have actively lobbied the Canadian government for the compensation promised to them over 25 years ago. Since 1998, they have appealed to the U.N. to pressure Canada and have invoked international law to assert their right to self-determination. As part of this process, the Cree have developed a unique government as a basis for their new relationship with Canada—one that demands respect for their fundamental human rights, while also incorporating aspects of Canadian law and adapting customary Cree law.<sup>9</sup>

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<sup>7</sup> See THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Risse et al. eds., 1999) (constructing a five phase “spiral model” of socialization to international human rights norms).

<sup>8</sup> During my field research, I compiled data from semi-structured interviews, analysis of government documents in Cross Lake and Winnipeg, and visits to the United Nations in Geneva.

<sup>9</sup> My use of the terms “custom” and “customary law” refers to the de facto habits that have developed in a people’s practices and institutions, based on a group’s cultural traditions. It does not imply that there exists an authoritative expression of a people’s culture. While I often refer to the Cree Nation as a collectivity with customary practices and laws, I recognize that there exists a multiplicity of perspectives within the group that I am not able to fully account for. Thus, my discussion of the Cree does not presuppose a single ethnic identity. It is a construction based on my personal encounters with different community members and my approximation of internal differences.

By designing a government that integrates Canadian and international law into their own legal institutions while also adapting Cree cultural norms, the Cree are engaging in legal mediation. This process describes a web of overlapping identifications with the local, state, and international legal spheres. Yet legal mediation refers to more than just an interaction between multiple legal orders in the same social field, referred to by some scholars as “legal pluralism.”<sup>10</sup> It describes a process of negotiation among multiple normative commitments and legal entities. Under legal mediation, local actors play an important role in shaping how international norms become internalized within their communities. They influence how international human rights norms are received and incorporated in local institutions, and how they interact with state and non-state norms (e.g., religious norms or cultural practices).

The case of the Cree thus demonstrates how the global discourse of human rights is becoming incorporated into local communities as indigenous peoples are “redefining their projects in the global space of . . . human rights.”<sup>11</sup> Their strategic use of human rights discourse is indicative of the growing role played by international law in their societies. International human rights law gives them political leverage when negotiating with the states in which they reside. It has also led groups like the Cree to adapt their customary law to accommodate their relationship to other legal institutions. The dialectical process of legal mediation, whereby indigenous groups shift between different normative communities, represents their multi-layered identifications within the local, state, and international spheres.

The remainder of the Article proceeds as follows. Part I reviews existing literature from international law and international relations on norm diffusion and internalization. I identify the gaps in the literature, including how norm internalization occurs in local settings. I then argue that ethnographic studies can shed light on these local processes, particularly how international human rights norms can shape law-making in local communities. When analyzing these processes, theories of legal pluralism provide useful insights. I review scholarship on legal pluralism and then build on these theories to discuss the model of “legal mediation.” Under this model, local actors are able to mediate

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<sup>10</sup> See, e.g., BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE, AND POLITICS IN THE PARADIGMATIC TRANSITION (1995); John Griffiths, *What is Legal Pluralism?*, 24 J. LEG. PLURALISM 1 (1986); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988); Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443 (1992).

<sup>11</sup> Michael Kearney, *The Local and the Global: The Anthropology of Globalization and Transnationalism*, 24 ANN. REV. ANTHROPOLOGY 547, 560 (1995).

between local law and state law by borrowing from international law. As I describe in Part I.B, communities, particularly indigenous groups, are also lobbying state and international institutions to recognize local norms and customary practices. Thus, not only are multiple types of legal norms *interacting* within local settings, but they are also *shaping* and *being shaped by* one another. Finally, I analyze how indigenous peoples are adapting their local laws as they internalize international norms.

Part II offers ethnographic evidence of the diffusion of international norms in a local community. I first set out a brief narrative of the Pimicikamak Cree Nation, including the historical events that spurred its appeals to the U.N. This case study exemplifies an indigenous people that is appealing to international law to win compensation from a state government and to assert its right to self-government. As they speak the language of international human rights law, the Cree are promoting their use of customary law as a legitimate basis for their political autonomy. I then describe how the Cree are participating in transnational advocacy networks for indigenous rights and the environment. Lastly, I discuss how they are asserting their right as a people to self-determination, which they interpret as an on-going negotiation between multiple normative communities.

In Part III, I analyze the Pimicikamak Cree Nation's recently adapted local government as an example of legal mediation. I first describe how the Cree are preserving cultural norms as they assert their right to self-government. I then analyze how they have adapted these norms to accommodate state laws, and have incorporated international norms into their official communications and local political discourse. Finally, I identify possible external and internal obstacles to legal mediation as I consider the ways in which this model could be most effectively utilized by local communities.

## **I. LOCALIZING THE PROCESS OF INTERNATIONAL NORM DIFFUSION**

Legal scholarship on international norm diffusion, including the development, circulation, and internalization of norms, has traditionally focused on states and how international law shapes state behavior. Analyses of norm internalization have been mostly limited to state legal systems. For example, transnational legal process theory examines the interface between international norms and domestic legal processes in an attempt to answer the question of why nations obey international law.<sup>12</sup> The theory outlines three phases: interaction,

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<sup>12</sup> See, e.g., Michael B. Likosky, *Introduction* to TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES xxiv (Michael B. Likosky ed., 2002); Sally Falk Moore, *An International Legal Regime and the Context of Conditionality*, in TRANSNATIONAL LEGAL

interpretation, and internalization. “Those seeking to embed certain norms into national conduct seek to trigger *interactions* that yield legal *interpretations* that are then *internalized* into the domestic law of even resistant nation states.”<sup>13</sup> Yet, as one scholar recently noted, “more is needed to fully flesh out the idea of transnational legal process in order to see how norm internalization actually takes place outside of the official organs of government.”<sup>14</sup> That is, how does norm internalization occur in local settings?<sup>15</sup>

Existing literature in international relations similarly emphasizes the spread of norms from transnational and international actors to states.<sup>16</sup> Constructivist theories treat transnational actors and their interests as “constructed” by their social context.<sup>17</sup> By shaping that context, “[t]he international system can change what states *want*.”<sup>18</sup> These accounts, however, do not adequately describe how transnational ideas shape local communities. One of the prominent theories in international relations is that of Martha Finnemore and Kathryn Sikkink. According to their theory, the life-cycle of norms consists of three stages: norm emergence, norm acceptance (or what is termed a “norm cascade”), and norm internalization.<sup>19</sup> The first stage is characterized by persuasion of states by “norm entrepreneurs”; the second by socialization of states to become norm followers; and the third by wide acceptance of norms and their

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PROCESSES: GLOBALISATION AND POWER DISPARITIES 333 (Michael B. Likosky ed., 2002); Koh, *Transnational Legal Process*, *supra* note 4; Koh, *Why do Nations Obey International Law?*, *supra* note 4; Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. “War on Terrorism,”* 5 THEORETICAL INQ. L. 47 (2004).

<sup>13</sup> Harold Hongju Koh, *Transnational Legal Process After September 11th*, 22 BERKELEY J. INT’L L. 337, 339 (2004).

<sup>14</sup> Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSN’L L. 485, 545 (2005).

<sup>15</sup> The Chayes’ managerial model and Thomas Franck’s fairness model similarly focus on states in their theories of norm compliance. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995).

<sup>16</sup> See, e.g., KECK & SIKKINK, *supra* note 6; Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS 1* (Thomas Risse et al., eds. 1999).

<sup>17</sup> See, e.g., MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); *THE POWER OF HUMAN RIGHTS*, *supra* note 16; John Gerard Ruggie, *What Makes the World Hang Together: Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 855 (1998); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992).

<sup>18</sup> FINNEMORE, *supra* note 17, at 5.

<sup>19</sup> Finnemore & Sikkink, *supra* note 16.

achievement of a “taken-for-granted” quality.<sup>20</sup> Yet, this theory, like transnational legal process, focuses on norm diffusion in states, rather than in localities. It does not explain the process by which international norms interact with local norms and change communities.

Scholars of international norm diffusion have paid little attention to the processes through which it occurs on the ground. What is missing is an analysis of the local—that is, how local communities internalize international norms, and in particular, how these norms interact with local and state norms and shape local institutions. In other words, one must study how non-state norms “affect the way in which an international norm is received . . . on the ground.”<sup>21</sup> It is important to understand how international norms affect local law-making and the relationship between communities and the states in which they reside. Empirical research, including ethnographic case studies, can illuminate local processes and fill the gaps that exist in legal scholarship. It is also useful to consider theories of legal pluralism, which provide valuable insights for the model of legal mediation that I present in Section I.B below.

### **A. Theories of Legal Pluralism**

In an age of globalization, people are affiliated with multiple, often overlapping communities that generate legal norms.<sup>22</sup> How does one analyze the interaction between multiple legal entities? How do local actors negotiate between conflicting normative commitments, including local, state, and international norms? A number of so-called “legal pluralism” theories have attempted to describe this phenomenon based on anthropological and sociolegal studies. These theories do not only posit the coexistence of more than one legal system within a social field (e.g., international, state, and local legal systems).<sup>23</sup> They also attempt to model the relationships between these legal spheres.<sup>24</sup> In reviewing classic and contemporary accounts of legal pluralism, I will extract insights that will help us analyze the local internalization of international norms.

Social theorists have developed models of legal pluralism to describe the existence of concurrent legal orders. Yet until recently, they have mostly failed to recognize the reciprocal and constantly changing relationship between them.

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<sup>20</sup> *Id.*

<sup>21</sup> Berman, *supra* note 14, at 539.

<sup>22</sup> *See id.* at 507.

<sup>23</sup> *See, e.g.,* John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986).

<sup>24</sup> *See, e.g.,* Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 879 (1988).

From the early twentieth century through the 1970s, studies examined colonized societies, focusing on the relationships of dominance and resistance between state and local normative orders. According to Leopold Pospisil, legal systems are superimposed upon one another as hierarchical levels, which can include the state, community, lineage, and family, among other subgroups.<sup>25</sup> A person is simultaneously a member of multiple subgroups and may be subject to competing legal obligations. Pospisil's theory does not allow for the continuous interplay between different legal systems within a society; nor does it permit the intermingling of levels that would result from legal systems borrowing concepts from one another.

Another leading theory of legal pluralism is that of legal scholar and anthropologist Sally Falk Moore. Moore's notable contribution to this literature rejects Pospisil's notion of legal levels, where multiple legal systems form a hierarchy with varying degrees of inclusiveness, with the state holding the monopoly of power. Moore claims that Pospisil focuses on state-made formal legal rules and does not sufficiently address the rule-making and rule-enforcing capacities of informal organizations.<sup>26</sup> Moore's own model of legal pluralism is based not on legal levels but rather on a network of "semi-autonomous social fields," defined by their rule-making capacity and their vulnerability to outside forces.<sup>27</sup> She describes all social locales as semi-autonomous because they are "simultaneously set in a larger social matrix which can, and does, affect and invade [them], sometimes at the invitation of persons inside [them], sometimes at [their] own instance."<sup>28</sup>

In the past two decades since Moore introduced her theory, legal pluralism has experienced a resurgence of interest among scholars studying non-colonized societies, including communities in the United States and Europe, who have challenged the classic view of legal systems as static and non-interacting.<sup>29</sup> Recent scholars recognize "the dialectic, mutually constitutive relation between state law and other normative orders," and the dynamics of power between them; they construct legal identities as fluid, provisional, and contested.<sup>30</sup> According to

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<sup>25</sup> See LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 125 (1971).

<sup>26</sup> See SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* 24, 57 (1978).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 56.

<sup>29</sup> See, e.g., David M. Engel, *Law, Time, and Community*, 21 *LAW & SOC'Y REV.* 605 (1987); Carol Greenhouse, *Nature is to Culture as Praying is to Suing: Legal Pluralism in an American Suburb*, 20 *J. OF LEG. PLURALISM* 17 (1982); Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 *LAW & SOC'Y REV.* 891 (1979). For a review of "classic" and "new" scholarship on legal pluralism, see Merry, *supra* note 24.

<sup>30</sup> Merry, *supra* note 24, at 880.

Gunther Teubner, legal pluralism is no longer “a set of conflicting social norms but . . . a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal.”<sup>31</sup> Teubner focuses on the symbolic systems inscribed in legal orders. He extends Moore’s notion of law as process as he describes the legal system as an autopoietic system of interwoven domains and circular relations continually being modified.<sup>32</sup>

The dynamic process of multiple networks of intersecting and interpenetrating legal orders is described by Boaventura de Sousa Santos as “interlegality.”<sup>33</sup> He analyzes the transnationalization of the indigenous peoples’ movement as creating a cosmopolitan legal terrain “composing different layers, all of them in force together but never in a uniform fashion, all of them in the same moment but always as a momentary convergence of different temporal projections.”<sup>34</sup> Every legal sphere is historically formed and the product of interactions with other legal spheres, challenging the classic jurisprudential view of separate and uniform legal systems.

Continuing this critique of the classic view of legal systems, scholars like Francis Snyder and Sally Engle Merry have introduced analytic frameworks for understanding transnational law-making. Snyder studies the international trade in toys between the European Union and China as a global economic network of legal sites, including the European Union, the World Trade Organization, and multinational corporations. According to Snyder, “global legal pluralism” is being formed in the interaction between EU law, U.S. law, World Trade Organization law, Chinese law, codes of conduct from multinational corporations and trade associations, and international customs conventions.<sup>35</sup> Drawing on Teubner’s work, he defines “global legal pluralism” as a network of interwoven sets of norms.<sup>36</sup> Another scholar, Sally Engle Merry, has recently proposed a “spatial global legal pluralism,” which “incorporates dimensions of power, meaning, and social relationships into a legal pluralist framework along with an analysis of spatial relationships.”<sup>37</sup> This version of legal pluralism conceptualizes

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<sup>31</sup> Gunther Teubner, ‘*Global Bukowina*’: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 14 (1997).

<sup>32</sup> See GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 11 (1993).

<sup>33</sup> Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J. LAW & SOC’Y. 279, 298 (1987).

<sup>34</sup> SANTOS, *supra* note 10, at 457.

<sup>35</sup> Francis Snyder, *Governing Economic Globalization: Global Legal Pluralism and European Union Law*, 5 EUROPEAN L.J. 334 (1999).

<sup>36</sup> *Id.* at 335.

<sup>37</sup> Sally Engle Merry, *International Law and Sociolegal Scholarship: Towards a Spatial Legal Pluralism* 4-5 (Jan. 2007) (unpublished manuscript, on file with author).

the spatial dimensions of laws in order to analyze their transnational movement and the places where they intersect, overlap, and conflict. It is a theoretically rich framework for understanding “the way pockets of legal regimes jump to new regions through transplants, global legal institutions, ratification of human rights treaties, the creation of special tribunals, and myriad other processes.”<sup>38</sup>

Building on rich ethnographies, theories of legal pluralism—from early scholars like Pospisil and Moore to recent ones like Merry, Snyder, Santos, and Teubner—attempt to understand local settings where multiple legal orders interact. Instead of focusing only on those norms with enforcement power, legal pluralists “look to whether members of various shifting and overlapping communities feel themselves bound by articulated norms.”<sup>39</sup> I borrow insights from these theories in developing a model of legal mediation, described in the following section. My model focuses on how legal structures are not only *interacting* within common locales, but are also *shaping* and *being shaped by* one another.

## **B. Legal Mediation**

Based on my study of the Pimicikamak Cree Nation’s experience, I build on theories of legal pluralism to further analyze the exchange between multiple normative communities that occurs on the local level. Local groups like the Cree are taking an active role in integrating state and international norms into their own legal institutions while also adapting their local norms and cultural practices. Legal mediation describes this process of negotiation between multiple legal spheres. Local actors play an important role in legal mediation by shaping how international norms get internalized within their communities.

International law is central to the process of legal mediation. Groups appeal to international law as a means of exerting pressure on states, which may be discriminating against them.<sup>40</sup> In so doing, they are familiarizing themselves with international norms and asserting their rights, such as indigenous peoples’ right to self-determination. As they assert their political autonomy, local groups are adopting new laws that borrow from international and state law. Most groups

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<sup>38</sup> *Id.* at 24.

<sup>39</sup> Berman, *supra* note 14, at 539.

<sup>40</sup> *See generally*, KECK & SIKKINK, *supra* note 6.

are not aspiring for statehood when seeking self-determination, but rather the survival of their cultural communities.<sup>41</sup>

The process of legal mediation is an especially apt model for indigenous communities because of their status as self-governing, culturally cohesive peoples prior to their subjection to processes of colonization in their own territories. Indigenous groups are seeking recognition of their customs and laws while also lobbying for national and international policy reform. Contact with international institutions and participation in transnational advocacy networks may lead communities to adapt their local norms accordingly. In this way, the flow of ideas moves in both directions, with national and international norms being influenced by local norms. There is thus a “feedback loop,” so that “local actors deploying or resisting national or international norms may well subvert or transform them, and the resulting transformation is sure to seep back ‘up’ so that, over time, the ‘international’ norm is transformed as well.”<sup>42</sup> In the subsections below, I describe a number of instances where state and international law and institutions are recognizing and incorporating customary norms and indigenous law. I then explain how indigenous peoples participating in the international human rights community are negotiating the meaning and application of customary laws and practices as they integrate international and domestic norms.

### **1. Adaptation of State and International Law**

As indigenous communities lobby state and international institutions for policy reform and begin to adapt their own norms accordingly, there is a feedback loop and a sharing of concepts among legal orders. The interaction of multiple normative communities is leading to adaptations in state and international norms as well. Given the asymmetry of power between local norms and state and international norms, the sharing of concepts is not completely reciprocal and local norms are certainly influenced to a greater degree. However, there are some signs that international and national institutions are beginning to recognize the validity of local norms, particularly indigenous customs and laws. There are also a number of examples of institutions incorporating indigenous norms.

Many international bodies, including the United Nations, the World Intellectual Property Organization, and the World Bank, have given more attention to indigenous issues and even recognized indigenous customs in their

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<sup>41</sup> See Maivan Clech Lam, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT’L L.J. 603 (1992); Sally Engle Merry, *Anthropology and International Law*, 35 ANN. REV. ANTHROPOLOGY 295 (2006).

<sup>42</sup> Berman, *supra* note 14, at 551.

policies. Over the last few decades, the United Nations (U.N.) has drafted an international human rights instrument on the rights of indigenous peoples and created international fora for them to voice their concerns. The U.N. Working Group on Indigenous Populations served as the primary arena for indigenous peoples during the 1980s and 1990s. In 2000, the U.N. created the Permanent Forum on Indigenous Issues as an advisory body that reports directly to its Economic and Social Council. The Permanent Forum, which holds an annual two-week session in New York City, is jointly composed of state representatives and indigenous peoples' representatives (eight government appointees and eight indigenous peoples). This is the first time that state and non-state representatives have been accorded parity in a U.N. permanent body.<sup>43</sup> Following the creation of the Permanent Forum, the United Nations appointed the first Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People.<sup>44</sup> The most recent development has been the adoption of the U.N. Draft Declaration on the Rights of Indigenous Peoples by the U.N. Human Rights Council.<sup>45</sup>

Other international organizations have similarly supported the protection of indigenous rights. The World Intellectual Property Organization (WIPO), an agency of the United Nations, has sponsored activities in support of the traditional knowledge of native peoples. After assembling its first annual Roundtable on Indigenous Intellectual Property in 1998, WIPO undertook fact-finding missions to native communities worldwide to study current approaches to the protection of intellectual property rights of holders of indigenous knowledge, innovations, and culture. In 2000, it established an Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge, and Expression of Folklore. One of the aims of this body is to encourage the development of national intellectual property legislation to protect indigenous knowledge and folklore. In this way, international institutions like WIPO are promoting the recognition of indigenous norms and customs by state legal systems.

Finally, development aid agencies like the World Bank have integrated indigenous norms into their investment projects. In 1991, the Bank issued operational directive (OD) 4.20, which was designed to “avoid or mitigate potentially adverse effects on indigenous people caused by Bank-assisted

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<sup>43</sup> Carey & Wiessner, *supra* note 2.

<sup>44</sup> In 2001, the U.N. Commission on Human Rights appointed Rudolfo Stavenhagen from Mexico as the first Special Rapporteur. See U.N. Doc. E/CN.4/Res/2001/57, available at [http://ap.ohchr.org/documents/sdpage\\_e.aspx?m=73&t=11](http://ap.ohchr.org/documents/sdpage_e.aspx?m=73&t=11).

<sup>45</sup> See *supra* note 3.

activities.”<sup>46</sup> OD 4.20’s strategy statement promotes the adoption of customary law and the informed participation of native peoples in projects. It supports the “incorporation of indigenous knowledge into project approaches” and the integration of “local patterns of social organization, religious beliefs, and resource use” in the Bank’s Indigenous Peoples Development Plans.<sup>47</sup> In 2005, the Bank approved a revised operational policy and bank procedure on indigenous peoples (OP/BP 4.10), which includes similar provisions. Other development banks have approved comparable guidelines to address indigenous issues and protect customary norms when designing development projects.<sup>48</sup> The development banks’ operational policies demonstrate the power of local communities to influence international law, which then shapes the laws of borrower countries.<sup>49</sup>

In addition to international organizations, there are state courts and legislative bodies that have not only recognized but have also incorporated indigenous norms into domestic policy. One of the most notable developments is the Canadian Supreme Court’s acceptance of oral history as an admissible form of legal evidence to prove aboriginal land title. In the 1997 case of *Delgamuukw v. British Columbia*, the Court expanded the rules of aboriginal title to land to include evidence of the Gitksan and Wet’suwet’en peoples’ spiritual connection and attachment to their territory, including oral history.<sup>50</sup> It held:

A court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs, and traditions engaged in. The courts must not undervalue the evidence

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<sup>46</sup> World Bank, The World Bank Operational Manual, Operational Directive 4.20 (Sept. 1991) (Indigenous Peoples).

<sup>47</sup> *Id.* at paras. 8, 14.

<sup>48</sup> See Inter-American Development Bank, Strategy for Indigenous Development (2006), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=691275>; Asian Development Bank, Policy on Indigenous Peoples (1998), available at [http://www.adb.org/Documents/Policies/Indigenous\\_Peoples/ADB-1998-Policy-on-IP.pdf](http://www.adb.org/Documents/Policies/Indigenous_Peoples/ADB-1998-Policy-on-IP.pdf).

<sup>49</sup> See generally, Galit A. Sarfaty, Note, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L.J. 1791 (2005).

<sup>50</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010. This case was brought in the early 1980s by the Gitksan and Wet’suwet’en peoples, who sought to pressure the government of British Columbia to acknowledge aboriginal title and enter into land claims negotiations. The most significant evidence of a spiritual connection between the two groups and their territory was a feast hall where the Gitksan and Wet’suwet’en peoples orally pass down stories and songs that tie them to their land. The Supreme Court ruled against the trial judge’s refusal to recognize the indigenous peoples’ oral history as permissible evidence and ordered that a new trial be convened that gave weight to their oral histories as evidence.

presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case. . . . Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with.<sup>51</sup>

This decision recognizes that the traditional laws of evidence in Canadian courts unfairly discriminated against indigenous peoples and, therefore, should be expanded in future trials to include oral testimony.

In Norway, the native Sami people, who have presided over the Sami Council since 1956, have influenced court procedures and federal law through their political participation. As a result of the Sami's effective lobbying, Norwegian courts are now obliged to use the Sami language in prosecution and when taking evidence.<sup>52</sup> Moreover, Sami may be used as a language of administration in the six municipalities with the largest concentration of Sami people.<sup>53</sup>

Besides revising court procedures to accommodate indigenous norms, many countries are also passing legislation that explicitly recognizes and gives rights to native peoples and incorporates their customary law. Under pressure from civil society movements, several Latin American countries, such as Colombia and Mexico, have recently voted to officially recognize indigenous peoples within their constitutions.<sup>54</sup> The new constitution in Bolivia, adopted in 1994, treats indigenous communities as legal entities and gives them the power to exercise administrative functions and alternative dispute resolution procedures in accordance with their customs.<sup>55</sup> Traditional indigenous councils in Colombia are

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<sup>51</sup> *Id.* at paras. 80, 87.

<sup>52</sup> MANUELA TOMEI & LEE SWEPSTON, *INDIGENOUS AND TRIBAL PEOPLES: A GUIDE TO ILO CONVENTION NO. 169* (1996), Box No. 8

<sup>53</sup> *Id.*

<sup>54</sup> Colombia's new constitution, adopted in 1991, recognizes and protects the ethnic and cultural diversity of the Colombian nation. *See* Constitución Política de la República de Colombia, *as amended*, Título I, Artículo 7, 27 de Julio de 2005 (Colom.). A 1991 amendment to the Mexican constitution states that Mexico has a multicultural composition based originally on its indigenous peoples. *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Título Primero, Capítulo 1, Artículo 2, Diario Oficial de la Federación [D.O.], 27 de Septiembre de 2004 (Mex.).

<sup>55</sup> *See* Constitución Política de la República de Bolivia, *as amended*, Título Tercero, Artículo 171, 6 de Julio de 2005 (Bol.).

given similar power under the country's constitution. They have full judicial authority in accordance with their customary laws, as long as their practices are not contrary to national legislation.<sup>56</sup>

European countries have also recognized indigenous rights and, in one case, borrowed from the local norms of indigenous peoples when drafting national laws. As an expression of united European support for indigenous concerns, the European Parliament in 1994 adopted a resolution on "Measures Required Internationally to Provide Effective Protection for Indigenous Peoples."<sup>57</sup> The resolution affirms the right of native peoples "to determine their own destiny by choosing their institutions, their political status, and that of their territory."<sup>58</sup> Some European countries have also issued policies on indigenous rights to guide aid to developing countries.<sup>59</sup> For instance, Switzerland's policy requires consultation with indigenous organizations in the planning, implementation, and evaluation of projects and the design of corrective measures against potential harmful impacts.<sup>60</sup> The policy commits Switzerland to engage in political dialogue with partner countries towards strengthening indigenous peoples' political participation and protecting their rights within local legal systems.<sup>61</sup> Denmark has gone so far as to draw upon the customary law of the Greenlandic Inuit when writing its Greenland Criminal Code. The law measures sanctions not by the gravity of the crime but by the individual offender's personal background.<sup>62</sup> It is based on Inuit legal tradition, which aims to eliminate conflict and restore peace rather than to seek punishment or justice.<sup>63</sup> The adoption of these policies suggests the growing influence of the indigenous rights movement

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<sup>56</sup> See Constitución Política de la República de Colombia, *as amended*, Capítulo V, Artículo 246, 27 de Julio de 2005 (Colom.).

<sup>57</sup> Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, EUR. PARL. DOC. (PV 58) 2 (1994).

<sup>58</sup> *Id.* at 3, para. 2.

<sup>59</sup> See SWISS AGENCY FOR DEVELOPMENT AND COOPERATION, SWISS ACTION FOR INDIGENOUS PEOPLES 32 (1998) (referencing Netherlands's Policy on Indigenous Peoples, 1993; the Danish Strategy for Support to Indigenous Peoples, 1994; Guidance on Ethnicity, Ethnic Minorities and Indigenous Peoples, United Kingdom, 1995; Policy for Indigenous Peoples in Latin America, Germany, 1996; and Strategy for Cooperation with Indigenous Peoples, Spain, 1997).

<sup>60</sup> *Id.* at 18.

<sup>61</sup> *Id.* at 21. In accordance with this policy, Switzerland supported the creation of human rights defense centers in Bolivia, which pay special attention to the rights of indigenous peoples in the administration of justice. *Id.*

<sup>62</sup> See VERNER GOLDSCHMIDT, *Introduction to THE GREENLAND CRIMINAL CODE* 3 (Leonard Kaplan, Michael Merrit & Norval Morris eds., Fred B. Rothman & Co.) (1970).

<sup>63</sup> Elaine Schechter, *The Greenland Criminal Code and the Limits to Legal Pluralism*, 7 ÉTUDES/INUIT/STUDIES 79, 79 (1983) (*quoted in* ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER, HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, THIRD REPORT 23 (1995)).

in lobbying for recognition and even incorporation of customary norms and cultural practices.

## **2. Indigenous Peoples and their Negotiation of Local Law**

In the process of lobbying for changes in domestic and international policy, indigenous communities are adopting normative commitments from other legal orders (i.e., state and international law) and reevaluating their own conceptions of law and justice. Political mobilization by indigenous groups contains at least three interrelated components: (i) an appeal to international human rights norms to justify the protection of their rights; (ii) an attempt to interpret state law and enforce treaty obligations in a light favorable to the maintenance of their autonomy; and (iii) an effort to assert the legitimacy of local indigenous law and cultural norms in both domestic and international legal systems. While advocating for the recognition of their customary practices, they are negotiating the meaning and application of their local laws. As they frame and re-frame their claims for national and international audiences, groups find themselves looking within and engaging in an intra-group dialogue over the meaning of their cultural norms.

As a collectivity, rather than simply a group of individuals, an indigenous group acts as an insular interpretive community, or in the terminology of Robert Cover, a *nomos*—a normative universe held together by interpretive commitments.<sup>64</sup> Such communities “establish their own meanings for constitutional principles through their constant struggle to define and maintain the independence and authority of their *nomos*.”<sup>65</sup> Indigenous peoples are engaged in constant campaigns for their political, cultural, and economic sovereignty. They are fighting for decision-making authority over such issues as the structure of their government, their language of administration, and their strategy for economic development.

The “jurisgenerative” process, whereby legal meaning is created within a community, is dialectical between those inside and outside the community and among community members themselves.<sup>66</sup> Cover notes that freedom of association within an interpretive community “implies a degree of norm-generating autonomy,” which he defines as “a liberty and capacity to create and

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<sup>64</sup> Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>65</sup> *Id.* at 25.

<sup>66</sup> *Id.* at 15.

interpret law—minimally, to interpret the terms of the association’s own being.”<sup>67</sup> As indigenous groups translate the language of rights into their own local legal conceptions, non-indigenous (state and international) norms become what Clifford Geertz describes as “local knowledge” and customary norms are reinterpreted accordingly.<sup>68</sup> This has been the experience of the Pimicikamak Cree Nation when redesigning its local government and laws pursuant to its right to self-determination. Building on their recent political mobilization in the international human rights community, the Cree are engaging in legal mediation among local, state, and international norms.

## II. THE PIMICIKAMAK CREE NATION

Before engaging in legal mediation, local communities like indigenous peoples have often been exposed to international norms through their global campaigns for human rights. This Part offers an ethnographic narrative of the diffusion of international norms in one indigenous community, the Pimicikamak Cree Nation of Cross Lake, Manitoba. Since suffering from the destructive effects of a state-funded hydroelectric dam constructed in the 1970s, the Cree have demanded compensation from the Canadian government, as promised under the Northern Flood Agreement (NFA).<sup>69</sup> Over the past two decades, the socio-economic situation of the Cree has been dismal—by 1998, they were suffering from about 85% unemployment,<sup>70</sup> high alcoholism, one of the highest crime rates in Manitoba, and a suicide rate ten times the general rate for native people in Canada and 23 times the national average.<sup>71</sup> Although the Cree were enduring poverty conditions and mental health problems, they nevertheless remained hopeful that change was possible.

Rather than waiting indeterminately for external assistance, the Cree decided in 1998 to pursue an international campaign against the Canadian government as a means of rebuilding their community. Their activism was motivated by “an absence of validation, a lack of willingness on the part of governments to seriously acknowledge social suffering and a collective

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<sup>67</sup> *Id.* at 32.

<sup>68</sup> Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167-235 (1983).

<sup>69</sup> See *infra* Part II.A.1.

<sup>70</sup> AITCHISON ET AL., REPORT OF THE INTERCHURCH INQUIRY INTO NORTHERN HYDRO DEVELOPMENT (2001).

<sup>71</sup> Grand Council of the Crees, *Reciting the Symptoms, Ignoring the Cause: The Systematic Dispossession of Aboriginal Peoples in Canada, Submission to the U.N. Committee on Economic, Social and Cultural Rights* (Nov. 16, 1998), <http://www.gcc.ca/archive/article.php?id=67> (citing data communicated verbally by anthropologist Ronald Niezen).

experience of injustice.’’<sup>72</sup> In cooperation with other indigenous and environmental organizations, the Cree invoked international human rights discourse as they asserted their right to self-determination. In this case study, I describe the historical circumstances that form the background of the Cree’s human rights campaign. I then describe the Cree’s appeals to international law and their participation in the transnational advocacy network for indigenous rights. Finally, I discuss the international right to self-determination that serves as the basis for their assertion of political autonomy. In Part III, I will analyze their unique model of self-government that reconciles local, state, and international law.

## **A. Historical Background**

The Pimicikamak Cree’s reservation is located 520 air kilometers north of Winnipeg along the shore of the Nelson River, where it enters Cross Lake. The total registered population is 6,625 (including 4,701 on-reserve),<sup>73</sup> with more than 50 percent of the population under the age of 20.<sup>74</sup> Language is the basis of Cree culture and is spoken by the majority of residents in everyday conversation. Not only is Cree instruction incorporated into the on-reserve schools, but public meetings, political debates, local entertainment, and radio broadcasts are also conducted in Cree.<sup>75</sup>

Until the 1970s, Cree residents subsisted off the land in relative isolation from the rest of Manitoba. Leading a self-sufficient, nomadic way of life, they developed a social structure that was highly influenced by their natural resource-based economy. Their basic governing process was based on consultation and consensus, which was the customary decision-making method among Cree hunters working in trapline areas.<sup>76</sup> The Cree’s relative isolation gradually began

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<sup>72</sup> RONALD NIEZEN, *THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY* 66-67 (2003).

<sup>73</sup> Indian and Northern Affairs Canada, *First Nations Community Profiles* (2007), available at [http://pse2-esd2.ainc-inac.gc.ca/FNProfiles/FNProfiles\\_home.htm](http://pse2-esd2.ainc-inac.gc.ca/FNProfiles/FNProfiles_home.htm). On-reserve means living on the reservation.

<sup>74</sup> Jason Miller, Statement to the Interchurch Inquiry on Northern Hydro Development (June 22, 1999) (on file with the Harvard International Law Journal).

<sup>75</sup> Operating since 1979, the local television station broadcasts talk shows and public service announcements in the Cree language as well.

<sup>76</sup> Hunters had to leave areas fallow in order to allow the animals to replenish themselves. As they moved their families from one trapline to another, the hunters needed to coordinate their activities with other families. Cooperation and consultation within the village were necessary for survival. See RONALD NIEZEN, *DEFENDING THE LAND* 16-17, 62 (1998).

to decline, as increasing accessibility to the outside through winter roads led to greater contact with non-Cree society.

In the 1970s, an unexpected event suddenly altered the Cree's lifestyle and transformed their community: the construction of the Churchill-Nelson River hydroelectric dam project. The three parties responsible for the dam were the Canadian government, the Manitoba government, and Manitoba Hydro, an electric utility corporation headquartered in Winnipeg. Construction on the project commenced without the completion of environmental studies and, most notably, without prior consultation with or approval from the five affected native communities.<sup>77</sup> The Canadian government later acknowledged these failures in the 1992 Report of the Auditor General of Canada and the 1996 Final Report of the Royal Commission on Aboriginal Peoples.<sup>78</sup> Due to the lack of an environmental impact review, the project unexpectedly flooded 20 percent of the five communities' reserve land-base, causing permanent disruptions to the ecosystem and their livelihoods.<sup>79</sup>

The flooding of Cross Lake in 1974 and the completion of the dam a year later caused massive ecological destruction that severely altered the subsistence economy and culture of the Pimicikamak Cree Nation.<sup>80</sup> The erosion of the

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<sup>77</sup> The five affected native communities were the Cree Nations of Cross Lake, Split Lake, Norway House, York Landing, and Nelson House.

<sup>78</sup> The 1992 Report states, "We found no evidence that a comprehensive environmental impact assessment had ever been performed. We believe that such an assessment is essential for NFA implementation. . . ." OFFICE OF THE AUDITOR GENERAL OF CANADA, REPORT OF THE AUDITOR GENERAL OF CANADA § 15.118, 377 (1992), available at <http://www.oag-bvg.ca/domino/reports.nsf/html/ch9215e.html#0.2.L39QK2.WYGVQP1>. The 1996 Final Report states, "Although the [Churchill River Diversion] project directly affected the lands and livelihood of five treaty communities, . . . they were not consulted, nor did they give their approval for the undertaking." 2 ROYAL COMM'N ON ABORIGINAL PEOPLES, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 516 (1996).

<sup>79</sup> Patricia M. Larcombe Cobb, *The Northern Flood Agreement: Implementation of Land, Resource, and Environmental Regimes in a Treaty Area* (A Report Prepared for the Royal Commission on Aboriginal Peoples Land, Resource and Environmental Regimes Project, Oct. 1995), at Section 3.5.2. The flooding was unexpected given that "the Premier repeatedly stated that the project would not result in any reserve flooding." *Id.* The federal government misled the Cree regarding the expected effects of the project. The "Lime Green Brochure" (information bulletin) distributed by the Canadian government in 1975 stated that there were no unexpected long term effects and that it was "hoped that conditions [would] be such that it [would] be unnecessary to pay compensation to anyone" (quoted in Report of the Interchurch Inquiry into Northern Hydro Development, *supra* note 70, at 11).

<sup>80</sup> As a result of these physical and biological changes, there has been "a systemic degradation of the local economy." *Id.* at Section 2.5.3. For a detailed list of the adverse effects of the project, see the 1992 *Report of the Auditor General of Canada* (372).

shorelines, unnatural fluctuations in water levels, and reversal of seasonal water flows rendered numerous traditional Cree hunting routes fatally treacherous. The sedimentation in the water caused the release of methyl-mercury and the contamination of fish, an integral part of the Cree subsistence diet.<sup>81</sup> As a result of elevated mercury levels, as well as the destruction of spawning grounds and changes in water flows, commercial fishing was no longer a viable industry.<sup>82</sup> Without the option of continuing to live off the land, the majority of Cree became welfare recipients and had to learn new skills to compete in the growing wage economy.<sup>83</sup> By undermining the traditional hunting, trapping, and fishing way of life, the hydroelectric project attacked Cree cultural values as well as the physical and psychological health of the community.

### **1. The Northern Flood Agreement (NFA) in the Context of Canadian-Indigenous Policies**

In the wake of the Churchill-Nelson River hydroelectric project, five Cree First Nations, including the Pimicikamak Cree Nation of Cross Lake, formed the Northern Flood Committee in 1974 and negotiated the Northern Flood Agreement (NFA) with Manitoba Hydro and the governments of Canada and Manitoba (the three “Crown parties”).<sup>84</sup> The comprehensive NFA, a legally binding document, was signed on December 16, 1977.<sup>85</sup> It promises four acres of replacement land for each acre flooded, protection of wildlife resources and harvesting activities, compensation for injury or loss of life on hazardous waterways, funding for social and economic development, and remedial measures to secure eroding shorelines, remove debris, and restore burial sites.<sup>86</sup> It also guarantees the protection of all rights described in Treaty Number Five of 1875.<sup>87</sup> Finally, the NFA promises to support the ongoing viability of the communities “for the lifetime of the project” (Art. 25) and to ensure “the eradication of mass unemployment and mass poverty”

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<sup>81</sup> Luke Hertlein, *Lake Winnipeg Regulation Churchill-Nelson River Diversion Project in the Cree of Northern Manitoba Canada* 8 (World Comm’n on Dams, Thematic Review 1.2: Dams Indigenous People and Vulnerable Minorities, 1999).

<sup>82</sup> *Id.*

<sup>83</sup> Ronald Niezen, *Treaty Violations and the Hydro-Payment Rebellion of Cross Lake, Manitoba*, 23 *CULTURAL SURVIVAL Q.* 18, 19 (1999).

<sup>84</sup> Cobb, *supra* note 79, at Section 3.1.

<sup>85</sup> *Id.* at Section 3.9.

<sup>86</sup> *Id.* at Sections 3.9, 4.2.1, 4.2.2, 5.4, and 5.5.3.

<sup>87</sup> Treaty 5 between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians, Can.-Saulteaux and Swampy Cree Tribes of Indians, 1875, *available at* [http://www.ainc-inac.gc.ca/pr/trts/trty5\\_e.html](http://www.ainc-inac.gc.ca/pr/trts/trty5_e.html). In exchange for giving up their rights to huge tracts of land in northern Manitoba, the treaty provides reserve lands of not more than 160 acres per family of five, an annual payment of \$5 for each band member, and legal protection of the tribes’ water, fishing, trapping, and hunting rights.

(Schedule “E”). The NFA does not represent a one-time legal settlement, but a long-term socio-economic relationship of trust between the indigenous communities and the Crown parties. In order to understand where the NFA fits within the larger context of Canada’s treatment of its native people, it is important to review the Canadian policies leading up to and following its adoption.

The NFA is part of a history of Canadian-indigenous relations that began with the Indian Act of 1876. Administered by the federal Department of Indian Affairs, the Indian Act gives the Canadian government far-reaching control over the affairs of native people—e.g., tribal government structure, reservation lands and resources, Indian status, taxation, health, and education. It represents a fiduciary obligation on the Canadian government to protect Indian lands from unauthorized use or takings. Under the Indian Act, a Chief and Council replaced traditional tribal governments as agents of the Canadian government. In its provisions for the Chief and Council tribal government system, the act establishes regulations for elections and political administration, giving tribes limited power under federal supervision. Its basic agenda of assimilation and its attitude of paternalism have been partially mitigated with revisions in 1951 that reversed the ban on the potlatch and sun dance traditional ceremonies and ended the prohibition against native people’s entry into public bars. A 1995 amendment to the Indian Act removed a gender discriminatory regulation that did not recognize native women who married non-native men as “status Indians” deserving of federal benefits.<sup>88</sup>

In 1982, the government drafted the Canadian Constitution, which recognizes and affirms existing aboriginal and treaty rights.<sup>89</sup> It invited indigenous leaders to preparatory talks regarding the Constitution and consulted with them on other policy reports, including the Report of the Special Committee on Indian Self-Government (the Penner Report) of 1983. The Penner Report calls “for a renewed federal-Indian relationship . . . [which] recognize[s] that Indian First Nations constitute a distinct order of government in Canada.”<sup>90</sup> It outlines a process of devolving more management responsibility to native communities and

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<sup>88</sup> Status Indians are those who are registered with the federal government as Indians according to the terms of the Indian Act. Before the 1995 amendment, the Indian Act only removed Indian status from Indian women who married non-Indians and their children. In the reverse situation, when Indian men married non-Indian women, the Indian men and their children could still hold Indian status.

<sup>89</sup> Constitution Act, 1982, 35, Part I, ch. 11 (U.K.), as reprinted in R.S.C., No. 44 (Appendix 1985).

<sup>90</sup> House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* 32 (1983).

full legislative power to Indian governments in such areas as social and economic development, land and resource use, and law enforcement.

Over the last two decades, Canadian policy statements have supported the right of indigenous peoples to political autonomy. In August 1995, the government approved a policy for negotiating self-government agreements individually adapted for different communities.<sup>91</sup> Its recognition that no single form of government works for all communities is a marked departure from the Indian Act approach. A number of communities, including the Pimicikamak Cree Nation, have taken advantage of this new policy to design a government that draws upon customary law. I will outline the details of this government in Part III.

## **2. Failure to Implement the NFA**

In the decades since the the NFA's ratification, the Crown parties have failed to implement its core provisions.<sup>92</sup> According to the Report of the Interchurch Inquiry into Northern Hydro Development, "much of the history of NFA implementation is characterized largely by avoidance of responsibility on the part of the Crown parties."<sup>93</sup> A research report prepared for the Royal Commission on Aboriginal Peoples concludes:

The three parties did not intend, and have never intended to cooperate energetically in measures designed and determined to be effective in confronting the adverse impacts of the project. They have instead used every legal device to limit their individual liabilities under the Agreement. The sixteen year history of the NFA is largely a record of the deployment of those devices . . . . To the communities [the history of the NFA] is a manifestation of bad faith by both levels of government. It has done little to address the impacts which continue to confront the communities.<sup>94</sup>

By 1999, the Cree had received negligible compensation in the 23 years since signing the NFA.<sup>95</sup> For example, the federal government had granted only 60 of

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<sup>91</sup> Government of Canada, Inherent Right of Self-Government Policy (1995)

<sup>92</sup> The 1996 Report states, "[The NFA's] history has been marked by little or no action in implementation of NFA obligations and a long, drawn out (and continuing) process of arbitration to force governments to implement their obligations." 2 ROYAL COMM'N ON ABORIGINAL PEOPLES, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 517 (1996).

<sup>93</sup> AITCHINSON ET AL., *supra* note 70, at 23.

<sup>94</sup> Cobb, *supra* note 79, at Section 7.1.

<sup>95</sup> In March 1999, Warren Allmand, the federal Minister of Indian Affairs who negotiated the NFA in 1977, stated to a parliamentary committee: "Last year, much to my dismay, I discovered that the

the 14,000 hectares of promised replacement lands and Manitoba Hydro had not created the jobs that it had promised under the NFA.<sup>96</sup>

Beginning in 1992, the Crown parties offered to replace the NFA with one-time cash buy-out settlements, called Comprehensive Implementation Agreements (CIAs), with the five affected native communities.<sup>97</sup> Rather than implement the provisions of the earlier agreement, the CIAs would have terminated many of the Crown parties' NFA treaty and fiduciary obligations and prevented signatory tribes from pursuing any future lawsuits by limiting the parties' ongoing liabilities under the NFA (with the exception of injuries, deaths, and unforeseen impacts).<sup>98</sup> Given that the Canadian government did not conduct a comprehensive damage assessment, there was no assurance that the lump sum payments would fairly compensate for long-term NFA implementation costs. The communities were forced into a seemingly lose-lose situation—sign the CIA and accept the extinguishment of treaty rights or continue to live in severe poverty, unsure of whether the NFA would ever be implemented.

Amid heated intra-tribal disputes, all the signatory indigenous nations accepted the CIAs except the Pimicikamak Cree of Cross Lake.<sup>99</sup> As the largest and poorest of the five affected Cree communities, the Pimicikamak Cree Nation

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great majority of the Northern Flood Agreement was never implemented. After 21 years, virtually nothing had been done.” Allmand also suspected that at some point, governments “came to the conclusion that they didn’t like the Northern Flood Agreement, that maybe it had too many obligations, it was too rich and they decided they would try to get something better in its place— [the Comprehensive Implementation Agreements].” Standing Committee on Aboriginal Affairs and Northern Development, House of Commons (Mar. 9, 1999) (statement of Warren Allmand, former federal Minister of Indian Affairs), *available at* <http://cmte.parl.gc.ca/Content/HOC/committee/361/aand/evidence/ev1039313/aandev52-e.htm>.

<sup>96</sup> DEP’T OF INDIAN AFFAIRS AND N. DEV., REPORT OF THE AUDITOR GENERAL OF CANADA, art. 15. 139 (1992), <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/ch9215e.html>; AITCHINSON ET AL., *supra* note 70, at 18.

<sup>97</sup> The United States similarly tried to compensate American Indian tribes with monetary payments in the 1946 Indian Claims Commission Act, 25 U.S.C. §§ 70-70w (1976) (repealed 1978). This policy was intended to overcome procedural and financial obstacles in the way of Indian tribes seeking restitution for grievances against the United States. In repaying tribes for historical abuses, the Indian Claims Commission also attempted to extinguish long-standing Indian rights.

<sup>98</sup> There were earlier attempts, beginning in 1985, to extinguish the NFA by offering cash settlements, but they were rejected. See NIEZEN, *supra* note 72, at 68.

<sup>99</sup> However, the federally-administered process by which the agreements were ratified casts serious doubt on the credibility and legitimacy of the settlement. In Norway House, for instance, although an initial referendum on the CIA failed, the government administered a repeat vote only two months later. It relaxed the criteria for approval and promised monetary payments to each community member who voted for the settlement deal, which was finally approved. See AITCHINSON ET AL., *supra* note 70, at 66.

refused to abandon claims to the NFA obligations that it had awaited for over twenty years. Many community members viewed the CIA as a “sell-out” with no mechanism for reaching the lasting self-sufficiency promised under the NFA.<sup>100</sup> The Pimicikamak Cree’s decision was influenced by the factionalization of communities like the Norway House Cree Nation, which ultimately ratified the CIA in 1997. A prominent minority of dissidents in Norway House questioned the legitimacy of the federally-administered process, which was based on a local referendum where the Canadian government promised to pay about \$1,000 to each community member who voted for the settlement deal.<sup>101</sup> A few years after Norway House signed the CIA, former Chief Allan Ross attributed “personal greed” as the reason why residents voted for the agreement.<sup>102</sup> He admitted that he didn’t see much benefit in signing the agreement for Norway House because many of their rights under the NFA have been now extinguished and they no longer have the option of appealing to the Canadian government.<sup>103</sup>

Since their decision to reject the CIA in late 1997, the Pimicikamak Cree intensified their campaign for NFA implementation and extended it internationally. They promised to “take all legitimate actions, consistent with [their] commitment to non-violence and [their] treaties of peace with Canada, to defend [their] human rights.”<sup>104</sup> The devastating social, environmental, and economic damages deriving from the hydroelectric project and the non-implementation of the NFA inspired a wave of political and cultural awareness within the community. Political mobilization prompted many residents to advocate for a return to their customary practices. According to Chief John Miswagon, the Cree decided to base their new government on traditions, which “are integral to our identity as a people and our relationship to the land.”<sup>105</sup> Their recent self-government initiative and the preservation of their cultural norms

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<sup>100</sup> Interview with Gerald Frogg, Resident of the Pimicikamak Cree Nation, in Cross Lake, Manitoba (July 25, 1999).

<sup>101</sup> See AITCHINSON ET AL., *supra* note 70, at 66. There were also allegations of “arbitrary changes to locations and hours of polling stations, intimidation of voters, insufficient and inaccurate communication about the difference between the NFA and the MIA [Master Implementation Agreement, which is another name for the CIA], . . . withholding the per capita payments to MIA opponents, and arrests of Band members legitimately seeking to communicate their opinions.” *Id.*

<sup>102</sup> Former Norway House Cree Chief Allan Ross, Statement to the Interchurch Inquiry into Northern Hydro Development, Band Hall, Cross Lake (June 21, 1999) (on file with Harvard International Law Journal).

<sup>103</sup> *Id.*

<sup>104</sup> Chief Roland Robinson, *Broken Promises Litter Northern Hydro Treaty*, WINNIPEG FREE PRESS, July 14, 1998, at A11.

<sup>105</sup> A Government of Our Own, Speech by Chief John Miswagon to the Fronteir Center for Public Policy (April 21, 2005), available at [http://www.fcpp.org/main/publication\\_detail.php?PubID=1043](http://www.fcpp.org/main/publication_detail.php?PubID=1043)

indicate that they have not given up their fight for social justice. Twenty-three years after the signing of the NFA, the Cree have united under a new rallying cry: “Enough is enough!”<sup>106</sup>

## **B. Transnational Political Mobilization**

Our voice will be heard in homes, in schools, in churches, in courts, in the legislature, in Parliament, in export markets, in bond-rating agencies, in international financial circles, in human rights forums, in places you have not yet dreamed of. . . . [O]ur voice will not be silenced. It is high time that public and international attention should focus on the behavior of federal and provincial governments towards us over the last three decades. And yes, we hope that those whose causes include human rights, aboriginal rights, the environment, ethical investment, religion, and international law will join us.

-- Former Pimicikamak Cree Chief Roland  
Robinson<sup>107</sup>

Following their rejection of the CIA in October 1997, the Cree felt that it was time to take action against the Canadian government’s failure to implement the NFA. During this period, there was “a confused reawakening in which anger and sorrow over years of unatoned grievance mingled uncomfortably with a sense of empowerment.”<sup>108</sup> For the first time, the Cree invoked their “inherent jurisdiction” (as opposed to the jurisdiction provided in the Indian Act) to elect a new Chief, who reinvigorated their battle for NFA implementation and their right to self-government.<sup>109</sup> Inherent jurisdiction refers to the power of a people to govern itself as it formerly did, based upon its traditions, customs, and inherent rights as a nation. This form of government stands in contrast to a system of laws deriving from treaties or a delegation of authority by the Canadian government.

Feeling betrayed by the Crown parties’ attempts to buy out their NFA promises, the Cree organized a political campaign focused on appeals to international human rights law, particularly their right to self-determination. They

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<sup>106</sup> Former Cross Lake Cree Chief Roland Robinson, Statement to the Interchurch Inquiry into Northern Hydro Development, Band Hall, Cross Lake (June 25, 1999).

<sup>107</sup> Robinson, *supra* note 104.

<sup>108</sup> Niezen, *supra* note 83, at 21.

<sup>109</sup> See NIEZEN, *supra* note 72, at 170-71 (“The exercise of inherent legal authority is . . . not only an assertion of self-determination but also part of a process of reconstituting sovereignty, of indigenous nation building.”).

adopted a strategy of public visibility by collaborating with national and international human rights organizations and using the media to broadcast their grievances. They called this tactic: a “politics of embarrassment.”<sup>110</sup> In a working paper entitled *A New Relationship*,<sup>111</sup> the Cree proclaim that “for [their] purposes, the court of public opinion tends to work faster, cheaper, and better. Expressed in Cree terms, [the Pimicikamak Cree’s] strategy is to rely upon the Law of Consequences, . . . [in which] visibility is seen as a more effective approach to accountability than alternatives such as arbitration or court actions.”<sup>112</sup>

While asserting the right to self-determination of peoples under international law, the Cree have campaigned internationally to protest injustices by the Canadian government and the state-sponsored Manitoba Hydro corporation.<sup>113</sup> They have spoken to church groups and colleges throughout Winnipeg to inform Manitoba Hydro customers of the social costs of their electric power.<sup>114</sup> Their public relations drive has extended to the Midwestern United States, including Minnesota, whose residents purchase 90 percent of Manitoba Hydro’s energy exports.<sup>115</sup> Finally, it has even reached Geneva, Switzerland, where the Cree have lobbied the U.N. for the protection of their rights under the International Human Rights Covenants.<sup>116</sup> Through their involvement at the U.N., the Cree have publicized Canada’s violations of their rights, as demonstrated by its failure to implement the NFA, its underfunding of the tribe

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<sup>110</sup> The Pimicikamak Cree’s use of the “politics of embarrassment” was modeled after the campaign against hydroelectric development by the James Bay Cree of Quebec. Beginning in the early 1990s, the James Bay Cree successfully campaigned against the construction of the Great Whale hydroelectric project. Their international lobbying efforts aimed to bring “to the attention of a largely sympathetic audience of voting constituents, the injustice, bigotry, and impact of the government’s negligence on the living conditions in native communities.” Niezen, *supra* note 83, at 5.

<sup>111</sup> Pimicikamak Cree Nation, *A New Relationship* (1999) (on file with Harvard International Law Journal). This working paper, drafted in January 1999, is a 32-page booklet that proposes a new relationship between the Cree and the Crown parties. Based on community discussions within circle groups and general assemblies, the paper outlines principles and structures for the implementation of the NFA in a manner that respects Cree laws, traditions, and rights.

<sup>112</sup> *Id.* at 2.

<sup>113</sup> See U.N. Charter art. 1, para. 2; International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, Annex, art. 1, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>114</sup> Will Braun, Manitoba Aboriginal Rights Coalition Information Sheet, “Cross-Border Kilowatts, Indians, and Human Rights” (Sept. 10, 1999), *available at* <http://www.alphacdc.com/treaty/pimicikamak.html>.

<sup>115</sup> NIEZEN, *supra* note 72, at 181.

<sup>116</sup> *Id.*

over the last decade, and its depriving of the Cree's own means of subsistence. Their transnational campaign reflects the political mobilization of indigenous groups worldwide as they pressure states to comply with international norms.

## 1. Appeals to the United Nations

While traveling across Manitoba and the United States to gather support for their campaign, the Cree decided to further broaden their audience by appealing to the U.N. They first became involved with the U.N. through their affiliation with the Grand Council of the Crees, a political body that represents about 14,000 Cree in Northern Quebec.<sup>117</sup> The Grand Council, which has had consultative status with the U.N. Economic and Social Council since the 1980s, has educated the Pimicikamak Cree on the international human rights system and included information about their situation as part of its submissions to U.N. bodies. For example, the Grand Council's November 1998 report to the U.N. Committee on Economic, Social, and Cultural Rights, which monitors countries' compliance with the International Covenant on Economic, Social, and Cultural Rights, described the unfulfilled NFA promises, low per capita government expenditures, and high suicide rate at the Pimicikamak Cree Nation.<sup>118</sup> During the December 1998 meeting of the U.N. Committee, then Pimicikamak Cree Chief Roland Robinson joined Grand Council representatives, the Chief of the Assembly of First Nations, and four other Manitoba Chiefs to address the third-world social conditions existing on Canadian reservations.

The observations published at the conclusion of the U.N. meeting reproached Canada for its treatment of its indigenous people. The Committee concluded that "policies which violate aboriginal treaty obligations and extinguishment, conversion, or giving up of aboriginal rights" are a human rights concern emerging out of the International Bill of Human Rights.<sup>119</sup> Thus,

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<sup>117</sup> See Grand Council of the Crees (Eeyou Istchee): About the GCC, <http://www.gcc.ca/gcc/whogcc.htm> (last visited March 16, 2007).

<sup>118</sup> Grand Council of the Cree, *Reciting the Symptoms, Ignoring the Cause: The Systematic Dispossession of Aboriginal People in Canada, Submission to the U.N. Committee on Economic, Social and Cultural Rights* (Nov. 16, 1998), <http://www.gcc.ca/archive/article.php?id=67>.

<sup>119</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN CESCR, 1998, UN Doc. E/C.12/1Add.31, paragraph 18. The International Bill of Human Rights consists of the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); the International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); and the International Covenant on Civil and Political Rights and its two Optional Protocols, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc A/6316 (1966). The Canadian government signed and ratified the international human rights covenants in 1975, one year before signing the NFA.

Canada's failure to honor the Northern Flood Agreement would be considered a breach of its U.N. treaty obligations. The Committee's comments on Canada's violation of indigenous rights received worldwide attention as "one of the most scathing critiques of an affluent country that's ever been released by a U.N. human rights body."<sup>120</sup>

Only four months after the release of the Committee on Economic, Social, and Cultural Rights' observations, another U.N. committee, the Human Rights Committee on Civil and Political Rights, declared that "the situation of the aboriginal peoples remains the most pressing human rights issue facing Canadians."<sup>121</sup> As the U.N. body responsible for monitoring the implementation of the International Covenant on Civil and Political Rights, the Human Rights Committee emphasized the right of indigenous peoples to self-determination and urged Canada to implement the recommendations of the Royal Commission on Aboriginal Peoples' 1996 study. The Committee's April 1999 report was largely in response to a submission by the Grand Council of the Crees that included testimony from the Pimicikamak Cree Nation.

The health care crisis at the Pimicikamak Cree Nation, including the high suicide rate and the shortage of nurses, was the subject of further international lobbying at the U.N. by the Cree.<sup>122</sup> After repeatedly issuing complaints to the provincial and federal governments, the Cree contacted Dr. Arthur Kleinman, then chairman of Harvard University's School of Social Medicine, for an expert opinion on the inadequate health care services in the community. Citing Dr. Kleinman's assessment of the "crisis level" situation at their reservation, the Cree wrote letters to the World Health Organization (WHO) and the U.N. Committee on Economic, Social, and Cultural Rights. A Cree representative also testified at a WHO conference during the fall of 1999.<sup>123</sup> He informed the panel that the Pimicikamak Cree Nation had been forced into a state of emergency that violates

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<sup>120</sup> Helen Branswell, *U.N. Report Card Flunks Canada for Social Injustice*, THE CANADIAN PRESS, Dec. 4, 1998, at A9.

<sup>121</sup> U.N. Human Rights Committee, U.N. Doc. CCPR/C/79/Add.105 (Apr. 7, 1999). The U.N. Human Rights Committee adopted these words from the Canadian Human Rights Commission, which also described native people's conditions as "the most pressing human rights issue facing Canadians."

<sup>122</sup> See Allison Bray, *Nurse Shortage Shuts Northern Health Centre*, WINNIPEG FREE PRESS, Sept. 17, 1999, at A9. The shortage of nurses is based on Health Canada's formula for the number of nurses that are needed for a community the size of Cross Lake. There is no hospital in the community, only a nurse's station. Anyone in need of serious medical attention must travel to Winnipeg, which is very expensive for most residents.

<sup>123</sup> The formal presentation occurred at the WHO's first International Consultation on the Health of Indigenous Peoples, Geneva, November 23-26, 1999.

Articles 1, 2, and 12 of the U.N. International Covenant on Economic, Social, and Cultural Rights.<sup>124</sup> The Cree publicized the testimony to the WHO and comments by the U.N. Committees to bring international pressure on the Canadian government.

## 2. Participation in Transnational Advocacy Networks

The Cree's U.N. submissions and participation at international meetings reveal the growing importance of the international arena in their battle for NFA implementation and the protection of their human rights. By uniting with other Cree nations across Canada, the Pimicikamak Cree were able to magnify their voice in U.N. fora and challenge Canada's human rights record. They have collaborated with indigenous groups from across the globe as they communicated their grievances at the annual meetings of the U.N. Working Group on Indigenous Populations. They have also garnered support from environmental organizations, particularly in the United States where they have publicized the environmental degradation "at the other end of [residents'] power supply."<sup>125</sup> In so doing, the Cree have joined transnational advocacy networks on the environment and on indigenous rights.<sup>126</sup> Groups like the Cree who participate in advocacy networks "create categories or frames within which to generate and organize information on which to base their campaigns."<sup>127</sup> As they attempt to open up channels of communication with states, they follow a "boomerang pattern of influence, . . . [where] domestic NGOs bypass their states and directly search out international allies to try to bring pressure on their states from outside."<sup>128</sup>

Indigenous peoples like the Cree are employing international human rights discourse to win recognition as collectivities deserving of protection. As anthropologist Sally Engle Merry has observed:

As various societies mobilize Western law in their demands for human rights, they reinterpret and transform Western law in accordance with their own local legal conceptions and with the resources provided by the global human rights system. They talk rights, reparations, and claims—the

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<sup>124</sup> Article 1 of the U.N. International Covenant on Economic, Social, and Cultural Rights includes a people's right to self-determination and to its own means of subsistence. Article 2 notes a country's obligation to guarantee the enunciated human rights without discrimination as to race, color, etc. Article 12 recognizes the right to health and health care. *See supra* note 119.

<sup>125</sup> NIEZEN, *supra* note 72, at 181.

<sup>126</sup> Transnational advocacy networks are "organized to promote causes, principled ideas, and norms" across borders. KECK & SIKKINK, *supra* note 6, at 8.

<sup>127</sup> *Id.* at 10.

<sup>128</sup> *Id.* at 12.

language of law—but construct a new law out of the fragments of the old.<sup>129</sup>

This form of popular mobilization has become an important mechanism for achieving consciousness-raising both inside and outside the international indigenous movement. The prevalence of international human rights legal discourse within campaigns represents “the capacity of constitutionalism and contract, rights and legal remedies, to accomplish order, civility, justice, [and] empowerment.”<sup>130</sup> Indigenous peoples have become “word warriors” who use the language of human rights law, including its discourse of rights, reparations, and claims, to develop an intercultural dialogue.<sup>131</sup> Through this process, they translate collective claims for redress for past injustices into narratives of human rights and nation-building.

In invoking international human rights language and publicizing violations by the Canadian government and Manitoba Hydro, the Cree have allied themselves with not only indigenous organizations but also environmental interest groups in the United States. The Cree’s lobbying activities in the United States have aimed at making Manitoba Hydro’s American customers aware of the negative environmental and social effects produced by the dam that provides their electricity. The rationale of this approach was that if enough people in Minnesota became concerned about the situation, they might successfully lobby the Northern States Power Company to stop purchasing hydroelectric power from Manitoba Hydro. Such a result would have severely reduced Manitoba Hydro’s profits and damaged its reputation, consequently hindering future purchases of its power by other American companies.

The Cree spread their message and recruited support from national and international environmental justice organizations through a public relations tour beginning in late 1998. They allied with organizations such as the Sierra Club and the Audubon Society.<sup>132</sup> They were also able to join forces with local environmental groups like Minnesotans for an Energy Efficient Economy, which was resisting the establishment of a proposed transmission line by Manitoba Hydro in the Midwest-Northeast corridor that would threaten farmlands and

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<sup>129</sup> Sally Engle Merry, *Legal Pluralism and Transnational Culture: The Ka Ho’okolokolonui Kanaka Maoli Tribunal, Hawai’i, 1993*, in HUMAN RIGHTS, CULTURE, AND CONTEXT: ANTHROPOLOGICAL PERSPECTIVES 28, 29 (Richard A. Wilson ed., 1997).

<sup>130</sup> Jean Comaroff & John L. Comaroff, *Millennial Capitalism: First Thoughts on a Second Coming*, 12 PUB. CULTURE 291, 328 (2000).

<sup>131</sup> James Tully, *The Struggles of Indigenous Peoples for and of Freedom*, in POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 36, 51 (Duncan Ivison et al. eds., 2000).

<sup>132</sup> NIEZEN, *supra* note 72, at 181.

wildlife habitat.<sup>133</sup> They borrowed many of their public relations and lobbying tactics from other indigenous groups like the James Bay Cree, who had mounted a successful campaign against a proposed Hydro Quebec project in the early 1990s by allying with environmental organizations in the Northeast United States.<sup>134</sup> As a result, the Cree expanded their network of supporters across the border and identified their cause with a broader range of values, such as environmental justice, that would appeal to the non-indigenous public.

### C. Asserting a Right to Self-Determination

The international human rights norm that is most frequently invoked and most internalized among indigenous peoples is the right to self-determination, which forms the basis for the Cree's campaign for political autonomy. One cannot discuss indigenous rights today without encountering the concept of self-determination. Defined as a fundamental right of all "peoples" under the 1945 U.N. Charter, self-determination is understood by indigenous groups as the right to "freely determine their political status and freely pursue their economic, social, and cultural development."<sup>135</sup> Despite the right's historical association with secession, most indigenous peoples favor its realization through the attainment of limited sovereignty within states.<sup>136</sup>

Self-determination refers to the power of peoples to govern themselves and to exercise autonomy over their affairs. As an abstract principle, it has political, cultural, social, and economic aspects. Economic self-determination, for instance, describes a people's control over the development of its land and natural resources. References to self-determination in this Article focus on the concept's political aspect—i.e., an indigenous group's realization of political autonomy through self-government.

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<sup>133</sup> *Id.*

<sup>134</sup> *See id.* at 149.

<sup>135</sup> U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Working Group on Indigenous Populations, *Draft Declaration on the Rights of Indigenous Peoples*, art. 3, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Aug. 26, 1994). The U.N. Draft Declaration on the Rights of Indigenous Peoples is a statement of international human rights standards concerning indigenous peoples. Formulated by the U.N. Working Group on Indigenous Populations, the Draft Declaration is the product of over eight years of extensive deliberations by indigenous peoples and U.N. experts.

<sup>136</sup> *See ANAYA, supra* note 1, at 80-88. There are some indigenous peoples that do favor secession as an application of their right to self-determination. For example, the Mohawk Nation asserts its right to statehood and refuses to acknowledge Canada's sovereignty over its territory.

Self-determination is commonly understood as a sort of relational autonomy existing under a principle of non-domination, rather than as sovereign independence entailing non-intervention and non-interference.<sup>137</sup> In a global world where state sovereignty is transforming, “the concept of self-determination is capable of embracing much more nuanced interpretations and applications [than just independent statehood].”<sup>138</sup> S. James Anaya differentiates between two normative strains within the right of self-determination—its constitutive aspect and its ongoing aspect. The first aspect refers to the requirement “that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed.”<sup>139</sup> The second refers to the requirement “that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.”<sup>140</sup> The Pimicikamak Cree’s reinvention of their government on their own terms, rather than on the terms of Canada’s Indian Act, expresses the constitutive aspect of self-determination. By designing a government that negotiates between local, national, and international law, they are striving to achieve the ongoing aspect of self-determination.

Self-determination is widely recognized as a customary international legal principle and even as *jus cogen*, a peremptory norm of universal application.<sup>141</sup> However, there exists no universal model of self-determination that defines particular institutional forms or political-judicial frameworks for all contexts. Understandings of self-determination differ across groups and shift over time, all the while necessitating ongoing negotiations. The specific features of a regime of self-determination should be evaluated “in terms of the historical conditions it stems from and for which it tries to provide responses.”<sup>142</sup>

Thus, self-determination can be understood as a negotiated governance agreement between states and peoples. It has a contextualized meaning, in the sense that self-determination models vary according to each group’s

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<sup>137</sup> For a discussion of this interpretation of self-determination, see Iris M. Young, *Two Concepts of Self-Determination*, in HUMAN RIGHTS: CONCEPTS, CONTESTS, CONTINGENCIES 25, 40 (Austin Sarat & Thomas Kearns eds., 2001).

<sup>138</sup> S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 842 (1990).

<sup>139</sup> *Id.* at 81.

<sup>140</sup> *Id.*

<sup>141</sup> S. James Anaya, *Self-Determination as a Collective Human Right Under Contemporary International Law*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 3 (Pekka Aikio & Martin Scheinin eds., 2000).

<sup>142</sup> HECTOR DÍAZ POLANCO, INDIGENOUS PEOPLES IN LATIN AMERICA: THE QUEST FOR SELF-DETERMINATION 95 (1997).

circumstances. Indigenous peoples would each determine appropriately defined models for their relational autonomy within states. Under the principle of self-determination, the Pimicikamak Cree are developing a unique self-governance model—one that adapts customary norms with Canadian and international law. The Cree have developed an innovative strategy of legal mediation as they assert their right to self-determination.

### **III. LEGAL MEDIATION BETWEEN CREE, CANADIAN, AND INTERNATIONAL NORMS**

In the process of appealing to international human rights law to support their campaign for self-determination, the Pimicikamak Cree exercised their inherent lawmaking authority and developed a new government—one based on legal mediation between their local law and Canadian and international law. According to the Assembly of First Nations, the Pimicikamak Cree Nation is “a model of accountable governance based on inherent jurisdiction that seeks to reconcile tradition with modern circumstances.”<sup>143</sup> The case of the Cree represents one way in which indigenous nations and other communities can design their governments as they assert their political autonomy from states.

In this Part, I elaborate on the unique model of self-government that the Cree have developed in pursuit of their right to self-determination. I first describe how the Cree have preserved particular cultural norms and customary legal procedures as the basis for their new government. In the second section, I analyze how they have adapted their governing structure and laws to accommodate their new relationship with Canada. I then provide evidence of how they have internalized international human rights norms into both their government and local political discourse. Finally, I consider possible limits of the legal mediation model for the Cree and other local communities.

#### **A. Preservation of Cultural Norms**

PCN [The Pimicikamak Cree Nation] is rediscovering itself, after enduring more than a century of governmental repression, disaggregation and assimilation. Despite all, PCN survives. Its cultural roots are deep. PCN’s traditional government, by which it has governed its own affairs since time immemorial, has re-awakened [sic] and has modernized its structure and methods.<sup>144</sup>

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<sup>143</sup> See <http://www.sfu.ca/igs/netherton.html>.

<sup>144</sup> Pimicikamak Cree Nation, *supra* note 111, at 22.

As the Cree designed a government that borrowed from national and international norms, it was important for them to concurrently preserve their cultural norms. They sought to liberate themselves from the tribal government that Canada had imposed on them under the Indian Act and that had, in their view, led to social breakdown within their community. Associating the Indian Act legal model with a history of betrayal by Canada, they aimed to integrate traditional legal practices into their government and thereby encourage local political participation. The Cree have restructured many of their political institutions in an effort to maintain their cultural integrity.

The revival and adaptation of Cree governing institutions originated in a general cultural resurgence within the community over the past decade. Raymond Robinson, the Cree's former director of economic development, described this time as "a new beginning, with respect to . . . being proud to be a Cree and to defend[ing] the Cree holistically inside and out, community-wise, politically, and against anyone who dared squash it."<sup>145</sup> The Cree elders played an important role in this movement for cultural renewal, as a resident affirmed: "Through the elders' teachings, [the Cree] found that [they] have to go back to [their traditional Cree value system] to make it work."<sup>146</sup>

The Cree have incorporated their traditional dispute resolution approach to justice in their new government. Many Cree felt impaired by "the external nature and formality of the provincial court system [that] creates barriers to an effective resolution of disputes for families."<sup>147</sup> While sanctions are used for punishment in Western judicial systems, the primary objective of the Cree judicial system is to reestablish peaceful coexistence between community members and to restore harmony. Instead of relying on an individual-based, adversarial approach to achieving justice, the Cree view justice as a perpetual process of maintaining balance. According to this perspective, justice is attained when *min-oo-puh-niw* (harmony), *mi-nah-sin* (beauty), and *mi-nah-yaw-win* (well-being) are achieved at the levels of individual, family, and community.<sup>148</sup> *Mi-nah-yaw-win* refers to both the inseparability of body and spirit and an intimate connection between

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<sup>145</sup> Interview with Raymond Robinson, Former Director of Economic Development, Pimicikamak Cree Nation, in Cross Lake, Manitoba (Aug. 6, 1999).

<sup>146</sup> Interview with Darwin Paupanekis, Resident of the Pimicikamak Cree Nation, in Cross Lake, Manitoba (July 13, 1999).

<sup>147</sup> AWASIS AGENCY OF NORTHERN MANITOBA, FIRST NATIONS FAMILY JUSTICE (Awasis Agency of Northern Manitoba 1997). This was distributed as a booklet on August 12, 1999, during the Women Wellness Healing Conference, Cross Lake.

<sup>148</sup> *Id.* Author transliterated these terms for justice from the original Cree language which, along with English, is widely spoken in Cross Lake.

human life and the natural world.<sup>149</sup> As opposed to the more limited Western definition of wellness as “the state of being well or in good health,”<sup>150</sup> the Cree concept also extends to a balanced relationship with the natural environment.

Achieving *mi-nah-yaw-win* through the Cree dispute resolution process necessitates the use of consensus decision-making, a common practice among many indigenous peoples, including the Navajo in the United States. In the Navajo judicial system, “the proper way to handle a dispute or a breach of the peace [is] to give everyone who had any interest or knowledge of the matter a chance to speak. Everyone’s input [is] taken into consideration. Justice [comes] from the participation of all interested persons in resolving the problem and restoring harmony.”<sup>151</sup> The Cree have implemented this type of procedure as part of their governing process, as is evident in their monthly General Assembly meetings, their formulation of a community development plan, and their design of a new government.<sup>152</sup>

## **B. Adaptation of Cree Government and Laws**

As the Cree began to design their new government, they debated over whether it should be based only on Cree customary law or should also integrate Canadian and international legal norms. They decided that they needed a government that followed the latter model, one that mediated between multiple legal systems by adapting local laws to accommodate other legal norms. They recognized that simply returning to customary practices was insufficient for effective self-governance. A government based exclusively on customary law would ignore the outside institutions that interact with contemporary Cree society. In asserting their autonomy, the Cree realized that their government must be recognized as legitimate by the Canadian government and the international community, and that it must be capable of engaging in negotiations with them. As Cree Chief John Miswagon explained: “Traditional ways provide the framework; but we also need[ed] to catch up with more than a century of modern governance. . . . We see sovereignty . . . as a matter of reconciliation. We seek to harmonize the way we administer our laws with the administration of other

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<sup>149</sup> Ronald Niezen, Speech at the Interchurch Inquiry into Northern Hydro Development (June 22, 1999).

<sup>150</sup> THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>151</sup> Tom Tso, *The Navajo Concept of Justice*, 6 LAW & ANTHROPOLOGY 1, 2 (1991).

<sup>152</sup> The development of *A New Relationship*, the Pimicikamak Cree Nation’s working paper on NFA implementation and self-government, also utilized methods of consensus decision-making, including “written communications, phone calls and verbal messages, Circle Groups, general assemblies, TV call-in programs, and a ‘did we get it right’ check before it was finalized.” Pimicikamak Cree Nation, *supra* note 111, at 1.

Canadian laws.”<sup>153</sup> Achieving legal validation from international and state authorities would also educate those outside the community about Cree legal norms and cultural practices.

The Cree’s written codification of laws exemplifies how they have adapted their traditional legal norms to accommodate their new relationship with outside institutions. Although their culture has a historically oral tradition, the Cree began to write their laws down because “that’s the way the white man does things and that’s the only way [the Cree] can convey [their] message to them.”<sup>154</sup> Sandy Beardy, the former Chief of their Council of Elders, summarized the necessity of documenting Cree laws: “We had our own laws before the Europeans came, but now we’re writing them down so others won’t forget, in case later on they try to take away our land from us again.”<sup>155</sup> Thus, the Cree have recognized that their contemporary relationship with the outside world requires that their laws be accessible to and comprehensible by non-indigenous peoples. Written laws facilitate communication with external governments and international bodies.

Based on the principle of inherent jurisdiction, the Cree ratified The First Written Law in 1996, which laid the foundation for their adaptation of customary practices.<sup>156</sup> The law codifies oral Cree traditions to provide “improved opportunity for Crown parties and others to comprehend the democratic (but culturally different) concepts of Cree government.”<sup>157</sup> It outlines the constitutional powers of the Pimicikamak Cree Nation, including the new government’s four council structure and its legislative procedures. According to The First Written Law, the Cree government “is based on, and expands upon, existing traditional law, . . . reconcil[ing] the [Canadian] Indian Act government with inherent governance.”<sup>158</sup> The integration of Indian Act entities, such as the positions of Chief and Council, into the Cree’s customary political system reflects their creative accommodation of Canadian legal structures.

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<sup>153</sup> Chief John Miswagon, Speech to the Frontier Center for Public Policy: A Government of Our Own, (Apr. 21, 2005).

<sup>154</sup> Paupanekis, *supra* note 146. Darwin Paupanekis also noted the possible dangers of writing one’s laws down: “When you start writing things down, you’re subject to criticism and outside challenges. When you start challenging things, you start breaking that supreme law of respect that governs relations.” *Id.*

<sup>155</sup> Interview with Sandy Beardy, Former Chief, Pimicikamak Cree Nation Council of Elders, in Cross Lake, Manitoba (July 20, 1999).

<sup>156</sup> PIMICIKAMAK CREE NATION LAWS, The First Written Law (1996).

<sup>157</sup> Pimicikamak Cree Nation, *supra* note 111, at 9.

<sup>158</sup> *Id.*

The Cree have incorporated the legal entities of Chief and Council, which did not exist in Cree tradition, to facilitate an orderly transition to self-government. Their working paper, *A New Relationship*, explains why they have retained these entities under The First Written Law:

[The First Written Law] expands upon [traditional law] because it comes to terms with the (offensive) existence of and also the (practical) need for Chief and Council as an executive arm of government. ‘Offensive’ because it was a violation of our human right of self-determination by means of the Indian Act. . . . ‘Practical’ because the world has changed much and normal evolution of Cree governance has been suppressed for generations.<sup>159</sup>

At the same time, the Cree have altered the powers of Chief and Council in order to reconcile them with their traditional political system. The Chief and Council still represent the backbone of their government, with the power to initiate written laws under their inherent jurisdiction. Yet, instead of following the Indian Act’s delegation of all political power to the Chief and Council, the Cree have redistributed some of their administrative authority to three traditional bodies, all of which operate by consensus: the Council of Elders, the Women’s Council, and the Youth Council. The Chief and Council form the executive branch of this new four council system and conduct the day-to-day administrative affairs in cooperation with the federal and provincial governments.

Following The First Written Law, the Cree have continued to pass additional laws that adapt or replace provisions of the Indian Act. Chief Miswagonec noted that this process is incremental: “We are replacing [the Indian Act] at our own pace, in our own way, with something that works for us.”<sup>160</sup> To date, they have adopted five laws according to this procedure—The First Written Law, The Pimicikamak NFA Implementation Law, The Pimicikamak Okimawin Trust and Hydro Payment Law, The Citizenship Law, and The Election Law—and are in the process of drafting a Resource Management Law and Financial Administration Law.<sup>161</sup> The Citizenship Law and Election Law nullify federal jurisdiction over citizenship and election procedures and redefine the membership and voting criteria for the Cree, even incorporating the Canadian Supreme Court *Corbiere* decision regarding the rights of off-reserve Indians.<sup>162</sup> The Hydro

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<sup>159</sup> Pimicikamak Cree Nation, *supra* note 111, at 9.

<sup>160</sup> A Government of Our Own, *supra* note 153.

<sup>161</sup> See PIMICIKAMAK CREE NATION, PIMICIKAMAK CREE NATION LAWS (on file with author).

<sup>162</sup> *Corbiere v. Canada*, [1999] 2 S.C.R. 203 (Can.). This case struck down provisions of the Indian Act’s section 77(1) and held that members of Indian bands who live off-reserve have the

Payment Law mandates that hydroelectric bill payments be placed in a trust, instead of being paid to Manitoba Hydro, until the NFA is implemented according to its spirit and intent. These local laws, which integrate Cree customary law with Canadian legal concepts, permit the Cree to exercise authority over their economic administration, membership, elections, and political institutions.

### **C. Incorporation of International Norms**

Having been exposed to international human rights norms through their political mobilization, the Cree began to incorporate these norms into both their official discourse (e.g., their constitution, laws, and formal statements to external parties) and their local political discourse. As part of their new constitution, the Cree have included language from the U.N.'s International Covenant on Civil and Political Rights and its International Covenant on Economic, Social, and Cultural Rights.<sup>163</sup> They have also officially recognized that the authority of the Canadian Charter of Rights and Freedoms must apply "to every Law of [the Pimicikamak] First Nation."<sup>164</sup> Finally, the Cree have adopted new laws and restructured their government to protect individuals within their community, which represents the first time that they have mandated the protection of the rights of historically discriminated groups like women. This is a radical step for the Cree who, like other indigenous peoples, have often focused on the protection of group rights rather than individual rights.

The Cree assert the dual importance of individual and group rights in their working paper, *A New Relationship*:

We have . . . rights as *individuals* and a people. . . . We intend from this time onward to subject the conditions facing our people to ongoing human rights scrutiny, as is entirely appropriate. . . . It is established that the human rights of peoples and nations are the legitimate business of other peoples and nations, and that any intervention concerning fundamental human rights is not interference. We will continue to call on others, including an international community, who are concerned with human

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right to vote in on-reserve elections. In accordance with this decision, the Cree Citizenship Law broadened the Indian Act definition of a band member to include off-reserve Indians, thus making them eligible to vote in elections and run for office.

<sup>163</sup> International Covenant on Civil and Political Rights, *supra* note 119, art. 1, paras. 1 & 3; International Covenant on Economic, Social and Cultural Rights, *supra* note 119, art. 1, paras. 1 & 3.

<sup>164</sup> The First Written Law, *supra* note 156.

rights to intervene to ensure that our human rights are respected (emphasis added).<sup>165</sup>

They also recognize their obligation to prevent human rights violations within other indigenous communities: “We also intend to take all legitimate steps to ensure that the human rights of our brothers and sisters in our communities . . . are respected. . . . It is our obligation to intervene and help to ensure that they are restored and respected.”<sup>166</sup> In this way, the Cree have codified certain international human rights norms.

The Cree have particularly focused on the rights of women and youth in the design of their four council government. While participating at U.N. human rights meetings, Cree representatives heard the grievances of women’s and children’s rights groups and reported their concerns back to their communities. Empowered with the knowledge that they had internationally recognized rights, women like Rita Monias, a member of the Cree’s Women’s Council, began to educate themselves about human rights through Internet research and at the library of a local university.<sup>167</sup> Monias has observed that, prior to the formation of their new government, people had criticized her for speaking about her rights under international law.<sup>168</sup> However, with the development of new laws and the increased community awareness of international human rights norms, she had the opportunity to realize those rights by lobbying for women to have more decision-making power.

As a result of lobbying activities by women, the Cree adjusted the functions of the traditional councils under The First Written Law to give more voice to women and youth. The law removes primary authority over law-making from the Council of Elders and shifts the customary role of the Women’s Council from an executive function to a legislative one that is more prominent in everyday affairs. Whereas the Women’s Council formerly had only a consultative role in the law-making process, it now has veto power over all laws and supervises elections of the Chief and Council.<sup>169</sup> The law also confers a legislative role on the Youth Council, which traditionally lacked governing responsibilities.

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<sup>165</sup> Pimicikamak Cree Nation, *supra* note 111, at 9-10.

<sup>166</sup> *Id.*

<sup>167</sup> Interview with Rita Monias, Spokesperson, Pimicikamak Cree Nation’s Women’s Council, in Cross Lake, Manitoba (June 30, 1999).

<sup>168</sup> *Id.*

<sup>169</sup> Women also participate in the other three councils.

The Cree's law-making process now consists of the following steps: (i) A law is proposed by the Chief and Council. (ii) The law must be approved through traditional consensus by the Council of Elders and the Women's Council and be referred to the Youth Council for consultation. The Council of Elders and Women's Council can also refer the law back to the Chief and Council with a recommendation that it be amended before being reconsidered for approval. (iii) The proposed law then requires public approval at a General Assembly meeting held through consensus decision-making. If it is not approved, the law is referred back to the Chief and Council for redrafting. (iv) The law and any amendments made to it are adopted and signed by the Chief and Council. Under this new legislative process, the three councils and the Cree citizens cooperate with the Chief and Council in the formulation and approval of laws.

The prominent role of women in the current Cree administration has been widely celebrated by community members who felt underrepresented by the previous system. Many women have expressed their support for the new government and its recognition of their rights, and have, as a result, increased their participation in the political process. During a General Assembly meeting, Patsy Corierre, a member of the Women's Council, declared that the Cree's latest laws "are for the children, for the future generations. [The people] are finally going in the right direction."<sup>170</sup> Women are now among the political leaders determining the nation's future, and they give credit to the international human rights movement for influencing the structure of the new government.

The Youth Council's increased political power reflects the growing percentage of young people within the reservation, where about 50 percent of residents are under the age of 20.<sup>171</sup> Gerald Frogg, a former Youth Council member and candidate for Council in the August 1999 election, expressed his excitement for the enhanced opportunities for youth in the Cree government: "Before, we were in the background, we never really got a chance to say much. But since the new government, we have a lot of power. . . . We actually have a say about the things that are going on in our community."<sup>172</sup> Although political apathy still exists among many young residents, they are becoming more involved as they realize their decision-making power under the new laws.

While international human rights norms, such as the rights of youth and women, have become embedded in official legal documents, they are also starting

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<sup>170</sup> Patsy Corierre, Speech during a Cree General Assembly meeting (June 30, 1999).

<sup>171</sup> Interview with Gerald Frogg, *supra* note 100.

<sup>172</sup> *Id.*

to shape how law is talked about in local settings.<sup>173</sup> Cree politicians have begun to use the language of rights within their community when deliberating over their local government. For instance, during the General Assembly meeting when the Cree public voted on the proposed Election Law, Council representatives justified the assertion of the Pimicikamak Cree Nation's inherent jurisdiction by distributing copies of the two U.N. international human rights covenants.<sup>174</sup> They explained the significance of international law as a foundation for their self-government and educated the community on how they were seeking to realize their rights. Politicians further appealed to the symbolic power of international human rights discourse in the ensuing local election.

In preparation for their first election for Chief and Council administered under the Election Law, the candidates invoked international human rights norms as rhetorical devices in campaign slogans and televised speeches. Posters for the reelection of Council member Nelson Miller featured the slogan: "Vote Nelson Miller for strong *self-determined* PCN [Pimicikamak Cree Nation] governance and *human rights*" (emphases added). The publicly distributed pamphlets for the reelection of Chief Roland Robinson similarly alluded to international legal principles in declaring Robinson's support for "aboriginal, cultural, economic, social, political, civil, and human rights." In the debate among candidates for Chief in 1999, Robinson argued that the Canadian government's underfunding is a violation of the Cree's "fundamental human rights under the U.N. and the Canadian charter rights."<sup>175</sup> Thus, the Cree are appropriating rights language to secure not only external legitimacy for their incipient government but also its acceptance within the community.

As rights language begins to penetrate the Cree's laws and political discourse, it may become vernacularized or "adapted to local institutions and meanings."<sup>176</sup> In other words, the Cree may translate or redefine human rights concepts in their everyday life in terms of existing cultural norms and values. In my study, it was not yet clear whether the Cree are adopting international human rights norms as simply a strategic weapon in their campaign against Canada or whether the norms are truly becoming vernacularized. Further empirical research is necessary to determine the degree to which international human rights norms have become internalized in the Pimicikamak Cree Nation and have shaped their

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<sup>173</sup> See generally Sally Engle Merry, *Culture, Power, and the Discourse of Law*, 37 N.Y.L. SCH. L. REV. 209 (1992).

<sup>174</sup> Galit A. Sarfaty, Personal Notes (June 30, 1999) (on file with author).

<sup>175</sup> Galit A. Sarfaty, Personal Notes (Aug. 17, 1999) (on file with author).

<sup>176</sup> Sally Engle Merry, *Transnational Human Rights and Local Activism*, 108 AM. ANTHROPOLOGIST 38, 39 (2006).

informal communications and everyday practice—e.g., whether the Cree have begun to think about local grievances as human rights violations and whether they would continue to use human rights language within their community if their conflict with Canada were resolved.<sup>177</sup> It is possible that norm internalization is more of a continuum, ranging from formal adoption to vernacularization, and that it may take years to determine at which point a community falls.<sup>178</sup>

#### **D. The Limits of Legal Mediation**

Having described the Cree's government as a model of legal mediation, I would like to now consider the limits of this model for the Cree and other local communities. That is, what are the necessary conditions under which legal mediation will most likely work? In what circumstances is this model not as appropriate? Based on my study of the Pimicikamak Cree Nation and other indigenous communities, I have identified two types of obstacles: external and internal.

##### **1. External Obstacles**

The effectiveness of the legal mediation model is closely linked to state cooperation. In order for local appeals to international law to be influential, state governments must feel vulnerable to international pressure and care about their public image. This approach works best in countries like Canada, a nation that projects an image of protecting human rights and wants to be viewed as doing so by the international community. Such countries are more willing to negotiate with local communities and even adapt their laws to accommodate customary norms. However, even countries like Canada, which have pledged their support for indigenous self-government in official literature and public statements, have been reluctant in taking actions to realize that pledge.<sup>179</sup> This reluctance is exemplified in Canada's objections to the Cree's recently adopted Election Law.

Canada did not protest the Cree's emerging self-government process until the passage of the Cree's Election Law in June 1999. The law directly replaced Section 74 of the Indian Act, which details the election procedures for indigenous

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<sup>177</sup> See *id.* at 42.

<sup>178</sup> For a discussion of vernacularization as a continuum, see *id.* at 44.

<sup>179</sup> The Canadian government's 1997 aboriginal action plan entitled *Gathering Strength* states that Canada "supports the concept of self-government being exercised by aboriginal nations" and commits itself to "work closely with aboriginal people on initiatives that move in this direction." Minister of Indian and Northern Affairs, *Gathering Strength: Canada's Aboriginal Action Plan* (1997), available at [http://www.ainc-inac.gc.ca/gs/chg\\_e.html](http://www.ainc-inac.gc.ca/gs/chg_e.html).

communities, with provisions based on Cree customary norms.<sup>180</sup> Their election under the law was the first one held by a Canadian Indian nation to allow off-reserve members the opportunity to vote, based on revised membership criteria outlined in the Cree's new Citizenship Law. The Indian Act prohibits off-reserve Indians from the privileges granted to citizens, including the right to vote in community elections. In addressing this issue, the Canadian Supreme Court declared the Indian Act's denial of voting rights for off-reserve residents as unconstitutional.<sup>181</sup> The Pimicikamak Cree cited this case when developing their own citizenship provisions that recognize the status of off-reserve Indians.

Although Cree officials had pursued a process of open communication with the Department of Indian and Northern Affairs in Winnipeg and Ottawa during the months that they developed the Election Law, the federal government rejected the legitimacy of their first election under this law and threatened not to recognize the newly elected Chief. On August 19, 1999, the Canadian Department of Indian and Northern Affairs issued a statement to the Cree declaring its refusal to honor the results of the election due to a lack of "evidence that the changes to [the Pimicikamak Cree Nation's] election and membership act were arrived at through a democratic process."<sup>182</sup> The Canadian government did not believe that a majority of Cree electors had accepted the new election procedures, despite the fact that the General Assembly had voted unanimously to adopt the law on June 30, 1999, and a record number of people turned out to vote at the August 17<sup>th</sup> election.

After intense pressure by the Pimicikamak Cree and other indigenous groups in Canada, as well as by representatives from international human rights NGOs, Canada decided in late September to recognize the new Election Law. It realized the threat of negative international publicity if it refused to negotiate a self-government arrangement. Granting this one concession by accepting the Election Law of a small tribe in northern Manitoba was preferable to a long drawn-out battle with the Cree, particularly given the resistance and international attention that the Cree had brought against the federal government. This incident illustrates how indigenous groups should continue to place international pressure on their governments as they pursue an incremental strategy for self-government. The Cree's legal mediation approach demonstrates the level of success that can be achieved against external obstacles if communities incrementally pass laws that

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<sup>180</sup> Indian Act, R.S.C., ch. I-5, §74 (1985).

<sup>181</sup> *Corbiere v. Canada*, *supra* note 162.

<sup>182</sup> Len Kruzenga, *Northern Reserve Elects New Chief*, WINNIPEG FREE PRESS, Aug. 19, 1999, at A3.

replace aspects of federal law, incorporate international norms, and adapt local norms, while continuing to participate in transnational advocacy networks.

## 2. Internal Obstacles

The second type of challenge to the legal mediation approach is internal. A community may be divided over whether it should create a new government based on local norms or whether it is more prudent to retain a state-imposed government that does not borrow from local norms. This type of internal dispute occurred among the Hopi, an American Indian nation in which a faction of members have tried to reconcile their traditional norms with the current government. Between 1948 and the late 1980s, a “traditionalist” movement emerged on the Hopi reservation that was independent of the Hopi Tribal Council, the governing institution recognized by the U.S. government and established by the Indian Reorganization Act of 1934. This movement attempted to “create a new political path that is the obverse of the U.S. government’s intrusion into Hopi life and its creation of the Hopi Tribal Council.”<sup>183</sup> Traditionalists embraced the village-based Hopi governing structure, organized under the *kikmongwis* or village chiefs, as the basis of their new leadership, and they attempted to reorganize the Hopi political system.<sup>184</sup>

As a result of internal tension, two concurrent bodies were claiming authority over the Hopi community: the Tribal Council (recognized by the United States) and the traditional Hopi government. A power conflict developed between Council leaders and traditionalists, creating many obstacles to community unity and administrative efficiency. Factionalism caused the traditional village leadership to become “marginalized and displaced from the political center stage of tribal life.”<sup>185</sup> Despite growing community support for the traditionalists’ preservation of Hopi culture, the Tribal Council remained the only conduit for distributing U.S. government benefits. Yet, the Tribal Council was often unable to establish a quorum “because traditional village leaders sometimes refuse[d] to certify elected representatives.”<sup>186</sup>

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<sup>183</sup> Richard O. Clemmer, *The Hopi Traditionalist Movement*, 18 AM. INDIAN CULTURE & RES. J. 125, 152 (1994).

<sup>184</sup> *Id.* at 133.

<sup>185</sup> Shuichi Nagata, *From Ethnic Bourgeoisie to Organic Intellectuals: Speculations on North American Native Leadership*, 29 ANTHROPOLOGICA 61, 66 (1987).

<sup>186</sup> Peter M. Whiteley, *The Interpretation of Politics: A Hopi Conundrum*, 22 MAN 696, 710 (1987).

The Hopi case—featuring “acquiescence to the economic and political system of the intrusive dominant European-derived culture on the one hand and, on the other, phrased as traditionalism, an ideology of independence of, and scorn for, the intruders and their system”<sup>187</sup>—offers several lessons to other local communities, including the Pimicikamak Cree Nation. Jurisdictional complications and internal conflicts similar to those in the Hopi community can plague the self-government process. Notably different from the Cree case, the Hopi traditionalists did not attempt to negotiate Hopi law with U.S. or international law but instead strived to create a government based exclusively on customary norms. Nonetheless, even within a government based on legal mediation, internal factionalism may threaten its stability and the cultural cohesiveness of the community. Moreover, if a group’s new political leadership is unclear and contested, this may also decrease the likelihood that the state will recognize the recently established local government.

Another possible internal challenge may emerge over what actually constitute the “traditional” local norms that should form the basis of a new government. This dispute occurred within the Pimicikamak Cree community, in which there exist many different interpretations of customary law. As one Cree representative has noted, “The Chief and Council say they are proud to be Cree, but they don’t really know what it means to be Cree.”<sup>188</sup> The process of adapting customary practices into Cree local government depends on people’s consensus over what they consider to be the local norms. While the entire community may agree on the need to return to their traditional governing institutions, several key questions must first be addressed: Who defines what is considered “traditional?” Is there an objective set of customary norms? Such issues hinder groups who want to present a united voice when seeking political autonomy.

Among the Cree, the debate over what procedures are considered democratic according to traditional standards has heated up in recent years.<sup>189</sup> There have been criticisms that the local government does not adequately model its consensus decision-making procedures on those followed years ago by the Cree, and that they are instead a production of non-native influences.<sup>190</sup> The

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<sup>187</sup> Clemmer, *supra* note 183, at 157.

<sup>188</sup> Interview with anonymous resident of the Pimicikamak Cree Nation, in Cross Lake, Manitoba (Aug. 6, 1999). This statement was made to the author on the condition that the person’s identity not be revealed.

<sup>189</sup> See NIEZEN, *supra* note 72, at 176 (providing a detailed description of the cleavages within the Cree community).

<sup>190</sup> These criticisms are partly a result of class warfare within the community. The reservation is mainly divided into two classes—the unemployed (80–85 percent) and employed (15–20 percent), which may be further divided into those working in government jobs and those working in non-

identification and interpretation of traditional norms has been primarily determined by the political representatives from the four governing councils, leading to frustration among the general public and lower-ranked employees in the tribal government. Thus, in order to address these internal challenges, it is important for groups like the Cree to continuously engage in consultations with the rest of the community and to make efforts to include them in the political decision-making process.

## CONCLUSION

Legal mediation presents a model for how local communities can integrate international and state norms into their legal institutions while also adapting local laws and practices. I argue that indigenous communities like the Pimicikamak Cree Nation are engaging in legal mediation as they negotiate among multiple normative commitments. While mobilizing an international campaign for self-determination, the Cree have joined transnational advocacy networks and become familiar with international human rights norms. Their new government mediates between different legal systems by borrowing from Canadian and international law and adapting cultural norms and customary practices.

This ethnographic study seeks to contribute to international legal scholarship on norm diffusion by examining the local process by which international norms are adopted. Legal mediation explains how international norms can become embedded in local communities and interact with customary and state norms. It builds on theories of legal pluralism by offering a model of how local communities can accommodate multiple legal systems. Yet, it also extends existing frameworks by focusing not just on the interaction of legal orders but also on the adaptation of local norms and the shaping of local law-making in the process of integrating state and international norms.

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governmental, business sector jobs. According to a survey of 150 people conducted in 1998–1999 by the Cross Lake Community and Economic Development Organization, the average monthly income earned from employment is \$638.26 while social assistance provides \$483.50 to the unemployed. Due to the participation of elected officials (the Chief and Council and Chiefs of the Council of Elders, Women’s Council, and Youth Council) in the national and international political arenas, they have been criticized by the unemployed as not truly understanding, or participating in, Cree customs and simply “show boating” their knowledge of traditions. Interview with anonymous member of the Pimicikamak Cree community, *supra* note 188. Dissenters believe that the tribal leaders are “deploying the rhetoric of [Cree] values as a badge of legitimacy.” Russel Barsh, *The Challenge of Indigenous Self-Government*, 26 U. MICH. J.L. REFORM 277, 299 (1993).

This model is only one way in which legal mediation can operate with respect to international norms. Local communities are not the only actors that can initiate contact with international norms; states may also do so. For example, states can invoke international norms in an attempt to hold local communities up to international legal standards. They can leverage international pressure against communities whose cultural practices or religious laws fail to abide by international human rights norms, such as women's rights. In such instances, states invoke international law to influence local norms, or at least seek to end practices they deem as violating universal human rights. Local communities are then under great pressure to engage in legal mediation and to adapt local norms to comply with international standards. Unlike in the form of legal mediation that I discuss in this article, local actors in such situations are *not* the key players in shaping how international norms get internalized within their communities. They have much less influence in determining how local customs and laws will be negotiated since they are under pressure by states and international human rights groups.

One must therefore consider the power relations between the local, national, and global legal systems, and how the process of legal mediation can be strategically employed by either local actors or states. There are also power inequalities among states such that some states are more receptive to international pressure and to a legal mediation model than are others. Such factors reveal the constantly changing interaction between multiple normative communities and suggest diverse models of legal mediation.