SELF-DETERMINATION AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW

Elena Cirkovic[*]

I. Introduction

In an era of pragmatism, dominated by institutions in international law, scholars have so far failed to move away from longstanding elitist attitudes and practices regarding the politics of power inherent in international relations and in international law. To no surprise, questions of universality and particularity keep recurring with little hope of resolution. This is especially evident in the arena of international human rights law, where human rights discourse claims universality while remaining deeply embedded in the colonial sources of international legal order. At the same time, such rights discourses offer promises of liberation by mobilizing marginalized peoples everywhere. By focusing on indigenous[1] rights in international law, this investigation seeks to engage with a larger contemporary inquiry into the universalist aspirations of the public international legal order and the continued debate over the possibility of globally accepted human rights. As a result of a state-centered international legal order, the unresolved status of indigenous claims unfolds in the context of a global struggle over universal human rights, where indigenous rights do not seem to be easily recognizable in either the national or international arena.

This analysis will examine the struggle over the recognition of indigenous peoples as subjects under public international law and their right to self-determination as expressed in Articles 1 and 55 of the UN Charter, as well as in common Article 1 of the International Covenant on Civil and Political Rights (ICCPR)[2] and the Covenant on Economic, Social and Cultural Rights

---

* Ph.D. Candidate, Osgoode Hall Law School of York University.

1. The term "indigenous" refers here to peoples and individuals who have originally, or for a prolonged period of time, occupied and governed over a particular territory. Using this term when referring to diverse nations worldwide is problematic because it has different connotations in different countries. However, due to the pervasive use of the term in international institutions and documents, this analysis retains the term "indigenous" in reference to original nations of the Americas.

2. International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), Annex, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 19, 1966).

(CESCR).[3] Three guiding questions will orient the analysis. First, Part II will address whether the established human rights discourse can serve as a strategic tool for indigenous peoples, or whether it works to delegitimize indigenous discourses and world views. Second, Part III examines the difference, if any, between the present situation of indigenous peoples in international law from that of previous historical periods. And finally, Part IV asks whether a contradiction exists between the right to self-determination as a liberating, legal instrument, and the current politics of national reconciliation that purport to bring peace and security.

At the international level, both indigenous peoples and states arrive with opposing claims. Both nationally and internationally, indigenous peoples are increasingly focusing their struggles on the right to self-determination, principally over their lands and resources which continue to be threatened by international and national economic interests. One of the main goals pursued by indigenous people during the still-ongoing UN International Decade of the World's Indigenous People has been the revision of the UN Draft Declaration on the Rights of Indigenous Peoples for eventual ratification by the General Assembly.[4] However, after a decade of debate only two articles (5 and 43) of the forty-five articles in the Draft Declaration have been provisionally approved by the participating states.[5] Furthermore, those two articles only affirm individual, rather than group rights, as member states continue to further curtail indigenous political aspirations. Meanwhile, in contrast with the claims to self-determination continually being made by indigenous groups, nation states continue to employ policies of reconciliation and nation building as a peacemaking paradigm.

---

3. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200(XXI), Annex, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 19, 1966).

4. U.N. Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, 58-73, Annex, U.N. Doc. A/HRC/1/L.10 (June 30, 2006) [hereinafter Draft Declaration]. The Draft Declaration is printed as an Annex to the report.

5. Throughout the first International Decade of the World's Indigenous People (1994-2004), little progress was made towards the adoption of the Declaration. However, when the Working Group met in 2004, there was an indication of an emerging consensus among states and indigenous peoples regarding provisional adoption of additional articles, including new and revised articles proposed by the Indigenous Caucus. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Working Group on Human Rights & Indigenous Issues, *Indigenous Issues: Human Rights and Indigenous Issues: Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session*, Annex I, U.N. Doc. E/CN.4/2006/79 (Mar. 22, 2006) (*prepared by* Luis-Enrique Chávez).

This provides an example of the conflict between universal (international legal system) and particularistic (national reconciliation) visions of a moral order that haunt the international legal system. Claims to universality of international law are regularly brought without acknowledgment of its violent colonial origins. Thus, the quandary of international law lies in its repressed memory of the extralegal violence which constituted and maintained the international legal order,[6] excluding or eliminating indigenous peoples in the system of civilized nation states. Through contemporary human rights discourses, indigenous peoples expose this duality of international law as they claim their rights as universal human rights. However, law has no such universality, as it continues to be tied to particular preferences and interests of states. Moreover, in the contemporary era of national security concerns, states consider self-determination as a security problem, and focus on national reconciliation as a peacemaking paradigm. This represents yet another colonial strategy of assimilation of indigenous peoples who remain within borders of settler states.

II. Repressed Memories and Contemporary "Crisis" of International Law

> Inkarri's brother Espanarri cut off Inkarri's head . . . . Inkarri's head is trying to grow towards his feet. The pieces of him will surely come together one day. On that day he will walk the earth . . . .
>
> — Eduardo Geleano[7]

The Inca nobleman Jose Gabriel Condorcanqui Tupac Amaru II (the "Great Snake" in Quechua) initiated the Great Rebellion of the Andes in 1780 in response to the increasing pressures on indigenous peoples by Spanish colonial rule, including the labour draft assigned to the mining and other sectors of the economy.[8] The movement of Tupac Amaru II was an insurgence of self-determination, much influenced by new ideas and events in Europe and the United States, as well as the Andean currents of neo-Inca revivalism and nationalism in the second half of the eighteenth century. For Quechua peoples of the Andes, Tupac Amaru II represented a return of the Inkarri (the Inca King) who, as is still believed, will restore the Andean order of justice and

6. *See, e.g.*, Anne Orford, *The Gift of Formalism*, 15 EUR. J. INT'L L. 179 (2004).
7. EDUARDO GALEANO, MEMORY OF FIRE 76 (Cedric Belfrage trans., 1985).
8. PETER FLINDELL KLARÉN, PERU: SOCIETY AND NATIONHOOD IN THE ANDES 31 (2000).

harmony. Upon defeat, Jose Gabriel and his followers were taken to the capital of the Inca Empire, Cuzco, and summarily tried and executed for treason. On May 18, 1791, before a gathering in the central square, the rebel leader watched the hanging of his family members and execution of his wife, Micaela Bastidias, by garroting. After being tortured and then unsuccessfully drawn and quartered, Jose Gabriel was beheaded. In the aftermath, the Spaniards unleashed repressive tactics throughout the region of Tupamarista supporters.[9] The Spanish conquest severed the head of the Inca, which ever since remained separated from the body. According to myths that originated in the Peruvian Andes, when body and head come together again, the period of disorder, confusion, and darkness initiated by the Europeans will end and the Andean people will recuperate their memory.[10]

The story of Tupac Amaru II is a memory of a failed indigenous rebellion against the Spaniards. It became a historical symbol of waves of Indian rebellions and subsequent violent repressions, which continue to this day. The prospect of a possible revolution and reversal of the colonial order remained in the minds of the European colonizers, allowing them to resort to terror as a legitimate source of sovereign power and law. Unless Indians were entirely subjugated, there would always remain a risk of war. The Tupac Amaru II was one of the most important rebellions against the Spanish Empire, representing the first anti-colonial, pro-nationalist, movement in the region.[11] Its objective was to reverse the order established by the Spaniards and expulse them from the American soil. The injustice of colonialism could be compensated only at the cost of transferring the material as well as the psychological fear of Indians to the whites.[12] Terror became a legitimate source of sovereign power and law to prevent such a reversal of the colonial order and to repress potential indigenous uprising. As will be argued, the founding act of violence of the legal order became so embedded in the functioning of the legal order of the colonies. This was how the Spaniards justified their actions in conquering and governing the Indians, and legitimized the view that any rebellion against this new order was a transgression in violation of the universal legal order.

---

9. *Id.*; *see also* Xavier Albó, *Ethnic Identity and Politics in the Central Andes: The Cases of Bolivia, Ecuador, and Peru*, *in* POLITICS IN THE ANDES: IDENTITY, CONFLICT, REFORM 17, 17 (Jo-Marie Burt & Philip Mauceri eds., 2004).

10. *See* JOSÉ MARIÁ ARGUEDAS & FRANCISCO IZQUIERDO RIOS, MITOS, LEYENDAS Y CUENTOS PERUANOS [PERUVIAN MYTHS, LEGENDS AND STORIES] (1947); ALBERTO FLORES GALINDO, BUSCANDO UN INKA: IDENTIDAD Y UTOPIA EN LOS ANDES [LOOKING FOR AN INCA: IDENTITY AND UTOPIA IN THE ANDES] (1987).

11. KLARÉN, *supra* note 8, at 31.

12. *See generally* GALINDO, *supra* note 10.

Eventually, the terror of such colonial encounters became a suppressed memory within contemporary institutions and values of the international law — what remained was only its universal moralism.

In order to resolve the perpetual crisis of authority in contemporary international law, legal scholars have focused on international organizations or powerful national sovereigns as sources of single and legitimate authority. The mystical foundation of law,[13] or the relationship between international law and extralegal "mystical" violence, remained veiled in the mainstream debates over international law's authority and legitimacy, which continue to negate and silence the memory of those who remained unaccounted for in the international system. Beyond international institutions and norms lie experiences of violence from a particular space and time. The situation before the law, as Jacques Derrida argues, is the "situation, both ordinary and terrible, of the man who cannot manage to see or above all to touch, to catch up to the law."[14] At the moment of constitution of a legal order, that founding violence is neither legal nor illegal. The legitimacy of law and of authority is established only once that violence has succeeded in creating a new order, and, even then, only provisionally. However, a threat of future violence and fundamental change remains. In an attempt to provide a secure and generalized foundation for the law, international lawyers have turned to authoritative texts, institutions, and powerful sovereigns.

For indigenous peoples, however, the idea of a crisis or a state of emergency is not something out of the ordinary. In fact, the crisis in the international legal system, which, as some scholars argue, appeared to intensify in the contemporary context of the Kosovo crisis and the war on terrorism,[15] is most acute for those who look to international institutions or international law as a benign system seeking to establish peace and security. As they find themselves in a moment of danger and insecurity, some international lawyers and scholars turn to tradition, or repetition, in order to avoid something "better left asleep."[16]

But that which is better left undisturbed is the blind spot where atrocities continue to take place against those whose rights were not historically

---

13. *See* Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 920 (1990) (Mary Quaintance trans.).

14. *Id.* at 993.

15. *See, e.g.*, Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113 (2005); Orford, *supra* note 6, at 188.

16. JACQUES DERRIDA, THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND 353 (Alan Bass trans., 1987).

recognized by the international legal system. For the victims of continuing gross and systematic human rights violations, the crisis of justice in the international system is perpetual. Historically, Euro-American international lawyers were able to explain colonial atrocities as civilizing missions — unfortunate but necessary violence to bring the savage into modernity.[17] The hierarchical and discriminatory nature of colonial societies has been legitimized through philosophical understanding of the ontological asymmetry of human species.[18] The central argument in the founding texts of international law has been over whether the lands of savages can be justly taken by Christian and civilized Europeans. The precepts developed by jurists, such as Francisco de Vitoria, justified endless incursions into indigenous lands of the Americas by the Spaniards and eventually became reinvented in future doctrines of humanitarianism, trusteeship, and, most recently, development, good governance, and democracy.[19] Spanish jurists and theologians developed a legal hierarchy, which ensconced what is legitimate or illegitimate, good or bad, thus making indigenous resistance to the colonial order illegal. For the "colonized" then, the return to tradition and repetition in international law does not promise liberation or delivery from a crisis. Moreover, their continuous existence points to the danger of subversion and future violence.

What international law *was*, until the emergence of human rights institutions, is telling of what it *is* in its contemporary form. While it is seemingly no longer legally and morally plausible to extinguish indigenous titles through civilizing missions or to force indigenous people into slave labour, the conception of indigenous peoples' diminished rights and status (derived from such canons as the doctrine of discovery, or *terra nullius*) still remained prevalent in international legal discourse during construction of contemporary international human rights norms and institutions. Furthermore, through their loss of sovereignty, as "groups" or "tribes" indigenous peoples did not have the same protection of international law as nation states and their citizens. As such, they became objects and not subjects of the international

17. James Tully, On Law, Democracy and Imperialism, Address Given at the Twenty-First Annual Public Lecture, Centre for Law and Society, University of Edinburgh at 27 (Mar. 10-11, 2005), *available at* http://web.uvic.ca/polisci/tully/publications/Tully%20Presem%20-%20Edinburgh%20draft%20criculation%20paper.pdf.

18. Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM SOUTH 533 (2000), *available at* http://muse.jhu.edu/journals/nepantla/v001/1.3quijano.pdf.

19. Anthony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. LEGAL STUD. 321 (1996).

legal system, with questionable humanity. For if universal human rights did not apply to indigenous peoples, then they had to be less than human.

The colonial relationships have reached a new stage with contemporary, post-1945 human rights discourses, which not only claimed universality, but also appeared to give agency to previously marginalized populations. As Patrick Thornberry writes, "This illustrates a fundamental ambiguity that flows through historical discourses and principles — the universalizing discourse of law and right is a form of imperialism; the law that oppresses promises liberation."[20] The international legal system was now facing a new dilemma: to uphold the sanctity of a sovereign state, or to accommodate growing self-determination claims for purposes of peace and security. The blind spot of international law, the permanency of discriminating and exclusionary practices, became challenged by the growing participation of indigenous peoples and their advocates at international human rights forums, challenging the legitimacy of legal principles stemming from the doctrines that diminished indigenous sovereignty.

How different then is the situation of indigenous resistance in the presumably post-colonial contemporary world? In the post-1945 period, the human rights discourse's endorsement of the right to self-determination and explicit rejection of classical colonialism appears to provide indigenous resistance with the potential to achieve some legitimacy in international law. Human rights emerged as a double edged sword, with both a promise of emancipation, as well as the continuum of the relationship of exclusion and inclusion in modern international law — recognition of different societies as bound by the universal law, exclusion due to this same difference, as well as the maintenance of colonial authority and legitimate use of force.

A. Questions of Indigenous Sovereignty and Contemporary Self-Determination Claims

> . . . We are the victims of genocide in the most terrible and explicit meaning of that idea.
>
> Yet some of us have survived and are still here, along with the States that perpetrated these crimes against us. The world knows that the sovereignty, legitimacy, and territorial integrity of these States is tainted and fundamentally impaired because of the unjust, immoral, and murderous means employed in their establishment upon indigenous lands.

---

20. PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS 63 (2002).

> How can a thief go about establishing legal and legitimate possession of his stolen spoils? This, in reality, is the difficulty, which confronts these States — a difficulty which is compounded by the fact that some of the victims continue to walk about and remind everyone not to forget what was done.
>
> — Chief Ted Moses[21]

By using the claims of human rights to universality, indigenous peoples have insisted that they, as all other "peoples," have the right to self-determination. Their claims, however, have been met by legal and conceptual objections. It appears that the universalizing discourse of human rights — "all peoples have the right to self-determination" — does not really mean that it can apply to *all*. In practice, self-determination emerged from and justified a state-centered international legal order, where human rights applied to individuals or groups that were entitled to become independent states. Increasingly, however, non-state groups, such as stateless peoples, refugees, minorities, and indigenous peoples, have become a mounting presence in the international community and law. For them, the established idea of human rights law remained ambiguous, with no clear definitions or possibilities for enforcement. But the claims to these rights also became a necessity in the struggle of peoples for their very existence.

The violence committed against indigenous peoples in the Americas came to be justified through theories that permanently allocated them to the position of the non-sovereign peoples in the sphere of international law. In the sixteenth century, Spanish theologian and jurist Francisco de Vitoria concluded that the different social and cultural customs and practices (non-European) of the *Indian* justified the disciplinary measures of war, which ultimately annihilated the Indian identity, and replaced it with the identity of the Spanish.[22] His propositions, which subsequently influenced the developing law of nations, argued that the differences between Indians and the Spaniards could be overcome through his system of *jus gentium*; Indians possessed universal reason and were therefore capable of understanding and being bound by this universal law. Thus, Spanish claims to Indian land on the basis of "discovery" or divine law, could not violate the inherent rights of Indian

---

21. Ted Moses, Ambassador to the UN for the Grand Council of the Crees, Address at Indigenous Self-determination International Guest Panel, Plenary Session 2, Australian Reconciliation Convention at paras. 21-23 (May 27, 1997), *available at* http://www.austlii.edu.au/au/other/IndigLRes/car/1997/3/speeches/plenary2/moses.htm.

22. Anghie, *supra* note 19.

inhabitants. If however, the Indians transgressed these universally binding norms, since despite their possession of reason they were barbaric and uncivilized, the Spanish were justified in conquering and governing them "partly as slaves."[23]

At the moment where indigenous peoples came to be identified "partly as slaves" in an Aristotelian sense, (Vitoria and other Spanish scholars at the time were influenced by Aristotle's category of natural slaves),[24] they lost all capacity of being recognized as equal bearers of rights under the overreaching legal system. This idea was premised on the notion that all societies were bound by a universal law expressed in Christian doctrine and the Roman law of nations.[25] When Indians engaged in violence, repelling the "friendly" advances of Christian Spaniards, they violated the law of nations (more specifically), thus vindicating any repressive and violent tactics employed against them.

While the principles of universalization have changed over time, the criteria of what and who was civilized or uncivilized, legal or illegal, sovereign or non-sovereign, continued to be defined by European, and later by Euro-American, standards. International law thus elaborated and expressed "normative superior/inferior relations, conceptualized in terms of what is good (right) and what is bad (wrong), what is valid and what is not, and what works and what does not."[26] Thus, hierarchy meant a difference in a normative light. Indigenous peoples remained outside of the regulation of international law, which operated only between sovereigns. At the same time, they participated as peripheral peoples who were to be conquered and civilized. In other words, as bearers of rights, indigenous peoples were excluded or simply ignored.

Contemporary indigenous struggles for self-determination are taking place in the context of developments in international law, which, albeit unwilling and imperfect, have established some legal support for indigenous peoples' demands. The universalization of a juridical order based on precept which affirmed basic and inviolable dignity of human life owes its existence to the enormous impact of a universal cultural event: the memory of the Second World War. The promotion of victorious states of an ambitious program of

---

23. *See generally* FRANCISCO DE VITORIA, POLITICAL WRITINGS 231-327 (Anthony Pagden & Jeremy Lawrance eds., 1991).

24. ARISTOTLE, THE POLITICS 39 (Carnes Lord trans., 1984) (bk. 1, ch. 4, 1253a14).

25. *See, e.g.*, PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW (2001).

26. Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT'L L. 566, 567 (1997).

juridification of state obligations limited the principle of state sovereignty.[27] Thus contemporary international law appeared to position itself against the early colonial and modernizing missions, by virtue of its repudiation of direct colonialism, de-legitimation of openly racist language, and establishment and recognition of the norm of self-determination. These reforms emerged in response to the growing unrest in colonial territories as a conflict prevention mechanism. At the same time, however, by making colonialism illegal they provided grounds for social forces to further challenge the boundaries of international law.

Because of the domination of settler states in the international system, the legal principle of self-determination and the process of decolonization became applied only in the context of state-to-state relations in the post-war period. As Antonio Casesse argues, one of the legal modes of acquisition of territory under the classical international law included colonial conquest.[28] The source of this legacy can be traced to the 1823 opinion of Chief Justice John Marshall of the US Supreme Court for a unanimous Court in *Johnson v. M'Intosh*,[29] where he propounded that the discovery of territory occupied by American Indian tribes in the New World "gave [the discovering European nation] an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest."[30] The core of the decision was the establishment of the "discovery" doctrine that gave rights of ownership to the European sovereigns who "discovered" the land and converted the indigenous owners into tenants.[31]

---

27. Eduardo González, *La Globalización del Derecho a la Verdad [Globalization of the Right to the Truth]*, *in* MEMORIAS EN CONFLICTO: ASPECTOS DE LA VIOLENCIA POLÍTICA CONTEMPORÁNEA [MEMORIES IN CONFLICT: ASPECTS OF CONTEMPORARY POLITICAL VIOLENCE] 179, 179 (2004).

28. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 186 (1995). In the Canadian and United States jurisprudence even judgments which affirm indigenous territorial rights and recognize their prior existence as independent nations, affirm the right of the federal government's (in the United States) or the Crown's (in Canada) exclusive right to regulate relationships with indigenous peoples, thus recognizing the colonial state's sovereignty over indigenous lands and peoples. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The Supreme Court of Canada has said that Aboriginal rights were recognized and affirmed in the Canadian Constitution of 1982 in order to reconcile Aboriginal peoples' prior occupation of Canada *with* the Crown's assertion of sovereignty. *See* Kent McNeil, *Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin*, 2 INDIGENOUS L.J. 1 (2003).

29. 21 U.S. (8 Wheat.) 543 (1823).

30. *Id.* at 587.

31. *See id.* at 574, 592.

> The United States and other Western settler states formally adopted the colonial principles supporting the doctrine of discovery as outlined by Justice Marshall in *Johnson* as part of their domestic law of indigenous peoples' rights and status. European and other Western writers on international law in the 19th century regarded this "customary" practice of Western colonizing nations as demonstrating the general acceptance of denying indigenous peoples' territorial rights and equal sovereignty as part of the "civilized" world's law of nations."[32]

Consequently, even in the post-war period, legal doctrines such as *uti possidentis iuris*, effectively excluded any recognition of the rights to the lands that indigenous peoples had historically inhabited. *Uti possidentis iuris* "bestowed an aura of historical legality to the expropriation of the lands of indigenous peoples."[33]

Thus, "[t]he new law of self-determination has not resulted in the *invalidation* of these legal bases of title *ipso facto*."[34] The so-called "blue-water doctrine" considered as indigenous those peoples beyond Europe who lived in the territory before European colonization and settlement, and who now form a non-dominant, culturally separate group; hence, it did not include the forms of internal colonialism practiced in countries with significant indigenous populations.[35] Nor did the UN Charter provide specific definitions for what self-determination actually means, or which groups constitute a "peoples."[36] The UN General Assembly was leaning towards accepting whole colonial territories as subjects of self-determination.[37] In a post-Charter assessment, indigenous peoples were not considered in the provisions of non-governing territories in Chapter XI.[38] Self-determination of internally

---

32. Robert Williams, *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World, in* INTERNATIONAL LAW AND INDIGENOUS PEOPLES, THE LIBRARY OF ESSAYS IN INTERNATIONAL LAW 165, 172 (S. James Anaya ed., 2003).

33. W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350, 352 (1995).

34. CASSESE, *supra* note 27, at 186.

35. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. of Human Rts., *Prevention of Discrimination Against and the Protection of Minorities*, ¶ 25, U.N. Doc. E/CN.4/Sub.2/2000/10 (July 19, 2000).

36. *See* U.N. Charter art. 1, para. 2.

37. THORNBERRY, *supra* note 20, at 92.

38. *Id.*

colonized peoples or even a limited degree of autonomy in relation to the state became one of the most disputed issues in the international public law and a continuous security concern.

Indigenous peoples, however, have taken the meaning of self-determination as a universal human right applicable to all peoples very seriously. The current impasse at the United Nations regarding indigenous peoples' right to self-determination and its inclusion in the Draft Declaration of the Rights of Indigenous Peoples, is a result of the apparent failure to reconcile the discord between indigenous demands and human rights institutions. In the charter-based international human rights system, the principle of self-determination is referred to in the UN Charter, Articles 1(2) and 55, and is implied in Chapters XI (declaration regarding non governing territories) and XII (international trusteeship system). The Charter provides a broad mandate to maintain international peace and security based on respect for the principle of equal rights and self-determination of peoples. The anti-colonial paradigm was expressed in the General Assembly Resolution 1514 (XV) of 1960 and the Declaration of Granting of Independence to Colonial Countries and Peoples.[39] This declaration upheld the "territorial integrity" of states and focused on peoples as whole territories and not particular ethnic groups or groups within them. Indigenous peoples, not constituting sovereign states, were excluded.

More explicitly in the treaty-based system, self-determination became a right in the current human rights framework of international law as included in common Article 1 of the ICCPR and the CESCR: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[40] By virtue of its inclusion in the treaties, self-determination is a human rights norm that already exists in international law as a part of general or customary law. Significantly, Article 1 does not create the right to self-determination, but confirms that it already exists and is in possession of all "peoples."[41] In addition to being applicable to all human beings, the connection of self-determination with the term "peoples" also implies its collective character; in essence, self-determination means that human beings, collectively or as individuals are entitled to have a control over their own

39. *Id.* at 93.

40. International Covenant on Civil and Political Rights, *supra* note 2, art. 1; International Covenant on Economic, Social, and Cultural Rights, *supra* note 3, art. 1.

41. Ted Moses, *The Right of Self Determination and Its Significance to the Survival of Indigenous Peoples*, *in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 155, 157 (Pekka Aikio & Martin Scheinin eds., 2000).

destinies. Indigenous peoples have proposed that the UN Draft Declaration of the Rights of Indigenous Peoples incorporate a version of common Article 1(1) of the ICCPR and the CESCR, modified by changing the opening word from "All" to "Indigenous" so as to state that the right to self-determination belonged to indigenous peoples. Article 3 of the Draft Declaration states that "[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."[42] Representatives of many member states strongly opposed this motion, stating that these groups are not "peoples" and have no rights to self-determination based in international law. The members disagreed with the use of the term "peoples" because it implied collective rights of indigenous peoples, clearly undermining state control of lands and resources.

This ambiguity of terminology has been the source of endless debates in the international human rights system, trying to determine what constitutes a "people" and who has the right to self-determination. In general, post-1945, international law practice, "people" constitutes an entity that already has attributes of sovereignty or statehood. Thus the very definition of "sovereign," as historically defined in European law among nations, continues to exclude claims that would challenge the territorial integrity of existing states. The question then becomes whether self-determination of indigenous peoples should assimilate to the already existent interpretation of the term. Is it supposed to eradicate presumed "deficiencies" of indigenous peoples if identified against "non-deficient" states? In order to accommodate indigenous claims to self-determination, existing international legal systems would need to move away from the state as the overwhelming standard. This raises the issue of what exactly is the difference between indigenous peoples and the state. And finally, are indigenous peoples trying to be equal to, or the same as, sovereign subjects of international law?

A fundamental problem of inclusion and exclusion of peoples who are not sovereign continues in the sense that their "human rights" can be protected only insofar as they resemble the image of an "ideal state." As Koskenniemi writes, "Without a principle that entitles — or perhaps even requires — groups of people to start minding their own business within separately organized "States", it is difficult to think how statehood and everything we connect with it — political independence, territorial integrity and legal sovereignty — can be legitimate."[43] Indigenous peoples are not sovereign states, but they claim

42. Draft Declaration, *supra* note 4, art. 3.

43. Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory*

collective as well as individual rights. Here, it is argued that only if they are recognized as self-determining peoples, through an internationally recognized document such as the Draft Declaration, will they achieve some form of equality in international law. In other words, only if they come to resemble the already preconceived ideal of what constitutes a people will they have equal rights. However, possessing precisely those elements of sovereignty as defined in international law indicates a degree of assimilation and adoption of a pre-defined standard on the part of indigenous peoples, at the same time that they are challenging the state-centeredness of international law. This points to a contradiction between the conception of human rights as the new standard of civilization and the inclusion of the rights of indigenous peoples, who were excluded in the very constitution of that standard. Although the main actors within the international human rights system, international and regional organizations such as the United Nations, the European Union, Organization of American States, and international non-governmental organizations, refer to international human rights law as non-ideological, impartial, and the quintessence of human goodness, modern human rights philosophy is associated primarily with Western theories of liberalism, individualism, and democracy.[44] To address this requires examination of some theoretical underpinnings of the contradictory relationship of inclusion and exclusion of indigenous peoples in international law.

B. Double-Edged Nature of the Human Rights Narrative

The position of indigenous peoples in international law reflects their perpetual and paradoxical relation of inclusion and exclusion in the very discourse of human rights. Indigenous claims to self-determination demonstrate the core of the problem in international law — the distinction between the self, and the "other."[45] As a non-recognizable entity, or an entity that does not fit into the image of the familiar self, the "other" enters into a space of both exclusion and inclusion as something that needs to be changed or even eliminated. Indigenous peoples were not bearers of rights enjoyed by states and their citizens and, as such, were considered less than human. This situation of savagery appeared in Europe when millions of people without a political status, and the very qualities that make it possible for other people to treat them as fellow human beings, suddenly emerged "in the midst of

---

and Practice, 43 INT'L & COMP. L.Q. 241, 245 (1994).

44. Alan S. Rosenbaum, *Introduction* to THE PHILOSOPHY OF HUMAN RIGHTS: INTERNATIONAL PERSPECTIVES 3, 36 (Alan S. Rosenbaum ed., 1980).

45. LAWS OF THE POSTCOLONIAL 4 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).

civilization, on their natural givenness, on their mere differentiation."[46] Thus, as Hannah Arendt writes,

> The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships — except that they were still human. The world found nothing sacred in the abstract nakedness of being human.[47]

This "abstract nakedness of being human" was the most dangerous state; "[b]ecause of it they were regarded as savages . . . . Because only savages have nothing more to fall back upon than the minimum fact of their human origin . . . ."[48] As a result, the universal "inalienable" human rights "would confirm only the 'right of the naked savage,'"[49] of those reduced to inhumanity. In this sense, the true bearer of human rights becomes precisely the previously excluded savage. This, however, is something that international law has a great difficulty recognizing, because any such recognition of rights as applicable to all would effectively eliminate the existence of the savage. For as long as there is recognition of that difference, there is also the justification of exclusion from the comity of nations. The elimination of a "savage" would demand equality of indigenous peoples and rights that, at the moment, challenge some of the powerful political and economic interests — rights to control their lands and resources.

The development of human rights also implies that there are rights are to be protected by some authority and that violation of those rights must be remedied accordingly. As there is no authoritative list of rights and their definitions, a right becomes defined and delimited by a particular meaning of that right, which is inevitably hierarchical and political. When claiming their rights, indigenous peoples are trying "to lift that claim from political contestation and from the discretion of the relevant authority."[50] However, international law remains rooted in a European tradition, and it is this tradition that it attempts to universalize. At the same time, because there is no authentic

---

46. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 302 (1973).

47. *Id.* at 299.

48. *Id.* at 300.

49. *Id.*

50. Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration* 17 CAMBRIDGE REV. INT'L AFF. 197, 208 (2004).

universal authority, indigenous claims also encounter disagreements over the meaning and definition of rights, yet another particularity. Indigenous peoples' actions are strategic as they gain legitimacy through the use of human rights principles and proper channels of existing national and international legal institutions; communities increasingly self-define as indigenous.

On the other hand these actions also give legitimacy to international human rights bodies as rights claims presuppose an existence of democratic institutions as well as their accessibility to potential claimants. Legitimacy of a particular struggle is evaluated through the lens of accepted institutional language, which in turn becomes affirmed as a neutral space for equal participation of different actors. Consequently, those excluded from international law because of social practices which put them beyond reach of universality are now invited into the universal, to become assimilated into its realm.[51] As Fitzpatrick puts it,

> This imperative inclusion simultaneously brings the constituent force of the excluded into a necessary relation with the human of human rights *and* founds a civilizing mission directed at overcoming exclusion — an exclusion which must also, of course, persist. People placed in this appositive arena between inclusion and exclusion can participate in the scheme of human rights only through attenuated or dependent means.[52]

One of the mechanisms of granting citizen rights to indigenous peoples is the national reconciliation paradigm, whereby past abuses are recognized and indigenous peoples are invited to become equal members of the society. At the same time, their claims to self-determination and equality as nations are met with violent opposition.

III. Self-Determination Movements and Developments "From Below"

Significantly, the work of indigenous peoples at the level of the United Nations and their push for the UN Draft Declaration on the Rights of Indigenous Peoples is based on their continuous experience of human rights abuses. As Ted Moses writes, indigenous representatives did not rely on "theory or hypothesis about international law and international rights. There

---

51. LAWS OF THE POSTCOLONIAL, *supra* note 44, at 9.

52. Peter Fitzpatrick, *Terminal Legality? Human Rights and Critical Being*, *in* CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT 119, 125 (Peter Fitzpatrick & Patricia Tuitt eds., 2004).

was nothing abstract about our work."[53] In a way, the introduction of particular experiences of indigenous peoples into the arena of international law signified an attempt to include different forms of understanding and knowledge, based on indigenous experiences or interpretation. The voices of indigenous peoples have for the first time entered the international arena as directly articulated by their leaders and representatives rather than through a particular theory of international law or rights. However, it is precisely this aspect of the Declaration that differentiates it from other instruments at the UN, and deviates from the formal language employed within the institution. Despite their participation, whether indigenous arguments and claims are recognized by their audiences is unclear. In the arguments on self-determination, it becomes evident that their idea of what self-determination means is quite different from the visions of state representatives or some UN officials. The implication for indigenous peoples is that while they are fundamentally affected by the way the right to self-determination is constituted in international law, they are not necessarily included in the process of its interpretation. Indigenous lobbying at the Working Group demonstrates indigenous participation in the making of the draft Declaration, but true consideration and respect for their perspectives is limited. Over its history, international law has constructed a particular meaning of indigenous identity and entitlement that is inconsistent with the self-image of indigenous peoples as nations. The accepted model of law and legal reasoning depends on how an institution, such as the UN, views itself and what sorts of arguments it recognizes as valid.

In the wake of the collapse of communism, the rise of new forms of nationalist and secessionist movements in the 1990s resulted in a new quest of international lawyers and scholars to investigate how to better accommodate ethnic and national identities. The role of international law and its responsiveness to this situation, including the viability of self-determination as a legal norm, came into question. International law was supposed to either act as a responsive mechanism, which would adjust to the current situation of post-Cold War secessionist movements, or resist any negotiation, which would threaten to undermine the very concept of statehood. The debates over whether the norm of self-determination should be broadened to accommodate this new situation, however, continued to deny the colonial context of its

53. Ted Moses, Ambassador to the UN for the Grand Council of the Crees, Invoking International Law, Keynote Address at the Special Convocation at the Univ. of Saskatchewan (June 27, 1996), *available in part at* http://www.usask.ca/nativelaw/publications/jah/moses.html.

foundations. What remained absent in the debates was the violent event outside of law — the moment in which it was formed — in other words, the colonial relationships between the Europeans and other world peoples.

The notion of self-determination of indigenous peoples inevitably referred to some reversal of the colonial process, and spread the fears of secession and destruction of existing settler states. For this reason, far from drastically changing the position of indigenous peoples in international law, human rights discourse, with limits outlined by its cultural, political, or historical origins, only reaffirmed their absence from international law as equal actors. This is particularly evident in the way in which indigenous peoples became portrayed in literature on self-determination as minorities or peoples who have largely assimilated into the greater society.[54] Even in the context of third world struggles for recognition and development, some critical legal scholars warn against the increasingly multiplying number of categories to cover distinctive cases which threaten divisionism.[55] The focus is on the economic and power inequalities among First and Third World states, but sovereignty and territorial integrity are still the aim and the end result.[56] It appears then, that the colonization process has been completed. For indigenous peoples, however, an addition of the "fourth world" category[57] has been more useful in specifying that indigenous peoples are distinct from nations within third and first worlds.

Undoubtedly there are "pressures from below," violent or peaceful secessionist movements, lobbying of non-governmental organizations and such, but how decisions are made within international institutions is limited by

---

54. *See, e.g.*, THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 145 (1995).

55. B.S. Chimini, *Third World Approaches to International Law: A Manifesto*, *in* THE THIRD WORLD AND INTERNATIONAL ORDER 47, 49-50 (Anthony Anghie et al. eds., 2003).

56. Upendra Baxi points to the involvement and lobby of non-aligned states at the UN for the limited application of self-determination beyond situations of "'classic' colonialism," which meant that "all sorts of different peoples, cultures, and territories vessels of imperial unity, should continue in the post-colony. The post-colonial state was somehow to create out of many nations a single 'nation-state'." UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 36 (2002).

57. "Fourth World" is a term first used by Chief George Manuel and Michael Posluns in their book *The Fourth World: An Indian Reality* (1974). It refers not only to a geopolitical positioning of Indigenous nations which was separate from the First and Third World blocs but also to a Hopi prophecy about the people climbing up though the worlds to this current one we live in — the Fourth World. Since that time the term has come to be widely used and we have expanded the paradigm further to talk about the Fifth World — which is the world of the refugee and the displaced persons. In times of discourse focused solely on development and trade at the international level these terms are important ways to remind ourselves of the need for active political analysis.

their ultimate goal and purpose. And what is the ultimate goal and purpose of the UN? The UN Charter does not only concern itself with protection of human rights, but also with humanitarian intervention and territorial administration. The UN might offer space for resistance against imperialism, but at the same time it remains a tool for imperialism as a "manager of problems in the developing world."[58] In his analysis of the influence of social movements on policies of international institutions, Balakrishnan Rajagopal has recently referred to "Nancy Fraser's notion of 'subaltern counterpublics' which she defines as 'parallel discursive arenas where members of subordinated social groups invent and circulate counter discourses, which in turn permit them to formulate oppositional interpretations of their identities, interests and needs.'"[59] The problem with this formulation, however, is that Fraser, and to some degree Rajagopal, still fail to adequately address the power cleavages between different discursive arenas. Marginalized groups remain in a position where they hope to ameliorate their situations through an instrument that does not recognize them as equal actors. While institutions such as the International Monetary Fund and the World Bank have adopted the language of human rights in response to increasing pressures from social movements, their overall mandates — coordinating and managing international monetary and financial matters — have not changed.[60]

The "voices of suffering" of the people directly affected by politics of violence are inevitably operating within pre-defined borders of international legal institutions. Post-1945, human rights discourses appeared to "confront[] the politics of cruelty so far justified, and held justifiable."[61] Upendra Baxi, argues that in contrast to the modern idea of human rights, which sought to civilize and conquer, "the 'contemporary' human rights paradigm . . . is based on the premise of radical self-determination. Self-determination insists that every human person has a right to a *voice*, ... [Human rights are] no longer *exclusively* at the service of the ends of governance, thus opening up sites of resistance."[62] Yet despite the increasing resistance among indigenous peoples and marginalized groups everywhere, these social movements also operate in a context in which they are not the only non-state sites of norm-production.

---

58. Orford, *supra* note 6, at 188.

59. BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENTS, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 262 (2003).

60. *See generally* ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005) (providing a discussion of past and present roles of the IMF and World Bank).

61. BAXI, *supra* note 55, at 28.

62. *Id.* at 31.

In fact, the increasing fragmentation in international law "into specialized branches, deferring to special interests and managed by technical experts .... pits functional regime against each other: trade institutions *versus* environmental or human rights regimes . . . ."[63] Specifically, the role of trade institutions and economic globalization in the reconstruction of "post-conflict" territories and the promotion of free trade directly contrasts with interests of local or indigenous peoples' claims to self-determination.[64]

Rights then become balanced against each other, depending on a particular context and political priorities. Self-determination can represent a struggle for freedom from colonial oppression, or it can pose a security threat to the international community. Recently, the context of national security has presented a powerful challenge to the discourse of human rights. Furthermore, for some settler-states, indigenous claims to self-determination have been equated with violent secession movements and balkanisation.[65] The debates in international legal scholarship have focused on potential threats to international peace and stability posed by new claims to self-determination, as well as the capacity of international law to change and accommodate these new threats. This became particularly evident in the emergence of the reconciliation paradigm in contrast with, or avoidance of, self-determination claims. States, as well as legal scholars, have continued to stress the Hobbesian savagery or "post-modern" tribalism[66] caused by secessionist movements of the post Cold-War period. In order to present the state-preserving perspective, analysis shifts from broad themes of international law to particular situations of national reconciliation paradigms.

IV. Reconciliation and Indigenous Peoples

In some situations where the relationship between settler states and indigenous peoples continued to be that of violence and genocidal policies — cycles between state repression and possibilities of uprisings — recent international pressures for peace-building and reconstruction in conflict-ridden places have resulted in the policies of reconciliation. However, as Mohawk scholar Alfred Taiaiake describes, "Reconciliation gives Onkwehonwe

63. Martti Koskenniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241, 243 (2004).

64. *See* ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW (2003).

65. Demetrio Cojti Cuxil, *Gobernabilidad democratica y derechos indigenas en Guatemala*, *in* GUATEMALA AFTER THE PEACE ACCORDS 65 (Rachel Sieder ed., 1998).

66. FRANCK, *supra* note 53, at 145.

[original peoples] a place inside of Settler society with no requirement for Settlers to forego any of their ill-gotten gains personally or collectively."[67]

Reconciliation emerged as an integral component of a peacemaking paradigm in response to gross and systematic human rights violations of the twentieth and twenty-first centuries. Truth commissions emerged as mechanisms for reconciliation in the form of investigative tribunals with mandates to answer those questions, as well as to reach some form of justice for the victims. Their purpose has been to restore state legitimacy, social stability, and healing by acknowledging past injustices. These official bodies, however, did not have a mandate to address situations of indigenous dispossession to which Alfred refers. In particular, when contrasted with self-determination claims, reconciliation implies yet another attempt on the part of nation states to ignore recognition of collective rights of indigenous peoples and, instead, to further promote nation building.

In general terms, dilemmas of reconciliation focus on the question of what should be done about the past. The questions look to whether it is better to remember past violence and what methods can best prevent future violence. Increasingly, as exemplified through the work of South Africa's Truth and Reconciliation Commission, the reconciliation paradigm has moved away from punitive justice, focusing instead on the ideal of restorative justice, which would repair injustice by restoring societal harmony, thus affecting future behavior.[68] The conception of reconciliation promotes termination of hostilities between different factions of a society and citizenship. Presumably, recognition of previously marginalized groups as equal citizens would contribute to social solidarity of a liberal democratic society.

A substantial component of reconciliation is the importance of acknowledgment versus denial of past wrongs committed against a sector of society. Acknowledgment and recognition, however, are always granted by the perpetrator and received by the victim. As Govier writes, "Received acknowledgment presupposes granted acknowledgment, and granted acknowledgment presupposes self-acknowledgment."[69] In this process indigenous peoples are receivers of official offers of reconciliation and acknowledgment. Furthermore, the reconciled relationship would need to

---

67. TAIAIAKE ALFRED, WASÁSE: INDIGENOUS PATHWAYS OF ACTION AND FREEDOM 151 (2005).

68. Damien Short, *Reconciliation and the Problem of Internal Colonialism*, 26 J. INTERCULTURAL STUD. 267 (2005).

69. Trudy Govier, *What Is Acknowledgment and Why Is It Important?*, *in* DILEMMAS OF RECONCILIATION: CASES AND CONCEPTS 65, 80 (Carol A.L. Prager & Trudy Govier eds., 2003).

change for the better, eliminating discrimination and socio-economic marginalization of indigenous peoples. The focus on indigenous peoples as citizens would involve a re-thinking of the legitimacy of the social contract in settler societies. If, however, indigenous peoples never clearly agreed to this contract, is equal citizenship something that is willed by them? Finally, do indigenous peoples have to accept the official acknowledgment that is "given" to them?

Several problems arise in the context of reconciliation within settler states. First the concept of reconciliation implies some pre-existing unity that can be reconciled. Yet, as Priscilla Hayner asks in her work on truth commissions, "How can a nation of enemies be reunited?" In societies founded on conquest there never was an achieved "unison" and homogeneity of a nation. In situations where a social contract did not take place between the new colonial state and indigenous peoples, the concept of *conciliation* would be more appropriate.

Second, truth and reconciliation focus on atrocities of a past "illegitimate" regime, hoping for a transition to a new legitimate, liberal, democratic regime. In some societies, however, the so-called "period of brutal repression" has usually not been a "period" but a norm, as well as a consequence, of continuous marginalization, discrimination, and racism. For instance, in Peru the most recent conflict (1980-2000) targeted mostly Quechua peoples, leaving approximately 70,000 dead. Peruvian novelist and Nobel Prize winner Mario Vargas Llosa has argued that indigenous peoples in Peru present "archaic obstacles" to the development of "modern" nations.[70] Myths of violent indigenous resurgence played an important role in the fear of mysterious and atavistic Quechua peoples who were seen as potential violent subversives and terrorists.[71] In the post-war period, the Peruvian Truth and Reconciliation

---

70. *See* Mario Vargas Llosa, *Questions of Conquest: What Columbus Wrought, and What He Did Not*, HARPER'S, Dec. 1990, at 45.

71. An interesting example is the Investigating Commission on the Uchuraccay massacre of eight journalists that took place in the Peruvian Andes in 1983. The official *Comisión Investigadora de los Sucesos de Uchuraccay*, presided by Mario Vargas Llosa, concluded that the massacre was committed by peasants who mistook them for terrorists. Vargas Llosa described the culture of the Andean community as remote and removed from the metropolitan of Lima as an explanation of the state of the journalists' bodies: eyes gouged, bodies mutilated and buried face downwards "so that their souls could go straight to hell." These acts evidenced the harsh nature of Andean culture, which Vargas Llosa dubbed "feudal" and "archaic." Two community members were eventually tried, convicted, and imprisoned. Nobody in the community has ever talked about what happened. The Peruvian Truth Commission, however, reopened the case after the evidence emerged that the Peruvian military forces in fact committed the massacre.

Commission focused on "a process of reestablishment and recasting of fundamental ties among Peruvians; ties that were destroyed or that deteriorated in the conflict experienced over the past two decades;"[72] an implementation of a process of re-establishing and rebuilding relationships among Peruvians. Although the reconciliation process must possess "certain fundamental characteristics" that respond to the multiethnic, pluricultural, multilingual, and ecumenical reality of the country, it assumes that there are certain fundamental ties *among Peruvians*, and not among distinct peoples. Thus, in the Peruvian Commission, as well as in other commissions that have sprung up in various contexts and not necessarily in post-war climates,[73] indigenous claims are not seen as requiring a fundamental restructuring of the state itself and recognition of indigenous collective rights.

While indigenous peoples support attempts to clarify past human rights abuses and bring perpetrators to justice, reconciliation stands in direct contrast with the claims being made in the international arena by indigenous groups. States purport to transcend the legacy of colonialism through truth-telling and acknowledgment of past abuses. Rights granted to indigenous peoples through limited constitutional reforms are expressed as state-derived individual rights rather than as collective rights of distinct nations. It remains to be seen to what extent the international human rights community of nations is willing to move beyond the colonial assertion of legitimate sovereignty towards the recognition of indigenous peoples as people with an "s" and consequently some form of political power sharing.

V. Conclusion

In the epilogue of his book *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Martti Koskenniemi writes,

> Universality still seems an essential part of progressive thought — but it also implies an imperial logic of identity: I will accept you, but only on the condition that I may think of you as I think of myself. But recognition of particularity may be an act of condescension, and at worst a prelude for rejection. Between the

---

72. FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION: SUMMARY OF RECOMMENDATIONS (Int'l Ctr. for Transitional Justice trans., 2003), *available at* http://www.aprodeh.org.pe/sem_verdad/informe_final/english/recomendations.pdf.

73. Some examples are the Guatemalan Historical Clarification Commission (CEH) of 1999, Council for Aboriginal Reconciliation Act of 1991 in Australia, and the Royal Commission Report on Aboriginal Peoples of 1996 in Canada.

> arrogance of universality and the indifference of particularity, what else is there apart from the civilized manners of gentle spirits?[74]

With the emergence of the post-war human rights discourse, indigenous peoples have become nominally included as participants, but only within limits of established discourses and norms and in competition with powerful international actors. Whether the ongoing differentiation and proliferation of human rights discourses will benefit indigenous peoples remains to be seen. Indigenous peoples continue to struggle for a reform of Eurocentric legal texts which deny their heritage and knowledge. The international indigenous movement is attempting to provide an alternative view of existing principles and broaden the definitions and cultural reach of human rights. These attempts to "indigenize" international law represent, for the existing states, a new current which threatens the state-centered notions of peace and security, reversing the centuries-long period of disorder and confusion initiated by the Europeans.

A preferred solution by the international community and states has been to promote national reconciliation. Yet, instead of creating the foundations for negotiating peaceful coexistence among diverse ethnic groups on equal terms (as in the case of Peru) the process was framed in nation-building language, which continues to ignore the status of indigenous peoples as distinct peoples. Official reconciliation merely continues the assimilationist nation-building process through the language of citizenship rights and inclusion of victimized indigenous peoples. These policies, however, run counter to more recent demands that are being put forward by indigenous organizations at the international level, specifically claims dealing with the right to self-determination over indigenous lands and resources.

The relationship between indigenous people and international law points to a tension between the law's universal aspirations and its incapability to overcome what it sees as indigenous particularity and distinctiveness from recognised sovereign states. Still, when they are applied, international legal rules and principles express some interpretation and collective experience. As indigenous peoples partake of the pre-established institutional norms, they also make political claims in legal language. They enter into a space of contestation with other social and political actors, albeit in a weaker position, over the meaning and scope of particular rights and duties. Universal aspirations of different actors are inevitably connected to some particular collective experience and interest. But aspirations to universality can rest

74. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 515 (2001).

precisely in the capacity to engage in constant dialogue among different particularities. Thus, the test for international law's capacity to include indigenous peoples lies in being open to constant negotiation and contestation of its existing boundaries.

As Peruvian novelist and anthropologist Jose Maria Arguedas writes: "How are the barbed wire borders Comandante? How long will they endure? Just as those servants of the gods — the gloomy darkness, threats, and terror that were raised up and heightened — are being weakened and worn away, so are those borders, I believe."[75] The open question is whether the colonial borders of international law are being weakened, and whether other speeches can gain presence; for in its original mandate, human rights discourse belongs to the very Leviathan indigenous peoples are trying to oppose.

75. JOSÉ MARÍA ARGUEDAS, *Last Diary? August 20, 1969*, *in* THE FOX FROM UP ABOVE AND THE FOX FROM DOWN BELOW 1, 260 (Julio Ortega ed., Frances Horning Barraclough trans., 2000).