The Myth of the Inkarri: Colonial Foundations in International Law and Indigenous Claims to Self-Determination

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1572: Cuzco
With Tupac Amaru, four centuries of the Inca dynasty and nearly forty years of resistance in the Wilcabamba Mountains come to an end. Now the storms of war, the harsh rhythm of the conches, will no longer fall on the valley of Cuzco.
Eduardo Galeano[1]

Abstract

Past and present human rights violations have compelled indigenous peoples to seek effective remedies outside the states or territories in which they live. The general question of the role of public international law as a strategic tool for indigenous peoples to advance their claims opens the doors to the inner workings, dualities, and paradoxes, which lie at the heart of the international legal order. Recent developments in the area of indigenous peoples' rights in international law, especially the UN Declaration on the Rights of Indigenous Peoples, have included indigenous peoples only in so far as their distinctiveness allocated them particular status that still remained secondary to the territorial integrity and national interests of states. International law has sought to reaffirm, on the one hand, its legitimacy through greater inclusiveness and recognition of legal pluralisms and, on the other, the *fait accompli* status of its colonial past through which indigenous peoples lost their sovereignty.

Since the promulgation of the Declaration of Human Rights, the United Nations (UN) has become an arena for the ongoing struggle over the scope and content of an adequately inclusive human rights regime. Indigenous peoples' claims have presented a challenge to the universalizing mission of international law. This is due to, among other reasons, a continuing contestation between indigenous peoples and some states over the affirmation of indigenous peoples' legal status as "peoples", with a corresponding right to self-determination under international law, and the recognition of their collective rights as human rights.

This paper provides an exploration of indigenous rights and international law as part of a larger contemporary inquiry into the universalist aspirations of the public international legal system and the continued debate over the possibility of globally accepted human rights. Claims to the universality of international law are regularly brought to negation or ignorance of its relationship with colonialism. Much of International Law's official history is the creation of rights among sovereign nations based on the idea that, in time, the legitimacy of a just order would work from the top down as it would from the bottom up. The origins of international law, however, are based on the exclusion and discrimination of the indigenous Other as barbaric and incompatible with other legal addressees. This legacy casts its dark shadows on international law's claims to universality because such universality would demand the inclusion of indigenous peoples as equal actors. In search of international law's memory of its violent origins, this paper shall look to the existing, yet fragmented and often rejected narratives and memories of those who found themselves excluded in the creation of international law. The objective is not to provide proposals for a reform of international law, but to outline the conditions indigenous peoples encounter in the sphere of international law as they attempt to advance their claims, as well as observe what their claims signify for international law's reform and reaffirmation in the present.

[1] Eduardo Galeano, *Memory of Fire, I. Genesis* (New York: Norton and Company, 1985) at 76.

Introduction: Que dirian, cuando vuelva nuestro Inka?

Inkarri's brother Espanarri cut off Inkarri's head...The highest mountains know. 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 followed by the birds.
Eduardo Galeano[2]

Since the first moment of the encounter with the Spaniards, a choice between two alternatives became apparent to the diverse indigenous nations of the Americas: to accept or reject the conquest. The result of the second alternative is evident in the Andean narrative of the Inkarri.[3] The title, Inkarri, comes from the Quechua pronunciation of Spanish words Inca Rey, or the Inka King. It tells the tale of the last Inka nobleman and rebel leader in Peru, Jose Gabriel Condorcanqui Tupac Amaru II (the 'Great Snake' in Quechua) and his followers who were taken to Cuzco, the capital of the Inka Empire, and summarily tried and executed for treason. On 18 May 1791, before a large gathering in the central square, Tupac Amaru II 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 (his limbs could not be separated from his body by the horses employed), the rebel leader was beheaded. In the aftermath, the Spaniards unleashed a reign of terror against the Quechua people. The conquest severed the head of the Inca, which since has remained separated from the body. According to the story, when both come together again, the period of disorder, confusion, and darkness initiated by the Europeans will end and the Andean people will recuperate their memory.

Inkarri is a memory of a failed indigenous rebellion against the Spanish colonial rule. The story recollects the period in which the notion or a colonial narrative of 'indigenous' emerges: as the vanquished Other, the subjugated, and the victim. The relationship between the colonizer and the colonized became a source of many debates in the sixteenth century among Spanish theologians and jurists, over the legitimacy of the Spanish invasion, as well as the legitimacy of indigenous rebellion against it. The hierarchical and discriminatory nature of colonial societies has been legitimized through the philosophical understanding of the ontological asymmetry of human species. This was the moral, but also rational legitimization of the relation of domination within colonial societies and the colonial ethnocide.[4]

The announcement of a possible revolution and reversal of the colonial order in narratives such as the Inkarri remained in the minds of the European colonizers as a potential violent disturbance to the newly established hierarchies, allowing them to resort to terror as a legitimate source of sovereign power and law. The terrible injustice of colonialism could be compensated only at the cost of transferring the fear of *Indios* to the 'whites'. The modern jurisprudence, however, concealed the effects of colonial violence as this history became a suppressed memory within the institutions and values of the international law; what remained was only its universal moralism.

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[2] *Ibid.*

[3] For historical overview of Andean myths see Jose Maria Arguedas y Francisco Izquierdo Rios, *Mitos, leyendas y cuentos peruanos* (Lima: Ministerio de Educacion, 1947) and Alberto Flores Galindo, *Buscando un Inka: Identidad y utopia en los Andes* (Magdalena: Instituto de Apoyo Agrario, 1987).

[4] Significantly, other indigenous groups, who were subjugated by the Incas prior to the Spanish arrival, assisted in the defeat of Tupac Amaru II by the Spanish.

The memory of violence, however, never disappeared; it remained guarded within the subconscious of a culture whose memory never forgot the details.[5]

The attempts to re-found international law and human rights through inclusion of historically marginalized and excluded non-Western moral-legal systems, has aimed to create the concept of human rights as either truly 'universal' and 'applicable to everyone', or as a plurality of competing visions and dialogue among different approaches. Once re-affirmed as more universal and inclusive, or as a product of continuous dialogue, human rights appear to become a tool for peoples everywhere in their struggles against different forces threatening the annihilation of their environments, cultures, and lives.[6] At present, however, indigenous peoples represent polities, which a) are not sovereign nation states, and b) are entities subordinated to nation-states. I refer throughout this to indigenous peoples' claims to self-determination and self-definition, in contrast to the constant "othering" of indigeneity. The two-sided aspect of indigeneity is its use as a liberating tool by peoples who claim under indigenous identity (and an aspiration to an exclusive control over a territory), as well as its utilization by other forces (state, international law, international institutions, transnational corporations, and so on) in order to allocate these peoples to the position of permanent difference. In particular, 'indigeneity' or status of difference has been recognized primarily within the framework of identity-based rights. The vast majority of the world's indigenous peoples do not have recognized rights to commercially valuable resources or to veto projects of extractive industries.

What then, are the possibilities for the existence of more universal international law, and more inclusive human rights protection regime, with its reference to basic values of 'fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women'? This analysis is concerned with this tension and the extent to which international law can recognize its own pluralism, as well as the pluralism of the sovereign, while at the same time promoting the decolonizing process and seeking to uphold indigenous rights. Relying on some recent studies on the relationship between international law and imperialism, provides a brief historical account of international law's treatment of indigenous peoples.[7] Part of the problem in situation of indigenous peoples in international law, lies in continuing ambiguity of the definition, content, and scope of human rights in international law. The international human rights system has recognized individuals and other non-state entities as subjects who would be able to assert

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[5] Jacques Derrida, "Canons and Metonomies: An interview with Jacques Derrida," in Richard Rand ed. *Logomachia, The Conflict of the Faculties* (Lincoln and London: University of Nebraska Press, 1992).

[6] I wish to emphasize at the beginning that for the purposes of my project, and taking into an account the context of contemporary local, national, international, and transnational levels, the concept of indigeneity does not in any way have an a priori content and scope. Moreover, the manner in which indigeneity has been defined and utilized not only by indigenous peoples, but also among others, the state, non-governmental organizations, international financial institutions, and transnational corporations, has revealed that the concept is yet another tool for, or forum of contestation for a variety of interests, which also exclude or include others, including those peoples who wish to claim under this category. I use thus the term 'indigenous' or 'indigenous rights' (as identity-based rights) with caution, for the terminology in and of itself does not have to hold emancipatory properties.

[7] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge:Cambridge University Press, 2005) at 47; Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001) at 55.

their rights before international law in their own capacity.[8] Different human rights bodies have capacities to monitor national governments' respect of human rights and investigate claims of violations of indigenous rights.[9] At the same time, the enforcing mechanisms of the international human rights bodies have been limited by among other reasons, the primacy of the doctrine of territorial integrity, enforceability and applicability of human rights norms to non-state actors, or conflicts between rules of non-intervention and rules of state responsibility.

This paper is divided into four sections. Section I discusses the colonial origins of international law, focusing on its structural grounding and the need to legitimate the violent invasion of the Americas. It looks at the sixteenth century debate among Spanish theologians and jurists, evaluating the legitimacy of Spanish conquest of the Americas and the extremity of violence waged against indigenous populations. Discourses that took place in the sixteenth century, concerned directly indigenous people's lives, but excluded them as equal interlocutors and questioned their place in the emerging international order. Section II observes briefly the evolution of international law through nineteenth-century legal positivism, culminating in the contemporary discourses of human rights. It examines how international law developed a contradictory notion that in order for order, progress, and enlightenment to spread, violence, however extreme, would be needed to modernize the local peoples who did not want to be modernized. Section III observes the extent to which contemporary international law has the capacity to recognize this contradiction and its colonial past through human rights discourse. It examines this question by focusing on the principle of self-determination. Section IV contains brief final conclusions.

I. Indigenous Peoples and Development of International Law

To our father the creator Tupac Amaru:
Listen, my father, my Serpent God, listen
The bullets are killing; the machine guns are exploding the veins,
Iron sabres are cutting human flesh;
The horses, with their hoofs, with their mad and heavy skulls...
Here and in all parts
Jose Maria Arguedas, 1984[10]

Conquest of new lands was a primary concern of Europeans who arrived to South America in the sixteenth century, and few had sufficient preparation or interest to comprehend the challenges represented by the world they encountered.[11] They did not recognize or understand the societies with organizational and recording traditions radically different from their own. For Spaniards who came from overseas "preoccupied with enriching themselves, securing honours, and evangelizing natives by force," the primary intellectual concern was finding new justifications for

[8] Philip Alston ed., *Non-state actors and human rights* (Oxford; New York: Oxford University Press, 2005).

[9] For instance, The UN Human Rights Committee (UNHRC) and the UN Committee on the Elimination of Racial Discrimination (CERD).

[10] Jose Maria Arguedas, "Himno a Tupac Amaru," in Migel Angel Huaman ed. *Poesia y utopia andina* (Lima:DESCO, 1988) at 65. [Translated by the author.]

[11] Maria Rostworowski de Diez Canseco, *History of the Inca Realm* (Cambridge University Press, 1999) at 3-4.

the invasion.[12] An abyss then formed between the local peoples and the Spaniards, which to the present day, continues to mark the structural fission in the identities of postcolonial societies. At the same time permanent situation of pluralism was created, where colonized and the colonizer entered into a relationship of coexistence and assymetrical power relations.

In his account of Latin American history, *The Memory of Fire* trilogy, Uruguayan novelist and journalist Eduardo Galeano writes, "Bad dreams, nightmares about abysses or vultures or monsters, may portend the worst. And the worst, here, is being forced to go to the Huancavelica mercury mines or to the far-off silver mountain of Potosi."[13] Between 1530 and 1650 alone, Spain received 181 tons of gold and 16,887 tons of silver from its colonies in the Americas.[14] The enormous wealth created by mining fueled Spain's prosperity and early stages of industrialization. In the Santa Barbara mercury mine located in Huancavelica, highland Peru, most of the forced indigenous labourers died swiftly as they produced what the Iberian conquerors sought above all, precious metals and free Indian labour needed for its extraction.[15] Notably, the epicentre of the Tupac Amaru rebellion was in the area near Potosi mines. The new lands producing silver and gold revolutionalized the markets in Europe and launched the first stages of the modern era. In the period between 1520 and 1540, Peru and Mexico became the heartlands of the Spanish Empire, not only because of their rich mines, but also because of the large population of highland Indians. In response to violent patterns of exploitation, indigenous peoples did respond through both passive and active resistance. Tupac Amaru II launched the rebellion in response to the tightening of the oppression and particularly taxation and the labour draft to ensure a greater number of workers for mine owners. This massive and organized movement engulfed the entire southern Andes, ushering in an age of violent confrontations. Tupac Amaru became a historical symbol of waves of indigenous rebellions and subsequent violent repressions, which have continued to this day. Unless indigenous peoples were entirely subjugated, there would always remain a risk of war.

The legality of violence in the colonies came into question after its excessive nature shocked some of the Spanish missionaries. Not all colonizers arrived solely in search of gold, some arrived seeking souls for salvation. The atrocities committed against indigenous peoples by the Spaniards in the decades following 1492 prompted a famous sermon by Dominican friar Antonio de Montesinos in 1511 in which he dramatically urged the Christianization of the Indians and inquired: "Are these Indians not men? Do they not have rational souls?"[16] This apparently astonished the colonists developing a public clash in the Americas between the zeal for propagation of the gospel and the greed for precious metals.[17] Even at the beginning of

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[12] *Ibid.*

[13] Galeano, *supra* note 1 at 173.

[14] Celso Furtado, *Economic Development of Latin America: Historical Background and Contemporary Problems,* 2nd Edition (Cambridge: Cambridge University Press, 1978) at 22.

[15] Henry Dobyns and Paul Doughty, *Peru: A Cultural History* (New York: Oxford University Press, 1976) at 122.

[16] Quoted in Lewis Hanke, *All Mankind is One: A Study of the Disputation Between Bartolome de Las Casas and Juan Gines de Sepulveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (Northern Illinois University Press, 1974) at 4.

[17] *Ibid.*

colonization, which resulted in a ninety to ninety-five percent depopulation of indigenous peoples overall in the Americas, Spanish scholars and jurists were concerned with the universality of the emerging law among nations. [18] The legitimacy of the conquest was to be determined through the debates and discourses of Spanish theologians and jurists.

Significantly, the emerging doctrine of discovery has relied on a papal document issued in 1452, whereby Pope Nicholas V issued to King Alfonso V of Portugal the bull Romanus Pontifex, declaring war against all non-Christians throughout the world, to "capture, vanquish, and subdue the saracens, pagans, and other enemies of Christ," to "put them into perpetual slavery," and "to take all their possessions and property."[19] By the fifteenth century, however, the Pope's temporal powers had come to be resisted by the rulers in Europe. The more effective basis of the Pope's authority to create exclusive rights in the New World was his spiritual role, as head of Christendom, to encourage conversion of non-believers.[20] To this end, the Pope could assert control over temporal matters. His control over the territory was only incidental to the stated main purpose, conversion of the heathens. In an attempt to delineate this new relationship, Spanish theologian and jurist Francisco de Vitoria posited precepts on the law of war and the rights of dependent peoples, which came to have an enduring influence on subsequent theories of the developing law of nations.

In 1532, Vitoria, set out the following propositions, which subsequently influenced the developing law of nations: (1) The difference between Indians[21] and the Spaniards were rendered primarily along the lines of the respective differences of customs and social practices (2) These differences could be overcome through the system of *jus gentium* and Vitoria's understanding of Indians as possessing universal reason and therefore capable of understanding and being bounds 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 inhabitants (3) If, however, the Indians transgressed these universally binding norms, for despite their possession of reason they were barbaric and uncivilized, the Spanish were justified in conquering and governing them "partly as slaves."[22] The conclusion was, that it was precisely what denoted their different social and cultural customs and practices that also justified the disciplinary measures of war, which would annihilate the Indian identity, and replace it with the identity of the Spanish. Natural and divine law therefore legitimized Spaniard's overlordship and war against the "barbarians."[23]

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[18] Russel Thornton, *American Indian Holocaust and Survival: A Population History since 1492* (Norman:University of Oklahoma Press, 1987).

[19] Frances Gardiner Davenport, *European Treaties bearing on the History of the United States and its Dependencies to 1648*, Vol. 1 (Washington, D.C.: Carnegie Institution of Washington 1917) at 20-26.

[20] *Ibid.*

[21] I use the term Indian or *Indio* interchangeably with the term 'indigenous' in reference to the original texts.

[22] Anthony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law," (1996) 5 Social and Legal Studies 3 at 321-336; Francisco de Vitoria, *Political Writings,* ed. by Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press) at 291.

[23] For a more detailed discussion on the effects of colonialism on South America see Gerardo Munarriz, *A Comparative Analysis of the UN and OAS Failures to Positively Affect the Human Rights Situation in Peru* (Master of Laws Thesis, North York: York University April, 2004) at 113-134.

The precepts of Vitoria's natural law came from the medieval scholastic theology of St. Thomas Aquinas.[24] Thomist natural law was applicable to all rational beings, and could be ascertained through the observation of people's practices.[25] Significantly, natural law ultimately cohered in Aquinas's notion of eternal law emanating from God.[26] Consequently, the ultimate source of law remained rooted in the Christian God, as well as European notions of culture, family, and government. Although Vitoria appears to be distancing himself from the Spanish claims on the basis of the divine law, his own precepts are deeply rooted in Christian thought. As Vitoria mentions, natural law encompassed all rational humanity, and included rights such as the right to travel, sojourn, trade, and proselytize in foreign lands. Indigenous peoples had to respond positively to Spanish arrival, because this was a part of some preceding consensus among sovereign peoples. But in order to constitute a sovereign people they had to resemble the Europeans; otherwise they were non-sovereign. The indigenous peoples, not resembling the Spaniards, consequently entered a permanent situation of inclusion and exclusion in international law. They were included as its violators and excluded as equal actors and participants in the making of its norms.

Vitoria's intent, however, remains ambiguous. This is revealed, I would argue, in the epilogue to *De Indis*, which reveals both his reservations with the situation in the colonies, as well as his pragmatism and recognition of Spanish imperial interests. He writes, "The conclusion of this whole dispute appears to be this: that if all these titles were inapplicable, that is to way if the barbarians gave no just cause for war and did not wish to have Spaniards as princes and so on, *the whole Indian expedition and trade would cease,* to the great loss of the Spaniards. And this in turn would mean a huge loss to the royal exchequer, which would be intolerable."[27] This initial conclusion recognizes the irreconcilability between following the rules of natural law and the interests of Spain, for if he could prove that the war against the Indians is not justified, conquest would have to cease to the detriment of Spanish interests. He qualifies this by explaining how the trade would not have to cease for "barbarians have a surplus of many things, …they have many possessions, which they regard as uninhabited, which are open to anyone who wishes to occupy."[28] Lastly, he points to the Portuguese, "who carry on a great and profitable trade war with similar sorts of peoples without conquering them."[29] He further proposes a tax system to be imposed on the gold and silver brought back from the barbarian lands. Finally, however, the Spaniards would have to continue the administration of those territories once a large number of barbarians have been converted.

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[24] Vitoria formed part of the so-called School of Salamanca that had been established in 1218 and became the centre of Thomistic and natural law studies. Theologians and jurists who were part of the school, focused on the teachings of St Thomas Aquinas and the question of how to reconcile the presence of the divine with natural law philosophy. The juridical doctrine of the School of Salamanca had long standing effect on the developing law of nations and the concept of natural rights. See also, Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001) at 155.

[25] St. Thomas Aquinas, *On Law Morality and Politics* ed. By William P Baumgarth and Richard J. Regan (Indianapolis: Hackett Publishing Company, 1988) at 19-20, 58-60.

[26] Fitzpatrick, *supra* note 24 at 155.

[27] Vitoria, *supra* note 22 at 291.

[28] *Ibid.*

[29] *Ibid*. at 291-292.

Vitoria thus provides a mix of force and persuasion, natural rights and subjective pragmatism, sovereign and law among nations. He allocates the sovereign decision to the realm of exception to natural law precepts. Rather than being a contradiction in Vitoria's argument, the latter part of *De indis* is a contradiction between normative universalist precepts of natural rights, and politics. In his critique of the conquest, Vitoria refers to universal natural rights, which he then uses to justify the imperial interests of Spain. Without an apology for the Spanish conquest in the latter part of his writing, violence of conquest would remain banished as illegitimate, as Vitoria recognizes in his conclusion. He finds a justification for Spanish interests within the existing universal precepts and understanding of the Good.[30] Vitoria locates this justification in delimiting certain practices of American Indians as inherently in violation of the natural law, and the Good. A violation of the Good, justifies punishment. Nonetheless, as both Vitoria and Aquinas had delineated, the punishment would have to obey the laws of war. Vitoria cannot and/or is unwilling to repeal the conquest. He does, however, seek to lessen the impacts of the atrocities, and propose a controlled trade. For international law to avoid complicity with colonial aspirations, or 'just war' as a means to an end of some universal Good, its normative purpose would need to have a different understanding of good and evil, where evil is not just a means to an end in punishment, or a contradiction to the Good, but associated with violence and suffering, and combated through law. As it remained in Vitoria's writings, the concept of Christian just war, and therefore the colonial invasion in the Americas, sanctions the violence against the indigenous Other, who was found to be in violation of an aspiration and an image of a universal common good.

The discussion on legitimacy of colonialism continued to oscillate further between criticism and apology for colonial invasion in the debate between Bartolome de Las Casas and Juan Gines de Sepulveda. Las Casas, who had spent several years as a Roman Catholic missionary in the Americas, wrote extensively criticizing the violent nature of the conquest, and the extinguishment of indigenous title. He also criticized Vitoria's treatment of possible titles to Spanish jurisdiction in the Americas, which have provided for the extinguishment of indigenous title. Las Casas was concerned with the Spanish *encomienda* system, which granted Spanish conquerors and colonists parcels of lands and the right to the labor of the Indians living on them.[31] The royal lawyer Juan

[30] Aquinas sees natural law as constituted by the basic principles of practical rationality, which also implies that the precepts of the natural law were universally binding and knowable by nature. The concept of ownership or *dominium* was based on man's capacity to reason, and therefore, even the infidels and children have capacity for ownership. However, the concept of perfective goods, or what is owned, also relates to Aquinas' theory on just war. Vitoria's writings refer to Aquinas' theory on just war. In reference to Augustine, Aquinas delineates the conditions necessary for a just war: first, the authority of the sovereign by whose command the war is to be waged; secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault; and finally it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil. The universal precepts on rights and justice had an objective to establish a state of equilibrium among men: war in itself is not just, unless it is waged to attain some notion of the good. The seeming contradiction in Vitoria's writings stems from the principle of just war; he can justify the Spanish conquest only in so far as he can prove that indigenous peoples have violated the precepts of natural law.

[31] See generally, Lewis Hanke, *supra* note 16. Hanke discusses the work of Las Casas as a supporter of indigenous rights, in particular his attack on the *encomienda* system. Also in Leslie C. Green and Olive Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989) at 201-14. While Las Casas was actively in opposition to the violence in the colonies, he still advocated for peaceful conversion to Christianity. For a more critical view of Las Casas' engagement with the Spanish

Lopez Palacios, had prepared an official juridical declaration, known as the "Requirement" or *Requirimiento,* which required indigenous people to acknowledge the Church and the Pope as the ruler and superior of the whole world, and in his name the Spanish King and Queen as superiors, lords, and kings of the "new world." If the indigenous peoples failed to accept these requirement the document warned: "We shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them, as their Highness may command; and we shall take your goods, and shall do all the harm and damage that we can, as to vassals that do not obey."[32]

Las Casas' attempts to restrict Spanish activities in South and Central America enraged his opponents and resulted in an official dispute at Valladolid in 1550 with Sepulveda, who supported the war against the Indians.[33] According to Las Casas, "If I should go to particularize the murders and slaughters committed in that region [Peru], the reader would find them so horrid and so numerous that in both respects they would far excel what have been said touching the other parts of India [the Americas]."[34] Apparently, "Emperor Charles V was so impressed by Las Casas' views on the sovereignty of the Indians over their lands that he had been disposed to abandon Peru on grounds of conscience, had not the famous Dominican theologian Francisco de Vitoria recommended otherwise."[35] Sepulveda, however, was a fairly influential renaissance scholar and an Aristotelian, whose arguments had significant impact in Spain. Founding his arguments in Aristotle's theory of natural slaves, Sepulveda argued that "Spaniards have an obvious right to rule over the barbarians because of their superiority."[36] He further made several references to Francisco de Vitoria's doctrine on jurisdiction in support of his argument. Consequently, the nature of the Indians became involved in the kind of treatment to be accorded to them. It was the cultural differences between them and the Spaniards, what demarcated a vision of the sovereignty doctrine. Brief episodes of troubling conscience, which Las Casas exposed in his dramatic testimonies of brutalities in the colonies, became a blind spot in the emerging doctrines of natural law among sovereign nations.

The realities of conflict and co-existence of peoples in colonial societies was contrasted by attempts on the part of both international law and the sovereign to 1) erase these pluralities, and 2) justify the colonial invasion. This erasure became explained as a rational outcome of new

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colonial activity, see Bartolome Clavero, *La destruccion de las Indias, ayer y hoy* (Madrid: Marcial Pons, 2002) and Daniel Castro, *Another Face of Empire* (Durham and London: Duke University Press, 2007).

[32] Hanke, *ibid.* at 35-36.

[33] Antonio E. Perez Luno, *La polemica sobre el Nuevo Mundo-Los clasicos espanoles en la Filosofia del Derecho* 2nd ed., (Madrid: Editorial Trotta,1995); Martin Mangus, ed., *La escuela de Salamanca y el Derecho Internacional en America* (Salamanca: Consejo Social de la Universidad de Salamanca,1993).

[34] Bartolome de Las Casas, *The Tears of the Indias: Being an Historical and True Account of the Cruel Massacres and Slaughters of Above Twenty Millions of Innocent People Committed by the Spaniards in the Islands of the West Indies, Mexico, Peru, Etc. An Eye-witness Account written by B. de Las Casas*, trans. by John Phillips and Published in London in 1656 (Baarle-Nassau: SoMa, 1980) at 66.

[35] Hanke, *supra* note 16 at 61.

[36] Juan Gines De Sepulveda, *Democrates Segundo o de las Justas causes de la Guerra contra los indios.* Edicioncritica bilignue, traduccion castellana, por Angel Losada (Madrid: Instituto Francisco de Vitoria, 1951) at 38-43.

conceptualization of what it signified to be human and sovereign. With the advent of positivist bent in international law as well as the transition from natural to human rights, the philosophical grounds changed, with the individuals, who through social contract, created the sovereign state as the higher secular authority. My objective is not to recount numerous studies on the history of rights.[37] Natural rights, as contemporary human rights, have provided an image, or possibility of a society that would transcend the present. As such, the concept of rights owned by human beings, could escape the need for some rooting, a common element of what constitutes humanity. A definition of humanity had also created the criteria of who would be included or excluded. With gradual separation of God from nature and the concept of absolute free will, sovereignty became the omnipotent organizational structure. Still, the question of relations among sovereigns never escaped the bent towards transcendental image of the international community and the ideal of what constituted humanity.

II. Legal Positivism and Methods of Civilization

Naturalist international law asserted that universal international law applied to all peoples who could understand it through reason. In contrast, a positivist outlook relied on law production among a community of civilized sovereigns. Whereas natural law originated in a transcendental view of the Good, emanating from the divine source, positivist law relied on the careful observation of how sovereigns, or the 'family of nations' acted among each other. However, observing as non-metaphysical interactions among individuals, communities, and states produced yet another ideal form vis à vis civilizational and evolutionary discourses. These discourses posited that all humanity was once savage, but that Occidental civilization superseded this pre-civil state while other, non-civilized societies could not. According to definitions of property and governance, as put forward in Europe, indigenous peoples were not sovereign nations with exclusive jurisdiction and ownership of their territories.

A. Sovereignty, Territory, and Property

European jurists and theorists continued to concern themselves with finding appropriate justification for colonialism in different parts of the globe. The conceptual framework offered by private law, played an influential role in the jurisprudence regarding the acquisition of territory.[38] Notably, both writings of Hugo Grotius and later John Locke, focused on the nature of property in support of Dutch and English colonial settlements.[39] In natural law tradition, they linked civilization to ideas on property, territoriality, and trade. The idea of rights, however, or human nature came to replace divine authority as another secular theology.[40] Different understandings of human nature also demanded different forms of government. The individual, rather then the divine source, became the central source of types of societal organization, and law.

Christianity, however, never retreated entirely, for even if modern societies depended of the idea of individual subject, general understanding of rights and humanity rested in Christian properties.

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[37] See for eg. Costas Douzinas, *The end of human rights* (Oxford: Hart Publishing, 2000).

[38] James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993).

[39] Martine Julia Van Ittersum, *Profit and principle: Hugo Grotius, natural rights theories and the rise of Dutch power in the East Indies, 1595-1615* (Boston:Brill, 2006).

[40] Douzinas, *supra* note 37 at 66.

Locke's assumption on human nature emerged from his observations on law and the rights to property. However he begins his writing on property by stating that, "God…has given the Earth to the children of Men, given it to Mankind in common."[41] The secular world governed by human nature, still remained rooted in the religious tradition of European societies. The image of a free individual and rights to ownership over his own body, skill, and work, did not accommodate for alternate epistemologies, which Locke observed in North America.[42] Forms of governance rested in European understandings of ownership and private property: "the great and chief end therefore of men's uniting in commonwealths and putting themselves under government is the preservation of their property".[43] Through Locke's theory of property, English colonization was not justified only as a divine right, but also because colonists had a natural right to obtain land through labour. Furthermore, trade and commerce, were the mechanism for advancement and progress, which required its expansion deep into the interiors of appropriated continents.

Peoples who resisted the European incursion and failed to comply with its standards of civilization were not recognized as legal entities. The territories they inhabited became *territorium nullius*- or vacant lands.[44] This signified, that indigenous peoples could, indeed, partake in land appropriation through cultivation and enclosure of land, and settled agrarian life. However, if they did not transform their approach to land ownership and governance, indigenous peoples had to give up their land. Within this framework, the traditional governance and ownership structures of indigenous peoples directly clashed with notions of rights and liberty. The recognition of individual rights and freedoms only existed within a particular framework, which denied peoples' indigenous epistemologies.

Sovereignty thus became inextricably linked to the control over territory. For instance, Emmerlich de Vattel's perspective on sovereignty, which he applied to the indigenous peoples in the Americas, observed a distinction among the "civilized Empires of Peru and Mexico" and North American "peoples of those vast tracts of land [who] rather roamed over them than inhabited them."[45] While the empires of Incas, Mayas, and the Aztecs had clear jurisdiction over a territory, Vattel did not recognize American indigenous peoples' nomadic practices as having properties required for a recognition of a sovereign people.

International law and sovereignty became coextensive with the recognition of membership to a society of sovereigns, presupposing the possession of civil society's characteristics. The manner in which an entity became a state or acquired territory was not significant. Conquest generally involved militarily defeating an opponent and acquiring sovereignty over the defeated party's territory. Once colonization, or cession, took place, the colonizing power assumed sovereignty over the non-European territory, and the personality of the non-European was extinguished or diminished.

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[41] John Locke, *Two Treatises of Government* (Oxford: Oxford University Press, 1988) II, para. 25.
[42] *Ibid.* 82.

[43] *Ibid.* Sec. 41 para. 124.

[44] Lassa F.L. Oppenheim, *International Law* 3rd ed., Ronald F. Roxburgh ed.,(New York: Longmans 1920) at 383-84.

[45] Emmerich de Vattel, *The Law of Nations, or the Principles of Natural Law,* trans., Charles G. Fenwick (Classics of International Law Series 1916) at 38.

Significantly, three decisions of the United States Supreme Court regarding the status of American indigenous peoples, each written by Chief Justice John Marshall, affirmed colonization as one of the legitimate ways of obtaining territory.[46] In the 1823 opinion for *Johnson v. M'Intosh*,[47] Marshall described North American Indians as fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as distinct people was impossible because they were as brave and high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[48]

Marshall justified upholding superior U.S. title to Indian land on the basis of discovery. While he recognized that this conclusion deviated from "natural right, and to the usages of civilized nations" it was conditioned by the context of limits of domestic judicial competency and "indispensable to that system under which the country has been settled."[49] Marshall's opinion for a unanimous Supreme Court in *Johnson* continued to echo the doctrine of discovery, as established in the fifteenth century.[50] As Marshall's opinion reveals, colonial conquest remained as one of the legal modes of acquisition of territory under the classical international law, giving the rights of ownership primarily to the new settler sovereigns who "discovered" the land.

One of the premises of Marshall's Supreme Court Opinions, was that of the pre-existing community of states, which both created international law and possessed rights and duties under it. In the 1831 case *Cherokee Nation v. Georgia*,[51] the treaties with the new sovereign implied a pre-existing international personality of the Cherokee. However, Marshall described the Indian tribes as "domestic dependent nations…their relationship to the United States resembles that of a ward to his guardian." [52] In his previous decision in another case involving the Cherokee, *Worcester v. Georgia*,[53] Marshall emphasized the common reference to the tribes as "nations" and, citing Vattel, compared them to the "tributary and feudatory states" of Europe, which were included among sovereign states subject to the law of nations despite their having assented to the protection of a stronger power.[54] Marshall upheld the "original natural rights" of the Indians over their lands, which they could not lose by discovery alone.[55] In *Worcester*, he recognized

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[46] James Anaya, *Indigenous Peoples and International Law 2nd Ed*., (Oxford University Press, 2004) at 23. See also, Robert K. Faulkner, *The Jurisprudence of John Marshall* (Princeton: Princeton University Press1968).

[47] 21 U.S. (8 Wheat.) 503 (1823).

[48] *Ibid.* at 590.

[49] *Ibid.* at 592.

[50]Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourse of Conquest* (New York: Oxford University Press 1990) at 231.

[51] 30 U.S. (5 Pet.) 1(1831).

[52] *Ibid.* at 17.

[53] 31 U.S. (6 Pet.) 515 (1832).

[54] *Ibid.* at 560-61.

[55] *Ibid*. at 559.

voluntary cession or actual conquest as a basis for deciding whether an Indian tribe had been divested of its rights. In the absence of conquest, the relationship between indigenous peoples and the settler state was a matter of treaty relationship.

Marshall characterized this "the discovery doctrine" as regulating "the rights given by discovery among the European discoverers", but not as affecting "the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man".[56] As such, the discovery doctrine was a part of customary law, based upon consent among involved states. Significantly, Marshall's emphasis on the nature of governance of the Cherokee points to criteria for a political community that Vattel and other theorists used to denominate nations or states. He stressed the national character and self-governing capacity of the Cherokee in contrast to the societies, which lacked such organization.[57] This characterization of indigenous peoples signaled the ensuing dominance of the political and jurisprudential tendency to deny them sovereign status, unless they fit within narrow parameters of political and social organization as they had been established in Europe.

Several state-centric doctrines of international law, such as *uti possedetis,* ensured that the territorial borders of the new state remained as they were delineated by the colonial powers. As the British publicist M.F. Lindley argued, while non-European peoples with a certain minimum of organization did qualify as "political societies" their territories could be acquired only by the rules ordinarily applicable to members of the "International Family."[58] Once a conquest "has become a *fait accompli*, International Law recognizes its results".[59] Consequently, any future recognition of indigenous peoples' sovereign status would have allowed for the possibility of re-carving of international borders—as well as recognized alternate forms of governance that international law did not deem legitimate.

The act of recognition by other civilized sovereigns who comprised 'family of nations' was necessary for the establishment and existence of a nascent state as an international person and a subject of international law. [60] This necessity of gaining recognition as a sovereign by other sovereigns became known as the constitutive theory of recognition of statehood. As Lassa Oppenheim wrote in 1920, "As the basis of the law of Nations is the common consent of the civilized states, statehood alone does not imply membership of the Family of Nations."[61] The criteria for civilization were linked to social and political practices of the peoples within a territory.

Indigenous peoples' diminished legal status allowed for economic dominance and loss of property and land and resources. Treaties with indigenous groups by which they ceded lands

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[56] *Ibid.* at 554.

[57] *Ibid.* at 26.

[58] Mark F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (New York: Longmans Green 1926) at 45-6

[59] *Ibid.* at 47.

[60] James Crawford, *The Creation of States in International Law,* 2nd ed. (Oxford: Oxford University Press 2006) at 12-36.

[61] Oppenheim, *supra* note 44 at 134-5.

could not establish a state's title to territory because the "uncivilized tribes" did not comprehend the full attributes of territorial sovereignty.[62] By the early twentieth century, indigenous peoples found themselves surrounded by the now consolidated colonizing states, many of which adopted trusteeship notions, seeking to bring the native peoples from their backward practices and to "civilize them". In the case *Cayuga Indians (Great Britain) v. United States* [63] the international arbitration tribunal in 1926 ruled that Great Britain could not maintain a claim for the "Cayuga Nation" as such, but only for the Cayuga Indians living in Canada on the basis of their British nationality. The tribunal declared resolutely that an Indian tribe is not a legal unit of international law. [64]

The moment of sovereignty's assertion had taken place in the realm that was neither legal nor illegal (or as Carl Schmitt has posited "the paradox that the decision to produce law need not be based on law"),[65] but became reaffirmed in law it subsequently created. [66] The law established the sovereign that established the law. The assertion of sovereignty over territory, and its character beyond law, became a fact defined as justifiable through law. The nation state became the universal summit, while non-state forms of social and political organization could be dominated and treated as non-subjects within the realm of law.

B. Legal science and civilization discourses

International law's complicity with empire retained a propensity to creation of absolute frameworks. For instance, scientism gave international lawyers a theoretical justification for avoidance of the questioning of grounds of international law. The legal discipline became imagined as a 'science.' In part, this was a response to the very uncertainty of international law's existence. The argument put forward by John Austin in 1832, that international law was not "properly so called"[67] spurred legal scholars to actively search for international law's authority, which would not be a mere morality. For John Westlake, order among nations could be established through classification of "institutions or facts" which could then be arranged in order to develop a coherent and overreaching international law. [68] The scientific methodology relied upon a formulation of categories and rules required for arriving to a correct solution to any particular problem or a crisis.

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[62] *Ibid.* 143-5

[63] Cayuga Indians (Great Britain) v. United States, VI R. Int'l. Arb. Awards 173 (1926). The claim was based on obligations Great Britain had undertaken toward the Cayuga Indians in an 1814 Treaty with the United States.

[64] *Ibid.* 176.

[65]Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Massachusetts: MIT Press, 1985 [1921]) at 13.

[66] Derrida, Jacques, "Force of Law: The "Mystical Foundation of Authority"," (1990) 11 Cardozo Law Review 51 at 921.

[67] John Austin, *The Province of Jurisprudence Determined* (New York: Noonday Press 1954) at 139.

[68] John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press,1894) at 12.

Legal science in the latter half of the nineteenth century was conceived as an ordering mechanism against the chaos of individual preferences. Ensuring the autonomy and fixity of law, and establishing its inner characteristics and principles, would mediate multiple interests of individuals and states. However, the image of law as a science allowed the discipline to remain confined to a place beyond the reach of historical scrutiny and blinded to complicity of law in the violence that took place in the colonies. European jurists and theorists now emphasized international law as an autonomous system, divorced from its own history. The legal system and its binaries of just/unjust or legal/illegal were applicable only to relationships among European states. The concept of just or unjust treatment remained ambiguous in the colonies, because international law did not recognize indigenous peoples as sovereign and thus capable to protect their own rights. As indigenous peoples' governance structures came to be subsumed within the new colonial sovereigns, their rights and existence were negotiated against the interests of settler societies. The participated in international only as peripheral peoples who were to be conquered and civilized.

C. Emergence of Self-Determination as a Principle

The outbreak of the First World War, and the press for independence of different peoples put forward by numerous ethnic groups—which were until then part of Russian, Austro-Hungarian, and Ottoman empires—raised the principle of self-determination to an international political concern.[69] Several state-centric doctrines of international law, such as *uti possedetis,* ensured that the territorial borders of the new state remained as they were delineated by the colonial powers. New concepts justifying colonialism, continued to arise, such as the notion of trusteeship, which continued to differentiate the less civilized Other, in its endless transformation into the modern, and civilized nation.[70] Under the 1919 Covenant of the League of Nations all League members committed to "undertake to secure the just treatment of the native inhabitants of territories under their control".[71]

The association of national identity with statehood became relevant during the territorial reconfiguration at the Versailles Peace Conference in 1919. It, however, did not yet exist as a legal right in international law, but as an assurance of independence to already existing states.[72] An affirmation of self-determination as a legal right would have posed a clear challenge to the major European powers, which retained extensive colonial holdings well into the twentieth century. The legacy of the nineteenth-century differentiation between civilized and non-civilized peoples, as evident in the establishment of the Mandate System,[73] as well as insistence on independence as a precondition of statehood, served to perpetuate the exclusion of European colonies from the community of states, as full subjects of international law.

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[69] Crawford, *supra* note 60.

[70] The notion of trusteeship became internationalized through a series of conferences such as the 1885 Berlin Conference on Africa, or the 1919 Covenant of the League of Nations adopted at the close of World War I.

[71] Covenant of the League of Nations art. 23 (a).

[72] *Ibid.*

[73] Anghie, *supra* note 7 at 47.

The new borders were drawn primarily along national lines, thus aligning self-determination with nationalist claims. A necessary prerequisite for the realization of this goal was the creation of a European system of minority protection. In 1924, a delegation of Six Nations led by Iroquois Cayuga Chief Levi General, known as Deskaheh, traveled to Geneva to plead their case for treaty rights of self-government. The General Secretary of the League of Nations took up the matter in 1923, and Deskaheh's case was supported by states such as Ireland, Estonia, Panama, and Persia. Britain, however, removed the question from the League agenda, insisting that it was an internal affair of the British Empire, and consequently no official action was taken.[74]

While the process of decolonization in international law recognized the capacity of conquered peoples to self-rule as sovereign states, it did not entirely re-formulate their status of incomplete sovereignty. Non-European peoples were now capable of self-rule, but still lacking development and modern rule of law. Concepts of civilization became replaced by new theories and images of the underdeveloped, third world realm, where governance and judicial reforms had yet to be modernized. For European powers, images of law and the sovereign gained totalizing tendencies, an image of a shared and unitary ontology. Re-imagining of sovereignty would also demand new understandings of political institutions, the workings of power and in general, the very concept of community. The debates over sovereignty and self-determination in international law have replicated these very questions of existing categories and proposed alternatives.

III. The Age of Human Rights and Indigenous Peoples' Right to Self-Determination

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. How can a thief go about establishing legal and legitimate possession of his stolen spoils? This, in reality, is the difficulty, which confronts the 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[75]

With the advent of the human rights discourse in the second half of the twentieth century, some indigenous peoples have accepted the language of international law, with the hope that their claims would be addressed and understood. International law not only claimed agency, but also seemed to give agency to previously marginalized populations. The universalization of a juridical order, based on a precept that affirmed the basic and inviolable dignity of human life, owed its existence to the enormous impact of a universal cultural event: the memory of the Second World War. Juridical institutions of universal pretenses formalized a particular moral memory of the atrocities committed during the Second World War. The UN Charter Preamble includes a specific reference to wars that ravaged the western world in the twentieth century.[76] The "untold sorrow

[74] Anaya, *supra* note 46 at 51.

[75] Ted Moses, "Statement by Ambassador Ted Moses on behalf of the indigenous peoples of the North AmericanRegion to the World Conference on Human Rights," Vienna, 14-25 June 1993. Available at: http://www.dialoguebetweennations.com.

[76] The Preamble begins with, "We the People of the United Nations Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind..."

of mankind" mentioned in the Preamble refers to this particular moment in history, the scourge of two world wars.

In order to advance human rights protection, it was necessary to put limits on previously sacred principle of state sovereignty. What legitimated international law in the twentieth century, and appeared to position it against the early civilizing missions, was its repudiation of direct colonialism, delegitimation of openly racist language, and establishment and recognition of the norm of self-determination. The reforms of modern international law have made colonialism illegal, providing grounds for social forces to further alter or even reverse the direction of international law where it concerns the indigenous peoples today. The purpose of these reforms was to prevent an escalation of conflict, considering the growing unrest in the colonial territories. It appeared that the role of international law was to uphold human rights norms and that the indigenous peoples could for the first time seek a space in international law, which would accept their grievances as legitimate. While the legacy of colonialism in international law did not vanish, the discourse of human rights now appeared as a sufficient and legitimate tool for marginalized peoples to advance their claims.

A. Self-Determination as a Human Right

Beneath the discourse of human rights and their universal applicability, the ambiguousness of the principle of self-determination illuminates the fundamental contradictions of international law — its historical legitimation of colonial violence, contrasted with normative pretences and ambitions. Self-determination, if it were to take on its proper meaning, would undermine the essential principle on which international law was founded: the existence of sovereign nation states.[77] However, if indigenous peoples *are* peoples, their right to self-determination would be undeniable in accordance with international law, and as such, could potentially endanger the unity of existing sovereign states. If they are not recognized as peoples, as some states claim, they have no such right and, as Vitoria explained over 400 years ago, are not sovereign.

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.[78] The so-called "blue-water doctrine" did not include the forms of internal colonialism practiced in countries with significant indigenous populations. The UN Charter did not provide specific definitions for what self- determination actually means, or which groups constitute 'peoples.'[79] The UN General Assembly was leaning towards accepting whole colonial territories as subjects of self-determination. Consequently, in the post-Charter

[77] The content of the meaning of self-determination is taken from Article 1.1 of ICCPR, "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."

[78] In the Canadian and United States jurisprudence even judgments which affirm indigenous territorial rights and prior existence as independent nations, *affirm* the colonial state's sovereignty over indigenous lands and peoples. See for example 1832 US supreme court decision for Worcester v. Georgia 31 US 515 (1832). The Supreme Court of Canada has said that Aboriginal rights were recognized and affirmed in the Canadian Constitution in 1982 in order to reconcile Aboriginal peoples' prior occupation of Canada with the Crown's assertion of sovereignty. On this topic see Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin," (2003) 2 Indigenous L. J.1.

[79] Charter of the United Nations, 1 United Nations Treaty Series xv1; (1946).

assessment of its contents, indigenous peoples were not considered in the provisions of non-governing territories in Chapter XI.[80]

In the wake of the collapse of communism, the rise of new forms of nationalism and secessionist movements in the 1990s resulted in a new quest by international lawyers and scholars to investigate how to better accommodate sovereign claims of ethnic and national identities. The role of international law and its responsiveness to this situation came into question, including the viability of self-determination as a legal norm. 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 foundations. Law was seen as a responsive mechanism, which should either adjust to the current situation of post-cold war secessionist movements, or resist any negotiation, which would threaten to undermine what Westlake deemed as the basis of international law's existence, the very concept of statehood.[81] The notion of indigenous peoples' self-determination inevitably referred to some reversal of the colonial process, spreading fears of the secession and destruction of existing settler states. For this reason, far from changing drastically the position of indigenous peoples in international law, human rights discourse with its limits outlined by its cultural, political, or historical origins, only reaffirmed their absence from international law as equal actors.

The narrow association of self-determination with the right of an entity to be a state has presented a challenge to the existing borders, and separatist claims have been met by piecemeal and inconsistent responses by the international community.[82] At the same time, international law's embrace of democratic governance and human rights as universal entitlement has focused on the right to governance by the consent of the governed, challenging the traditional state-centered, sovereignty discourse.[83] The emphasis on democratic governance has put into question the process of constitution and disintegration, and the carrying out of proper institutional arrangements. Self-determination has become an important constitutive aspect of state building, as well as a disintegrative challenge to existing borders.

Thomas Franck's emphasis on fair processes as means to just outcomes, results in his emphasis on the importance of a right to democratic government, which, "while not yet fully encapsulated by law, is now rapidly becoming a normative rule of the international system."[84] Franck, however, does not endorse a more permissible external right to self-determination than is already permitted by the colonial model. He argues for national systems of government, which prove their validity with established rules and processes that legitimize their governance. In discussing the possibility of extending the application of the law of self- determination, he gives the example of minorities who have been denied political and social equality and the opportunity to retain their

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[80] Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002) at 92.

[81] See Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).

[82] Diane Orlenticher, "Separation Anxiety: International Response to Ethno-Separatist Claims" (1998) 23 Yale J. Int. L. 1

[83] Martti Koskenniemi, "Legal Cosmopolitanism: Tom Franck's Messianic World," (2003) 35 N.Y.U. J. INT'L L. & POL. 471.

[84] Franck, *supra* note 81 at 84.

cultural identity.[85] The tension between liberal hopes and international law reveal that the desire to include Others is only under already existing conditions. Franck disapproves of the separatist agendas, which he associates with 'post-modern tribalism'. However, his broader moral framework leads to the conclusion that international lawyers should find more appropriate responses to these nationalist claims by way of fairness discourse. Accommodation of new self-determination demands, in turn, may lead to a deconstruction of the colonial model of statehood, and further secession claims by groups denied the opportunity to retain their cultural identity.

The presumed universality of the nation, has also allowed for the emergence of proto-national movements, which came to challenge the claims to national unity of existing sovereigns. Numerous wars of secession became the examples of extremism and nationalism. However, the critique of these movements was primarily that of the historicism of the warring peoples: the examples of ethnic hatred, and backward cultures. Concept of a nation as such became related to something extreme and fundamentalist, forgetting the violence of nation formation among European powers and colonial settlements. In order to be accepted in the international community, the emergent nations following the decolonization movements and secession movements had to conform with certain set of universal values with a certain set of universal values such as the rule of law, democracy, and development of market economics.[86] This has been evident in the notions of the Third World or underdevelopment, which allocated the newly formed nations to another position of non-universality. Their sovereignty and independence became contingent upon the capacity to resemble Western nations as exemplars of development.

In the process of becoming 'developed' and 'modern', these nations required assistance, which came in a variety of institutions and organizations, from the Mandate system, to the more contemporary policies of the World Bank. The universality in international law thus became related to a definite process and an idea –one, which has claimed universality since the sixteenth century. This tension is especially apparent in the situation of indigenous peoples' claims to self-determination, for unlike the proto-nationalist movements, their multiple forms of governance and interests have sought for an alternative outside of the accepted universality of sovereign nation states. The mainstream argument on self-determination continues to hold "[s]elf-determination refers to the right of the majority within a generally accepted political unit to the exercise of power. In other words, it is necessary to start with stable boundaries and to permit political change within them."[87] Relationship between self-determination and clearly defined territorial borders, rejects the recognition of indigenous peoples' modes of (political) governance in international law.

Self-determination, either manifested as internal self-governance of indigenous peoples, or secession, challenges the monopoly of legal personality that was initially allocated to European powers. At the same time it offers to both the international law and existing sovereigns, the possibility of attaining true universality. Claims of international law to have jurisdiction over everyone have historically excluded the Other, who could not claim to be the subject under

[85] *Ibid.* at 160.

[86] Partha Chatterjee, *The Politics of The Governed: Reflections on Popular Politics in Most of the World* (New York: Columbia University Press, 2004).

[87] Rosalyn Higgins, *The Development of International Law through the Political Organs of the UN,* (London: Oxford University Press, 1964) at 104.

international law. Consequently, the recognition of the Other as an equal subject would redeem international law. Its claims to universality would transform from being nominal to being true.

B. Question of Indigenous Peoples' Right to Self-Determination

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on 13 September 2007,[88] following more than two decades of negotiations between governments and indigenous peoples´ representatives. The UN Declaration was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).[89]

The U.N. Declaration establishes a universal framework of minimum standards for the survival, dignity, wellbeing, and rights of the world's indigenous peoples, rooted in international norms such as equality, non-discrimination, self-government, and cultural integrity. Article 3 of the Declaration affirms indigenous peoples right to self-determination.[90] It addresses both individual and collective rights[91] and cultural rights and identity, among others; it outlaws discrimination against indigenous peoples[92] and promotes their full and effective participation in all matters that concern them.[93] It also ensures their right to remain distinct and to pursue their own priorities in economic, social and cultural development.[94] The Declaration explicitly encourages in the preamble harmonious and cooperative relations between states and indigenous peoples. Significantly, the Declaration has emerged out of indigenous peoples' engagement with the United Nations, member states, representatives of specialized agencies and departments of the Secretariat, independent experts, and indigenous representatives, in an attempt to reach understandings regarding self-determination under international law, and to establish new mechanisms and methods for cooperating on matters relating to the sustainable development of

[88] UN Declaration on the Rights of Indigenous Peoples, G.A. Res. UNGAOR, 61st Sess., Un Doc. A/RES/61/295 (2007) [hereafter the U.N. Declaration].

[89] The Human Rights Council adopted the Declaration on 29 June 2006 (Resolution 2006/2). See the Report of the First Session of the Human Rights Council (A/61/53). The General Assembly approved the Declaration on 13 September 2007 (Resolution 61/295). Significantly, the Declaration provides precepts for a process of 'belated state-building,' which would enhance its legitimacy through engagement with other forms of community and accommodation of pluralism and multiple identities. This approach to enduring relations between states and indigenous peoples could also consider variations in types of autonomy and governance of indigenous peoples, as well as the geographical and demographic setting. See further, Erica-Irene Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination," (1993) 3 Trans'l L& Contemp. Probs.1 at 9.

[90] U.N. Declaration, *supra* note 71 at Article 3.

[91] *Ibid.*, Article 40.

[92] *Ibid.*, Articles 13, 34 and 40.

[93] *Ibid.,* Articles 3, 4, 18, 9, 23 and 32.

[94] *Ibid.,* Article 3.

indigenous lands and resources.[95] Meaningful political and economic self-determination is closely related to indigenous peoples having legal authority to exercise control over their territories and resources.

The process of indigenous peoples' engagement with the international legal system was predicated by emergent global transformations in the development of the human rights protection regime and decolonization. At the same time, indigenous activism at the level of international institutions had been influenced by local conditions transformed through conflicts between states and indigenous peoples, as well as the impact of economic globalization.[96] Sally Engle Merry has observed that just as "local places cannot be studied in isolation, nor can the global be understood except as constituted by multiple locals clustered together at some local spot."[97] In a way, the introduction of indigenous peoples' particular experiences into the arena of international law signified an attempt to include different forms of understanding and knowledge, based on indigenous experiences, cosmovision, or interpretation.

During the debates over the principle and right of self-determination, it became evident that what indigenous peoples envisioned as their right to self-determination diverged from the visions of State representatives or some UN officials.[98] Throughout its development, international law has constructed a particular meaning of indigenous identity and entitlement, inconsistent with most indigenous peoples' self-image as nations. Hence, the accepted model of law and legal reasoning has been conditioned by the self-perception of the UN as an institution, as well as the arguments it could recognize as valid.[99]

In the 1980s and 1990s, the Working Group drafted the Declaration on the Rights of Indigenous Peoples, which was the result of persistent lobbying since the Working Group's formation. After twelve years of debate, a broad consensus was reached among the UN human rights experts and the Indigenous partners on a proper interpretative declaration, which articulates forty-five articles that set minimum standards for indigenous people's human rights. This process witnessed collaboration between technical experts and indigenous people. It also became a set of aspirations of postcolonial self-determination and human rights. In order to create an ongoing UN mechanism for indigenous peoples a Permanent Forum on Indigenous Issues (UNPFII) was established in 2000 by the UN Economic and Social Council (ECOSOC).[100] The United Nations

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[95] *Final Report of the Special Rapporteur, Erica-Irene Daes, 'Indigenous peoples' permanent sovereignty over natural resources.* UN Doc. E/CN.4/Sub.2/2004/30 13 July 2004 at para.7.

[96] See e.g. Jerry Mander and Victoria Tauli-Corpuz eds., *Paradigm wars : indigenous peoples' resistance to economic globalization: a special report of the International Forum on Globalization, Committee on Indigenous Peoples* (San Francisco, Calif. : International Forum on Globalization, 2005).

[97] Sally Engle Merry, "Crossing Boundaries: Ethnography in the Twenty-First Century" (2000) 23 PoLAR 127 at 129.

[98] Sarah Pritchard, *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the First Six Sessions of the Commission on Human Rights Working Group*, June 2001, online: www.arena.org.nz/unindigp.htm.

[99] See Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002).

[100] The Permanent Forum was established by the United Nations Economic and Social Council (ECOSOC) Resolution 2000/22 on 28 July 2000.

Permanent Forum on Indigenous Issues (UNPFII), composed of 16 independent experts, many of whom are indigenous persons, was mandated to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights and make recommendations to the UN system through the Economic and Social Council. The Permanent Forum's mandate also included raising awareness and promoting the integration and coordination of activities related to indigenous issues within the UN system, as well as producing relevant material. Furthermore, the Commission on Human Rights now the Human Rights Council established the position of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. The Special Rapporteur has the mandate to undertake country visits, report on trends and take up cases directly with governments in relation to human rights violations.

The adoption of the UN Draft Declaration on the Rights of Indigenous Peoples has been an important concern for indigenous peoples, as the UN Decade of the World's Indigenous People approached its end. The goal stated at the outset of the Decade was to strengthen international cooperation for the solution of problems faced by Indigenous peoples in the areas of human rights. However, the Decade ended in 2004 with the failure of efforts to see the Declaration adopted by the Human Rights Commission, questioning whether any gains have been made in pursuit of Indigenous self-determination at an international forum. In response, indigenous people's representatives at the UN initiated a hunger strike, which ended after a negotiation with representatives from the UN Commission for Human Rights, resulting in the renewal of the Decade (2005-2015) and developments regarding the Declaration.[101]

The most controversial component of the Declaration and consequently the main stumbling block against its adoption by the General Assembly has been its affirmation of indigenous peoples' right to self-determination in the Article 3, which echoes the UN Charter Article 1(2) and the common Article 1 of the widely ratified international human rights covenants, the International Covenant on Civil and Political Rights, ICCPR,[102] and International Covenant on Economic, Social and Cultural Rights, ICESCR,[103] and is also included in the African Charter on Human and Peoples' Rights. [104] It states, "Indigenous 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." This proclamation of indigenous peoples' right to self-determination has been opposed by a number of states fearing secession. Furthermore, proposals for the recognition of indigenous rights, as subject to the existing constitutional framework of each State, would contradict the aspirations of indigenous peoples, who want recognition of rights that cannot be defined or limited by the states in which they live. According indigenous peoples

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[101] On 22 December 2004, the General Assembly adopted Resolution A/RES/59/174 for a Second International Decade, which commenced on 1 January 2005.

[102] *International Covenant on Civil and Political Rights,*19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR].

[103] *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force 3 January 1976) [ICESCR].

[104] It is also included in the *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982) (entered into force 21 October 1986) [African Charter].

greater rights to self-governance, poses a direct threat to state interests in managing territories and resources on which indigenous peoples live.[105]

The right of peoples to self-determination has been acknowledged to be a principle of customary international law and even *jus cogens,* a preemptory norm of universal application.[106] Some indigenous scholars have described the self-determination principle as an instrument for reconciliation or belated state building, as it opposes, both prospectively and retroactively, patterns of empire and conquest.[107] Recognition of indigenous peoples' self-determination could be a prerequisite for efforts towards reconciliation with the settler society, or, perhaps more accurately, conciliation to recognize instances where there was no mutual agreement on state building between indigenous peoples and settler societies. Indigenous peoples' self-determination would also aid the process of state legitimation and reach of what contemporary sovereigns wish to claim: the full democratic development. If so understood, reconciliation processes within settler states would take place between distinct nations who chose to live together, and not only among citizens of one unified nation. It is not clear, however, how these processes would challenge the concepts of sovereignty, community, and nation, which developed throughout the history of international law.

While the humanism of Vitoria and Las Casas emerged from natural law and Christianity, today's human rights advocates turn to universalism of human rights, as well as democracy and good governance. However, universalism in international law continues to connote the automatic assimilation or exclusion of the Other. 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 these borders, I believe."[108] The open question is whether the colonial borders of international law are being weakened; whether other speeches can gain agency; for in its original mandate, human rights discourse belongs to the very Leviathan indigenous peoples are trying to oppose.

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[105] For example the Canadian government's position is that the Declaration is incompatible with its constitution and the Charter of Rights and Freedoms because it affirms only the collective rights of indigenous peoples and that fails to keep a balance with individual rights. Furthermore, the Canadian government, like the United States, opposes the UN Declaration on the Rights of Indigenous Peoples because it calls for both governments and private businesses to obtain prior and informed consent of indigenous communities in order to use their lands and resources. See *Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples - June 29, 2006* online: http://www.ainc-inac.gc.ca/nr/spch/unp/06/ddr_e.html

[106] Ian Brownlie, *Principles of Public International Law* 6th ed. (Oxford: Oxford University Press, 2003) at 489; Hector Gross Espiell, "Self-Determination and Jus Cogens," in Antonio Cassese ed. *U.N. Law/Fundamental Rights: Two Topics in International Law* (Alpena an den Rijn: Sijthoff & Noordhoff, 1979) at 167; Hurst Hannum, *Autonomy, Sovereignty and Self-Determination* (Philadelphia: University of Pennsylvania Press, 1996) at 45; Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991) at 14; *Proceedings from the 11th Meeting of the UN Working Group on Indigenous Rights*, UN GAOR U.N. Doc. E/CN.4/Sub.2/1992/33 (1992) at 18.

[107] Ted Moses, "Renewal of the Nation" in Gudmundur Alfredsson and Maria Stavropolou eds., (New York: Martinus Nijhoff Publishers, 2002) at 57.

[108] Jose Maria Arguedas, "Last Diary? August 20, 1969" in *The Fox from Up Above and the Fox from Down Below* (Pittsburgh: University of Pittsburgh Press, 2000) at 260.

IV. Conclusion

The appraisal of indigenous peoples' self-determination in relation to existing states, upholds the classic image of sovereign nation state, and the diminished sovereignty of indigenous peoples. In her discussion on the use of the term sovereignty in relationship to natural resources, Erica Irene Daes writes, "we may conclude that the term 'sovereignty' may be used in reference to indigenous peoples without in the least diminishing or contradicting the 'sovereignty' of the State."[109] While sovereignty in its classic sense, may not be viable in the case of indigenous peoples, understanding of indigenous peoples' self-determination as subordinate to that of states, contradicts norms of equality and non-discrimination in international law. Involvement of the international human rights community on behalf of indigenous peoples is tempered by continuous presumption of noninterference in domestic affairs and doctrine of state sovereignty. There is a general lack of implementation procedures in remedies to violations of indigenous peoples' human rights, which have been countered by a lack of political will by some of the states concerned.

Nonetheless, the emergence of a body of conventional and customary norms in international law that specifically concern indigenous peoples, demonstrates a shift towards recognition of indigenous peoples' aspirations. International law has been both, a tool for imperial powers, as well as a tool for human rights claims of marginalized and conquered peoples. This tension indicates that international law has not entirely moved away from its colonial legacy, but rather accepted certain indigenous identities and revalorized their cultures. Limits remain in the sphere of ownership over natural resources and territories, where interests between states, indigenous peoples, as well as non-state actors such as the transnational corporations, continue to collide. Continuous oscillation between state interests and universal rights remains at the core of international law's instability.

[109] *Final Report of the Special Rapporteur, Erica-Irene Daes, 'Indigenous peoples' permanent sovereignty over natural resources.* UN Doc. E/CN.4/Sub.2/2004/30 13 July 2004 at para. 30.