

**LOCATING INDIGENOUS POWER: CULTURAL RELATIVISM,
UNIVERSALISM AND STATE SOVEREIGNTY PREFACE**

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Melida raised her hand, palm tilted up but held at a slight angle, about a foot above the cement floor of the suddenly very still little room. Only the small children moved, but even they remained silent. She was crying softly, silently, slow tears that hadn't quite fallen from her brimful haunted eyes, crystal droplets clinging to the lower lashes. She spoke hurriedly, slightly gasping as if struggling within herself to get the words out. This was actually the first time that Melida had told this story after ten years of fearful silence since the events themselves took place:

"They forced us to clean the clinic. After two days of killing. My husband and my twelve year-old son and all the men they had rounded up in Chichupac were tortured inside for two days. And many of the women too, but mostly the men. Some they took with them toward the place we call Tierra Blanca and shot them along the way. We don't know where they were left, and we've never seen any of those ones again. But here they beat them, and tore them apart. They hit them with clubs and machetes. They disemboweled many. My husband and my poor son. The blood was this thick on the floor and they made two of us clean it out with scrub brushes. They said they would kill us if we didn't go in there and clean it up. The smell made us sick and the floor was sticky and slippery. I was on my hands and knees to keep from falling down in the blood This thick..."¹

Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive.

C.S. Lewis (1970)

This article appears in Volume 7 of the New England International and Comparative Law Annual, an electronic publication available on the Internet at <<http://www.nesl.edu/annual/index.htm>>. As a young experimental enterprise, the articles and notes published in the Annual tend to be short pieces, less formal than conventional law journal articles, which focus on provocative and current issues in the fields of international and comparative law.

* Michael Skinner, PERSONAL JOURNALS: LA TIERRA SANGRIENTA (1995). (One of the hundreds of testimonials I documented during the period that I worked in Guatemala, between March and August 1995. A report based upon the interviews that I helped to conduct has just been released.)

¹ See generally, Patrick Ball, Paul Kobrak, Herbert Spirer, STATE VIOLENCE IN GUATEMALA 1960-1996: A QUANTITATIVE REFLECTION (1999).

I. INTRODUCTION

The roots of this brief paper lie in my personal experiences in Central America, where I participated in human rights investigations and the exhumation of mass graves, in conjunction with the recently established Guatemalan Forensic Anthropology Team (EGAF).² I worked from 1987 to 1993 for the nongovernmental organization (NGO) Witness for Peace (WFP), in both Guatemala and Nicaragua. In 1995, following a short six-month period as regional co-coordinator of an American Association for the Advancement of Science (AAAS)-sponsored effort to develop a computer database of human rights violations in Guatemala – the Guatemala Human Rights Database Project (GHRDP) – I reached disturbing conclusions about human rights intervention in foreign nations.³

In particular, I came to realize, through the development of the database project, the need for careful and meticulous analysis of language and culture within the context of each individual community under investigation. I continue to be concerned about the ability of outsiders to accurately assess the needs of indigenous peoples – considering the difficulties that I experienced in Maya⁴ communities throughout Guatemala and particularly because of the barriers imposed on me by language, culture, and the imprint of my Euro-American heritage on my perceptions and expectations.⁵

In the case of Guatemala, I have witnessed the vulnerabilities of indigenous groups when confronted by a dominant state government. My perception was that a

²EGAF began its work as an independent local team in 1993, following training and sponsorship by the American Association for the Advancement of Science, the Inter-American Institute for Human Rights (IIDH), with additional support from the Physicians for Human Rights, Boston, MA, and the Argentine Forensic Anthropology Team (EAAF).

³The GHRDP is a fictitious name for the project, which for reasons of safety, was completely clandestine at the time. The results have only just been released this year. Much of the work has been incorporated into studies completed by the Catholic Church's Human Rights Office of the Archbishop of Guatemala, a project called Recuperation of Historical Memory (REMHI), the LYN-sponsored Commission for Historical Clarification, and a nongovernmental group, the International Center for Human Rights Investigations (CIIDH). Ball, *supra* note 1.

⁴Use of the term "Maya" is deliberate. The author finds the term linguistically closest to how the Maya identify themselves in conversation either in their local dialect or Spanish when speaking with the author.

⁵See Catherine Price, *Lakotas And Euroamericans: Contrasted Concepts of 'Chieftomship' and Decision-Making Authority*, 41 ETHNOHISTORY 447, 459 (1994). (Catherine Price states that "a Euroamerican [is] a person who has either emigrated from Europe to the North American continent or descended from European heritage.") See *id.* While her article addresses Euroamericans in North America and their treaty relations with the Lakota Sioux, the definition is equally valid for European invaders in Central and Latin America.

government had apparent rights within the international system to act with apparent impunity when they committed human rights abuses against their own populations. These Governments rights derived from the international law concept of sovereign immunity and are endorsed in the Charter of the United Nations (U.N.).⁶

The constraint inherent in the Charter's proscription against interference in a state's internal affairs has, until recent years, allowed countries like Guatemala to commit horrendous atrocities against their citizens. It was not until reports of human rights violations in Chile, following the coup by Augusto Pinochet, that the U.N. first developed a sufficient consensus that it should be examining such violations as a matter of international concern.⁷

While I worked in Guatemala, the doctrine of non-interference, as personified in the U.N. Charter's Article 2 and developed in the Economic and Social Council's (ECOSOC) procedures in resolution 1235 of the U.N. Commission on Human Rights, meant that the appointment of a U.N. Rapporteur must wait for the host government's permission before he is allowed to enter the country.⁸ This resulted in a three-year wait before the Rapporteur finally landed in Guatemala and then thirteen more before truly objective fact-finding began.⁹

Concern over the reports of genocide and political killings was raised in the Commission of Human Rights in 1979, but the first Rapporteur did not arrive in Guatemala until 1983. At that time, Lord Colville of Great Britain toured with an army escort and had to report that most interviewees were too frightened to speak with him. He also refused to consider whole classes of abuses, namely disappearances, despite his instructions to the contrary.¹⁰ What was most disturbing, was that in 1979 the army was in the early stages of a military sweep through the highlands, called Tierra Arrasada, or Scorched Earth. More than one hundred thousand Mayan Indians died or disappeared,

⁶ See U.N. CHARTER, art 2, (7). "Nothing contained in the present Charter shall authorize the U.N. to intervene in matters which are, essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." See *id.*; See also U.N. CHARTER, art 39. (Chapter VII authorizes the Security Council to intervene only when it finds a "threat to the peace, breach of the peace, or act of aggression.") See *id.*; See also, Alison Dundes Renteln, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 23 (1990). "The Security Council must interpret gross human-rights violations as being serious enough to constitute a threat of war." See *id.*

⁷ See Frank Newman & David Weissbrodt, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 10 (1996).

⁸ See ECOSOC Res. 1235 (XLII), 42 U.N. ESCOR Supp. No. 1 at 17, U.N. Doc. E/4393 (1967).

⁹ NEWMAN et al., *supra* note 7 at 358, 359.

¹⁰ Adding the years from in 1979 when "concerns" were first raised, until Tomuschat's report to the U.N.

Commission appeared in 1995.

over six hundred village communities ceased to exist, and more than one million persons became internally displaced.

In 1995, Christian Tomuschat returned to Guatemala after new negotiations with the government of Guatemala and proceeded to establish more independent investigators and human rights monitors throughout the country—at which time a number of my colleagues applied for membership on the U.N. investigatory teams. By the time the U.N. and the world community acted, the worst that could happen to the Maya was fait accompli.¹¹ In Guatemala, the U.N. opted to ignore the blatant horrors reported daily from refugees fleeing the country into exile. Moreover, year after year the U.N. chose to issue

¹¹ See Susanne Jonas, *The Battle for Guatemala: Rebels, Death Squads, and U.S. Power* 2 (1991). ("Figures for the human toll in Guatemala vary, although by even the improbably low count of 50,000-70,000, the bloodshed has been staggering." See *id.*; Susanne Jonas quotes the Inter-American Commission on Human Rights (IACHR) figures: "200,000 unarmed civilians have been killed or "disappeared" by government security forces and semi-official death squads during thirty years of counterinsurgency war.") See *id.*; See also Christian Tomuschat, *Report by the Independent Expert*, U.N. Commission on Human Rights, December 18, at 23 (1992). (The U.N. High Commission on Refugees (UNHCR) Commission on Human Rights officially recognizes over 45,000 Guatemalan refugees currently living in U.N. camps in Southern Mexico. Another 50,000-150,000 unrecognized persons live outside the sanctioned camps while possibly 500,000 and as many as a million internally displaced persons struggle for scarce land and scarcer jobs. Truly accurate figures are elusive.) More recent reports have attempted to establish a more accurate record of the depth and breadth of the violence: Three different groups published three independent studies of data collected about that period: the Recovery of Historical Memory, a project originated in the Human Rights Office of the Archbishop of Guatemala; the UN-sponsored Commission for Historical Clarification, and a nongovernmental group, the International Center for Human Rights Investigations (CIIDH). Even though the data collection and analysis were done separately, all three studies showed the same patterns of violence against Guatemalan citizens by the same groups: the military and the paramilitary groups sponsored by the state. What were the numbers? The CIIDH study documents more than 37,000 killings and disappearances, 24,500 of them committed during a three-year period, 1981-83. Of these 37,000, 92 percent were rural people living in remote villages. During 1981-83, whole villages were destroyed, families made homeless, farms left in ruins, and in the case of two provinces, a case for genocide has been declared because of the elective destruction of two indigenous tribes. Less than one percent of the 25,000 killings and disappearances by known perpetrators were committed by guerrillas. Herbert F. Spierer & Louise Spierer, *Talking About The Peace Prize* 1 (1999) <huridocs-gen-l@mail.comlink.apc.org>.

See generally, Tom Barry & Deb Preusch, Guatemala, THE CENTRAL AMERICAN FACT BOOK, 242 (1986). Guatemala has never conducted an accurate census of its indigenous populations typical issue in most lesserdeveloped countries and the majority population, Maya, historically has never been considered by the Guatemalan Government important enough to keep track of. See *id.*

"advisories" rather than reports of the seriousness of the violations, which would have forced the international community to debate the situation."¹²

The U.N. Special Rapporteur, Christian Tomuschat, made numerous visits to Guatemala during the early nineteen nineties in an attempt to craft an agreement with the government to allow a U.N. human rights monitoring team to investigate allegations of abuses and to offer a sort of buffer between civilians and the military. His attempts finally resulted in the placement of a monitoring team, arriving in late 1995, yet the ability of the U.N. to actively intervene in the internal affairs of the host government was less than effective to halt the continual recurrence of abuses by the government or various proxies in the military and paramilitary groups.¹³

In addition, the U.N. and the international community generally chose to ignore United States' role. As Guatemala's major military and police training and weapons supplier, this left the U.S. to co-opt the western hemisphere into its personal sphere of geopolitical influence in its obsession to contain communism during the cold-war years."¹⁴

Following this introduction, Part II discusses the term "indigenous," and highlights the first hurdle that indigenous people must overcome to establish their identity within the framework of international human rights law. Part III addresses the debate about the universality of human rights and what has been called cultural relativism, a term originally arising from anthropology.¹⁵ Part IV first defines then explores state sovereignty and the relevance of cultural relativism to indigenous peoples and the problems facing international intervention for the protection of their human rights within the constraints of national-sovereignty claims. Part V offers my conclusion and thoughts about the future of human rights for indigenous peoples. My thesis is cautionary in that intervention may be a laudable goal, but within the traditional context of state sovereignty, indigenous people will be unlikely to find special protection where the world community cannot agree to enforce basic guarantees already established in international human rights law and existing treaties.

¹² Linda Green, *Fear as a Way of Life*, 9 CULTURAL ANTHROPOLOGY 227, 237 (1994).

¹³ See Christian Tomuschat, *Report by the Independent Expert*, U. N. Commission on Human Rights 23 (1992).

¹⁴ Spierer, STATE VIOLENCE IN GUATEMALA, 1960-1996: A QUANTITATIVE REFLECTION 16 (1999).

¹⁵ Carole Nagengast & Terence Turner, *Universal Human Rights versus Cultural Relativity*, JOURNAL OF ANTHROPOLOGICAL RESEARCH 269, 270 (1997).

II. INDIGENOUS PEOPLES

A. *Who is "Indigenous?"*

From the beginning, it is important to note that most descriptions of the indigenous peoples derive from non-indigenous sources. Much of what I have examined are the terms of the debate about cultural relativism and universalism, trying to find voices that best represent the indigenous themselves. Language in terms of its political power over a citizenry, where "even colonizers in linguistically alien environments must at some point communicate via language,"¹⁶ can be a force to control or coerce, and inadvertently, to alienate a people from their heritage if that is the goal of an oppressor.¹⁷

Indigenous peoples are variously defined as native peoples, original inhabitants or as precolonial groups. For instance, James Anaya describes them as "[t]he culturally distinctive and more or less cohesive groups whose ancestors were the original inhabitants of lands now dominated by others."¹⁸ Another description calls them "[s]ubjects of the exclusive domestic jurisdiction of the settler state regimes that invaded their territories and established hegemony during prior colonial eras."¹⁹ The U.N. Study on Indigenous Populations²⁰ devised a definition for its own purposes, stating in part:

¹⁶ William M. O'Barr & Jean F. O'Barr, *LANGUAGE AND POLITICS*, 5 (1990). The irony of this study occurs at one point in the early portion of the book where the author describes the conflict between the Canadian Government and the Quebecois over the use of the French language. Ignored is any reference to indigenous peoples and their own difficulties gaining entrance into the mainstream cultural life of Canada. *See id.*

¹⁷ In Central America, Mayan language translations typically have been done by foreigners, mostly religious, like the Summer Language Institute (SIL), who have their own political and/or spiritual agendas, and have been accused of "destroying Indian [sic] culture." *See* David Stoll, *Fishers of Men or Founders of Empire: The Wycliffe Bible Translators in Latin America* 3 (1982). *See also* Julian Burger, *Report From the Frontier, the State of the World's Indigenous Peoples*, *CULTURAL SURVIVAL QUARTERLY* 27 (1987).

¹⁸ S. James Anaya, *Indigenous Peoples and International Law Issues*, 92 *AM. SOC'Y INT'L L. PROC.* 96 (1998).

¹⁹ Robert A. Williams, Jr., *Encounters on the Frontiers of international Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, *DUKE L.J.* 660, 664 (1990).

²⁰ "[A] second international NGO meeting, the Conference on Indigenous Peoples and the Land, was convened at Geneva in 1981. That conference called for the establishment of a United Nations working group on indigenous peoples so that 'indigenous nations and peoples [could] submit their complaints and make their demands known...' Following the lead of the two NGO conferences, the Sub-Commission recommended the establishment of a pre-session Working Group on Indigenous Populations, and the Commission and ECOSOC approved. The working group first met in August 1982 with members from Norway, Yugoslavia, the Sudan,

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them.²¹

It has been difficult to find the words of the native peoples themselves, submerged as they are in the discussions that would determine their fate within the nations and states to which they belong. Indigenous peoples have argued that only they have the right to define who they are, particularly given their lack of inclusion in the discussions concerned with a definition of who is indigenous.²²

The concern over definition was an accident of fate, raised by Belgium and thereafter called the "Belgium Thesis."²³ Many countries argued against definitions that compared indigenous groups to colonized peoples, because to do so drew attention to their own native populations and would force the conclusion that these groups may be entitled to special rights, specifically to self-determination. These included such diverse countries as the United States, the Soviet Union, India, Bangladesh and those of Latin America, who argued over whether these peoples were any more "indigenous' than the balance of their populations, and that in fact they are all "minorities," and only subject to local jurisdiction within the purview of national governments. Bangladesh wished to refer to its entire population as somehow indigenous, where they were juxtaposed against those colonizers who overthrew the local state and established colonial rule.²⁴

B. *People, Peoples or Populations?*

Panama and Syria." Russel Lawrence Barsh, *Indigenous Peoples: an Emerging Object of International Law*, 80 *AM. J. INT'L L.* 369, 372 (1986).

²¹ J. Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc.

E/cn.4/sub.2/1986n/add.4, U.N. Sales No. E.86.XIV.3 (1986).

²² Barsh, *supra* note 20, at 375.

²³ *See* Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 *CASE W. RES. J. INT'L L.* 199. "It was based on the arguments that, first, the Charter does not refer to colonialism, but to non- self-governing territories, and second, that the treatment of indigenous communities was comparable to the treatment of colonized territories overseas... [During the Drafting of the Declaration of Human Rights] a Belgium delegate at the UN stated that, he had a great deal of documentation to prove that a number of States were administering within their own borders territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. These populations were disenfranchised; they took no part in national life; they did not enjoy self-government in any sense of the word." *See id.* at 251.

²⁴ "Bangladesh [stated] that 'indigenous' refers only to 'those countries where racially distinct people coming from overseas established colonies and subjugated the indigenous populations.'" Barsh, *supra* note 20, at 375.

Another term that bedevils international law as it relates to the indigenous is "peoples." The U.N. study quoted above, struggled with the use of the word "peoples" versus "populations," finally adopting the later as the most appropriate term, given the sensibilities of the non-indigenous governments that would be asked to sign on to future declarations in favor of special rights for their indigenous citizens.²⁵

International law, as described above, incorporated a tremendous legal barrier to indigenous people by defining sovereignty in such a way that any intervention to remedy a state's egregious treatment of its native population represents an international threat to every state's territorial integrity. Government discussions about who constitutes a "people" or "peoples" for purposes of the benefits of protection under the U.N. Declaration of Human Rights and other human rights instruments is representative of the types of hurdles that indigenous peoples have to cross to achieve universal protection and enforcement of their rights.²⁶

One representative to the drafting of the Declaration of Human Rights was ashamed at what he perceived as the unjustifiable distinction accorded to indigenous people when it came to the granting of rights: "What this draft Declaration does is to say that the term 'peoples' as used in the Charter and the Covenants does not include indigenous peoples and in so far as it includes them it only refers to certain rights and not all the fundamental rights."²⁷

III. UNIVERSALITY AND CULTURAL RELATIVISM EXPLORED

A. *Universalism*

The development of modern human rights law followed the end of the Second World War, the convening of the Nuremberg Tribunals, and the creation of the United Nations.²⁸ The drafters of the Universal Declaration of Human Rights conceived of human rights as a seamless ideal, "a concept of universalism which holds that there is an underlying human unity, which entitles all individuals, regardless of their cultural or

²⁵ "This use of 'populations' instead of 'peoples' was a choice made for political reasons, namely that states did not want to imply, by the use of 'peoples,' any right to self-determination for indigenous peoples." Iorns, *supra* note 23, at n.15.

²⁶ "Government representatives have accordingly rejected the use of the term 'peoples' and instead referred to indigenous 'populations' so as to avoid any implication that indigenous peoples are thereby entitled to the right of 'all peoples' to self-determination. Further, government representatives have stressed that any declaration of the rights of indigenous peoples should operate within existing human rights instruments and not confer new, additional rights on indigenous peoples; nor should any such declaration 'infringe upon the sovereignty and independence of the Member States of the U.N.'" *See id.* at 212, 213.

²⁷ Russell Lawrence Barsh, *Indigenous Peoples in the 1990's: From Object to Subject of International Law?* 7 HARV. HUM. RTS. J. 33, 37 (1994).

²⁸ *See Newman & Weibrodt, supra* note 7, at 6.

regional antecedents, to certain basic minimal rights."²⁹ It is important to note that universalism is itself based upon three moral philosophies that have guided western thought since the ancient Greeks: natural law, rationalism, and positivism.³⁰ It may be accurate to state that contemporary human rights law finds its base in the positivist theory, where its proponents argue that broad international adoption of human rights legal norms demonstrates a universal acceptance of their underlying principles.³¹

The debate about universality encompasses the most basic terms that we use to describe ourselves as citizens of our nation. The U. S. Constitution begins, "We the People of the United States..." yet native Americans, like other indigenous peoples generally, are set apart and have been denied – not unlike many minorities in this country – admittance to full citizenship in this elite club.³² Even as I write this paper, native Hawaiians are forced to argue that they are entitled to be called a distinct people, while Supreme Court Justices seem determined to deny them that most basic of human affiliations, their identity.³³

While at work in Guatemala, I found that the Maya adapted themselves readily to the idea that they possessed human rights. It was difficult to establish the origins of their belief in these rights, although they seemed deeply rooted in their ethical and moral systems and to a great degree, in their religious and spiritual beliefs. To some degree, their belief in a "divine" moral code resembles theorists' notions regarding "natural law" rights.³⁴ The Maya are deeply spiritual people, deriving their cosmology from ancient, pre-

²⁹ Elizabeth M. Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual*, 53 JOURNAL OF ANTHROPOLOGICAL RES. 319 (1997).

³⁰ *See id.* at 320.

³¹ "Positivists also observe that the source of human rights lies *not in individual cultures* but rather in *international law* which gave rise to the idea of universal rights." *See id.* at 321.

³² Indigenous peoples and their cultures have been attacked since their "discovery" and colonization. The treatment of indigenous peoples has been so severe that it has been referred to as "genocide" and as a "holocaust." While the particular histories of different indigenous peoples differ, they have in common a history of conquest by another group and subordination within their present states, even where they may not numerically be in a minority. Further, the tragedy of the treatment of indigenous peoples is not merely historical; it continues today." *See Iorns, supra* note 23, at 199, 200.

³³ *See Linda Greenhouse, Justices Consider Arguments of race in Hawaiian Voting*, N.Y. TIMES, Oct. 7, 1999, at A25.

³⁴ The natural law [bases of human rights] begins with the assumption that there are natural laws, both theological and metaphysical, which confer certain particular rights upon individual human beings. These rights find their authority either in divine will or in specified metaphysical absolutes... A principal emphasis has been upon a common human nature that implies comparable rights and equality for all. Myres S. McDougal et. al, *Human Rights and World Public Order: The Basic Policies of an International Law of human Dignity* 127, 167-168 (1980), in *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROGRESS* (Frank Newman, et. al, eds. 1996).

colonial times, in combination with postcolonial Catholicism or a more recent Protestantism.³⁵ Their experience is also informed to a great degree by their struggle to resist colonization and its consequent violence, and their worldview has come to incorporate a mask of passivity over deep suspicions and distrust.³⁶ My investigations were hampered by an apparent readiness to cooperate on the part of witnesses, yet answers had to be vetted several times to dig through layers of justifiable self-protection. A reasonable first step was to convince witnesses that we posed no threat to them.³⁷ Historically, admissions were used to further persecute victims and survivors and to intimidate them from telling their stories.³⁸

Yet, today, a universalist concept of human rights may be the correct one, and more likely to protect indigenous people than a culture-specific, "relativistic" interpretation. Utilizing customary international law and the sovereignty proscription from violating their national borders, countries in Africa and China raise the culture relativity banner to argue that universal rights are Eurocentric.³⁹ It is important to examine the concept of cultural relativity as it may impact indigenous peoples and their protection under international law.

B. Cultural Relativism

³⁵ See Michael Skinner, *The Guatemala Human Rights Database Project: Culture And Bias* 10 (1995). This mixture of Maya spiritualism survives in its odd conjunction of their deep connection to their land and ancient gods, and the acceptance of Christianity's monotheistic interpretation of a "heavenly father." One example of the mix of symbolism can be read from my undergraduate thesis, which was a description from the GHRDP: The region where I worked was in the depths of three months of severe drought, and one major harvest withered and died while we traveled from community to community taking testimonies from the people. At the same time, two exhumations of mass graves were completed and a third was underway. Everyone was edgy, death threats and fighting were common, and the Guatemalan military and security forces activated their garrisons. My coworker, an Achi Maya, whose wife and two children had just been reinterred in a mass grave after their bodies were exhumed two months before, said to me "It's [the drought] the wrath of God. We all are being punished for the sins of the massacres and the killings." He condemned those who actually committed the murders, but at the same time appeared to accept the guilt as the collective sin of all the Maya. As the crops continued to die and more bodies were exhumed, three locivil patrollers," who had participated in the massacre of my coworkers' families, burdened by guilt turned themselves in. More and more Achi Maya were saying that the drought was the result of the blood on their hands. See *id.*

³⁶ See Edward F. Fischer, *Cultural Logic and Maya Identity*, 40 CURRENT ANTHROPOLOGY 473, 486, Aug.-Oct 1999.

³⁷ See Green, *supra* note 12. "Silence about the present situation when talking with strangers is a survival strategy that Mayans have long utilized." Green, *supra* note 12, at 238.

³⁸ See BALL et al, *supra* note 1, at 113.

³⁹ See Nagengast et al., *supra* note 15, at 270.

My empirical grasp of the culture-specific human rights needs of the Maya might be seen as an endorsement of cultural relativism—a term first originating with anthropologists, who expressed concern that the 1948 Universal Declaration of Human Rights placed all the various peoples of the world within the same aegis of western culture.⁴⁰ Progressive anthropologists thought to protect indigenous difference by placing it outside the normal expectations of the highly developed Eurocentric nations of the post-war world, particularly as the cold war' threatened.⁴¹

The concept of human rights as particularized and culture-specific fit the occasion when initially posited. At conception of the Declaration, the historic subjugation of indigenous peoples was recognized to have left indigenous peoples' social constructs and rights of self-determination "colonized," thus beholden to the whims of "outsider" dominant societies. It is then no wonder "It is not decolonization, but a cruel deception, when self-determination in a colonized country is considered the exclusive prerogative of the colonists."⁴²

To be "colonized" under international law has specific meanings. Unfortunately for indigenous peoples, they are not considered "colonized" under formal law, as most nations refuse to grant them a status that would threaten their own rights of sovereignty, particularly since the wave of de-colonization following the Second World War. "The definition of colonialism in international law restricts the category of colonies or non-self-governing territories, to those under alien subjugation, which are also politically and geographically separate and ethnically or culturally distinct, and at the same time arbitrarily subordinated by the state in question. States which are not colonial powers are entitled to have their territorial integrity respected."⁴³

Now, with the new Declaration, a "universalist" concept of human rights seemed to offer more of the same—laws promulgated by the dominant authorities, without input or consideration of the needs of indigenous societies. "[U]nderlying the presumption of universality is the belief that all peoples think in a similar fashion."⁴⁴

As noted earlier, in Guatemala, my cultural biases and culturally driven assumptions particularly struck me, most especially in my relationships with the Maya. One example would be in the design of "fichas," the questionnaires that we used for our interviews of victims and survivors of genocide.

We wrote and rewrote the "ficha" trying to find a universal Spanish that everyone in the field could work with. Words that made sense in one region seemed to leave Mayans shaking their heads in confusion in another. Articles of clothing might have

⁴⁰ See generally Tracy E. Higgins, *Anti-Essentialism, Relativism, And Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996). "[T]he Executive Board of the American Anthropological Association (AAA) warned that the Declaration would be "a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America." See *id.* at 92.

⁴¹ See Nagengast et al., *supra* note 15, at 270.

⁴² See Barsh, *supra* note 27, at 36.

⁴³ Iorns, *supra* note 23, at 293.

⁴⁴ Renteln, *supra* note 6.

colloquial terms of identification that we had to ferret out by trial and error. The "ficha" grew when we learned new words, then shrank again when we needed to shorten its cumbersome length. Time worked against us, because we had to resupply the expanding network of new investigators almost every week with questionnaires and they had to be familiarized with each revision. It never occurred to us, beyond a joking reference, to translate the questionnaires into local dialects. This sounds unwieldy, yet is an idea worth considering. At the very least, local investigators, who we recruited directly from their localities, would be able to work from a more intelligible reference. If the "ficha" had to remain in Spanish, then a helpful manual in their own idiom might make life easier for the indigenous members of the team. Yet most indigenous are just as illiterate in their own dialects as they are in Spanish.

I wish that I could say that I was able to solve the problem, yet that was not the case. The fichas continued to be produced in Spanish, laboriously gleaned from hours of investigation and interviews. My lack of cultural knowledge and my perceptions of reality based upon my Eurocentric upbringing made my efforts at communication much more difficult. Fortunately for me, my Maya compañeros (co-workers) were endlessly patient and equally committed to the work. In this, I could see our mutual understanding. To a great degree, both the Maya and my own deeply held belief in the "moral rightness" of our striving for justice seemed to be the bridge between the universalist and relativist arguments.

The cultural relativism argument might be supported by a self-interested advocate of its claims and at the same time rejected as a credible basis of support for other minorities and indigenous peoples within the same border-- i.e., the Qudbdcois and the Cree.⁴⁵ Hawaiian natives are in the midst of a court battle in which their very status as a distinct group is under attack, yet the members of the U.S. Supreme Court, who will decide their fate, are non-indigenous and appear by their comments to be uninformed about the definitional terms of the modern debate over who exactly are native peoples.⁴⁶

IV. SOVEREIGNTY

⁴⁵ In their continuing struggle for independence from Canada, the Quebecois argue that somehow they 'have the right to self-determination and secession, while other arguably distinct peoples within Quebec do not.' Rachel Ouglielmo, *Three Nations Warring in the Bosom of a Single State: An Exploration of Identity and Self-Determination in Quebec*, 21 THE FLETCHER FORUM OF WORLD AFFAIRS 197 (1997).

⁴⁶ See generally, *Rice v. Cayetano*, 528 U.S. 495 (1999). (In *Rice v. Cayetano*, the Court is deliberating Hawaiian State law that restricts voting for trustees of the Office of Hawaiian Affairs, an agency that administers a trust for the native Hawaiians, to "native Hawaiians." Mr. Rice argues that the restriction is discriminatory and clashes with his Constitutional rights under the 14th and 15th Amendments.) See *id.* One Justice, Antonin Scalia, refuses to recognize native Hawaiians as entitled to the same rights as other native Americans, because they "never organized into tribes." His simplistic argument flies in the face of the modern distinctions accorded indigenous peoples and demonstrates an underlying antipathy to such distinctions. See Greenhouse, *supra* note 33, at A25.

A. Sovereignty Defined

Linked to my discussion of universality and cultural relativism is state sovereignty, which I will attempt to relate together with the argument that cultural difference embodies distinct values and expectations and may further insulate states from outside judgment.⁴⁷ Because a thorough description of sovereignty itself would subsume my thesis, I offer only a brief definition before moving forward and incorporating the balance of my argument. "Sovereignty" conflates various meanings in the context of international law. Nations and states define themselves under customary international law as politically independent and separate entities within the recognized world of nations and states and are able to conduct their own affairs without interference, as well as to be treated on "an equal footing with other nations."⁴⁸

State territorial sovereignty is embodied in Article 2 of the U.N. Charter. Article 2 (4) particularly, militates against the use of force "directed against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."⁴⁹

Any challenge to traditional state sovereignty is an exceptional one and goes to the heart of the international legal system: "Sovereignty is the sine qua non of statehood: there is no higher earthly authority."⁵⁰ Yet sovereignty is a club to wield, not only in the defense of borders from enemies without, but to be used on the citizenry if any challenge to its legitimacy is raised. In historically colonized countries, like those of the western hemisphere, Africa, Asia and elsewhere throughout the world, indigenous populations became unwilling subjects by a sovereignty imposed through doctrines of so-called

⁴⁷ Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1335-1336 (1993)

⁴⁸ "International law provides perhaps the most common understanding of sovereignty, where 'sovereignty' denotes the independence of a nation-state, and represents the 'totality of international powers' that international law recognizes as attaching to states. Although it has been said that 'only states can be sovereign,' international law does not view sovereignty as a criterion of statehood. In this light, sovereign authority points to the power of an independent state." Macklem, *supra* note 47, at 1346; Catherine Iorns offers a more comprehensible definition for my purposes, describing "external" and "internal" forms of sovereignty: "External sovereignty is concerned with relationships between international personalities. It has been defined as 'the rights of the state freely to determine its relations with other states or other entities without the restraint or control of another state. This aspect of sovereignty is also known as independence.' The internal aspect of sovereignty is concerned with internal self-government: the state's right to devise its own constitutional and political institutions, enact and enforce its own laws, and to make decisions concerning citizens and residents of the state, without the interference of another state." Iorns, *supra* note 22, at 200.

⁴⁹ Covey T. Oliver et al., THE INTERNATIONAL LEGAL SYSTEM 1262 (1995).

⁵⁰ See *id.* at 82.

discovery or conquest. In the case of the American colonies, both doctrines were applied together in order to legitimize the new state.⁵¹

B. The Indigenous Challenge to Sovereignty

Indigenous peoples' rights challenge the traditional limits of state sovereignty in the popular dialogue about universal human rights.⁵² I have seen, through my work with the Maya in Guatemala and the Rama, Sumo, and Garifuna in Nicaragua, how native peoples are forced to mediate their needs and rights within the bureaucracies of unsympathetic conquerors. Their rights, particularly in the case of the Mayan peoples, are and have been subject to the whims of the non-indigenous societies in which they now are forced to live.⁵³ For indigenous peoples, genocide and surviving outsiders' attempts to destroy their cultural heritage is a fact of their collective histories.⁵⁴

The non-indigenous leadership typically proceed without any concern that subject peoples may possess any right to self-determination – despite broad claims of many governments offering speeches and constitutions proclaiming, "that indigenous groups and their members are entitled to be full and equal participants in the creation of the institutions of government under which they live."⁵⁵

Self-determination is probably the greatest threat to nation-states, which fear that it undermines the very concept of sovereignty. If states grant broad rights to indigenous people, the argument goes, these minorities will undertake to secede from the national union, and bring down the political structure. At the very least, self-determination means the ceding of power over the resident population and the acknowledgment of internationally recognized human rights.⁵⁶

⁵¹ See an excellent discussion of this doctrine appears in our readings from Johnson and Graham's *Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573, 587: "The principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made."

⁵² "The theme of indigenous self-determination as a fundamental human right represents the most significant challenge to present conceptions of international law posed by the emerging discourse of indigenous human rights." Robert A. Williams, Jr., *Encounters on the Frontiers of international Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, DUKE L.J. 660, 691 (1990).

⁵³ See *id.* at 664.

⁵⁴ Iorns, *supra* note 23, at 200.

⁵⁵ See S. James Anaya, *Indigenous Peoples in International Law*, 87 (1996). (S. James Anaya describing the Draft Declaration of Principles proposed by the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference, and the International Indian Treaty Council). See *id.*; see also Report of the Working Group on Indigenous Populations on its Fourth Session, Annex IV, U.N. Doc. E/CN.4/Sub.2/1985/22 (1985).

⁵⁶ See Iorns, *supra* note 23. "Because the principle of state sovereignty forms the basis of state identity in the present international legal and political system, and because states are desperately concerned with preserving their identity, state sovereignty is given priority over

The language of the law is particularly frustrating, seeking not so much "value-neutral" terms, as what I call "value-predictable" precision, whereby lawmakers can draft law that does not surprise its makers with an unintended meanings down the road. One problem that customary law embodies is its purely western, Eurocentric interpretation. It is argued that indigenous peoples have their own. historical claim to customary laws, which identify and interpret their own heritage and worldview.⁵⁷ Why is the international order written to the exclusion of their laws?

C. State Borders and Impunity

In a 1992 speech before the United Nations General Assembly at the opening session of the U.N., then Secretary-General, Boutros Boutros-Ghali, heralded a new era of enlightened international concern for human rights. More importantly, the Secretary-General described an international community, under U.N. leadership, that would no longer stand by and watch human rights violations occur with impunity within state borders.⁵⁸

At around the time that the Secretary spoke, he been exhorting the Security Council about what Serbs were doing to non-Serbs in Bosnia-Herzegovina, using the colorful new language of modern genocide, "ethnic cleansing."⁵⁹ As history demonstrates, the international community reacted with excruciating slowness to the killings in the former Yugoslavia before taking decisive action – by which time many thousands had been murdered. One of my former undergraduate" classmates in forensic anthropology took part in the exhumation of mass graves in Vukovar under the auspices of the U.N., AAAS, and the Physicians for Human Rights (PHR). In 1994, genocide erupted in the East African country of Rwanda, claiming the lives of hundreds of thousands of Tutsi, while the international community watched in virtual silence and dissembled upon the use of the word "genocide."⁶⁰

other, competing claims, even when those claims are matters of fundamental human rights. These claims cannot be met within a paradigm that assumes the present conception of state sovereignty as a given." Iorns, *supra* note 23, at 203.

⁵⁷ S. James Anaya, *The Emerging System of International Protection of Indigenous Peoples' Rights*, 9 ST. THOMAS L. REV. 251, 259 (1996).

⁵⁸ "In these past few months a conviction has grown, among nations large and small, that an opportunity has been regained to achieve the great objectives of the Charter-a U.N. capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, 'social progress and better standards of life in larger freedom.' " Boutros Boutros-Ghali, *An Agenda on Peace (1992)*. D.R.L. Ludlow, *Humanitarian Intervention and the Rwandan Genocide*, XIX The Journal of Conflict Studies, Spring (1999) at 22.

⁵⁹ See MICHAEL P. SCHARF, BALKAN JUSTICE, 29 (1997).

⁶⁰ Alison Des Forges, "LEAVE NONE TO TELL THE STORY": GENOCIDE IN RWANDA, HUMAN RIGHTS WATCH, 595 (1999).

On September 20, 1999, the current Secretary-General, Kofi Annan, addressed the General Assembly at the LJN's Opening Session, to urge greater speed and decisiveness when it is faced with human rights violations and genocide around the world. More importantly, to the purposes of this paper, was his statement, "Nothing in the Charter (LJN Charter) precludes a recognition that there are rights beyond borders," and that "[C]ountries ... will no longer be able to hide behind protestations of national sovereignty when they flagrantly violate the rights of citizens."⁶¹

Despite the Secretary General's comments, sovereignty presents the most formidable barrier to timely intervention to prevent human rights abuses.⁶² Ultimately, the real cost of the political deference to national sovereignty is impunity, as is the case in Guatemala, where the generals act in full view of the international legal apparatus.⁶³

Today, we are faced with the daily headlines of events in Chechnya and recently, with the bombings of civilians by the United States in Serbia. Of what value is the rhetoric of international human rights unless a mechanism to enforce them is built into the very U.N. Charter that sanctifies state territoriality.

V. CONCLUSION

I am concerned with the discussion of classical state sovereignty and cultural relativism within the context of contemporary human rights goals, particularly considering the human rights of indigenous peoples, and in light of the ideals expressed by the quotes of both SecretaryGenerals of the U.N. For example, Secretary Annan's recent comments interpret humanitarian interventions by implying that international borders are now porous to the scrutiny of the greater world community and sacrosanct only until that community chooses to cross over an as yet undetermined threshold of internal violations of its citizens rights. The obvious question begs "Where does that threshold lie?"

⁶¹ " If States bent on criminal behavior know that frontiers are not the absolute defense; if they know that the Security Council will take action to halt crimes against humanity, then they will not embark on such a course of action in expectation of sovereign impunity." Kofi Annan, *Secretary-General Presents His Annual Report to General Assembly*, Press Release: SG/SM/7136, GA/9596, 20 September 1999. See also, Barbara Crossette, *U.N. Chief Wants Faster Action to Avoid Slaughter in Civil Wars*, NY Times, September 21, 1999, at A1.

⁶² See Anaya *supra* note 57. "The traditional doctrine of state sovereignty, with its corollaries of territorial integrity, exclusive jurisdiction and non-intervention in domestic affairs, has hobbled the capacity of the international legal order to affirm indigenous peoples' rights and to limit accordingly the action of states within their asserted spheres of control." S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 2, 5 (1991).

⁶³ "The usefulness of violence is its effectiveness and the crucial point concerning the proliferation of violence in Central America is its impunity under the Law." Green, *supra* note 12, at 237.

The disparity of interests expressed in the actions taken in Serbia-Herzegovina and Rwanda and today's failure to react in a timely manner in East Timor-despite the foregoing rhetoric about the new transparency of borders belies any change for the better. Despite the mass killings in Guatemala, and despite the release of statistical documentation demonstrating the complicity of the state government, the Guatemalan leadership continues to act with apparent impunity.⁶⁴ In the 1990's, the indigenous peoples in Canada applied on three separate occasions to the U.N. Human Rights Commission for help to resolve their conflicts with the Ottawa Government. On all three occasions their claims were rejected and they were ultimately forced to find domestic solutions through grass-roots campaigns.⁶⁵ Where does this leave the aspirations and protections of indigenous peoples in the new scheme of rights that the Secretaries-General represent to the world? Overall, my conclusion is both optimistic and skeptical that the future holds hope for the indigenous peoples of the world. It is positive that the language of human rights is universalized and a topic of discussion everywhere. International law and state domestic laws embrace and incorporate this language, albeit mostly in word and not deed. It is only a short time since the modern human rights era began, virtually within my lifetime, and the contemporary challenges to state sovereignty can be said to have arisen within this recent period.⁶⁶ Beyond that, the granting of specific rights for indigenous peoples is an even more recent development. One may speculate that this trend represents positive movement toward greater protections within the international system and consequently, greater protection within state borders. I admit that these signs are positive and hopeful, and at the same time offer a caution.

Until and unless the trend toward greater human rights protections is reflected in amendments to the U.N. Charter, and ancillary treaties and documents that hold states' sovereignty and territoriality sacrosanct, states will continue to act with impunity often in violation of international law. It is hypocritical for modern governments to argue for greater human rights protections, while pleading "not-in-my-backyard" excuses for why the same rules do not apply for themselves. It is dangerous to assume that one nation or people is the moral arbiter for all others and has the right to act on their belief to the exclusion of all other philosophical or cultural imperatives. This moral claim argument has led to counter-claims that the international human rights system is nothing more than a political tool for the dominant, western powers, namely, the United States.⁶⁷

⁶⁴ See Ball et al, *supra* note 14, at 116. Another measure of impunity is that those who work to clarify this history still face repression. On April 24, 1998, the Catholic Church presented its REMHI report on the armed conflict, detailing both the operation and the effects of the state violence. Two days later Juan Josd Gerardi Condera, the Church's Bishop for Human Rights, was murdered inside his parish garage. The government has shown little seriousness in pursuing those responsible. See *id.*

⁶⁵ See Barsh, *supra* note 27, at 79,80.

⁶⁶ See Newman et al, *supra* note 6, at 5.

⁶⁷ See Uwe-Jens Heuer and Gregor Schirmer, *Human Rights Imperialism*, 49 Monthly review, March 1, 1998, at 5.

International forums are struggling with the ideas raised by cultural relativists and those who present the universalist view of human rights. Both are likely to be right. The contemporary human rights activists within the Maya community expressed their views to me as a complex mix of both traditional beliefs, overlaid by assimilated colonial moral teachings and recently embraced modern human rights aspirations. It all makes sense. The bottom line is respect for the dignity of the Maya people and their right to survive on their own terms. At the very least, we are asked to respect their right to participate in the growing international dialogue about the nature of the laws that will be applied to them and purports to speak to their beliefs and needs. This is a right that everyone demands.

The "bridge" I noted earlier, crosses over pure universalist notions of rights readily discernible to all and allows a relativistic respect for the human dignity of all peoples to be drawn into the discussion. Anyway, this is how I see it.