

## Claims by Non-State Groups in International Law

### I. Objectives and Structure of this Article

The capacity of international society<sup>1</sup> to deal with the challenges posed by the claims of non-state groups<sup>2</sup> is a matter of pressing concern. The adequacy of existing international structures is highly questionable. Fundamental conflicts exist between values of justice and the hitherto dominant values of order. While many of the issues are not primarily legal, public international law is necessarily involved. This article examines the norms developed in the international legal system to address issues arising in relations between states and non-state groups. This article argues that in international political debates, and in much (but by no means all) of the principal legal material, three distinct general domains of discourse have been employed to express and address claims by non-state groups.<sup>3</sup> The separate structure of each of these domains has obscured the overlap (if not the identity) of underlying justificatory purposes among these different domains.

Certain fundamental problems in the application of international legal norms to relations between states and non-state groups might be

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1. Hedley Bull's definition of a society of states, modified to include a wider range of actors, suggests that an international society exists where a group of actors, "conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions." HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 13 (1977).

2. The term "non-state groups" is used here in a non-technical way to denote encompassing groups important to the identity of individual members in which individual membership, while not necessarily resting on ascriptive identity, is not simply a matter of readily-reversed voluntary choice. It thus includes, but is not limited to, ethnic groups. The existence or absence of formal legal personality for the group under municipal or international law is not directly material.

3. The three general domains of discourse are: claims to self-determination, minority rights claims, and human rights claims. See *infra* text accompanying note 4. 25 CORNELL INT'L L.J. 481 (1992)

avoided by focusing attention on the commonality of justificatory purpose. In particular, such a unified analysis would help in resolving some of the problems of commensurability or reconciliation where the different domains appear to conflict, and ought to open the way to better balancing of competing rights and interests. More generally, this article argues that the international community has not done enough to develop either the normative framework, or the systems of monitoring and enforcement necessary to make the norms effective. The result is that in relations between states and non-state groups there is often no consensus among parties or non-parties concerning the nature or application of relevant norms. The response of the international community to particular conflicts or crises has often been ad hoc rather than a straightforward and predictable application of clear rules. Such a response diminishes the authority and effectiveness of international community action when it is finally attempted.

Many areas of international law, including state succession, state responsibility, the law of treaties, the law relating to title to territory, recognition, and the law of international organizations, are relevant to the legal analysis of claims by non-state groups. However, claims by non-state groups are characteristically expressed at the international level in five principal domains of discourse. Three of these are general: claims to self-determination; minority rights claims; and human rights claims, including those relying on principles of equality or non-discrimination.<sup>4</sup> The other two, while important, by their nature have value only in a more limited and specialized range of circumstances. These are claims to sovereignty legitimized by historical arguments or other special circumstances, and claims to special rights by virtue of prior occupation.

Each of these five domains of discourse has its own bounded structure of legitimacy and justification, and thus shapes claims and responses made within it. It is common for claims by the same group, or arising out of the same situation, to be articulated simultaneously within different domains. The domain of discourse in which the claim is articulated and assessed will affect its political and legal nature, perceptions of its justification and merits, and the form of its legal expression and resolution, for both claimants and respondents.<sup>5</sup> There are both overlaps

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4. The claims of the Korean minority in Japan appear to have been expressed and addressed primarily in this latter domain of discourse. See Onuma Yasuaki, *Interplay Between Human Rights Activities and Legal Standards of Human Rights: A Case Study on the Korean Minority in Japan*, 25 CORNELL INT'L L.J. 515 (1992).

5. For instance, there may well be political and legal differences depending on whether a particular indigenous land rights claim is: a claim to reassert an anterior sovereignty; a claim to special measures justified on grounds of the special historical circumstances of an indigenous people; a means of attaining a degree of self-determination; a general minority rights claim which should also be open to other minorities; simply a substantive equality claim. Cf. the issues relating to the Pitjantjatjara Land Rights Act (1981) (South Australia) (a state act providing for the vesting of title to a large area of land in the northwest of South Australia in the Pitjantjatjara people), and the decision on the validity of sections of this act by the High Court of Australia

and conflicts between the different domains. The conflicts come sharply into focus where particular competing programs are in contention, as where conflicts appear between programs of group autonomy and gender equality.<sup>6</sup> Often the rights and interests of one group are articulated and protected under one program, but this program does not itself take adequate account of the rights and interests of other groups or of affected individuals.<sup>7</sup> An important part of the international normative agenda is to address such conflicts between programs, to avoid the structure of irreconcilable clashes between competing universal norms.

Why is the development of a general international normative framework an objective worth pursuing? Law in this area has many functions, including that of mandating or guiding behavior of parties and non-parties, structuring coordinated responses, providing procedures for dispute or conflict resolution, and establishing the basis for an authoritative, perhaps even dispositive, decision. Particularly important for present purposes is the compliance-pull exerted by legal norms. One useful account of compliance-pull in international law is Franck's discussion of legitimacy.<sup>8</sup> In his terminology: "Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."<sup>9</sup> Expressed this way, legitimacy is a function of the norm-creating process and of fairness and efficacy in implementation. This interpretation of legitimacy resembles Fuller's inner morality of law in the emphasis on propriety of sources and of operation.<sup>10</sup> Certainly this form of procedural

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in *Gerhardy v. Brown*, 57 A.L.R. 472 (High Court of Australia 1985) (per curiam) (upholding Section 19 of the state act, which had been challenged as contrary to the Racial Discrimination Act 1975, a commonwealth act).

6. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (discrimination suit against tribe barred under the Indian Civil Rights Act of 1968); *Attorney-General of Canada v. Lavell*, 1974 S.C.R. 1349 (Sup. Ct. Can.) (provisions of the Indian Act excluding women of Indian birth who marry non-Indians from the tribe are not rendered inoperative by the Canadian Bill of Rights); *Lovelace v. Canada*, 68 I.L.R. 17 (1981) (U.N. Hum. Rts. Comm.) (denying female Indian who married a non-Indian the right to live on a reservation violates international covenant on civil and political rights).

7. Some well-known examples of problems of this type are summarized in Douglas Sanders, *Collective Rights*, 13 HUM. RRS. Q. 368, 378-86 (1991). This theme is developed by Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES I* (James Crawford ed., 1988).

8. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990). Franck seeks to advance the voluntarist thesis that nations (coterminous with states in this usage) obey rules "[b]ecause they perceive the rule and its institutional penumbra to have a high degree of legitimacy." *Id.* at 25.

9. *Id.* at 25.

10. Cf. LON L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969). Franck's correlates of rule legitimacy include pedigree (meaning "the depth of the rule's roots in a historical process"), determinacy ("the rule's ability to communicate content"), coherence ("the rule's internal consistency and lateral connectedness to the principles underlying other rules"), and adherence ("the rule's vertical connectedness to a

justice is important to international compliance-pull. Indeed, one of the concerns about international responses to the emergence of new states in the territory of Yugoslavia and the Soviet Union was that norms of minority protection, in particular, were being invented in the heat of the moment, applied on a case-by-case basis to new states by existing states which were not domestically committed to their internal application, and propounded without adequate systems of international monitoring and enforcement.

Franck, however, takes the further step of avoiding making legitimacy contingent on substantive justice, arguing that the secular international community must be distinguished from the moral community, and that in view of divergent perceptions of justice it is imperative for the global secular rule community to focus instead on legitimacy.<sup>11</sup> He adheres to this view notwithstanding that "a legitimate rule may pull less powerfully toward compliance when it is seen to be unjust."<sup>12</sup> In relation to non-state claims which, to the state directly involved, have an acutely internal character, the compliance-pull arising from international legitimacy may well be insufficient to influence the behavior of the state unless there is also some perception that vindication of the claim does not involve profound injustice for the state and its major constituencies. The same is true, *mutatis mutandis*, to the extent that the behavior of non-state groups is directly affected by the compliance-pull of international norms: the more so because the direct involvement of these groups in the rule-making and supervision process has typically been very limited.

Does "legitimacy" have a definite meaning, and do the components of legitimacy have a significant impact on the effectiveness of international law? Koskenniemi argues that as used by Franck, "[l]egitimacy' is an intermediate concept whose very imprecision makes it available to avoid the attacks routinely mounted against the formal (but too abstract) idea of legal validity and the substantive (but too controversial) notion of justness."<sup>13</sup> The "imprecision" referred to by Koskenniemi is a function of intermediacy between these poles: the concept of legitimacy is not itself incapable of concrete application. Doubtless the principal use of the concept of legitimacy as here articulated is by neo-liberal advocates of international cooperation in positing explanations of international behavior which go beyond those of classic realism. Nevertheless, the concept has a wider attraction, and does not involve discarding the insights of realism. Some variant of legitimacy is part of the explanation for rule-governed behavior, but the configurations of power and interest

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normative hierarchy, culminating in an ultimate rule of recognition, which embodies the principled purposes and values that define the community of states"). Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 51 (1992).

11. FRANCK, *supra* note 8, at 236.

12. *Id.* at 242.

13. Martti Koskenniemi, Book Review, 86 AM. J. INT'L L. 175 (1992) (reviewing THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990)).

also remain central to any understanding of relations between states and non-state groups.

The configurations of power and interest have limited the effectiveness, and hence the scope of claims by non-state groups since 1945. New states emerging in Europe have accepted commitments to protect minority rights through their domestic legal orders, and to tolerate international supervision through such mechanisms as those established by the Conference on Security and Cooperation in Europe (CSCE). This is undoubtedly both a response to international pressure and a reflection of the overwhelming interest of the new states in providing any undertakings necessary to secure recognition of their statehood. However, acknowledgement that the acceptance and honoring by states of such commitments is influenced by perceptions of their interests does not itself call into question the significance of legitimacy as an independent variable. External forces encouraging and even coercing compliance with legitimate norms and institutions are themselves, in part, a product of the collective interest in maintaining legitimacy. In addition to the pressures from these external forces, the other factors of compliance-pull identified by Franck have played, and continue to play, a significant role.

The remainder of this article will be structured as follows. Section II will examine the five domains of discourse within which claims by non-state groups are typically expressed in international law. Section III will discuss the presently unsolved problem of how the principle of self-determination can be reconciled with the concern of states to maintain their territorial integrity and with the concern of the international community not to risk unlimited fragmentation of existing states. Section IV will use a recent case study relating to the three general domains of discourse to illustrate the difficulties of developing ad hoc responses to acute issues raised by non-state claims where no adequate normative or procedural framework has been established in advance. This case study is of the views of the Arbitration Commission, established by the Conference on Yugoslavia, on questions as to whether and on what terms the European Community should recognize the new states which had formerly been republics of Yugoslavia. Faced with the imperative to accede to demands for recognition of self-determination by some units, the EC was not able to establish effective minority rights and human rights guarantees that might (conceivably) have limited the pressure for revisionist forms of self-determination. It will be argued that the compliance-pull or legitimacy of the norms and procedures prescribed ad hoc was thus, almost inevitably, very limited. Section V will examine some of the implications for the normative development of international law of recent experience relating to claims by non-state groups, and will discuss problems arising from the separation of, and limitations of, the existing domains of discourse.

## II. Five Domains of Discourse for Claims by Non-State Groups

Each of the five international domains of discourse in which claims by non-state groups are expressed is of considerable contemporary importance. Three are very general in their range of potential application. The other two domains of discourse themselves incorporate conditions of eligibility which, however open-ended, limit the range of situations in which they may effectively be invoked, and they will be mentioned only briefly.

### A. Self-Determination Claims

The charismatic principle of self-determination, and the nationalism to which it gives operational expression, has had a powerful normative appeal for more than a century. The political principle of nationalities had a significant pedigree before giving way to the more sweeping doctrines of self-determination espoused by Lenin and Wilson. In the United Nations period the principal normative formulations have been the principle of "equal rights and self-determination of peoples,"<sup>14</sup> contained in the UN Charter and elaborated in various subsequent non-treaty instruments, and the right of all peoples to self-determination, which is expressed in common Article 1 of the 1966 Covenants: "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."<sup>15</sup>

Self-determination and its socio-political analog, nationalism, are often associated, particularly in United States thinking, with liberalism. This tradition links self-determination with democratic choice, and especially with "free elections."<sup>16</sup> Historically, however, nationalism has been variously associated with liberty and with the suppression of freedom, with democratization and with inequality for non-members of the nation. As Acton (who thought the theory of nationality retrogressive) wrote in 1862, nationalism "was appealed to in the name of the most contradictory principles of government, and served all parties in succession, because it was one in which all could unite."<sup>17</sup> Self-determination is not simply an end result or a legal process of choice: as Minogue points out, nationalism is "a spirit or style of politics."<sup>18</sup>

The rhetoric of self-determination is universal, and the range of possible claimants (peoples) supported by the rhetoric is very wide. The

14. U.N. CHARTER, art. 1, ¶ 2.

15. International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, art. 1, ¶ 1 (1966).

16. Cf. the material discussed in Franck, *The Emerging Right to Democratic Governance*, *supra* note 10.

17. John Emerich Edward Dalberg-Acton, *Nationality*, in *ESSAYS ON FREEDOM AND POWER* 166, 181 (Gertrude Himmelfarb ed., 1948).

18. KENNETH R. MINOGUE, *NATIONALISM* 135 (1968). He adds his assessment, based mainly on nineteenth century European examples, that as a style of politics nationalism is aimed at radical transformation, and "is hostile to long-established institutions and connections." *Id.* at 135.

reality of international practice has been that self-determination has been available only to a limited range of units, each of which is, in principle, eligible for separate statehood if that is the choice of the unit. Having been interpreted as a right to form separate states, the international community has endeavored to limit the right to self-determination to a very narrow range of rightholders.

Not surprisingly, the practical response of existing states to claims to separate statehood by new entities has been favorable only in a limited range of cases, which may be broken down into five principal categories:<sup>19</sup>

- (i) Mandated territories, trust territories, and territories treated as non-self-governing under Chapter XI of the UN Charter;
- (ii) Distinct political-geographical entities subject to *carence de souveraineté* (the only entity to have achieved statehood in accordance with this criterion thus far is Bangladesh, and even this case is not easy to interpret);<sup>20</sup>
- (iii) Other territories in respect of which self-determination is applied by the parties, as where a plebiscite is held to determine the fate of a territory;
- (iv) Highest level constituent units of a federal state which has been (or is in the process of being) dissolved by agreement among all (or, in the case of Yugoslavia, most) of the constituent units; and possibly
- (v) Formerly independent entities reasserting their independence with at least the tacit consent of the established state where incorporation into the other state was illegal or of dubious legality.<sup>21</sup>

Thus most secessionist entities, such as the Turkish Republic of Northern Cyprus, have received minimal international recognition.<sup>22</sup> Irredentist claims on the basis of nationality, such as that espoused by Somalia before the civil war which began in 1991, have also received very little support. The general argument against accepting these claims has been that of territorial integrity and stability of frontiers. Where transitions have occurred, as in the case of decolonization, these principles are reinforced by the doctrine of *uti possidetis juris*.<sup>23</sup> The doctrine of *uti possidetis*

19. The first three categories are discussed in JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 84-102 (1979).

20. For a recent non-legal analysis of this category, see Alexis Heraclides, *Secession, Self-Determination and Non-Intervention: In Quest of a Normative Symbiosis*, 45 J. INT'L AFF. 399-420 (1992).

21. It is arguable that the principal candidates for category (v), the recognition of the three Baltic republics, particularly by states such as Spain and the Netherlands which had recognized their incorporation *de jure* into the USSR (see *Recognition of States* (A. V. Lowe & Colin Warbrick eds.), 41 INT'L & COMP. L.Q. 473, 474 (1992)), and the prospect of the gradual recognition of Eritrea, could properly be accommodated within category (iii).

22. The question of a "right to secede" raises different issues from the right to self-determination, and is not addressed in this article. For a recent discussion of some of the questions of political philosophy relating to a "right to secede," see ALLEN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* (1991).

23. This doctrine states that parties should retain possession of that which they have acquired.

*juris* has been invoked to limit the fragmentation of dissolved or dis-integrated federations in the cases of the USSR and Yugoslavia, in what will represent, if generally accepted,<sup>24</sup> a significant extension of the doctrine. Whereas in decolonization the boundaries set by one or more colonial powers are inherited by the new states without regard to ethnic or other considerations, here the internal boundaries of federal states were treated as establishing the international boundaries unless modified by agreement. In the case of Yugoslavia, this was treated by the EC as entailing that units within Republics, such as Kosovo, were not entitled to separate statehood. The Federal Constitution, under which Republics were the federating units and were alone entitled to secede, was cited as establishing the legal framework in respect of which the principle of *uti possidetis juris* would apply. While this is readily intelligible as an attempt to prevent virtually unlimited fragmentation, the logic of accepting statehood for Republics while denying any right to statehood to sub-Republic entities which enjoyed a considerable degree of autonomy within the federal state, and the exact status of which depended on particular political configurations and internal legal practices, is not itself compelling. Some of the difficulties with this approach are presently being confronted in the former Soviet Union. Within the 15 Union Republics of the USSR there were 20 Autonomous Republics, 8 Autonomous Regions (*oblast'*), 10 Autonomous Areas (*okrug*), and many lower-level units, as well as numerous groups now seeking autonomy rights.<sup>25</sup>

## B. Minority Rights Claims

There is a sharp contrast between the sweeping entitlements associated in standard international practice with the right to self-determination and the very limited provisions applicable expressly to minorities since 1945. Minority protection provisions have long been included in bilateral treaties or in multilateral treaties involving particular territories or areas,<sup>26</sup> and there were several 19th century examples of diplomatic

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24. As this article goes to press Bosnia-Herzegovina, Croatia, Moldova, Georgia, and other former highest-level republics are divided de facto, although there is, as yet, no indication that the international community has reached the point of formally endorsing non-peaceful (or at least non-negotiated) divisions in any of these cases.

25. See 1977 U.S.S.R. Constitution, arts. 82-88, reprinted in John N. Hazard, *The Union of Soviet Socialist Republics*, in 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1990); see generally BOHDAN NAHAYLO & VICTOR SWOBODA, *SOVIET DISUNION: A HISTORY OF THE NATIONALITIES PROBLEM IN THE USSR* 360-61 (1990).

26. See, e.g., Treaty of Utrecht, April 12, 1713, Eng.-Fr., art. 15; Jay Treaty, 1794, Eng.-U.S., art. 3; Third Additional Article to the 1822 Treaty between Great Britain and Muscat on the Prohibition of the Slave Trade (added in 1839); Treaty of Guadalupe-Hidalgo, 1848, U.S.-Mex., art. 11; and Berlin Conference, Feb. 26, 1885, final act. Concerning the Balkans, see, e.g., the 1830 Treaty on the Independence of Greece; the Protocol of the Conference of Constantinople (1856); the Treaty of San Stefano, Mar. 3, 1878; Treaty of Berlin, July 13, 1878; and Treaty of Constantinople, Sept. 29, 1913.



representations or military intervention in response to oppression of minorities.<sup>27</sup> A more general (although far from universal) institutional system of minority protection, involving the League of Nations and the Permanent Court of International Justice, was a particular feature of the public order of Europe, 1919-39. This model fell into disfavor during and after the Second World War. The focus shifted away from minority rights to universalization of individual human rights, although several local minority protection arrangements were adopted on a case-by-case basis,<sup>28</sup> and the UN was required to face a number of contentious minority questions.<sup>29</sup> Minority concerns are partially addressed through equality and non-discrimination provisions, and other human rights norms. However, the cautiously-worded Article 27 of the International Covenant on Civil and Political Rights (I.C.C.P.R.) remains for the time being the only express and legally binding minority rights provision of general application.<sup>30</sup> Article 27 provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

This provision is narrow in scope, and does not adequately address the range of minorities issues with which the international community is again being confronted.<sup>31</sup>

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27. See, e.g., Antoine Rougier, *La théorie de l'intervention d'humanité*, 17 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 468 (1910); G. Rolin-Jaequemyns, *Note sur la théorie du droit d'intervention*, 8 *REVUE DE DROIT INTERNATIONAL ET LEGISLATION COMPARÉE* 673 (1876); President Harrison's message to the U.S. Congress in 1891, quoted in 83 *BRIT. & FOREIGN STATE PAPERS* 427, 436-37 (1897); and RAYMOND PEARSON, *NATIONAL MINORITIES IN EASTERN EUROPE 1848-1945* (1983).

28. See, e.g., Special Statute for the Free City of Trieste, Memorandum of Understanding 1954, Italy-U.K.-USA-Yugoslavia, 538 *U.N.T.S.* 99, providing in detail for the "unhindered cultural development" of the minorities in each zone; the guarantees for the Slovene and Croat minorities in the Austrian State Treaty, 1955, arts. 7 & 26, 217 *U.N.T.S.* 223; the Treaty of Guarantee, 1960, U.K.-Greece-Turkey-Cyprus, 382 *U.N.T.S.* 3, recognizing the state of affairs established by the Basic Articles of the 1960 Cyprus Constitution (now essentially inoperative as regards the rights and powers accorded to each community—*cf.*, G.A. Res. 37/253, U.N. GAOR, 37th Sess., calling for "a mutually acceptable agreement based on the fundamental and legitimate rights of the two communities"); and the Treaty of Osimo, 1975, Italy-Aus., providing for an autonomy regime for Bolzano-Bozen. Francisco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, at 30, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1977).

29. See, e.g., G.A. Res. 44(I) concerning the treatment of Indians in South Africa, U.N. Doc. A/Res./44/1; and S.C. Res. 47 (1948) asking that India ensure that "minorities in all parts of the State [Jammu and Kashmir] are accorded adequate protection."

30. The wording of Article 27 was adopted *mutatis mutandis* in the U.N. Convention on the Rights of the Child, art. 30 (1989), with the exception that members of indigenous peoples were there referred to separately from members of minorities.

31. Probably the most influential current definition of "minority" is Capotorti's:

The subject of minorities is extremely sensitive for many states. Such concerns have been reflected to some extent in the Human Rights Committee, which has been divided over numerous issues concerning the application of Article 27, and has been unable even to adopt a General Comment on the article.<sup>32</sup>

Article 27 is a limited provision. Several of the leading cases on it have in fact been brought by individual members of minority communities seeking what was in effect protection from policies of the minority community itself. As to the scope for protection of the interests of minority communities under Article 27, questions remain regarding the extent to which it places states under a duty to take positive measures, whether the right to enjoy "culture" extends to land and resource rights, and whether it effectively establishes rights for human groups as such. The case of *Ominayak v. Canada*<sup>33</sup> was one of the most expansive decisions of the Human Rights Committee on the two latter questions. The case involved a claim brought by a group of Canadian indigenous people who had never received an adequate area of land and had suffered disastrous problems as a probable result. The Committee found that:

Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of Article 2 of the Covenant.<sup>34</sup>

This implies that the right of members of a group to enjoy their culture may be violated where they are not allocated the land and control of resource development necessary to pursue economic activities of central importance to their culture, such as hunting or trapping. The right to enjoyment of culture also seems to extend to maintenance of the group's cohesiveness through, for instance, possession of a land base and pursuit of important cultural activities of an economic nature.<sup>35</sup>

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A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed toward preserving their culture, traditions, religion or language.

Capotorti Report, *supra* note 28, p. 96, para. 568. See also Jules Deschênes, *Proposal Concerning A Definition of the Term "Minority"*, at 30, para. 181, U.N. Doc. E/CN.4/Sub.2/1985/31 (1985); and the discussion of Deschênes' report in the Sub-Commission, U.N. Doc. E/CN.4/Sub.2/1985/SR.13-16. See further PATRICK THORBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 1-21 (1991).

32. U.N. Doc. CCPR/C/SR.625 and SR.633 (1985).

33. Final Views, March 26, 1990, U.N. Doc. CCPR/C/38/D/167/1984 (1990).

34. *Id.* at 29.

35. See also *Kitok v. Sweden*, Report of the Human Rights Committee, at 221, U.N. Doc. A/43/40 (1988), where the Committee implies that the right of an individual Sami to engage in reindeer husbandry as a member of a Sami community is protected by Article 27.

While longstanding or "traditional" economic activities are more likely to fall within the ambit of "culture," this is a matter of appreciation; no such limitation is inherent in Article 27.

The dispositif in *Ominayak* is very brief and is not easy to interpret. Nevertheless, the finding that historical inequities which continued were a major component of the violation is potentially very significant. In *Ominayak*, historical inequities resulted especially from the failure of Canada (including, for responsibility purposes, the Province of Alberta) to honor the terms of a treaty with indigenous people (Treaty 8), and possibly also the terms of certain legislation, by ensuring reasonable land rights for the Lubicon Lake Band. In particular, they were never allocated a suitable reservation despite a morally (and perhaps legally) compelling claim to one. The recent developments included rapid energy and other developments in the Band's traditional area from the early 1970s onward, with serious repercussions for the Band's hunting and trapping activities as well as for the life of the community. Thus Canada was responsible under the Covenant for the failure to rectify a continuing inequity, notwithstanding that the initial injustices predated the entry into force of the Covenant by many years.

It is also of interest that the Human Rights Committee's views in *Ominayak* address the position of the Band rather than the rights of Chief Ominayak, although he was the only individual author. This is an illustration of how Article 27 is likely to be regarded increasingly as a vehicle for direct recognition of collective rights.

It is clear that if some very serious conflicts are to be adequately addressed, more comprehensive and more detailed provisions for minority protection are needed, and that such provisions will only function effectively with adequate and dependable international supervision, monitoring, and national and international enforcement mechanisms. Two approaches to normative development are presently being pursued: particularized country-specific obligations, and general normative instruments.

### *1. Particularized Obligations*

The first possible approach is to endeavor to secure the acceptance by specific states of particularized obligations with respect to minorities. Particularized obligations are naturally favored by representatives of non-target states, who are reluctant to assume potentially intrusive international obligations in this sensitive area. Policymakers from countries where potential ethnic fissures have not developed likewise do not wish to encourage latent tendencies to ethnic division within their own countries through promulgation of sweeping minority rights norms of general application, although there is debate about the risks and benefits of general normative commitments in such situations. A particularized approach was proposed by the EC in the November 1991 Draft

Convention on Yugoslavia,<sup>36</sup> but even if the obstacles are overcome and such an instrument is eventually adopted by the states of former Yugoslavia, it is unlikely that many other states will be induced to undertake such customized obligations in the absence of general agreement. There are also serious problems of supervision and of enforcement with respect to such instruments.

The experience of the League of Nations is an important reminder of the difficulties facing such a particularized approach. In total, some 25 treaties dealing with minorities in Europe were concluded and entered into force between 1919 and 1934.<sup>37</sup> The minorities treaties established that minority issues were, in certain circumstances, appropriate matters for international concern. Individuals and groups were provided with a forum of moderate effectiveness to which to address complaints,<sup>38</sup> but they did not have direct rights to a hearing or a remedy.<sup>39</sup> Some cases were settled effectively, but non-state petitioners had no formal standing or right to representation, little access to information on the progress of their petition, no power to expedite it or to appeal against an adverse finding, and no certainty of their individual grievances being rectified. This was especially so if they lacked the backing of an influential state. The obligations concerning minorities were imposed on new states, defeated states, or states struggling to attain full international sovereignty. They did not apply to established victor states, and did relatively little in practice to protect any minorities outside Europe. They did not apply to any of the Great Powers except

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36. Treaty Provisions for the Convention (1991) (text issued by the EC Commission).

37. These provisions have been treated, in general, as having ceased to have effect on account of the fundamental change of circumstances wrought by the Second World War and the ensuing reordering of the international system. See generally U.N. Secretariat, *Study on the Legal Validity of the Undertakings Concerning Minorities*, U.N. Doc. E/CN.4/367/Add.1 (1950). It is possible that certain of the instruments may nevertheless retain legal significance for specific and limited purposes—see, e.g., LOUIS B. SOHN & THOMAS M. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 304-5 (1973), concerning Greece and Turkey. A number were clearly superseded by post-1944 instruments, including peace treaties and, possibly, the Helsinki Final Act. New questions may conceivably arise, however, as old states reemerge.

38. Approximately 300 petitions (excluding those concerning Upper Silesia) were received in the period 1921-29, of which some 150 were declared unreceivable. More precise statistics concerning petitions were published from 1930: 204 petitions were received in 1931, 101 in 1932, and between 45 and 70 in 1930, 1933, 1934 and 1935. After 1935 the numbers plummeted, and the Minorities Section was dissolved in 1939. See U.N. Doc. E/CN.4/Sub.2/6 (1947); and JACOB ROBINSON ET AL., *WERE THE MINORITIES TREATIES A FAILURE?* 124-34 (1943).

39. In League practice a procedure evolved whereby petitions received from any non-anonymous source alleging violations of minorities treaties were first considered by the Minorities Section of the Secretariat which determined (subject to appeal by states) whether they were receivable, solicited responses from the governments concerned, and played an important intermediary role. Receivable complaints were considered by committees of the League Council, which could drop the case, refer it to the Council, or initiate "informal and benevolent negotiations." For assessment of the procedure, see, for example, PABLO DE AZCARÁTE, *LEAGUE OF NATIONS AND NATIONAL MINORITIES: AN EXPERIMENT* (Eileen E. Brooke trans., 1945).

Germany, and then only in respect of Upper Silesia. The States bound by minorities obligations not unnaturally tended to resent the discrimination inherent in this selective minority protection, and compliance and supervision problems became increasingly acute throughout the latter part of the 1930s. Proposals for a general international treaty on minorities were made frequently, but once the particularized obligations were established it was not surprising that other states showed little interest in a universal instrument under which they would also assume obligations. This difficulty also confronts contemporary particularist efforts.

## 2. *Development of General Norms on Rights of Minorities*

Urgent efforts are now being directed to implementing the second approach: developing additional and more detailed normative standards, together with more effective and systematic procedures for implementation and enforcement. A Working Group of the United Nations Commission on Human Rights has, after many years of slow progress, been able to elaborate a draft Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities for consideration by the UN General Assembly.<sup>40</sup> The Council of Europe is considering a European Charter for Regional or Minority Languages, and the European Commission for Democracy Through Law (the Venice Commission) in 1991 proposed that the Council of Europe adopt a European Convention for the Protection of Minorities, implementation of which would be supervised by a European Committee for the Protection of Minorities.<sup>41</sup> The CSCE included a cautious provision on minorities in the Helsinki Final Act of 1975, to the effect that:

The Participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.<sup>42</sup>

The Document of the Copenhagen Meeting on the Human Dimension (1990) contains much more elaborate provisions, which have been reiterated and elaborated in subsequent CSCE documents.<sup>43</sup> The CSCE has also begun to contribute significantly to monitoring and supervision.

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40. It is ironic that the Commission on Human Rights finally reached agreement on a modest draft Declaration in the shadow of the human misery accompanying the disintegration of Yugoslavia; the diplomatic impetus for such a Declaration was for many years provided by Yugoslavia, and a Yugoslav representative chaired the Working Group.

41. For text of the proposed Convention, see 12 HUM. RTS. L.J. 269 (1991). Other proposals for Council of Europe action have also been mooted, including a Protocol on minority rights to the European Convention on Human Rights.

42. Declaration on Principles Guiding Relations Between Participating States, section VII, reprinted in 14 I.L.M. 1292, 1295 (1975).

43. See, e.g., Report to the CSCE Council from the CSCE Seminar of Experts on Democratic Institutions (1991), 31 I.L.M. 375 (1992).

The Vienna Mechanism for monitoring of state compliance with CSCE commitments, and other Mechanisms in place or being developed, may help promote compliance in certain limited classes of situations where other states take a particular interest in the target state's treatment of minorities. The provision in the 1992 CSCE Helsinki Document for appointment of a High Commissioner on National Minorities with power to monitor national minority issues and to provide early warning to the Committee of Senior Officials is a step toward more general independent monitoring and supervision, although the effectiveness of this step will depend on the stature and resources of the High Commissioner as well as further supervision and sanctions initiatives. The High Commissioner's mandate relates to groups; the High Commissioner is expressly barred from considering "violations of CSCE commitments with regard to an individual person belonging to a national minority."<sup>44</sup>

### C. Human Rights Claims

The principles of human rights are a major source of legitimation for claims by non-state groups.<sup>45</sup> Such human rights claims have the greatest purchase when articulated as claims by aggregates of individuals who are seeking vindication only of the same rights as those enjoyed or espoused by other members of the ambient society. More difficult problems arise with this domain of discourse where the claim of the group is couched as something more than simply an aggregate of individual rights claims, or where the rights sought are not demonstrably identical with those enjoyed by the ambient population. In these and other situations the discourse of human rights and equality may lose its purchase for non-state groups, and they may find that their claims are opposed by others on human rights grounds. Equality rights, like other human rights, inure for the benefit of everyone, and may thus provide grounds for upholding or for rejecting a particular group claim.

The paucity of provisions for express minority rights has meant that many of the claims of non-dominant groups have been assessed only in the standard universalist discourse of human rights. Turpel<sup>46</sup> rightly draws attention to the very cautious approach of the Human Rights Committee in its interpretation of the right to participate in public affairs (Article 25 of the I.C.C.P.R.) in the case brought by Mikmaq leaders with respect to the refusal of the Canadian Government to accept direct Mikmaq Grand Council participation in the First Ministers Conferences on matters concerning aboriginal peoples.<sup>47</sup> The general right to political participation in constitutional deliberations was treated as

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44. *The Challenges of Change*, CSCE Helsinki Document 1992, Helsinki Decisions, Chapter II (on file with author).

45. Cf. Onuma, *supra* note 4.

46. Mary Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L.J. 579 (1992).

47. *Human Rights Committee Final Views* (Communication No. 205/1986) *Mikmaq Tribal Society v. Canada*, U.N. Doc. CCPR/C/43/D/205/1986 (1991).

being satisfied by the national system of representative government. The Human Rights Committee did not regard Article 25 as necessitating specific representation of particular groups, no matter that the agenda item may be of particular importance to them, and no matter that they may not be satisfied with their "representation" in the representative system. The concern of the Human Rights Committee to maintain a universalist interpretation of the Covenant, and thus not to set standards for political participation in one polity which it might feel unable to apply in another, is evident in the case law. The Committee's reticence is compounded by its unwillingness to adopt the concept of a margin of appreciation, so that its findings of no violation appear not simply as refusals to substitute its judgment for that of the state, but as legitimations of state policy. While the Committee has good reasons not to take an overly expansive view of its own role too quickly, and to emphasize universality, it has not done enough to elaborate the meaning of participation and representation in plural societies.

While the scope of existing norms is sometimes underestimated, there is a need for further normative development to deal with difficult problems in relating claims by non-state groups to human rights and equality norms. Non-state groups typically emphasize the need for greater sensitivity in accommodating their concerns within a human rights framework. It is also important that effective means be devised to hold non-state groups accountable, in appropriate circumstances, for their own violations of human rights. More generally, norms and procedures to resolve conflicts between group claims and rights of individual members of the group require further refinement, particularly where state power or other third party interests are involved.

#### D. Claims by Indigenous Peoples

Claims based on prior occupation or "indigeneity," which are discussed extensively in the articles by Lam and Turpel in this issue,<sup>48</sup> have the politically important characteristic of distinguishing and narrowing the range of potential claimants. Claims based on the special status of indigenous peoples are made by non-state groups in most parts of the world, and are aired internationally in the UN's Working Group on Indigenous Populations and many other fora.<sup>49</sup> The term "indigenous people" is not yet well defined,<sup>50</sup> and the label "indigenous" has without doubt been arrogated on occasion to legitimize chauvinist assertions contrary to the human rights of others.<sup>51</sup> Nevertheless, the category of "indigenous peoples" is a circumscribed one; it may well come to influ-

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48. Maivân Clech Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT'L L.J. 603 (1992); Turpel, *supra* note 46.

49. See generally Lâm, *supra* note 48.

50. See generally Benedict Kingsbury, "Indigenous Peoples" as an International Legal Concept, in *INDIGENOUS PEOPLES IN ASIA* (R.H. Barnes et al. eds., forthcoming).

51. Compare the argument made by Ved P. Nanda, *Ethnic Conflict in Fiji and International Human Rights Law*, 25 CORNELL INT'L L.J. 565 (1992).

ence discourse in the other three categories, but this process is only just beginning. At present indigenous peoples also utilize other domains of discourse in pursuing their claims. Cree in Quebec, for example, have argued that if the province proceeded to exercise the right to self-determination, the Cree would have a separate international legal right to self-determination; that historically Cree sovereignty was not surrendered to Quebec and could properly be (re)asserted; and that, international norms specifically applicable to indigenous peoples would also apply.<sup>52</sup>

#### E. Historical Sovereignty Claims

Historically-based claims to sovereignty typically involve an assertion of territorial exclusivity. Although historical assertions are an important element in many claims to sovereignty (including some by "indigenous peoples"), claims of major international political significance directed toward a change of international sovereignty, in which historical revendication was the chief domain of discourse, had until recently largely been limited to: claims to retrocession of small colonial territories, such as Hong Kong, the Falklands/Malvinas, or Gibraltar; irredentist claims pursued without much immediate success, such as that of Venezuela in respect of part of Guyana and that of Guatemala in respect of Belize;<sup>53</sup> certain boundary disputes; and possibly a small range of special situations where such historical assertions either accompanied or contradicted claims couched in terms of self-determination or rights of indigenous peoples. More recently, however, such assertions of historical sovereignty have been important in the dissolution or disintegration of federal states, and were crucial in legitimizing the claims to independence of Lithuania, Latvia and Estonia at a time when it seemed highly possible that decisionmakers in the Soviet Union would consider trying to use military force to prevent these claims from succeeding.

#### F. Impact of Legal Structure on Formulation of Claims

The structure of the law has had a strong shaping effect on international discourse; thus an inordinate amount of attention has been focused on the refusal of some states to describe indigenous groups internationally as indigenous peoples (even though these states use the term peoples freely in domestic political discourse). The equally fervent strategy on the part of some indigenous peoples is to secure recognition interna-

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52. See Grand Council of the Crees (of Quebec), *Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada*, Submission to UN Commission on Human Rights, February 1992 (United Nations files, Geneva).

53. To clarify the terms in this article, "secession" refers to attempts by a group within a state to withdraw from state control part of the territory and population of the state. "Irredentism" refers to attempts to alter state borders so as to combine groups presently separated by one or more borders, the groups to be combined either in an existing state or in a new state. See generally Donald Horowitz, *Irredentism and Secessions: Adjacent Phenomena, Neglected Connections*, in *IRREDENTISM AND INTERNATIONAL POLITICS* 9-22 (Naomi Chazan ed., 1991).



tionally as "peoples" so that they will win much of the battle with respect to all other claims. Legal structure—the preoccupation with "peoples" or "minorities"—interacts with social science and media classification to artificially reduce a great many claims and conflicts to single categories. In particular, there is a clear preoccupation with "ethnic" claims and "ethnic" conflicts (taking ethnicity to include religious and linguistic elements). These classifications are often simplistic, and miss important parts of identities,<sup>54</sup> and of the structure of claims and conflicts, including their territorial,<sup>55</sup> historical, resource, and class aspects. The power of the lexicon shapes the way in which claims are formulated and groups define themselves: thus, for instance, the scramble to be considered one of the "backward classes" in India,<sup>56</sup> or the rapid adoption among many non-state groups in Asia of the self-description "indigenous people" as it has become an empowering term internationally, even where the very same group may still have origin myths which recount their migration and subordination of another group still living in the same territory. Where a conflict may be largely about access to resources or about social stratification, the temptation for outsiders, and for participants, is often to define it as ethnic, thus clouding analysis and perhaps eventually altering its structure.<sup>57</sup>

Persuasive arguments are made that in some situations attention ought to focus on the inadequacies of a system that does not secure fair access to positions in the civil administration and the military, rather than on ethnic tensions associated with marginalization. Powerful voices argue that normative acceptance of extensive claims couched in terms of ethnicity or other group identity provides a strong incentive for claims to be formulated this way, leads politics to become irretrievably dominated by ethnic demands and divisions, and impels the society and eventually the polity toward fracture.<sup>58</sup> Many states deny that ethnic differences exist. Others assert that the differences that exist are not (and ought not to be) of any significance for the law, and in some states various peaceful forms of ethnic self-assertion are prohibited as threats to national unity. While some such denials and prohibitions are abusive, chauvinist ethnic claims have undoubtedly contributed to terrible ethnic conflicts, and there are proper concerns about deepening or causing divisions, and about fanning conflict.

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54. See, e.g., FREDRIK BARTH, *ETHNIC GROUPS AND BOUNDARIES* (1970).

55. See, e.g., Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT'L L.* 177 (1991).

56. See, e.g., MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984).

57. In a similar vein, Minogue correctly warns about overestimating the centrality of nationalism: "It is the business of the ideologist of nationalism to persuade us that history culminates in nationalism. . . . Ideologists, like egoists, see little else but their own reflection, and it is part of their strength that they should do so." KENNETH MINOGUE, *NATIONALISM* 25 (1967).

58. See, e.g., ELIE KEDOURIE, *NATIONALISM* (1960); and Solomon F. Bloom, *The Peoples of My Home Town: Before Nationalism Crushed Rumania's Design For Living*, *COMMENTARY* 329-35 (1947).

Not every claim by a non-state group has equal (nor necessarily any) moral merit. Blanket moral relativism about such claims attracts a strong charge of moral irresponsibility. The International Covenant on Civil and Political Rights (ICCPR) addresses one aspect of this issue in providing that nothing in the Covenant "may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for. . . ."<sup>59</sup> The further question of whether it is possible or desirable to prescribe general substantive norms in these areas is highly problematic. The circumspection of international tribunals in this area is to be noted: indeed, the scope for most non-state groups to bring claims remains very limited. On the other hand, it is clear that the claims of non-state groups, and the related problems of structuring relationships between states and non-state groups, are of central and enduring concern in contemporary international society. While they ought not to obscure other important questions from view, the dangers associated with abusive claims and demagoguery must be kept firmly in mind. The strategy of ignoring questions concerning the relations between states and non-state groups is neither viable nor internationally supported.

Having outlined the structure of the existing domains of discourse and pointed to the general need for further normative development, the next section will indicate a specific strategy for future development of the law concerning self-determination in a manner that both enhances the ability of the international community to respond to current problems and better reconciles the three general domains of discourse.

### III. Self-Determination

The appeal of the principle of self-determination has long rested (in part) on its generalizability, indeed its ostensible universality. At no stage have justifications of a general principle of self-determination successfully escaped the conundrum presented by the fact that legitimization of the claims of any one group has implications for the interests and claims of many other groups. The principal strategies intended to make it possible both to invoke and to limit self-determination have been either to call upon countervailing principles, such as territorial integrity, or to try to formulate claims to self-determination as rights claims with a limited category of rightholders, described as "peoples." A more promising strategy, insufficiently pursued, is to argue that the right to self-determination is a generalized right but that its realization does not always entail the option of separate statehood, and that its application in specific circumstances depends on those same circumstances. This strategy entails recognizing a degree of unity of justificatory principle

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59. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 5, para. 1 (1966).

between self-determination, autonomy, rights to language, culture, and participation, equality and non-discrimination, and general human rights in plural societies.<sup>60</sup> A major attraction of such a unified approach is that it allows for the rights and interests of non-members of the group—or even dissentient members—to be weighed on the same scale as the claim to self-determination. This aids in ensuring that the rights of all are effectively protected during the immediate self-determination process and after any ensuing transition. This is of particular importance where a territory is shared by more than one group. Such considerations suggest that it may be desirable to reexamine self-determination at the theoretical normative level. What follows is a tentative pointer toward one possible strategy—and it is not itself free from problems—for reconceptualizing self-determination.<sup>61</sup> It is not intended as an examination of *lex lata* or even *lex ferenda*.

#### A. Defining Rightholders

The phrase “all peoples have the right to self-determination,” found *inter alia* in Article 1 of the International Covenant on Civil and Political Rights, has for three decades been reified as the governing normative stipulation. The accompanying description of what the right entails (“By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”), and the other rights or powers conferred on “[a]ll peoples” in e.g., Article 1(2) of the 1966 Covenants, have been read back as indicators that the category of rightholders (“peoples”) must in fact be narrow. So narrow, indeed, according to most states, that the expression “peoples” has been stripped of its ordinary meaning and reconstructed as something quite different. This attempt to contain the category of rightholders within very narrow bounds is showing some signs of breaking down. Historically there have been opposing tendencies in the rhetoric (and indeed in practice) of self-determination, toward, on the one hand, universalizing, and, on the other hand, containing, the principle. The substantive tendency to universalization, while to some extent in eclipse again from the decolonization debates until the late 1980s, has not been permanently subdued. Rhetorically, the use of the phrase “all peoples”

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60. Recognition of the difficulties of drawing principled distinctions which would tightly control the number of new entities eligible for statehood, and of the value of “minority rights” as a means of avoiding demands for statehood, is evident in the UN Secretary-General’s report “An Agenda For Peace.”

The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult . . . . One requirement for solutions to these problems lies in commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic.

At 5, U.N. Doc A/47/277 (1992).

61. Much of the following discussion is based on a more specific argument made in Benedict Kingsbury, *Self-Determination and “Indigenous Peoples,”* 86 PROCEEDINGS OF THE AM. SOC’Y OF INT’L LAW (forthcoming 1992).

to designate the category of rightholders has provided an opening which many non-state groups have been energetic in exploiting.

According to the strategy discussed here, what is needed is to get beyond the arid assumption that, in the field of self-determination, the act of classification by reference to one or other of the socio-referential labels used to identify rightholders is itself determinative of virtually all questions as to the precise rights involved and their concrete application. Thus, for instance, the bifurcation in the Gros Espiell report<sup>62</sup> and in some Human Rights Committee practices under the Civil and Political Rights Covenant: "peoples" have the right to self-determination but "minorities" do not. In fact, it is increasingly evident that the right to self-determination must be more complex, and that its vindication in any particular situation depends upon the complex matrix of factual and legal considerations, rather than on the simple assignment of labels.

#### B. The Meaning of the Right to Self-Determination

The question of what is entailed by "self-determination" is fundamental. The logic of the principle of self-determination extends beyond the question of independent statehood, to political and cultural options exercisable within the established state.<sup>63</sup> This point is reinforced by the increasing emphasis on rights of political participation, on political structures providing for some degree of genuine representation and accountability, on a semblance of democratic process in the choice of government/representatives, and even on the choice of constitutional order after an upheaval.

When lobbying in the UN about general normative formulations, groups seeking "self-determination" have tended to maintain that in all cases self-determination includes the possibility of separate statehood. On the other hand, many are aware of the strength of the opposition this elicits among other states and acknowledge that in a large number of cases (perhaps the majority) separate statehood would not be sought or would be a most unlikely outcome.<sup>64</sup>

The notion of a widespread option to form separate states is, to some, intrinsically destabilizing, whether or not the options are ever exercised. Many fear cataclysmic division and conflict if any such general right is countenanced. A more abstract issue concerns competing visions of future international order. United Nations membership has now passed 175, including such "microstates" as Liechtenstein and San Marino whose suitability for membership had earlier been in doubt. A multifarious world, with many small states enjoying various relations with larger neighbors and regional bodies, is no longer far-fetched as a

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62. HECTOR GROS ESPIELL, *THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS* (1980).

63. See, e.g., BROWNIE, *supra* note 7, at 6; HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION* 473-77 (1989); and TURPEL, *supra* note 46.

64. See generally INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, *INDIGENOUS PEOPLES: A GLOBAL QUEST FOR JUSTICE* 36-40 (1987).

vision of the international system, and if attained probably need not of itself raise disastrous systemic instability problems. On the other hand, such a proliferation of small states would have significant practical (and perhaps eventually legal) effects on the nature of statehood, with the potential for further erosion of assumptions about the essential incidents of state sovereignty. This will be seen by some as an advance toward an effective international society, and by others as a step toward the abyss. A possible third perspective, however, held by some members of non-state groups, is that this threatens to debase the currency they are striving to secure. In this respect, the non-state group may share the perspectives of a good many citizens of decolonized states—with, however, a potential difference in cases where self-determination follows ethnic boundaries more closely and where allegiance to the state is thus slightly less central as a basis of unity.

There is understandable reluctance on the part of representatives of non-state groups to concede as a normative matter that the right to self-determination could *ever* be vindicated where the state(s) dealing with an ethnic minority dominant in a severable territory refuses to countenance even the option of separate statehood. Not only does such a concession appear to risk breaking ranks with, and indeed selling out, groups seeking separate statehood, it also moves away from, and thus risks losing some of the authority of, the U.N. practice on decolonization. In U.N. practice (with some glaring exceptions), separate statehood for colonial units was the presumptive option. In fact, the Special Committee on Decolonization was deeply suspicious whenever it appeared that another option might be exercised.

Several observations may be made with respect to this strategic view that self-determination must always entail the option of separate statehood. First, self-determination must be understood, not simply in terms of end result, but also in terms of process and of political legitimation; early commitment to the process, and to the legitimacy of the values associated with self-determination, may in some cases avert separation or violence. Arrangements for some degree of autonomy within a federal state structure have in many cases staved off or eclipsed demands for self-determination that might otherwise have tended toward secession. A federal structure may also establish units that, should the union disintegrate or secessionist pressures rise, are better equipped to move to independent statehood and to take advantage of the stabilizing principle of *uti possidetis juris*.<sup>65</sup> On the other hand, autonomy arrangements do leave important powers *de facto* or *de jure* in the hands of the central authorities; autonomous regions may be vulnerable to resource exploitation or demographic alteration.

Second, when concrete cases are addressed, there is an element of reductionism in treating "statehood" as a single outcome, as if this

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65. This fact does, of course, contribute to the reticence of powerful forces in unitary states about assuming a more federal character.

juridical form utterly transcends the specific features of spatial, economic, and political organization, of culture, environment, conflict, and militarization, which in fact loom large when individuals and groups come to make any determination for themselves. Inquiries by theorists into the "archaeology of the state," the "parcelization of sovereignty," the localism which has resisted the so-called upward displacement of power associated with modernization, and even the "ethnography of the state," all ought to remind us that the simplifications—and the sense of ultimate—sometimes found in discourses about statehood, may miss many important human dimensions with which human rights and self-determination are inevitably and properly bound up.

Third, there is the prudential caution that some of the groups making claims now may find themselves resisting them in the not-so-distant future.

There is nevertheless a deeply entrenched assumption in international practice and discourse that what self-determination is about is the right to determine, under certain conditions, whether a group or unit wishes to form a separate state or choose some other option. The question whether the character of self-determination applies also to situations where on the facts separate statehood is not a required option raises the fundamental issue of what justifies the right to self-determination.

One approach begins with the group, and with the proposition that the interests of the group itself are sufficient to establish a right. This is not the basis on which human rights analysis proceeds, although reference to it is a reminder that self-determination claims are not always premised on human rights considerations.<sup>66</sup> If self-determination is to be understood, as international instruments suggest, as a human right, the starting point must be the value to the interests of individuals of membership and participation in a particular kind of group. Following Raz and others,<sup>67</sup> the well-being of a group is related to, but different from, the aggregation of the interests of individuals.<sup>68</sup> In some circumstances the group's well-being can be secured only where it is self-governing (or has the option of being self-governing). Self-government is thus justified instrumentally; the case for an intrinsic justification is much harder to make. The idea of self-government is broad: it "speaks of groups determining the character of their social and economic environment, their fortunes, the course of their development, and the for-

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66. Arguments of this sort have generated a longstanding mistrust about nationalism and national self-determination within the tradition of liberalism. As MacCormick notes: "From Hitler to Ceaucescu, there has been no shortage of illustrative evils showing how the pursuit of national liberty and national values can lead to denigration, servility, torture and death for those outwith the charmed national circle, and even for many within it." Neil MacCormick, *Is Nationalism Philosophically Credible?*, in *ISSUES OF SELF-DETERMINATION* 10-11 (William Twining ed., 1991).

67. See Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHILOS. 439-61 (1990); and generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* 207-13 (1986).

68. This involves a rejection of methodological individualism.

tunes of their members by [the groups'] own actions . . ."<sup>69</sup> Self-determination in the sense of a choice among options that include separate statehood is a means of attaining self-government. Given the breadth covered by "self-government" in a range of different situations, however, it appears that self-determination in this narrow sense by no means exhausts the means of securing it. Other means of securing the objectives of (instrumentally-justified) self-government ought thus to be regarded as sharing the instrumental purposes of the narrow version of self-determination. While the existing formulations of the right to self-determination in international instruments do not so extend, provisions as to other human rights do bear on wider aspects of self-government. The point to be emphasized is that in their grounds or justifications self-determination and other rights are not sharply distinct, and depending on the facts of the particular case, the realization of other rights ought to be regarded as realizing purposes underlying self-determination. This being so, at least two possibilities are open. One possibility is to regard self-determination as the end of a continuum on which other rights beneficial to the group and the purposes it serves are also located. The other is to reformulate the right of self-determination so that it opens the way to a wider range of different relations between an ethnic group styling itself as a distinct "people" and an existing state, dependent not simply on the choice of the group but also on more precise criteria tied to the underlying justificatory purposes served by the right.

The first of these approaches has the advantages of being more consistent with established and evolving international law, and of being somewhat more realistic. A disadvantage of this approach for non-state "peoples" is that many of the sought rights may emerge only slowly and with heavy qualifications in general international human rights practice, and may never have the legitimating force of the general commitment to self-determination. The second approach could open the way to forms of functional self-determination for groups that cannot expect to form separate states because of, for instance, insufficient size or lack of preponderance in any significant territory. It could also eventually focus attention on the achievement of the underlying justificatory purposes for which the right to self-determination is at present a rather blunt, unnuanced, and underinclusive instrument.

### C. Operation of the Right

A statement that a right exists and that it is held by a particular category of rightholders by no means disposes of all the relevant issues. In practice, as in legal philosophy, it is quite possible that, while the right must ground some duties for some other actor(s), these duties will not correlate perfectly with the scope of the right. Furthermore, consideration of the operation of any right must also entail consideration of its consequences. For instance, a right to self-determination may affect persons

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69. Margalit & Raz, *supra* note 67, at 440.

living in a particular territory who are not members of the group seeking self-determination, or who are dissentient members not well served by the group, or who also belong to other welfare- or interest- or autonomy-serving groups (with different boundaries) that would be threatened or fissured by the proposed self-determination, or who simply belong to some such alternative group and seek self-determination for it. A typical result of weighing all these factors is that separate statehood would not be the optimal outcome, or that it would serve human rights purposes only where hedged by conditions.

These points reinforce the oft-made point that, while rights might be trumps, they are not absolute. The discourse of proponents of the right to self-determination has often had an absolutist overtone. This has been associated with a tendency to treat self-determination as a one-shot right, vindicated and exhausted by liberation from alien domination. A focus on the grounds or justifications of the right reaffirms that the performance of the group must be continually judged by reference to the wellbeing of individual members and, in a different way, non-members. The instrumental justifications of self-government are not served at all times by every form and means of government. Where a particular governmental arrangement is grossly failing to serve the purposes on which its instrumental justification rests, it is likely that rights resting on the same instrumental justification will be invoked in favor of change. In view of its justification, it would be surprising indeed if the operational right to self-determination were construed as never extending to such situations; recent practice strongly supports this view.

Finally, although much of the contemporary discussion about self-determination relates to outcomes, it is well to recall that much of the international practice concerning the right to self-determination relates to issues of process—not simply to who decides or to what the choices are, but to how the decision is to be made and with what supervision, accountability and guarantees. In this area, practice has been somewhat ad hoc; existing international law, including the law and practice of institutions, is not sufficiently developed, and future international efforts to set standards must address these issues systematically.

A recent illustration of the limitations of the prevailing domains of discourse, as presently structured, is the attempts by the European Community to respond to events in Yugoslavia. These attempts will be examined as a case study of some of the problems with the present normative framework.

#### **IV. A Recent Case Study: The European Community and Yugoslavia**

The international community has had particular difficulty in responding to post-cold war claims by new entities, especially those established on



the territories of the former Soviet Union and the former Yugoslavia.<sup>70</sup> Here, considerations arising from the traditional law and practice of recognition of new states and governments have combined with political concerns about the nature and stability of new entities, and about controlling the rate and extent of state disintegration. European Community practice with regard to Yugoslavia exhibits an amalgam of often contradictory and unreconciled considerations about existing law, order, and justice. One of the Community's responses to issues arising in Yugoslavia was to establish the Conference on Yugoslavia.<sup>71</sup> In addition to promoting European Political Cooperation, the EC hoped to use the Conference to control and condition the pace and nature of transition in Yugoslavia.

In two Declarations on December 16, 1991, the European Community and its member states set forth general guidelines concerning the recognition of new states in Eastern Europe and the Soviet Union. These declarations also set forth a policy and procedure whereby the Conference on Yugoslavia, with the advice of the Arbitration Commission,<sup>72</sup> would consider requests for recognition from Republics that had formed part of Yugoslavia. The stated general policy was that new states would be recognized only if they were democratic, had accepted the relevant international obligations, and committed themselves to proceed peacefully and by negotiation in good faith. More precisely, new states were required to respect the provisions of the UN Charter, the Helsinki Final Act, and the CSCE Charter of Paris for a New Europe, particularly concerning the rule of law, democracy, and human rights. They were expected to guarantee the rights of ethnic and national groups and of minorities, in conformity with engagements undertaken within the framework of the CSCE.

This formulation itself is revealing. Outside the declarations of the CSCE, which are not legally binding, there were no international treaties that set forth in detail the meaning of—let alone the means of realizing and ensuring—the rule of law, democracy, or rights of ethnic groups, national groups, or minorities. Indeed, these latter categories have not

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70. The bifurcation of Czechoslovakia, if it does come to pass, may raise comparable issues, although many major questions are likely to remain unresolved for some time.

71. The Community established a Conference on Yugoslavia, chaired by Lord Carrington, comprising the EC, its member states, the Yugoslav federal government, and such Republics of the former Yugoslavia as wished to participate. This Conference began to function in September 1991. It was supplanted in August 1992 by a broader conference also involving the UN; the plenum was chaired jointly by UN Secretary-General Boutros Ghali and British Prime Minister John Major, the United Kingdom then holding the Presidency of the EC. Carrington resigned as EC special envoy just before this conference.

72. The Arbitration Commission, established by the EC alongside the Conference on Yugoslavia, comprised presiding judges from constitutional courts of EC member states under the Presidency of Robert Badinter, President of the French Conseil Constitutionnel. The Commission was not in fact empowered to arbitrate claims, but was expected to respond to requests for advice from the Conference.

been fully defined. Furthermore, CSCE member states took very different views as to the meaning of relevant CSCE commitments when applied to themselves, such as the French position on the non-existence of minorities within the French Republic. In the case of Yugoslavia, these problems were partially addressed by the stopgap expedient of conditioning recognition on compliance with a draft Convention then under consideration by the Conference on Yugoslavia.<sup>73</sup> The other general requirements propounded by the EC related more closely to traditional interests of other states, although serious questions existed as to how even these requirements could be implemented. These requirements included respect for inviolability of frontiers and for the principle that frontiers can be changed only by peaceful means and on the basis of free agreement; respect for relevant commitments concerning disarmament, nuclear non-proliferation, security, and regional stability; and commitment to settle regional disputes and questions about state succession by agreement or, if necessary, by arbitration.<sup>74</sup>

The opinions issued by the Arbitration Commission on November 29, 1991 and January 11, 1992, are an interesting blend of traditional and innovative international law. They are propositions that would not be generally accepted by international lawyers but clearly appealed to constitutional law judges seeking to address unusual and difficult situations.<sup>75</sup> The Commission declared on November 29, 1991, that the existence of a federal state, combining entities endowed with a degree of autonomy and with political power in relation to the federal institutions, implied that the Federal organs must represent the component units and must be effective; that, four of the six republics having made declarations of independence or sovereignty, the essential organs of the Federation no longer satisfied the requirements of participation and representativity; and that Yugoslavia ought thus to be regarded as a federation in the process of disintegration, rather than as a rump state from which certain units had seceded. Thus the rump state would not automatically succeed to the rights of Yugoslavia; questions of succession would have to be agreed upon by the Republics themselves, in conformity with international law. This view is broadly tenable under established international law, although some questions arise as to whether it is consistent with the treatment of state succession in relation to the former USSR.

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73. This draft was not transformed into an agreed treaty in the November 1991 negotiations, primarily because the adherence of the Milosevic regime in Belgrade could not be obtained. It continued to be discussed as a possible basis for future arrangements in the new phase of the peace process inaugurated in August 1992 by the enlarged London conference.

74. Additional undertakings not to make territorial claims or engage in propaganda against a member of the Community were included to assuage Greek concerns about Macedonia.

75. Opinions 1, 2 and 3 have been published in 92 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 264-69 (1992). The comments which follow are based on the original French texts of the Commission's opinions; official English translations were not available to the author at the time of writing.

The Commission also emphasized principles of order in response to a question, raised by Serbia, as to whether the internal boundaries between Serbia and Croatia, and Serbia and Bosnia-Herzegovina, were to be regarded as frontiers in international law.<sup>76</sup> The Commission stated that the external borders of Yugoslavia must be respected; that the internal boundaries of Yugoslavia could only be modified by free agreement; that in the absence of such agreement the internal boundaries would take on the character of frontiers protected by international law by virtue of the general international legal principle of *uti possidetis juris*; and that any purported modification of external frontiers or internal boundaries effected by force would have no juridical effects. The last of these propositions was supported by reference to the U.N. General Assembly's 1970 Declaration on Friendly Relations, the Helsinki Final Act, and the draft Convention on Yugoslavia. Although the principle as to borders between independent states is well established,<sup>77</sup> it is interesting that none of the texts cited by the Commission is directly binding, and indeed the Commission's position as to modification of internal boundaries, an activity not infrequently attempted by various colonial powers, is not fully consistent with practice.

As to self-determination and minority rights, the Commission found more difficulty in simply basing itself on established international law. Serbia had posed the question whether the ethnic Serbs of Croatia and Bosnia-Herzegovina had the right to self-determination. The Commission asserted that the principle of *uti possidetis juris* trumped irredentist claims based on the right to self-determination, holding that borders existing at the moment of independence were not subject to alteration to satisfy the requirements of self-determination except where the states involved so agreed. The Commission further held that in the present state of international law, not all the consequences of the right to self-determination are specified. The Commission pointedly refrained from saying that the ethnic Serbs in the two other Republics did not have the right to self-determination. Indeed, the Commission stated that Article I of the 1966 Covenants established that the right to self-determination was a principle protecting human rights, and that by virtue of this right each human being could properly claim to belong to the ethnic, religious or linguistic community of her or his choice.<sup>78</sup> The Commission drew from the principle of self-determination the operational conse-

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76. Opinion No. 3, January 11, 1992.

77. This was reaffirmed by the Security Council following Iraq's purported annexation of Kuwait. *See, e.g.*, U.N. SCOR Res. 661 (1990).

78. The assertion that Article I establishes an operational right to self-determination for individuals seems to be inconsistent with assumptions made by the UN Human Rights Committee in its case law denying that individuals are ever entitled to bring Optional Protocol claims in respect of Article 1. *See* Communication No. 167/1984 *Ominayak v. Canada* (Final Views of March 26, 1990), discussed above; Communication No. 413/1990 *A.B. et al. v. Italy* (inadmissibility decision of November 2, 1990); Communication No. 358/1989 *R.L. et al. v. Canada* (inadmissibility decision of 5 November 1991); and Communication No. 205/1986 *Mikmaq Tribal Society v. Canada* (Final Views published December 3, 1991).

quence that, if the Republics so agreed, members of the Serbian communities in Bosnia-Herzegovina and Croatia could have the nationality of their choice, with all the rights and obligations following from that. Although the Commission is not explicit, it is presumed that choice of Serbian nationality would not entail loss of the right of residence in whichever state the individual lived. The Commission further found that imperative norms of international law (*i.e.*, *jus cogens*) oblige states to ensure respect for minorities' rights. The Commission applied these obligations to the Republics in respect of all minorities within their territories. The Republics had to recognize the identity of ethnic, linguistic or religious communities. Beyond this, however, the Commission did not state what other rights international law conferred upon minorities, although it referred in general terms to international treaties in force, and to chapter II of the draft Convention on Yugoslavia of November 4, 1991.<sup>79</sup> The Commission, however, in its unpublished Opinions concerning application for recognition by particular Republics, had necessarily to consider in detail the adequacy of particular legal provisions concerning use of minority languages, education, political representation or authority of minority communities, etc.<sup>80</sup>

#### V. Implications for the Development of International Law

Earlier sections pointed to the urgent need for development of more general international law principles, rules and structures suitable for dealing effectively with claims by non-state groups. The inability—or the failure—of the international community to develop sufficiently comprehensive and effective normative and procedural provisions for addressing claims by non-state groups has resulted in *ad hoc* attempts to develop these provisions in response to recent crises. These *ad hoc* provisions have come too late to effectively shape behavior, and they have lacked the legitimacy necessary to avoid or mitigate conflict. The lack of a generalized normative and procedural framework has also reinforced inevitable tendencies of major states to react in different ways to different claims, not for principled universal reasons but for particularist reasons reflecting the special interests of major states and decisionmakers.<sup>81</sup>

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79. Opinion No. 3, *supra* note 75.

80. Thus it is understood that in its unpublished Opinion concerning the request for recognition by Macedonia, the Commission noted in some detail provisions of the new Macedonian Constitution concerning rights of minorities to identity, cultural expression, establishment of private schools, education in their own language, etc. It is understood that the Commission took the view that education for members of minorities should also be provided in the Macedonian language, and that more detailed laws are needed to make these various constitutional guarantees operational. Somewhat similar material is understood to be contained in the unpublished Opinion concerning the request for recognition by Slovenia.

81. The fragmentary response of the major actors in the international community to events in Somalia in 1991-92, and the difference in promptitude (and at least initially in scale) between these attempts and the contemporaneous undertakings in

There are many explanations for the inadequate development of the norms of international law with respect to claims by non-state groups. In some respects this underdevelopment was deliberate; thus anxiety about the potentially harmful implications for state interests—and for individual rights—of conferring rights on non-state groups was a constant factor for most of the period from 1945 until about 1990. Normative development has also been impeded by well-known political obstacles, especially East-West and West-South divisions, associated with the structure of the post-1945 legal order. The absence of a focus on non-state groups was also an incidental byproduct of the preoccupation since 1945 with the development of norms and institutions for the protection of individual human rights, and with developing legal structures to facilitate specific and foreseen developments such as decolonization.

The political climate for normative development has become somewhat more propitious, although major differences continue. Perhaps equally important are the gradual changes in the structure of international order, including changes in the nature of state sovereignty. The changes in the nature of sovereignty are complex and uneven, but have been influenced by the proliferation of transnational non-state interactions; the transmission of ideas about such things as governance, markets, human rights, information, and environment; and increasing international accountability. The heightened level of self-assertion among national and other groups, and the increased willingness of the international community to consider some accommodation of the claims pressed by such groups, is sharpening the international focus on the nature of the state and of state sovereignty. An important report, issued by the United Nations Secretary-General in June 1992 and entitled "An Agenda For Peace," is evidence of changing views on state sovereignty, even within an inter-state organization. The Report examines the pressing need to enhance preventive diplomacy, peacemaking, peacekeeping, rebuilding peace after civil and international war, and amelioration of economic despair, social injustice, and political oppression, but adds:

The foundation-stone of this work is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. Commerce, communications and environmental matters transcend administrative borders; but inside these borders is where individuals carry out the first order of their economic, political and social lives.<sup>82</sup>

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Bosnia-Herzegovina and Croatia, illustrates this point. There were, without doubt, serious obstacles to effective action in each case.

82. At 5, para. 17, U.N. Doc. A/47/277 (1992).

A major obstacle to further normative development is that posed by the real problems in formulating and agreeing upon norms of general application with sufficient specificity, and with the necessary hierarchical ordering and coherence, to be useful at the operational level. The universal substantive normative formulations in the field of self-determination are very broad and have in practice been hedged with exceptions and limitations. Furthermore, they are part of the same legal system as other potentially conflicting general normative propositions of apparently equal value. It has proved difficult to secure the level of agreement and acceptance necessary to adopt sweeping substantive prescriptions dealing specifically with minority rights. Detailed and workable norms of general application have been adopted in the field of human rights,<sup>83</sup> and this area may provide the best starting point for a substantive effort to unify the three general domains of discourse by reference to the underlying justificatory purposes of each. The ICCPR indeed, despite its limitations, provides a modest textual basis for such an enterprise, in that it does not itself formally separate the three general domains of discourse. It recognizes that self-determination is indispensable to the realization of other human rights, and interpreted literally it treats minority rights as essentially the same as human rights. In practice, however, the domains have been divided. Self-determination has been permitted to operate largely in a separate plane, and the efforts of the international community to relate self-determination to protection of minorities and human rights have been patchy and enjoyed only modest practical success. The powerful discourse of individual human rights has not been extended with sufficient sensitivity to particular problems relating to non-state groups. The regime of minority rights has been severely limited, in part because inadequate normative development in the three domains left room for anxiety that it might impair individual rights on the one hand, or shade threateningly into overdrawn self-determination claims on the other.

Agreement is more easily secured on procedural rules. With respect to claims by non-state groups, however, procedural rules are not as well developed. Some of the procedural limitations are a result of the historically inter-state character of the international legal system. More effective procedural norms are beginning to appear, due to both the changing nature of the state and the increasing transnationalization of the international legal system. Nevertheless, with the monumental exception of decolonization, international bodies remain cautious when handling major claims by non-state groups. One reason for caution is the tendency of these bodies to maintain a universalist view of their practice, and thus to avoid setting workable precedents in one context which might, from their viewpoint, have disastrous political ramifica-

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83. There continue to be important challenges to the validity of fundamental human rights norms, including challenges to the norms of equality and non-discrimination; the major general challenge, that posed by the international law principle of non-interference in domestic affairs, has gradually been eclipsed.

tions in another context.<sup>84</sup> The most ambitious practice is often particularist, frequently undertaken in ways designed to minimize precedential implications. The response of various countries to the claims and interests of Kurds in Northern Iraq in 1991 is one illustration.<sup>85</sup>

The concentration on process, and the substantive neutrality of what Franck describes as the secular international rule community,<sup>86</sup> has important implications. It suggests that as a practical matter all eligible claims must be regarded as equally worthy. This is a politically impossible and morally uneasy position. A common response of international bodies has been to sidestep the problem by remaining circumspect. The normative response has been to try to restrict eligibility by narrow circumscription of the categories of rightholders. As this article has pointed out, however, definition of rightholders is only one aspect of the analysis of self-determination, minority rights, and equality provisions. The further questions of the meaning of the right, the justification of the right, and the consequences of the right, are at least as important.

Even if it is possible to articulate worthwhile general norms and to devise effective systems of international supervision, what is the proper role of the international community in relation to claims by non-state groups? Liberal internationalism tends to assume a moral obligation on the part of the international community to become involved, at least where basic rights are threatened or justice claims are denied.<sup>87</sup> Foreign states and decisionmakers have generally been more circumspect, supporting significant involvement only where international security or other external interests are directly jeopardized, or in some extreme humanitarian emergencies, especially where domestic political circumstances are favorable to involvement. In the wake of the question, "who ought to act?" comes the question, "who ought to pay?" Public international law has been concerned with these questions mainly with regard to international organizations. More fundamentally, however, they are moral and political questions. There is a continuing tension between the universalism of liberal ethics, in which proximity and connection are irrelevant to moral worth, and the ordinary human instinct to attach

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84. This explains the frustration exemplified in Turpel's conclusion that in terms both of norms and supervisory or political pressure "the United Nations and the Human Rights Committee have been of virtually no assistance in indigenous struggles [in Canada]." Turpel, *supra* note 46, at 602.

85. Note also, for example, the express provision in the 1992 CSCE Helsinki Document whereby the participating States reaffirm "the need to develop appropriate programmes addressing problems of their respective nationals belonging to Roma and other groups traditionally identified as Gypsies and to create conditions for them to have equal opportunities to participate fully in the life of the society." *The Challenges of Change*, CSCE Helsinki Document 1992, Helsinki Decisions, Chapter VI, para. 35 (on file with author).

86. FRANCK, *supra* note 8.

87. This does not mean, of course, that international involvement will always be adverse to the target state. The purposes served by rights are thwarted, and justice effectively denied, by non-state groups, by states, and by conflict for which responsibility is mixed or unattributable.

greater importance to family, to community, and to what one is intimate or at least familiar with. Indeed, one of the ethical arguments for nationalism is precisely that it is instrumental in realizing these particularist individual goods.<sup>88</sup>

Would the existence of comprehensive and precise international normative provisions and supervisory machinery have made any difference to events in Yugoslavia, or Somalia, or anywhere else? Certainly the factors which caused states and other actors to be unwilling to engage in norm-creating and institution-building endeavors would also have militated against the effectiveness of any such norms or institutions, and little is to be gained from a counterfactual exercise in which normative and institutional issues are isolated from the political and ideological background. For present purposes it is more useful to address the further skeptical claim that even if developed in the future, international legal provisions and machinery are still unlikely to be effective. This claim fits poorly with the vigorous efforts of states and other international actors to develop such provisions and machinery with uncharacteristic speed. While a skeptic may discern traces of delusion, illusion, or even hypocrisy, the rapid innovations in the CSCE, for example, seem to manifest a strong belief that the normative provisions matter, although the provisions are formally political rather than "legal," and that the institutional mechanisms will work.<sup>89</sup> More generally, reference may be made to studies of the effectiveness of various legal and other regimes.<sup>90</sup> While these studies provide some grounds for optimism about the potential effectiveness of international norms and institutions, few of them address human rights regimes, and fewer still address regimes dealing with claims by non-state groups.<sup>91</sup> Problems of methodology, perspective, and data collection in these areas are formi-

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88. See David Miller, *The Ethical Significance of Nationality*, 98 ETHICS 647 (1988); and Brian Barry, *Self-Government Revisited*, in THE NATURE OF POLITICAL THEORY 121-54 (David Miller and Larry Siedentop eds., 1983).

89. Formal records as to the use of the various CSCE Mechanisms have not generally been kept hitherto. Unofficial records compiled by the Netherlands Helsinki Committee show that between adoption of the Vienna Mechanism in 1989 and October 1990 the first phase of that Mechanism was invoked 103 times (7 against western states, 4 against neutral and non-aligned states, and 92 against eastern European states). The other three phases were also used on several occasions. See Arie Bloed & Pieter van Dijk, *Supervisory Mechanism for the Human Dimension of the CSCE*, in THE HUMAN DIMENSION OF THE HELSINKI PROCESS 73, 79 (Arie Bloed & Pieter van Dijk eds., 1991).

90. A few of many examples of such studies are Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599 (1986); ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (1989); INTERNATIONAL REGIMES IN EAST-WEST POLITICS (Volker Rittberger ed. 1990); Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479 (1990); Martin List & Volker Rittberger, *Regime Theory and International Environmental Management*, in THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 85-109 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

91. Studies have been undertaken of the relative success of the international legal and institutional regime for dealing with decolonization, and of international contributions to transitions to democracy.



dable. Experience in other issue areas suggests that future regimes for relations between state and non-state groups might be workable, effective, and preferable to the alternatives. The importance of further work in this area has been widely recognized; the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has appointed a Special Rapporteur on "possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities,"<sup>92</sup> and the CSCE has resolved to convene a seminar in 1993 on "Case Studies of National Minorities Issues: Positive Results."

Established international law principles, doctrines, and institutions for supervision and implementation may contribute significantly to the adjustment of relations between states and non-state groups. Even when the best possible interpretation is given to existing legal materials, however, it is clear that further normative and institutional development is urgently needed if adequate frameworks are to be established. It is also clear that part of the normative development involves more sophisticated reconciliation of the existing domains of discourse. The adequacy and effectiveness of such frameworks depends in part on their legitimacy, which itself has an impact on the willingness of those with the necessary power to apply or ignore them. In so far as legitimacy is the compliance-pull felt by established states or entities emerging in accordance with well-established legal standards, legitimacy is likely to attach to principles of order, including principles for managed transition where necessary. In so far as legitimacy is influenced by the perceptions of non-state groups with revisionist demands, it will depend both on the actual efficacy of the rules and on the extent to which they are consistent with claims of substantive and procedural justice. Given existing distributions of power, and the instrumental value of stability, considerations of order are likely to remain central to the international normative structure.

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92. The Special Rapporteur is Mr. Asbjorn Eide. For his preliminary report, see U.N. Doc. E/CN.4/Sub.2/1991/43 (1991).