SELF-DETERMINATION AND THE PROBLEM OF TERRITORY: A CASE FOR LANDLESS STATES

A Thesis Submitted to the

Department of Law

in partial fulfillment of the requirements for the degree of Master of Arts in International Human Rights Law

By

Katie Ann Osterloh

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The American University in Cairo

School of Global Affairs and Public Policy

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in partial fulfillment of the requirements for the degree Master of Arts in International Human Rights Law
has been approved by

Professor Tanya Monforte _______________________________
Thesis Adviser
Affiliation ____________________________________________
Date ____________________

Professor Outi Korhonen ________________________________
Thesis First Reader
Affiliation ____________________________________________
Date ____________________

Professor Hani Sayed ___________________________________
Thesis Second Reader
Affiliation ____________________________________________
Date ____________________

Professor Hani Sayed ___________________________________
Law Department Chair
Date ____________________

Nabil Fahmy, Ambassador _______________________________
Dean of GAPP
Date ____________________
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ABSTRACT

The human rights regime, with its emphasis on individual rights and the liberal democratic state, is failing to fully protect the rights and legal personality of certain transnational and mixed residential minorities and indigenous populations. As a result of this failure and their history of subjugation, these groups should be entitled to remedial self-determination. Traditionally, however, the international community of states has limited the right to self-determination to pre-specified former colonies because they fear secession and the breakup of their territorial sovereignty. To overcome that barrier, self-determination must expand both in its inclusiveness and its possible outcomes. This paper advocates a non-territorial form of statehood for transnational/mixed-residential minority and indigenous populations experiencing human rights abuse or notable exclusion from international law. Combining models of non-territorial autonomy with the goals of secession, landless states would provide an innovative multilevel governance solution that recognizes the right of these groups to exercise moral agency internally and externally. Landless states would have full legal personality in the international community yet not be tied to a specific, contiguous territory. The idea leads to a reconception of the state as exercising citizen-sourced, rather than territorial sovereignty. This paper focuses primarily on the Roma of Europe with a parallel discussion of American Indian Tribal Nations in the United States for illustrative purposes. The proposal could be adapted to various situations where remedial self-determination is required but territorial solutions are unsuitable.
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I. Introduction

In 1998, a Roma man by the name of Ludovit Gorej was arrested in the Czech Republic for stealing four dollars worth of sugar beets. Gorej lacked citizenship despite having lived in the Czech Republic since he was four months old, and so he was sentenced to expulsion. The Supreme Court eventually revised the decision, but the case highlights a troubling range of human rights abuses plaguing Roma communities across Europe, including statelessness, poverty, lack of access to social services, and political disenfranchisement. For a regionally dispersed stateless nation like the Roma, the framework of protection supposedly offered by the human rights regime has become inaccessible. Sadly, the Roma are not the only group facing the consequences of this breakdown. Minority and indigenous populations that lack statehood also lack the international legal personality that could compensate for the failure of individual rights to protect group identity. These groups are unique because their ties to land have not traditionally resembled the Western conception of settled land ownership.

The formulation of the modern, liberal state took place within a relatively narrow European cultural experience, and resulted in constructions designed to respond to and retain territorial sovereignty. Territorialized sovereignty—and territorialized international legal personality in the form of statehood—results in dominance of ethnic or cultural majorities over minorities, as well as the dominance of settled populations over immigrants or indigenous peoples. Indigenous and minority groups who are spread across nations or mixed residential areas are subject to the sovereignty of nations, but without having participated in the creation of the rules or institutions that now control their lives.

During the early development of the human rights framework, the doctrine of self-determination acknowledged the presence of groups in the international system that had a claim to statehood but were under the control of a colonial power. Though the growing global

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1 Heather O’Nions, Bonafide or Bogus?: Roma Asylum Seekers from the Czech Republic, Web J. Current Legal Issues, at http://webjcli.ncl.ac.uk/1999/issue3/onions3.html#Heading11, 1999. Article 57 of the Czech Criminal Code states that expulsion may be warranted “provided that the safety of the people or of property or another public interest requires it.” Later, the Prague High Court ruled that expulsion is warranted where a non-citizen has committed “serious criminal activity directed against life and health as well as against property.” See Decision 42/1994 of the High Court, Prague.

awareness of human rights necessitated a right to self-determination of peoples, states quickly moved to limit this right in order to protect their own power. A territorial approach to self-determination was manifested through *uti possidetis*, which limited newly independent states to territories whose boundaries had been drawn by previous colonizers. Outside of the Post-Colonial States who were the original beneficiaries of self-determination, the international system has now rejected secession as a legitimate action because it interferes with the territorial integrity of established states. Instead of making statehood widely available through self-determination, the human rights regime focused on individual rights as a way to protect non-state actors. The framework of the human rights regime now includes an ever-expanding number of conventions, declarations, and customary law norms designed to protect and promote human rights in a variety of circumstances. The focus of the human rights framework, however, remains heavily focused on the individual and the protection of individual rights. While varying cultural experience provides a wealth of meaning from which international law can draw upon for the promotion of rights, the language of individualism manifested through the human rights regime attempts to isolate the self from its surroundings, eliminating the importance of the cultural aspect of identity. Thus, the framework is failing to offer an effective or meaningful measure of rights protection or legal personality to groups, especially those with cultural frameworks that emphasize the collective rather than the individual. Consequently, the objective of the international community to build a framework that would make statehood unnecessary for minority and indigenous populations has not been achieved.

Illustrative of this failure, the Roma have a long history of subjugation and abuse, culminating in their present status as a dispersed, heterogeneous minority in Europe.\(^3\) Roma populations in Europe often lack citizenship and other rights because national governments in the region have laws and customs which contradict the values and statutes of international organizations and human rights law. The European Union and its various human rights bodies have, in some cases, recognized the abuse taking place. Yet the response has been an unsuccessful string of individual court cases, reports, and resolutions that fail to reach past individual crimes to address the systemic discrimination and structuralized attack on group

identity taking place. The law erases Roma identity by trying to provide universal justice through an enforced, foreign cultural framework. Better access to human rights law will not solve the deep-rooted conflict in value systems and life experience that prevents international law from offering meaningful protection to the Roma or other minority groups. Instead, the moral agency of Roma must be acknowledged internally, to provide governance and justice to their own community, and externally, to participate in the conversation of international law and widen its application beyond the current cultural framework.

Similarly, within the United States, the American Indians have faced tremendous discrimination, including genocide, enslavement, forced assimilation and marginalization in civil and cultural life. The legacy of assimilationist policies carried out by the U.S. government has lately been criticized and efforts have been made to reverse termination procedures between the government and Tribal Nations. However, analogous to the attitude toward Roma communities in Europe, the prevailing attitude in the United States centers on advocacy of greater economic, educational, and cultural assimilation. The processes of the liberal democratic state have tended to erase the discrete international legal personality of American Indians. In fact, the erasure of their legal personality may be the most problematic long-term effect of previous discrimination and rights abuse. American Indian Tribal Nations require an expanded right to self-determination to remedy the failures of the current rights framework.

Expanding the right to self-determination involves a dual approach: expanding who is eligible, and expanding the outcome by re-imagining statehood. In re-examining who may be eligible for self-determination, the debate currently centers on defining what a “people” is in accordance with the U.N. mandated right. It seems apparent at least that “peoples” no longer includes only recognized former colonies. W. Ofuatey-Kodjoe develops a definition of the peoples entitled to self-determination as *subjugated*: “those non-self-governing, those occupied, those under foreign rule and those deprived of a previous independent condition.”\(^4\) In keeping with this view, the right to self-determination exists as remedial to human rights abuse. The concept of remedial self-determination carries with it a condition that group narratives contain some enunciation of human rights abuse or exclusion from international law. The cases

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employed in this paper illustrate how a subjugation narrative can be combined with more organic aspects of group identity to achieve “peoplehood” and access to the right of self-determination.

In terms of the outcome, the exercise of self-determination most frequently corresponds to the call for independence or secession; for nearly all trust territories and former colonies, the end goal of self-determination was a separate, sovereign state. 5 Statehood remains the most effective way to ensure the holistic goals of a group. 6 However, current trends now emphasize schemes of internal autonomy. In the academic and policy maneuverings of various groups seeking self-determination, interesting proposals have emerged that could be useful when expanding the outcome of self-determination. Recognizing the potential for territorial disputes to result in violent conflict, G. Gottlieb and others suggest a functional approach to autonomous governance that “involves the demarcation of different layers of lines for different purposes”—taking autonomy beyond territorialized conceptions. 7 Combining models of non-territorial autonomy with the international legal personality inherent to statehood to form landless states may be a solution to the problem of territory.

The concept of landless statehood seeks to place more actors on the international plane in equal conversation with one another. Expanding self-determination and the very idea of the state would mean conceiving of new ways to construct relationships between individuals and communities, communities and states, and states among themselves. Furthermore, expanding these concepts would mean viewing sovereignty as sourced from people—individuals and communities of various compositions—rather than territory. In a model of landless statehood that takes autonomy beyond the internal field and into true statehood, the emphasis is not on physical territory at all, but on personality-based citizenship and functional governance. Citizen-sourced sovereignty shifts the definition away from a zero-sum game of competition and re-imagines it as an unbounded resource. This is a call for multilevel governance as experienced prior to the consolidation of nation-states and currently experienced within the EU.

5 “By substituting the state in international law for the individual in private law, the international law of territory can proceed by analogy with the law of property… the right of self-determination can be seen as restoring power or territory to the rightful sovereign, just as private law requires the restoration of wrongfully taken property to its owner.” D. P. O’CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 1: 22 (Cambridge: Cambridge University Press, 1967).
Landless statehood addresses the fears of states because it is uniquely and only suitable for transnational and mixed residential groups with a strong claim for remedial self-determination, thus limiting the possibility for free-for-all secession. The combination of multilevel governance and overlapping, multi-sourced sovereignty leads to a deterritorialized conception of the state—a state that fully encompasses the rights and responsibilities of international law and is able to participate in it as an equal, yet is not tied either symbolically or physically to a territory. The practical aspect of this discussion is limited to transnational and mixed-residential minority and indigenous populations that are experiencing notable exclusion from international law and/or substantial human rights abuse, with a particular focus on the Roma of Europe\(^8\) contrasted with the case of American Indian Tribal Nations\(^9\) in the U.S. for illustrative purposes. The proposal could be adapted to various situations where remedial self-determination is required but territorial solutions are impractical.

The cases examined in this paper do not present a clear assurance of the right to self-determination because neither are former colonies under the internationally recognized definition, yet both possess unique national identities that deserve attention. In contrast with the dominant capitalist/colonialist norms, Roma and indigenous Tribal Nations have a relationship

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\(^8\) The term “Roma” refers to an ethnic group living mainly in Europe. “Roma” is both a designation for the branch of the Romani people with historic concentrations in Eastern Europe and the Balkans, as well as a generic term for the Romani people as a whole. Subgroups of Romani peoples include Roma, concentrated in central and eastern Europe and central Italy; Iberian Kale; Finnish Kale; Welsh Kale; Romanichal, in the United Kingdom; Sinti, in German-speaking areas of Europe; Manush, in French-speaking areas of Western Europe; and România, in Sweden and Norway. For the purposes of this paper, “Roma” shall refer to all subgroups of Romani people, with the understanding that the usage is not an attempt to imply a coherent or homogenous group identity. Most scholars trace their origins to the Indian Subcontinent. For a full history of the Roma, including their origins and recent political activity, see Ilona Klimová-Alexander, *The Development and institutionalisation of Romani representation and administration Part 1*, 32:3 NATIONALITIES PAPERS (2004); Ilona Klimová-Alexander, *The Development and institutionalisation of Romani representation and administration part 2: Beginnings of modern institutionalisation (nineteenth century—World War II)*, 33:2 NATIONALITIES PAPERS (2005); Ilona Klimová-Alexander, *The Development and institutionalisation of Romani representation and administration Part 3a: From National Organizations to International Umbrellas (1945–1970)—Romani Mobilization at the National Level*, 34:5 NATIONALITIES PAPERS (2006); Ilona Klimová-Alexander, *The Development and institutionalisation of Romani representation and administration Part 3b: From National Organizations to International Umbrellas (1945–1970)—the International Level*, 35:4 NATIONALITIES PAPERS (2007). See also Elena Marushiakova & Vesselin Popov, *Historical and ethnographic background; gypsies, Roma, Sinti, in BETWEEN PAST AND FUTURE: THE ROMA OF CENTRAL AND EASTERN EUROPE* (Will Guy ed., UK: University of Hertfordshire Press, 2001).

with the land that is based on communal use and stewardship rather than exclusive ownership. Additionally, Roma and indigenous groups are similar in that “they can be seen as inherently sovereign encapsulated nations, which, unlike national minorities, maintained and retained powers and rights that predated the constitutions of the nation states in which they became encapsulated.” That is why a non-territorial scheme is ideally suited for their claims to self-determination.

Chapter One discusses the origin of the modern state and the current international criteria for recognition of statehood. This is significant because the creation, definition, and position of states in international law influence the limitations of self-determination and the possible outcomes imagined by communities seeking it. It proceeds to describe the origins of the right to self-determination and the limitations placed on it by states in order to retain their territorial integrity and sovereignty. The chapter concludes by arguing that the inequality of state creation and survival, alongside the limitations on the right to self-determination, has resulted in a neocolonial world order where states and others trust the human rights regime to protect minorities and indigenous populations, but deny them a voice in actually creating the norms and laws that govern them.

Chapter Two discusses the failure of the human rights regime to protect the rights of minority and indigenous groups or to afford them legal personality within international law, examining the Roma in Europe in particular, with reference to the American Indians. This chapter examines rights violations and the effect of a narrowly expressed cultural framework on the rights regime and non-majority groups.

Chapter Three argues that as a result of the failures inherent to the human rights framework, the right to self-determination must be expanded. This expansion must take place on two levels: first, the inclusiveness must be expanded by engaging with counter-culture construction of group identity; second, the possible end results must be expanded to include innovative forms of autonomy and self-government. Ultimately, Chapter Three draws a link between the human rights abuse suffered and the right to external self-determination.

Chapter Four discusses the possibility of landless states to solve the problem of human rights protection and the traditional limits to self-determination. Building on ideas of agonistic patriotism and non-territorial cultural autonomy like the Renner-Bauer model, the chapter presents a sketch of landless statehood with the aim of infusing creativity and innovation into the processes of international law. It then describes the activity of the Roma of Europe, the American Indians, and others to pursue non-territorial statehood. Chapter Four concludes that this kind of vision is necessary to international law, as global changes threaten territorial sovereignty and make it expedient to begin adopting pioneering techniques, which will ensure that all communities have an equal voice in the processes of international law and rights protection.
II. Chapter One

The history of the modern nation-state as currently understood is a narrative of power. Once consolidated and justified, the early nation-states began to control who else would be allowed to gain this power and thus enter into dialogue on a similar plane. Since the advent of decolonization, more blatant forms of power retention have given way to soft control and manipulation through an international legal sphere, which essentially codifies and neutralizes the elitist impulses of a previous world order. Yet both the structures and purposes of the state are undergoing changes that cannot be ignored. This chapter discusses the origin of the modern state and the current international criteria for recognition of statehood. It then describes the origins of the right to self-determination and the limitations placed on it by states in order to retain their territorial integrity and sovereignty, and concludes by arguing that limitations on the right to self-determination produced a neocolonial world order where states and others trust the human rights regime to protect minorities and indigenous populations, but deny them a voice in actually creating the norms and laws that govern them.

A. Artificial States: The Construction and Definition of the Modern State

The formulation of the modern, liberal state took place within a relatively narrow European cultural experience, and resulted in a number of constructions designed to respond to and retain territorial sovereignty. The creation, definition, and position of states in international law are relevant to the following discussion of self-determination, owing to the strong ties between the international community of states and the formation and practice of the human rights regime. Furthermore, the structure of a state has a direct impact on the recognition and functionality of minority populations contained within it. The question of who has a right to self-determination, which will be explored in Chapter Three, is found in facts about what a state is, and how best a system dominated by states may function.13

1. Origins of the Modern State

Georg Sørensen analyzes the realm of statehood in postcolonial international relations, and finds three distinct models: the Westphalian State, the Postcolonial State, and the Postmodern State. The Westphalian State, or modern liberal state, originated in the Treaty of Westphalia in 1648, but its formation follows a responsive pattern of development throughout history involving “empires, city-states, barbarian tribes, feudal systems, and absolutist states.”14 Martin Wight argues that the origins are found in the late fifteenth century, with the modern secular nation-state established in the mid-seventeenth century through the balance of power of Renaissance Europe’s inter-dynastic rivalries, diplomacy, and the Treaty of Westphalia. Grotius conceived of a state system with an inner circle of Christian European powers, and an outer circle of the rest of mankind subject to natural law. The age of imperialism formalized asymmetry of power and “the state system… became embedded in the technological revolution and the new means of centralized authority during the absolutist epoch.”15 Economically, the development of capitalism and industrialization provided the resources for these states to coalesce. Technology provided the ability to communicate and store information in the capacity necessary for absolute government.

Sørensen relates that the separation of the economy into the public and private sector is a distinct feature of the modern state. He also cites the industrialization of warfare as essential to the shaping of European states. Bruce Porter agrees, saying, “It was war, and the preparations for war, that provided the most potent energizing stimulus for the concentration of administrative resources and fiscal reorganisation that characterised the rise of absolutism.”16 The notion of modern statehood is thus closely linked with the exercise of power through both internal and external sovereignty. Once formulated, Westphalian States began to coalesce into a community of similar state structures, necessitating efforts at definition and exclusion. This community of states later birthed and codified international law and its corresponding human rights framework.

When examining the modern state in the context of international law, James Crawford contends that “there has long been no generally accepted and satisfactory legal definition of statehood” because “attempts to declare rules about recognition within the framework of international codification have always been rejected.”¹⁷ Both Brierly and Scelle agree, and the canon of international law has not yet arrived at a conclusive definition. ¹⁸ In an early draft of the Vienna Convention on the Law of Treaties, then-special rapporteur Fitzmaurice devised this formula:

For the purposes of the present Code (a) In addition to the case of entities recognized as being States on special grounds, the term “State” (i) means an entity consisting of a people inhabiting a defined territory, under an organized system of government, and having the capacity to enter into international relations binding the entity as such, either directly through some other State; but this is without prejudice to the question of the methods by, or channel through which a treaty on behalf of any given State must be negotiated—depending on its status and international affiliations; (ii) includes the government of the State.¹⁹

This segment of the draft was later deleted, but it is similar to the modern, recognized definition in the Montevideo Convention: “a ‘state’ as a subject of international law should have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.”²⁰ However, Öyvind Österud notes that “the evolution of the state system is historically obscure, the criteria for statehood seem rather erratic, and the status of sovereignty is

¹⁷ Nonetheless, Crawford himself describes the notable features of a state: “(1) In principle, States have plenary competence to perform acts, make treaties, and so on, in the international sphere: this is one meaning of the term ‘sovereign’ as applied to States. (Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J. 133 § 265)... it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in coordination with that of another State. (2) In principle States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2(7) of the United Nations Charter. (3) In principle States are not subject to compulsory international process, jurisdiction, or settlement without their consent.” (Monetary Gold removed from Rome in 1943, 1954 I.C.J. 19, 20 ILR 441)... (4) In principle States are regarded as ‘equal’, a principle recognized by the Charter Article 2(1). (5) Derogations from these principles will not be presumed: in case of doubt an international court or tribunal will tend to decide in favour of the freedom of action of States.” JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 37 (2nd edn., Oxford: Clarendon Press, 2006).

¹⁸ Brierly: “the definition [of ‘State’] would be difficult to establish and highly controversial... the word was commonly used in documents and speech, and its meaning had been understood without definition.” Scelle: he “had been active in international law for more than fifty years and still did not know what a State was and he felt sure that he would not find out before he died.” ILC YEARBOOK I 84 §22 (1950); ILC 2nd session 52nd meeting 8 (22 June 1950).

¹⁹ Sir Gerald Fitzmaurice, ILC YEARBOOK II, 107 (1956).

both politically contested and conceptually diffuse.”21 While international law may often cite the Montevideo Convention to define statehood, the definition fails to incorporate any meaningful nuance that would indicate the complex and often arbitrary way states are created and survive. Österud concludes that no consistent pattern of rules for entry into the state system has emerged.22

2. Criteria for Statehood

The current criteria for statehood as recognized in the Montevideo Convention developed in response to practical realities, and provide further substantiation that statehood is an arbitrary title and often unmerited legitimizer of sovereignty. In early Europe, inter-dynastic marriage or small pockets of rebellion led to sovereign states, which other states recognized through ambassadors and treaty relations. In the nineteenth century, established territorial authority was the non-explicit rule. Territorial control eventually morphed into international law through the process of recognition. “And recognition in turn derived from practice: the practice of partnership in treaties, in invitations to interstate conferences, and by participation in diplomatic exchange with the dominant European states.”23 However, there existed no universal recognition practice from all participants in the international system; recognition remained subjective, and the system lacked a definite number of actors. Recognition could either be seen as a practical codification of established status, or an expression of a political act which created this status. J. D. B. Miller emphasizes the importance of recognition to statehood: “Just as we know a camel or a chair when we see one, so we know a sovereign state. It is a political entity which is treated as a sovereign state by other sovereign states (emphasis added).”24

Öyvind Österud notes that twentieth-century events like the establishment of the League of Nations made it necessary to establish criteria independent of recognition. Only a core of non-

22 Österud argues that while external criteria for statehood have become more specific formally with the Hague Conferences and UN doctrine, conceptual ambiguities have actually proliferated. Id.
contested sovereign states participated in the League, but non-sovereign entities like India also participated, making participation itself an unsuitable recognition factor. “Article 1 of the Covenant states that “any fully self governed State, Dominion or Colony… may become a Member of the League if its admission is agreed to by two-thirds of the Assembly,” and on condition of showing proof of its intentions to observe its obligations and the regulations of the League.”25 This set a precedent for involvement of non-states in the international system, and further solidified the ambiguity of statehood criteria.

The point of this brief history is that the very idea of statehood is and should be subject to evolution as necessary within international law. As the development of the state was highly reactive, the state itself is not a sacred formulation that must remain static to survive. In fact, its survival, like that of many other international political and legal principles, depends upon its ability to adapt to the needs and purposes of the international community. Similarly, a system built upon static notions of statehood will find a domino effect of change likely to occur, necessitating flexibility.

Today, the codification of customary international law can give the illusion of homogenous statehood. Marti Koskenniemi called this “The Wonderful Artificiality of States,” saying,

The demonstration that legal statehood seems independent of any objective sociological criterion (wealth, power, size, population) makes a mockery of arguments that hold statehood as basic for the international order. Statehood is merely a historical accident; a product of particular constellation of power and interest. That Vanuatu is a state and Taiwan is not is inexplicable by any sociologically valid criterion.26

Prior to the creation of international conferences like the League of Nations, recognition of states fell to other states; as the international legal and human rights regime developed, recognition became as much a role of the regime itself as a role of states. However, certain powerful states gained preeminence in the international system, and so power to recognize

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26 Koskenniemi begins his argument by describing two versions of the thesis of the withering away of the state in international law. The first version, sociological in nature, describes how states are no longer able to assert their sovereignty because of globalization and the global nature of problems that must be confronted. Cooperation is necessary for state survival. The second version, ethical in nature, idealizes humanity as a global community with individuals entitled to universal human rights and freedoms, regardless of where they come from. Martti Koskenniemi, The Wonderful Artificiality of States, 88 AM. SOC’Y INT’L L. 23 (Proceedings of the Annual Meeting, 1994).
statehood did not exactly change hands. The creation of the United Nations, following the League of Nations, began a flow of rhetoric regarding elitism and whether a state-centric model was the best method of ensuring universal human rights. However, notions of state sovereignty and territorial integrity were already enshrined in the charter of the UN and other international organizations. This fact would go on to cement the elitism of the community of states and the human rights regime that emerged out of it.

B. The Territorialization of State Sovereignty

1. The Historical Development of Sovereignty

The centrality of territory to the modern conception of statehood goes back several hundred years. The current approach to power, sovereignty, and stability is distinctly tied to this territorial method of thinking. “The modern state system is not based on some timeless principle of sovereignty, but on the production of a normative conception that links authority, territory, population (society, nation), and recognition in a unique way and in a particular place (the state).”

Today, while some authors are beginning to question the norm, in most instances the existence of a system of more or less distinct territorial units as the foundation for human governance is not even questioned. Yet, territorial units of authority do not always correspond to premodern or postmodern conceptions of sovereignty. This conceptualization emerged from post-Westphalian ideals that gradually became fixed in the societal mindset.

During the Middle Ages, European territorial structures “were complex and overlapping, and no one particular form of governance dominated throughout.” The view of territory and space linked to these structures was flexible. Rulers and those in the power hierarchy saw trends of overlapping control and porous, changing boundaries, with institutions like the church holding

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moral authority while political and economic control was spread elsewhere. However, as city-states consolidated power and continental wars sparked technological and economic innovation, territory began to take on new importance. In response to these changes, in the second half the sixteenth century, Jean Bodin wrote regarding new ways of thinking about political territory. “Concerned with promoting peace by validating the power of the French King against rival claimants, Bodin championed the idea that a state’s ruler had absolute authority within his own realm.” Meanwhile, Grotius and his followers were recycling Ancient Greek and Roman concepts of property rights which assumed a territorial order in which states held absolute internal sovereignty. By the time of the Peace of Westphalia, absolutism in the West and the emergence of increasingly autonomous states within the Holy Roman Empire had made the independent territorial state an important part of people’s conceptualizations of Europe. In fact, Quentin Skinner argues that by the early seventeenth century, the territorial state was “the most important object of analysis in European political thought.”

Alexander Murphy distinguishes between two types of sovereignty that developed during this time: “sovereignty as a principle governing relations among states” and “sovereignty as a territorial ideal.” He argues that the recent trend toward a wider acceptance of the sovereign territorial ideal is linked to what Robert Sack calls human territoriality:

The successful pursuit of a territorial strategy in human affairs has several potential advantages: it is an efficient way of communicating the authority of the controller of territory over people and things; it simplifies the task of enforcing control over those people or things; and it reifies power. To the extent that these advantages can be exploited—and that is only possibly under circumstances in which a given territorial

order enjoys substantial legitimacy—the spatial units that are the product of territoriality can assume great importance in the way individuals intellectually organize the world. An effective territorial order embodies the potential to change patterns of interaction and shape issues in ways that promote particular spatial ontologies.38

Thus, the ability of leaders to consolidate power over their territory in post Westphalian Europe set in motion a complex series of events whereby the spatial order of life was reorganized.39 What resulted was a system where maintaining the territorial status quo became synonymous with pursuing peace and security. Political, social, and legal thought centered on unquestioned territorial norms:

As power is consolidated… networks of interactions and communication are built that can enhance the social significance of territorial units. At the same time, as rulers in difference territories exercise power in distinctive ways, the boundaries between territories can become increasingly meaningful dividers between social, economic, and cultural system. In the process, interests can become focused on arrangements geographically structured along territorial lines, and this, in turn, can promote the identification of social concerns with maintaining the existing territorial order. As these tendencies play out, it becomes increasingly likely that political, social, and economic issues will be understood in territorial terms, and ultimately that the logic of the sovereign territorial idea will be reinforced.40

This territorial ideal also fed into the development of modern nationalism and the rights of a nation, “a group of people who saw themselves as a cultural-historical unit,” and its desire to control its own territory.41 Nationalism presumed the strong link between people and territory, and redefined the state as an entity for providing “identity, autonomy, security, and opportunity for national betterment.”42 Territorialized nationalism lent new legitimacy to states that pursued the territorial ideal, and in many ways led to the colonial undertakings of Western powers as they equated the acquisition of territory with increased power, or sovereignty.

38 Id., at 89-90. See also ROBERT D. SACK, CONCEPTIONS OF SPACE IN SOCIAL THOUGHT (Minneapolis: University of Minnesota Press, 1980).
39 Id., at 91.
To problematize this record, territorialized sovereignty—and territorialized international legal personality in the form of statehood—suggests dominance rather than equality of rights or opportunity. This results in dominance of ethnic or cultural majorities over minorities, as well as the dominance of settled populations over immigrants or indigenous peoples. Karl Renner critiqued the territorial nature of the international system thus: “If you live in my territory you are subjected to my domination, my law and my language.” The formulation of redoubtable linkages between space, territory, and political activity or exercise of sovereignty emphasizes territory rather than personality—which certainly accounts for much of the dissatisfaction with the current system expressed by minorities and indigenous populations. Like the criteria for statehood, however, sovereignty is not a fixed principle that must remain territorialized in order to be viable. Deterritorializing sovereignty may in fact be a necessary step for the international community in the future.

2. States and Sovereignty Today

Sovereignty, now inextricably linked with the territorial state, has become a zero-sum competition between and within states for power, and this competitive atmosphere results in winners and losers in the state system. Hurst Hannum simplifies the idea of sovereignty as constitutional or legal independence, and emphasizes that it is only constrained by international law. Hannum states that the first “positive” purpose of sovereignty is granting legitimacy to the exercise of political power. A second “negative” purpose of sovereignty allows a political unit to defend itself from encroachment. Third, sovereignty allows other actors to identify the locus of political power in a state, clarifying expectations in international relations. Hannum links sovereignty to statehood by arguing that, “Today, all states are theoretically sovereign, no matter what their actual degree of political or economic independence.” The Westphalian State often possesses more than just formal sovereignty—it is substantial because it has capacity for self-

45 Id., at 489.
government, an economic resource base, and the ability to defend itself militarily.\textsuperscript{46} Furthermore, it possesses a monopoly on the use of violence which it uses defensively.\textsuperscript{47} Finally, the “nation” element of the state seals the concept with what Sørensen calls the “we-ness” of the state—some level of shared culture, language, or ethnicity that can be real or constructed. The Westphalian State in its purest form is thus indicative of comprehensive territorial sovereignty.

Sovereignty can be largely theoretical in the case of the other two models of statehood: the Postcolonial State and the Postmodern State. Historically, “states… were empirical realities before they were legal personalities.”\textsuperscript{48} The sweeping decolonization that followed WWII produced states that did not necessarily have positive sovereignty or even the capacity for self-government— Postcolonial States. In these states, power often becomes concentrated in individuals, who use personal loyalty, a spoils share system and patronage to retain their power. Violence or armed forces become a tool in the hand of the ruler.\textsuperscript{49} Economic development flounders, sparking a negative feedback cycle that, coupled with unequal and exploitative relationships with former colonizers, severely restricts the ability of the state to develop meaningful nationhood. Postcolonial States were created on the basis of decolonization rather than the development of institutions necessary to interact and compete with already-established Westphalian States, leaving them at a disadvantage in the international system. The relationship between a Westphalian State and a Postcolonial State is not reciprocal; cooperation takes the form of a donor and a recipient, where the donor has conditions with which they manipulate the recipient.\textsuperscript{50} The Postcolonial State shows a distinct move away from the Westphalian model: original criteria such as defined territory and effective government became far less stringent in the postcolonial legal sphere, while sovereignty became less absolute.

Moving away from the zero-sum game of traditional sovereignty, innovative multilevel governance schemes turn sovereignty into a shared commodity in the case of the Postmodern State. These states are postmodern “in the sense that they comprise political space organized

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\item \textsuperscript{46} Georg Sørensen, \textit{An Analysis of Contemporary Statehood: Consequences for Conflict and Cooperation}, 23:3 REV. INT’L STUD. 258 (1997).
\item \textsuperscript{47} ANTHONY GIDDENS, \textit{The Nation-State and Violence} (Cambridge: Cambridge University Press, 1985).
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Robert O. Keohane, \textit{Reciprocity in International Relations}, 40:1 INT’L ORG. 1-27 (1986).
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either on a non-state territorial basis (such as the European Union), or on a functional basis (such as international regimes in specific issue areas).” They are further characterized by having autonomous power that affects the sovereignty of their participants. This conception is, in many ways, an experiment in non-territorial sovereignty. Robert Keohane has coined the term “operational sovereignty,” indicating a situation where states choose to limit their substantial, operational sovereignty through international agreements. According to Keohane, in this case sovereignty “is less a territorially defined barrier than a bargaining resource for a politics characterized by complex transnational networks.”

Initially, this kind of experimentation in non-territorial sovereignty was prompted by security concerns best met through cooperation; now, globalization and economic interest play a role as states become more dependent on one another. Sovereignty becomes a bargaining chip and the line between foreign and domestic affairs is blurred. This leads to a different role for the state: while states are still central actors in the EU, the system itself is characterized by multi-level governance. The Postmodern State indicates a shift away from the “we-ness” of nationality and toward a plurality of identity. Among others, James Rosenau envisions a patchwork of “sovereignty-free” individuals squares built by the forces of globalization. Similarly, Seyom Brown describes “a polyarchy in which nation-states, subnational groups, and transnational special interests and communities are all vying for the support and loyalty of individuals.” At present this type of state seems limited to Europe, while other regions rely on more traditional methods of regional cooperation. However, like the Postcolonial State, the

52 Id.
57 SEYOM BROWN, NEW FORCES, OLD FORCES, AND THE FUTURE OF WORLD POLITICS 245 (Glenview, IL, 1988).
58 “With multi-level governance characterizing the internal relations between EU members, the resulting political space is no longer adequately described in terms of the Neorealist dichotomy between an international realm which is anarchic and a domestic realm which is hierarchic. Both rule-making (the European Commission, the European
Postmodern State illustrates the changes that are taking place to traditional understandings of statehood and sovereignty. It is logical, therefore, to conclude that the Westphalian State model no longer serves the international sphere as the sole point of hegemony. Nonetheless, this model remains central to the international system and thus central to the creation of international laws and human rights norms.

C. Elitism in the International System and the Purpose of the State

1. The Marginalization of Non-State Actors

Today, the state is “the privileged unit for analyzing most phenomena while discouraging consideration of the nature of the territorial state itself.” In the progress narrative of the international legal sphere, a postcolonial understanding of diversity and rights has supposedly replaced the blunt instruments of paternal imperialism, wars of territorial acquisition, and the hegemony of concentrated power. Despite this purported progress of understanding, many practical structures of the old system remain: foundational stones of a building in the throes of near-constant renovation. In this outdated system, states remain the primary actors of international law. Not only do they create and enforce the laws of the international community, they also retain the preeminence of power.

Hannum recognizes that “by the mid-twentieth century, after the creation of the United Nations and under the impetus of decolonization, the ‘sovereign state’ had come to be viewed by many as the only desirable and acceptable form of government.” However, the “fundamental problem [is] represented by the current commitment (in liberal theory and international practice) to exclusive and absolute territorial sovereignty which concentrates power in the hands of the states and privileges nations who have been aggressive enough to achieve a state. The liberal


political tradition still keeps stateless groups politically subordinated (emphasis added).”\textsuperscript{61} As Otto Bauer observed, the liberal democratic state is organized according to the “centrist-atomist” principle, whereby an absolutist state reduces society to its smallest parts, leaving only two real recognized politico-juridical entities: the individual and the sovereign state. This model “fails to acknowledge important and meaningful intermediate locations, like the ones occupied by ethnic and national minorities.”\textsuperscript{62}

Non-state actors have made progress in international law, but this progress falls short of achieving true equality of voice in the activities of lawmaking and rights protection and promotion. Indigenous and minority groups who are spread across nations or mixed residential areas are subject to the sovereignty of nations, but without having participated in the creation of the rules or institutions that now control their lives. Oftentimes, “contemporary liberal democratic mechanisms” leave these groups without a real voice because they are the minority.\textsuperscript{63} Non-state groups such as the Roma and indigenous populations have begun to appeal directly to international fora, where they have made some success, but not yet achieved the goal of equal participation in international lawmaking activity.\textsuperscript{64} This will be discussed in greater detail in Chapter Two.

2. The Shifting Purpose of the State

\textsuperscript{61} M. Goodwin, The Romani Claim to Non-Territorial Nationhood: Taking Legitimacy-Based Claims Seriously in International Law 122 (Unpublished PhD dissertation, Florence: European University Institute, 2006). Nootens recently argued that liberal thought sanctions the current division of the world into two classes of ethno-national communities— “those which have been fortunate enough to have a state of their own, and the unfortunate others” who remain politically subordinated. G. Nootens, Liberal nationalism and the territorial ideal, 12:1 Nations and Nationalism 39 (2006).

\textsuperscript{62} Ephraim Nimni, National-Cultural Autonomy as an Alternative to Minority Territorial Nationalism, 6:3 Ethnopolitics 348 (2007).

\textsuperscript{63} A group-based rights approach that tolerates difference fails because “negotiations and their outcome are not based on equality of the parties, instead depending on the benevolence of the majority group. The result is that any progress made towards justice within this framework is marginal because it is “tolerated by the state only to the extent that it serves, or at least does not oppose, the interests of the state itself.” Ilona Klimová-Alexander, Transnational Romani and Indigenous Non-territorial Self-determination Claims, 6:3 Ethnopolitics 395, 408 (2007).

Separate from but essential to the definition and criteria of statehood is the purpose of the state: the reason for its existence and the methods by which it legitimizes its power. At the heart of a society’s normative values is a hegemonic belief about the moral purpose of the state, which encompasses beliefs about legitimate statehood and rightful state action. It has shifted through history: “in the modern era, the rationale for the state has been increasingly tied to the protection of individuals' rights.” In moments of international societal expansion, the previously held belief becomes insufficient and shifts, leading to the dismantling of current sovereign systems. When the purpose of the state shifts, its definition and behavior must shift as well. Statehood may currently be an elite club where the members have no real inducement to cut their slice of the pie any thinner by expanding membership, yet the area around this elite club is brimming with other actors, many of whom are eager for a more defined role. As countless revolutions throughout history show, reality follows the expansion and creativity of human thought. Citizens across the world once clamored to take power back from the divine right of kings; now, many groups are attempting to do the same by challenging the position of states as both the kings and gatekeepers of international law. A shifting purpose of the state may pave the way for other changes in the territorially-sovereign state-centric system.

Although international relations take it for granted that states are the analytic units, recent developments have already begun to challenge the efficacy of the territorial state model. Perhaps the clearest example of that challenge is the spatial structure of the international economy, which is at variance with the territorial state. The rise of the human rights regime has

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66 Beginning with Greek and Roman eras, a distinction emerged between manmade laws and divine laws which continued until the Treaty of Westphalia which replaced the previous hierarchy with sovereign equality of states. “That order continues to be the foundation of international law today, although it is under increasing pressure from the growing number of nonstate actors-- including international organizations, nongovernmental organizations, and substate political entities-- that participate in and influence international affairs.” Hurst Hannum, *Sovereignty and Its Relevance to Native Americans in the Twenty-First Century*, 23:2 AM. INDIAN L. REV. 490 (1998/1999).
sparked questions about the soundness of the current spatial understanding of power, and UN interventions for the purpose of human rights may signal an erosion of the territorial ideal as the authority on non-political issues.\(^9\) The EU, previously described as a Postmodern State, has reduced “the economic, social, and psychological importance of boundaries… the Union has provided a framework within which new kinds of regional linkages have been able to emerge.”\(^70\)

Regarding the purpose of the state and its provision of legitimacy, Koskenniemi lists a selection of views from various groups with a stake in the current international law framework, all of which posit some external fundamental “authenticity” in contrast to the supposed artificiality of the state, on which society should be based.\(^71\) These views point to a belief that there is some universal, basic truth separate from history or social construction about the purpose of the state. Two problems arise with this supposition. First, the critiques are contradictory, and cannot be realized simultaneously. Second, the critiques are indeterminate, and provide no immediate solutions for the organization of public life.\(^72\) However, the conversation between these differing political ideologies finds its expression in the evolving state. According to Koskenniemi, the structure, purpose, and behavior of the state internationally is a language through which society expresses itself—and the legal rights and responsibilities accorded to


\(^70\) Alexander B. Murphy, Emerging Regional Linkages within the European Community: Challenging the Dominance of the State, 84 TIJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE 103-18 (1993).

\(^71\) (1) The neo-left critique of the liberal Rechstaat argues that enlightened political action should do away with the formal state in favor of the interests of the proletariat. (2) The neo-right critique of the social welfare state believes the market creates the best living conditions and state bureaucracies should step aside. (3) The conservative critique of real socialism argues against the socialist elite in favor of authentic communities. (4) The critique of elitism of third world states argues that the rural majority are oppressed by the postcolonial elites who continue colonial oppression to support capital cities and their corrupt practices. (5) The managerial critique argues that management problems must be dealt with by structures larger than the state, while political problems must be dealt with by local structures, and emphasizes rational structures over rigid statehood. (6) The ideologies of human rights view the state as an obstacle to the realization of human rights and individual freedom; transnational regimes should be created to protect individuals from the state. (7) The cultural critique of states critiques the assumed homogeneity of the nation and favors the natural indigenous cultural formations. (8) The feminist critique of the public/private distinction accuses states of upholding formal, patriarchal power distinctions and advocates tearing down the private divide so that silent voices (like women’s) can access civil affairs. Martti Koskenniemi, The Wonderful Artificiality of States, 88 AM. SOC’Y INT’L L. 24-5 (Proceedings of the Annual Meeting, 1994).

\(^72\) “Agreement about the primacy of individual rights is useless when such rights conflict, or appear to conflict; that is, precisely in situations where public power is needed to prevent Hobbes's helium omnium.” Martti Koskenniemi, The Wonderful Artificiality of States, 88 AM. SOC’Y INT’L L. 26-7 (Proceedings of the Annual Meeting, 1994).
states echo that expression. In other words, as society changes and priorities shift, the state and its corresponding community should be responsive to that.

If states do reflect the needs and beliefs of a given society, the present emphasis on universal human rights is leading to a state that is accountable to their promotion and protection. Over time, the state’s duty in human rights law has evolved from one of respecting rights to protecting and promoting rights. Treaties and conventions constitute the realm of human rights law that sovereign states choose to adhere to; however, the sources of international law also include customary law and general principles, which expand the realm of human rights law beyond state sovereignty. The trial at Nuremburg following WWII marked a move away from state sovereignty and increased the power of human rights law by expanding the notion of peremptory norms, exemplified by *jus cogens* within customary law. These peremptory norms have the power to override the most obvious model of territorial sovereignty in the international legal system, treaties, thus shifting the tense relationship between human rights and state sovereignty in favor of the former. Yet, this potential is thwarted by the control states continue to have over the human rights regime.

Christian Reus-Smit presents a constructivist argument of the relationship between human rights and sovereignty expressed through statehood. He claims that “the principle of sovereignty is widely considered the *grundnorm* of international society, and evolving human rights norms are seen as a compensatory international regime, the purpose of which is to limit the inhumane consequences of the sovereign order.” This channels Hedley Bull’s argument regarding the inherent contradiction between states and the purpose of the human rights

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73 Hans Kelson takes this view in order “to distinguish between an ethical and a juridical conception of the state: the state as the realization of Utopia, and the state as the form in which different Utopias clash today in order to mold the social reality in which we live.” Hans Kelson, quoted in *Id.*, at 28.


regime. The potential tyranny of sovereignty has today created a “global consensus that state sovereignty is conditional upon the protection of at least basic human rights.” Reus-Smit argues that instead of viewing sovereignty and human rights as two separate and competing regimes, we should see them as contradictory but potentially justifying sides of the same regime. Human rights norms were essential in the delegitimizing of colonialism and the subsequent creation of new states. Though initiated as a defense against the excesses of monarchical rule, the recent codification of human rights norms has acted simultaneously as a check to sovereignty and a legitimizer of it.

After the Second World War legitimate statehood was more explicitly tied to the protection of basic human rights. This connection has been articulated in an ever expanding battery of international human rights instruments. These instruments are elaborations on the principles laid down in Articles 55 and 56 of the Charter of the United Nations, which commit member states 'to take joint and separate action' to provide 'higher standards of living, full employment, and conditions of economic and social progress and development', and to cultivate 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. Further articulating these principles, the 1948 Universal Declaration of Human Rights defines the simultaneous satisfaction of individuals' economic rights (such as the rights to work and to social security) and civil and political rights (such as the right to vote, to free speech, and to due process) as a common standard of achievement for all peoples and all nations ...

The development and codification of human rights law, and its use as a potential check to state sovereignty and a justification for the exercise of sovereignty, thus implies that a primary purpose of the modern state is the protection and promotion of human rights. However, if we also accept that the human rights regime can be used as a tool of the states responsible for its creation, we see how subtle limitations on certain rights serve state interests and undermine the universal goals of human rights. Limitations to human rights and international law are found within the charter of the UN itself. Article 2:7 states “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.” To treaties and conventions, states have the option of making reservations to maintain their sovereignty. Treaties highlight yet another limitation of the

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81 UN Charter, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, (1945) at art. 2(7).
human rights law system: the gap between idealistic rhetoric and state practice. If a state violates human rights set down by a treaty, but does so in a way that only injures its own citizens, it is unlikely the state will be brought to justice.\textsuperscript{82} Similarly, the human rights legal system still functions inside notions of jurisdiction and state sovereignty. That is why much of the rights discourse, in particular the right to self-determination, fails to realize its potential.

D. Self-Determination as Progress?

1. Origins and Limits of Self-Determination

While speaking of human rights and dignity, the current international system nevertheless enforces the artificially-created selves of colonial territories through principles such as \textit{uti possidetis}, territorial integrity, and state sovereignty. It further substantiates the admitted evils of colonial practice by enforcing an understanding of “peoples” that is directly tied to the victimization of a group of people that inhabits a constructed colonial state, regardless of their previous identity or current character. Thus the goals of imperialism are nailed into the structures of order while leaders use vaguely codified laws and rhetoric to deny it. Self-determination, which emerged alongside the human rights regime out of the previously-described community of states, contains within it the potential to break down the elitism of the international system, but states continue to have the final say on its limitations.

The international system was born out of and based on the notion of sovereign states, where domestic legal jurisdiction is maintained and the involvement of the international community is subject to state consent.\textsuperscript{83} The doctrine of rational design envisaged an international legal system that advanced states’ joint interests.\textsuperscript{84} Constructivists argue that these institutions, once created, spread global norms and advance cooperation. Realists, on the other

\textsuperscript{82} The growing body of non-state actors presents a possible solution to this limitation. Henry Steiner, \textit{International Protection of Human Rights}, in \textit{INTERNATIONAL LAW 753} (Malcolm Evans ed., 2\textsuperscript{nd} edn., 2006).
\textsuperscript{83} \textsc{Ian Brownlie}, \textsc{Principles of Public International Law} \textit{287} (4\textsuperscript{th} edn. 1990).
\textsuperscript{84} Oscar Schachter argues that this concept is a fantasy because the international system is characterized by unequal power relations among states. In practice, the unequal relations play heavily into the relationship between human rights and state sovereignty. Oscar Schachter, \textit{International Law in Theory and Practice}, in \textit{INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 79} (Henry J. Steiner, Philip Alston, Ryan Goodman eds., 3\textsuperscript{rd} edn., Oxford University Press, 2007).
hand, contend that these institutions are simply another bastion of state power and serve no other function than to promote state sovereignty. The human rights movement is rooted in the international legal system and finds its authority—and limitations—therein. Specific to human rights, Henry Steiner suggests that “human rights norms may... threaten a State’s political structure and ideology.” Human rights violations may be confined to state territory, resulting in tension between the state as the primary insurer of and the primary threat to human rights, and human rights law.

At the beginning of the twentieth century, “a major divide emerged between ‘states’ and ‘peoples.’” The doctrine of self-determination acknowledged the presence of groups in the international system that had a claim to statehood or sovereignty but no ability to fulfill their goal owing to the power dynamics of the current arrangement. Simply put, self-determination is the “need to pay regard to the freely expressed will of peoples each time the fate of peoples is at issue.” Similarly, Brownlie describes the core of self-determination as “the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives.” Karen Knop notes that Brownlie’s definition is “instrumental to the protection of minority identity create a normative synthesis of the public international law principle of self-determination and the gamut of international human rights relevant to minority identity.” In spite of the potential inherent to the idea, the right to self-determination was implemented in such a way that it could be accommodated within the system of international law. First, the process gave self-determination to territories rather than peoples, even though the notion of decolonization was meant to be the exercise of self-determination by

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88 David Kennedy argues that this is a primary weakness of the human rights system. However, the tension keeps the relationship between the two balanced in many ways. David Kennedy, The International Human Rights Movement: Part of the Problem? 15 HARV. HUM. RTS. J. 101, 111 (2002).
colonized peoples.\(^{93}\) Rather than creating a process designed to identify authentic colonized peoples, the territory itself determined who had a right to self-determination. This territorial approach to self-determination was manifested through \textit{uti possidetis}, limiting newly independent states to territories whose boundaries had been drawn by previous colonizers.\(^{94}\)

The neocolonial nature of \textit{uti possidetis} was even recognized by the international community in an early case: the ICJ stated in the Frontier Dispute between Burkina Faso and Mali, “[a]t first sight this principle \textit{[uti possidetis]} conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice.”\(^{95}\) Thus coating the concept in concern over security and potential disruption, the international community ensured the right to self-determination would not grow beyond their control.

Though the growing global awareness and codification of human rights necessitated a right to self-determination of peoples, states quickly moved to limit this right to protect their own power. International law “closed the door on self-determination very quickly when the overseas territories (and the people living within these borders) had gained their independence and became states proper.”\(^{96}\) One of the methods of protection was to keep the right ambiguous, so that states would have the final say on who had access and what the outcome could be. Article 2(4) of the UN Charter protects the sovereignty and territorial integrity of pre-determined states. Some “have seen Article 1(2) as a promise of political emancipation for non-self-governing peoples. The UN Secretariat suggested already in 1945 that ‘peoples’ in the Charter was a wider concept than the already sovereign ‘states’.\(^{97}\)” According to others, the UN had the debate about self-determination built into it; on the one hand it was a body of sovereign states and frowned upon interference, on the other hand, any secessionist movement might appeal for self-

\(^{94}\) Id.
\(^{95}\) The Case Concerning the Frontier Dispute of 22 December 1986 (Burkina Faso v. Republic of Mali), I.C.J. Reports 1986, 567.
determination and threaten the sovereignty or territory of a state. General Assembly resolution 1514 briefly tipped the balance in favor of self-determination and decolonization, confirming that, “all peoples have a right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”98 Yet it goes on to denounce “any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country” as incompatible with the purposes and principles of the UN Charter.99 This doctrine limited self-determination to former colonies and thereby protected territorial integrity from being threatened from within a state.

The doctrine also contained the salt-water criterion for political independence, which specified its use for non-self-governing territories which were geographically separate and ethnically or culturally different than the countries that administered them, i.e. former colonies. In the OAU, “With few exceptions, secession has been refused on principle according to the ‘domino theory of disintegration,’ and to thwart neo-colonialist comebacks or reduced viability.”100 The salt-water theory implied that neither governmental effectiveness nor popular approval was a necessary factor for new states, and there was special emphasis on former white dominance overseas, while inter-ethnic repression were seen as less illegitimate. Österud argues that while this doctrine was acceptable to the world of established sovereign states, it did not satisfy disenfranchised nationalities. The manner in which self-determination originated and developed shows a legitimizing effort on the part of states who recognized that the international community must begin to embrace rights rhetoric, but did not want this rhetoric to actually allow change beyond certain limits.

Self-determination was thus constricted at its outset. James Crawford gave the following categories for units that could traditionally access the right to self-determination: “(1) mandated territories, trust territories, and territories treated as non-self-governing under Chapter XI of the UN Charter; (2) states (except those parts of states which are themselves units of self-determination); (3) distinct political-geographical entities subject to carence de souverainete; and (4) other territories in respect of which self-determination is applied by the parties.” This has

98 United Nations General Assembly Resolution 1514, Adopted by the UN General Assembly Resolution 1514 (XV), 14 December 1960, art. 2.
greatly limited the use of self-determination, which is used primarily for establishment and maintenance of a separate state, or less commonly, to associated-state status or integration.\textsuperscript{101}

The modern use of the right to self-determination is subjective and not yet matched to a precise or complete body of law.\textsuperscript{102} This subjective right can be interpreted as 1) the right of colonial peoples to become a state; 2) The right of minorities of a state (or multiple states) to become an autonomous state or join another state; and 3) The right of ethnic minorities to benefit from collective rights.\textsuperscript{103} However, the lack of clear and consistent jurisprudence regarding the right to self-determination results in an unjust system where states generally have the final say on its use and outcome.

2. \textit{Current Practice Regarding Self-Determination}

As previously described, the right to self-determination is limited in its inclusiveness and in its outcome by the international community of states. The Paris Peace Conference had “invoked an explosive doctrine of self-determination which was selectively employed to dissolve the Ottoman and Habsburg Empires, and to revise European borders at the territorial expense of the powers that had lost the war.”\textsuperscript{104} However, states involved did not use the power to its full extent, and in the 20s and 30s the idea of self-determination was mostly confined to European powers.

Initial attempts to modify the territorial integrity of states by applying the Wilsonian principle of self-determination failed. The precedence of territorial integrity was firmly codified in Article 10 of the Charter of the League; and the first test case, the settlement of the Aaland Islands question, gave priority to historically established state boundaries over the secessionist demands of peripheral minorities. The League favoured as an alternative to independent statehood the formal protection of minorities, partly expressed in separate peace agreements between contending states, partly by international declarations in support of minority claims, and partly by a right of appeal to the Council of the League.

\begin{itemize}
\item \textsuperscript{101} James Crawford, \textit{The Creation of States in International Law} (2\textsuperscript{nd} edn., Oxford: Clarendon Press, 2006).
\item \textsuperscript{103} Id., at 493.
\item \textsuperscript{104} Öyvind Österud, \textit{The Narrow Gate: Entry to the Club of Sovereign States}, 23:2 Rev. Int’l Stud. 174 (1997).
\end{itemize}
The current range of outcomes, however, appears to be expanding. A traditional typology of self-determination claims actually made would include: (1) claims involving establishment of a new entity: (a) claims by a group within an established entity to form a new entity from part of the preexisting entity; (b) claims by a group within a more fluid polity to form a new entity; (2) claims not involving establishment of a new entity: (a) claims of an entity to be free from external coercion; (b) claims of a people to overthrow their effective rulers and establish a new government in the whole of an entity; (c) claims of an entity or a people or a group within an entity to control its own resources; (d) claims of a group within an entity to special protection (e.g., autonomy); (3) claims of an established entity, or of a group within an established entity or fluid polity, to join or associate with an existing entity. New categories of claims have emerged through the breakup of the former USSR and Yugoslavia, which may be identified as: (5) units of a federal state that has been dissolved by agreement among all (or, in the case of Yugoslavia, most) of the constituent units; and possibly (6) formerly independent entities reasserting their independence with at least the tacit consent of the established state where incorporation into the other state, although effective and enduring de facto, was illegal or of dubious legality.

At the beginning of 2003, statistics showed 22 ongoing armed conflicts for self-determination, 51 groups using conventional political means to pursue self-determination, and 29 groups using militant strategies short of armed conflict. These groups are pursuing a variety of goals, including multilingualism, religious tolerance, review of borders, or independent statehood. As evident, a multiplicity of movements and goals are grouped together under the concept self-determination. All of this indicates that lately, the range and variety of claims to self-determination has increased dramatically in the international system. Nonetheless, groups

attempting to use self-determination have faced many challenges. Since the 1980s, the demand of ethnic, linguistic or cultural minorities for a separate state has gained notice, with such various groups as Croatians, Chechens, Basques, Quebecers, Scots, and the Kurds making claims.\(^{109}\) Some of these claims constitute political maneuvering to gain more power within an established state, but others have resulted in armed conflicts and full-scale attempts at securing the highest goal of self-determination, statehood. Which of these groups has claim? Which are more entitled to self-determination on account of rights abuse or political disenfranchisement? Should all have the right?

The International Covenant on Civil and Political Rights, as well as the International Covenant on Economic, Social and Cultural Rights declare that, “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.”\(^{110}\) International lawyers virtually all agree that whatever else the term ‘peoples’ may mean, it means the colonial categories of trust territories and non-self-governing territories established by the United Nations Charter.\(^{111}\) “All trust territories have now exercised their right of self-determination. Except for a few territories—most notably, Western Sahara—all non-self-governing territories have also achieved self-determination. The exercise of self-determination has most often resulted in independence, creating almost one hundred new states.”\(^{112}\)

However, outside of the Post-Colonial States who were the original beneficiaries of self-determination, the international system has now rejected secession as a legitimate action because

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\(^{111}\) Charter of the United Nations, 26 June 1945, 59 Stat. 1031, 145 BFSP (1943-5) 805 (1953). “While the UN Charter envisaged progress toward self-government for trust territories and non-self-governing territories, it made no mention of self-determination. It is generally accepted, however, that the subsequent development of international law gave these territories a right of self-determination which they were free to exercise by the establishment of an independent state, their association or integration with another state or the transition to any other freely chosen political status.” Karen Knop, *Diversity and Self-Determination in International Law* 52 (Cambridge: Cambridge University Press, 2002). See also Namibia (South West Africa), Advisory Opinion, I.C.J. Reports 1971, 16; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, 12; East Timor (Portugal v. Australia), I.C.J. Reports 1995, 90.

\(^{112}\) Karen Knop, *Diversity and Self-Determination in International Law* 52 (Cambridge: Cambridge University Press, 2002).
it interferes with the territorial integrity of already established states. While secession is not prohibited in international law, it is seldom encouraged.\textsuperscript{113} The Declaration of Friendly Relations states that “The establishment of a sovereign and independent State, the free association or integration with an independent State of the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”\textsuperscript{114} Yet later on it seemingly contradicts itself: “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States...”\textsuperscript{115} The rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities attempted to reconcile the contradiction by stating that,

\begin{quote}
The principle of equal rights and self-determination… does not grant an unlimited right of secession to populations living in the territory of an independent sovereign State… the right of secession unquestionably exists, however, in a special, but very important case: that of peoples, territories and entities subjugated in violation of international law. In such cases, the peoples have the right to regain their freedom and constitute themselves independent sovereign States.\textsuperscript{116}
\end{quote}

This idea of remedial self-determination, which may be available to non-colonized peoples in the case of gross human rights abuse, has mainly been confined to the realm of theory and requires further development. It may provide a way to break down the restrictions on the use of self-determination.

The coalescence of the current international community of states occurred in a capitalist manner, where territorialized sovereignty granted power and voice to groups aggressive enough to achieve statehood. These states then consolidated the international system to prevent power from dispersing, and, following a shift in the perceived moral purpose of the state, constructed a...
regime of universal human rights to provide legitimacy to their rule. However, in a bid to retain the majority of their power, they severely limited the right to self-determination, resulting in a neocolonial world order where states and others trust the human rights regime to protect non-state actors and communities, but deny these actors a voice in the creation of the laws and norms that govern them. The following chapter will discuss how this rights regime has failed to truly protect the rights or humanity of these groups, causing a need for an expanded right to self-determination.
III. Chapter Two

The framework of the human rights regime includes an ever-expanding number of conventions, declarations, and customary law norms designed to protect and promote human rights in a variety of circumstances. After the dissolution of the League of Nations and the creation of the United Nations, emphasis shifted away from group rights and towards individual rights.117 For a long time, then, the work of rights bodies focused almost exclusively on delineating individual rights within a liberal mindset that saw groups and group rights as inherently discriminatory and unnecessary in the idealized, equalized rights regime.118 Recent trends have shown a growing awareness that the individual rights framework is insufficient to protect cultural and ethnic minorities and indigenous populations, resulting in some limited attention to the notion of group rights.119 However, the efforts on the subject of both individual and group rights have failed to provide adequate protection to minority and indigenous populations. This chapter discusses the failure of the human rights regime to protect the rights of minority and indigenous groups or to afford them legal personality within international law, examining the Roma in Europe in particular as well as the American Indians. It then examines rights violations and the effect of a narrowly expressed cultural framework on the rights regime and non-majority groups.

A. The Human Rights Framework for Minority and Indigenous Rights

1. Individual Rights v. Collective Rights

The theory behind group rights relates to the importance of group membership in individual identity construction. Within a society, citizenship does not necessarily reflect all

119 Russel Lawrence Barsh notes that “The Universal Declaration reflected intellectual optimism in the ability of individuals to defy the power of States. Contemporary reality suggests a new view of protecting human rights, however, which recognizes the importance of empowering groups within the State, and enabling them to counteract State power. From this perspective, the recognition of group rights is not statist, but antistatist.” Russel Lawrence Barsh, Evolving Conceptions of Group Rights in International Law, 13 TRANSNATIONAL PERSPECTIVES 1 (1987). See also Marlies Galenkamp, Collective Rights in International Organisations: A Survey of Recent Developments, ADVISORY COMMITTEE ON HUMAN RIGHTS AND FOREIGN POLICY (The Netherlands, 1994).
interests of individuals, nor is the state the sole focus of loyalty. Rights attributed on the basis of group membership are perceived as essential to prevent the imposition of the cultural hegemony on members of more economically and socially marginalized groups. Collective rights give the individual members of a group rights as a moral entity, affirming belief in the value of cultural membership to the individual. “Membership of such groups is of great importance to individual well-being, for it greatly affects one’s opportunities … If the culture is decaying, or it is persecuted or discriminated against, the options and opportunities open to its members will shrink, become less attractive, and their pursuit less likely to be successful.”

Membership and group allegiance is a significant element of a person’s life and also frames individual personality. Furthermore, group membership reflects a wider sense of the individual’s position in society and thus becomes relevant to access to meaningful participation and rights. Notably, “our identity is partly shaped by recognition or its absence, often by misrecognition of others, and so a person who group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.”

Communitarian scholars advocate an international community that recognizes and defends group identity. Michael Sandel espouses the view that “intolerance flourishes most where forms of life are dislocated, roots unsettled, traditions undone,” and argues on behalf of group rights as essential to a functional society. This view confirms the idea that for individuals born into unequal, disadvantaged situations, focusing solely on individual rights does not adequately address their reality. If the purpose of human rights resides in securing the indispensable conditions necessary for existence as a human being, the realization of group rights will be essential to meet this objective. The recognition that multiple, distinctive groups are

present in the international community further necessitates their involvement in any system of
rights claiming to be universal. Varying cultural experience provides a wealth of meaning from
which international law can draw upon for the promotion of rights. Jeremy Waldron recognizes
that there should not be “one cultural framework in which each available option is assigned a
meaning. Meaningful options may come to us as items or fragments from a variety of cultural
sources.” Acknowledging the importance of groups to the international community will thus
affect the rights framework available on both an individual and collective level.

Identity is forged through a dialogue with those people that share our values and culture,
hinting at the conclusion that language and culture are not only aspects of the external world that
frame our identity, but they are also constitutive of selfhood. Correspondingly, Zelim
Sukabarty analyzes the importance of group identity:

The ‘profane’ dimension of collectivity is not something counterpoised to the
‘sacredness’ of an individual, but represents one of the vital ingredients of the
individual’s self, the psyche (self-consciousness, self-image, self esteem, etc.) as well as
the most important vehicle through which it experiences, actualizes and objectivates
itself. From this point of view, the preferred ways of dichotomization of these inseparable
facets of the same integral phenomenon seem unwarranted and artificial.

By contrast, the language of individualism attempts to isolate the self from its
surroundings, eliminating the importance of the cultural aspect of identity. Within this context,
the liberal state with its emphasis on equality and non-discrimination can be viewed as
“inhospitable to difference because it can’t accommodate what the members of distinct societies
really aspire to, which is survival.” Liberal societies contain a tendency to drive out non-
liberal forms of life, to ghettoize or marginalize them, or to trivialize them. To put it bluntly,
“civic nation states… endorse, implicitly or explicitly, the legal and political-cultural mores of
dominant nations …[M]inorities who feel… alienated by what they claim to be the imposition of

129 CHARLES TAYLOR, MULTICULTURALISM AND THE POLITICS OF RECOGNITION 32-3 (Princeton University Press
130 ZELIM SKUBARTY, AS IF PEOPLES MATTED 278 (Kluwer, 2000).
131 HELEN O’NIONS, MINORITY RIGHTS PROTECTION IN INTERNATIONAL LAW: THE ROMA OF EUROPE 46 (Ashgate
132 CHARLES TAYLOR, MULTICULTURALISM AND THE POLITICS OF RECOGNITION 61 (Princeton University Press,
133 HELEN O’NIONS, MINORITY RIGHTS PROTECTION IN INTERNATIONAL LAW: THE ROMA OF EUROPE 46 (Ashgate
the values of dominant nations dressed up in universal liberal values, have little recourse for redress.”134 Any system based on liberal values, then, can become antagonistic to difference, particularly when that is manifested through collectives rather than individuals.

Individual citizens may be equal within a state, but that equality is often bought at the price of embracing a dominant political culture that is somehow presented as a neutral medium, or hidden behind the discourse of modernization.135 In fact, some scholars logically note that societies attempting pluralism do so hierarchically—constructing levels of civilization that promote the “culturally superior” nation while gradually assimilating the rest.136 Tyranny of the majority within states and within the international community of states is played out in the distinction between individual and groups rights. A rights regime that views society through the lens of the individual will be incapable of seeing the inherent cultural/political bias against minority groups. Unable to clearly see the effects of its structures on collectives, the regime is incapable of comprehensively protecting or promoting their rights or legal personality. The current trend away from group rights and in favor of individual rights protection leaves only three options to liberal states that contain minority groups: assimilation, integration,137 and pluralism.138 Often, assimilation is the preferred policy, resulting in overt and subtle attacks on minority group identity in society. The focus on the individual, as well as the frequent reliance on assimilation techniques, results in an international framework that is antagonistic to groups that do not share the mindset or experience of the liberal state.

135 Id., at 352.
137 According to Special Rapporteur Capotorti, integration would seek to: (i) eliminate all purely ethnic lines of cleavage; ii) to guarantee the same rights, opportunities and responsibilities to all citizens, whatever their group membership. While this may appear to be a desirable objective, it gives rise to the question, how is transcultural unity to be achieved without damaging the cultures of the constituent units? F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, 5 UN STUDY SERIES § 373-377 (1991). 138 Walzer outlines three functions of pluralism as the defense of ethnicity against cultural naturalization; the celebration of an ethnic identity (involving both celebration of diversity itself and more specifically, of the historical and cultural development of the group); and finally, ethnic assertiveness which may serve to promote institutions and provide specific educational and welfare services. M. Walzer, Pluralism: A Political Perspective, in THE RIGHTS OF MINORITY CULTURES 148 (W. Kymlicka ed.), Oxford: Oxford University Press, 1995). Additionally, Adeno Addis has differentiated between two kinds of pluralism – ‘paternalistic pluralism,’ which aims to ‘protect’ and isolate the minority as the Other; and ‘critical pluralism’, which is committed to a relational dialogue between minorities and the majority. This critical pluralism which Addis advocates depends on the allocation of resources and institutional structures for minorities. Adeno Addis, Individualism, Communitarianism and the rights of ethnic minorities, 67 NOTRE DAME L. REV. 621 (1991-92).
An examination of the various human rights instruments in existence today reveals “a clear focus on the rights of the individual, although there is a limited recognition that the individual personality can only fully develop within the context of community.”\(^{139}\) The individual is acknowledged as existing within a variety of social relationships, such as family and religious groupings, but the rights to petition the Human Rights Committee in the UN are available to the individual rights holder only. The history behind individual rights theory actually aims to “liberate” the individual from group loyalties, making strong group affiliation incompatible with effective access to rights protection.\(^{140}\) Furthermore, there is emphasis on the negative formulation of non-discrimination, as opposed to any positive obligation to actively and creatively ensure the rights of minority populations. Together proclaimed as official policy in virtually every state, equality and non-discrimination are essential to any recognition of minority based rights,\(^{141}\) yet in reality, the enforcement of non-discrimination provisions varies greatly from nation to nation.\(^{142}\) Ultimately, collective rights have the ability to “transcend the domain of the atomized individual,” but these rights cannot be gained through individual rights mechanisms alone.\(^{143}\) The focus on individual rights rather than collective or group rights reveals the natural intention of the current rights framework to make statehood unnecessary to minorities and indigenous groups. Nevertheless, the framework is failing to truly offer an effective or meaningful measure of rights protection or legal personality to these groups.

2. *The Curse of Ambiguity in the Current Framework*

Ambiguity in definition or expected outcome of a convention or declaration leaves room for states to determine where and how the instrument will be enforced, resulting in a framework that is cut off at the knees by its reliance on state benevolence. A major drawback to the current framework is the lack of clarity that exists in defining groups, including minorities and


indigenous populations. According to Marlies Galenkamp, the idea of collective rights presupposes “the existence of de facto, pre-legally existing non-reducible collectivities, having collective interests.”\textsuperscript{144} She argues that collective rights should be restricted to relatively homogeneous communities where the identity of individual members is clearly framed by their membership in that community. Will Kymlicka distinguishes between immigrant groups which are “not ‘nations’ and do not occupy homelands” and “national minorities,” extending group based rights to minorities, while noting the role of a host state in determining the policy of integration necessary for immigrant groups.\textsuperscript{145} Kymlicka further separates both of these groups from “new movements,”—subcultures such as women and the disabled.\textsuperscript{146}

The fact that the term “minority” is not clearly defined in international law leaves a gap wherein states can deny minority rights to anyone they do not define as such. For example, Capotorti found that it is rare for states to recognize the Roma as a legal minority, most probably because recognized minorities are often well-defined groups with political and economic leverage. Groups such as the Roma which are scattered throughout the territory of a country seldom appear among those forming the subject of recognition by the state with legal effect.\textsuperscript{147} Some scholars argue that the most important aspect is “the exposition of a distinct culture and way of life as compared with the majority culture and living conditions should be seen as a decisive criterion for determining the nature of a minority.”\textsuperscript{148} Similarly, Fawcett defined a minority group as having “a common will—however conditioned—to preserve certain habits and patterns of life and behaviour which may be ethnic, cultural, linguistic or religious, or a combination of them, and which characterise it as a group.”\textsuperscript{149} However, international conventions continue to defer to states on the definition of minority. The Declaration on the Rights of Minorities in 1992 contains no definition, and international human rights documents

\textsuperscript{146} The problem with Kymlicka’s division of groups is its reliance on the territorial ideal embodied in the nation state, which results in a presumption of majoritarian nationalism. \textit{Multicultural Citizenship: A Liberal Theory of Minority Rights} 14-15 (W. Kymlicka ed., Oxford: Oxford University Press, 1995).
\textsuperscript{148} W. Heinz, \textit{Indigenous Populations, Ethnic Minorities and Human Rights} 1 (Berlin: Quorum Verlag, 1988).
use a range of terms, from “ethnic, linguistic and religious” minorities in the ICCPR to “national” minorities in the Council of Europe’s Framework Convention.  

Illustrative of this problem, the final version of Article 27 of the International Covenant on Civil and Political Rights refers to “members of minorities” rather than the minority itself as the rights bearer. Article 27 technically covers both minority and indigenous populations, but Jackson-Preece observes that giving states the right to determine whether minorities exist allows them to redefine national minorities to avoid the international obligations. This fact is seen in France’s reservation under Article 27: “France is a country in which there are no minorities.” In an effort to remedy the weaknesses of Article 27, a Declaration on the Rights of Persons Belonging to Minorities was drafted and adopted in 1993. The Declaration requires states to protect the identity of minorities as well as their existence, while the nine articles cover topics including education, which should promote awareness of traditions and culture, participation in cultural, religious, social, economic and public life, as well as the right to participate in decisions concerning the minority at a national and, where appropriate, regional level; and the right to associate and maintain contact with other members of the minority group. No minorities were involved in the drafting, however, and once again, the definition of minorities is not included. Furthermore, weak word choices such as “should” rather than “shall” or “will” implies gradual or partial rather than full and immediate implementation of standards. Sigler refers to the declaration as a “minimalist version of Minority Rights.”

The Framework Convention for the Protection of National Minorities suffers from similar failings. Gudmundur Alfredsson identifies shortcomings including the programmatic formulation, the limited scope of the special measures called for, weak wording and frequent qualifications in the text, the absence of group rights, a monitoring instance relying only on the

150 J. Packer, On the Definition of Minorities, in THE PROTECTION OF ETHNIC AND LINGUISTIC MINORITIES IN EUROPE 24-7 (Packer & Myntti eds., Akademie University, 1993).
153 Article 1(1): “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity.” UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities UN General Assembly Res. 47/135.
154 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities UN General Assembly Res. 47/135.
examination of state reports, political control over the monitoring body, and the apparent opening for states to arbitrarily identify minorities which are entitled to protection.\textsuperscript{156} The emphasis on “persons belonging to minorities” rather than the groups as such, as well as the absence of a collective right of petition to the Human Rights Commission, fail to adequately protect the human rights of those members, and neither the adoption of the UN Declaration on the Rights of Minorities in 1992 or the Council of Europe’s Framework Convention remedy this failure.\textsuperscript{157} Helen O’Nions notes that the watering down process from the political commitments in the Organization for Security and Co-operation in Europe to the Framework Convention results in “an even weaker, more nebulous approach” to rights protection. Furthermore, the failure of some major Council of Europe states to ratify either the Framework Convention or the Convention on Regional and Minority Languages “leaves little room for enthusiasm about the potential of these documents to provide effective protection for the minority rights of the Roma.”\textsuperscript{158}

In addition to the lack of clarity of terms, most major conventions and declarations are built around a seemingly naïve belief that states will fulfill their obligations of their own accord, even in cases where little oversight or accountability is built in. In fact, some have criticized the system of rights protection in the EU as relating only to states still in the process of applying for membership;\textsuperscript{159} once the states become full EU members, any problems with discrimination or rights violation are presumed to have been solved, and are not further noted.\textsuperscript{160} Gaetano Pentassuglia cites a number of examples where states have improved laws and policies towards minorities, but nonetheless, the picture that emerges is one of bilateral agreements and initiatives designed to protect minorities with strong political voices.\textsuperscript{161}


\textsuperscript{158} Id.

\textsuperscript{159} “For the EU, concern for minorities is primarily an export product and not one for domestic consumption.” Bruno De Witte, \textit{Politics versus law in the EU’s approach to ethnic minorities}, in EUROPE UNBOUND: ENLARGING AND RESHAPING THE BOUNDARIES OF THE EUROPEAN UNION 139 (Zielonka ed., London: Routledge 2002).

\textsuperscript{160} Id.

political voice, rarely benefit from such measures.\textsuperscript{162} The Committee on the Elimination of Racial Discrimination (CERD), for example, has issued numerous reports demonstrating the wide range of discriminatory practices that Roma are exposed to, including segregation in housing and education, contrary to Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination; racial hatred, contrary to Article 4; and the denial of access to public services including courts, contrary to Article 5c, which shall be discussed further below.\textsuperscript{163} However, CERD is not able to enforce the Convention, and efforts to remedy the effects of such violations are left to individual states.\textsuperscript{164}

In contrast with the human rights instruments available to minority populations like the Roma, the American Indians have been differentiated in international law as an indigenous population entitled to various special rights. Some overlap exists between the conception of minority and indigenous populations, yet the unique position of indigenous groups globally, along with what is assumed to be some measure of collective guilt, led to the recent development and codification of special indigenous rights instruments. In spite of this, the body of instruments relating to indigenous rights and legal personality fails in similar ways that minority rights doctrine does.

The progress made by indigenous peoples in international fora has, according to some, been aided by the political perception that this category of claimants is limited and unique, and that their claims can safely be treated as a special case.\textsuperscript{165} The current indigenous peoples’ movement began at the end of the 1970s.\textsuperscript{166} In 1994, a UN body adopted the Draft United Nations Declaration on the Rights of Indigenous Peoples, while in 1989, the International Labour Organization (ILO) replaced its largely assimilationist 1957 convention with the Convention on

\textsuperscript{162} Helen O’Nions, Minority Rights Protection in International Law: The Roma of Europe 142 (Ashgate Publishing Company, 2007).
\textsuperscript{163} CERD General Recommendation XXVII Discrimination against Roma adopted at 57th session on 16 August 2000.
\textsuperscript{164} Helen O’Nions, Minority Rights Protection in International Law: The Roma of Europe 82 (Ashgate Publishing Company, 2007).
\textsuperscript{166} Timo Koivurova, From High Hopes to Disillusionment: Indigenous Peoples’ Struggle to (re)Gain Their Right to Self-determination, 15 Int’l J. Minority & Group Rts. 1 (2008).
Indigenous and Tribal Peoples in Independent Countries.\textsuperscript{167} Since 1999, the Human Rights Committee has reliably regarded indigenous peoples as falling under Article 1 of the Covenant on Civil and Political Rights and the Covenant on Social, Economic and Cultural Rights, particularly in the cases of groups that are widely recognized as indigenous by the international community.\textsuperscript{168} Additionally, the Committee has not tried to confine Article 1 to guaranteeing only the resource self-determination of indigenous peoples, even though this has been its clearest emphasis.\textsuperscript{169} Even so, the concept and definition of “indigenous people” remains problematically abstract.\textsuperscript{170}

Lately, “the indigenous movement has achieved a significant victory in the sense that there is now a wide consensus that indigenous peoples possess the right of self-determination.”\textsuperscript{171} Article 3 of the UN Declaration on the Rights of Indigenous Peoples, as adopted by the Human Rights council, states that: “Indigenous 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.”\textsuperscript{172}

\textsuperscript{167} ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 28 ILM 1382 (1989).

\textsuperscript{168} See the following concluding observations where explicit references to either the concept of self-determination of peoples or Article 1 can be found: The Fifth periodic report of Finland to the Human Rights Committee, 24 July 2003, CCPR/C/FI/N/2003/5, § 86–93 (18); the Human Rights Committee on Finland, 2 December 2004, CCPR/CO/82/FIN.


\textsuperscript{170} The most widely is the definition given by Jose Martinez Cobo: “Indigenous communities, peoples and nations are those which, having a historical continuity with preinvasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors: (a) Occupation of ancestral lands, or at least of part of them; (b) Common ancestry with the original occupants of these lands; (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.); (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); (e) Residence in certain parts of the country, or in certain regions of the world; (f) Other relevant factors.” 4UN Doc. E/CN.4/Sub.2/1986/7/Add.4,11378. For the working definition used during the study, see Study of the Problem of Discrimination Against Indigenous populations, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/1986/7/Add.4, §379.


Indigenous Populations (WGIP), tenth session 31 July 1992, stated, “Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determinate their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government.”

The adopted Declaration identifies several of the significant powers that indigenous governments would wish to assert, including the ability to define their own membership, establish their own government institutions, participate in national decision making that affects them, and control their territory, environment, natural resources, and economic development. Yet despite this so-called victory, the indigenous right of self-determination has been severely limited by state efforts to retain their own power. Though earlier drafts of the UN Declaration on the Rights of Indigenous Peoples articulated the right to self-determination of indigenous peoples, important changes were made to the final draft adopted at the 61st session of the General Assembly, in September 2007. In order to make sure that there was no possibility to read too much into the indigenous right to self-determination, the version ultimately adopted made a crucial change in Article 46(1), which now reads: “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.” This effectively limited indigenous self-determination to state-sanctioned schemes of internal autonomy.

Despite the increase in international attention for indigenous rights, vague definitions and rhetoric which reinforces the primacy of state sovereignty limits any effectiveness the rights framework could have had. Internationally, indigenous participation in the international community is limited to a non-governmental consultative status at the ECOSOC and to eight seats at an ECOSOC’s advisory body—the UN Permanent Forum on Indigenous Issues, which discusses issues related to economic and social development, culture, the environment, and much more.

education, health and human rights.\textsuperscript{176} Robert Coulter summarizes the current situation of indigenous rights as follows:

(1) Indigenous populations' rights are imperfectly protected under existing municipal law regimes. Violations of fundamental rights of indigenous peoples are of the most serious sort nearly everywhere. (2) Widespread disregard of indigenous populations' rights can and does constitute a serious threat to peace, a threat to international security. (3) Rights of indigenous peoples are by nature group rights, rights of entities, which depend on the right of self-government for their realization; it is futile to try to protect indigenous peoples' rights without protecting them as group rights and as rights subject to definition and exercise by a collectivity with a government. (4) The wrongs we seek to remedy derive from wrongs against the entity or collectivity. (5) In many instances indigenous populations carry on relations with nations other than the dominant government. (6) In many instances, international cooperation to achieve humanitarian, economic and social ends is not possible or effective without immediate and direct participation of the indigenous peoples themselves speaking through their freely chosen governments. (7) Finally, ordinary and fundamental concepts of justice demand recognition of additional rights and recognition of juridical personality for indigenous populations.\textsuperscript{177}

The brief overview given above demonstrates the failings of the current human rights framework to constitute a suitable substitute to recognized statehood in the international community. The following sections will address more particular rights violations in order to further demonstrate the way the rights framework is failing, and to highlight the need for alternate solutions.

B. The Failure of the Human Rights Framework to Protect the Roma

The Roma continue to be one of the most discriminated minorities in Europe. Romaphobia, also known as Antiziganism or Anti-Romanyism, thrives owing to a combination of self-segregation on the part of the Roma and extreme xenophobia in dominant communities.\textsuperscript{178} Roma activist Rudki Kawcynski links the treatment of Roma to the situation of human rights for the periphery in Europe, stating, “We Roma have in the last few years become the measure for the newly created democracies in Europe: so long as those countries are not ready to let go of their

\begin{itemize}
\item DAVID CROWE, \textit{A HISTORY OF THE GYPSIES OF EASTERN EUROPE AND RUSSIA} (Palgrave Macmillan, 2004).
\end{itemize}
anti-Roma policies, they are as far from democratic development as they ever were under their communist regimes.”

Current marginalization and discrimination follows centuries of oppression, including slavery and genocide. The failure of the human rights regime with regard to the Roma goes beyond surface-level rights abuse, however. The extensive, overwhelming nature of the failure combines with different understandings of law and justice, and actually succeeds in erasing the personhood and humanity of the Roma community in international law, thus promoting a view that they are not fully human for the purposes of the international legal framework. This section will first discuss individual rights abuses and then describe how this adds up to a more profound attack on Roma agency and community survival.

The Roma have a long history of subjugation and abuse, culminating in their present status as a dispersed, heterogeneous minority in Europe. Like other minority populations, Roma have trouble accessing international and EU policies that could improve their lives and ensure their basic rights. Roma populations in Europe often lack citizenship and other rights because national governments in the region have laws and customs which contradict the values and statutes of international organizations and human rights law. Much of the current literature on the Roma promotes citizenship and assimilation within particular European states as the only way of ensuring Roma rights. This is despite the fact that social ills often stem from underlying racial and socioeconomic discrimination that goes far beyond a mere lack of political representation. Additionally, assimilation within majority communities as a precursor to rights protection contradicts the universality of human rights described by organizations like the UN. Even where Roma have gained citizenship and attempted assimilation within a dominant culture, as a community they remain perpetually “stateless” in the sense that they do not gain a truly equal voice within established states and are prevented from participating in a meaningful way.

As stated in the introduction, “Roma,” or “Romany,” is the name increasingly used by academics, activists, and politicians to refer to a wide variety of communities predominantly

occurring in Central and Eastern Europe, previously referred to as gypsies. Some scholars note that the introduction of the term “Roma” represents “an attempt to break away from this social stigma and to produce a more positive image of themselves as a single ethnic group occurring in different countries.” The Roma are often visibly and culturally distinct from the other populations, and make up more than ten percent of the population in Europe, with anywhere from ten to twelve million living in the European Union. Despite their sizeable population, they are systematically discriminated against by national governments, regional governing bodies, and individuals. A recent European Commission report stated that the Roma “represent the most discriminated and disadvantaged minority group in Europe.”

An examination of the many problems facing the Roma as a geographically dispersed minority will illustrate the need for some innovative arrangement to increase their access to rights protection mechanisms and political, economic, and social opportunities. As European nations become more xenophobic and nationalistic, violence and prejudice against this community has grown. Running parallel to the social issues is the legal question of Roma status. Roma are often stateless, since many European nations hold the principle of ius sanguinis as the exclusive or predominant principle in granting nationality or citizenship. This is in opposition to the European Convention on Nationality, adopted by the Council of Europe in Strasbourg in 1997, and other international agreements. When Roma do have citizenship within a given state, they are often politically disenfranchised owing to the trend of political parties

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185 EU urges action to integrate Roma, BBC WORLD NEWS at http://news.bbc.co.uk/2/hi/europe/7619703.stm.
188 Hungary arrests over Roma Murders, BBC WORLD NEWS at http://news.bbc.co.uk/2/hi/europe/8215552.stm.
189 JASMINKA DEDIĆ, ROMA AND STATELESSNESS 1 (European Parliament: Committee on Civil Liberties, Justice and Home Affairs, 2007).
190 The Convention on Nationality contains several articles which should immediately include the Roma as citizens in their state of residence. “The Strasbourg Court has stated that the non-provision by states of proper personal documentation which would facilitate employment, medical care or providing for other crucial needs, may indeed contradict the right to private life, a human right protecting the individual’s moral and physical integrity.” Council of Europe European Convention on Nationality, Nov. 6 1997, E.T.S. No. 166.
representing the interests of particular ethnic communities.\footnote{Aidan McGarry, \textit{Ambiguous nationalism? Explaining the parliamentary under-representation of Roma in Hungary and Romania}, 19:2 ROMANI STUD. 103-124 (2009).} Electoral campaigns and mobilization based on ethnicity are a \textit{leitmotif} of politics in Central and Eastern Europe, and parties sometimes use ethno-nationalism to bolster support, thereby linking territory to ethnic affiliation.\footnote{Huri Türsan, \textit{Introduction: Ethnoregionalist parties as ethnic entrepreneurs}, in \textit{REGIONALIST PARTIES IN WESTERN EUROPE} 5-6 (Lieven De Winter & Huri Türsan eds., London: Routledge, 1998).} Aidan McGarry notes that “demographically, Roma should be a political force in many Central and Eastern European states, yet this has not translated into electoral success for a variety of reasons, including an ambivalent attitude of Roma towards elections as well as the lack of clearly defined political objectives on the part of Romani political elites.”\footnote{Aidan McGarry, \textit{Ambiguous nationalism? Explaining the parliamentary under-representation of Roma in Hungary and Romania}, 19:2 ROMANI STUD. 104 (2009).} Furthermore, it has been argued that “fragmentation and factionalism has permeated the thin stratum of Roma representatives,”\footnote{PROJECT ON ETHNIC RELATIONS (PER), POLITICAL PARTICIPATION AND THE ROMA IN HUNGARY AND SLOVAKIA 2 (Princeton, NJ, 1999).} resulting in political activity that legitimizes the state governments without offering Roma any real representation or voice within the wider community.\footnote{Martin Kovats, \textit{The politics of Romani identity: Between nationalism and destitution}, OPEN DEMOCRACY 3 (2003).} As a result, Roma communities have typically been denied “full and effective participation in the political processes that have sought to govern over them,” and the rights of citizenship in some cases become a tool of assimilation rather than representation.\footnote{J.S. ANAYA, \textit{INDIGENOUS PEOPLES IN INTERNATIONAL LAW} 152 (2\textsuperscript{nd} edn., Oxford: Oxford University Press, 2004).}

1. \textit{Statelessness}

The case of the Roma highlights the problem with the current rights regime as an effective tool for minority populations. The international human rights regime is purportedly based upon the notion of universal human rights, endowed to man by nature of his humanity rather than his political or national inclusion.\footnote{SEYLA BENHABIB, \textit{THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS} 7 (Cambridge: University of Cambridge, 2004).} “Within a citizenship framework, we are entitled to rights as ‘citizens’ of a sovereign, territorially bounded political entity… Within a human rights framework, we are entitled to rights as ‘human beings;’ since we are born into them, they
precede our political status and practice as citizens, and they are essential and inalienable.”198 A major problem of the current regime, however, is a “citizenship bias” wherein states’ greatest obligations towards human rights are set down vis-à-vis their own citizens.199 This leaves vast populations of migrants, aliens, and stateless people outside the protection of a human rights regime purported to be universal. With no fora to protect so-called “universal rights,” states retained the power to confer or deny rights within their sovereign jurisdiction.

The time period following WWII left thousands of Roma stateless. The period “revealed the limits of abstract commitments to human rights in an international system in which the main guarantor of human rights is the nation-state: Since the Declaration of the Rights of Man and Citizen, ‘rights of man’ were practically ‘rights of citizens.’”200 Though some structures have developed to protect rights independent of the state, these structures are extremely limited.201 In addition to the problem of acquiring and retaining citizenship, access to political, legal, and social rights is restricted for stateless populations. Because human rights are primarily assured through the state apparatus, non-citizens of all kinds often find themselves disenfranchised and unable to protest against violations. “Despite the multiplication of human rights instruments after World War II, we still find non-citizens in a very precarious condition as many of their rights, especially those that are related to political action and necessary for claiming existing rights and demanding new ones, depend on the charity or good-will of the receiving states.”202 Ayten Gundogdu’s opinion refers to all manner of non-citizens, but arguably the most vulnerable groups are stateless populations who lack rights both in their current domicile and outside because they have no home state to return to. Roma face exclusion on the basis of several

201 The individual as a non-state actor has achieved new status in the international system since the creation of the UN, especially in the case of humanitarian laws of war.201 Since the trials at Nuremberg, individuals have been elevated to actors on the international plane, capable of being brought to trial outside of their state. The relationship between an individual and a state is now more knotty than ever: acting at the behest of a state, an individual may be individually responsible, but a state may also be responsible. Jose Alvarez, International Institutions as Law Makers (2005), in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 685 (Henry J. Steiner, Philip Alston, Ryan Goodman eds., 3rd edn., Oxford University Press, 2007).
202 AYTEN GUNDOGDU, CITIZENSHIP AND HUMANITY IN THE MAKING: HUMAN RIGHTS, NON-CITIZENS, AND THE RECONSTITUTION OF POLITICS 3 (Department of Political Science, University of Minnesota, 2005).
factors: legal provisions reliant on blood, preference of ethnic kin, conflicting policies of state succession, or a simple lack of documentation required for citizenship. Underscoring these legal exclusion factors is a growing mindset that the Roma are uncivilized and must conform to European norms of lifestyle and behavior before they will be assured of their rights. This viewpoint directly contradicts the ethos of international human rights law, which has made great strides in Europe in the last decade, at least on paper.

As a potential human rights tool, the European Convention on Nationality of 1997 begins by defining nationality: “‘nationality’ means the legal bond between a person and a State and does not indicate the person's ethnic origin” and, in Article 3, indicates that “Each State shall determine under its own law who are its nationals… in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality.” Immediately, the convention creates space for international consensus on the issue of nationality to prevent ethnic majorities from denying other groups’ rights. Article 4 firmly states that: “everyone has the right to a nationality,” “statelessness shall be avoided,” and “no one shall be arbitrarily deprived of his or her nationality.” Here, the convention verifies the importance of legal citizenship. “Citizens are entitled to a variety of state benefits… Non-citizens are unable to vote in elections and are unable to participate in certain professions such as the police and the military. Those non-citizens who are not entitled to permanent residence may be deprived of a host of associated rights.” Article 5 emphasizes the importance of non-discrimination in awarding nationality, stating, “The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.” Most scholars currently regard increased adherence to this convention as the primary solution for stateless Roma, but this seems to be a problematic conclusion. State sovereignty often overrides

208 Council of Europe, Explanatory Report to the European Convention on Nationality. at art. 5.
these conventions, as states continue to sideline minority rights, pushing either for the swift assimilation or expulsion of minorities and stateless groups.

The European Roma Rights Centre (ERRC), acting as a non-state actor pursuing Roma rights, has contributed to the call for citizenship and assimilation within dominant societies. This group raises an interesting case study: in 1999, the Czech Republic caved to international pressure to amend a 1992 law that had rendered thousands of Roma stateless. The ERRC suggests using the Czech case as a model for implementing change in other Eastern European states, especially to reverse laws that deny Roma citizenship. The ERRC draws dramatic linkages between statelessness and lack of healthcare, education, and social services that are not backed by recent data. The implication that access to state welfare will drastically improve the rights of Roma is erroneous, however. According to a report by the European Union’s Fundamental Rights Association (FRA), nearly two thirds of Czech Roma report they have suffered discrimination in the last year. The figure is the highest for any minority in the EU, despite changes in Czech citizenship laws. If Roma continue to be persecuted socially for their identity, the most positive thing participation in established states could provide is a forum to bring these concerns to the state legal system in order to gain accountability to the populace. But this is a negative response and will continue the cultural assumption that Roma as an entity are outsiders who must either be excluded or assimilated.

The Council of Europe has emphasized that states should employ all possible means to end the de facto or de jure statelessness of Roma and provide them with a nationality, in accordance with the standards of the 1997 European Convention on Nationality and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State

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212 “There will be those who, like some indigenous people in Canada, reject the claim that equal citizenship is a good, because for them the language of equal citizenship has always been used to justify cultural assimilation policies.” Melissa Williams, *Non Territorial Boundaries of Citizenship*, in IDENTITIES, AFFILIATIONS, AND ALLEGIANCES 234 (Seyla Benhabib & Ian Shapiro eds., Cambridge: Cambridge University Press 2007).
Succession. However, state laws continue to disregard important conventions like those mentioned above. Recent trends in Europe showcase the exclusion of the Roma from citizenship, as well as their exclusion from a wider application of human rights. “Croatia adopted a citizenship law aimed at excluding Serbs, Roma and others from access to belonging in the new state, and has reinforced this law with extremely restrictive practice in this area, including forced expulsions of Roma from Croatia.” This is in direct violation of Article 31 of the 1964 Convention Relating to the Status of Stateless Persons. “Exclusion can be overt, when the state is defined in the constitution as the state of a given nation. An example is the 1990 Constitution of the Republic of Croatia: The Republic of Croatia is established as the national state of the Croat nation and a state of members of other nations and minorities, who are its citizens: Serbs, Muslims, Slovenes, Czechs, Slovaks, Italians, Hungarians, Jews and others.” Similarly, the Preamble of the 1991 Constitution of Macedonia defines that State as “the national State of the Macedonian people, which guarantees ... permanent coexistence of the Macedonian people with Albanians, Turks, Wallachians, Roma, and other nationalities living in the Republic of Macedonia.” Additionally, “according to the Preamble of its 1990 Constitution, Serbia is in the first place a democratic State of the Serbian people.” These states could almost be called “ethnocracies” instead of democracies because their identity is based on a nationality/ethnicity rather than the will of citizens. Macedonia set out restrictive citizenship laws once it gained independence, which had an adverse affect on the Roma. “Slovenia adopted an extremely restrictive citizenship law excluding undesirables from the south… The Slovene Constitutional Court ruled the act illegal in 1999, but a subsequent public referendum reinforced government intransigence.” All of these cases illustrate the incongruity that exists between domestic law and international law and the failure of the human rights regime to break through the sovereignty of states, even in the midst of human rights abuse.

Current literature still seems to regard participation and assimilation as not only the highest goal for Roma, but as the only solution to their rights protection. In spite of the

213 Jasminka Dedić, _Roma and Statelessness_ 1 (European Parliament: Committee on Civil Liberties, Justice and Home Affairs 2007).
216 _id._
217 Jasminka Dedić, _Roma and Statelessness_ 1 (European Parliament: Committee on Civil Liberties, Justice and Home Affairs, 2007).
international and regional attempts at promoting rights through citizenship, stateless Roma face severe constrictions on their ability to earn money, receive an education, pursue legal rights, or travel. “Rights to freedom of expression and peaceful assembly, as two major rights that guarantee effective exercise of existing rights and enable collective action for demanding new rights… can be suspended in times of national emergency, as stated in the International Covenant on Civil and Political Rights.” States have little incentive to adhere to protocols that do not directly influence their relationship to the lucrative European Union structure. Additionally, the social situation in many Eastern European countries suggests that even if such populations were granted citizenship, human rights violations would continue.

2. Rights Abuse and Failed Responses

In addition to statelessness, Roma face a myriad of problems in Europe including poverty, lack of integration into local economies, lack of access to education, unequal or discriminatory education, lack of access to healthcare, and lack of legal or political representation. The rights abuses are not limited to certain individuals or locations, but culminate in a massive, systemic attack on the Roma as a community. The endemic nature of the abuse cannot be remedied through the current human rights framework precisely because the framework does not yet recognize the profound implications on group identity, or what it means for individual violations to do violence to an entire group as such. The human rights violations cut at the nature of the Roma population and at their way of living. Thus far, response to these violations has centered on individual cases that entirely miss this wider crisis.

Geoff Gilbert discusses the failures of the human rights framework to protect minority rights, including its failure to define minorities and decide whether minority rights are human rights. He also looks extensively at whether legal rights alone are sufficient for minority

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protection. This question is relevant to the Roma in Europe because aside from lacking citizenship and basic rights, there are massive social forces set against them that law cannot hope to change instantly. Gilbert critiques the framework convention set down by the Council of Europe as a weak attempt to protect minority rights that will fail as many other attempts have before it. He particularly criticizes the convention’s vagueness, and suggests lack of enforcement make it irrelevant. For the Roma population, greater involvement in established states will not be enough to improve their status, since they will remain minorities whether or not they have citizenship and access to civil society.\(^{220}\)

Aside from civil disenfranchisement, Roma are often confined to ghetto-like living conditions. They face discrimination in the workforce and in educational opportunities.\(^{221}\) A practice has arisen in the region of relegating all Roma children to schools for the mentally handicapped.\(^{222}\) This, among other behavior, has strengthened the cycle of poverty and discrimination for Roma. Roma communities suffer “widespread discrimination and abuse in many countries, notably in southern and central Europe where the benefits of economic growth have starkly failed to trickle down to many areas. In Slovakia for example… some Roma… live in dirt-poor conditions reminiscent of the Dark Ages.”\(^{223}\) Many are living outside any polity without birth certificates, work permits, or drivers’ licenses.\(^{224}\) Without these basic documents, accessing social services or jobs in Europe is extremely difficult. The poverty and discrimination Roma experience prove that European states are failing not only to fulfill their obligations under the Council of Europe, but also to fulfill the most basic requirements of the Universal

\(^{220}\) Gilbert discusses the failure of previous laws and treaties to protect minorities during WWII; since the Roma were some of the most persecuted of the time, Gilbert’s argument suggests that current law should have remedied previous failures. However, here his argument falls short and does not adequately critique current laws for their inability to evolve. One fascinating aspect of this article is the notion that the existence of minority groups can be a threat to peace, and minority laws are not merely there to protect minority rights, but also to protect majority populations from the incendiary presence of these populations. This is an important point to remember when considering alternate means of rights protection. Geoff Gilbert, *The Council of Europe and Minority Rights*, 18 HUM. RTS. Q. 160-189 (1996).


\(^{223}\) Gypsies want global “nation” to fight exclusion, GLOBAL POLICY FORUM, at http://www.globalpolicy.org/component/content/article/172/29961.html.

Declaration of Human Rights. The UN Independent Expert on Minority Issues recently commissioned a paper focusing on the human rights regime within the European Union. Claude Cahn and Sebihana Skenderovska begin by stating that the rise of the EU has created an illusion of human rights protection where none actually exists. They argue that the Council of Europe has been effective in some states, but problematic practice continuing in individual states adds up to a culture of rights violation that has not been successfully addressed at the regional level.

A major concern for Roma is failure to achieve the right to housing, reflected in the Universal Declaration of Human Rights and reaffirmed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which calls upon states parties to take all necessary steps to ensure the realization of the right to adequate housing. Furthermore, the UN Committee on Economic, Social and Cultural Rights (CESCR) notes that this right does not refer simply to the existence of a “roof over one’s head,” but that it “should be seen as the right to live somewhere in security, peace and dignity.” According to a recent study conducted by the European Union Agency for Fundamental Rights, “The existence of prejudicial attitudes on the part of public authorities and/or the general public” leads to the allocation of housing for Roma “in areas separate from the majority population,” which are often “low value sites, such as polluted land or adjacent to waste dumps or motorways.” The research found that in EU member states such as Bulgaria, the Czech Republic, Greece, Spain, France, Cyprus, Hungary, Italy, Lithuania, Poland, Portugal, Romania, Slovenia and Slovakia, Roma “live in segregated areas,” while in Belgium, Denmark, Portugal and Sweden, Roma often “live with other minority groups, particularly immigrants, in socially deprived areas of low quality housing.” The study reports overcrowding and a risk of health problems; in addition, housing occupied by Roma “does not

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226 According to Article 25.1, “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing […]” UN General Assembly (1948), at http://www.un.org/en/documents/udhr/ (04.03.2010). See also UN General Assembly (1966), Article 11(1), at http://www.ohchr.org/english/law/cescr.htm (04.03.2010).

227 CESCR, General Comment 4: The Right to Adequate Housing (1990), at: http://www.unhchr.ch/bsb/doc.nsf/009b725fe87555e5c8025670c004fc803/469f4d91a9378221c12563ed0053547e?OpenDocument#%20Contained%20i (04.03.2010).

tend to be regularly maintained by public or private landlords, and informal or unauthorised settlements are often constructed from recovered waste materials such as cardboard or plastic.” Furthermore, the study found that Roma settlements often have limited access to public utilities, such as clean drinking water, waste disposal, connection to sewage pipes, electricity or gas supplies. The study attributes poor housing to segregation, which stems from prejudice on the part of local authorities and landlords, or others involved in the housing industry. For example, banks are apparently reluctant to offer mortgages to applicants over the working age and Roma women, “who often do not enjoy equal pay to non-Roma women or men, [and] find themselves unable to accumulate sufficient resources to purchase or rent property.”

A similar study interviewed Roma in Bulgaria, Czech Republic, Greece, Hungary, Poland, Romania and Slovakia, and showed that only 11.5 per cent of those Roma experiencing discrimination over the preceding 12-month period actually chose to report it, and the majority of those who did not report these incidences stated that “this was in part because they believed that nothing would be achieved by doing so. A quarter of respondents were also concerned that reporting would result in making the situation worse. Sixteen per cent feared that they might be subject to reprisals.” Despite this segment of the population’s awareness of the rights violations involved, they could not access the right because of the overwhelming sense of disenfranchisement within European society.

Aside from housing, nearly every member state of the EU reports major discrimination that is often policy-related, indicating that the rights abuse is systemic to the political system. In Norway and other EU states, forced sterilization of Roma women occurred until at least 1977, and possibly later. In 2005, Germany deported thousands of Romani refugees to Kosovo, in violation of the 1951 refugee convention. More recently, in Northern Ireland in 2009, twenty Romanian Romani families (up to 115 people) were forced to seek refuge in a local church hall after being attacked by citizens. In 2010, French authorities caused controversy by

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229 Id.
230 Id.
232 Nicholas Wood, Germany Sending Gypsy Refugees Back to Kosovo, NEW YORK TIMES (19 May 2005), at http://www.nytimes.com/2005/05/19/international/europe/19kosovo.html?_r=1.
demolishing roughly fifty-one Roma camps and deporting the Roma to countries they had previously migrated from. In the Czech Republic, a 2010 survey shows that 83% of Czechs consider Roma asocial and 45% of Czechs would like to expel them out of Czech Republic altogether. In the UK, statistics show that 90% of retrospective planning permission applications by Roma attempting to gain permission to live on their own land were initially refused by local councils, compared with a national average of 20% for other applicants. In August 2008, the Commissioner for Human Rights of the Council of Europe Thomas Hammarberg stated that “today's rhetoric against the Roma is very similar to the one used by Nazis and fascists before the mass killings started in the thirties and forties. Once more, it is argued that the Roma are a threat to safety and public health. No distinction is made between a few criminals and the overwhelming majority of the Roma population. This is shameful and dangerous.” This brief survey of facts barely scratches the surface of the overarching environment of rights abuse Roma face in Europe. Even where they have citizenship and supposedly equal participation in democratic state, Roma remain perpetually “stateless” in the sense that they do not gain a truly equal voice or equal rights protection.

As previously argued, the systemic nature of the abuse has not been remedied through the current human rights framework. Instead of addressing the abuse at the level of the group and its expression of identity, response centers on individual cases, thereby failing to uproot the deeper discrimination at work. For illustration, we can look to several court cases that address the discrimination in education policies throughout Europe. In 2006, the European Court of Human Rights ruled on the “Ostrava” case, i.e., D.H. and Others v. the Czech Republic, and the original decision dealt a massive blow to the development of minority rights. The case challenged the disproportionate numbers of Roma children placed in special schools for the learning impaired in


the Czech Republic, and was viewed by many as “the centre-piece of the litigation strategy of the Romani rights movement.” Despite the prevalence of discrimination in education, this case was the first to reach the European Court of Human Rights, and the first decision taken by the Court ruled that no violation had occurred by six votes to one. Morag Goodwin critiqued this decision, stating, “the Court’s focus on intent and its refusal to allow statistical evidence to demonstrate it appears to disregard one of the most important purposes of prohibiting indirect discrimination, that of exposing the entrenchment of discrimination within the structures and institutions of our societies.”

In 2007, the Grand Chamber revised the decision, finding a violation of Article 14 along with Article 2 of Protocol 1. However, it has become clear that “Despite this landmark decision, there has been little change: the ‘special schools’ have been renamed but still follow the same substandard curriculum; Roma continue to be assigned to these schools in disproportionate numbers; and attempts to challenge the biased attitudes of teachers and parents have been minimal.” In 2008, the Court upheld the Ostrava decision in the case of Sampanis and Others v. Greece. Again, though, the ruling utterly failed to incite any real change in the system. Evidence of that failure came on 25 March 2011, when the same applicants filed yet another claim with the ECHR regarding the continuing racist educational segregation of Roma children to a Roma-only ghetto school, the Elementary School of Aspropyrgos. The new complaint shows that discrimination continues despite the 2008 Sampanis case; additionally, it shows how individual court cases as a response to systemic rights abuse are failing to bring about any substantial remedies for the Roma.

3. The Denial of Roma Legal Personality in International Law

239 Id.
240 Id., at 426.
The failure of the human rights regime to protect the Roma as described above goes beyond individual rights abuse and culminates in the denial of legal personality to Roma under international law. The supposed universality of human rights and the rhetoric employed by the rights regime is challenged by the power of states to deny rights to various groups. Without the existence of any meaningful cosmopolitan citizenship, the human rights regime remains skewed in favor of majority-communities and the accessibility of international law is subject to a tyranny of the majority. In the case of the Roma and other populations experiencing similar abuse, this amounts to an attack on their moral agency to participate in the processes of international law.

In January 2001, the European Court of Human Rights ruled on five cases brought by members of the Roma community in the UK.\(^\text{243}\) The Roma claimed they had suffered a violation of the right to respect for private and family life under article 8, paragraph 1 of the European Convention on Human Rights, because they had been evicted from land they legally purchased with the intention of living on it. Article 8 reads,

> Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except… in the interest of national security, public safety of the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.\(^\text{244}\)

The European Court of Human Rights agreed that the right had been interfered with, but ruled that there was no violation because the interference was considered “necessary in a democratic society” in order to protect the rights of the majority.

Sal Buckler, conducting field research in the UK at the time, describes how the Roma he worked with were not particularly interested in the ruling, and how they articulated a sense that “any decision by Strasbourg or another mainstream source of ‘justice’ would fail to convey a sense of their humanity, in that it would not treat them as fully human.”\(^\text{245}\) The European legal concept of family life is not understood the same way by Roma, who have a “profoundly

\(^{243}\) Chapman v. United Kingdom application 27238/95; Beard v. United Kingdom 24882/94; Coster v. United Kingdom 24876/94; Lee v. United Kingdom 25289/94; Jane Smith v. United Kingdom 25154/94.


different experience of family [which] leads them to experience what it is to be human in a way very different from that which underpins rights law discourses.”

The specificity of culture behind the human rights regime thus limits who the law views as human: if the law is seen as a reflection of human moral agency, the vision of “an absolute and objective international law” is disproved by the subjectivity of human experience.

Though the European Court accepted that the Roma lifestyle might be fundamentally different from other UK populations, they still upheld the UK actions as “necessary in a democratic society” to uphold the rights of others. Furthermore, the Court claimed the families in question could move to one of the official sites provided by the government, despite the fact that some official sites “had no available pitch, were often location some distance away from there the applicants lived, and could not… provide a congenial and peaceful atmosphere.”

Finally, the Court rejected the idea that human rights contain any positive obligation to recognize and empower the full personhood and participation of minorities in democratic processes of the state, arguing that its mandate was mere negative protection. The lack of recognition of nomadic or counter-culture lifestyles in the United Kingdom led to the Criminal Justice and Public Order Act of 1994, which sought to protect the dominant cultural values of stringent planning controls and sedentarism by criminalizing previously civil violations relating to nomadism.

The Court’s judgment in the Coster Case recognizes the tension between the needs of minorities and the needs of society as a whole. Yet by ignoring the cultural spectrum through which this judgment would apply to the Roma families, the Court wrongly assumed that the rights discourse underlying their judgment was singular and universal. Toivanen has described

246 Id., at 245.
248 Coster v. UK, § 87.
250 From the Court judgment: “The Court is not convinced… that Article 8 can be interpreted to involve such far-reaching positive obligation of general social policy…” Chapman v. UK, § 94. See also the Court’s judgment in the case Connors v. UK (application 66746/01) 27 May 2004, which essentially ruled against actions of the local authorities rather than in favor of the rights of Gypsies.
251 The Criminal Justice and Public Order Act 1994 (c.33).
252 Coster v. UK, §127.
the partiality of knowledge, through which the rights discourse can be seen as a dominant understanding surrounded by other equally valid, though less widely spread, understandings.253 Human beings reach their full development in compellingly social situations, surrounded by culture.254 In other words, “we are taught to be fully human by people who have been taught before us.”255 Jackson demonstrates that social awareness informs our behavior and reinforces a feeling of “rightness,” and these actions contain moral value and grounds our ability to act as moral beings.256 Cultural identity does not mean mere diversity of life experience, but a diversity of understanding on what it means to be human.

The Roma conception of the family is profoundly linked to their conception of what it means to be human.257 Noting Anderson’s imagined community—which includes a world of members whom we may never meet—as relevant to the Western conception of moral agency, Buckler contrasts this with the face-to-face interactions that form the Roma understanding of moral agency, law, and justice. In the mindset of the Roma community he worked with, Buckler found that:

‘Proper people’ are those who are known to ground their responsibility and actions in a sense of mutual responsibility to others in the group. ‘Not proper people’ are those who rely upon imaged structures such as states to guide their moral decisions and actions—in other words whose understanding of moral responsibility is grounded in a sense of responsibility to an ideal or imagined norm as opposed to mutual and contingent experience.258

Family, therefore, is the baseline of moral decision-making and sense of social responsibility, and consists of an extended network that Roma have regular face-to-face contact with.259 When the Court spoke of family life, they referred to a discrete, private experience,

259 Id., at 253.
which was a purely Western and non-transferable concept. Family life in the Roma mindset is a semi-public realm not confined to the house as in Western cultures; interference with family life, therefore, obstructs their ground of moral action and social accountability. Like other non-Western cultures, the individual is not viewed as independent of the community, but rather finds its full expression within the community. Buckler concluded that “the Gypsies’ appeals for justice which was rooted in their desire to keep alive the very heart of their sense of Gypsiness—the very grounds of their claims to be human—could not be articulated without becoming reframed as something else.”

The core conflict of human experiences illustrates how the law erases Roma humanity by trying to provide universal justice through an enforced, foreign cultural framework. When you multiply this particular case by the plethora of rights abuse and potential legal cases described above, it becomes clear that better access to human rights law is not going to solve the deep-rooted conflict in value systems and life experience that prevents international law from giving meaningful legal personality to the Roma or other minority groups. Instead, the moral agency of Roma must be acknowledged internally, to provide governance and justice to their own community, and externally, to participate in the conversation of internal law and widen its application beyond the current narrow cultural framework.

C. The Failure of the Human Rights Regime to Protect American Indians

Within the United States, the American Indians have faced tremendous discrimination, including genocide, enslavement, forced assimilation, and relegation to the dark corners of civil and cultural life. Although it is beyond the scope of this discussion to cover the plethora of rights

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262 "The individual is that which his belonging to a given group makes him. He is neither known nor recognised as an individual, but by the situation within the group, which determines his identity both for himself—his self-designation—and for others: the ways in which he will be seen by them, and see them in turn. Hence the significance, when people meet, of employing linguistic and cultural elements and designations, enabling the individuals in question to define themselves and each other, to differentiate themselves and yet feel a common bond.” J. P Liégeois, Roma, Gypsies, Travellers 63 (C/E, 1994).
abuses, both past and present, particular historic examples of rights abuse are relevant to the broader understanding of American Indian identity and legal status domestically and internationally. The legacy of assimilationist policies of the U.S. government has lately been criticized and efforts have been made to reverse termination procedures between the government and Tribal Nations. However, analogous to the attitude toward Roma communities in Europe, the prevailing attitude in the United States centers on advocacy of greater economic, educational, and cultural assimilation.

Presently, 562 federally recognized American Indian tribal governments exist in the United States; the largest tribes are the Navajo, Cherokee, Choctaw, Sioux, Chippewa, Apache, Blackfeet, Iroquois, and Pueblo. American Indians have historically been divided into several hundred ethno-linguistic groups, most of them grouped into the Na-Dené (Athabaskan), Algic (including Algonquian), Uto-Aztecan, Iroquoian, Siouan-Catawban, Yok-Utian, Salishan and Yuman-Cochimí phyla. American Indian Tribal Nations possess the right to form their own government, to enforce laws (both civil and criminal), to tax, to establish requirements for membership, to license and regulate activities, to zone and to exclude persons from tribal territories. However, current limitations on self-government match those applicable to states. The Bureau of Indian Affairs reports that it is “responsibility is the administration and management of 55,700,000 acres (225,000 km2) of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives.” There are a number of tribes that have yet to be recognized by the federal government. There are an estimated 2.1 million American Indians, and statistics show that they are the most impoverished of all ethnic groups residing in the United States. According to the 2000 Census, approximately 400,000 American Indians live on reservation land, and American Indians writ large rank at the bottom of nearly every social statistic: they have the highest teen suicide rate of all minorities at 18.5 per 100,000; the highest rate of teen pregnancy; the highest high school dropout rate at 54%; the lowest per capita income; and unemployment rates between 50% to 90%.

264 CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 180-7 (New York: W.W. Norton and Co.).

63
1. Past Human Rights Abuse: A History of Assimilation

“When the white man came he put everything into a new light. He saw how everything in nature could render him a service. Our wanders along his track proved a hindrance to his progress and we were driven away until finally we found ourselves penned on reservations… this is our past.”267 Spoken by a young Native American boy regarding the impact of various assimilationist policies on native culture, this quote particularly relates to the practice within the United States of removing indigenous children from home and family to “civilize” them in boarding schools. The profound attack on legal personality, moral agency, and cultural diversity resulting from this practice has left a troubling legacy on the relationship between the dominant culture of the U.S. and the Tribal Nations.268

American Indians have always held an uncertain status in America, ranging from an admirable symbol of freedom and the frontier to an unchristian, uncivilized “other” who must be conquered with the territory.269 The latter view became increasingly prevalent following the Civil Wars and with the end of the Indian Wars. The Hopewell Treaty of 1785 was quickly forgotten when Andrew Jackson passed the Indian Removal Act of 1830.270 In 1845, the concept of Manifest Destiny swept the nation, ensuring that Indians would continue to lose land and

267 Talks and thoughts of the Hampton Indian students 4 (N.P., February 1904).
268 Kristoffer P. Keifer notes that the control of the federal government has inhibited relational development between tribes, as well as stunting the economic development of tribal nations. Furthermore, by refusing to ascribe to certain human rights instruments, the federal government is restricting the ability of tribes to gain meaningful sovereignty or human rights equality. Kristoffer P. Keifer, Exercising Their Rights: Native American Nations of the United States Enhancing Political Sovereignty through Ratification of the Rome Statute, 32 SYRACUSE J. INT'L L. & COM. 345 (2004-2005). See also Steve Pavlik, The U.S. Supreme Court Decision on Peyote in Employment Division v. Smith: A Case Study in the Suppression of Native American Religious Freedom, 8:2 WICAZO SA REV. 30-39 (1992); Sandra Lee Nowack, So That You Will Hear Us: A Native American Leaders’ Forum, 18:2 AM. INDIAN L. REV. 551-575 (1993). In response to certain arguments challenging the ability of American Indians to properly administer trust territories, or to effectively utilize resources at their disposal, see Nicholas E. Flanders, Native American Sovereignty and Natural Resource Management, 26:3 HUM. ECOLOGY 425-449 (1998).
270 This treaty allowed President Jackson to continue to make land deals with Native Americans to push them west of the Mississippi River. Howard Zinn, A People’s History of the United States: American Beginnings to Reconstruction 105 (New York: New Press, 2003). Addressing Congress about the act, Jackson said, “It gives me pleasure to announce to Congress that the benevolent policy of the Government, steadily pursued for nearly thirty years, in relation to the removal of the Indians beyond the white settlements is approaching to a happy consummation.” Andrew Jackson, quoted in James D. Richardson, A Compilation of the Messages and Papers of the Presidents 1789-1908 2 (Bureau of National Literature and Art, 1908).
rights. President Hayes himself declared, “What a prodigious growth this English race, especially
the American branch of it, is having! How soon will it subdue and occupy all the wild parts of
this continent.”

This goal of subjugation was not just limited to the land, but also to the land’s
previous inhabitants.

In order to maintain current racial hierarchies in the face of changing norms, a scientific
rationale for the inferiority of non-Europeans was needed; once produced, it took hold of the
country. Education was the method by which Indians could be assimilated into American
culture, and made pliable to the dominant culture’s wishes. Of course, this could only happen by
eliminating “Indianness” in the population; schools, therefore, were made agents of cultural
change.

In 1884, the Indian Service began its educational experiment, opening four boarding
institutions; by the end of the century, there were 153 boarding schools, twenty-five of which
were off-reservation. These changes corresponded with the Dawes Act of 1887, through which
the government attempted to draw American Indians into white economic and social patterns.
The Act aspired “to provide for the allotment of lands in severalty to Indians on the various
reservations, and to extend the protection of the laws of the United States and the Territories over
the Indians.”

271 Rutherford Hayes, Personal Diary, January 1, 1857, at

272 Estelle Reel, the superintendent of Indian schools from 1898-1910, illustrated a common opinion of Indians:
“Allowing for exceptional cases, the Indian child is of lower physical organization than the white child of
corresponding age… The very structure of his bones and muscles will not permit so wide a variety of manual
movements as are customary among Caucasian children… In like manner his face… is without free expression…
and his mind remains measurable stolid because of the very absence of mechanism, for its own expression.” Estelle
Reel, quoted in K.T. Lomawaima, Politics, Curriculum, and Land, 35 JOURNAL OF AMERICAN INDIAN EDUCATION
5-31 (1996). As early as 1874, a report discussed the importance of reservations, where Indians’ “intellectual, moral,
and religious culture can be prosecuted, and thus it is hoped that humanity and kindness may take the place of
barbarity and cruelty… [It] is the further aim… to establish schools, and through the instrumentality of the Christian
organizations… where these savages may be taught a better way of life… and be made to understand and appreciate
the comforts and benefits of a Christian civilization.” Columbus Delano, 1874 Annual Report from Secretary of

273 David Wallace Adams, Schooling the Hopi: Federal Indian Policy Writ Small, 1887-1917, 48:3 THE PACIFIC

274 Jacqueline Fear-Segal, Nineteenth-Century Indian Education: Universalism versus Evolutionism, 33 J. AM. STUD.
335 (1999).

275 “An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations,” February 8,

matrix and dragged him into an alien world. It was a world marked by punctuality, discipline, competition, study and punishment; a cold friendless passage to the culture that counted.”

The lack of public or governmental commitment to improving health and other regulatory standards at these schools continued to entrench racist concepts of native people in American society and on the reservation. Army officer Richard Pratt, who helped found several of the early boarding schools, inadvertently summed up the destructive and ineffectual nature of this policy, “A great general has said that the only good Indian is a dead one. In a sense I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.” All too often this mindset played itself out in physical violence and sexual abuse. The schools held a strictly militarized attitude toward education, which fostered remedial-style obedience training rather than positive learning. Students were absolutely forbidden to speak their native languages. The tragedy of language and culture loss was acute: Bernice Loafer-Goodro remembers, “I forgot my native language and ways as they were forbidden. I was molded like clay in the hands of the non-Indian religious teachers… They taught me everything about religion and nothing about life. I went on a path of self-destruction. How I survived I’ll never know… my language, my heritage, my identity [were] completely wiped away.”

280 K. Tsianina Lmawaima writes that “the practices of military regimentation, uniform dress, and domesticity training flowed from the federal vision of boarding school as a complete transformative experience, training Indians for their place as a detribalized social and economic underclass.” K. T. Lomawaima, Domesticity in the federal Indian schools: the power of authority over mind and body, 20:2 AM. ETHNOLOGIST 228 (1993).
282 Bernice Loafer-Goodro, Letter to the Editor, INDIAN COUNTRY TODAY A4 (June 1996). On top of poor health standards and extreme discipline and abuse, the schools offered a negligible level of education that focused more on training students to do menial labor than educating them at the standards of other public schools. In order to “instruct children in industrial skills” and “impress upon [them] their prescribed role in society,” the Indian service required children to spend the majority of their days doing heavy labor, ranging from industrial and agricultural work for the boys to laundry and domestic training for the girls. Lucy Toledo, who attended the Sherman Institute,
Federal Indian schools and boarding schools continued well into the twentieth century, though they began tapering off following the World War I when the nation’s focus was drawn to external threats. However, the mindset that led to the schools continues to test the illusion of a post-racial society in the U.S. today. The federal government has yet to acknowledge or apologize for the consequences of their education policy on the American Indian community. The experience on reservation and nonreservation schools in the late nineteenth and early twentieth centuries has profoundly impacted relations between the U.S. government and Tribal Nations today, as well as effectually stifling American Indian efforts to achieve self-determination for a long period of time. The boarding schools are illustrative of the societal attitude toward native peoples and the wider policy goals of the government.

2. Assimilation and Legal Personality Today

Navajo tribal member Mark Charles clarifies the link between the legacy of previous government policies and the difficulty of avoiding assimilation even today:

At a young age my grandfather was removed from his home and sent to a boarding school. There he was forbidden from speaking Navajo, practicing Navajo traditions and culture, and even learning from his elders. Everything that was 'Navajo' was pushed aside and replaced with what was 'American'. He was forced, at an early age, into a whole new world and this world had little value or patience for who he was or where he came from. The world is becoming more and more integrated and assimilated; television, radio, the internet and the Global Marketplace are bringing people together in ways that were never imagined even 25 years ago. Unfortunately, as we are being drawn ‘together’ we are also being stripped of many of the things that make us different and unique; things such as language, cultural traditions and dress. Our Navajo children look around and see the unemployment and depressed economy of the reservation and quickly realize that learning to herd sheep, speaking Navajo and knowing their clans will be of little value in this new global economy. So they learn the same thing my grandfather was told, that things which make us distinctive and unique are supposed to be shed and tossed aside in an effort to 'fit in' and succeed.283

Owing to this attack on the value of indigenous identity, advocacy for greater recognition of civil or cultural rights including autonomy has only recently gained momentum in the wake of

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282 Later remarked, "It wasn’t really about education." When they did leave, the result was a polarizing effect on reservations, and the creation of separate subcultures rather than one assimilated culture.

the civil rights movement. Howard Berman notes that although the most extreme of discriminatory practices “began in the age of European colonialism, they have been continued by actions of successor states structurally indistinguishable from those of the colonial era.”\textsuperscript{284} In 1975, the U.S. government passed the Indian Self-Determination and Education Assistance Act, which recognized the need of American Indians for greater internal self-determination by granting them greater control over welfare spending.\textsuperscript{285} The act discontinued a policy of termination wherein stated severed treaty obligations to tribes. Still, the act retains U.S. sovereignty over the tribes.

In North America, early treaties between European states and indigenous peoples recognized the legal personality of both parties and stated continuing mutual obligations, and these treaties are the legal foundation for their relationships with the states that enclose them. Although colonizing states received substantial benefits from the treaties, and although they form the foundation of state territorial rights under international law, the treaties and the legal personality they demonstrate are often disregarded.\textsuperscript{286} Chief Lyons notes that his coalition of tribes, the Haudenosaunee, signed “the first treaty of peace and friendship made with the United States after peace with Great Britain in 1783, the 1784 Fort Stanley Treaty. We made another treaty with George Washington, the 1794 Pickering Treaty at Canandaigua, N.Y., also pledging peace and friendship forever.”\textsuperscript{287} These treaties and others were concluded between sovereign nations.

Despite the continuing force of \textit{pacta sunt servanda}, the processes of the liberal democratic state have tended to erase the discrete international legal personality of American Indians. In fact, the eraser of their legal personality may be the most problematic long-term effect of previous discrimination and rights abuse. Robert Coulter describes how intercourse

between an indigenous nation and the colonizing nation transitioned from multilateral, to bilateral, and finally to unilateral. “The impact of the discovery doctrine combined with historical and geographical encirclement has resulted in today's situation, where indigenous nations have been cut off from intercourse and have been left out of the decolonization discussion.”

Hurst Hannum says that Congress’s plenary power over tribes undermines their ability to gain meaningful self-determination. “Both the negative (protective) and positive (assertive) powers inherent in sovereignty are needed by Native American governments to prevent unwanted Congressional revocation of existing powers and, in some cases, to expand the scope of tribal authority.” Hannum further argues that, at the least, “Meaningful tribal authority and responsibility must rest on a firmer basis than the whims of Congress.”

Recent discussion of human rights and the American Indian community in the U.S. has affirmed that treaty violations go hand-in-hand with rights abuse and the continued marginalization of the community. In 2006, CERD issued a strongly-worded decision to the U.S. challenging their ownership of 90% of Shoshone land, which was accorded to the tribe by the Treaty of Ruby Valley. The federal government refuses the tribe access to courts to contest the land rights, seizes Shoshone livestock on the land, issues exorbitant trespassing fines, and conducts surveillance over any Shoshone members actively seeking to reassert their rights. A Shoshone delegation, concerned with the negative environmental effects of federal land ownership, brought the case before CERD, who urged the U.S. to respect the treaty land rights and the spiritual and cultural significance of the land. Although the Shoshone tribe hailed the decision as a victory, it was a symbolic victory at best. Unfortunately, the U.S. has not shown any inclination to respect the recommendations of CERD or other human rights bodies, despite clear evidence of violations. In 2010, the UN Human Rights Council heard a number of testimonies by American Indians dealing with continued rights violations perpetrated by the

federal government. Despite the troubling nature of these testimonies, the government refuses to make improvements in its relationship with tribal nations.\textsuperscript{292} The human rights framework still fails to reach within the domestic sovereignty of powerful nations, leaving minority groups like the American Indians without any significant recourse for rights violations.

National constitutions and laws do not protect indigenous rights on a consistent basis.\textsuperscript{293} In the case of American Indians, they most frequently serve to facilitate and legitimize the continuing dispossession of indigenous peoples from their lands, resources, and social and political institutions.\textsuperscript{294} Mark Charles notes that American Indians “account for around 1\% of the population” yet are “virtually nonexistent in the structures of power… We have been a ward of Congress and do not even have an embassy or a formal relationship with the US government. Even after we were given the right to vote, our numbers were so small and we were so marginalized and separated that no unified voice could be heard.”\textsuperscript{295} While this lack of political power may be true of a number of minorities, the American Indian’s plight is a direct result of genocide, discrimination, and assimilationist policies carried out by the federal government.\textsuperscript{296} With these linkages in mind, it seems impractical as well as immoral for this community to be given no other options for exercising comprehensive moral agency—in a sense forcing them to continue to partake of and be subsumed by a dominant culture and political system that effectively silences their voice and separates them from meaningful international legal personality.

The rights abuse and denial of legal personality to the Roma and the American Indians exemplifies the ways in which the individualized rights regime is failing minorities and indigenous populations globally. Although this discussion is limited to a few unique case studies, any examination of the condition of minority and indigenous groups globally will demonstrate

\textsuperscript{294} Id.
how extensive the failure of the rights regime is.\footnote{See e.g., Robert A. Williams, Jr., \textit{Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World}, 1990:4 DUKE L. J. 660-704 (1990); Louis B. Sohn, Peter A. Cumming, Sam Deloria, Solomon Nahmad Sitton, A. Willemsen-Diaz, Drew L. Kershen, Ved P. Nanda, Rennard J. Strickland, \textit{The Rights of Indigenous Peoples: A Comparative Analysis}, 68 AM. SOC’Y INT’L L. 265-301 (Proceedings of the Annual Meeting, 1974); Carole Nagengast, \textit{Women, Minorities, and Indigenous Peoples: Universalism and Cultural Relativity}, 53:3 J. ANTHRO. RESEARCH 349-369 (1997); Sumner B. Twiss, \textit{History, Human Rights, and Globalization}, 32:1 J. RELIGIOUS ETHICS 39-70 (2004).} If the human rights regime is to be more than a front for state legitimacy, there must be an expansion of the right to self-determination that goes beyond minimal internal autonomy schemes and actually invites these groups into the conversation of international law. Similarly, it is necessary to give these groups the right to protect themselves when the rights regime fails to do so.\footnote{D. Sanders, \textit{Collective Rights}, 13:3 HUM. RTS. Q. 382 (1991).} Trying to address the rights abuses and marginalization minority and indigenous populations face through the context of the current rights regime has produced few, if any, viable solutions. The ongoing discrimination Roma, American Indians, and other minority groups endure point to the need for remedial self-determination to correct the human rights abuses and incorporate their voice in the processes of international law. The next chapter will describe how, in order to be accessible to the groups that need it most, the right to self-determination must expand both its inclusiveness and possible outcomes.
IV. Chapter Three

The right to self-determination has alternately been viewed as the right of former colonies to independence, the right of current states to determine their political activity, or the right of all peoples to choose their own state structure and government. All of these views challenge elitism in the international community, but current practice shows that a limited form of self-determination is the most widely accepted interpretation of the right. This chapter argues that as a result of the failures inherent to the human rights framework, the definition of self-determination must be expanded. This expansion must take place on two levels: first, the inclusiveness must be expanded by engaging with counter-culture construction of group identity; second, the possible end results must be expanded to include innovative forms of autonomy and self-government. Ultimately, this chapter draws a link between the human rights abuse suffered and the right to external self-determination as a way to affirm the collective internal and external moral agency of these groups.

A. Impetus for Expanding the Right to Self-Determination

In recognizing the shortcomings, outright failings, or evils of a current system, ideas are free to emerge that either remedy these evils or envision reconstructive activities to produce a system more useful to humanity. It is important to recognize that law is a tool of man, and not vice versa. Kahlil Gibran poetically illustrates the illusion of law when he wrote,

> But what of those to whom... the law [is] a chisel with which they would carve it in their own likeness? What of the ox who loves his yoke and deems the elk and deer of the forest stray and vagrant things? What shall I say of these save that they too stand in the sunlight, but with their backs to the sun? They see only their shadows, and their shadows are their laws. And what is the sun to them but a caster of shadows? And what is it to acknowledge the laws but to stoop down and trace their shadows upon the earth?299

Three options, then, emerge: to be satisfied with a law traced from antique figures and adhere rigidly to it; to carve the law in the likeness of our current selves by matching it to whatever reality we can agree exists; or to attempt to draw a law based not on shadows but on the creative potential of forward-thinking imagery.

The first option seems to negate the evolutive potential of humanity in favor of a stagnant and elitist system. Mohammed Bedjaoui describes the loyalty to traditional international law as “legal paganism’’: the worship of an international law detached from the reality it governed and preserved as an idol.” He further argues that such practice results in a form of law that is not neutral, but serves “only to perpetuate one kind of reality and a certain type of unequal relationship. It would be a law of dominance, a law for the preservation of oligarchical privileges.” In summarizing the argument of M. Virally in 1968, Karen Knop states that rigid and rule-based traditional international law is “developed by the more technical and empirical methods of induction and analogy, it is… lawyers’ law. It privileges international lawyers, and states with a strong diplomatic traditional and experienced diplomatic corps.” This section seeks to problematize a rigid interpretation of international law, particularly for the inter-related concepts of self-determination and the recognized criteria for statehood.

In contrast, the second and third options described above are similar in their innate possibilities. Reality eludes definition, especially in the diverse and fast-moving societies we inhabit. There is an element, then, of an attempt to grasp the future in both remaining options, and a compromise between them might harness the potential of best-practice legal interpretation with the flexibility to keep pace with some notion of reality. Controversial, vaguely defined laws such as self-determination, which exist in both treaty law and customary international law, must keep moving from lex lata (the law as it exists) towards lex feranda (the law as it should be) if they will ever be meaningful.

The previous chapter argued that the level rights abuse and denial of legal personality to minority groups makes an expanded right to self-determination necessary to ensure that these groups can exercise their moral agency for internal governance and justice as well as external participation in a more equalized international legal sphere. As Karen Knop explains, the line drawn at colonies for self-determination is regarded as normatively arbitrary, and the practice of self-determination has become “a struggle for inclusion, not only a people’s struggle to become

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part of the world of sovereign states, but their struggle to incorporate their own story into international law. Self-determination appears to give peoples a right to participate in the international legal order, an issue previously decided by the fact of power alone."  

This need for inclusion requires a radical reconception of self-determination and the principles that currently limit it.

While it is easier to distinguish the need for self-determination in the case of former colonies, Judge Wildhaber stated that self-determination is a tool to secure human rights and representative government, more specifically, “a tool which may be used to re-establish international standards of human rights and democracy.” Furthermore, the European Communities Conference on Yugoslavia Arbitration Commission determined that a minority’s entitlement to self-determination could be judged within a human rights framework, legitimizing the idea of remedial self-determination in the case of human rights abuse and lack of internal options.

Pushing for an expanded right of self-determination implies that “states must refrain from attempts to assimilate, submerge or otherwise manipulate the organization, culture, and development of ‘insular minorities,’ …not just as a matter of human right, but because it is a universal human right of minority communities to determine… terms on which they associate with the government that hosts them.” Will Kymlicka defends the rights of national minorities to remedial self-determination as a response to unequal circumstances, citing Allen Buchanan, who argues that such a right is necessary to preserve “the distinctive interests of indigenous

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305 Robert McCorquodale, Self-Determination: A Human Rights Approach, 43:4 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 872 (1994). “The spread of support for human rights and the emergence of a norm of democratic entitlement [lend] credence to the view that the state is itself the subject of obligations as well as entitled to rights, and that these obligations may be implemented both by a politics of resistance on the part of citizens and by a process of humanitarian intervention by the international community. This condition of sovereignty is further evolved in relation to the capacity of a state to carry out governmental functions. When the state fails to provide governance, other political actors are needed to protect a vulnerable citizenry… There is a clear trend away from the idea of unconditional sovereignty and toward a concept of responsible sovereignty. Governmental legitimacy that validates the exercise of sovereignty involves adherence to minimum humanitarian norms and a capacity to act effectively… As with other fundamental norms and principles, sovereignty evolves in relation to practice and to changes in community expectations.” Georges Abi-Saab, The Changing World Order and the International Legal Order: The Structural Evolution of International Law Beyond the State-Centric Model, in GLOBAL TRANSFORMATION: CHALLENGES TO THE STATE SYSTEM 439 (Y. Sakamoto ed., 1994).
peoples and other minorities—typically as a result of historical injustices perpetrated against them.”

307 Rejecting a fixed notion of law therefore means rejecting the primacy of already-established states in limiting access to and decisions about rights.

Claims to self-determination are ambiguous by nature, and in this highly subjective environment it becomes essential to view international law in terms of principles rather than rules. This allows for the conversation to expand to voices that had no say in the original creation of the law. 308 During early discussions on the right to self-determination, this distinction was noticed and arguments were made to view the right as a principle rather than a rule. 309 Cassese interprets the rule/principle distinction in international law by saying “principles differ from legal rules in that they are the expression and result of conflicting views of States on matters of crucial importance… principles are a typical expression of the present world community, whereas in the old community—relatively homogenous and less conflictual—specific and precise rules prevailed.” Knop similarly describes principles as an ongoing process in which the creative potential of law to evolve alongside or in front of reality is tapped. 311

To view self-determination as a principle rather than a rule gives potential for the right to be accessed beyond overseas colonies, the original recipients. Additionally, it corrects the law for inequalities present in its creation and original usage. Because the interpretation of rules is heavily dependent on state practice and the paper trail of lawmakers, it contains an inherent bias in favor of states that can afford such participation and train expert lawyers in its use. 312

308 “The question surely is that most of the rules of customary international law were established in the last four centuries by only a handful of Western European States; the advocates of consent as the only basis of obligation for sovereign States are also the first to insist that the three-quarters of the world that took no part in its formation must be regarded as bound by it, consent or no consent.” T. O. ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW 72 (Dobbs Ferry, N.Y., Oceana Publications, 1972).
311 KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 46 (Cambridge: Cambridge University Press, 2002).
312 Unequal access to these resources and unequal ability to use them are strong disadvantages in making an argument about the existence or meaning of a rule. GEORG SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW 13 (Dobbs Ferry, New York: Oceana Publications, Inc., 1965).
hundred cases from sub-Saharan Africa (fifty-plus states, population around 800 million) as compared to around 320 cases from Austria (population 8.9 million)." Knop believes this is precisely why interpretation must take place in the context of a principle of international law subject to evolution:

The problems posed by differences of culture and gender for the interpretation of international law are exceptionally acute for self-determination because its interpretation directly affects non-state groups as well as states. Moreover, the groups involved, including the colonized, ethnic nations and indigenous peoples and women within these groups, tend to be marginalized both internationally and domestically. As distinct from interest groups, these groups are generally characterized by an experience of membership as non-voluntary and immutable and correspond historically to patterns of social and political inequality and negative stereotyping. For such groups, differences of power and voice often combine to exclude them unfairly from the making of the law, placing pressure on its interpretation to begin the work of inclusion.

Inclusion will provide greater richness, depth, and legitimacy to the work of the human rights regime, as diverse voices and cultures struggle within the agonistic framework to create law that broadens rather than narrows accessibility to full legal personality.

Self-determination is already the subject of debates within the UN and elsewhere regarding expansion. New concepts that have emerged from recent debates include the possibility that self-determination may be an ongoing right—a right to democratic governance with a built-in divorce clause that allows people to divorce their government when it ceases to represent their voice. Other conversations indicate self-determination includes the right to have a say in socio-economic development policies, as well as the potential right of minorities to maintain demographic integrity in their area of residence. These discussions indicate that self-determination is and should continue to be a malleable concept with the goal of inclusion.

B. Expansion of Inclusion—Who is a “People”?

1. Problematizing the Definition of “Peoples”

315 Russel Lawrence Barsh, Evolving Conceptions of Group Rights in International Law, 13 TRANSNATIONAL PERSPECTIVES 5-6 (1987).
In reevaluating who is eligible for self-determination, the debate currently centers on defining what a “people” is, in accordance with the U.N. mandated right. Initially, the recognized definition of “peoples” referred primarily to those in the Third World, but it did not address ethnic minorities within existing states. The UN instead exhibited an intention to protect these populations through individual rights, with the UDHR and other acts.\(^{316}\) The previous chapter shows that this intention is failing. “Ever arbitrary, the definition of ‘peoples’ has become all the more so today, now that the entire planet is subdivided into compound states.”\(^{317}\) Some authors attempt to identify key components that would distinguish a “people” from minority populations, focusing on factors such as a distinct tie to territory, comparability to other national groups within a state, or clear legal status in a country’s constitution.\(^{318}\) However, these can be criticized as giving too much leeway to states in determining who will have access to certain rights. The difference between minority groups and “peoples” is unclear and possibly nonexistent. Jane Wright notes that such distinctions are “more apparent than real” and serve only to support majoritarian systems of government; the status of Iraqi Kurds, for example, points to the political motivation behind the definition.\(^{319}\)

It seems apparent at least that “peoples” no longer includes only recognized former colonies. Groups such as the Basques or the Catholics of Northern Ireland claim to have been colonized despite not fitting within the traditional definition. Furthermore, the decolonization process produced a number of hypocrisies that are hardly a recommendation for continued usage of the historical definition. For one, “Western states with high degrees of internal self-determination denied the same self-determination to the peoples they dominated.”\(^{320}\) Second, national liberation movements that attained power “often resort to force to prevent self-determination from developing internally.”\(^{321}\) Besides, the use of self-determination as a tool of decolonization did not always match the understood definition of “peoples” or “nations”. Kaveli Holsti points out that, “the elites who led independence or national liberation movements under


\(^{321}\) Id.
the doctrine of… self-determination often had no nation to liberate. Rather, they had a collection of communities that, aside from their dislike of colonialism, had little in common.”

States, however, continued to limit the application of self-determination through restricted interpretation of those entitled to it; hence a “people” is still usually understood only in terms of the population of an already constituted state. The exception, however, is contained within the 1970 Declaration on Friendly Relations, which has specified other peoples beyond the colonial context as being entitled to self-determination. This includes those subjected to alien subjugation, domination or exploitation. M. Goodwin notes that “there is an on-going debate about whether oppressed minority groups could… be entitled to independence, so that where they are prevented from a meaningful exercise of their right to self-determination… they become bearers in their own right— the so-called ‘positive’ aspect of the safeguard clause.” Most commentators agree on a high threshold of abuse before a group could be considered internally colonized and thus entitled to invoke the provisions of G.A. Resolutions 1541 or 2625. Other arguments for a general, expanded definition of “peoples” combine objective elements, such as language, religion, ethnicity, or common will to live together.

Discussion of what it means to be a “people” consequently include a multiplicity of identifying factors, yet the world today contains at least 600 active linguistic communities and more than 5,000 ethnic groups. Not all of these communities can become a state. Even extending each group the right to some form of self-determination would be a challenging endeavor, to say the least. On the other hand, law that bases itself on convenience rather than equality has no legitimacy. Without delving too deeply into the tension between the moral purpose behind law and its practical application, this discussion nevertheless notes that fear, which has arguably been the main reason for retaining the status quo internationally, is not a

valid reason to deny certain groups rights that others enjoy. Various historical endeavors—such as mass accession to a human rights framework, or decolonization, for example—seemed impossible (or at least impractical) before they were achieved. Recognizing the complexity of self-determination, it may be that the right should continue to be examined on a case-by-case basis, with this process occurring alongside an expansion of definitions and criteria. Still, it is of the utmost importance that any dialogue regarding self-determination incorporates those groups struggling to achieve it.

Two approaches have emerged to expand the current definition of “people” with that reality in mind: the Categories approach and the Coherence approach. The Categories approach seeks expansion by establishing the existence of new categories and rules. Karl Doehring employs the Categories approach when he includes ethnic minorities in the historical development of self-determination in international law. Ethnic minorities can be recognized as “a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity… in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship… and rendering mutual assistance to each other.”

The Coherence approach, by contrast, seeks to create a broad narrative involving global definitions, principles, and rationality into a “single powerful story of identity.” In arguing for a Coherent approach to the idea of “peoples,” Brownlie contends that self-determination is “the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives.” A standard way to construct a coherent

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328 *Greco-Bulgarian ‘Communities’, Advisory Opinion* (1930), PCIJ Ser. B, No. 17, 21. Further evidence of this category is found in the UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (GA Resolution 2625 (XXV). A standard way to construct a coherent

329 The right of self-determination entered its third phase of enunciation: it ceased to be a rule applicable only to specific territories (at first, the defeated European powers; later, the overseas trust territories and colonies) and became a right of everyone. It also… stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate. The right now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state.” Thomas Franck, *quoted in* R. Howse & K. Knop, *Federalism, Secession, and the Limits of Ethnic Accommodation: A Canadian Perspective*, 1 NEW EUROPE L. REV. 269 (1993).

expansion of “peoples” is to rely on a story of subjugation. W. Ofuatey-Kodjoe develops a
definition of the peoples entitled to self-determination as subjugated: “those non-self-governing,
those occupied, those under foreign rule and those deprived of a previous independent
condition.”331 In keeping with this view, the right to self-determination exists as remedial to
human rights abuse. In a 1996 Judgment of European Court of Human Rights, Judge Wildhaber
said the following:

Until recently in international practice the right to self-determination was in practical
terms identical to, and indeed restricted to, a right to decolonization. In recent years a
consensus has seemed to emerge that peoples may also exercise a right to self-
determination if their human rights are consistently and flagrantly violated or if they are
without representation at all or are massively underrepresented in an undemocratic and
discriminatory way. If this description is correct, then the right to self-determination is a
tool which may be used to re-establish international standards of human rights and
democracy.332

If this is indeed the case, historical/pre-colonial group identity may be less relevant than
the substantiation that a community is experiencing flagrant violation of human rights or
considerable exclusion from civil activity. Ofuatey-Kodjoe argues that if the international
community is to achieve justice, peace and security, the right of self-determination must expand
and apply to all subjugated people, including minorities and tribes.333 Ofuatey-Kodjoe further
observes that the two main factors necessary to communities wishing to invoke the right of self-
determination are political coherence and subject status.334 This departs from earlier conceptions
that are based on territorial linkages.

Similarly, Robert McCorquodale argues that self-determination should be viewed as part
of the human rights approach, and that its meaning can be extended to cover a variety of
situations. He concludes that the present focus on peoples and territory is too rigid and should be
amended.335 Robin White notes that traditional conceptions of self-determination have ignored
the problems of non-territorial minorities, stating that, “[t]he United Nations needs to turn its

331 W. Ofuatey-Kodjoe, Self-Determination, in UNITED NATIONS LEGAL ORDER 1:375 (O. Schachter & C. C. Joyner
eds., Cambridge: American Society of International Law and Grotius Publications of Cambridge University Press,
1995).
333 W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION INTERNATIONAL LAW 188 (Nellen Publishing
334 Id., at 36.
attention to the plight of minorities and to attempt to provide some effective machinery for assuring self-determination and equal rights for such peoples.”\textsuperscript{336} The cultural boundaries of a group are fluid, and a sense of belonging to the group is defined by varying sociological factors such as myth, symbol, and communication. A minority or indigenous group, therefore, should not be defined by the territory it inhabits. Cara Feys argues that a new definition of a “people” is required to reflect this reality: “A more useful definition… for the purposes of the contemporary international system is a politicized ethnic group acting with or without attachment to a territory. This definition more adequately captures the goals of a nation without undermining the territorial integrity of existing structures.”\textsuperscript{337} Although moving away from a territorialized group identity is clearly needed, some level of cohesiveness among a given group should exist to ensure they are actually seeking the right to self-determination, rather than being dragged toward it by a few powerful voices.

2. Subjugation Narratives and the Construction of National Identities

The question of whether group identity can be authentically constructed on the basis of difference, separateness from a dominant culture, and a history of subjugation is particularly relevant in the case of the Roma. The very nature of nationalism as a modular construction always implies some degree of imagination in conceiving of a shared ethos and goals.\textsuperscript{338} If one accepts Anderson’s argument that the “nation” is a distinctly European creation, and “nationalism” a product of colonization in the Americas, the link between nationhood, the definition of a people, and the right of self-determination seems fraught with neocolonial objectives.\textsuperscript{339} M. Goodwin argues that a breakdown of the international legal system occurs when it fails to recognize the cultural bias of the language and conventions used to determine

Forcing a community to define itself in terms of an imagined identity before their legitimacy is validated by the international elite has motivated peripheral scholars and activists to push for alternative ways of constructing identity for the purposes of self-determination.

A. Cassese has pointed out the flaw in self-determination’s reliance on imperially constructed identities in discussing the anomalous cases of Gibraltar, Western Sahara, East Timor, Quebec, and Palestine. In recognizing the limitations of the jurisprudence on self-determination, Cassese argues that political, rather than legal, solutions may have to be sought to find a compromise on who is entitled to self-determination and what form it should take. Conceiving of self-determination as an expanded right available to non-colonial, hard-to-define groups like the Roma or American Indians would not only provide a forum to address their particular concerns, but would promote the evolution of the international system away from state-centric/elite control and toward inclusion. “Those making the claim are thus not mistaken in the potential they see in their claim for radicalising the principle of self-determination and, through it, offering up an alternative vision of the international system.”

The concept of remedial self-determination carries with it a condition that group narratives contain some enunciation of human rights abuse or exclusion from international law. Historically, Bangladesh is the only state to actually secede from another state because of “carence de souverainete”—a gross breach of the duties of a sovereign state against a minority group. However, as previous chapters have argued, current international practice places greater emphasis on the idea that a state should be freely chosen by its people and uphold standards of human rights, and accordingly, remedial secession may become more widely accepted. In theorizing the purpose of remedial self-determination, Bhikhu Parekh describes the potential to overcome long-standing hostility between groups: “Intercommunal conflicts thrive on memories...”

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341 A. Cassese, Self-Determination of Peoples: A Legal Reappraisal Ch. 9 (Cambridge: Cambridge University Press, 1995).
343 "When 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.” Benedict Kingsbury & William S. Grodinsky, Self-Determination and "Indigenous Peoples", 86 Am. Soc’y Int’l L. 387 (Proceedings of the Annual Meeting, 1992).
of real or imagined past acts of injustice.”

Correspondingly, as Anaya wrote, “Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation.” A true appreciation for the human rights violations committed will lead to action intended to remedy the ills.

3. The Construction of Roma National Identity

“Na daran Romale vi ame sam Rom chache.” Do not fear, you Gypsy men, for we too are Gypsies.

The failure of individual and minority rights to deliver true results has resulted in “widespread agreement in recent years among the Romani leadership on the need to stake a claim to self-determination.” With this in mind, it is necessary to understand that the Roma are a heterogeneous community that resists traditional understandings of nationhood. Nationalism is “a powerful adhesive which minorities have wielded to unify communities throughout history… [which] tends to move from cultural to political forms, and entails popular mobilization,” but is not always conducive to the authentic expression of minority identity. The Roma elite have difficulty in determining or defining who the Roma are. According to the Project on Ethnic Relations, a search of documents and recommendations produced over the last decade by international organizations exhibits a spectrum of categorizations of Roma populations in Europe (Rom, Roma/Gypsies, Roma and Sinti, Roma/Gypsies/Travelers) and an equally large number of definitions: the Roma as a people, as a nation, as a transnational minority, as a European minority, as an ethnic group, or as a truly European minority.

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346 Michael Freeman, Past Wrongs and Liberal Justice, 5 Ethical Theory & Moral Practice 201-220 (2002).
350 Project on Ethnic Relations (PER), Roma and the Question of Self Determination: Fiction and Reality (Jadwisin, Poland, 2002).
Stereotypical imagery aside, arguably the most unifying aspect of the Roma is the discrimination they face. As previously noted, W. Ofuatey-Kodjoe argues that the subjugation by a foreign power—whether direct, indirect, historic, or present—can be sufficient to both define and create a people. His definition of people as “a self-conscious, politically coherent community that is currently under the political subjugation and domination of another community separate and distinct from itself” is inclusive to the Roma and other indigenous groups.351 The importance of the memory of the Porajmos, or holocaust, in which at least a quarter of the total population of Roma living in Europe were murdered, suggests that the Roma have also begun to construct their identity on the basis of external injustices done to them.352

In the past, attempts to construct a sense of Roma nationalism followed the methods of Jewish Zionism,353 but like other minorities, they struggled against the lack of a fatherland or territorial attachment to back up their political claims.354 Traditional understandings of nationalism seem to preclude the Roma, who lack a kin state, are geographically dispersed, and do not share a common language.355 Inherently autonomous of both state and territory, their nomadic way of life ensured that they never developed a niche in society the way other migrant populations did. Western thought, therefore, has been confounded of how to incorporate them into its organizational pattern. Even theories of diasporas fail to fully elucidate the nuances of their identity, because such theories “are written from the perspective of sedentary societies and encounter difficulties in grasping the deterrioralised and spatially unbounded culture of

353 Claude Cahn encourages this example, stating, “It is not only on this strict organizational/mechanistic front that Zionism has ideas of potential use for a Romani movement – the core challenges of Zionism, such as breaking the primary allegiance of Jews to the national states of other people and building the Jewish patriot and the Jewish body politics, were nearly identical to challenges facing Romani activists today.” Claude Cahn, quoted in PROJECT ON ETHNIC RELATIONS (PER), ROMA AND THE QUESTION OF SELF DETERMINATION: FICTION AND REALITY (Jadwisin, Poland, 2002).
Roma/Gypsies who… are constantly reminded of their difference and their inability to fit in and to be identified with a well-defined national territory.”

In contrast to most mainstream literature on the Roma, Erin Jenne presents a history which shows multiple Roma organizations forming early on to protect Roma rights and identity. Following this development of identity, however, Roma populations were assimilated under communist regimes in Eastern Europe. Jenne discusses the impact of Roma culture, which is protectionist and suspicious of outsiders, on their current political plight in Europe. Jenne further suggests that preserving or creating a definable Roma national identity will jump-start the process of advocating for rights. Forming a strong cultural identity may be essential to advocating rights outside of the traditional state entity. Aidan McGarry argues that despite their heterogeneity and geographic dispersal,

All persons subsumed under the appellation “Roma” share a history of assimilation, persecution, integration and oppression by non-Roma (gadje) at various points in time which has created a necessity for adequate political representation at all levels. Furthermore, “Romá” has always carried with it aspirations of a political platform which potentially could be pursued at the local, national and transnational level.

Roma identity is not a recent construction. According to some, Roma identity is historically a product of culture, which “rests in an atemporal value-pattern of Romanipen—‘being a Rom’ in the surrounding world of ‘others’—and in maintaining horizontal kinship relations, ways of life, and patterns of interactions with non-Romanies.” Cara Feys likewise contends that “Roma have had a sense of difference ever since the time of their earliest migrations into Europe… due to non-Western cultural characteristics… [and] reinforced by the discrimination they have faced since their arrival in Europe.” She further notes that in response to this discrimination, Roma maintained their separateness, resulting in a clear

distinction between Roma and non-Roma gadje. Cultural characteristics such as ritual purity deepen the divide between Roma and non-Roma, but do not necessarily provide internal unity for the group. A few decades ago, Acton described the Roma as a “most disunited and ill-defined people, possessing a continuity, rather than a community, of culture. Individuals sharing the ancestry and reputation of ‘the Gypsy’ may have almost nothing in common in their way of life and visible or linguistic culture.”

Today, however, activists and politicians have succeeded in placing emphasis on Roma nationalism, and a growing sense of group identity has developed that is unrelated to uniformity of culture or language. Roma activists assert that hostile external factors rather than voluntary internal choices caused the fragmentation of Roma people. International Roma structures have attempted to construct Roma nationalism, including the symbolic creation of a flag and an anthem, while at the first World Romani Congress in 1971, the key demands related to war crimes, language standardization and culture, and social affairs. Any categorization of the Roma, however, involves a shared history far removed from their present situation, and must rely instead on more recent factors that may reveal the shades of interrelated identity necessary to be considered a people.

M. Kovats asserts that Roma nationalism predates the emergence of grassroots Roma politics, and describes how international Roma structures, including the International Romani Union (IRU), the Roma National Congress (RNC), and the more recent European Roma and Traveller Forum, have propagated the construction of Roma as “a nation without a territory.”

This construction was explicitly articulated in the ‘Declaration of Nation’ at the fifth Romani World Congress in 2000. Roma activists argue that as a non-territorial nation, the Roma

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should possess the same rights as other nations, including representation in intergovernmental organizations.\(^{367}\) The Project on Ethnic Relations (PER) describes the two different positions toward a Roma nation that have emerged. One can be called a universalist/voluntarist position, expressed by the RNC: the Roma nation exists, but since Roma are diverse and hold different traditions and cultures, any attempt to forge a unitary nation is fruitless. The Roma nation is therefore an open structure, inclusive to each group, because what binds them together is anti-Gypsy sentiment.\(^{368}\) The other position, linked to the IRU, focuses on Romani culture and aims to develop its unified form along with a codified language and renewed traditions and values. Each of these two positions is additionally associated with a different conclusion as to what should be in the Roma’s main interest: defending Roma rights against a hostile community or working to develop a unifying culture.\(^{369}\) In either case, A. Moltchanova concludes that the Roma do, in fact, have the necessary foundations of identity to seek self-determination, and have only to collectively agree to pursue it.\(^{370}\)

The current development in Europe clearly shows that Roma, regardless of their social status, are confronted with overt, anti-gypsy hostility. Such hostility cannot be abolished through welfare or development projects. In order for social development projects to succeed, Roma must be granted guarantees for protection of civil liberties. This means a change in the political status of the Roma toward political, social and cultural self-determination.\(^{371}\)

Drawing on an expansive definition of the right to self-determination and a progressive view of international law allows us to establish that the Roma can be considered a people or nation for the purposes of self-determination. This conclusion is based on the notion of self-determination as participation, active and continual. It is not “a reserved seat in a parliament, a


\(^{368}\) *Project on Ethnic Relations (PER), Roma and the Question of Self Determination: Fiction and Reality* (Jadwisin, Poland, 2002).

\(^{369}\) *Id.*


title of status laid down in an agreement, or the right to positive discrimination, but rather the right of one's culture or identity to participate as an equal in society with others.”

4. The Construction of American Indian National Identity

“An Indian is one who offers tobacco to the ground, feeds the water, and prays to the four winds in his own language.”

Like the Roma, American Indians are a vastly heterogeneous community, divided by tribal affiliations, urban/rural and geographic separation, and degree of assimilation within society. Conflicting theories abound over what it means to be Indian; individually, it may mean self-identification regardless of lifestyle. On the collective level, however, external and internal forces have struggled to develop a coherent sense of “Indianness” amidst historic stereotypes. Race, as a social/political construct, is no longer sufficient as a distinguisher. Even more difficult is building a group identity that includes some measure of politicalization for the purposes of self-determination. A significant problem for American Indian identity formation is the emphasis given to work by elite scholars in constructing the historical narrative that will form the backbone of identity.

With the recent resurgence of American Indian identity claims, tribal affiliation is set to expand. American Indians have come up against identity-forming work of academics, advocates, and writers in striving for an identity that escapes pure victimhood in favor of more nuanced historical understanding. Charles Trimble, former executive director of the National Congress of American Indians, examined among other histories the Wounded Knee massacre of

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373 Written by Crow poet Henry Real Bird.
375 “We need a true and factual history - taking into account oral histories from time immemorial, not one that is constantly twisted to fit agendas. Perhaps what would help is a national Native American Historical Society. Not an elite cadre of academic favorites that comprised the Indian Historical Society in the 1960s and 70s, nor an arbiter of historical fact. We need an organization for Indian scholars, degree or not, to do research and write true history; and, indeed, to debate it and hone its accuracy and truth.” Charles Trimble, Twisting History for Victimhood (October 20, 2008), at http://64.38.12.138/News/2008/011474.asp.
1890, claiming that the current telling erases the agency and bravery of Indians as active fighters rather than passive victims. He notes that bringing such analysis to a larger scale in compiling Indian history for the purpose of modern identity formation “would help us today in our quest for true self determination and self government… We must learn and pass on the real histories, not those spun to fit contemporary purposes.”

A cohesive, national identity only began developing in the 1960s, alongside the American Indian Movement (AIM) and others. A precursor to more radical movements, the National Congress of American Indians (NCAI) was founded in 1944 in response to the assimilationist policies of the federal government. Although NCAI works within the constitution of the U.S. to achieve their goals, their methods involve bringing recognized tribes together in a voting system that could be the foundation for an independent government. The Congress has an executive council, a general assembly, and multiple committees. Their current activities center around economic, social, and cultural rights: increasing economic development on reservations, maintaining cultural and educational rights, and supporting environmental protection. The National Indian Youth Council (NIYC), by contrast, was founded in 1961 to protect treaty, hunting, and fishing rights, and to express dissent from more conservative tribal leaders. The NIYC took the idea of a unified American Indian national identity a step further than the previous generation, stating in their constitution: “We further recognize the inherent strength of the American Indian heritage that will be enhanced by a national Indian organization… We believe in a greater Indian America.” Intertribal activity, such as fish-ins, gathered more than 45 tribes in unified protest against the interference of the federal government in Indian affairs.

In 1968, the American Indian Movement “was founded to turn the attention of Indian people toward a renewal of spirituality which would impart the strength of resolve needed to

reverse the ruinous policies of the United States… and other colonialist governments of Central and South America.”383 The Movement sought to bring together various tribes and nations by invoking both the subjugation narrative of early colonialism and a deeper, more esoteric cultural/spiritual bond: “At the heart of AIM is deep spirituality and a belief in the connectedness of all Indian people.”384 In 1972, AIM set out a range of claims to the President of the U.S., demanding that Congress restore treaty making with tribes as sovereign nations, review treaty commitments and violations, repeal state jurisdiction over tribal nations, abolish the Bureau of Indian Affairs, and establish national Indian voting. Furthermore, they demanded the restoration of 110 million acres of land unlawfully taken by the U.S. In 2007, Russell Means, founder of AIM, along with many Lakota tribes, unilaterally seceded from the U.S., and several countries showed interest in recognizing their independence.385 Although its activities at times have been controversial, AIM credits itself with a revival of Indian culture and unity that directly translates into a claim for self-determination.386

These movements and other forms of activism show the development of American Indian national identity that has occurred over the last few decades. Recognizing the necessity of intertribal efforts to achieve self-determination, various tribes and nations have alternately struggled with the federal government and the international community for greater acknowledgement of rights. The challenge posed by indigenous communities such as American Indians to traditional definitions of international law is the fact that they were colonized long before African and Asian people, yet their need of decolonization was never recognized because they reside on the territory of a firmly established and powerful state. It is estimated that there are 300–500 million indigenous people worldwide, and with indigenous people living in the territory of most states, granting them self-determination would pose a direct challenge to the way the states of the world have organized their internal governance structures.387

384 Id.
American Indians have long held a precarious position in the US, owing to their status as encapsulated Tribal Nations. U.S. and foreign governments do not consider them to be true states or allow them to possess international legal personality. Hurst Hannum believes that Congress’s plenary power over the tribes undermines their self-determination. “Both the negative (protective) and positive (assertive) powers inherent in sovereignty are needed by Native American governments to prevent unwanted Congressional revocation of existing powers… to expand the scope of tribal authority.”388 It would appear that the U.S. government intends to limit the rights of indigenous people in favor of the liberal democratic ideals. In 2007, the UN passed the Declaration on the Rights of Indigenous People after several decades of discussion, with 143 votes in favor. Only four states voted against, and the U.S. was one of them.389 However, the recent history of American Indian activism implies a converging national identity that, like the Roma, points to eligibility for an expanded right to self-determination, should they choose to pursue it.

C. Expansion of the Outcome—Autonomy and Secession

1. Traditional Emphasis on Secession

The exercise of self-determination most frequently corresponds to the call for independence or secession; as stated before, for nearly all trust territories and former colonies, the end goal of self-determination was a separate, sovereign state.390 Knop affirms that “A right of secession acts as the ultimate guarantee not of the individual rights of political participation associated with a democratic polity, but of a complex of rights recognizing ethnos and ranging from linguistic, cultural and religious rights of minorities to a right of autonomy or self-

390 “By substituting the state in international law for the individual in private law, the international law of territory can proceed by analogy with the law of property… the right of self-determination can be seen as restoring power or territory to the rightful sovereign, just as private law requires the restoration of wrongfully taken property to its owner.” D. P. O’CONNELL, STATE SUCCESION IN MUNICIPAL LAW AND INTERNATIONAL LAW 1:22 (Cambridge: Cambridge University Press, 1967).
government.”391 While an array of choices are available to those seeking self-determination, the most important and widely-sought of these is independent statehood. In today's international order, “the sharp divide between the status of statehood and all other forms of subordinate political organization elevates the value of territorial independence beyond what it might otherwise be.”392

There must a right of secession where remedial self-determination is required. “Without a right to secession in the case of unreasonable discrimination, which cannot be evaded by other means, the right of self-determination would be a hollow shell.”393 Knop notes that for some scholars, the right to secession is triggered by “the failure of internal self-determination: a group’s right to secede [emerges] only where, depending on the particular scholar’s view of international self-determination, democracy, minority rights, or autonomy within the state is insufficient to secure the group’s well being.”394 Internal self-determination can fail, however, even in conditions that seem favorable to equality and representation. Democracies can restrict the voice and politically silence minorities, triggering the right to secession.395 However, states fear that if secession begins to be normalized, it could carry on ad infinitum for every ethnic, nationalistic, or minority claim.396 States also fear losing access to important resources tied up in territory. But more fundamentally, states fear losing what territory represents. An expanded range of outcomes to self-determination would require an important change: “that international legal principles explicitly acknowledge that political authority within states may be multiply

395 “Although the tendency in international law is to equate representative government with democracy, particularly constitutional parliamentary democracy, the Declaration on Friendly Relations does not explicitly make this equation. Even if it did, some authors criticize the insistence on a traditional Western-style parliamentary system on the grounds that it is an ineffective guarantee of representation for minorities and amounts to democratic imperialism.” R. McCorquodale, Self-Determination: A Human Rights Approach, 43 INT’L & COMP. L. Q. 865 (1994).
396 A report of the Secretary General, “An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping,” states that there would be no limit to fragmentation if every ethnic, religious or linguistic group claimed statehood. (UN doc. A/47/277-S/24111, 17 June 1992, par. 17). Similarly, “On the basis of fairly distinct contemporary ethnic groups, the number of sovereign states would probably surpass 5,000, entailing a complete political reorganization of the globe.” Öyvind Österud, The Narrow Gate: Entry to the Club of Sovereign States, 23:2 REV. INT’L STUD. 171 (1997).
located and organized in non-hierarchical tiers such that authorities at one level are not necessarily subsumed in their entirety by larger groupings.”397

Statehood carries with it rights and responsibilities that work to balance state power and ensure accountability to a state’s people. James Crawford affirms this, saying that “to be a State is to have a range of powers and responsibilities at that level… Not being a State is to be denied independent access to those forums that States—themselves or through international organizations—still control.”398 Additionally, statehood can give a voice to those who were formerly silenced within the system of international law. “While self-determination… involves speaking about and to nations, peoples and minorities, it has rarely involved speaking to them. States are the paradigmatic subjects of international law… The recognition of other entities as limited subjects of international law has not led to a role for them in constructing international law.”399

Statehood remains the most effective way to ensure the holistic goals of a group.400 In comparing states with other lesser forms of legal personality such as internally autonomous units, a UK representative noted that “An entity other than a State cannot be regarded as the same as the government of a State. A national liberation movement does not have the same ability as a government to provide the guarantee of good conduct and behavior which a host country is entitled to require.” These goals can include language and cultural protection, economic development, and self-government. Statehood still comprises the only way to be involved in the international community in an equal capacity, especially when forms of internal self-determination have failed. While internal rights to self-determination basically provide for a group to be participate in the legal or political system of a state, with possible autonomy in controlling natural resources and preserving and protecting their culture, external self-determination arises when “a people finds that this internal concept of self-determination is not being respected-- that fundamental human rights are not available to them. They cannot

399 KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 8 (Cambridge: Cambridge University Press, 2002).
participate in the system, and the wealth of the nation is inaccessible to them.”

Furthermore, external self-determination gives a group access to the legal and political processes of the international system, affording them legal personality and active, equal participation on the processes of international law.

2. Current Trends toward Autonomy

Keeping the importance of statehood in mind, it must be noted that current trends in the right to self-determination now tend to emphasize schemes of internal autonomy. The reason for this emphasis, no doubt, relates to the virtual stranglehold states maintain on self-determination and the recognition that some level of autonomy is better than nothing. Of course, some minority or indigenous populations do prefer to remain within an established state, and that preference is also their right. In the academic and policy maneuverings of various groups seeking self-determination, however, interesting proposals have emerged that could be useful when expanding the possible outcomes of self-determination.

Hurst Hannum analyzes the popularity of autonomy as a solution to cultural, ethnic, and political difference, and notes that regional autonomy has been extended to the Basque country and Catalonia by Spain, as well as to the 34 atolls composing the Marshall Islands by the United States. Additionally, demands for greater autonomy have been made by the Shetland Islands against Great Britain and by Quebec against Canada. Scholars distinguished between at least four, and possibly more, types of autonomy, including personal, cultural, administrative and territorial autonomy.

Cultural autonomy is characterized by extending rights and regulatory power to a particular cultural or linguistic group, such as the Sami in Norway, Sweden, Finland and Russia. Cultural autonomy is necessarily community-based, as contrasted with personal autonomy. Functional autonomy leans towards decentralization of control of a single

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functional subject matter in a semi-distinct geographic space, while administrative autonomy
instead consists of a set of coexisting functional autonomies and presupposes greater territorial
distinctiveness.\textsuperscript{405} Michael Tkacik argues that functional and administrative autonomy lack the
defined territorial space present in most legislative arrangements, in addition to the greater scope
and depth of legislative autonomy.\textsuperscript{406}

Like sovereignty, arrangements of autonomy have traditionally gained greater authority
and legitimacy as they become more territorialized. In fact, Tkacik proposes a formula for
determining the volume of autonomy in various arrangements: Scope $\times$ Depth $\times$ Territorial
Distinctiveness $= \text{Volume of Autonomy}$. According to Tkacik, “as one moves toward a greater
number of issues controlled, greater depth of control by the locals and greater territorial
insularity/ distinctiveness, the volume of local autonomy increases, culminating in what could be
a great deal of local control.”\textsuperscript{407} He further distinguishes issues of autonomy into tiers. Tier one
issues, such as including the character of the territory in question, the local legislature, the local
executive, central participation in local affairs, the local judicial system, language issues, and
local consultation on local participation in the central legislature, are concerned with legislative
autonomy.\textsuperscript{408} By contrast, tier two issues include education, local citizenship or domicile,
symbols, government funding, local taxation, freedom from central taxation, management of
revenue, internal security, and local election rules. Tier three issues deal with the international
personality of the autonomous entity, including the ability to negotiate international agreements
covering only local affairs, the right to have input on international agreements, and the right to
participate in regional organizations such as the European Union.\textsuperscript{409} However, participation in
international organizations by nonsovereign autonomous entities is uncommon, except in the
case of associated states.\textsuperscript{410}

Despite such attempts to dissect and classify autonomous arrangements, M. Suski
contends that the greatest strength of autonomy is its adaptability, and thus attempts at hard legal

\textsuperscript{406} Id., at 373.
\textsuperscript{407} Id., at 374.
\textsuperscript{408} Id., at 384.
\textsuperscript{409} Id., at 394-398.
definitions could limit its applicability: “the content of autonomy will vary according to the specific needs in each case.”

Hannum summarizes the previous discussion by stating that, “Autonomy and self-government are determined primarily by the degree of actual as well as formal independence enjoyed by the autonomous entity in its political decision-making process.”

Political or governmental autonomy is contrasted with more restrictive types of cultural or religious autonomy such as the case of the Aland Islands, the Belgian linguistic communities, or the millet system under the Ottoman Empire. Political/governmental autonomy is generally characterized by many structures familiar to states: an identifiable executive branch of government headed by a chief executive official, a locally elected legislative body, and a free and independent judiciary, although questions of subject matter jurisdiction may be quite complex.

In terms of the practicality of multilevel governance, each arrangement includes specificities to negotiate sovereignty. Provisions concerning the division of police and security powers are sometimes necessary to protect the interests of the central entity or to legitimize central intervention in the autonomous unit under specified circumstances. For example, the 1979 Basque autonomy provisions establish an autonomous police regime responsible to the Basque government, which has jurisdiction over the maintenance of public order within the province, while other police services such as guarding ports, airports, and frontiers, and controlling customs and immigration are reserved to the national security forces. To govern these separate units, a joint security council coordinates the local police and national security forces.

Similarly, control of natural resources must be negotiated between levels of governance, sometimes resulting in situations where such rights are theoretically vested in an autonomous entity, but exercised in fact by the central sovereign government under other powers such as national defense requirements. For example, U.S. military forces control approximately one-third of the land on Guam, including the island's major water supply, and allow for the establishment of military facilities. Research indicates that social services such as health,

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413 Id., at 876.
414 1979 Basque Statute, Article 17.1.
education, and welfare are generally the responsibility of the autonomous community rather than
the sovereign authority. 416 Links of control between the autonomous entity and the sovereign
state are often tight: the great majority of the nonsovereign entities form part of an economic and
customs union with the sovereign government.

By way of summarizing, Hannum notes the following principles to be applicable in the
case of a fully autonomous territory:

(1) There should exist a locally elected body with some independent legislative power…
limited by a constituent document. Within the realm of its competence-- which should
include authority over local matters such as health, education, social services, local
taxation, internal trade and commerce, environmental protection, zoning, and local
government structure and organization-- the local legislative body should be independent,
and its decisions should not be subject to veto by the principal/sovereign government. (2)
There should be a locally chosen chief executive…who has general responsibility for the
administration and execution of local laws or decrees. (3) There should be an independent
local judiciary, some members of which may also be subject to approval or confirmation
by the central/principal government, with jurisdiction over purely local matters. (4) The
status of autonomy and at least partial self-government is not inconsistent with the denial
of any local authority over specific areas of special concern to the principal/sovereign
government, as opposed to the reservation by the sovereign of general discretionary
powers. (5) Full autonomy and self-government also are consistent with power-sharing
arrangements between the central and autonomous governments in such areas as control
over ports and other aspects of transportation, police powers, exploitation of natural
resources, and implementation of national/central legislation and regulations.417

All of this is relevant to groups seeking self-determination, particularly those lacking the
political backing for secession. Critics of autonomy schemes deplore the separation that may
occur within society: “In the absence of common cultural and educational institutions a sense of
shared citizenship in the larger polity can hardly emerge. Civil society would be split into
separate public spheres and population segments that are at best indifferent and at worst hostile
towards each other.”418 However, it appears that much of the criticism of alternative autonomy
schemes result from a strong bias toward liberal individualism that ignores the profound role

416 “For example, health, education, public assistance, and social security were within the jurisdiction of Eritrea;
social welfare, education, cultural affairs, health services, and housing administration are within the home rule
jurisdiction of Greenland; and jurisdiction over social services, health, and education is among those powers
reserved to, for example, the Swiss cantons under the 1848 Constitution, the Saar under post-World War II French
administration, and the associated states of Niue, the Cook Islands, and the Netherlands Antilles.” Id., at 881.
417 Id., at 886-887.
418 Rainer Bauböck, Multinational Federalism: Territorial or Cultural Autonomy?, WILLY BRANDT SERIES OF
group loyalties already play in society. The positive aspect of autonomy is the potential for working out creative multilevel governance options that fill gaps in the system as each community requires. However, autonomy still falls short of the goal of many seeking self-determination, and it does nothing to improve these groups’ access to international legal personality.

The potential to deterritorialize schemes of autonomy has lately been explored, and this will become more relevant in the following chapter. Recognizing the potential for territorial disputes to result in violent conflict, G. Gottlieb and others suggest a functional approach to autonomous governance that “involves the demarcation of different layers of lines for different purposes”—taking autonomy beyond territorialized conceptions. Gottlieb later advocates “the eventual extension of the system of states to include alongside it a system of nations and peoples that are not organized territorially into independent states at all.” Similarly, Chandran Kukathas’ vision of a multicultural society maintains a role for territorial states, but views them merely as an institutional framework for carrying out certain tasks delegated by autonomous nonterritorial communities. In Kukathas’ view, the political institutions of territorial government would merely maintain order and peace, “leaving people free to pursue their own ends, whether separately or in concert with others, under the rule of law.” While such ideas relating to multinational federations may seem impractical, the possibilities for multilevel governance that relates to individuals and groups rather than spatial perimeters links back to many premodern governance methods. Such a federation may comprise asymmetrical constitutive units including

\footnote{Taking his argument to the extreme, “Imagine a society where core tasks that are now associated with territorial legislation of sovereign states, such as external defence, internal security, and the power of taxation, were devolved to national identity groups so that all their members and only their members would be subjected to the collectively binding decisions of the community’s political authorities independently of where these members live. The impacts of such a regime are obvious. Solidarity within neighbourhoods and workplaces could only be based on human decency and spontaneous association but no longer on the fact that the same laws apply to all. People living next to each other would contribute to separate tax funds, serve in different armies, be protected by their own police forces. It does not take a lot of imagination to regard such a society as close to a Hobbesian state of nature.” \textit{Id.}, at 25-26.}


\footnote{Gidon Gottlieb, \textit{Commentary, in Self-Determination and Self-Administration: A Sourcebook} 167 (Wolfgang Danspeckgruber, & Arthur Watts eds., Boulder: Lynne Rienner, 1997).}

non-territorial corporations as well as sovereign states, wherein the vertical division of powers is narrowly constrained.423

Some practical application of deterritorialized functional governance can be seen in border regions with strong trans-boundary communities. J. Blatter, conducting research in four such communities, notes that the difference in the structure of interaction between hierarchies and networks is important in respect to interterritorial dimensions and the intersectoral dimensions of governance. “In the ideal type of territorial governance, the lines of interaction are predominantly vertical, the information flows primarily within the national units and only ‘at the top’ across the national boundary.” However, “in the ideal-type of functional governance… both boundaries, the territorial and the sectoral, are blurred.”424 In the case of functional governance, many actors are free to participate and group loyalties apart from the central government can flourish.

Historic examples of non-territorial autonomy prove the workability of such deterritorialized schemes for self-determination cases:

The Polish-Lithuanian Commonwealth until 1764 allowed considerable latitude to the Jewish community in the administration of its internal affairs. This was exercised through the medium of the local Jewish community, whose governing body… sent representatives to regional and national-level Jewish councils. These bodies had responsibility not only for Jewish religious affairs but also for the regulation of family, housing, and economic matters, as well as acting as tax collecting agencies and liaising between the Jewish community and the central government. Second, the Muslim rulers of the Ottoman Empire allowed non-Islamic religious communities to exercise a considerable degree of autonomy, again on a non-territorial basis. Third, in certain parts of the Austro-Hungarian Empire, the ethnic complexity of certain power relations was recognized at an early stage. Thus in Transylvania down to 1867, political life was organized along lines that had for centuries recognized the participation of three ‘nations’, the Magyars, the Szekels, and the Saxons.425

According to Gottlieb, the deconstruction of rigid boundaries is a feature of current state relations. He describes the “soft jurisdical lines for authorities” as well as the creation of free-trade areas and the lack of boundaries interfering with the flow of ideas and information

423 Rainer Bauböck, Multinational Federalism: Territorial or Cultural Autonomy?, WILLY BRANDT SERIES OF WORKING PAPERS IN INTERNATIONAL MIGRATION AND ETHNIC RELATIONS 31 (2001).
across states, and concludes that “the principle of self-determination must be supplemented by a new scheme that is less territorial in character and more regional in scope.”

Furthermore, deconstruction and rearrangement of rigid concepts of territorial borders, sovereignty and independence has become necessary in situations where homogeneous nation states are impossible. His “states-plus-nations” approach requires functional spaces and special functional zones across state boundaries, the creation of national home regimes in historical lands, the grant of a recognized status to national communities that have no state of their own, the design of unions between peoples as distinct from territories, as well as an approach to issues of national identity and rights that differentiates between nationality and state citizenship. In short, “what is required is nothing less than a rethinking of self-determination; a revision of the Westphalian system, limited to states, from which other national communities are excluded.”

This chapter has primarily been concerned with why and how to begin expanding the current understanding of self-determination through reconceptualizing certain definitions and expected outcomes. In building national identities that lay claim to self-determination outside the traditional post-colonial understanding, space is created for self-determination to lead to multilevel participation, rather than strictly defined schemes of independence or autonomy. As M. Goodwin describes, “self-determination as participation is concerned with inclusion… it could serve to liberate identity-based international personality from territory.” The way this multilevel participation plays out practically will require creative options to suit various group specificities. The following chapter will continue this discussion of expanded outcomes of self-determination, and will combine the goals of secession with deterritorialized autonomy schemes to advocate the idea of landless states.

427 *Id.*, at 112.
V. Chapter Four

The previous chapter showed how a dual approach to expanding self-determination could be employed to remedy the human rights abuse certain groups are experiencing. This chapter discusses the possibility of landless states to solve the problem of territory associated with the traditional limits to self-determination. Building on ideas of agonistic patriotism and non-territorial cultural autonomy like the Renner-Bauer model, the chapter presents a sketch of landless statehood with the aim of infusing creativity and innovation into the processes of international law. This sketch is not a minutely practical proposal, but rather an effort to re-imagine current understandings of the state in a way that addresses the failings of the current system. This chapter describes the activity of the Roma of Europe and the American Indians to achieve self-determination and examines how it could be compatible with landless statehood. It concludes that this kind of vision is necessary to international law, as global changes threaten territorial sovereignty and make it expedient to begin pursuing innovations to ensure that all communities have an equal voice in the processes of international law and rights protection.

A. Landless States: Possibilities and Prescriptions

1. Why Territorial Secession is Unsuitable

The problem of territory has been the most consistent bar to independent sovereignty. In many instances, struggles for self-determination become violent conflicts over territories, particularly when several separate groups claim the same territory. The case of Palestine springs to mind, alongside others. The former Yugoslavia exhibited a spiral in which oppressed ethnic minorities sought statehood but denied other minorities the same right, resulting in armed conflict. “Each ethnic community, real or presumed, fought with every ounce of energy to achieve sovereignty over a given territory.”\(^4\) The multiple claims to self-determination were only conflicting because of the emphasis on territory and the goal of territorial sovereignty.

However, this problem need not be a bar for the groups specified. In fact, territorial secession would not even be suitable for these groups, because of the nature of the community structures. Transnational and mixed residential groups do not occupy contiguous land and therefore do not appear to qualify for traditional forms of internal autonomy or territorial secession. Ilona Klímová-Alexander describes the double predicament experienced by transnational and mixed residential groups:

Their demands for sovereignty, self-government, autonomy and participation remain unfulfilled because they do not fit the conventional interpretation of the principle of self-determination as territorial sovereignty and autonomy, which can only be exercised by states or their administrative (federal and other) subunits. Since the current international system only recognizes territorial control as the basis of political legitimacy, stateless communities which desire self-determination but do not want to establish their own territorial states, like the indigenous and the Romani, are caught in a vicious circle which keeps them politically subordinated by eclipsing their right of self-determination at all levels. While the territorial focus of the international system encourages those seeking self-determination to claim territorial autonomy, dispersed ethno-national communities are left without a satisfactory and fair remedy to their grievances because the practice of self-determination through territorial independence or autonomy is not suited to them.430

Klímová-Alexander draws a link between the Roma and other indigenous populations on account of their connection to land, saying that “traditionally many indigenous cultures had a sometimes fleeting tie to the land,” similar to the Roma.431 In addition, indigenous peoples do not necessarily demand territorial sovereignty over their lands, only the enjoyment of cultural and economic rights.432 In contrast with the dominant capitalist/colonialist norms, Roma and other indigenous groups have a relationship with the land that is based on communal use and stewardship rather than exclusive ownership.433 That is why a deterritorialized scheme is ideally suited for their claims to self-determination.

One of the areas in which Romani and other indigenous groups are similar is that “they can be seen as inherently sovereign encapsulated nations, which, unlike national minorities, maintained and retained powers and rights that predated the constitutions of the nation states in

which they became encapsulated.”

Owing to these factors, Klimová-Alexander argues that the dispersed settlement pattern makes territorial autonomy or secession impractical and undesirable for these groups. She employs a subjugation/grievance narrative in group identity formation across borders, and argues that even though these groups have members spread across several states and may speak a variety of languages and dialects and exhibit varied cultural features, their alienation owing to treatment by majority societies unites them. As previously argued, remedial self-determination is necessary to grant them equality in the international sphere and ensure and protect their rights. However, in line with the necessary expansion of the outcomes of self-determination, the remedial self-determination required cannot proceed on a territorial basis. Besides not being universally applicable, territorial arrangements also contain the problem of political subordination of minorities because they function on the premise of exclusive control over territory by the majority nation.

2. Re-imagining Self-determination and the State

As discussed in previous chapters, the legal personality that comes with statehood is needed, which is why models of autonomy fall short for some groups seeking self-determination. The failings of liberal democratic states to adequately represent or even foster diversity show that the structure of international society and law is the product of a very narrow culture. As James Tully describes, culture is “an irreducible and constitutive” component of politics, which cannot

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435 “Although various forms of non-territorial cultural autonomy have recently been introduced in Estonia, Latvia, Slovenia, Croatia, the Russian Federation and Hungary their practical success has been at best marginal, owing to the half-hearted support and limited scope allowed by the nation state that enacted the constitutional and statutory laws on cultural autonomy.” A. Eide, Cultural autonomy: concept, content, history and role in the world order, in AUTONOMY: APPLICATIONS AND IMPLICATIONS 256 (M. Suksi ed., The Hague: Kluwer, 1998); see also B. Bowring, Burial and Resurrection: Karl Renner’s controversial influence on the ‘National Question’ in Russia, in NATIONAL-CULTURAL AUTONOMY AND ITS CONTEMPORARY CRITICS (E. Nimni ed., London: Routledge, 2005).
be removed or neutralized and biases the system against those who do not create it.439 The determination of identity that occurs in dialogue with others demands positive recognition in the public sphere, and “such withholding of recognition arguably constitutes a form of domination.”440 Goodwin contends that the idea of self-determination is inextricably linked to freedom, and is not fulfilled by the right to vote in elections, but rather hinges on international recognition as a necessary component to free expression. Just as individuals in a democracy require an equal vote, so groups in the international system of governance require equal status.

The belief that underpins this argument is that diversity is a positive feature of society, and that inclusion and agonistic creativity between and among cultures, voices, and polities is necessary for the evolution of civilization. As Audre Lorde so famously said, “Difference must be not merely tolerated, but seen as a fund of necessary polarities between which our creativity can spark like a dialectic.”441 Beyond Lorde’s intended audience, it is not merely gender or racial differences that must be embraced, but the difference inherent to the expression of collective identity through groups. The dynamic of group difference may incite exponentially greater levels of creative thought and may propel the human rights project toward a sustainable ethics-based equilibrium. An international community built upon historical exercise of force and seizing of power to determine who now has access to statehood and the right to a voice in international governance can be viewed as capitalist: concentrating the right to be heard in the hands of an aggressive few.

The international system currently in place may tolerate difference, but it fails to meaningfully embrace the benefits that come from diversity. The design of the liberal democratic state, which gives an illusion of representation and fairness, as well as the system of states which restricts the expansion of human rights law to retain territorial sovereignty, perpetuate the subjugation of non-state persons. It is no great marvel, then, that secession and gaining international legal personality has been an important goal of those seeking self-determination.

439 JAMES TULLY, STRANGE MULTIPLICITY (Cambridge: Cambridge University Press, 1995).
Without this legal personality, some level of subjugation is inevitable. For the cases dealt with in this paper, anything short of international legal personality on par with states is insufficient.

It is necessary to address the dual nature of the failure of the international human rights system: the failure to protect groups from human rights abuse, as well as the failure of the system itself to adequately represent the diversity of the world it governs. Expanding self-determination and the very idea of the state would mean conceiving of new ways to construct relationships between individuals and communities, communities and states, and states among themselves. Furthermore, expanding these concepts would mean viewing sovereignty as sourced from people—individuals and communities of various compositions—rather than territory, which shifts sovereignty away from a zero-sum game of competition and towards conception as an unbounded resource.

To achieve legal personality while acknowledging that territorial secession is unsuitable for the groups in question, a reconception of the state must occur. Embracing diversity in the international system would make it possible for new expressions of statehood to emerge that exemplify the community values of minority groups. Thus, groups that follow patterns of nomadism or shared land usage may express statehood not through territorial sovereignty, but through community structures built around a shared value system. Of course, non-territorial independence goes against the traditional understanding, making it difficult to advocate for even though it may represent the best option. G. Nootens argues against a conventional interpretation for self-determination as territoriality, and called on the international community to investigate counter-traditions more suited to the needs of these groups. Similarly, M. Goodwin states that “the current political subordination of stateless communities (with which we cannot speak of the equality of all peoples so proudly proclaimed in the UN Charter and elsewhere) cannot be remedied unless we stop equating ethno-national communities with territorial statehood.”442 For these groups, it is possible to re-imagine statehood so that physical territory is no longer either a criterion or a goal.

The concept of landless statehood seeks to place more actors on the international plane in equal conversation with one another. Although this goal may seem threatening to the dominance of more traditional state structures, such fears are groundless when the myth of sovereign equality is compared with the actual variance in sovereignty and power among states. The previous chapters have illustrated an international system of human rights that is failing to fulfill its mandate and in the process causing real harm to certain groups. Furthermore, the system does not engender constructive conversations between or across cultural lines, but keeps the conversation located on an elevated plane of narrow cultural expression, accessible mainly to states that for a long time kept much of the world in subjugation.

During the last few decades, the model of the state has already undergone considerable critique by political theorists. A first wave pointed out the clear connection between the political culture and a majoritarian culture. The paradigm of the multinational state, examined by Kymlicka, critiques that connection. In the context of Western Europe, J. Habermas and J.M. Ferry argued on behalf of constitutional patriotism that overlapped with various national cultures and would comprise the core of a European citizenship. Finally, a third trend relates to debates on cosmopolitanism, focusing mainly on the relationship between democracy and the state. These critiques show that it is not only possible but necessary to reinterpret the very idea of effective authority and conceptualize a state that equates with some other form of sovereignty.

The source of sovereignty could shift to make a reinterpretation of statehood possible. As noted before, in the current understanding of a sovereign state, sovereignty flows from the “territorial principle”—consolidated political dominance exercised over anyone residing within a particular territory. To redraw the source of sovereignty, we can look to Renner’s contrasting “personality principle”—the idea that autonomous communities can be organized as sovereign collectives regardless of their territorial location vis-a-vis states. The personality principle

446 Karl Renner actually appropriated the idea from Meinecke’s Cosmopolitanism and the National State, arguing that “personality is not only the highest form of autonomy, but… also the highest level of personal autarky and the
prizes diversity because it accepts the fluid nature of culture and peoplehood by fostering continuous dialogue within and between communities when negotiating public space and formal relationships. \(^{447}\) Combining the need for genuine international legal personality accorded to states with schemes of autonomy, this redrawn source of sovereignty will make possible the conception of a landless state. As Chapter One discussed, the development of the criteria for statehood responded to the needs of the international community at the time, rather than any abstract truth about statehood as a construction. Thus, a reinterpretation of the criteria is possible when it responds to a need in international law.

In a model of landless statehood that takes autonomy beyond the internal field and into true statehood, the emphasis is not on physical territory at all, but on personality-based citizenship and functional governance. Landless states would overlap with established territorial states and would consequently require a great deal of particularized negotiation to establish realms of coexisting sovereignty that promote the rights of each group involved. This is a call for multilevel governance as experienced prior to the consolidation of nation-states and currently experienced within the EU. The combination of multilevel governance and overlapping, multi-sourced sovereignty leads to a deterritorialized conception of the state—a state that fully encompasses the rights and responsibilities of international law and is able to participate in it as an equal, yet is not tied either symbolically or physically to a territory. The concept of a landless state is somewhat alien to the heavily territorialized international system, but the idea builds upon a history of models regarding internal cultural and political autonomy and expands outward to statehood from there.

3. **Building on Models of Non-Territorial Autonomy**

The concept of ‘agonistic patriotism’ provides a suitable foundation, because it “does not assert cultural superiority through automatically affording modern liberalism the normative priority.” \(^{448}\) The concept, derived from the Greek and employed by Foucault and Nietzsche, combines democratic goals with cultural pluralism that “protects institutional manifestation of


difference,” and encourages a shift from antagonism to agonism without resorting to the “impossible neutrality” of political liberalism.\(^{449}\) Agonism does not limit political culture to a single expression, but protects identity in order to encourage a multilogue.\(^{450}\) Within this framework, there are specific autonomy models that could be instrumental in designing a practical landless state. Consociationalism, for example, emphasizes the individual’s right to choose to belong to a community that would have equal participation in broader government.\(^{451}\) To provide greater inclusion in the international community, as well as a more dramatic reconceptualization of that community, it is worthwhile to explore the Renner-Bauer National Cultural Autonomy (NCA) model.

Renner, together with Otto Bauer, held the nation-state model as “largely liable for the persistent struggles between national groups and the assimilation of minorities.”\(^{452}\) According to Renner and Bauer, controlling self-determination on the basis of the territorial principle “compels the nations to struggle against each other to get more power in the state.”\(^{453}\) Borrowing certain ideas from Renner–Bauer does away with “territorial belonging as the sole basis of political life,” and foresees institutions based on cultural identity existing alongside more traditional territorial organization.\(^{454}\) In the Renner-Bauer model, the state would encompass both territorial and cultural borders, and two separate branches of government would exist to deal separately with matters relating to each. Cultural identity, spread across the territories, would thus be independent of territorial residence.\(^{455}\)

This model of autonomy would protect and foster diverse identities while allowing for free movement, as Renner believed the only way to resolve existing tensions was to organize the

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\(^{453}\) Id.


nations into non-territorial public associations with autonomous cultural rights within a de-nationalized territorial state. In this way Renner divorced the nation and the state, realizing that “at the very least in theory, the idea of the nation-state and the political representation of ethnic diversity are diametrically opposed.” Uniquely, Renner rejected the predominant territorial principle and focused instead on a personality principle. The personality principle “constitutes the nation not as a territorial corporation, but as an association of persons.” The model further circumvents the “centrist-atomist principle” that saw only two actors in the system of the state: the individual and the indivisible collective will.

Crucial to the Renner-Bauer theory are the many spaces in between the individual and the state wherein solidarity is expressed, such as kinships, ethnicities, and cultural and political groups. To capture the “contemporary dimensions of historical legacies that have shaped the various national communities,” Bauer re-introduced the idea used by Nietzsche and Eduard von Hartmann that the nation is a “community of fate,” or Schicksalsgemeinschaft. This corresponds to the subjugation narratives described previously that may be employed to identify a people for the purposes of self-determination. Recognizing the interplay of historical injustice and cultural dynamism in the development of a national psyche, a sense of shared fate will be reflected in a community’s expression of self-determination through government, political society, and relationship with other states.

In extrapolating the principles of the Renner-Bauer model, Kristen Porter suggests a series of activities designed to implement some form of cultural autonomy. This model can be expanded towards actual statehood for the purpose of equality in the international community. First, Porter calls for “an assurance from the minority that they are not seeking to secede from the nation-state.” Second, Porter recommends that the nation-state “acknowledge that the national minority is entitled to maintain its distinct cultural identity.” Through this recognition,
the nation-state is affirming the right of the minority to formal and substantive equality. Porter’s third principle is more problematic for the landless state model. She recommends “that the national minority commits itself publicly to allegiance to the nation-state in which they reside and that the nation-state commits itself to publicly acknowledge the freedom of the national minority to maintain its identity.”\(^{461}\) Porter’s fourth principle, that “the nation-state acknowledges that the law must respect the freedom of the national minority to maintain its identity though without imposing an obligation on the nation-state to expend its resources to assist the national minority,” addresses the more complex difficulties inherent to overlapping sovereignty, especially in the area of public goods and services and economic activity. The final principle attempts to give a minority “influence over legislation, particularly concerning the rights of minorities, by granting minorities guaranteed seats in the Upper House of Review such that they have a more meaningful and effective voice in the creation and application of political policy and legislation.”\(^{462}\)

In the case of landless statehood, non-territorial secession is in fact the goal, so the first principle must be adapted to say that the minority is not seeking _territorial_ secession or the disruption of the territorial integrity of the state, which is “necessary to overcome the preoccupation of the nation-state with maintaining its territorial integrity.”\(^{463}\) The third principle must also be reformed, and the goal must be a commitment between the nation-state and the intended landless state to cooperate in the formation of a system of multilevel governance and overlapping sovereignty. Practically, this principle could function in a variety of ways as best suited to a specific scenario. Regarding the fourth principle, Renner believed that “minority representation and curial voting are incomplete forms” of determining such complex administrative issues, which is why simple internal autonomy does not go far enough to protect minority rights.\(^{464}\) The meeting of two equal governments is, instead, desirable. Likewise, the final principle will be adapted to the model of landless states, through the creation of an independent government structured as the group in question desires. Treaties between the two governments, then, will determine their relationship and ensure that citizens of the landless state

\(^{461}\) _Id._  
\(^{462}\) _Id._  
\(^{463}\) _Id._  
retain the rights of the territorial nation-state while expanding their lawmaking capabilities and rights protection through membership in the new state. While the Renner-Bauer model is applicable to the cases dealt with here in many ways, it nonetheless conceives of deterritorialized nations bound by a single state, which is where their idea diverges from the model of landless statehood presented here. Renner and Bauer challenged the notion that self-determination required separate statehood, but as exhibited, even multicultural states often fail to fully incorporate the voice of all groups into the international legal conversation.

4. Deterritorialized Citizenship and the Challenges of Landless Statehood

Landless statehood addresses the fears of states because it is uniquely and only suitable for transnational and mixed residential groups with a strong claim for self-determination, thus limiting the possibility for free-for-all secession. It does not disrupt territorial integrity, but invites states to participate in the challenge of designing a system of overlapping sovereignty and multilevel governance that has shown itself to be a future path for international law.465 As Goodwin argued, until now “self-determination has required limitation because of its territorial implications. Once one separates self-determination from territory, once self-determination is understood as types and degrees of participation rather than the exclusive control of territory, the need to limit its application all but evaporates.”466 States become “non-territorial public law corporations” that share powers and sovereignty with the territorial administration of the state.467

465 “Over the past 20 years… spatial practices, the ways in which space is produced and used, have changed profoundly. In particular, both territorial states and non-state actors now operate in a world in which state boundaries have become culturally and economically permeable to decisions and flows emanating from networks of power not captured by singularly territorial representations of space.” John Agnew, The Territorial Trap: The Geographical Assumptions of International Relations Theory, 1:1 REV. INT’L POL. ECONOMY 53-80 (1994); see also J.M. Stopford & S. Strange, RIVAL STATES, RIVAL FIRMS: COMPETITION FOR WORLD MARKET SHARES (Cambridge: Cambridge University Press, 1991).
Further, this model will respond to the “space of flows” reality of the global system, rather than remaining stuck in the “space of places” historical outlook.  

The emphasis on citizenship, rather than territorial residence, would provide landless states with a flexible model that could be adapted for group specificities. At the same time, such a model would expand the legitimacy of international law by diffusing the power of lawmaking and the benefits of statehood away from the central elite. “Does democratic citizenship require a territorially bounded political community, replete with the institutions of the constitutional state? The burgeoning languages of citizenship unbound from the territorial states of the post-Westphalian system seem to signal a refusal of that judgment.” Citizenship is a more malleable basis for state sovereignty and legitimacy, particularly for the groups in question. Political institutions bundle tasks and responsibilities on the basis of territorial space, but we are witnessing an un-bundling of these into “fragmented regionalism,” that could be employed in separating citizenship from territory for the model of landless states. Citizenship defines the complex relationship between a sovereign state and an individual who assumes the rights and duties required, comprising three elements: civil, political, and social rights; active participation in political institutions; and affiliation with an identity-providing structure. In the view of those who reject the conventional identification between demos, territory and citizenship, citizenship is not a set of practices and rights that need to be anchored in a particular demos defined by specific territorial boundaries; rather, “citizenship is ideally exercised in a multiplicity


469 If the group’s members are outnumbered by or intermixed with other population groups, autonomy on a personal level, meaning membership or and participation in the group’s activities irrespective of residence, is a legitimate and workable solution. In an example of internal autonomy, the Norwegian Legislation set up a consultative assembly for the Sami, the Sameting, wherein they can run for office and vote in elections for the assembly no matter where they live in the country. Gudmundur Alfredsson, The Right of Self-Determination and Indigenous Peoples, in MODERN LAW OF SELF-DETERMINATION 52 (Christian Tomuschat ed., London: Martinus Nijhoff Publishers, 1993).

470 Melissa Williams, Non Territorial Boundaries of Citizenship, in IDENTITIES, AFFILIATIONS, AND ALLEGIANCES 237 (Seyla Benhabib & Ian Shapiro eds., Cambridge: Cambridge University Press, 2007).


of sites, situated at different levels of governance.” 473 This kind of citizenship instigates a 
“vertical dispersal of power above and below existing sovereign states, which are stripped of 
their centrality.” 474

Based on the Postmodern state described in chapter one, landless states will function on 
the premise that one of the overarching purposes of states today is the protection and promotion 
of human rights, and that fulfilling this purpose gives a state legitimacy and the right to 
participate equally on the international plane. As the principles above describe, landless 
statehood could function similarly to the overlapping sovereignty occurring in the case of dual-
nationals or foreign nationals residing abroad, with each transnational or mixed residential group 
specifying the exact levels of sovereignty and the divisions of governance that will take place. 
The purpose of this paper is not to present a minutely practical model, but to urge the 
international community to embrace the possibilities presented by landless states for expanding 
self-determination. When viewed as the manifestation of a group’s political will, self-
determination should provide the necessary space for re-imagining structures and systems to 
better express group values, instead of forcing those groups to continue to express the values of a 
dominant community. Further research and analysis is needed to carry this idea beyond the 
sketch presented here toward a more developed policy proposal.

Additionally, a few caveats should be mentioned. The model of landless statehood 
described emphasizes civil and political rights at various levels, and prima facie appears to 
provide greater access to these rights for minorities. However, of equal importance to these 
groups are economic, social, and cultural rights. While landless statehood could provide a greater 
space for the fostering and expression of culture, economic and social concerns will remain 
challenging to fulfill. Social welfare states may contain valuable access to financial assistance, 
healthcare, and other services that Roma or other groups may deem essential to their well-being. 
Economic inclusion and access to national economies may likewise be essential to the 
development of a community. The concept of multilevel governance between a landless state and 
a partnering territorial state should promote cooperation to provide dual citizens with access to 
social services and economic inclusion as needed, but the overlapping layers of responsibility

between governments may not be seamless. Additionally, for indigenous populations like the American Indians, giving up rights to territory may seem counterintuitive. Forming a landless state, however, does not necessarily mean renouncing claims to territory, but acknowledges the complexity of such questions alongside the necessity of achieving self-determination. Landless statehood could potentially function as a complement rather than a substitute to other territorialized forms of autonomy. These challenges and others will be addressed in the following sections, which will examine Roma and American Indian claims to self-determination alongside the option of landless statehood.

B. The Roma: “Nation without a State”

Recent political endeavors among the Roma suggests that not only are they entitled to external self-determination, but they have been active in pursuing a solution that goes beyond internal autonomy and actually correlates to the model of landless statehood.

Following early attempts by intellectuals such as Ionel Rotaru to gain support for a Roma state, the first World Romani Congress in London in 1971 saw the reintroduction of the idea of Romanestan.475 Gheorghe and Mirga have compiled a list of events, both external and internal, that led to a Roma ethnic awakening, including greater interest in diasporic politics, as well as the establishment during the 1970s of institutional links between Romani international organizations and India. The support of the Indian government has been crucial for the international recognition of Roma/Gypsies as an ethnic group with Indian origins.476 International Romani organizations such as the IRU have since aimed to develop a diasporic consciousness among their people, focusing on a common Romani history and the portrayal of the Roma as a unified people, what Hancock has called Jekhipè, or oneness.477 Fox also notes

that importance of technology like the internet to create networks and a “virtual imagined community” among the Roma.\footnote{S. Fox, The new imagined community: identifying and exploring a bidirectional continuum integrating virtual and physical communities through the Community Embodiment Model, 28:1 J. COMMUNICATION INQUIRY 47-62 (2004).}

In the last few decades, the EU, the Council of Europe, and the Organization for Security and Co-operation in Europe (OSCE) have begun to pay attention to the Roma, initially on a socio-economic level, and later on a human rights and governance level.\footnote{Ilona Klímová-Alexander, Transnational Romani and Indigenous Non-territorial Self-determination Claims, 6:3 ETHNOPOLITICS 404 (2007).} Roma-specific policies and documents suggest that they are also increasingly treated as a transnational European entity requiring a standardized approach.\footnote{ROMA, GYPSIES: TEXT ISSUED BY INTERNATIONAL INSTITUTIONS (M. Danbakli ed., Hatfield: University of Hertfordshire Press, 2001).} Roma-specific institutions now include the OSCE’s CPRSI, the Council of Europe’s Group of Experts on Roma, Gypsies and Travellers, Co-ordinator for Roma and Travellers Issues and, most recently, the European Roma and Travellers Forum (ERTF), as well as an informal international working group on Romani issues bringing together actors such as the Council of Europe, European Commission, OSCE CPRSI, World Bank, Open Society Institute and Project on Ethnic Relations.\footnote{S.M. HIRVASKOSKI, EMERGENCE OF ROMANIES AS A PAN-EUROPEAN MINORITY IN 1990–THROUGH 2005, Ch. 3 (Unpublished Master’s thesis in Political History, University of Helsinki, 2005).} The EU Network of Independent Experts in Fundamental Rights began proposing Roma-specific legislation in 2003, and other proposals have surfaced for European Parliament resolutions recognizing the Roma as a transnational European entity.\footnote{Id.} Even so, all of this falls far short of what the Roma campaigning for self-determination aim to achieve.

Roma have only recently begun to use the language of self-determination to present their claims. “Although claims formulated on the basis of the concept of self-determination are believed to have been articulated by Romani elites since the end of the nineteenth century, up until 2002 there was a certain reluctance to make explicit references to the Romani right of self-determination.”\footnote{I. KLI’MOVA’, THE ROMANI VOICE IN WORLD POLITICS Ch. 2 (Unpublished PhD dissertation: University of Cambridge, 2003); see also PROJECT ON ETHNIC RELATIONS ROMA AND THE QUESTION OF SELF-DETERMINATION: FICTION AND REALITY (New Jersey: Princeton, 2003), at http://www.per-usa.org/Reports/Jadwisin1_12_03.pdf., p. 23.} Exceptionally, the International Romani Union (IRU), another umbrella organization aspiring to be the Romani world government, issued the Declaration of Nation in
2001, arguing that Roma are a non-territorial nation and as such should possess the same rights as other nations-states, including representation in intergovernmental organizations.\(^{484}\)

According to Klímová-Alexander, who has compiled to most comprehensive history on Roma political activity, the Roma eventually embraced the call for self-determination in April 2002, at a roundtable in Jadwisin, Poland organized by the OSCE Contact Point on Roma and Sinti Issues (CPRSI), together with the Project on Ethnic Relations, in order to ask the question “of whether the Romani leadership is seeking national self-determination based on recent developments resembling a serious drive for it.”\(^{485}\) Many Roma leaders and activists responded that “what is taking place now is a Romani national self-determination movement in the making… many international documents not only do not deny it, but actually strengthen the conviction among the Roma that they are indeed a nation.”\(^{486}\)

However, European governments have been slow to acknowledge the growing call for self-determination and self-governance. The Memorandum of Understanding and Cooperation signed between the Czech Ministry of Foreign Affairs (MFA) and the IRU in April 2001 is an exception. The Czech Ministry praised the IRU approach of non-territorial nationhood as “a reasonable point of departure in the present world.”\(^{487}\) Klímová notes that from 2000 until 2004, Emil Scuka, the president of the IRU, attempted to have the Romani claim to non-territorial nationhood acknowledged by a number of heads of various countries and high governmental officials and distributed the declaration during meetings of international organizations, with many expressing support for the request.\(^{488}\) This bodes well for the future of a landless Roma state. Roma seem to be the first community to publically express a desire for such an arrangement, and within the EU, the development of multilevel governance makes it a real possibility. M. Goodwin notes that “there are strong practical reasons for choosing to claim a

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\(^{486}\) *Id.*, at p. 12.


\(^{488}\) I. KLÍMOVÁ THE ROMANI VOICE IN WORLD POLITICS §2.3.1.5 (Unpublished PhD dissertation: University of Cambridge, 2003).
non-territorial nation within the structure of what is the boldest governance project yet." According to the Project for Ethnic Relations, the claim for a landless state exhibits the desire of Roma “to participate at the European level of politics, having not only a voice but the power to determine for themselves what their role at that level shall be.”

Accordingly, since 1993 activists have called for a representative Roma body within European structures. The Finnish president, Tarja Halonen, likewise called for a consultative assembly of Roma representatives at the pan-European level in her speech to the Council of Europe Parliamentary Assembly in January 2001. Two Roma manifestos further corroborate the growing desire for a landless state that has an equal voice in European activity. The RNC’s ‘European Charter of Romani Rights,’ calls for “a change in the political status of Roma toward political, social and cultural self-determination” as the only way to guarantee the protection of civil liberties of the Roma. The charter demands political autonomy through the right to political representation in the European Parliament, the Council of Europe and the UN, with full voting rights, greater involvement in any political scheme that concerns the Roma, and diplomatic recognition of elected Roma nation representatives. Moreover, it advocates cultural autonomy in education, and aims to establish “a regular forum in which national governments, elected Romani representatives and multilateral organisations could come together to resolve problems.” This charter shows practical steps toward working out the hierarchy of governance that could exist between a landless Roma state and the existing European state.

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The second notable charter, the ‘Moral Charter of the Roma Nation in the European Union’ was drawn up by the Romani Activists Network on Legal and Political Issues. It demands that the EU “acknowledge the existence on the territory of its Member-States of a Romani nation without a compact territory” and “declare the Romani nation living on its territory one of the constituent nations of Europe, in full equality from all points of view with all the other nations which constitute Europe, irrespectively of their possible relations with States and territories.”

The call for landless statehood exists, and appears to have greater momentum among the Roma than any other minority group at the present. One challenge the Roma could face in implementing this plan is the focus of many Roma on socio-economic access and access to social welfare programs. However, the activity described above illustrates how it is necessary for a community to formulate the practical aspects of a landless state in a way that addresses their specific needs. As this section shows, Roma have begun to call for external self-determination in the form of a landless state and have made progress in formulating governmental structures and negotiating with surrounding states. Their efforts could make swift headway towards empowerment if the structures of international law began to re-imagine self-determination and statehood in the ways advocated above.

C. American Indian Tribal Nations: “Throw Me a State Dinner.”

On a visit to Pueblo communities in New Mexico in February 1998, Newt Gingrich told Indian leaders that he had trouble understanding the concept of tribal sovereignty. The president of the Navajo Nation, Albert Hale, offered Mr. Gingrich an explanation, telling him how an Indian leader would prefer to be treated. “When I come to Washington, you don't send me to the Bureau of Indian Affairs,” said Mr. Hale, leader of a tribe with nearly a quarter-million members. "You have a state dinner for me.”

Alongside the wider indigenous movement for self-determination, American Indians have sought to revive interest in their status as sovereign nations by emphasizing treaties and mobilizing against federal government interference in certain rights. Some American Indians, noting the way liberal democracy in the U.S. fails to adequately represent their voice, have been calling for alternative plans that correspond to the idea of a landless state.

Navajo leader Mark Charles proposes a fifty-first “Virtual Native American State” that would be a landless state functioning within the government of the United States. He cites the continuing problem of gaining a true voice within a democracy as a reason why American Indians require an innovative solution to their marginalization. As previously noted, “the tension between the international system and identity is therefore a core failing of the Westphalian international system,” where identity, culture, history and tradition “are valued only if they strengthen national debates... The dilemma is that to separate may lead to violence, but not to separate may continue institutionalized oppression and structural violence.”

Leaving behind territorial secession, Charles advocates the following plan:

This virtual state will function primarily as a means to give Native Americans a voice in the national structures of power that currently exist. Each member of every federally recognized tribe will, for national elections and for the US Congress and Senate, vote and be represented as a virtual Native American state. Based on the population, 2-5 votes will be added to the Electoral College, 2-5 members will be added to the US House of Representatives and 2 members will be added to the Senate. Also a 51st star and a 14th stripe should be added to the flag. I believe these institutional and constitutional corrections will allow the Native American population an equal voice within the structures of power and in the representation of our lands. No longer will Congress or the President be able to quietly cut funding from health care and social services, which were guaranteed in the treaties that were signed... And no longer will Native Americans be forced to be a ward of congress and at the mercy of the state governments and the BIA.

The idea follows the model of landless statehood but retains an internal dimension that focuses on the linkages between American Indians and the U.S. government. It further corresponds to the plan for Indian Territory to become the state of Sequoia in the late 1800s, a plan that ultimately failed. The concept of a fifty-first state emerged again in congressional

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American Indian Policy Review Commission studies in 1975-76. The commission was directed to study and recommend arrangements for more effective Indian representation, including the possible election of an American Indian Congressional delegation, but ran out of funds before its study could conclude.\textsuperscript{503}

It is possible to take a cue from the proposed State of Sequoia in fathoming a Confederation of Indian Nations coming together to form a landless state. The concept of Sequoia statehood at the time advocated a “dual state” wherein Oklahoma would enter the Union alongside and even overlapping with Sequoia, exhibiting multilevel sovereignty and governance. Such a scheme could potentially combine international legal personality and the specific involvement in U.S. government advocated by Charles to produce both a fifty-first state and a sovereign nation with a right to participate internationally. The value of international recognition would force greater respect for American Indian rights on the U.S., provide opportunities to enforce and gain remedy for broken treaties, and benefit the international community by diversifying the rhetoric used in law-making and rights advocacy.\textsuperscript{504}

One reason among many why this scheme should extend beyond a purely internal level is that the U.S. government still retains a good deal of control over tribal recognition. Although tribes may have the power to recognize individual members, the U.S. government controls which tribes are recognized as such, and gaining recognition as a tribe can be quite an arduous process, as members must submit extensive genealogical proof of tribal descent.\textsuperscript{505} This exemplifies a wider problem of manipulation of the concept of tribal sovereignty through policies, laws, and legal decisions, which could be remedied if full sovereignty were transferred to a confederation of tribes. In fact, discussion over whether greater respect for tribal sovereignty should be pursued instead of autonomy has produced a number of schools of thought. Re-conceptualists view tribal sovereignty as a separation of council authorities, and an embracing of property rights, while rejectionists view sovereignty as an exclusionary concept that is inappropriate for Tribal Nations.


\textsuperscript{505} For example, see the efforts of the Muwekma Ohlone Tribe (among others) to gain recognition, \textit{Makkin Mak Muwekma Wolwoolum, 'Akkoy Mak-Warep, Manne Mak Hiswi!}, at http://www.muwekma.org/.
The rejectionist-conceptualist school of thought views sovereignty as a process of reclaiming culture before political advancements can be made, while the revolutionary-conceptualist school of thought focuses on the discussion between the colonizer and the colonized in which any measure of sovereignty is absent. According to Vine Deloria, nationhood implies decision-making that is free and uninhibited within a community and corresponds to full external sovereignty, while the kind of self-government currently allowed to Tribal Nations gives superior political power to the federal government to monitor the local decision-making authority within the context of a larger political framework. R. O. Porter describes that sovereignty is the power of a people to control their own destiny, and further argues that the legitimacy of sovereignty lies in tribal ability to extend and enforce it. This depends upon the extent to which tribes believe in the right to define their own future, possess the ability to carry out those beliefs, and are able to achieve recognition of their tribal sovereignty. As these activities are currently limited by the federal government, and Congress actually has the authority to limit or abolish tribal powers altogether, the level of sovereignty accorded to Tribal Nations is insufficient.

In response, Taiaiake Alfred argues that if greater recognition of limited sovereignty rather than independence remains the goal of indigenous politics, “Native communities will occupy a dependent and reactionary position relative to the state.” Alfred instead advocates a separate state that could correspond to the landless state described above, and describes the way overlapping governance could function:

The Kanien’kahaka Kaswentha (Mohawk Two-Row Wampum) principle embodies this notion of power in the context of relations between nations. Instead of subjugating one to the other, the Kanien’kehaka who opened their territory to Dutch traders in the early seventeenth century negotiated an original and lasting peace based on co-existence or power in a context of respect for the autonomy and distinctive nature of each partner. The metaphor for this relationship – two vessels, each possessing its own integrity, travelling

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the river of time together – was conveyed visually on a wampum belt of two parallel purple lines (representing power) on a background of white beads (representing peace).\textsuperscript{510}

These ideas are actually consistent with Western conceptions of federalism that have often been forgotten in the primacy of the liberal democratic state. To Alfred and Deloria, limited internal sovereignty serves the purpose of the established state, but does not fully embody the aspirations of Tribal Nations. Howard Adams likewise warns of the emphasis on cultural nationalism for the purposes of internal autonomy or self-government, calling it “reactionary nationalism” with neocolonial roots that could potentially silence liberation ideologies if it is not united with efforts to achieve independent status.\textsuperscript{511}

A unique concern American Indians must face in their activity towards a landless state is the continued importance of land rights: the trust territories and stolen land that remain significant barriers to the goals of Tribal Nations. Although traditional relationships to the land centered on communal use and partnerships, modern principles of land-ownership have forced Tribal Nations to lay claim to territory, whether through previously signed treaties or historic evidence of ownership. The concept of a landless state will fail unless it can recognize and accommodate the continued importance of land in the dialogue between American Indians and the U.S. government. For example, when Russell Means and his group of Lakota seceded, he claimed the Missouri River and the Black Hills as legally belonging to the Lakota. A U.S. Supreme Court decision in 1980 awarded the tribes $122 million as compensation, but the court did not award land, causing the Lakota to refuse the settlement. In the late 1980s, New Jersey Senator Bill Bradley introduced legislation to return federal land to the tribes, and California millionaire Phil Stevens also tried to win support for a proposal to return the Black Hills to the Lakota.\textsuperscript{512}

The complexity of land claims and trust territories means that it may be in the best interest of American Indians to pursue self-determination through a landless state without giving up claims to land, and continue to pursue those claims as a sovereign nation in the future.

\textsuperscript{510} TAIALAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 52 (Canada: Oxford University Press, 1999).
\textsuperscript{511} HOWARD ADAMS, PRISON OF GRASS: CANADA FROM A NATIVE POINT OF VIEW 170 (Saskatoon, Saskatchewan: Fifth House Publishers, 1989).
Landless statehood does not imply a fulfillment or end to the goal of self-determination, but a particular step that can overlap with other steps to achieve rights. The problem of territory should not restrict American Indians from gaining greater influence in the international community or exercising sovereignty over their tribes, which is why landless statehood may expedite the necessary process of gaining international legal personality. Nevertheless, the problem of territory does not disappear once moral agency is recognized. Uniting landless statehood with a continued effort to achieve control over trust territories would imply a high level of cooperation in delineating governance between an American Indian state and the federal government. Certain tribes already hold rights over their trust territories ranging from control over natural resources to jurisdiction over citizens. As described in a recent working paper, “independent liberal states... can more easily accept a blurring of citizenship boundaries through multiple nationality and equality of rights between citizens and foreign residents.”

The current level of sovereignty Tribal Nations enjoy has thus laid a foundation for that cooperation.

D. Facing the Future of International Law

Landless states address the problem of territory while pushing the international community towards more creative and useful understandings of statehood and self-determination. Reconceptualizing what it means to be a state from the perspective of citizens rather than territory may be a necessary step for international law in the future. Among many other relevant concerns facing the international community, global warming and rising sea levels have sparked an environmental disaster that may directly relate to theoretical discussion of how to incorporate greater diversity into international law. Low-lying island states such as Kiribati, Vanuatu, the Marshall Islands, Tuvalu, the Maldives and the Bahamas are in danger of completely losing their territory to sea-level rise. High tides are already destroying habitable land and access to natural resources. In the event that all inhabitable territory is lost, the institutions of government and statehood will be lost along with it, leaving the citizens of these states with few options: adopt the citizenship of another state, or become stateless migrants. If

the concept of landless statehood takes root, it may provide a better alternative to states facing the loss of their territory: to retain the structures and privileges of statehood while residing elsewhere.

The Maldives, an island nation in the Indian Ocean, has its highest point only 2.4 meters (8 feet) above sea level, so even minor changes have the potential to wipe out vast amounts of land, foul fresh water supplies, and destroy crops. Owing to the fact that such floods have become more frequent in recent years, the nation’s government has constructed an artificial island nearby in case evacuation becomes necessary. Similarly, Tuvalu has a maximum elevation of 4.6 meters (15 feet), and its 11,000 citizens are sufficiently convinced of its imminent disappearance that they have already begun to evacuate. Most estimate submersion will occur within fifty years. New Zealand has agreed to grant “environmental refugee” status to a mere 75 Tuvaluans per year. A crisis in statelessness could break out at any moment, prompting the UN and others to begin examining possible solutions to the permanent loss of territory for a state. A UN report confirms that “Low-lying island States are... very likely to be entirely uninhabitable long before their full submersion, causing entire populations and the governments to be externally displaced... The government’s independence could thus also be questioned.” The report further notes that unless a benevolent state conceded territory to the exiled government and population, statelessness was likely to occur. However, territory need not become the reason the state ceases to exist.

Whatever option a displaced population chooses to pursue, it is far more difficult for an existing state to cease being a state than it is for a non-state entity to become a state. Knop describes a distinction that exists between the creation of a new state and “the subsistence or extinction of an established State on the other... The independence of an existing State is protected by international law rules... so that the State may... continue to exist as a legal entity despite lack of effectiveness.” In the case of vanishing islands, the criteria for effective

516 United Nations High Commissioner for Refugees (UNHCR), Climate Change and Statelessness: An Overview, 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC) (1 to 12 June 2009), Bonn, Germany.
government may continue to be met regardless of a lack of territory. In fact, many regard a functioning government as the most important criteria for statehood. The Permanent Court of Justice once affirmed that “a new State may exist despite claims to its territory, just as an existing State continues despite such claims.”518 Similarly, Ambassador Jessup stated that the criterion implies some entity “over which its Government exercises authority.”519 As previous sections have explained, a government may exercise sovereignty that is personality-based rather than territorial. The only reason the continued existence of a state is likely to be contested is if the territory of another established state is claimed.

If the international community reinterprets the necessary criteria for statehood to exclude territory, and allows vanishing islands to retain their statehood and sovereignty over citizens, a looming crisis would be averted. In more abstract terms, the valuable cultural experience of these island nations could be preserved. Landless statehood would create space in international law for a government to reform and continue to function after an environmental disaster, and promote the involvement of other states in determining the details of overlapping sovereignty. The international community has a responsibility in this case, as well as others, to offer remedial self-determination to the population of a sinking state, to retain their governmental structure and continue to exercise moral agency.

The reason for granting remedial self-determination to these populations stems from the environmental damage that may lead to the crisis. Climate change is a result of human activity—oftentimes, the activity of powerful, developed states, releasing greenhouse gases into the air that promote global warming, the melting of polar icecaps, and thus, sea level rise.520 With this in mind, it seems fair to suggest that the international community should not allow all the consequences to be borne by small states. The no-harm principle of customary international law requires compensation when a state causes harm to another state through its polluting activities.521 This principle cannot be precisely measured in the case of climate change, because

518 Permanent Court: Monestary at St Naoum (Albanian Frontier), PCIJ ser B no 9 (1924) 2 ILR 385; Polish-Czechoslovakian Frontier (Question of Jaworzina), PCIJ ser B no 8 (1923).
519 Ambassador Jessup, SCOR 383rd meeting, 2 December 1948, quoted in KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 48 (Cambridge: Cambridge University Press, 2002).
520 Christoph Schwarte & Ruth Byrne, International climate change litigation and the negotiation process: Working paper 1, FOUNDATION FOR INTERNATIONAL ENVIRONMENTAL LAW AND DEVELOPMENT (2010).
521 The no-harm rule is a widely recognized principle of customary international law whereby a State is duty-bound to prevent, reduce and control the risk of environmental harm to other States. The legal precedent usually cited in
it is impossible to determine the measure of responsibility among the community of states.\textsuperscript{522} However, measurable harm has certainly occurred when a state loses its territory completely on account of climate change. A communal action, therefore, is practical, and that communal action may be relinquishing the current monopoly on statehood—its criteria, recognition, and functionality. Remedial self-determination, once again reconceived away from the traditional colonial understanding, could mitigate some of the consequences of climate change by ensuring the survival of vulnerable island states. This is one example of many where an expanded right of self-determination coupled with the idea of landless statehood could present a solution to an impending global problem.

This chapter has presented a sketch of landless statehood that seeks to infuse stale aspects of international law with innovations that may be helpful in the future. Although this is not a minutely practical proposal, the idea itself could be widely applicable as communities struggle for inclusion and the free exercise of their moral agency. The impulse to shift sovereignty away from the territorial ideal and toward citizens responds to developments taking place on a global level in technology, governance, and economic exchange. Unlike other proposed schemes of internal autonomy, landless statehood focuses on the right of groups to participate in the processes of international law as well as their right to defend access to rights that may currently be lacking. The option of landless statehood made available to groups like the Roma or American Indians would symbolize a re-oriented international community that embraces diverse expressions of political and social will.

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this connection concerns a Canadian smelter whose sulphur dioxide emissions had caused air pollution damages across the border in the US. “[U]nder the principles of international law, … no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.” \textit{Trail Smelter Arbitration: United States v Canada} (1931–1941) 3 \textit{UNRIAA}, vol. III (1965).
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VI. Conclusion

The purpose of this paper is to invite a broad discussion about the nature of the international community and its flaws by focusing on a particular right and the communities that are unable to access it. It is hoped that such a discussion will lead to recognition that the global community is free to deconstruct, rebuild, and change set definitions or concepts in order to remedy flaws and promote the goals we share as a society. The changeable nature of civilization indicates that the structures of law must respond to change and evolve alongside it. Without such flexibility, law becomes a useless idol that oppresses rather than serves humanity. Specifically, the right to self-determination appears to be a microcosm of the human rights regime in the way that it has traditionally translated into freedom for some, but ongoing oppression for many. While this paper is limited to a few illustrated cases, its purpose is to advocate innovation that strikes at elitism and embraces diversity.

The human rights movement has recognized the dignity of human beings and sought to protect this dignity through law. In spite of this, states have responded to the territorial ideal of sovereignty and limited the effectiveness of the human rights movement in order to protect their territorial integrity. In examining the history of state creation and the development of the right to self-determination, a narrative emerges that maintains the exclusivity and homogeneity of the international community. Territorialized sovereignty expressed through statehood results in dominance of ethnic or cultural majorities over minorities, as well as the dominance of settled populations over immigrants or indigenous peoples. Groups characterized by non-Western conceptions of settled land ownership are particularly vulnerable because they cannot access internal territorial autonomy, while their culture may be in direct conflict with the values of the dominant population. It is troubling that these groups are subject to the sovereignty of nations without having participated in the creation of the rules or institutions that now control their lives, especially when the built-in protection measures are not working properly. Minority and indigenous populations that lack statehood also lack the international legal personality that could compensate for the failure of individual rights to protect group identity. Is it naiveté on the part of states that causes them to trust the individual rights framework to protect minority and indigenous rights when so many violations are evident? Or is it a more sinister form of self-interest?
The world is moving beyond the horrors of colonialism in rhetoric; now, it is time to do so in practice as well. The international community must be more embracing of diverse voices, cultures, and groups, and in the process, recognize and empower the moral agency of these groups both internally and externally. The right to self-determination has the potential to offer greater equality to the evolving international community, while holding established states to a higher standard of respect for rights through the option of remedial self-determination. When viewed as the manifestation of a group’s political will, self-determination should provide the necessary space for re-imagining structures and systems to better express group values, instead of forcing those groups to continue to express the values of a dominant community. An expanded understanding of statehood would encourage a creative and dynamic interpretation of international law that acknowledges the inequalities inherent to the current framework. This would also lead to a more nuanced understanding of what it means to be human both individually and as a member of a group, and work against imposed imperial understandings of identity.

Groups like the Roma of Europe and the American Indians have long been denied the freedom to build and determine their own identity, their own government, and their own society. External forces have imposed these things upon them, with or without their consent. As long as human rights exist as an aspiration and obligation of the international community, efforts must be made to dissolve such imposition and restore empowerment. While the human rights movement has made efforts to protect these stateless groups, the efforts are unable to penetrate the systemic discrimination and rights abuse perpetrated not only against individuals, but against the survival of groups as such: against their identity, values, and moral agency expressed through collective will.

Deterritorializing the outcome of self-determination through the option of landless statehood recognizes that these groups are experiencing human rights abuse and exclusion from international lawmaking processes that cannot be remedied through either the liberal democratic state or the current human rights framework. It further asserts that these groups have meaningful identities that are valuable to the international community and should not be lost through assimilation. While varying cultural experience provides a wealth of meaning from which international law can draw upon for the promotion of rights, the language of individualism manifested through the human rights regime attempts to isolate the self from its surroundings,
eliminating the importance of the cultural aspect of identity. To draw a rough analogy, diversity in the natural world has been embraced as a necessary method of survival, as well as an investment in the long-term development of life. Allowing diverse groups to express themselves through culture and self-government similarly adds richness to the world, and would substantiate the so-called universality of the human rights project.

Of course, change is an uphill battle in a community where power is still seen as a finite commodity. Acknowledging the problem of territory for groups who are either spread across multiple states or throughout a single state, landless statehood overcomes that problem by offering internal and external recognition and involvement in lawmaking and governance. Citizen-sourced sovereignty, as contrasted with territorial sovereignty, responds to pre-modern forms of governance and emphasizes equality and participation rather than dominance. This paper has presented a brief sketch of the desirability of such a scheme, although further research is needed regarding its practicality in varying circumstances. As the world evolves, international law has a responsibility to embrace creative and forward-thinking imagery in service of the dignity of all human beings and the organizational structures they build. By expanding the inclusion and possible outcomes of the right to self-determination through ideas such as landless statehood, the international community will pave the way for an ever more inclusive multilogue and bring greater legitimacy to the human rights project.