Self-Determination as a Universal Human Right

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Conventional wisdom suggests that promoting self-determination for peoples and protecting the human rights of individuals are competing priorities. However, many recent international human rights documents include rights of peoples in their lists of basic human rights. In this paper, I defend including at least one people's right, the right to self-determination, in the list of basic rights. Recognizing that self-determination is a constitutive element of human dignity casts state sovereignty in a different light, with interesting consequences both for international law and for philosophical debates about the rights of minorities.

Introduction

Conventional wisdom suggests that promoting self-determination for peoples and protecting the human rights of individuals are competing priorities. Securing individuals in their human rights is said to require limits on the rights of their peoples and vice versa. However, many recent international documents have included rights that are traditionally thought to be rights of peoples in their lists of universal human rights.[1] These documents treat peoples' rights and the rights of individuals as not only mutually supporting but mutually necessary.

In this article I defend the inclusion of at least one peoples' right in lists of human rights: the right of all peoples to self-determination. Treating an interest of peoples like self-determination as a constitutive element of human dignity raises practical worries about the stability of the international system, and philosophical worries about potential conflicts between individuals and peoples; but these can be defused. One of the benefits of this approach is that it casts state sovereignty itself in a different light, with interesting consequences both for international law and for philosophical debates about the rights of minorities.

The term "peoples" occurs frequently in what follows. Let me forestall before proceeding a certain misunderstanding of the role that notion plays in the arguments presented below. I do not presuppose in what follows any particular definition of the term "peoples." I argue that the right of all peoples to self-determination is a universal human right of persons to make decisions in concert with others as a group and for themselves. While the argument does assume that there are cases in which it is of fundamental moral importance for individuals that decisions about an area of their lives be made in concert with specific others, it does not assume that this in turn requires that those individuals be tied to one another in any particular

way. The argument for a human right to self-determination given here is thus *compatible* with views that limit the use of the term "peoples" to sets of persons that are tied together in a particular way (e.g., by a common history, a common language, or a common conception of self); but it does not *require* such a view. In fact, it opens the door to a line of argument in which prior definition of the term "people" is no more necessary to an understanding of the human rights of peoples than is the prior definition of the term "person" to an understanding of the human rights of individuals.2

Self-Determination as a Human Right

To say that self-determination is a universal human right is to say two things that are controversial in international law: that self-determination is a principle that constrains states in their behaviour within their domestic realm, and not only in their behaviour toward other states and territories *outre-mer;* and that one can coherently include peoples' rights among the universal human rights.

Universal human rights are the constitutive elements of a special set of considerations: capacities, interests or activities which are of such universal and fundamental importance to human beings as such that securing persons in the enjoyment of these as *rights* should be adopted as an end in itself. Achieving this purpose--securing people in their development or enjoyment of capacities, interests, or activities vital to them--may, as a matter of contingent fact, require one to protect and to promote interests, capacities, and activities that are not of vital importance taken on their own, but as a matter of fact are necessary to protect and to promote elements of the basic set (derivative rights). But the universal rights justify constraints on state behavior on their own merit, and not only in virtue of their contribution to other (more fundamental) interests, capacities, or activities.3

Both elements of the basic set of universal rights and activities, capacities, and interests that are important contributions thereto (what I call derivative rights) give rise to particular claims.4Particular claims are states of affairs that must be secured as a matter of universal human right, even if this is only for a specific set of persons or only because of specific social, historical, or institutional facts. In short, the basic set of rights grounds derivative rights, and both of these give rise to particular claims.

In itself, naming groups as well as individuals as bearers of human rights is not radical. It articulates in a principled way an idea that has influenced the development of international norms for quite some time.5Explicitly naming peoples as the subjects of human rights is somewhat of a departure from the wording of many human rights documents, but it is still consistent with existing international norms and practice and can certainly be incorporated into the international bill of human rights without doing violence to its underlying framework.6

However, saying that self-determination of peoples is a *universal* human right goes beyond merely incorporating groups into international human rights discourse.

If self-determination is a universal right, then it is a right of *all* peoples, and it constrains states on its own merits and not because of a contingent empirical connection between respecting self-determination and respecting other (more important) interests. This implies that states must refrain from attempts to assimilate, submerge or otherwise manipulate the organization, culture, and development of "insular minorities" (communities within their borders who are culturally, religiously, or linguistically distinct) 7 not just *as a matter* of human right, but because it is a universal human right of minority communities to determine *as a community* and *for themselves* the terms on which they associate with the government that hosts them. To interfere with self-determination is to fail to show respect for a basic component of human dignity. This makes it a wrong of the same sort and seriousness as a failure to respect a person's physical integrity or ability to think for herself, so that interference with self-determination wrongs the persons involved directly, over and above any wrong done them by such action's undermining of other of their rights) In short, on this view, considerations of self-determination may stand as an argument *in addition* to arguments based on legal, constitutional, or treaty rights for governing arrangements such as special representation, the protection of language, and access, use, or ownership of land.

Most philosophical theories of minority rights treat self-determination as, at best, a derivative right, and perhaps only a particular claim. For example, Will Kymlicka defends the rights of national minorities as a response to unequal circumstances;9 and Allen Buchanan argues that the strongest case for according collective rights to indigenous peoples is "that they are needed as special protections for the distinctive interests of indigenous peoples and other minorities--typically as a result of historical injustices perpetrated against them."1~On these (derivative) justifications, the fight of self-determination, has an (historically contingent) empirical relationship to securing human dignity and *that* is why it is appropriate to talk about a right of peoples to self-determination that must be respected as a matter of human right. Unlike the universal interpretation (in which self-determination is a fight of all peoples, regardless of their circumstances) derivative interpretations present self-determination as a special right that peoples acquire as subjects of past injustice, or by special arrangement because of special circumstances, historical accident, or a negotiated compromise.

Three Reasons for Preferring the Universal View

The universal view is preferable for (at least) three reasons: it offers a more realistic view of the role communal decision-making plays in individuals' lives; it recognizes that individuated human rights leave a substantial and worrying amount of power in the hands of states; and it relies on a more realistic view of intra-state political relations.

Communal Decision-Making in the Life of an Individual

Human lives are lived in concert with other people, and not just in separation from them, and this is true not only symbolically but materially as well. Many of the decisions I make regard aspects of life that I share with specific others, and features of myself that tie others to me. Because of this, living a life that I can call my own as an individual requires that I live a life in concert with those to whom I am tied that *we* can call our own. This requires not only collective decision-making, but also the ability to make that decision-making effective. Sometimes, consulting with other members of a substate group and *answering* to those others for decisions I have made is a matter of justice, because the fact that we share aspects of life means that my actions impact them and their actions impact me in specific and immediate ways. When this is the case, it may well be wrong for state-level government to pre-empt substate decision-making. Self-determination is an essential condition for groups of persons whose lives are closely integrated to determine for themselves how their collective life develops and what future course it should take. This is what makes it a basic element of human dignity.

For example, suppose I own and live in a condominium complex. My ability to make decisions in my own life will be affected by my ability to influence decisions about the schedule and terms of work on the building, use of facilities, exterior decoration, as well as other factors. This is a point about the practicality of managing interdependence; it does not depend on claims about identity or the psychology of choice. Membership in a minority community differs from ownership of a condo in important regards; but most of the differences seem to make independent decision-making by a minority community more important to the ability to plan one's own life, not less so. Individuals rarely choose to be part of a minority community; and such membership is not a severable good that one may sell on the open market. Lives within a minority community are often closely integrated and the members are tied together in a variety of ways. Members of minority communities are often discriminated against simply because of their membership; and governments often see the mere existence of their communities as a barrier to national projects and unity. The common life of a minority community often includes much more than property, and the decisions such communities make about organization and administration may affect individuals' ability to maintain family ties, develop intimate relationships, and learn and practice a livelihood.

This centrality of communal life forms in structuring the paths of action that an individual may pursue is the core of the case for treating self-determination as a universal human right. Self-determination is a group's right to make decisions *together* and *for themselves* about the conditions and terms that govern shared aspects of life. Most significantly, it is the right to make those common decisions stick. The more extensive and integrated a group of persons' common life, the greater the range of activities, institutions, and conditions of life that they will have to be

able to determine together and for themselves for each to describe the life she develops as genuinely her own.

Self-Determination and the State

Derivative interpretations do not pay sufficient attention to the fact that at its heart, self-determination is about governance. In particular, self-determination is about the scope of state-level authority and the range of activities in which state-level decisions may override community-level ones. When one says that a group has the fight to limit state-level pre-emption only derivatively or as a result of special circumstances, one places the burden of proof in disagreements over the scope of state authority with the group. This effectively lengthens the chain of argument necessary to establish government malfeasance in specific instances, and weighs the scales in favor of state-level decision-making and against substate groups when the evidence is not decisive.HIn short, derivative interpretations empower states.

In contrast, to say that groups have the universal human fight to limit states' pre-emption of local decisions is to place the burden of proof with states in cases of disagreement.~2This reduces the resources that governments have to resist constraints on their behavior with respect to groups. It shortens the chain of argument for groups attempting to establish that specific government actions undermine human dignity. And it gives the benefit of the doubt to substate decision-making in cases where the evidence is not decisive.

Empowering states makes sense if one assumes that strong, centralized authority is one's best bet for the protection and promotion of human dignity. But of course that is a very big assumption, and it is not at all clear that derivative interpretations have a right to it.13One might reply that derivative interpretations are not intended to make self-determination less threatening to *states,* only less threatening to individuals (in particular, individuals within minorities). To this, I offer two observations.

First, it is illusory to think that one can weaken a right's importance *vis-g~-vis* the rights of other individuals without this having an effect on the extent to which it constrains states. These days it is rare for a state to argue that it may violate a human right "just because." States rather argue that they must act as they do, even if that *seems* to violate a fight because their obligation to protect the rights of other segments of their citizenry requires it.14Deflating or otherwise qualifying group rights widens the scope for this kind of argument, and in so doing it widens the scope for state control of minority communities. Second, describing self-determination, in particular, as "special" or "derivative" has the rhetorical effect of making it seem less important than the rights of states. The rights that minorities are denied when they fail to meet the criteria of derivative interpretations are not devolved to individuals, but left in the hands of a state. In effect, states are left as the default repository of all legitimate uses of collective power. This does more than simply bolster states' powers to protect minorities within a minority; it establishes state-

level organization and grouping as more a fundamental and appropriate site for decisions than other levels of organization and grouping.15

On the face of it, choosing to strengthen the hand that states can play against minority communities seems a dangerous game. The crucial question is whether, as a general rule, the risks involved are necessary to protect a minority group's members from one another. In effect, derivative interpretations lay their human rights bets with states. In contrast, the interpretation of self-determination argued for here lays its bets not with groups but rather against states. The universal view does not inflate the rights of groups to match those of states; it deflates the rights of states to make room for groups. To see how this is so, it is useful to look at the pragmatic argument against self-determination's weakening of state authority.

lntra-State Politics

Some interpreters of international law argue that self-determination of peoples ought to be read as a purely conventional right that extends only towards nation-states, occupied territories, and colonized peoples. The justification for this is primarily pragmatic. The system (which is assumed to be worth preserving) is designed for nation-states; in most cases, recognizing new claims to statehood undermines the ability of the nation-states to function as such internationally; consequently one ought not (in most cases) to recognize new claims to statehood. Occupied territories and colonized peoples are special cases: recognizing their claims not only enhances the functioning of the system, it may be necessary to maintain the system's plausibility. So if the system will function better for groups of that type being able to claim a right of independent statehood, then a right to self-determination ought to be extended. Who has a right to self-determination is grounded in facts about what makes for a state, and how best a system in which states exist may promote peace and stability.16

There are two things to note about this line of argument. Self-determination is equated with statehood; and the value of substate decision-making is subordinated to the value of maintaining the integrity of state-level units. 17This line of argument opposes treating self-determination as a universal right because to do so seems to undermine the overall system by undermining the primacy and inviolability of the rights of states. TM

A universal human right to self-determination undermines states' standing in two ways. First, it implies that indigenous peoples, national, ethnic, and linguistic minorities, and other substate groupings have independent status under international law. Second, it implies that such groups ought to be given independent status because of their constitutive role in human dignity. Collective actors other than states get independent legal status; and they get this status through international human rights law. This undermines states' standing as *the* ultimate representative and authority within an internationally delimited jurisdiction.

Such undermining of states' standing is argued to make for a system that is *un-*

stable and *impractical.* How, it is asked, can the international system be expected to remain stable with so many groups claiming rights to decide for themselves the rules and political institutions that apply? A special or derivative fight of self-determination can limit potential claimants by tying recognition to the system's overall stability. In contrast, a human right to self-determination that is universal has no in-principle limit on the number and variety of groups that may claim it. The doomsday scenario that is usually invoked is of widespread instability as existing political systems are broken up by a plethora of mini-states. This scenario suggests that a universal human fight of self-determination entails the extension of full rights of statehood to every group that wants them. In fact, however, such an outcome is neither necessary nor likely?9

First, as S. James Anaya has pointed out, if self-determination is a human right, then like all other human rights, *and like the rights of states,* its content will be limited by a requirement of consistency with the rest of the international bill of rights.2~This makes what is at issue in self-determination claims not whether substate groups may do whatever they like with respect to persons who fall within their jurisdiction, but rather whether the next avenue of appeal for an individual who is unhappy with substate decision-making or policy in a particular instance should be via the state or via some other (either nonstate or suprastate) mechanism.

Second, international tribunals and organizations have historically taken a very conservative approach to attempts to dismember a pre-existing state, in part out of respect for the principles of territorial integrity and collective security.2~This means that it is very unlikely that the international solution to a disagreement between a state and substate group over legitimate jurisdiction would be the creation of a new state.

Third, many representatives of minority groups start out demanding much less than an independent state and escalate their demands only in response to state repression.22This suggests that the absence of an option between full statehood and full *couverture* under the legal personhood of the state may be a *contributor* to secession movements and Balkanization, and not a bulwark against it. As Ian Brownlie notes, in practice, claiming a fight of self-determination need not be a first step to secession or statehood.23

In fact, most states already exhibit overlapping jurisdictions and multiple sites of governance that are not mutually exclusive and in whose dealings with one another no one party may claim the final say. Moreover, international human rights norms already compel states to answer to someone outside their borders for behavior and policy within it. In short, a universal human fight to self-determination does not *create* an international system in which states comprise multiple and overlapping levels of governance. Such a system already exists.

This internal multiplicity tends to be glossed over or ignored in discussions of the operation and foundations of international legal principles.24 In this regard, a universal right to self-determination does require an important change: that international legal principles explicitly acknowledge that political authority within states

may be multiply located and organized in non-hierarchical tiers such that authorities at one level are not necessarily subsumed in their entirety by larger groupings. If self-determination is a universal human right, then states' internal multiplicity is normal, and may even be desirable--a symptom of the absence of repression. In this, a universal right to self-determination does undermine state authority as we know it.

However, undermining state authority as we know it and undermining states *per se* are not equivalent. Pragmatic arguments against undermining states' standing make self-determination seem like something that only a select number of groups may have by *reducing* it to the bundle of rights traditionally associated with independent statehood. In contrast, demands for political autonomy *within* or *in concert with* existing states insist that the international system can deliver something different: governing authorities that have substantial positive obligations without the compensation of exclusive authority. This provides more scope for groups to limit the behavior of a state, not by handing them all the privileges of statehood, but by limiting the privileges that statehood entails.

Two **Worries**

In this paper I have assumed that there are interests of groups as such that are important enough to be considered basic to human dignity. There is a widespread worry that properly speaking, a human right ought not to be grounded in the interests of groups *per se,* only in those of individuated persons (even if such persons may sometimes have to use the fiction of a group to effectively claim their rights). After all, the whole point of human rights is supposed to be to protect individuals against predatory behavior. And people have repeatedly shown themselves more likely to behave predatorily when acting in and on behalf of groups.

There are two separate concerns here. One is that if commitment to human rights means anything, it must mean that there are limits on the actions and decisions that institutions and institutional actors may pursue.25Allowing the interests of groups as such to ground human rights seems to commit one to treating collective actors as inviolable and entitled to the same independence of judgment with respect to their sub-parts that is usually accorded to individual persons. Grounding rights in groups' interests seems straightforwardly to conflict with respecting the separateness of the individuals that make them up.

This concern can be defused by recognizing the difference between groups (irreducibly collective subjects) and the entities or persons acting on a group's behalf. That a human rights document's language recognizes collective subjects is not to say that the document implies that the specific organizations and institutional actors who wilt in many cases wield the rights of those subjects cannot be understood as proxies. It is possible to deny that *particular actors* may wield a right on a group's behalf without denying that there is a right to be wielded. This, in effect, was the reasoning behind denying membership in international organizations to South Af-

rica during the latter years of apartheid. The massive and consistent violation of human rights within the state, in combination with its exclusion of the majority of the population from a say in the workings of government, were taken to make it so implausible that those who claimed to speak for South Africa's population actually did so that it was incompatible with a commitment to the principle of self-determination to accredit members of the South African government as legitimate representatives of South Africa56

The heart of the issue is a different worry: that the interests persons have as part of a collective subject--as part and only as part of a group--are not sufficiently important to establish human rights on their own account. After all, rights imply constraints not just on institutional actors like states but on other individuals. The worry is that imposing constraints on individual persons---especially on fellow group members--requires much more to be at stake than the interests that individuals typically have as part of a group can muster.

Yet it is possible to conceive of interests that persons have as part of a group that are important enough to justify imposing constraints on fellow group members but neither reduce to individuated interests nor presuppose the absence of dissent. Consider cases of communal ownership of land, or of cultural resources. In such cases, to be effective, a fight of the group as an irreducible collective to make decisions about land use (or to determine when rituals may be performed, or how symbols and techniques may be used) must include a right to constrain the behaviour of members as well as outsiders in certain regards.

For example, a group fight to determine land use may mean that I must conform to a group decision forbidding the planting of potatoes, even though I desperately want to plant potatoes. The reasons that my fellow group members give me for restricting the use of potato growing may not make sense to me. Or they may make sense as a general prohibition, but not (I believe) in my particular case. Unless the group's right can be conceived as legitimately restricting persons within the group as well as those outside of it, my fellow group members will have difficulty preventing me from ignoring their proscription. But intuitively, it seems that my reasons for wanting the capacity to ignore that proscription on potato growing matter a lot to whether I ought in fact to be able to do so. If my reasons for wanting to ignore the proscription do not reflect a very important interest, capacity or activity of mine, it seems hard to justify curtailing the capacity of my fellow group members to pursue an activity that is very important to each of them (deciding in common how land we all own is to be used) simply because their interests are shared and mine is individuated.

This example illustrates how the ability to make communal decisions about an aspect of life *and to make those decisions stick* can be just as important as the ability to make personal decisions. Recognizing this possibility--that who has a say in decisions that affect communal organization and resources can be part of what it is to make decisions about the concrete, material terms on which one's own life is lived--points up a crucial assumption about group integrity that underwrites

the worry about groups' interests outlined above: that their impact on a person's day-to-day life is simply not as tangible or specific as the impact of individuated interests.

In fact, however, interests one has as part of a collective subject can have as important an impact as interests one has on one's own. For example, one of the reasons that self-determination of peoples is so important to indigenous groups is that the state and status of a people is reflected in the lives of its members in very specific and tangible ways. Some of the most destructive effects of governmental violations of the rights of indigenous persons are the devastation of the community's infrastructure and demographic base, which undermines their ability to organize effectively the day-to-day conduct of their communal life.27

In particular, many of the harms individuals experience result from persons in a dominant group failing or refusing to believe that members of a minority *have* interests of their own, in separation from the dominant group's or are *capable* of identifying or pursuing interests without dominant tutelage. The problem in these cases does not lie in the beliefs or sense of self of members of the minority; it lies in the beliefs and sense of self of those who identify with the nation or people of the state. In such a context, intra-group dependencies (and the vulnerabilities that accompany them) are often intensified, and liability to predation from fellow group members may be perceived as the lesser of two evils or the price of protection from the risks of a hostile social environment.28

Self-Determination as a Universal Human Right

Time and again, one of the first steps in denying that certain types of individuals have rights at all has been to deny that the groups in which those individuals participate can be trusted to make decisions, either because they are inherently vicious and untrustworthy or because they are historically backward and incapable of self-governance. As an empirical matter, hostility to self-determination and violations of rights to physical security, political participation, equality before the law, and other human rights tend to go hand in hand.29 Realistically, it is hard to imagine a state that consistently respects the rights of all the individuals within its borders without respecting the rights of the peoples of which those persons are members. Justifications for oppression of persons in collections usually mirror justifications for their oppression as individuals.3~

This suggests that international documents that treat self-determination of peoples as a universal human right are correct to do so not just for pragmatic reasons, but because respect for the peoples in which individuals participate is partially constitutive of respect for them as persons. On this way of thinking about what makes for a dignified human life, it is problematic to treat states as the primary and exclusive repository of legitimate political authority. Instead, this way of thinking about human lives suggests that states as much as other communities should have to justify their claims to be the appropriate level for decision-making; and that they should

have to do so by reference to the role that state-level social organization plays in individuals' lives.

Notes

1. See, for example, *Declaration on the Rights of Persons Belonging to National, Ethnic and Linguistic Minorities,* Article 1.1, G.A. Resolution 47ll 35 of 18 December 1992; *African [Banju] Charteron Human and Peoples 'Rights,* OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L,M. 58 (1982), entered into force 21 October 1986; *Drafi United Nations Declaration on the Rights of Indigenous Peoples,* U.N. Doc. EICN.4ISub.2/1194/56; *Vienna Declaration and Programme of Action,* World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc A/CONE 157l 24 (Part I); *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,* Maastricht Conference on the tenth anniversary of the Limburg Principles, Maastricht, The Netherlands, 22-26 January 1997.
2. For detailed discussion of what can be gained by avoiding prior definition of terms such as "peoples" see Jeff Corntassel, "Who Is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity," *Nationalism and Ethnic Politics* 9:1 (Spring 2003), 75-100.
3. In this, the notion of a universal right is similar to Joseph Raz's concept of a core right: a right that can ground duties and is not itself grounded in another right. See Joseph Raz, *The Morality of Freedom* (Oxford: 1989), 168-169.
4. This distinction can be seen in practice in the differing positions adopted by the justices of the European Court of Human Rights in the case *ofBuckley v. United Kingdom.* The complainantin that case was a Gypsy woman who had been denied permission to park her caravan on a piece of property which she owned on the grounds that using her land in this way "would detract from the rural and open quality of the landscape, contrary to the aim of the local development plan." The complainantargued that her rights to respect for private life, family, and home, and the fight to enjoy all Covenant rights without discrimination under the European Convention for the Protection of Human Rights and Fundamental Freedoms, had been violated. The European Court's assessment of the complaint was divided. The majority opinion (six of nine) found that there had been no violation on the grounds that the decision as to whether the complainant'sinterests in parking her caravan on her property could be traded off against the municipality'sinterests in controlling local development lay within the authority of the national government. Each of the dissentingopinions rejected this. They took the complainant'sCovenant rights to be fundamental or basic constraints on the kinds of trade-off between interests that state parties may make, and so argued that reviewing the appropriateness of the trade-offs that states decide to permit is precisely what the Court in its supervisory capacity is supposed to do. A difference in various judges' understandingof what kind of constraint the rights set out in the Covenant represent--universal or derivative--led to different conclusions regarding the scope of freedom in their decision-makingthat states should be allowed. *Case ofBuckley v. United Kingdom,* European Court of Human Rights Reference Number 00000664, Reports of the European Court of Human Rights 1996(IV), 23/199515291615, 25 September 1996.
5. On this see James Anaya, "A Contemporary Definitionof the International Norm of Self-Determination," *Transnational Law and Contemporary Problems* 3 (1993): 131-164 and *Indigenous Peoples in International Law* (Oxford University Press: New York, 1996), Chapter 3; Natan Lerner, *Group Rights and Discrimination in International Law* (M. Nijhoff Publishers: Dordrecht, The Netherlands, 1991), especially Chapter 1. It is true that most of the international fora in which violations of human rights may be pursued as a breach of legal obligation only accept complaints on behalf of individual persons, either severally or in groups. However, this does not arise from the nature of the rights such fora consider, but rather from the specific mechanisms for processing complaints that the various human rights treaties have set up. For example, the HRC (the monitoringbody for the *International Covenant on Civil and Political Rights)* and the CERD (the monitoring body for the *International Convention on the Elimination ofAll Forms of Racial Discrimination)* only accept complaints on behalf of individual persons, either sever-

ally or in groups. However, the amendment of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* to allow individuals and groups to bring complaints before the Court, and the *Additional Protocol to the European Charter Providing for a System of Collective Complaints* show that, as a pragmatic matter, complaints from groups can be brought within the mandate of instruments for the oversight and enforcement of human rights treaties if there is a will to do so.

6. For a general discussion of the conceptual feasibility of collective human rights see Peter Jones, "Human Rights, Group Rights, and Peoples' Rights." *Human Rights Quarterly* (1999) 21: 80-107. For a general discussion of collective human rights in the international legal system see Malcolm Shaw, *InternationalLaw*, 4th ed., (Cambridge University Press: Cambridge, UK, 1997), 209-224.
7. For detailed discussion of the history and current understanding of the norms governing the treatment of insular minorities see Natan Lerner, *Group Rights and Discrimination in International Law* (M. Nijhoff Publishers: Dordrecht, The Netherlands, 1991); Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination* (University of Pennsylvania Press: Philadelphia, PA, 1990), especially Chapters 3 and 4; Antonio Casesse, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press: Cambridge, UK, 1995), especially Chapter 5.
8. For a general discussion of the importance of self-determination to indigenous human rights see S. James Anaya, *Indigenous Peoples in lnternationaILaw* (Oxford University Press: New York, 1996), especially Chapters 3 and 4.
9. Will Kymlicka, *Liberalism, Community and Culture* (Clarendon Press: Oxford, UK, 1989).
10. Allen Buchanan "The R~ ~ C~ Rights in the The~ ~ Indigen~ Pe~ Rights"' *Transnational Law & Contemporary Problems* 89: 3(1993), 104. Buchanan develops this view specifically in relation to the international legal norm of self-determination in *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*. (Oxford University Press: Oxford, UK, 2003).
11. For example, in *Lansmann v. Finland* a group of Saami reindeer breeders argued that the Finnish government violated the fight to culture outlined in Article 27 of the International Covenant on Civil and Political Obligations (the ICCPR) by granting logging concessions in areas that reindeer normally use for winter grazing. The decision went against the complainants because the Committee found that the evidence did not permit them to conclude that the logging concessions constituted a pressing threat to the Saami's ability to herd reindeer. The Finnish government has taken this to indicate that it need not change its policies with respect to logging in the area. Had the Saami been able to appeal to a right of self-determination, their claim to a say in the distribution of logging concessions would have been easier to establish empirically. *Lansman v. Finland,* Communication No. 511/1992 and *Lansman et al v. Finland,* Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/67111995 (1996).
12. It is worth noting here that the core cases for a human fight to self-determination are ones in which states and substate groups *disagree* over which is the appropriate level for decision-making. Insofar as individuals have complaints in cases where the states and substate groups *agree* about the appropriate level for decision-making, the issue is likely to be not so much whether the *level* at which a decision is made is appropriate but rather whether the decision is one that is permitted to a governing agency, regardless of the level at which they operate. For example, this was the case in *Ballantyne v. Canada and Maclntyre v. Canada,* in which complainants argued that language laws in Quebec restricting their ability to display commercial signs in English violated their rights to freedom of expression under Article 19 of the ICCPR. The complainants did not argue that the province did not have the fight to legislate restrictions because it was not the proper level at which such decisions should be made; they argued that governments ought not to be permitted to make such decisions. See *Maclntyre v. Canada,* HRC, Communication No. 385/1989: Canada, 5 May 1993 U.N. Doe CCPR/C/471D/38511989; *Ballantyne v Canada,* HRC, Communication No. 359/1989: Canada, 5 May 1993 U.N. Doc CCPR/C/47/D/35911989.
13. For example, historically there seems to be some evidence that the creation of strong, centralized power is a catalyst to vilification and repression of minorities.
14. In *Buckley v. United Kingdom,* for example, the state party successfully argued that the decision to interfere with a Gypsy complainant's right to culture (by forbidding her to park a caravan on

her land) ought to be left to the state's discretion because it involved a trade-off between comparable interests (the complainant's interest in culture and the interest of local residents in an unobstructed countryside). See *Case of Buckley v. United Kingdom,* European Court of Human Rights Reference Number 00000664, Reports of the European Court of Human Rights 1996(IV), 23/1995/529/615, 25 September 1996, especially at B.14 (1), E.2 (74-84).

15. For an interesting discussion of indigenous peoples' claims as a challenge to this kind of statist conception of rights see Richard Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in *The Rights of Peoples,* James Crawford, ed (Clarendon Press: Oxford, UK, 1992), 17-37.
16. This is the interpretation of self-determination endorsed by Malcolm Shaw (see Malcolm Shaw, *International* Law, 4~ ed (Cambridge University Press: Cambridge, UK, 1997) at 181-182: the right of self-determination is a right of nation-states to maintain the independence of their state, and a right of populations within colonially governed territories to independence.
17. In fact, this reflects both a very conservative view of the international legal conventions governing the terms "peoples" and "self-determination" and a very generous view of the political and legal regimes governing indigenous communities in most parts of the world. For example, it is not at all clear, given the legal and administrative regimes that govern indigenous peoples in Canada, the United States, New Zealand, and Australia, that restricting the term "peoples" to populations within a colonized or occupied territory would rule out treating indigenous groups as peoples.
18. Using the term "peoples" to refer to minority communities generally and "self-determination" to include claims short of full statehood is not a big departure from existing international practice. For example, the increasing importance of international human rights law has established individual persons as subjects of international law in addition to states. And regardless of whether they count as colonized populations, there is a widespread international legal practice of describing indigenous groupings as "peoples." (See Ian Brownlie, *Principles of Public International* Law, 5~ ed. (Oxford University Press: Oxford, UK, 1998), Chapter XXV; Malcolm Shaw, *op cit* at 182-184.) The issue is not whether treating self-determination as a human right is a *proper* use of the terms "peoples" and "self-determination" (a use that players within the system can recognize), it's whether it is a *good* use of those terms (a use that players within the system should recognize).
19. Of course, to say that a right to self-determination *need* not imply a right to set up an independent state does not mean that self-determination *does* not imply such a right in many cases. It might turn out that the realities of negotiating with a modern state are such that it must be in principle possible for a group to claim a state of its own for that group to successfully negotiate any measure of autonomy. If this is true, then the (basic) right of self-determination will imply a (derivative) right to set up an independent state. Or it might turn out that the specific circumstances and history of many groups is such that having the option of establishing an independent state is necessary for them to successfully negotiate any measure of autonomy. In this case the universal right of self-determination will often imply a particular claim to an independent state. There is also a third possibility: that the right to an independent state is implied by something apart from or in addition to the right to self-determination, such as the right to equality before the law.
20. See S. James Anaya, *Indigenous Peoples in International Law* (Oxford University Press: 1998), pp 80-82.
21. For example, the United Nations 1970 *Declaration on Friendly Relations* seems to rule out an unconditional fight to unilateral secession. See United Nations, *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,* General Assembly resolution 2625, 24 October 1970. For a good general discussion of international norms governing unilateral secession see Supreme Court of Canada, *Reference re secession of Quebec* [1998] 184 R.C.S. 217. For a good discussion of international norms governing unilateral secession in relation to indigenous self-determination see S. James Anaya, *Indigenous Peoples in International Law,* Chapter 3.
22. This was the case in the early days of the Russia-Chechnya conflict, where it was not clear whether the Chechens were after secession *tout court* or rather the fight to negotiate their relationship with the USSR successor state on terms similar to those enjoyed by autonomous republics such as Georgia. For a good discussion of the Chechen case see Gail Lapidus "Contested

Sovereignty," *International Security* 23:1 (Summer 1998): 5--49. For a discussion of this as a general phenomenon see Hurst Hannum, *Autonomy, sovereignty and self-determination: the accommodation of conflicting rights* (University of Pennsylvania Press: Philadelphia, PA 1996), Chapters 1-2.

23. *•an Br•wn•ie• ``Rights•f Pe•p•es in Intemati•na• Law•• in The Rights •f Pe•pes• James Crawf•rd`* ed. (Clarendon Press: Oxford, UK, 1992) at 6.
24. For a discussion of the difficulties faced by non-state groups in international law see Benedict Kingsbury, "Claims by Non-State Groups in International Law," *Cornell International Law Journal* 25 (1992) 482-513.
25. This is particularly apparent in the way rights-based approaches are often characterized by contrasting them with utilitarian or communitarian views. See for example: Jack Donnelly, *The Concept of Human Rights* (New York: St. Martin's Press, 1985), especially Chapter 4; Rhoda Howard, *Human Rights and the Search for Community* (Westview: 1995).
26. For a detailed discussion of the South African and Southern Rhodesia cases as milestones in the elaboration of international norms regarding internal self-determination see Antonio Cassesse, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press: Cambridge, UK, 1995), Chapter 5.
27. See for example, Inter-American Commission, *Report on the Situation of Human Rights in Brazil (1996),* Chapter VI; *Report on the Situation of Human Rights in Ecuador (1996),* Chapter IX, especially "The Impact of Development Activities"; *Report on the Situation of Human Rights in Colombia (1999),* Chapter X, especially section F "Megaprojects and their Impact on Indigenous Lands and Cultures."
28. On this see Uma Narayan, "Minds of Their Own: Choices, Autonomy, Cultural Practices, and Other Women" in *A Mind of One's Own: Feminist Essays on Reason and Objeetivio; 2"aed., L.* Antony and C. Witt, eds. (Westview Press: Boulder, CO, 2002), 418-432.
29. For example, in Canada and the United States, policies regarding the removal of indigenous children to residential schools and non-indigenous adoptive families (which in themselves constituted violations of a number of human rights) were *driven* by a desire to end the existence of independently functioning indigenous communities. Similarly, the motivation for attempts by many state legislatures in the United States to eliminate Indian gaming by re-writing state gambling laws is a desire to curb the independent political and economic power that some of communities which operate gaming facilities have been able to develop, and to divert some of the economic revenue that such communities generate into state coffers for the benefit of non-indigenous citizens.
30. This is in large part why treaty-monitoring bodies such as the CERD, the HRC and the Inter-American Commission regularly demand that state parties include information on the status and treatment of communities as well as individuals in their periodic reports on the implementation of their treaty obligations and why organizations such as the ILO, UNESCO, and the OAS in the Protocol of San Salvador include collectivitiesas well as individual persons as potential victims of human rights violations.