Autonomy and Minority Groups: A Right in International Law

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Introduction

In Canada, they established Nunavut, but refused Quebec secession. In France, they set in motion a process to accord Corsica limited powers to run its own affairs. The Faroese plan a referendum on independence from

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Denmark in 2001. In the United Kingdom, various degrees of autonomy were accorded to Northern Ireland, Scotland, and Wales. NATO warplanes undertook a bombing campaign against the Federal Republic of Yugoslavia (FRY) in order to force the latter to confer greater autonomy to Kosovo. The European Court of Human Rights has talked of a “democratic restructuring” without destroying the territorial integrity of Turkey with respect to its Kurdish population, and that a group of persons might call for autonomy or even secession of part of a country’s territory, but that would not automatically justify banning the group’s assemblies.

And yet, despite the above, there is no express, extant right to autonomy in international law for groups within States. International law does accord a right of self-determination to peoples. On the other hand, States owe a much weaker obligation to persons belonging to minorities; they shall not be denied the right to enjoy their culture in community with other members of the group. However, this distinction between peoples and minorities in international instruments is a purely legal creation, especially when no definition of either type of entity has proved possible. Since there is no definition, then no one can deny that a particular group might form a minority within the State and, at the same time, qualify as a people:

[The] issues of self-determination, the treatment of minorities, and the status of indigenous populations, are the same, and the segregation of [these] topics is an impediment to fruitful work. The rights and claims of groups with their own cultural histories and identities are in principle the same—
they must be. It is the problems of implementation of principles and standards which vary, simply because the facts will vary. . . . This association of categories is not generally accepted, and the separation of categories is one reason for the hesitant approach to the definition of 'peoples' or 'minorities' or 'indigenous populations.'

The traditional interpretation of self-determination was that it was external in character and applied to situations of colonial domination or racist regimes. It will be argued here that self-determination is increasingly recognized as having an internal aspect that requires full and effective participation by all groups in society. This paper will consider autonomy as a method of affording internal self-determination to minorities who form part of the peoples of the State. The question is whether there is an obligation on States in international law to facilitate autonomy for minority groups as part of the right to self-determination or even as part of some wider conception of minority rights. Autonomy connotes degrees of control over one's own affairs. Dictionary definitions refer to it as self-government from its Greek etymological roots. It will initially be considered in terms of self-government of a region of a State where the group forms a sufficiently substantial proportion of the local population. However, autonomy with regard to minority populations can be read wider than just self-government, and the 'right to autonomy' argued for in this paper may be satisfied in appropriate circumstances through control of the group's own cultural affairs rather than through territorial self-government. It will be argued that the test as to the necessary degree of autonomy should be whether, having regard to the particular group in question, it is being included in the governance of the State to the fullest extent appropriate. Thus, this article challenges two orthodoxies: first, that minority groups have no right to self-determination and, secondly, that there can be no


10. Self-government, though, does not mean exclusive government of a territory; no one would deny that the states of the United States of America are autonomous, but they have no powers to conduct foreign relations. It is the Canadian federal government, not the provinces, that has the principal responsibility of upholding criminal law in Canada. See also Ross. Gazeta, 15 July, 1997 (decision of the Federal Russian Constitutional Court with respect to Article 66.4 of the Federal Constitution on the relative competences of different types of 'subject of the Federation' under Article 5 of the 1993 Constitution. I am indebted to Professor M. Lesage for a copy of his note to the Council of Europe on the implications of the decision). See also Vladimir Kartashkin & Aslan Abashidze, Study on the Use of Autonomy Approaches in the Russian Federation, U.N. Doc. E/CN.4/Sub.2/AC.5/2001/WP.3 (2001).

11. See infra note 55.
legal right to autonomy since a right to autonomy would require intervention in the political systems and structures of a sovereign State.

The structure of this paper is to look first at the ‘State’ and the ‘nation.’ The reason for this preliminary examination is the symbiotic relationship between the State, a legal fiction, and the nations, which are historico-political fictions, that constitute States. Non-dominant nations within the State will aspire to the greatest degree of self-government and autonomous control of their own affairs of which they believe themselves capable. As such, these concepts and their teleological differences need to be noted. The distinction between the State and the nation is followed by a consideration of the specific references to autonomy in international instruments. Given, however, that there is no general, international minority rights treaty granting, *inter alia*, autonomy, then the relationship between the acknowledged right to self-determination and autonomy has to be analyzed. Whereas self-determination originally applied only to situations of decolonization and alien domination, where secession was an appropriate method of implementation, now its ambit extends to each State in order to guarantee participation by all groups within society where autonomy is a more appropriate means of meeting the collective aspirations of all types of group. The ultimate aim is to show that there is an emerging right to autonomy that has developed from the right to self-determination, but which is in fact broader than self-determination and is not confined to “peoples.” The content of this emerging right is also examined, for a right to autonomy means little if the scope of autonomy in this context is left unexplored. Developing from the traditional and contrary stance of international law with respect to minority groups, this paper advocates, at the very minimum, a new interpretation and remit for existing rights and, potentially, for the adoption of a new right.

I. The State and the Nation

The State itself is a legal institution, most succinctly defined in the Montevideo Convention 1933: “The State as a person in international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) a capacity to enter into relations with other States.” As such, it is a contrivance, a legal fiction, but one with immense consequences because of the fourth self-fulfilling requirement—it can enter into relations with other States.


The nation, on the other hand, is just as much of a contrivance, but this time one of historians and political scientists—in the words of Benedict Anderson, it is "an imagined political community." Gellner goes further, claiming that "nationalism engenders nations, and not the other way round . . . [using] the pre-existing, historically inherited proliferation of cultures or cultural wealth, though it uses them very selectively, and it most often transforms them radically. Dead languages can be revived, traditions invented, quite fictitious pristine purities restored." Moreover, most 'nations' actually fail to fulfill their promise and do not transmogrify into States.

International lawyers have shied away from the nation and have concentrated on their own construct, the State. Carty claims that international legal theorists view the State as an order of competences with no "necessary connection with 'their' populations or territories." Population and territory may be conditions of Statehood, but once recognized in international law, the State itself is a mere legal construct. As such, international law has not coped well with internal self-determination and autonomy, because it "does not recognize or accept as a matter of legal concern a necessary connection between a territory and the people which may inhabit it." States are rarely mono-ethnic; but rather are composed of various different groups, different 'nations'. Non-dominant groups within the State


19. On ratifying the Framework Convention for the Protection of National Minorities, Luxembourg and Liechtenstein both entered reservations that they had no national minorities. "The Grand Duchy of Luxembourg understands by 'national minority' in the meaning of the Framework Convention, a group of people settled for numerous generations on its territory, having the Luxembourg nationality and having kept distinctive
will usually seek to preserve their identity in terms of their religion, their language and their culture rather than be assimilated into the majority.

The belief that every State is a nation, or that all sovereign States are national States, has done much to obfuscate human understanding of political realities. A State is a legal and political organization, with the power to require obedience and loyalty from its citizens. A nation is a community of people, whose members are bounded together in a sense of solidarity, common culture, a national consciousness. Yet in the common usage of English and other modern languages these two distinct relationships are frequently confused.

Autonomy is ordinarily granted to groups, defined territorially or by some characteristic, within a State. These groups might be called a 'nation,' or sometimes a 'people,' or sometimes a 'minority,' none of these terms are defined in international law. It is the interplay of the State and these groups that shapes the practical implementation of any 'right' to autonomy in practice.

Some might argue that there can be no right to autonomy in international law, because it is not possible to compel a State to order its constitution in a particular way; such would be an interference in the "domestic jurisdiction" of a State contrary to Article 2.7 of the Charter. To that extent, the right of the minority group might only be to participate in the governance of the State and, where that is wholly denied, to secede under a 'right to self-determination.' However, international organizations have presumed themselves to have the right to tell a State to amend its electoral laws and there is nothing to suggest that they could not require a State to enter into negotiations in good faith regarding autonomy, rather than sanction, through secession and subsequent recognition, an interference in the territorial integrity of a State; NATO governments were prepared to use force in order to compel the Federal Republic of Yugoslavia to negotiate a grant of territorial autonomy within the Republic to Kosovo.

Characteristics in an ethnic and linguistic way. On the basis of this definition, the Grand Duchy of Luxembourg is induced to establish that there is no 'national minority' on its territory.” Declaration contained in a letter from the Permanent Representative of Luxembourg (July 20, 1995) (on file with author; original in French).

20. SETON-WATSON, supra note 14, at 1.

21. Not all groups defined in terms of their national origin go on to form a State. See MACARTNEY, supra note 16, at 518-19 (giving the Ruthenians of the Carpathians as an example). See also Charles Taylor, Why Do Nations Have to Become States?, in RECONCILIING THE SOLITUDES 49 (Guy Laforest ed., 1993). Regarding the International Union Romani's desire for non-territorial nationhood, infra note 134.

States' responses to minority groups within the population have ranged from genocide to promoting the minority's sense of its own identity. There is a problem for the State, however, in that the more the group's identity is promoted, the more it will see itself as different and deserving of its own Statehood through secession. It is the job of the State to maintain the dominant, though artificial or self-imagined, nation because most if not all States are nationalist. Into this mutually parasitic relationship between the State and the dominant nation come minorities, nations that are not dominant within the State in which they reside. Their claim to autonomy may threaten both the dominant nation and, thus, the State itself.

The practical problems involved in the concept of national autonomy for minorities are large and vexing, even apart from the legal and administrative complications. There is the danger that such a move will have the reverse of the desired effect of making minorities loyal and contented citizens, especially where they are near or contiguous to the national State of their own people—that it would disrupt and destroy the unity of States.

However, the States have agreed in international instruments to preserve and promote the identity of minority groups. In sum, "[the] implication is that the State should not be conceived as a monolithic unity but as an agency for recognizing groups, determining what legal status and rights they shall have, supervising and coordinating their interrelationships, and itself conducting certain kinds of functions in which all have a common interest." Given that the State is a legal fiction, it can accommodate a wide range of aspirations among its population, but it is equally possible to redefine it.
with new territorial borders, and it is this fear of secession that clouds the relationship between the State and the minority group. In the period since the Congress of Berlin of 1878 alone, the borders of European States have been redrawn many times. Nevertheless, redrawing borders is, as might be expected, the least favored alternative in the international community for dealing with inter-ethnic tensions. With respect to minority groups and their needs qua the group, there are increasing references, although with little precision, to autonomy as an alternative to secession. That autonomy can lead to the formation of new States is borne out by the experience within the Ottoman Empire during the nineteenth century vis-à-vis its territories within the Balkans—Serbia, Bulgaria, Walachia, and Moldavia. Thus, whether autonomy is the solution to prevent the break up of multinational States is, having regard to the experience of history, open to question. Nevertheless, autonomy is increasingly viewed as a proper alternative to secession.

27. For an extreme example, see PIOTR S. WANDYCZ, THE PRICE OF FREEDOM 8 (Routledge 2d ed. 2001) (1992) (“An individual born in Ungvar around 1900 grew up in the Austro-Hungarian monarchy (more exactly in the Hungarian part) but in 1918 he found himself to be a citizen of Czechoslovakia, his home town being called Uzhhorod. In 1939, he lived for a few days in a Carpatho-Ukrainian state to become again a Hungarian subject. Since the Second World War, he has been a Soviet citizen. By ethnic standards he may have been a Ukrainian, a Hungarian, a German or a Jew.”). Stalinist Russia redrew the internal borders in the former Soviet Union (“FSU”) to suit minority groups in the Caucasus. Tom Whitehouse, Blast at Russian Market Kills 56, GUARDIAN (U.K.), Mar. 20, 1999, at 15.


response to meeting the needs of a group within the State, as evidenced by
the 1998 Northern Ireland Peace Agreement\textsuperscript{31} and the establishment of
Nunavut in Canada in 1999;\textsuperscript{32} it is also seen as less drastic than secession,
the true measure of last resort, as is implicit in the decision of the Supreme
Court of Canada in the \textit{Quebec Secession} case.\textsuperscript{33} Given that its content can
be adequately described, for law requires precision, the existence of a right
to autonomy for groups within the State could meet the need to satisfy
group claims on society whilst leaving the State intact.

II. Autonomy in International Instruments

How far has a right to autonomy been recognized in international
instruments? In the aftermath of World War I,\textsuperscript{34} the partition of the former
Empires of East Central Europe and the Balkans led to the creation of
new States with minority populations. A contemporary commentator esti-
\textit{mated that while the minority population in Central Europe was reduced
from over 50 million in the former Empires to less than 20 million in the
new States, a quarter of the “population of Jugo-Slavia, one third of that of
Roumania, two fifths of that of Czechoslovakia and well towards one half of
that of Poland consist of ethnic minorities.”}\textsuperscript{35}

The situation with which the Powers have now to deal is new, and experi-
\textit{ence has shown that new provisions are necessary. The territories now
being transferred both to Poland and to other States inevitably include a
large population speaking languages and belonging to races [sic] different
from that of the people with whom they will be incorporated. Unfortu-
nately, the races have been estranged by long years of bitter hostility. It is
believed that these populations will be more easily reconciled to their new
position if they know that from the very beginning they have assured protec-
tion and adequate guarantees against any danger of unjust treatment of

\textsuperscript{31} Northern Ireland Peace Agreement, \textit{supra} note 5.
\textsuperscript{32} After twenty years of negotiation, Canada established a new province on April 1,
1999, Nunavut, giving self-government to 25,000 people, 85\% of whom are Inuit. See
generally Nunavut Act 1993, \textit{supra} note 1. See also John Aglionby, \textit{Ethnic Groups Flex
Muscles at Jakarta}, \textit{GUARDIAN} (U.K.), Mar. 18, 1999, at 16 (discussing the claims of
indigenous peoples within Indonesia).
\textsuperscript{33} Reference re Secession of Que., [1998] 2 S.C.R. 217, 58 (Can.). See generally
Bayefsky, \textit{supra} note 2.
\textsuperscript{34} For example, see the Treaty of Versailles with respect to Poland, June 28, 1919,
Cmd. 223, 22 U.K.T.S. 8 (including a letter from Clemenceau to Paderewski); Treaty of
St. Germain with Czecho-Slovakia, Sept. 10, 1919, Cmd. 479, 22 U.K.T.S. 531; Treaty of
St. Germain with the Serb-Croat-Slovene State, Sept. 10, 1919, Cmd. 461, 22 U.K.T.S.
543; Treaty of Trianon with Hungary, June 4, 1920, Cmd. 896, 25 U.K.T.S. 345; Treaty of
with Turkey, July 24, 1923, Cmd. 1929, 13 U.K.T.S. 533. For a full list, see Commission
on Human Rights, \textit{Study of the Legal Validity of the Undertakings Concerning Minorities},
\textsuperscript{35} See generally EDMUND C. MOWER, \textit{INTERNATIONAL GOVERNMENT} (1931). See also
oppression.  

The Minorities Treaties provided guarantees for these populations in more or less standard form; later agreements, drawing on the development of the League of Nations, such as the Aaland Islands agreement, were not so formulaic. The aim of all the treaties, however, was twofold: to guarantee equality with the majority population for the members of the minority group, and to ensure that the minority could preserve its characteristics and traditions; without the latter, the former amounted to little more than assimilation. In brief, the treaties provided for the acquisition of the nationality of the new States for all residents who so desired it, but with an option to go to the kin-State for those not wishing to remain and become nationals, equality with the majority, the right to express their own culture, manifest their religion, speak their language, establish their own institutions. An equitable share of public funds for minority groups was also provided, where the group formed a considerable proportion of the nationals of a town or district. In some cases, however, the treaties provided for

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36. Excerpted from the letter from Clemenceau to Paderewski of June 24, 1919, which accompanied the draft Treaty of Versailles with Poland. Treaty of Versailles, supra note 34, ¶4.

37. See supra note 34 and accompanying text.


39. See MACARTNEY, supra note 17, at 261–263 (regarding the declarations by the Baltic States on accession to the League of Nations). See also PABLO DE AZcáRATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES 174–177 (1945).


41. See, e.g., Treaty of St. Germain with Czecho-Slovakia, supra note 34, art. 3. Minority rights were for nationals of the new States; all the rights, including autonomous self-government where it was granted, were to be balanced by loyalty to the State. See also Badinter Commission, Opinion No. 2, Arbitration Commission, European Community Conference on Yugoslavia, 11 January 1992, 92 INT’L. L. REP. 167, 3–4(ii); Asbjorn Eide, Working Paper for the United Nations Working Group on Minorities: Citizenship and the Minority Rights of Non-Citizens, U.N. Doc. E/CN.4/Sub.2/AC.5/1999/WP.3 (1999). There does not seem to have been any consideration of the issue of dual nationality. Various reasons can be advanced, such as (i) the fact that the Allies were, for the most part, creating new States and giving them a population formed predominantly, but not exclusively, from one ‘nation’, (ii) the fear that if the minorities had the nationality of another State this would be a destabilizing factor and, finally, (iii) because the treaties were influenced by a draft drawn up by Jewish groups who at that time lacked a nation-state with which to have dual nationality. MACARTNEY, supra note 16, at 212, 507–508. In spite of the guarantee of a nationality, it proved possible to create stateless persons in the new States formed out of the old Austro-Hungarian Empire and, inevitably, these persons tended to belong to minority groups. Id. at 507–09.

42. See, e.g., Treaty of St. Germain with the Serb-Croat-Slovene State, supra note 34, art. 7–8; Treaty of Versailles with Poland, supra note 34, art. 2; Treaty of Trianon with Hungary, supra note 34, art. 58; Treaty of St. Germain with Czecho-Slovakia, supra note 34, art. 7–8.

43. Treaty of Lausanne with Turkey, supra note 34, art. 41.
special rights for a particular minority population, including territorial autonomy. The Treaty of St. Germain provides: "Czecho-Slovakia undertakes to constitute the Ruthene territory south of the Carpathians ... as an autonomous unit within the Czecho-Slovak State, and to accord it the fullest degree of self-government compatible with the unity of the Czecho-Slovak State."}

The following limitation should be noted: autonomy only leads to self-government, not to self-determination, as the concept was understood in 1919. Self-determination in the immediate aftermath of WWI was the process whereby the nations of the former empires in Central and Eastern Europe were turned into States as part of the peace process. These other nations which were part of the new States definitely had no right to secession which would have destroyed the unity of the newly created States. At that time, the mix of nations within the new States was to be resolved by the minority rights guarantees, not by self-determination in the form of a process leading to Statehood; self-determination post-WWI was for the Czechs and Slovaks, not for the sub-Carpathian Ruthenes. The Aaland Islanders fared better under the agreement between the League of Nations and Finland, but there was to be no union with Sweden. This is not to say the Allies were never prepared to reconsider the post-WWI borders.

44. Treaty of St. Germain with Czecho-Slovakia, supra note 34, art. 10.

46. The Ruthenians never enjoyed that autonomy, the Prague government deciding that the population was 'backward' a contemporary commentator described them as 'amiable,' but 'both ignorant and superstitious.' Macartney, supra note 16, at 519; see also Patrick Leigh Fermor, Between the Woods and the Water (1986). The inter-War Czech authorities also reneged on their promises to the Slovaks, giving rise to a sense of resentment that played its part in the 1993 division of the Czech and Slovak Federative Republic (CSFR). See R. J. Crampton, Eastern Europe in the Twentieth Century And After, 14–15, 66 (2d ed. 1997); Robert Bideleux & Ian Jeffries, A History of Eastern Europe: Crisis and Change, 413–418, 592–593 (1998); Roger East & Johyon Pontin, Revolution and Change in Central and Eastern Europe 78, 81–83 (1997).

47. See supra note 45 and accompanying text. Poland similarly incorporated East Galicia which was predominantly Ukrainian and which had been given to Poland by the Allies on the basis of autonomy for the local population. Rogers Brubaker, Nationalism Reframed 99-100 (1996). As for the Jews in Poland, Clemenceau had made it clear in a letter to Paderewski accompanying the then proposed Treaty of Versailles that despite the special guarantees regarding their religious rights, this should not create any obstacle to the unity of Poland. They do not constitute any recognition of the Jews as a separate political community within the Polish State. Letter from Clemenceau, supra note 36, at 6 (emphasis added).


The agreements concerning the Saar and Upper Silesia gave the populations the right to vote as to their future union with the adjoining States. Both were special cases, but it cannot be denied that the Allies were prepared to redraw borders in line with the wishes of the local population. In the case of Upper Silesia, the League of Nations "fixed a frontier . . . endeavoring to take into account both the municipal results of the plebiscite and the geographical and economic conditions of the locality." Thus, post-WWI, full political autonomy within the State was not a general right for minority groups, it was seemingly unenforceable if political will in the State was not present and, where granted, it was in the gift of the Allies.

More recently, international instruments dealing with minorities have included concepts of autonomy. The United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities provides: "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." There is no express call for autonomous self-government in the 1992 Declaration, but the weak wording of Article 1 needs to be read in the light of Article 2.3, which gives it a little more content. Article 2.3 states: "[p]ersons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation." Even in a General Assembly Declaration, therefore, representing only what could be agreed amongst the international community as a whole, there is a call for minority participation and promotion of its identity.

52. See De Azcarate, supra note 39, at 137-160.
53. Id. at 139. See also Whelan, supra note 45, at 101 (citing the new border between Germany and Denmark resulting from a plebiscite, which gave Humptrup to Germany and Saed to Denmark).
54. See also Whelan, supra note 45, at 108-110.
55. For the moment, autonomy should be taken to mean self-government; it will be suggested, however, that being allowed to use one's mother-tongue is a form of autonomy. See John Packer, On the Definition of Minorities, in The Protection of Ethnic and Linguistic Minorities in Europe 23, 40-42 (John Packer & Kristian Myntti eds., 1993). Like many other terms in this area, autonomy is undefined in international law. Given that international law does not readily take cognizance of entities which are neither States nor individuals, it should not be surprising that no definitions have yet emerged. Id. at 23.
57. 1992 Declaration, supra note 56, art. 8.4. ("Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States.").
While still not legally binding in and of itself, the OSCE's Copenhagen Document expressly notes the use by some States of autonomous administrations for minorities meeting certain conditions:

The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities. The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.

The OSCE commitments are reached on the basis of consensus and, as such, are peculiarly appropriate for assertions of claims to autonomous self-government; for a State to divest itself of part of its internal control requires strong political will, more in evidence where this is a voluntary act of State without the threat of legal enforcement procedures were it to fail to comply. However, more important is the fact that autonomy in paragraph 35 was recognized; in amongst a series of traditional rights of minorities in Part IV of Copenhagen, as being necessary and appropriate for some


The difference should not be exaggerated, as the binding force of [OSCE] commitments is not seriously doubted . . . . 'A commitment does not have to be legally binding in order to have binding force; the distinction between legal and non-legal binding force resides in the legal consequences attached to the binding force,' not in the binding force as such. Violation of politically, but not legally binding agreements is as unacceptable as any violation of the norms of international law. In this respect there is no difference between politically and legally binding rules.


60. On local government as a means of better meeting the needs of minority groups, see A. E. Dick Howard, After Communism: Devolution in Central and Eastern Europe, 40 S. Tex. L. Rev. 661, 682 (1999).
groups.\textsuperscript{61}

In 1993, the Parliamentary Assembly of the Council of Europe drafted a proposed Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)\textsuperscript{62} on the rights of national minorities.\textsuperscript{63} Article 11 provided that "in the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status matching the specific historical and territorial situation and in accordance with the domestic legislation of the State." Again, although the provision is hedged round with limitations, if it had been adopted it would have provided a justiciable right in minority groups to seek autonomous government before the Strasbourg organs of the ECHR.\textsuperscript{64}

Neither paragraph 35 of the Copenhagen Document nor Article 11 of Recommendation 1201 expressly refers to self-government; they speak of local or autonomous administrations or authorities, which could be interpreted as being limited to the control of the group's own affairs. However, such administrations and authorities are to correspond to historical or territorial circumstances or situations. If the territorial situation were such that in order to fully and effectively protect and promote the identity and culture of the minority group, including its status within the State, that group needed self-government, that is, a local or autonomous authority over that territory, then the above two provisions would provide justification for such an expression of internal self-determination. What is also clear is that autonomy is not a static, uniform concept, but can vary in content to meet the circumstances of the group.

As indicated, however, the proposed minority rights protocol to the ECHR was rejected by the Heads of State and Government of the Council of Europe.\textsuperscript{65} With the demise of Recommendation 1201, the Council of


\textsuperscript{65} The Vienna Summit of the Heads of State and Government of the Council of Europe (October 1993) rejected the Assembly's draft Protocol and called only for a protocol in the cultural field to guarantee rights to individual members of minorities. \textit{Recommendation 1255 (1995) on the Protection of the Rights of National Minorities}, EUR. PARL. ASSEMB. DEB. 3D SESS. (Jan. 31, 1995). The cultural protocol has also fallen by the way-
Europe promulgated the Framework Convention for the Protection of National Minorities, 1995.\textsuperscript{66} It contains no provision on autonomous government. The Convention operates by imposing an obligation on States to implement the various provisions within their own constitutional and legal systems.\textsuperscript{67}

Whereas autonomy has so far been considered in terms of minority rights within human rights instruments, the Dayton Agreement of 1995 reasserted the sovereign status of the Republic of Bosnia and Herzegovina in Article 1 of the General Framework Agreement for Peace, but created two autonomous entities, the Federation of Bosnia and Herzegovina and Republika Srpska.\textsuperscript{68} The Constitution, set out in Annex 4, having reiterated the standard commitments to the Charter of the United Nations and to a variety of human rights instruments in the Preamble, provides in Article 1.3 that this sovereign Republic shall consist of the two Entities. The Dayton Agreement shows that minority rights, may, in the eyes of the international community, require autonomous self-government.\textsuperscript{69} Similarly, the ultimately rejected Rambouillet Accord and the final Kosovo peace agreement in United Nations Security Council Resolution 1244\textsuperscript{70} both


\textsuperscript{67.} The Framework Convention is very much an aspirational document. Article 15 provides: "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them." Framework Convention, \textit{supra} note 66, art. 15. Article 17.2 provides: "The Parties undertake not to interfere with the right of persons belonging to national minorities to participate in the activities of non-governmental organisations, both at the national and international levels." \textit{Id.} art. 17.2. Somewhat unnecessarily in the circumstances, Article 21 provides: "Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States." \textit{Id.} art. 21. Given that the Convention is a mere framework for States to implement, on its own it is unlikely to lead to the United Nations Security Council having to make a Chapter VII Resolution vis-à-vis any breakaway movement by a minority group.


\textsuperscript{70.} Resolution 1244, \textit{supra} note 6, at 10-11.
relied on autonomy for Kosovo within the FRY as a means of guaranteeing the rights of the Kosovar Albanians.\footnote{71}

Finally with regard to so-called minority groups in particular, the Republic of Hungary has entered into treaties with neighbors which deal with minority rights.\footnote{72} These legally binding treaties with the Slovak Republic\footnote{73} and Romania\footnote{74} both incorporate the rights set out in the Copenhagen Document and Recommendation 1201,\footnote{75} neither of which, for different reasons, has any independent legal force in its own right. Article 15(4)(b) of the Hungaro-Slovak Treaty's reference to Recommendation 1201 as providing rights for kin-minorities, led to a delay of over a year in the Slovak Republic's ratification, and that was only forthcoming accompanied by an explanatory resolution denying any claim to collective rights or autonomous structures. The status of this resolution shall depend on how it is treated by Hungary.\footnote{76} The treaty with Romania, containing a similar legalization of the norms in Recommendation 1201 and the Copenhagen Document, was ratified more swiftly, possibly because its Annex expressly declared that "[r]ecommendation 1201 does not refer to collective rights, nor does it imply upon [the parties] the obligation to grant to the concerned persons any right to a special status of territorial autonomy based on ethnic criteria."\footnote{77} Nevertheless, that declaration does not dispose of a


75. Copenhagen Document, supra note 59; Recommendation 1201, supra note 63.


77. See Copenhagen Document, supra note 59, at 35. It is arguable that paragraph 35 only provides for an autonomous administration in order to "protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity" of minority groups, that is, cultural autonomy. \textit{Id.} However, the second paragraph needs to be read into the first paragraph, where the State undertakes "to respect the right of
legal right under the bilateral treaty to autonomy based on paragraph 35 of the Copenhagen Document.

Indigenous peoples assert that they should not be treated as minorities, that they are a discrete group entity within international law. Nevertheless, there is nothing to stop them from benefiting from minority rights guarantees, although the converse is not true vis-à-vis minority groups. The change in tenor of the ILO Conventions on Indigenous Peoples between No. 107 of 1957 and No. 169 of 1989 is noteworthy as regards recognition of the collectivity. As Galenkamp observes, the earlier convention was concerned with the assimilation into the rest of the population of individual members of indigenous groups as they 'became civilized,' whereas No.169 seeks to preserve the "integrity and identity of those communities. Hence, the 'individualistic' approach has made way for a 'collectivist' approach which gives priority to the preservation of the traditional group identity."79

Moreover, the United Nations Draft Declaration on the Rights of Indigenous Peoples80 provides for an independent right to autonomy, defined for these purposes as self-government:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.81

Thus, while the details have not been fully worked out, there is a growing recognition in international instruments dealing with minorities and indigenous peoples that the instruments should include the possibility of auton-
omy in the form of self-government for appropriate groups within the State. However, it is those details that will provide the substance of this so-called right; at present, one is seeking to accord to ‘minorities’ a right to ‘autonomy’, and both concepts are undefined.

The principle of autonomy evidently depends for its practicability and value on the historical, ethnic, linguistic, and psychological factors involved in each situation. The proposition of autonomy as a solution to the ‘minorities problem’ in general is of course unjustified and impractical. It is far too facile to simple [sic] point to Switzerland and say to the national States to ‘study her institutions and follow the good example.’ Switzerland’s institutions are a result of a specific set of historical circumstances based on a large number of complex factors. Political institutions taken separate [sic] from the practical conditions in which they are to apply are meaningless. It is perfectly true that certain of today’s minorities problems might best be solved by autonomy, but it could only be applied as the result of a profound knowledge of the specific conditions involved. . . . [The] potential dangers and disadvantages of the principle [of autonomy] must be weighed against the advantages it offers. 82

These concerns, however, stem from an understanding of autonomy as regional self-government. If autonomy is accorded a wider range of interpretations, as is discussed below, then its applicability to the situation of groups within the State in general will become more apparent. What is clear beyond doubt from all the above, however, is that it would be possible to incorporate a legal right to autonomy for a minority group in a treaty if the States parties were so minded.

III. Autonomy and Self-Determination

In the absence of a universal minority rights treaty, which incorporates a right to autonomy, could the right to self-determination provide the route to autonomy for minority groups? The traditional view of self-determination is of external self-determination, the right for the peoples of the State to determine how the State will be run without external interference. 83 Alongside, there developed the concept of internal self-determination that all the peoples within the State ought to be part of the process of State governance. 84 Koskenniemi shows that self-determination both but-
tresses the State by acknowledging that peoples have the right freely to determine their political status without external interference and that endows State acts with legal validity, while on the other hand, it provides a challenge to the formal structures of Statehood.\textsuperscript{85} "[I]t explains that Statehood \textit{per se} embodies no particular virtue and that even as it is useful as a presumption about the authority of a particular territorial rule, that presumption may be overruled or its consequences modified in favor of a group or unit finding itself excluded from those positions of authority in which the substance of the rule is determined."\textsuperscript{86}

The link between autonomy and self-determination has already been seen in Article 31 of the 1994 Draft Declaration on the Rights of Indigenous Peoples.\textsuperscript{87} Autonomy mirrors aspects of both concepts of self-determination; it recognizes the right of all peoples freely to determine the future of the State through democratic self-governance,\textsuperscript{88} for the State can delegate competences to other organs within its 'space,'\textsuperscript{89} while it can also enhance the semi-detached nature of some of those peoples within the State. That still, however, does not provide a right to autonomy for minorities; what is increasingly certain, though, is that for some minority groups, mere recognition of the individual human rights of the members of that group will not suffice to meet their needs or demands.\textsuperscript{90}

Gros Espiell, in his study of self-determination,\textsuperscript{91} argued that at the time of writing, almost twenty years ago, that self-determination was a


86. Koskenniemi, \textit{supra} note 18, at 248–249. Koskenniemi goes on to describe these two facets of self-determination as "Hobbesean" and "Rousseausque." \textit{Id.} at 249–250. In this paper, internal self-determination is the principal topic of concern, since the focus is on the inclusion of all groups within society in the governance of the State. Ignatane v. Latvia, U.N. GAOR, Hum. Rts. Comm., 56th Sess., Supp. No. 40, Vol. II, at 191, U.N. Doc. A/56/40 (2001) (held that barring a member of the Russian minority from standing in local elections on the ground that her proficiency in Latvian was not adequate, despite the fact that a State approved test three years earlier had given her the highest grade, violated Articles 25 and 2 of the ICCPR: she had been “prevented from exercising her right to participate in public life.” \textit{Id. at} 7.4.).

87. Draft Declaration on the Rights of Indigenous Peoples, \textit{supra} note 80, art. 31.


89. \textit{CARTY, supra} note 17, at 5.


right of peoples under colonial and alien domination. The right to self-determination was established through a variety of United Nations resolutions and other documents. In the Declaration on the Granting of Independence to Colonial Countries and Peoples, the right is granted to all peoples by virtue of which they can freely determine "their political status and freely pursue their economic, social and cultural development." It is possible for self-determination to be pursued other than through secession, for example through union with another State, but with regard to peoples under colonial or alien domination secession was the preferred solution. However, Gros Espiell's study also makes clear that in focusing on peoples under colonial or alien domination, he was not exhausting all elements of the right to self-determination. The study did expressly exclude minorities, but made it clear that the law could develop to give them, too, the right to self-determination. On the other hand, Hannum writing in 1992 still averred that no non-colonial people "had yet acquired the right to independence or self-determination in international law." However, Hannum was confining the right to self-determination to independence from the State, which leaves open the question as to whether other modes of implementation might be open to non-colonial peoples, and, as demonstrated previously, Brownlie argues that the distinction between peoples and minorities is, in fact, otiose.

What is still left unclear, therefore, is: (i) whether non-colonial peoples and those not under alien domination can assert a right to self-determination at all; (ii) whether, if so, self-determination extends to the different peoples, including minority groups, within a State as opposed to the peoples of the State as a whole, implicitly granting a right to secede; and (iii) whether, in the alternative, less drastic forms of self-determination, such as autonomy, are available to such other peoples within the State where colonialism and alien domination are not in issue?

A. Has Self-Determination a Role Beyond Decolonization?

Higgins has argued that self-determination as set out in the United Nations Charter was never intended to be the basis of a right to decolonization, let alone that it should develop into a general right for individual

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93. See Gros Espiell, supra note 91, 48.
95. Gros Espiell, supra note 91, 56.
98. See Epps, supra note 45, at 435-36.
groups within a State.\textsuperscript{99} However, whereas the 1960 Declaration on the Granting of Independence\textsuperscript{100} referred to peoples solely within a context of decolonization, the 1970 Declaration on Friendly Relations\textsuperscript{101} was not so restricted. The section on 'The principle of equal rights and self-determination of peoples' links self-determination with the upholding of fundamental human rights.\textsuperscript{102} During debates in the drafting stage, views were expressed that since it was a right of all peoples,\textsuperscript{103}

[In an exceptional case, peoples living, for example, in a region geographically distinct and ethnically and culturally different from the rest of a State's territory, should be allowed, with appropriate safeguards, to exercise their right to self-determination.\textsuperscript{104}]

The final version of the 1970 Declaration included a clause which attempted to construe the principle as not "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{105} Thus, on this understanding, minorities within a State would not have a right to self-determination in terms of secession, only those groups suffering colonial domination or alien subjugation. However, that limitation on self-determination in the Declaration only applies to States "conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race creed or colour."\textsuperscript{106} Furthermore, in the 1974 Resolution on the Definition of Aggression, it was reaffirmed that nothing in that Resolution could be taken to prejudice the right to self-determination of peoples, "particularly peoples under colonial and racist regimes or other forms of alien domination."\textsuperscript{107} Self-determination, thus, is not confined to the particular situation of those under colonial or alien domination, which is merely a specific example. Indeed, at the World Conference on Human Rights held in Vienna in 1993, the disclaimer from the 1970 Declaration relating to

\textsuperscript{99} Rosalyn Higgins, Postmodern Tribalism and the Right to Secession, Comments, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 29 (Catherine Brölmann et al. eds., 1993). Which is not to deny that Higgins recognizes the responsive nature of international law. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994).

\textsuperscript{100} Declaration on the Granting of Independence, supra note 94, ¶ 2.

\textsuperscript{101} Declaration on Friendly Relations, supra note 83, at 121.

\textsuperscript{102} Id. Although this principle is also said to be implemented in order to bring a speedy end to colonialism.

\textsuperscript{103} No one has ever provided a conclusive definition of peoples or a people. See Robert McCorquodale, Self-Determination: A Human Rights Approach, 43 INT'L & COMP. L.Q. 857, 866-68 (1994); cf. Brownlie, supra note 9, at 5, 16; Musgrave, supra note 9, at 148-67.


\textsuperscript{105} Id. at 279.

\textsuperscript{106} Id.

terrestrial integrity and political unity was reiterated, but with the qualification now being that the government of the State must represent the whole people without distinction of any kind if it is to have the benefit of that disclaimer.\textsuperscript{108} Thus, with respect to international instruments, self-determination should be available to groups in a State where the government does not represent the "whole people without distinction."

It might also be argued that common Article 1 of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights provides support for a non-colonial application of the right of self-determination.

1. 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.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.\textsuperscript{109}

Nevertheless, Hannum has convincingly shown that the drafters of the Covenants viewed self-determination in Article 1 as solely a right relating to situations of colonial or alien domination.\textsuperscript{110} However, the Human Rights Committee in its 1984 General Comment on Article 1, observed that all States, not just those with colonies, have reporting obligations vis-à-vis Article 1 rights. "Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely 'determine their political status and freely pursue their economic, social and cultural development.' The Article imposes on all States parties corresponding obligations."\textsuperscript{111} While confining self-determination to a right of all peoples within the State, and not any particular people, except possibly


in one particular case discussed below, it still reinforces the view that self-determination as a human right is applicable to all peoples, not just those under colonial or alien domination. Furthermore, at paragraph 6, the General Comment provides that "all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination." Although paragraph 6 deals with Article 1.3, this approach to the right to self-determination as something the State must take steps to facilitate, must apply to every case, including internal self-determination for each people constituting the "peoples" of the State. As Steiner makes clear, self-determination can interfere with the implementation of human rights in a manner that is not a simple balancing of two different human rights; self-determination operates in such a way as to affect the very structure of human rights guarantees for persons within the self-determining regime. Self-determination is both a human right and a way to preserve human rights, for it is a continuing process.

That self-determination has an internal aspect can also be inferred from the fact that according to paragraph 6 of the HRC's General Comment on Article 1, States have to refrain from interfering in the internal affairs of other States, "thereby adversely affecting the exercise of the right to self-determination." Furthermore, the 1970 Declaration also holds that self-determination might be implemented not only through the establishment of a sovereign and independent State, but by the emergence into any other political status "freely determined by a people" indicating the possibility that an autonomous government within the State for that people would be an acceptable form of self-determination and one pertinent to certain minority groups.

The case law of the ICJ on self-determination was initially restricted to cases of colonialism or alien domination. In the Namibia case, the ICJ affirmed the principle of self-determination for non-self governing ter-


112. See Franck, supra note 88, at 59; see also Preamble to the Protocol of San Salvador, OAS Treaty Series No. 69 (1988) 6:

Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources.

113. Id. at 6.


116. HRC General Comment 12(21), supra note 111, 6.

117. See generally Crawford, supra note 9.

ritories, a decision generally interpreted as giving a right to self-determination for colonies.\textsuperscript{119} This view of the Namibia case was endorsed in the ICJ's Advisory Opinion in the Western Sahara case,\textsuperscript{120} where the Court held the right of self-determination requires a free and genuine expression of the will of the peoples concerned. Judge Dillard, in a separate concurring opinion, held that for the purposes of the present proceedings, the Court was "forthright in proclaiming the existence of a 'right.'"\textsuperscript{121} In the East Timor case, Portugal alleged that by entering into an agreement with Indonesia re the Timor Gap, Australia had infringed the right of the people of East Timor to self-determination and the powers of Portugal as administering Power of the Non-Self Governing Territory of East Timor.\textsuperscript{122} The ICJ rejected Portugal's claim, but stated that the assertion that the right of peoples to self-determination had an \textit{erga omnes} character was irreproachable.\textsuperscript{123} None of those cases, however, can be taken to endorse a general right to self-determination in situations not concerned with decolonization and alien domination.\textsuperscript{124} In the Crime of Genocide case,\textsuperscript{125} though, the Federal Republic of Yugoslavia raised a Preliminary Objection "that, by its acts relating to its accession to independence, the Republic of Bosnia-Herzegovina had flagrantly violated the duties stemming from the 'principle of equal rights and self-determination of peoples.'" According to Yugoslavia, Bosnia-Herzegovina was not, for this reason, qualified to become a party to the Genocide Convention."\textsuperscript{126} Moreover, the dissenting opinion of \textit{Ad Hoc} Judge Krecak makes constant reference to self-determination having been denied to the Serb population of Bosnia-Herzegovina, thus invalidating a claim to Statehood and accession to the Genocide Convention.\textsuperscript{127} How-

\textsuperscript{119} Id. at 31-32; cf. POMERANCE, supra note 92, at 69.
\textsuperscript{121} See Western Sahara, Advisory Opinion 1975 I.C.J. 12, 116-26 (Dillard, J., dissenting).
\textsuperscript{123} See Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, at 29. On the customary character of the 1970 Declaration, see Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), 188-205, 228. Whether the decision extends to the whole of the Declaration is debatable, but there are sufficient other indicia of the customary nature of self-determination.
\textsuperscript{124} East Timor seems to have been treated by the ICJ as the final fulfillment of its decolonization from Portugal in the 1970s, not as a case of independence from Indonesia. \textit{See also} Gregory H. Fox, \textit{Self-Determination in the Post-Cold War Era: A New Internal Focus}, 16 MICH. J. INT'L L. 733 (1995), \textit{abstracted in} STEINER & ALSTON, supra note 114, at 1272.
\textsuperscript{126} Id. at 604; cf. Badinter Commission Opinion No. 2, supra note 41, at 167.
ever, the ICJ summarily rebutted the Preliminary Objection by simply referring to Bosnia-Herzegovina becoming a member of the United Nations by decisions of the General Assembly and Security Council on 22 May 1992. It needs to be noted that it did not refute the objection by the Federal Republic of Yugoslavia on the ground that this was not a colonial situation. Had self-determination applied only to situations of colonialism and alien domination, surely the ICJ would have felt compelled expressly to reject the objection for this reason. What is important about this decision, therefore, is that self-determination was treated as a potentially relevant factor by the ICJ in a non-colonial situation.

Finally, if self-determination were to be limited to colonialism or alien domination, one would be focusing on the dominant group rather than upon those to whom the right is accorded. Should externally imposed borders and alien domination in Central and Eastern Europe and the Balkans, therefore, be treated any differently from those in Africa, for example? Following the tearing down of the Iron Curtain, the break-up of the FSU and the former Yugoslavia have been accepted by the international community, although the question as to whether that was part of a right to self-determination on the part of the various population groups admittedly remains undecided.

Therefore, given that it is accepted, on the weight of law and practice considered above, that self-determination is available beyond situations of decolonization, the next question is whether it is a right for all the peoples within the State as a whole or whether it attaches to each individual people. One possible consequence of self-determination for each individual people would be to recognize a right of secession in situations of quasi-alien domination from within the State, although secession is not the only tenable interpretation of the right to self-determination. To answer the question of whether it might attach to an individual people where decolonization and alien domination were not in issue, one would need to determine when self-determination for 'all peoples' within a State was not being accorded, and where some of those peoples were not being incorporated within the whole, whether they could then form their own State. On the other hand, it may be that in situations beyond decolonization, secession is not an acceptable form of self-determination.

B. Self-Determination—Simply a Right to Secede?

McGarry and O'Leary have analyzed the methods used by States for 'eliminating' and 'managing' different groups. One method they list for

128. See POMERANCE, supra note 92, at 37.
129. See Fox, supra note 124, at 138. Eritrea has also been recognized, but again after the event. See Makau wa Mutua, Why Redraw the Map of Africa: A Moral and Legal Inquiry, 16 MICH. J. INT'L L. 1113 (1995).
'eliminating' the minority group is to grant it secession. Of course, to achieve that end the group has to have a connection, current and historical, to a definable territory. On this test, therefore, non-territorial groups within a State could never aspire to secession. Murswiek has argued that a right of secession arises for a group with a definable territory where it is in the majority and its fundamental human rights, evidently and severely, are being violated. The State is obliged to preserve the group if the latter is to achieve self-determination of any kind. Where the State seeks to destroy the group, then self-determination for the group may give rise to a right to secession, it might even be viewed as a form of self-defense against aggression.

Kirgis adopts a similar line. He builds on the disclaimer in the 1970 Declaration that territorial integrity and political unity could not be impaired by self-determination where the State was “conducting [itself] in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government represent-

132. Alternatives for the State include genocide and assimilation. For the State, the principal question may not be whether there is a right to secession, but how to best deal with this discrete group. See also Stavenhagen, supra note 23, at 21; Asbjorn Eide, Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, U.N. Doc. E/CN.4/Sub.2/AC.5/2000/WP.1 (2000), at 4 (dealing with art. 1.1). According to Kymlicka, with respect to the United States, “a deliberate decision was made not to accept any territory as a state [within the United States] unless these national groups were outnumbered.” Kymlicka 1996, supra note 26, at 28. In 1918, Theodore Roosevelt said: “Every immigrant who comes here should be required within five years to learn English or leave the country.” BILL BRYSON, MADE IN AMERICA 143 (Morrow 1994). While there were concentrations of various ethnic groups in different parts of the United States, the desire to integrate meant that English was the first language within a generation. See H. L. Mencken, The American Language (Abridged), cited in BRYSON, supra at 142.

133. See Brilmayer, supra note 17, at 179. It would be a matter of degree as to how precisely similar the past and current territories would need to be.

134. The Fifth World Congress of the International Union Romani called for non-territorial nationhood for the Roma at its meeting in Prague in July 2000, reflecting the need for recognition as a nation if the developing jurisprudence on self-rule were to apply to the Roma peoples. Kate Connolly, Europe’s Gypsies Lobby for Nation Status, GUARDIAN (U.K.), July 28, 2000, at 14; Gary Young, A Nation is Born: Europe and Race: Gypsies Defence Against Extremism as Germans Wring their Hands, GUARDIAN (U.K.), July 31, 2000, at 15.


136. 1992 Declaration, supra note 56.

137. See 1974 Resolution, supra note 107, art. 7.


139. Kirgis, supra note 50, at 305.

140. Declaration on Friendly Relations, supra note 83, Principle V.
ing the whole people belonging to the territory without distinction [of any kind]." On this basis, he argues that where any State is not providing internal self-determination through non-discriminatory representative government for all its peoples, then an excluded group within that State could secede. Epps is also prepared to find that groups within States which are not under colonial or alien domination could, in appropriate circumstances, secede. The Supreme Court of Canada in the Quebec Secession case by implication accepted, obiter, that where "a people is blocked from the meaningful exercise of its right to self-determination internally," then it could secede. While NATO's campaign against the FRY was commenced with the intent of forcing Belgrade to grant autonomy to Kosovo, the human rights violations perpetrated by the Yugoslav army during its program of ethnic cleansing were so gross that it was subsequently decided that only international protectorate status would suffice, with the possible implication of eventual independence for Kosovo.

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141. As reinterpreted in the 1993 Vienna Declaration and quoted in Kirgis, supra note 50, at 305-06. The Supreme Court of Canada in the Quebec Secession case held that where the people of Quebec had unparalleled access to the governance of Canada such that they could not claim that Canada was not possessed of "a government representing the whole people who belong to the territory without distinction" and, on that reasoning, that they had no right to self-determination. Reference re Secession of Que., [1998] 2 S.C.R. 217, 133-39 (Can.).


144. Epps, supra note 45, at 437-39.

145. Epps also believes that fully represented groups in democratic States will have the right to secede if they have claims to territory. Id. at 442. The terms in which she describes this 'right' makes it more akin to a privilege within the grant of the State.


147. U.N. S.C. Res. 1244, supra note 6, at 10-11 (Preamble discusses autonomy for Kosovo). The fall of former President Milosevic reduces the likelihood that independence for Kosovo would be endorsed by the international community. Derek Brosn, A New Pilot in Europe's Cockpit, GUARDIAN (U.K.), Oct. 6, 2000, at 5; Ian Black & Nicholas Wood, UN Fears New Ethnic Clashes in Kosovo, GUARDIAN (U.K.), Oct. 10, 2000, at 14; Richard Norton-Taylor, Kosovo Security is NATO's Priority, GUARDIAN (U.K.), Oct. 11, 2000, at 17; Paddy Ashdown, After the Revolution, GUARDIAN (U.K.), Oct. 14, 2000, at 21; John Gray, Between Dubya and the Deep Blue Sea, GUARDIAN (U.K.), Nov. 1, 2000, at 19; John Steele, EU Threat to Cut Kosovo Aid, GUARDIAN (U.K.), Feb. 24, 2001, at 15; George Galloway, Harbingers of Death in the Gulf, GUARDIAN (U.K.), Nov. 20, 2001 at 15; Reports, on the one hand, from a commission established by the Swedish prime minister and, on the other, by the International Crisis Group suggest that Kosovo should still obtain a measure of independence after Milosevic's removal from office. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 9-10 (2000); Jonathan Steele, Give Kosovo Independence or
However, with the potential exception of Kosovo, there is little practical evidence to support such claims.\textsuperscript{148} Even where the ICJ considered self-determination beyond decolonization in the \textit{Crime of Genocide} case, it rebutted the claim of the Bosnian Serbs and, if anything, recognized the claim of Bosnia-Herzegovina as a whole to self-determination from the former Yugoslavia.\textsuperscript{149} The new States of the 1990s owe more to territorial coherence and \textit{ex post facto} recognition of the State than any former discrimination against a particular ethnic group or nation within some larger ‘former’ State.\textsuperscript{150} Beyond decolonization, there appears to be no right to secession that can be supported on the basis of international law and practice.\textsuperscript{151} Indeed, the much-vaunted 1970 Declaration, ultimately on which rests the claim to a general right to secession beyond decolonization, provides that “the territorial integrity or political unity” of States shall not be dismembered or impaired subject only to the requirement of participatory democracy. While secession is the preferred option for decolonization,
self-determination has never been so limited. Beyond decolonization, self-determination may be satisfied through "emergence into any other political status freely determined."\textsuperscript{152} The focus of self-determination should be people, not territory.\textsuperscript{153} Moreover, according to the 1970 Declaration, that status is to be determined freely by a people, so it is implicit that self-determination is not confined to a right for all peoples within the State and can be utilized for any group within a State which is not being allowed to participate fully in the polity.

C. Non-colonial Peoples and Other Forms of Self-Determination\textsuperscript{154}

Self-determination, as has been seen, is broader than mere secession and can be enjoyed within the State;\textsuperscript{155} it is a lesser interference by international human rights law in the internal status of a State to provide a right to autonomy than to provide for secession.\textsuperscript{156} The Helsinki Final Act of 1975 expressly recognizes the right to internal self-determination.\textsuperscript{157} Where the right to participate as part of self-determination is denied, then one can posit a right to negotiated autonomy.\textsuperscript{158} Kirgis has provided a taxonomy of self-determination,\textsuperscript{159} including a right to autonomy, "as in autonomous areas within confederations," and minority rights as established in Article 27 of the ICCPR.\textsuperscript{160} To incorporate Article 27 within the

\begin{itemize}
\item \textsuperscript{153} \textit{See} Hannum 1998, \textit{supra} note 108, at 15.
\item \textsuperscript{155} Indeed, internal self-determination is a continuing process for all States. "With regard to paragraph 1 of Article 1, State parties should describe the constitutional and political processes which in practice allow the exercise of this right." HRC General Comment 12(21), \textit{supra} note 111, 4 (emphasis added). \textit{See also} Rosas, \textit{supra} note 84, at 225; Karl Doehring, \textit{Self-Determination as ius cogens}, in \textit{The Charter of the United Nations: A Commentary} 70 (Bruno Simma ed., 1994); Antonio Cassese, \textit{Political Self-Determination: Old Concepts and New Developments}, in \textit{UN Law/ Fundamental Rights: Two Topics in International Law} 137 (Antonio Cassese ed., 1979); Antonio Cassese, \textit{Self-Determination of Peoples: A Legal Reappraisal} 47, 101 (1995).
\item \textsuperscript{156} \textit{See} Opinion No. 2, \textit{supra} note 41, 1.
\item \textsuperscript{157} Conference for Security and Cooperation in Europe: Helsinki Final Act, August 1, 1975, 14 I.L.M. 1292.
\item \textsuperscript{158} \textit{Reference re Secession of Que. [1998]} 2 S.C.R. 217, 134 (Can.). NATO governments were prepared to use force to compel Belgrade to grant autonomy to Kosovo. The threat was that force would be used, \textit{inter alia}, if there were no good faith negotiations with the implicit obligation to achieve some greater autonomy than currently existed. \textit{See} Res. 1160, \textit{supra} note 22; Res. 1199, \textit{supra} note 22; Res. 1203, \textit{supra} note 22.
\item \textsuperscript{159} Kirgis, \textit{supra} note 50, at 307, particularly points (6) and (7). \textit{See also} McGarry & O'Leary, \textit{supra} note 131, at 23–38 (taxonomy of methods listed for managing minorities).
\item \textsuperscript{160} On minority rights, see Patrick Thornberry, \textit{International Law and the Rights of Minorities} 141 (1991); \textit{see also} Gilbert 1996, \textit{supra} note 64, at 170.
\end{itemize}
definition of self-determination under Article 1 is to conjoin two separate rights for two different types of beneficiary; Article 27 is for individual members of minority groups, not for the group as a collective.\textsuperscript{161} While entitlement to Articles 1 and 27 is not mutually exclusive, that does not entail that Article 27 is a subset of Article 1. However, to the extent that minorities need collective rights,\textsuperscript{162} Kirgis' incorporation of Article 27 may simply be a case of shorthand; Kirgis is rightly making the point that self-determination is broader than secession, although whether it should be read to include the principles of minority rights as a whole is open to question. It also highlights the need to stop focusing on the type of group, minority or people, and focus on the group's particular needs.\textsuperscript{163}

Kirgis also argues that secession is dependent on the extent of the democratic character of the State; a balancing exercise, the greater the amount of democracy, as evidenced by the quality of participation, the less amount of self-determination is available for the group. "If a government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect."\textsuperscript{164}

However, the right to self-determination in whatever form is not just a question of the democratic credentials of the State.\textsuperscript{165} The status of the group itself may demand a certain type of democratic governance;\textsuperscript{166} a State, which held regular elections with universal suffrage, might well still fail to satisfy the right to self-determination of a particular group.\textsuperscript{167} It is increasingly recognized in the more recent literature that self-determination has an internal, on-going aspect that requires inclusion of all parts of society in the governance of the State.\textsuperscript{168} What is suggested here, however, is that the nature of the group can determine that, in order to satisfy its

\textsuperscript{161} A point on which the HRC itself has not always been clear. In Lovelace \textit{v.} Canada, U.N. GAOR, 36th Sess., Supp. No. 40, 166 (1981); 2 HUM. RTS. LJ. 158 (1981), 7.2, the HRC spoke in terms of Article 27 requiring "State parties to accord protection to ethnic and linguistic minorities . . . ." (emphasis added). However, Article 27 talks of States not denying the right, which implies that the right existed before the ICCPR, evidently as part of custom. Moreover, individuals cannot enjoy their Article 27 rights unless the minority group's own existence is preserved and promoted.

\textsuperscript{162} Regarding collective rights for minorities, see Copenhagen Document, \textit{supra} note 59, at 35; Rec. 1201, \textit{supra} note 64, art. 11.

\textsuperscript{163} See Brownlie, \textit{supra} note 9, at 13. Article 5.1. ICCPR provides that nothing in the Covenant should be interpreted by any State so as to limit or destroy the rights set out therein. ICCPR, \textit{supra} note 109, art. 5.1. According members of a group rights under Article 27 cannot be used to deny that same group rights under Article 1 if they so qualify. \textit{See also} id. art. 47.

\textsuperscript{164} Kirgis, \textit{supra} note 50, at 308-09.


\textsuperscript{166} Vernon Van Dyke, \textit{The Individual, The State, and Ethnic Communities in Political Theory}, in Kymlicka 1996, \textit{supra} note 26, at 31. \textit{See also} Brownlie, \textit{supra} note 9, at 16.


obligation to provide opportunities for participation in society, the State must accord autonomy to that group. As Van Dyke explains, the legitimacy of government is based on the consent of the governed, who are generally assumed by political theory to be individuals.

The assumption is understandable if the population of the State is homogeneous, sharing a common culture. However, if the population is divided into different communities, each cherishing and wanting to preserve its distinctive identity, why should it be assumed that the consent that counts comes from individuals? Cannot entire communities give or withhold consent as collective units?169

The nature of the group and the democratic credentials of the State form a symbiotic relationship. The fulfillment of the right to self-determination in such circumstances provides a mechanism by which the conflicting entities, the group and the State, can resolve the apparent lack of legitimation for the latter through, inter alia, autonomy for the former.

[The] basic claim underlying self-government rights is not simply that some groups are disadvantaged within the political community (representational rights), or that the political community is culturally diverse (polyethnic rights). Instead, the claim is that there is more than one political community, and that the authority of the larger State cannot be assumed to take precedence over the authority of the constituent national communities. If democracy is the rule of 'the people,' national minorities claim that there is more than one people, each with the right to rule themselves.170

True democratic governance recognizes autonomous groups and provides for their autonomous status.171 As the Human Rights Committee has made clear, the fact that a State does not recognize the existence of minority groups does not mean that there are no minorities in that State deserving of the rights recognized under Article 27 of the ICCPR.172 Likewise, the existence of groups requiring autonomy within the State is an objective

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169. Van Dyke, supra note 166, at 45. "So democracy can only work if all groups in a society feel that they are included, and that their rights will be respected. Often that means rejecting a political system in which the winner takes all. It means ensuring by one device or other, that minorities are given a permanent share of the power." Mortimer, supra note 9, at 24.


172. "The existence of an ethnic, religious, or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria." U.N. GAOR, Hum. Rts. Comm., 5th Sess., 5.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994). Furthermore, the fact that Article 27 speaks of the right set out therein as one that "shall not be denied" indicates that minority rights pre-exist the ICCPR. Similarly, those groups requiring autonomous forms of government possess it through pre-existing obligations of Statehood imposed on the dominant majority.
determination, and their existence determines the form of democratic governance, such as federalism,\textsuperscript{173} appropriate for that State.

Where national minorities\textsuperscript{174} are regionally concentrated, the boundaries of federal subunits can be drawn so that the national minority forms a majority in one of the subunits. Under these circumstances, federalism can provide extensive self-government for a national minority, guaranteeing its ability to make decisions in certain areas without being outvoted by the larger society.\textsuperscript{175}

It is the obligation of the State to provide proper autonomous structures, recognizing the needs of groups within the State, thereby providing effective equality and a level playing field with the majority. In line with the view that a human rights treaty imposes on a State the obligation to respect the right, promote the right and, ultimately, fulfill its obligations,\textsuperscript{176} then autonomy in an appropriate degree might be that fulfillment of the right to self-determination.

In sum, the right to secession,\textsuperscript{177} if it exists at all, seems limited so far to situations of colonial or alien domination. Autonomy, on the other hand, is a more broadly available form of internal self-determination.

D. Autonomy—'Part of' and 'Broader than' Self-Determination

The right to self-determination is broader than secession and is available to peoples not under colonial or alien domination. The error in the self-determination debate has been to focus on the beneficiaries, that is, 'peoples' as opposed to 'minorities,' rather than the conditions justifying whatever form of self-determination is appropriate to the group; self-determination is about people, not just peoples. Much time and ink has been wasted trying to justify the inclusion of minorities in the concept of Article 1 peoples. Kirgis recognized this error, but, in one sense, 'threw the baby out with the bath water,' not allowing the nature of the group to define the form of democratic governance required in the State.\textsuperscript{178}

Whether one refers to the group as a people or a minority, both terms undefined in inter-


\textsuperscript{174} Kymlicka does not place undue emphasis on the distinction between peoples, nations, and national minorities. Kymlicka 1995, supra note 9, at 27.

\textsuperscript{175} Kymlicka 1995, supra note 9, at 27–28. See also Vernon Van Dyke, \textit{Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought}, 44 J. Pol. 21, 24–31 (1982). See also the redrawing of internal borders in the FSU to deal with the claims of various minority groups. Whitehouse, supra note 27, at 15.

\textsuperscript{176} For the roots of this analysis, see generally Henry Shue, \textit{Basic Rights: Subsistence Rights: Shall We Secure These Rights?}, in \textit{How DOES THE CONSTITUTION SECURE RIGHTS?} (Robert A. Goldwin & William A. Schambra eds., 1985); \textit{The Interdependence of Duties, in THE RIGHT TO FOOD} 83–95 (Philip Alston & Katarina Tomasevski eds., 1984); Henry Shue, \textit{Mediating Duties}, 98 ETHICS 689 (1987–88).

\textsuperscript{177} See generally Kirgis, supra note 50.

\textsuperscript{178} In seeking to include minority rights within self-determination, he also left himself open to the criticism that Articles 1 and 27 of the ICCPR are distinct—autonomy is in fact the linking bridge. Kirgis, supra note 50, at 308
national law. For that matter and on that basis, 'pink bananas,' is irrelevant; the focus must be on the implementation of the right appropriate to the needs of the group as it seeks to determine its own future and preserve its own culture. By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter "[a]ll peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development . . . " To that extent, self-determination includes the preservation of the group culture.

For some groups, the autonomy to preserve their own culture will be the fullest extent of their self-determination, whereas for other groups it will extend to political autonomy through a federal State structure. In that sense, autonomy is a continuum, providing an appropriate degree of control to each group within society over its own affairs. International law accords this right to autonomy to groups within society through two guarantees: the right to self-determination and the right of members of ethnic, linguistic, and religious groups to enjoy their own culture. As the PCJ noted in 1935, "[T]here would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority." Also, as the Human Rights Committee in Love-

179. See Thornberry, supra note 49, at 124, for a description drafted by UNESCO experts in 1989. See also Brownlie, supra note 9, at 16.

180. The desire to preserve its own culture is a prerequisite; the State is only obliged to provide the proper environment and facilities, it should not seek to preserve a group where the group lacks that will. See Jurgen Habermas, Struggles for Recognition in the Democratic Constitutional State, in Multiculturalism, supra note 40, at 130.

181. Drawing on the Declaration on Friendly Relations, supra note 83, Principle V.

182. See Advisory Opinion of 6 April 1935 on Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B) No. 64, at 17. See also Sidoropoulos v. Greece, 4 Eur. Ct. H.R. 1594 (1998) (where the European Court of Human Rights held that the refusal by the Greek courts to register an organization calling itself "Home of Macedonian Civilization" violated Article 11, freedom of association, of the ECHR). Given that one only had the proposed organization's aims as they had been set out in its draft memorandum of association, and those were of a wholly cultural nature, even if its true aim were to assert that there was a "Macedonian" minority in Greece and that the Greek authorities did not respect its rights, banning the organization was disproportionate. Id. at 43–47. A press release by Amnesty International in September 1998 reported that the Greek authorities have charged four members of the Rainbow Party, an ethnic Macedonian party, with "causing and inciting mutual hatred among the citizens" for displaying a sign in Florina in Greek and Macedonian which simply stated "Florina Committee." Press Release, Amnesty International, Charges Against Members of the "Rainbow" Party Should be Dropped, Sept. 11, 1998, available at http://www.amnesty.it/news/1998/index0998.htm. Nevertheless, it would seem the Greek government has now reversed the original position as a result of the decision by the European Court of Human Rights. See Committee of Ministers, Appendix to Resolution DH (2000) 99:
lace noted in 1981 with respect to Article 27: “The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as... protection of its resources and preservation of the identity of its people.”

The confusion prevalent in discussions on these topics stems from the loose use of overlapping and undefined terminology. Autonomy is in one sense but one aspect of self-determination, but it is also much broader than a right solely of 'peoples' and extends to traditional minority rights. The confusion has been enhanced, though, by the inclusion of clauses dealing with autonomy, in the sense of regional or local self-government, in the more recent international instruments dealing with minority rights. The confusion is avoidable if one considers only the degree of control over its own affairs and the powers to achieve that end that the group requires, and one does not worry whether what is undoubtedly a minority group is also a 'people.' To take two examples, a religious group such as the Free Presbyterians in Scotland would not want territorial self-government, but, in satisfying Article 27 of the ICCPR, the State would necessarily permit it to run its own internal affairs and to hold property for its own purposes—in running the Church, it would be autonomous. On the other hand,
some ethnic-national groups are recognizable and distinct from the dominant group within the State because of a difference of religion; in those cases, mere autonomy over church affairs would not properly meet the State's obligation to ensure the self-determination of all its peoples186 and, where appropriate, territorial self-government would be the true means whereby the group would achieve self-determination through being included in the democratic governance of the State.187 Furthermore, autonomy can meet the needs of an identifiable ethnic group that is not concentrated in one region of the State but is distributed in clusters.188 It is autonomy that spans both Articles 1 and 27 of the ICCPR, its implementation under each Article being appropriate not only to the particular right, but, more importantly, to the nature of the group, too.189 A right to autonomy, therefore, is both radical, since it applies to all groups in society, whether deemed peoples or minorities, and, at the same time, the logical consequence of two exiting rights, the right of peoples to self-determination and the right of persons belonging to minorities to enjoy their own culture.

IV. The Elements of Autonomy190

The right to autonomy is a right for the group to decide its own affairs, determined by reference to the nature of the group within the society. Although the degree of autonomy to be accorded will vary, there are, for the
purposes of this paper, three facets to it—participation, culture, and financial matters.\footnote{191}

A. Participatory Autonomy

Participation in this sense encompasses the idea of power-sharing within the State.\footnote{192} That power-sharing might be reflected in a federated State through self-government of a region where the group is in a majority,\footnote{193} considered above, or through participation in the political process and the right for the group to run its own internal affairs.\footnote{194} The European Commission of Human Rights has held that it is justifiable discrimination to adopt a voting system better guaranteed to ensure electoral representation of a minority population at the expense of the majority, even within just part of the State;\footnote{195} such a difference in treatment is designed to create a level playing field between the dominant group and all other groups in the State. De Varennes gives examples from all parts of the world of federal and non-federal autonomy arrangements.\footnote{196} The Hungarian Act LXXVII of 1993 on the Rights of National and Ethnic Minorities not only provides for local minority governments, but also minority self-government at the national level under ss5(1), 21 and 31. Whereas political autonomy is usually understood as self-government of a region of the State,\footnote{197} participatory autonomy embraces that and these other forms, as well.\footnote{198} It

\footnote{191. \textsc{Gellner, supra} note 15, at 118-19 (recognizing that where two nations arose within the same State with sufficiently different cultures but with a similar economic base, they would probably need to form "distinct cultural-political units, whether or not they will be wholly sovereign").


196. De Varennes, \textit{supra} note 194, at 6-9. Federations are well-known, but Valle d'Aosta in Italy and Gagauz-Yeri in Moldova are cited as non-federal systems. \textit{Id.}


has the dual aspect of providing the group with the political means to preserve its own culture and identity whilst bringing it within the political processes of the State. Further evidence that participation in political affairs is recognized by international actors as a necessary facet of multinational States can be found in the letters of the High Commissioner on National Minorities of the OSCE to various governments;\textsuperscript{199} while these are hortatory in nature, they are based on international instruments, legally binding and otherwise, dealing with minorities and they prompt State practice, thereby providing evidence of the incorporation of these standards in international law through custom.\textsuperscript{200} The 1991 Geneva Meeting of Experts on National Minorities, as well as noting that local, autonomous and territorial administration had been appropriate for certain minority groups, advocated “self-administration by a national minority of aspects concerning its identity” and “elected bodies and assemblies of national minority affairs.”\textsuperscript{201}

The United Kingdom is going through a process of extending participatory autonomy. One example is to be found in the Northern Ireland

\textsuperscript{199} The HCNM's letter to the Minister of Foreign Affairs of Macedonia expressly recommended in order “to promote inter-ethnic harmony... the partial introduction of a system of proportional representation.” Letter from Max van der Stoel, OSCE High Commissioner on National Minorities, to Stevo Crvenkovski, Minister of Foreign Affairs of Macedonia (FYROM) (Nov. 16, 1994), available at http://www.osce.org/hcnm/documents/recommendations/fyrom/1994/web_maced1194.pdf. Furthermore, he went on to express regret that no progress had been made in relation to:

[T]he law on local self-government, notwithstanding the fact that clarity about the role and competences of local government units is clearly needed. I would recommend that the draft law on this subject of July 1993 should be submitted again to the newly elected Parliament. There is even more reason to do so because articles 79, 80, 81 and 82 of this draft law contain provisions for the official use of the languages and alphabets of the ethnic nationalities in units of local self-government in which there is a majority or a significant number (according to article 79, para 2, 20%) of members of ethnic nationalities. \textit{Id.}

The HCNM's statement of 9 November 1998 regarding Macedonia calls for participation at the local level by all citizens, including members of national minorities. See also Howard, supra note 60, at 684. The HCNM also calls for proper financing of local institutions. See also Letter from Max Vander Stoel, CSE High Commissioner on National Minorities, to Laszlo Kovacs, Hungarian Minister of Foreign Affairs, July 18, 1994, available at http://www.riga.lv/minelres/count/hungary/94071Br.htm.

\textsuperscript{200} Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), at 19. Macedonia was even prepared to commit itself to OSCE standards, including, apparently, paragraph 35 of the Copenhagen Document, supra note 59, before its admission to the organization. See HCNM’s letter, supra note 199.

\textsuperscript{201} OSCE Meeting of Experts on National Minorities, supra note 194, § IV.
Peace Agreement of April 1998. Given that the nationalist and unionist populations could not practically have separate administrations within the Province, autonomy is granted to the Province as a whole with participation and control for both communities provided through various mechanisms. The Agreement provided not only for an Assembly elected by proportional representation, which is to be inclusive in its membership, and is to operate with due regard to both traditions, requiring cross-community support for "key decisions," but also in addition there are avenues for the Republic of Ireland to influence developments directly. There is a North-South Ministerial Council to discuss issues of concern to Belfast and Dublin and a British-Irish Intergovernmental Conference:

In recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters, on which the Irish Government may put forward views and proposals. These meetings, to be co-chaired by the Minister for Foreign Affairs and the Secretary of State for Northern Ireland, would also deal with all-island and cross-border cooperation on non-devolved issues.

Territorial autonomy has also been given to the people of Scotland through the Scotland Act 1998. Scotland has its own parliament with tax raising powers and most matters of concern to Scotland will be devolved from the United Kingdom parliament at Westminster. This supplements the pre-existing autonomy that had existed with respect to the legal system, the Church and the education system ever since the Act of Union in 1707.

Finally, it can be argued that participatory autonomy, as part of the right to internal self-determination under Article 1 of the ICCPR, is a justiciable right within Europe and, possibly, the Americas. The Human Rights Committee has held it cannot entertain communications under Article 1 because the Optional Protocol is limited to individual claims; such does not deny the State's obligation to its minority populations, merely their

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202. See generally Northern Ireland Peace Agreement, supra note 5.
203. Id.
204. Id.
205. Id.
207. It is unclear whether an attempt to change a fundamental term of the Articles of Union would be justiciable. See MacCormick v. Lord Advocate, 1953 S.L.T. 255 (1 Div.), at 411-13.
ability to enforce this right through quasi-legal mechanisms. Nevertheless, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights allow for petitions by groups. However, neither of those regional Conventions provide for self-determination. On the other hand, they both provide that nothing in the Conventions "shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under . . . any other agreement to which it is a Party." Although Ominayak and South Tirol case clearly state that no claim can be brought under the Optional Protocol before the HRC in relation to Article 1 ICCPR, that does not detract from the fact that self-determination is a human right recognized in both Covenants; it is simply not open to direct consideration by way of communication to the Human Rights Committee. Thus, it would be a human right ensured under another agreement to which the State is a party for the purposes of Article 53 ECHR and Article 29(b) ACHR. In General Comment 12(21), the HRC stated that "all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination." If a

209. "The correlation of rights with justiciability is an understandable attitude from the domestic-law point of view. But, of course, international lawyers are very familiar with the phenomenon that . . . it is not possible to bring claims in vindication of rights held in international law. The absence of the possibility of recourse to third-party judicial procedures is certainly not the test of whether the right exists or not. To the international lawyer, the existence of the right is tested by reference to the sources of international law." Higgins, supra note 99, at 100.


211. ACHR, supra note 210, art. 44.


213. ECHR, supra note 62, art. 53. See also ACHR, supra note 210, art. 29(b); Sidoropoulos, 4 Eur. Ct. H.R. 1594, at 44 (referring to the obligations of Greece towards minorities under OSCE instruments). See also Geoff Gilbert, Minority Rights under the Council of Europe, in Minority Rights in the ‘New’ Europe 53 (Peter Cumper & Steven Wheatley eds., 1999).


215. HRC General Comment 12(21), supra note 111, 6.

216. As already mentioned, paragraph 6 is dealing with the obligations on the State with respect to Article 1.3, but this description of self-determination is applicable to all instances in Article 1. "With regard to paragraph 1 of article 1, State parties should describe the constitutional and political processes which in practice allow the exercise of this right." Id. See also id. at 4.
State effectively prevented political participation by a minority group, then that might violate that group’s right to self-determination within the State under Article 1 ICCPR. The group might then seek to assert discrimination under Article 14 of the ECHR, taken together with Article 11 (interpreted in these circumstances to include this sense of self-determination, the right to political participation implicitly recognized in the German Communist Party case), on the basis of Article 53 Echo’s incorporation of Article 1 ICCPR as a human right “ensured under... any other agreement to which it is a Party.” Such an interpretation has yet to be litigated, but given that human rights are guaranteed by States under the ECHR and the ACHR, the application of self-determination would be within the existing State structure, that is, autonomy.

In *United Communist Party of Turkey (TBKP) v. Turkey*, the issues were not presented in terms of Article 1 ICCPR and Article 53 ECHR. Here, the Turkish government had sought the dissolution of the TBKP, which the Constitutional Court granted. Part of the reasoning was that the TBKP had allegedly carried out activities likely to undermine the territorial integrity of the State and the unity of the nation, in that it had called for a “peaceful, democratic, and fair solution for the Kurdish problem.” The European Court of Human Rights, holding that democracy was the only political model contemplated and compatible with the ECHR, held that Turkey violated Article 11 when it banned the TBKP. More pertinently

217. ACHR, *supra* note 210, art. 1.
218. *Id.* art. 16.
219. *Id.* art. 23.
221. ACHR, *supra* note 210, art. 29(h).
222. The opportunity may arise in *Sadak v. Turkey*, App. Nos. 2514494, 26149-54/95, & 27100-01/95, Eur. Ct. H.R. (2000), where a claim with respect to Article 3 of Protocol I was declared admissible. The applicants were Party of Democracy (DEP) members of the Turkish Parliament who had their parliamentary mandate removed by the Constitutional Court as a consequence of the dissolution of the DEP in June 1994; some were arrested and some fled the country.
224. It should be noted that in the European context, while it would be the European Court of Human Rights that would pronounce on whether there had been a violation of the rights in the ECHR read in conformity with Article 1 ICCPR, the execution of the judgment is supervised by the Committee of Ministers. ECHR, *supra* note 63, art. 46.2. In Stankov, App. Nos. 29221/95 & 29225/95, at 97, the European Court of Human Rights held that there could even calls for secession without there automatically being a threat to a country’s territorial integrity and national security.
226. *Id.*
227. *Id.* at 45, 61.
for the present debate, it noted that:

Although the TBKP refers in its programme\textsuperscript{228} to the Kurdish 'people' and 'nation' and Kurdish 'citizens', it neither describes them as a 'minority'\textsuperscript{229} nor makes any claim—other than for recognition of their existence—for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population. On the contrary, the programme states: 'The TBKP will strive for a peaceful, democratic and fair solution of the Kurdish problem, so that the Kurdish and Turkish peoples may live together of their free will within the borders of the Turkish Republic, on the basis of equal rights and with a view to democratic restructuring founded on their common interests.' With regard to the right to self-determination, the TBKP does no more in its programme than deplore the fact that because of the use of violence, it was not 'exercised jointly, but separately and unilaterally', adding that 'the remedy for this problem is political' and that '[i]f the oppression of the Kurdish people and discrimination against them are to end, Turks and Kurds must unite.'\textsuperscript{230}

Thus, the European Court of Human Rights not only acknowledged the right of the Kurdish people to be recognized as a group within Turkish society, but also that the right to self-determination must be "exercised jointly" and that it can be fulfilled following a "democratic restructuring" without destroying the territorial integrity of Turkey.\textsuperscript{231} In Socialist Party \textit{v. Turkey},\textsuperscript{232} the European Court of Human Rights used Article 11 again where a political party had been dissolved because of its program.

The Court notes that, read together, the statements put forward a political programme with the essential aim being the establishment, in accordance with democratic rules, of a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis . . . . In the Court's view, the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.\textsuperscript{233}

Furthermore, with respect to political parties whose role is essential to the proper functioning of democracy, the restrictions found in paragraph 2 of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{228} Id. at 9.
\item \textsuperscript{229} Contrary to the Turkish Constitution. TBKP, App. No. 19392/92, 26 Eur. H.R. Rep. 121, 133, at 10, 11, 55 (referring to Article 14 of the Constitution and § 81 of Law No. 2820 "on the regulation of political parties").
\item \textsuperscript{230} Id. at 56.
\item \textsuperscript{231} See also Sidoropoulos, 4 Eur. Ct. H.R. 1594, at 43, 46; Ahmet Sadik, 55 Eur. Ct. H.R. 22, at 19; see also Rainbow Party case, supra note 182.
\end{enumerate}
\end{footnotesize}
Article 11 are to be construed strictly.\textsuperscript{234} European Court of Human Rights went further its 2001 decision, \textit{Stankov and United Macedonian Organisation Ilinden v. Bulgaria}.\textsuperscript{235} It held that ethnic groups not only had the right to political recognition, but also political activity under Article 11. "The inhabitants of a region in a country are entitled to form associations in order to promote the region's special characteristics. The fact that an association asserts a minority consciousness cannot in itself justify an interference with its rights under Article 11 of the [ECHR]."\textsuperscript{236}

Freedom of assembly under Article 11 protects demonstrations that might annoy or give offense.\textsuperscript{237} According to the Court in \textit{Stankov}, minor incidents threatening public order should not lead to a ban on an organization's meetings; any isolated incident could be dealt with through individual criminal prosecution. Where \textit{Stankov} goes further is that it states that a group of persons might request secession and democratic principles demand that the State permit it.\textsuperscript{238} This does not recognize a right to secession; merely that States cannot exclude the topic from political debate.\textsuperscript{239} The combination of rights to freedom of expression and freedom of assembly for minority groups shows how political participation for such groups can be upheld through a judicial process and casts doubt on arguments that a right to autonomy could not be justifiable.

\subsection*{B. Cultural Autonomy\textsuperscript{240}}

In its General Comment on Article 27 of the ICCPR, the Human Rights Committee stated that:

\begin{itemize}
  \item \textsuperscript{234} ÖZDEP v. Turkey, App. No. 23995/94, 31 Eur. H.R. Rep. 27, 703, at 44; Stankov, App. Nos. 29221/95 & 29225/95, at 84.
  \item \textsuperscript{235} Stankov, App. Nos. 29221/95 & 29225/95, at 89.
  \item \textsuperscript{236} In this case, marches, meetings and demonstrations. \textit{Id.} at 89. \textit{See also} ÖZDEP v. Turkey, App. No. 23995/94, 31 Eur. H.R. Rep. 27, 703, at 44 (where the Court held "there can be no justification for hindering a political group"); Ignatane v. Latvia, U.N. GAOR, Hum. Rts. Comm., 56th Sess., Supp. No. 40, Vol. II, at 191, U.N. Doc. A/56/40, 7.3 (where the author of the communication to the Human Rights Committee had been arbitrarily barred from standing for election contrary to Article 25 ICCPR on the basis of language skills which were inappropriately tested. The Human Rights Committee held that discrimination based on language was prohibited under Article 2 ICCPR, so only if the difference in treatment were reasonable and objectively justifiable would it be justified).
  \item \textsuperscript{237} ÖZDEP v. Turkey, App. No. 23995/94, 31 Eur. H.R. Rep. 27, 703, at 86.
  \item \textsuperscript{238} Stankov, App. Nos. 29221/95 & 29225/95, at 97.
  \item \textsuperscript{239} Incitement to violence, rejection of democratic principles, and seeking the expulsion of others from the territory would allow for restrictions on the Article 11 right. \textit{Id.} at 97, 100.
\end{itemize}
Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language, or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.

As was noted above in the Minority Schools in Albania case, without their own institutions, the minority's culture and distinctiveness will disappear and they will be assimilated into the majority population. Cultural autonomy has been a focus of attention within Europe in the 1990s. Culture requires that children be educated about the history of all groups in the State. The Hague Recommendations Regarding Minority Education Rights deals mainly with mother-tongue education, but it also expects States to ensure the teaching to all of the histories, cultures, and traditions of national minorities. Beyond schooling, a minority cannot preserve its identity and culture if it is not permitted to use its own language, the topic addressed in the Foundation on Inter-Ethnic Relations' Oslo Recommendations of February 1998. Additionally, however, it needs to be accepted that minority cultures can only be preserved and promoted where the group can govern its own cultural affairs and feed into national plans, particularly on education. Culture, in this sense, is a very broad concept and may well extend to preserving a way of life. In many ways, cultural

241. See also the right to the benefits of culture in Article 14 of the San Salvador Protocol to the ACHR, supra note 111.
242. HRC General Comment 12(21), supra note 111, at 6.2. See also Human Rights Committee, General Comment 24(52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U. N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), 8 (where Article 27 was expressed to be a peremptory norm of international law).
246. Oslo Recommendations regarding the Linguistic Rights of National Minorities, particularly, recommendations, 6, 7 and 9 on establishing associations, funding and access to media. See generally Taylor, supra note 21.
autonomy is the most important right of groups within the State.\textsuperscript{248}

C. Financial Autonomy\textsuperscript{249}

The need for financial autonomy is well-established, yet it is often the most difficult to achieve. Nanda, arguing for a wider right to secede, was prepared to grant such if the ethnic group was deprived of its right to participate in the wealth and resources of the State.\textsuperscript{250} While not agreeing with his outcome, financial autonomy is a prerequisite to participatory and cultural autonomy.\textsuperscript{251} The common clauses in the WWI peace treaties provided for an equitable share to minorities of budgets for educational, religious or charitable purposes.\textsuperscript{252} The Aaland Islands received more favorable treatment; the local government bodies were only to subsidize Swedish schools and had powers to use certain tax revenues for their own requirements.\textsuperscript{253} More recently, common Article 1.2 of the two Covenants provided: “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”\textsuperscript{254} Under Article 31 of the 1994 Declaration on Indigenous Peoples, such peoples were to be provided with autonomous government along with “ways and means for financing these autonomous functions.”\textsuperscript{255} The 1991 Geneva Meeting of Experts on National Minorities noted the positive results obtained by the funding of teaching of minority languages to the general public and the provision of financial assistance enunciated in the Commission was not rejected and formed the basis for the partly dissenting opinion of Liddy, Trechsel, Thune, Rozakis, Ress, Perenic and Sváby in Cyprus v. Turkey, App. No. 25781/94, 23 Eur. H.R. Rep., 478, 3 (dissenting), regarding the destruction of the homes of the Turkish Cypriot community. See also Noack v. Germany, App. No. 46346/99, available at http://www.echr.coe.int/eng.


\textsuperscript{249} See the Preamble to the ACHR Protocol of San Salvador, supra note 112; see also Hannum 1996, supra note 13, at 463–66.

\textsuperscript{250} Nanda, supra note 143, at 452.

\textsuperscript{251} Consider Kymlicka 1995, supra 9, at 179–80, on the relationship between poverty and participation in the national culture.

\textsuperscript{252} E.g., Article 9 bis of the Polish Treaty: “In towns and districts where there is a considerable proportion of Polish nationals belonging to racial, religious or linguistic minorities, these minorities shall be assured an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State, municipal or other budget, for educational, religious or charitable purposes.” It was not the fault of the minority guarantees that the economies of these new States were so weak in the inter-War period.

\textsuperscript{253} Macartney, supra note 16, at 261.

\textsuperscript{254} ICCPR, supra note 109, art. 1.2.

\textsuperscript{255} Draft Declaration on Indigenous Peoples, supra note 80, art. 31.
to persons belonging to national minorities who "wish to exercise their right to establish and maintain their own educational, cultural, and religious institutions, organizations, and associations."\textsuperscript{256}

The HCNM also called on Macedonia in his November 1998 statement to finance properly local institutions.\textsuperscript{257} Interestingly, in examining the needs of the indigenous peoples of Russia's far north, the Minority Rights Group, referring to the 1989 meeting of experts at Tyumen, held that they needed autonomy "underpinned by two principles: legal guarantees to land and budgetary allocations made directly to the minorities."\textsuperscript{258} The Hungarian Act LXXVII of 1993 on the Rights of National and Ethnic Minorities also provides for financial autonomy.\textsuperscript{259}

It cannot be said that in the drafting of all these instruments, the financial implications of autonomy have been forgotten or ignored. Furthermore, this approach reflects the idea that all should participate in the wealth of the State and that economic and social rights are as important as civil and political ones.

Together, participatory, cultural, and financial autonomy, appropriate to the needs of the group, are the pre-eminent means of providing for the right to self-determination of non-colonial peoples and the rights of minorities within the State structure.

Conclusion

The nation-State is a myth and always has been.\textsuperscript{260} The genocide and forcible assimilation of minority groups through the centuries is ample testimony that there never have been mono-ethnic States.\textsuperscript{261} This is not to condemn President Wilson at Versailles, for he too saw the limited scope for solving the "minority problem."\textsuperscript{262} Rather it is to condemn international law which has yet to cope with groups of individuals. It is the lack of a voice on the international stage for entities other than States, which has made secession seem so appealing, and autonomy, viewed as a privilege within the gift of the State, as second best.\textsuperscript{263} There are those, though,

\begin{itemize}
  \item \textsuperscript{256} OSCE Meeting of Experts on National Minorities, supra note 194, at 7.
  \item \textsuperscript{257} Letter from the High Commissioner on National Minorities (HCNM) to the government of Macedonia, supra note 199.
  \item \textsuperscript{258} Nikolai Vakhtin, MRG: Native Peoples of the Russian Far North 31 (M.R.G. 1992).
  \item \textsuperscript{259} Hungarian Act LXXVII of 1993 on the Rights of National and Ethnic Minorities (1993), §§ 27, 37. See also György Réti, Hungary and the Problem of National Minorities, HUNGARIAN QUARTERLY 71 (1995) (on file with the Hungarian Embassy) (indicating that Hungary's foreign trade policy ought to be tied to the treatment of ethnic Hungarian minorities in the trading partners). See also Recommendation 7 of the Oslo Recommendations regarding the Linguistic Rights of National Minorities, supra note 252.
  \item \textsuperscript{260} Kymlicka 1996, supra note 26, at 52; SETON-WATSON, supra note 14, at 5.
  \item \textsuperscript{261} Stavenhagen, supra note 23, at 21.
  \item \textsuperscript{262} See Whelan, supra note 45, at 108; A.M. Gallagher, The Enduring Legacy: Reflections on Versailles, in EUROPEAN ETHNOCITY 197 (Dunn & Fraser eds., 1996).
  \item \textsuperscript{263} Cf. Hurst Hannum, The Limits of Sovereignty and Majority Rule: Minorities, Indigenous Peoples and the Right to Autonomy, in NEW DIRECTIONS IN HUMAN RIGHTS 3, 21 (Lutz, Hannum, & Burke eds., 1989). Franck, supra note 12, at 382, points out: "[T]he
who would argue that while lawyers can be involved in the negotiation of autonomy within the State, it is ultimately a political decision. Indeed, they would argue that since the content of the right is variable, that it is not a legal right.

It is perhaps immaterial whether one affirms the existence of a legal 'right' with an indeterminate content, or denies the existence of the 'right' because of its indeterminate content. Politically, of course, it may make quite a difference, because the former view offers the opportunity to clothe the arguments for one's own favored 'group' in the garb of impeccable legal legitimacy.

First, Pomerance is wrong to assert that the content of autonomy is indeterminate, for it is no more indeterminate than the acknowledged right to freedom of religion. What is indeterminate is its implementation. However, the fact that the right can only be concretized by reference to local facts does not mean that the right itself is uncertain; merely that its implementation must be case specific—international human rights law has long accepted that rights need a practical context. And just because it is non-justiciable in most instances, that again does not detract from its status as a right in international law: the corollary is that the State is under an obligation to accord autonomy by reason of existing international commitments.

Autonomy in appropriate measure needs to be seen as a right of all groups within the State, nations, peoples, or minorities. The foregoing attempts to show how autonomy for all groups within the State can be justified under existing international instruments and to outline the framework for its content. Where a group within society is able to assert a claim to control its own affairs, it should be accorded the right so to do under international law. The right to autonomy for groups in society is a necessary consequence of the combined effect of the right to self-determination and the rights of persons belonging to minorities to enjoy their own culture. As such, a principled right to autonomy would provide in practical terms appropriate rights for all groups within the State, bridging the gap between the self-determination of peoples and minority rights.