

DEALING WITH CLAIMS OF ETHNIC MINORITIES IN INTERNATIONAL LAW

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ABSTRACT

From an international legal point of view, claims by ethnic groups pose serious questions touching upon fundamental principles of international law. The right to existence of ethnic minorities; equality and non-discrimination measures; and the question of the relationship between self-determination, participation, and minority rights are some of the most important issues that arise. The integration of ethnic groups in regional and national decision-making processes, minority-benefiting power-sharing arrangements, and territorial claims (notably autonomy and secession) implicate key aspects of international law and should accordingly be regulated by international law. These key aspects center on three series of questions:

1. Does the active protection and empowerment of ethnic groups and as a consequence, the favorable treatment of minorities, undermine

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- fundamental principles of equality in international human rights law? What is the “acceptable” level of difference in treatment?
2. How can international law contribute to the protection of minorities? What are the legal standards regulating ethnic groups’ rights to exist, protecting minorities from political and economic discrimination, and enhancing the preservation of a group’s ethnic identity?
 3. What role does international law play in empowering ethnic groups? How can minority participation in state and local government be secured? Are power-sharing arrangements and autonomy compatible with international legal principles? How should territorial claims such as demands for secession and independence be addressed in international law?

This Article examines the challenges that claims of ethnic groups pose to international law and points out the weaknesses and loopholes in the protection of minorities. It gives recommendations on how international law could effectively contribute to dealing with ethnic claims and shows the limits of an international law approach to ethnic issues.

I. INTRODUCTION

Claims of ethnic minorities¹ generally fall in two major categories: demands for protection and demands for empowerment. The first category concerns requests for protection against extinction and discrimination, as well as claims focusing on the preservation of culture and ethnic identity of the group. Claims falling within the second category relate to empowering the group to have the authority to determine its own affairs, actively and effectively participate in state affairs, to obtain autonomy (non-territorial [segmental, cultural] and territorial), and, in some cases, to be able to secede from the state and gain independence. The claims depend on the structure of the ethnic group and its role in society.² Regionally concentrated groups with a history or myth of independent political existence tend

1. The term “ethnic minority” is not clearly defined in political and social science research or international law and its characterization depends on the context and the academic approach chosen. In this article, the term “ethnic community” will be used as defined by Anthony D. Smith. According to Smith, an ethnic group has six characteristics: a common name, a myth of common ancestry, shared memories (including historical experiences, myths, and legends), a link with a historic territory or a homeland (which the group may or may not currently inhabit), a common culture, and a measure of common solidarity and self-awareness. See Stephen Van Evera, *Hypotheses on Nationalism and War*, 35 INT’L SECURITY 5 (spring 1994); see also Anthony D. Smith, *The Ethnic Sources of Nationalism*, in ETHNIC CONFLICT AND INTERNATIONAL SECURITY 27, 28–30 (Michael E. Brown ed., 1993). The term “minority” will not only be used to refer to a group numerically inferior compared to the whole population, but also to express the power structure in a given case, namely to describe a group in a disadvantaged position.

2. See CHRISTIAN P. SCHERRER, ETHNICITY, NATIONALISM AND VIOLENCE: CONFLICT MANAGEMENT, HUMAN RIGHTS, AND MULTILATERAL REGIMES 113 (2003).

to seek secession or autonomy, while minorities integrated in pluralistic societies seek equal treatment and access to power within existing political structures.³

Claims of ethnic groups *per se* are not generally analyzed and settled by international law. However, many of the central issues arising from ethnic claims implicate key aspects of the international order and, as a result, international law.⁴ The protection of ethnic minorities from discrimination, their right to existence and preservation of their culture, the integration of ethnic groups in regional and national decision-making processes, minority-benefiting power-sharing arrangements, and territorial claims (notably autonomy and secession) touch upon international legal concepts and pose difficult questions: First, how can international law contribute to the protection of minorities, particularly regarding the political and economic discrimination of ethnic groups and the preservation of the group's identity? Second, how should territorial claims of ethnic groups be treated? Are power-sharing arrangements and autonomy compatible with international legal principles? How does international law deal with claims to secession and independence? And third, does the active protection and empowerment of ethnic groups and as a consequence, the favorable treatment of minorities, undermine fundamental principles of equality in international human rights law? Is the "acceptable" level of difference in treatment? This article examines the potential of international law to effectively address claims of ethnic groups. It examines the challenges different claims pose to international law and points out the weaknesses and loopholes in the protection of minorities. It gives recommendations on how international law could actively contribute to dealing with ethnic claims and shows the limits and debates about the feasibility of an international law approach. The discussion is mainly based on a United Nations ("UN") perspective that additionally integrates regional and national views.

II. PROTECTION

From an international legal point of view, protection of ethnic minorities can be problematic and lead to difficult theoretical and practical issues. In particular, the tension between the notion of equality of all human beings as promoted by international human rights law and the concept of the protection and promotion of rights for certain groups has caused intense debates among international lawyers. The most important aim of protection of minorities is stated in the Permanent Court of International Justice ("PCIJ") advisory opinion in the *Minority Schools in Albania* case.⁵ The court states:

3. Van Evera, *supra* note 1, at 5, 31.

4. Several areas of international law, including international human rights and humanitarian law, the law of treaties, state succession, state responsibility, state recognition, and the law of international organizations, are relevant to the legal analysis of claims by minority groups.

5. *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64 (Apr. 6) [hereinafter *Minority Schools*].

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.⁶

This view was confirmed by the United Nations Human Rights Committee ("HRC") in General Comment No. 23 on Article 27 of the International Covenant on Civil and Political Rights⁷ ("ICCPR") regarding minority rights, "[t]he protection of these rights [under Article 27] is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole."⁸

Justification of the protection of ethnic minorities is thus based on three concepts: maintenance of peace and security, respect of human dignity, and preservation of minority culture.⁹

First, one of the causes of ethnic conflicts is the failure to protect the rights of ethnic minorities. Minorities rebel against suppression, collective disadvantages, and human rights abuses.¹⁰ Ethnic conflict poses a threat to peace and security on the regional and international level. Conflicts in the Balkans, Rwanda, Chechnya, Iraq, Israel/Palestine, Indonesia, Sri Lanka, India, and Darfur are only the deadliest and best-known ethnic conflicts that have shaped international relations over the last fifteen years. Provinces, states, and in some cases even whole regions have been destabilized through a wave of ethnic insecurity and violence,¹¹ often paired with a downward spiral of economic decline and state failure, accompanied by corruption and mismanagement.¹² Ethnic conflicts often involve massive attacks on civilians, especially on the weakest part of the population. Widespread and systematic human rights violations, mass murder, genocide, rape, torture, and expulsions are among the worst atrocities committed during ethnic conflicts. Spillover effects of ethnic conflict to nearby regions can include refugee problems,

6. *Id.* at 17 (emphasis added).

7. International Covenant on Civil and Political Rights art. 27, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

8. Office of UN Human Rights Council, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, ¶ 9, UN Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).

9. See ATHANASIA SPILIOPOULOU ÅKERMARK, *JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW* 68–83 (Kluwer Law Int'l 1997) (1996).

10. See Ted Robert Gurr, *Why Minorities Rebel: A Global Analysis of Communal Mobilization and Conflict Since 1945*, 14 INT'L POL. SCI. REV. 161, 161 (1993).

11. See David A. Lake & Donald Rothchild, *Containing Fear: The Origins and Management of Ethnic Conflict*, 21 INT'L SECURITY 41, 41 (1996).

12. See Michael E. Brown, *Ethnic and Internal Conflicts: Causes and Implications*, in *TURBULENT PEACE: THE CHALLENGES OF MANAGING INTERNATIONAL CONFLICT* 209, 214–22 (Chester A. Crocker et al. eds., 2001).

economic disasters, ecological catastrophes, military complications (armament and proliferation), and instability leading to interstate war.¹³

Protection of minorities and their rights is thus vital for maintaining international and regional peace and security, a realization that has been confirmed by recent UN practice.¹⁴ Furthermore, the provisions in the Charter of the United Nations regarding the prohibition of the use of force, equality and non-discrimination, human rights, and the peaceful settlement of disputes are all relevant for the issue of minority protection and for dealing with ethnic conflict.¹⁵ Former UN Secretary-General Boutros Boutros-Ghali stated in his Agenda for Peace: "One requirement for solutions to these problems [maintaining peace and security] lies in commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic."¹⁶ He continued by reaffirming that democracy does not only require respect for human rights and fundamental freedoms, but also "a deeper understanding and respect for the rights of minorities"¹⁷

The second rationale justifying the protection of minorities is respect for human dignity. The preamble of the UN Charter refers to the reaffirmation of "faith in fundamental human rights, in the dignity and worth of the human person" and thus connects human dignity directly with human rights.¹⁸ The preamble of the Universal Declaration of Human Rights ("UDHR") speaks of the "inherent dignity . . . of all members of the human family," while Article 1 pronounces that "[a]ll human beings are born free and equal in dignity and rights."¹⁹ Autonomy, integrity, and freedom of human beings as well as individual well-being lie at the core of the concept of human dignity, which permits a dynamic treatment of rights.²⁰ The protection of minorities and human rights guarantees the individual dignity and well-being of human beings. Individual well-being, in the context of ethnicity, is strongly connected with the preservation of ethnic identity and the group's cultural attributes. Granting ethnic groups minority rights preserving their culture therefore promotes human dignity.²¹

13. See Michael E. Brown, *Causes and Implications of Ethnic Conflict*, in *ETHNIC CONFLICT AND INTERNATIONAL SECURITY* 3, 5 (Michael E. Brown ed., 1993).

14. See, e.g., S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991) (concerning the repressed Kurdish minority in Iraq); S.C. Res. 918, ¶ 3, U.N. Doc. S/RES/918 (May 17, 1994) (expanding the mandate of the operation in Rwanda to include peace enforcement); see S.C. Res. 1244, ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999) (regarding the establishment of an interim administration for Kosovo).

15. See generally UN Charter.

16. The Secretary-General, *An Agenda for Peace*, ¶ 18, delivered to the Security Council and the General Assembly, U.N. Doc. S/24111, A/47/277 (June 17, 1992).

17. *Id.* at para. 81.

18. UN Charter pmb.

19. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, 72, U.N. GAOR, 3d Sess., 183rd plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

20. See CARLOS SANTIAGO NINO, *THE ETHICS OF HUMAN RIGHTS* 178–80 (1991).

21. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP, A LIBERAL THEORY OF MINORITY RIGHTS*, 75–91, 121–30 (Oxford Univ. Press Inc. 1997) (1995). He argues that culture provides individuals with "meaningful options," which in turn promotes the individual freedom of human beings and thus human dignity. *Id.* at 83.

The third reason for justification of the protection of ethnic groups in international law is the preservation of culture. Protection of culture is seen as a fundamental value in itself²² as will be discussed below.²³

The realization that minority protection is central to ethnic conflict prevention and resolution led to the development of a range of norms, instruments, and institutions in international law addressing ethnic conflict and the rights of ethnic groups. Within this protection framework, ethnic groups have different claims, ranging from the defense against genocide to non-discrimination and the protection of the group's culture and identity. The following paragraphs address each of these issues and examine the response of international law.

A. *Existence*

The claim to physical existence is the most fundamental claim voiced by ethnic groups. In turn, the right to life and the right to existence are the most basic human rights. Thus, among the corpus of international standards that are relevant to the protection of minorities is the right to be protected against genocide. Genocide targets minorities with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group"²⁴ Genocide does not happen without warning, but is usually planned, organized, and systematically executed.²⁵

In international law, the term "genocide" was first defined in the context of the Jewish Holocaust. The legal scholar Raphaël Lemkin described genocide in 1944 as:

[A] coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of

22. Take for example, the establishment of the UN Educational, Scientific, and Cultural Organization (UNESCO) within the UN system or the European Cultural Convention of the Council of Europe. See Convention on the Rights of the Child, at arts. 29, 30, 32, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., 69th plen. mtg., U.N. Doc. A/RES/45/158 (Dec. 18, 1990) [hereinafter Migrant Workers Convention]; International Labour Organisation, Indigenous and Tribal Peoples Convention, at art. 2, 72 ILO Official Bull. 59 (Sept. 5, 1991); and U.N. Educ., Scientific, & Cultural Org., *Declaration on Race and Racial Prejudice*, at art. 1, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.1, annex V (Nov. 27, 1978). For a discussion on the preservation of culture in international law, see generally A.J.M. MILNE, *HUMAN RIGHTS AND HUMAN DIVERSITY, AN ESSAY IN THE PHILOSOPHY OF HUMAN RIGHTS* (1986). For more general discussion about the relationship of culture and international law, see generally MARTIN PHILIPP WYSS, *KULTUR ALS EINE DIMENSION DER VÖLKERRECHTSORDNUNG: VOM KULTURGÜTERSCHUTZ ZUR INTERNATIONALEN KULTURELLEN KOOPERATION*, in 79 SCHWEIZER STUDIEN ZUM INTERNATIONALEN RECHT (1992).

23. See *infra* Part 2.3.

24. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

25. See Gregory H. Stanton, *The 8 Stages of Genocide*, GENOCIDE WATCH, 1998, available at <http://genocidewatch.org/aboutgenocide/8stagesofgenocide.html>.

national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against . . . individuals, not in their individual capacity, but as members of the national group.²⁶

Lemkin identified different forms of genocide. "Political" genocide implies the complete destruction of a government and replacement by an ethnically homogenous, despotic regime. "Social" genocide involves the weakening of the spiritual resources of the state, especially attacks on critical intelligentsia. "Cultural" genocide comprises prohibiting the use of minority languages, education in the majority culture and language, and the control of culture in general, including manifestations of this policy such as book burnings. "Economic" genocide means the destruction of the minority's economic resources, including expropriation of land and the prohibition of traditional economic activities. "Biological" genocide involves measures to favor lower birthrates in ethnic minorities, such as the forcible separation and/or starvation of men and women, and measures designed to affect the survival capacity of children. "Physical" genocide is what is commonly referred to as genocide, namely mass killings. "Religious" genocide is the elimination and prohibition of a minority's religion. Finally, "moral" genocide represents an attempt to debase a group by, for example, encouraging the consumption of alcohol.²⁷

Genocide entered international law after the Second World War as part of "crimes against humanity" in Part I, Article 6, paragraph (c) of the Charter of the International Military Tribunal for Germany, namely as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds."²⁸

Under the auspices of the United Nations, genocide emerged later as a separate legal concept. UNGA Resolution 96/I (1946), which was adopted unanimously and without debate, defined genocide as "a denial of the right to existence of entire human groups," existence referring to physical existence of racial, religious, political, and other groups.²⁹ The resolution adopted genocide as "a crime under international law which the civilized world condemns" and refers to the punishability of the crime.³⁰ For the first time, genocide was treated independently from other war crimes. The resolution influenced the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").³¹

26. RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944).

27. *See id.* at 82-90; *see also* PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 61-62 (1991).

28. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 284. Signed by the United States, United Kingdom, France, and the Soviet Union, and later by nineteen other states.

29. The Crime of Genocide, G.A. Res. 96 (I), at 188, U.N. Doc. A/Res/64/1C (Dec. 11, 1946).

30. *Id.* at 189.

31. *See* Genocide Convention, *supra* note 24.

The Genocide Convention defined genocide as a crime under international law (Article 1).³² Any regime that commits genocide forfeits its legitimacy and can become subject to international intervention.³³ According to Article 2 of the Convention, genocide is defined as:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group,
- b. Causing serious bodily or mental harm to members of the group,
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,
- d. Imposing measures intended to prevent births within the group, and
- e. Forcibly transferring children of the group to another group.³⁴

It is not surprising that all acts under Article 2 refer to either “physical genocide” (a–c) or “biological genocide” (d), or both (e) as defined by Lemkin. The question of “cultural genocide” was excluded as the concept was too vague and open to abuse.³⁵ As a result, the term “genocide” was narrowed down to acts targeting the physical integrity of the group and lost the open meaning that originally adhered to the expression. The focus of protection was narrowed to “national, ethnical, racial or religious groups;”³⁶ political groups were excluded.

Besides the prohibition to intentionally destroy a group (Article 2) and obligations for parties to prevent, punish and prosecute the crime of genocide (Articles 1 and 4), the Genocide Convention includes a provision asserting that states themselves can be held responsible (Article 9).³⁷ This was confirmed by the International Court of Justice (“ICJ”) in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections),³⁸ in which the ICJ observed that state responsibility does not only apply if a state fails to prevent genocide, but also if a state directly commits acts of genocide (paragraph 32).³⁹ In addition, the ICJ has noted that the rights and obligations enshrined by the Genocide Convention are rights and obligations *erga omnes*, which means that a party’s duty to combat genocide is not

32. *Id.* at art. 1.

33. Gregory H. Stanton, *Create a United Nations Genocide Prevention Focal Point and Genocide Prevention Center*, GENOCIDE WATCH, 2004, available at <http://www.genocidewatch.org/aboutus/stockholmproposal.htm>.

34. See Genocide Convention, *supra* note 24, at art. 2.

35. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 51–101 (2d prtg. 2002) (discussing in detail the drafting of the Genocide Convention and the reasons for dropping “cultural” genocide from the final text).

36. *Id.*

37. See Genocide Convention, *supra* note 24, at art 9.

38. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595 (July 11).

39. *Id.* at 616.

limited to the party's territory (paragraph 31).⁴⁰ This was later confirmed in the ICJ judgment in the same case.⁴¹

The prohibition of genocide is not only a general international legal norm but also a norm of *jus cogens* under Articles 53 and 64 of the Vienna Convention on the Law of Treaties, which means that "no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."⁴² Under the UN. International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, genocide can entail international state responsibility which is attached to serious breaches of *jus cogens* norms.⁴³

Other documents and institutions protect the right to existence of ethnic groups. Protection for the physical existence of minorities derives from the jurisdiction of the UN international tribunals (the International Criminal Tribunal for the Former Yugoslavia ["ICTY"], the International Criminal Tribunal for Rwanda ["ICTR"], and the International Criminal Court ["ICC"]). All three tribunals prosecute persons for serious violations under international law, namely the crime of genocide, crimes against humanity, and war crimes ("grave breaches of the Geneva Conventions of 1949").⁴⁴ "Ethnic cleansing," which "entails deportations and forcible mass removal or expulsion of persons from their homes in flagrant violation of their human rights, and which is aimed at the dislocation or destruction of national, ethnic, racial or religious groups,"⁴⁵ is essentially covered by the Statute of the ICC.⁴⁶ Protection of a group's existence thus includes the continued residence in the area where the ethnic group lives and the right to freely move somewhere else inside state boundaries. Expulsions and displacement on the basis of ethnic identity are human rights violations and are part of the strategy of ethnic cleansing which is prohibited by the ICC statute.⁴⁷

40. *Id.* The ICJ distinguishes between "the obligations of a State towards the international community as a whole and those arising vis-à-vis another State." Obligations with *erga omnes* character are the concern of all states and all states can be held to have a legal interest in their protection. See *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

41. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), paras. 142–201 (Judgment of Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf> (last visited Mar. 25, 2009).

42. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

43. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, arts. 40, 41, U.N. Doc. A/CN.4/L.602/Rev.1 (July 26, 2001).

44. See the Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, Annex, delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993) and the Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, delivered to the Security Council*, U.N. Doc. S/25704/Add.1 (May 19, 1993), and S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; S.C. Res. 955, arts. 2–4, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; and Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

45. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Commission on Human Rights on its First Special Session*, at 2, U.N. Doc. E/CN.4/1992/S-1/8 (Aug. 14, 1992).

46. See ICC Statute, *supra* note 44, at art. 7.

47. *Id.* at art. 6–7.

In a more general way, the right to existence is addressed in human rights documents, such as Article 20 of the ICCPR⁴⁸ or Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁹ (“ICERD”) concerning the prohibition of propaganda for war and incitement to discrimination, hostility, or violence based on advocacy of national, racial, or religious hatred. The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (“Minority Declaration”) provides in Article 1 that states “shall protect the existence” of national or ethnic, cultural, religious, and linguistic minorities.⁵⁰ This refers to a basic right to be protected against genocide.⁵¹ The Report of the International Commission on Intervention and State Sovereignty, named “Responsibility to Protect,” states: “What is at stake here is not making the world safer for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them.”⁵²

Besides the protection against physical extinction, the prohibition of “cultural genocide,” which is understood as the destruction of a group’s specific traits, includes the ban of discrimination on ethnic, racial, national, linguistic, or religious ground, of forced assimilation, ethnocide, and specific measures regarding property rights and participation in political bodies.⁵³ These are only some examples that illustrate the internationally recognized preconditions for the preservation of a minority’s special traits, tradition, and culture. Regional documents confirm and streamline these obligations.⁵⁴

B. *Equality and Non-Discrimination*

Claims to not be discriminated against and to acquire equal rights and opportunities are among the most frequently uttered demands of ethnic groups. In turn, discrimination is among the most common offenses against members of minorities. Comprehensive equality and non-discrimination provisions contribute to the prevention of ethnic disputes and in turn, violations of equality and non-

48. See ICCPR, *supra* note 7, at art. 20.

49. See International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), at 48, 20th. Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965) [hereinafter ICERD].

50. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, 47th. Sess., U.N. Doc. A/Res/47/135/ (Dec. 18, 1992) [hereinafter Minority Declaration].

51. See THORNBERRY, *supra* note 27, at 44.

52. Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* ¶ 2.1 (Dec. 2001) [hereinafter International Commission].

53. GAETANO PENTASSUGLIA, MINORITIES IN INTERNATIONAL LAW: AN INTRODUCTORY STUDY 84 (2002).

54. See Framework Convention for the Protection of National Minorities, E.T.S No. 157 (1995) [hereinafter Framework Convention]; Conference on Security and Cooperation in Europe (CSCE), *Document of the Copenhagen Meeting on the Human Dimension of the CSCE*, Doc. CSCE/CHDC. 43 (1990) [hereinafter Copenhagen Document]; the African [Banjul] Charter on Human and Peoples’ Rights, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (June 27, 1981) [hereinafter Banjul Charter].

discrimination rights of minority groups are important underlying causes of ethnic conflict.⁵⁵

The right to equal treatment is a well-established principle of international human rights law.⁵⁶ Equality and non-discrimination provisions are part of the UN Charter,⁵⁷ the UDHR,⁵⁸ and particularly the international human rights covenants.⁵⁹ Specialized and regional instruments deal additionally with various aspects of discrimination.⁶⁰ Furthermore, principles of non-discrimination and the right to equality are widely acknowledged as customary international law binding all states, at least in racial matters.⁶¹ “Whenever ‘race’ is used, it also includes ‘ethnic group.’”⁶²

The non-discrimination clauses in the ICCPR not only prohibit discrimination, but oblige states to ensure that individuals are protected against discrimination by private actors.⁶³ The UN Committee on the Elimination of Racial Discrimination (“CERD”) General Recommendation on the rights of indigenous peoples, adopted in 1997,⁶⁴ and the 2001 Declaration and Programme of Action adopted by the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related

55. TED ROBERT GURR, *MINORITIES AT RISK: A GLOBAL VIEW OF ETHNOPOLITICAL CONFLICTS* 137 (1993).

56. See PENTASSUGLIA, *supra* note 53, at 84–85 (summary of the history of equality and non-discrimination clauses in international law)/

57. UN Charter, art. 1, para. 3 and art. 55.

58. UDHR, *supra* note 18, at art. 2.

59. ICCPR, *supra* note 7, at arts. 2, 3, and 26; International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 2, para. 2; art. 10, para. 3, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

60. See ICERD, *supra* note 50; UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981); the CRC, *supra* note 23; the International Labour Organization [ILO] Convention Concerning Discrimination in Respect of Employment and Occupation, ILO Doc. 111 (June 25, 1958); the UNESCO Declaration on Race and Racial Prejudice, *supra* note 22; the UNESCO Convention against Discrimination in Education, 429 U.N.T.S. 93, (Dec. 14, 1960); and the Migrant Workers Convention, *supra* note 22. On the regional level, Article 14 of the Council of Europe Convention on Human Rights and Fundamental Freedoms [hereinafter ECHR] and Protocol No. 12 to the ECHR include prohibition of discrimination.

61. Support for this argumentation comes from the significant international documents cited, international legal institutions such as the ICJ (in particular concerning the *Barcelona Traction*, *supra* note 40, and the International Law Commission, pronouncements by international human rights conferences and distinguished international legal scholars such as Ian Brownlie. See PENTASSUGLIA, *supra* note 53, at 85.

62. UN Commission on Human Rights [CHR], Sub-Comm’n. on Prevention & Prot. of Minorities, *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, ¶ 131, U.N. Doc. E/CN.4/Sub.2/1993/34 (July 16, 1993) (prepared by Asbjørn Eide) [hereinafter *Possible Ways and Means*].

63. See UN Human Rights Comm. [HRC], *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, General Comment No. 18 (July 29, 1994), ¶ 9, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

64. UN Comm. on the Elimination of Racial Discrimination [CERD], *Report of the Committee on the Elimination of Racial Discrimination*, Annex V, U.N. Doc. A/52/18 (Aug. 18, 1997).

Intolerance⁶⁵ emphasize the importance of equality and non-discrimination for minority groups.

Most states have adopted legislation covering many of the anti-discriminatory provisions of the international human rights covenants and the ICERD.⁶⁶ Effective implementation of these provisions is one of the first steps in preventing ethnic violence from occurring. The ICERD has one of the highest rates of ratifications among international human rights treaties,⁶⁷ which underlines the importance and the level of agreement on the matter of equality and non-discrimination. Equality provisions in national legislation include the right of individuals to be treated equally before the law, the enjoyment of civil and political rights, the right to property, the right to personal security, freedom from discrimination in employment, education, or housing, access to public service, the prohibition of associations that promote racial discrimination, and the prohibition of incitement speech.⁶⁸ A number of policies have been undertaken to counteract ethnic discrimination. States have established institutions monitoring racial equality, including human rights commissions, Ombudsmen, minority councils, etc.⁶⁹ The effectiveness of legislation prohibiting discriminatory practices depends on several factors, the most important ones being the general acceptance of the practice by the public, the consistent and impartial implementation by the courts, and unbiased enforcement by police and security forces.⁷⁰

Equality and non-discrimination constitute interdependent and mutually reinforcing concepts that are composed of two elements: (1) "abstention from any kind of differentiation based on arbitrary or unreasonable grounds," and (2) differential treatment ("positive" discrimination) with the intention to achieve equality in situations of inequality and discrimination.⁷¹

Regarding the definition of discrimination, the HRC stated in its General Comment No. 18 on non-discrimination under the ICCPR:

[T]he term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the

65. See, e.g., World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Aug. 31–Sept. 8, 2001, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration*, paras. 39, 59, 60, 66, 67, U.N. Doc. A/CONF.189/12 (Jan. 1, 2002).

66. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/Res/2106/Annex (Jan. 4, 1969).

67. As of April 2008, 173 states have ratified the ICERD.

68. See *Possible Ways and Means*, *supra* note 62, at paras. 136–49 (providing a detailed analysis).

69. *Id.* at para. 155.

70. *Id.* at para. 150.

71. PENTASSUGLIA, *supra* note 53, at 89.

recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁷²

The goal of anti-discrimination clauses is thus to place members of minorities on equal footing with other nationals of the state, to prevent any action which denies individuals or groups of people equality, and to suppress or prevent any conduct which denies or restricts a person's right to equality.⁷³ The protection of one minority, however, can lead to the discrimination of other minorities. In *Waldman v. Canada*, the HRC concluded that the public funding of schools of the Roman Catholic minority in Canada, but of no schools of any other minority religion, constitutes a violation of Article 26 of the ICCPR.⁷⁴

Nevertheless, "not every differentiation of treatment [constitutes] discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR," and if measures employed are "proportionate" to the goals sought.⁷⁵ Article 1, paragraph 4 of the ICERD states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.⁷⁶

This principle can also be found in international texts concerning minorities.⁷⁷ Positive discrimination, in the last years more commonly known as affirmative action, is "preference for certain groups or members of such groups (typically defined by race, ethnic identity or sex) for the purpose of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms."⁷⁸

Affirmative action comes in two forms: a "soft" version and a "hard" version.⁷⁹ The "soft" versions are basically "extensions of the principle of non-

72. HRC, General Comment No. 18, *supra* note 63, at para. 7.

73. Gudmundur Alfredsson, *Report on Equality and Non-discrimination: Minority Rights*, 5 COE H/Coll. 90/6 (1990).

74. Arieh Hollis Waldman v. Canada, UN HRC Communication, ¶ 10.6, No. 694/1996, U.N. Doc. CCPR/C/67/D/694/1996 (1999).

75. HRC, General Comment No. 18, *supra* note 44, at para. 13.

76. ICERD, *supra* note 50, at para. 4.

77. *See, e.g.*, Minority Declaration, *supra* note 50.

78. *Possible Ways and Means*, *supra* note 62, at para. 172.

79. *Id.* at para. 178.

discrimination.”⁸⁰ Stronger affirmative action measures are aimed at the accelerated creation of a balanced and equal society, namely equality in participation on all levels, including political life, education, economy, and many other fields.⁸¹ Typical means of accomplishing these goals are the establishment of quotas for access to higher education, civil service, employment, etc. Such measures suspend or modify the traditional criteria of merit as a basis for access, but can be justified if past discriminatory practices blocked members of those groups from gaining the merits needed.⁸²

Another method to achieve equality is the implementation of economic, social, and cultural rights on the basis of need, not taking into account ethnic, racial, or gender background. This would not qualify as affirmative action, as it is simply the realization of social and economic rights. Furthermore, the redistribution of resources such as land and capital can provide possibilities for equality of opportunity. This can take many forms, including direct and indirect taxation, free or state-sponsored education, grants etc.⁸³

An important distinction has to be made between the anti-discrimination/equality clauses and rights for minorities. The Subcommittee on the Prevention of Discrimination and the Protection of Minorities defined the difference as follows:

1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment, which they may wish.
2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.⁸⁴

Anti-discrimination clauses prohibit unequal treatment, but do not embrace minority rights. The basic aim of the prevention of discrimination is to secure full and equal enjoyment of human rights and fundamental freedoms⁸⁵ and to eliminate “barriers between races.”⁸⁶ Minority rights are a wider notion as they specifically

80. *Id.*

81. *Id.* at para. 179.

82. See generally Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999–2000); Marjorie Cohn, *Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violations of its International Obligations*, 43 VA. J. INT'L L. 249 (2002–2003); Celina Romany & Joon-Beom Chu, *Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions*, 36 CONN. L. REV. 831 (2003–2004).

83. See *Possible Ways and Means*, *supra* note 63, at paras. 185–93.

84. UN Econ. & Soc. Council [ECOSOC], Subcommittee on Prevention of Discrimination & Protection of Minorities, *Report Submitted to the Commission on Human Rights*, Sec. V, U.N. Doc. E/CN.4/52 (Nov. 24–Dec. 6, 1947) (prepared by Joseph Nisof).

85. ICERD, *supra* note 49, at art. 1, para. 4.

86. *Id.* at art. 2, para. 1(e).

aim at preserving the characteristics which distinguish the minority from the majority.⁸⁷ Articles 2 and 26 of the ICCPR are available to everyone who feels discriminated against, including persons belonging to minorities, women, political groups, and others. By contrast, Article 27, the minority provision of the ICCPR, provides guarantees that are only available to persons belonging to national or ethnic, religious, or linguistic minorities.⁸⁸

C. *Identity and Culture*

The foundation of minority protection lies in special, permanent measures to protect the identity of the group. The focus is on what distinguishes these groups from the rest of the population and how to protect these differences, while clearly rejecting any discriminatory regimes such as the policy of apartheid.

The major demand regarding preservation of identity and culture is the formal recognition of the group and its distinct character *per se*. The Badinter Commission, which was set up to provide the European Economic Community with legal advice regarding the dissolution of Yugoslavia, maintained that in states where one or more groups constitute "ethnic, religious or language communities, they have the right to recognition of their identity under international law."⁸⁹ In most states with two or more major ethnic communities, there is a general trend to include some reference of their existence in the national constitution.⁹⁰ However, in societies in which minorities are less established, less numerous, or not politically mobilized, explicit constitutional recognition may become less practicable. An often practiced alternative approach is the inclusion of a general reference to the multi-ethnic character of the population.⁹¹ Both forms of recognition provide a basis for more detailed legislative protection and recognition of ethnic groups, non-discrimination, the promotion of their identity, and their participation in the structures of the government.⁹²

The most important international provision granting protection of their identity and culture to minorities is Article 27 of the ICCPR, which states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in

87. See, e.g., *Minority Schools*, *supra* note 5, at 17.

88. ICCPR, *supra* note 7.

89. Conference on Peace in Yugoslavia, Arbitration Commission [hereinafter Badinter Commission], Opinion No. 2, Jan. 11, 1991, *reprinted in* 31 I.L.M. 1499 (1992).

90. See UN Econ. & Soc. Council [ECOSOC], Sub.-Comm'n. on Promotion and Protection of Human Rights, Working Group on Minorities, *Appendix to Working Paper (E/CN.4/Sub.2/AC.5/2001/WP.6) Integrative Approaches to the Accommodation of Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/2001/CRP.9 (April 25, 2001) (*prepared by* Tom Hadden & Ciarán Ó Maoláin) [hereinafter *Integrative Approaches*].

91. See UN ECOSOC, Sub.-Comm'n. on Promotion and Protection of Human Rights, Working Group on Minorities, *International and National Action for the Protection of Minorities: The Role of the Working Group on Minorities*, ¶ 20, UN Doc. E/CN.4/Sub.2/AC.5/2004/WP.3 (Jan. 26, 2004) (*prepared by* Tom Hadden) [hereinafter *International and National Action*].

92. *Id.*

community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.⁹³

Article 27 imposes specific obligations on the state parties, namely to protect members of minorities against violations of their rights by public and private parties, to fulfill non-discrimination provisions, and most importantly, to take positive action to ensure the survival and continued development of the cultural, religious, and social identity of minorities.⁹⁴ Thus, Article 27 recognizes a “right to identity,” even if it is not explicitly formulated. The elements of identity can be ethnic, religious, linguistic, or all three.

The most important contemporary, yet legally non-binding text regarding minorities on the international level is the 1992 UN Minority Declaration.⁹⁵ It is based on Article 27 of the ICCPR but goes further in concretizing the rights and is not bound by the limitations of the ICCPR. The declaration stresses the continued importance of minority rights against the background of human rights within a democratic framework based on the rule of law. In addition, other international and regional documents regulate educational aspects, religious and linguistic issues, and the treatment of special groups within minorities, particularly children.⁹⁶

As mentioned before, it is now generally accepted that every culture has dignity and value in itself and, consequently, has to be protected and preserved. Article 1 of the 1966 United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) Declaration of the Principles of International Cultural Co-operation states that “each culture has a dignity and value which must be respected and preserved” (paragraph 1) and that “all cultures form part of the common heritage belonging to all mankind” (paragraph 3).⁹⁷ However, no internationally recognized definition of culture exists,⁹⁸ which makes the implementation of rights designed to preserve culture difficult. The main elements

93. CCPR, General Comment No. 23, *supra* note 8, at paras. 6.2, 9.

94. *Id.*

95. See Minority Declaration, *supra* note 50.

96. See UNESCO Convention Against Discrimination in Education, *supra* note 60, at art. 5, para. 1(c), (which entitles members of national minorities to carry out their own educational activities, including the maintenance of schools, and, depending on the educational policy of the state, the teaching of their own language) Art. 30 of the widely ratified CRC, combines the rights of indigenous and minority children with the rights provided by Article 27 of the ICCPR. CRC, *supra* note 22. The Vienna Declaration and Programme of Action reaffirmed the rights of persons belonging to ethnic linguistic or religious minorities “to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.” See World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 19, U.N. Doc. A/CONF.157/23 (July 12, 1993). Regional documents comprise the Copenhagen Document, *supra* note 54, art. 14 and Protocol 12 of ECHR, *supra* note 60, the European Charter for Regional and Minority Languages, Nov. 5, 1992, ETS No. 148, and the Framework Convention, *supra* note 54.

97. See UNESCO Declaration of the Principles of International Cultural Co-operation, UNESCO Doc. 14C/8.I (Nov 4, 1966), available at http://www.unhchr.ch/html/menu3/b/n_decl.htm.

98. See THORNBERRY, *supra* note 27, at 187.

of identity are language and culture; the latter including religious practices. UNESCO identifies culture as:

[A]ll that is inherited or transmitted through society, it follows that its individual elements are proportionally diverse. They include not only beliefs, knowledge, sentiments and literature . . . but the language or other systems of symbols that are their vehicles. Other elements are the rules of kinship, methods of education, forms of government, and all the fashions followed in the social relations⁹⁹

Lyndel V. Prott distinguishes two meanings of culture: (1) culture in the sense of the highest intellectual achievements such as literary, artistic, and scientific works and (2) culture in the broader sense of the totality of all practices and knowledge of all groups in a given society.¹⁰⁰ Rodolfo Stavenhagen introduces the ethnic dimension by adding to the two former concepts the meaning of culture as the sum of the material and spiritual activities of a group, which distinguishes it from other groups in the society. He accentuates the changes in the perception of culture over time and points out that the “emphasis is on the way people perceive their culture, on the discourse about culture, rather than on culture itself.”¹⁰¹ In his study about the rights of people belonging to minorities, UN Special Rapporteur Francesco Capotorti points out that cultural issues include the general policy regarding minorities, educational policy for children belonging to ethnic groups, development of arts and literature of a minority, diffusion of their culture, and measures adopted for the preservation of their customs and of their legal traditions.¹⁰²

The recognition of culture as a justification for the protection of ethnic groups does not imply that all cultures or all cultural practices should be protected and promoted at any price.¹⁰³ The preservation of minority cultures and ethnic identity has to be seen against the background of international law recognizing the value of cultural diversity, the equality of all cultures, and as a result, the fact that all cultures deserve protection in order to secure their survival. This value is conditioned by other interests such that certain cultural practices may be limited or prohibited.¹⁰⁴

99. MICHEL LEIRIS, *RACE AND CULTURE* 21 (1951).

100. Lyndel V. Prott, *Cultural Rights as Peoples' Rights in International Law*, in *THE RIGHTS OF PEOPLES* 93, 94 (James Crawford ed., 1988).

101. Rodolfo Stavenhagen, *Cultural Rights and Universal Human Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS—A TEXTBOOK* 63, 67 (Asbjørn Eide ed., 1995).

102. Special Rapporteur of the Sub.-Comm'n on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, ¶¶ 327–385, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979).

103. Athanasia Spiliopoulou Åkermark speaks of a process similar to “an endangered species theory.” SPILIOPOULOU ÅKERMARK, *supra* note 9, at 83.

104. For instance, ceremonial female genital mutilation is an unacceptable cultural practice as it violates basic human rights of the women affected (e.g., the right to physical integrity).

Nevertheless, protection and promotion of a minority's identity can pose challenging questions. First, members of minorities should not only have the possibility to receive education in the minority language and practice their own religion, but also to receive some knowledge of their culture in general as well as about cultures of other groups and the society at large. States should therefore adopt measures in the field of education that encourage knowledge of the history, traditions, language, and culture of their minorities. In this context, the right to use one's name in a way it is used within the minority group and the right to have street names and toponyms in the language of the minority as well as the majority constitute significant contributions to the preservation of ethnic culture.¹⁰⁵

Second, the question of who belongs to a minority is usually difficult to determine and the degree to which identity matters are protected or promoted varies substantially between different countries. In the HRC case *Sandra Lovelace v. Canada*,¹⁰⁶ for example, the complainant was a Maliseet Indian woman who had lost, under Canadian legislation, her status as an Indian as a result of marrying a non-Indian. After her divorce, she wanted to go back to the Topique reservation where she was born and grew up.¹⁰⁷ Her request was denied by Canadian authorities because of the alleged change of status. The HRC stated that restrictions affecting the right to residence on a reservation must have a reasonable and objective justification.¹⁰⁸ Denying Sandra Lovelace the ability to live on the reservation was not seen as reasonable or necessary to preserve the identity of the tribe, and as a result, the HRC concluded that not recognizing her as a member of the group constitutes a violation of her rights under Article 27 of the ICCPR.

Third, protection of minority cultures in international law challenges other concepts such as the right of states to territorial integrity, which is especially contested if the minority concerned has kinfolk in neighboring countries. State authorities have in many cases been suspicious of these interactions fearing secessionist movements and the initiation of ethnic turmoil.¹⁰⁹ However, in most cases, minorities have fostered economic, cultural, and social cooperation across borders and thus supported the normalization of relations between states. They play a significant role in creating and determining the character of bilateral relations between countries.¹¹⁰ In addition, transborder contacts between ethnic groups contribute to the preservation of minority cultures.¹¹¹ It is thus important for the state to create a balance between its right to preserve its territorial integrity and the right of ethnic groups to interact with their kin groups across the border.

105. *Possible Ways and Means*, *supra* note 62, at paras. 202–205.

106. *Sandra Lovelace v. Can.*, H.R.C., Communication No. 24/1977, U.N. Doc. CCPR/C/13/D/24/1977 (July 30, 1981).

107. *Id.* at ¶ 9.7.

108. *Id.* at para. 16.

109. *See generally The Role of Minorities in International and Transborder Relations in Central and Eastern Europe*, WORKSHOP REPORT (Minority Rights Group Int'l, London, U.K.), March 1999.

110. *Id.*

111. *See Ivanka N. Atanasova, Transborder Ethnic Minorities and Their Impact on the Security of Southeastern Europe*, 32.2 NATIONALITIES PAPERS 355, 355 (2004).

And finally, the question of what the state should protect and to what extent it should engage in the promotion of culture and identity of minorities is difficult to answer, politically contested, and depends on the context. The best way to ensure the survival of a group's culture is to empower the group to determine its own affairs in collaboration with the state.

III. EMPOWERMENT

The second major set of claims are demands to empowering ethnic groups. These claims tend to be politically and legally challenging, but granting these demands can be very beneficial to both the minority group and to the society at large. The most difficult claim to accommodate is the demand for political self-determination, which potentially threatens the right of states to sovereignty and territorial integrity.¹¹²

The concept of self-determination originated from the French and American revolutions in the late 18th century and embraced the notions of sovereignty of citizens, individual freedoms, and the entitlement of all citizens to a representative government.¹¹³ This also included the idea of the "nation-state," namely the belief that the state should consist of one homogenous ethnic community governing itself; a line of thought that significantly influenced state-building in Europe during the 19th century. However, the implementation of self-determination has proven to be quite problematic as less than 20% of all states are ethnically homogenous.¹¹⁴

Self-determination became a legal right only after the Second World War. In the context of universal peace requiring friendly relations between states, the principle of self-determination of peoples became an integral part of the UN Charter.¹¹⁵ In this context, "self-determination of peoples" meant that the rights of peoples of one state were to be protected from interference by other states, with self-determination being a right of states, not individuals or sub-state groups. However, nothing in the UN Charter prohibited the emergence of a norm that went beyond non-interference and that included the right for peoples to determine their own destiny even on the sub-state level.¹¹⁶ The right to self-determination gained importance during decolonization struggles in the 1950s and 1960s. In this context, self-determination did not only refer to the right of states to determine their domestic affairs without external interference, but also to the right to independence

112. The principle of state sovereignty is stipulated in Article 2, paragraph 1 of the UN Charter. Sovereignty of states is linked with independence from outside interference ("domestic jurisdiction" principle), and the possibility to determine one's destiny. UN Charter art. 2, para. 7. International law has increasingly imposed limitations on the sovereign actions of states both on the international and domestic level, for example by prohibiting the use of force. UN Charter art. 2, para. 4.

113. See for a history of the concept of self-determination THOMAS D. MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* 2-14 (1997).

114. David Welsh, *Domestic Politics and Ethnic Conflict*, in *ETHNIC CONFLICT AND INTERNATIONAL SECURITY* 43, 45 (Michael E. Brown ed., 1993).

115. UN Charter art. 1, para. 2.

116. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 112-113 (1994).

for colonial peoples and the possibility for formerly colonized groups to integrate or associate with an established state.¹¹⁷

Over time, the right of peoples to self-determination was recognized also outside the colonial context. The UN Friendly Relations Declaration states that any “subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle.”¹¹⁸ The declaration does thus not distinguish between colonial peoples and peoples in other situations. Similarly, Article 1, paragraph 1 of the both the ICCPR and the ICESCR states that “[a]ll 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.”¹¹⁹

In addition, the 1975 Helsinki Final Act by the Conference for Security and Co-operation in Europe (CSCE) and the 1981 African Charter on Human and Peoples’ Rights identify the right of peoples to self-determination in Principle VIII and Article 20 respectively, both also including non-colonial situations.¹²⁰ At the end of the Cold War, new documents acknowledged the importance of self-determination and confirmed its standing among fundamental human rights instruments.¹²¹ The Vienna Declaration and Programme for Action, the final statement of the 1993 World Conference on Human Rights, states in Article 2:

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 The World Conference on Human Rights considers the denial of the right of self-determination as

117. The recognition of the right to self-determination as a legal right in the context of decolonization was confirmed by important UN General Assembly (UNGA) resolutions as well as by the International Court of Justice (ICJ) advisory opinions on *Namibia* (1971), *Western Sahara* (1975), and in its judgment concerning the *East Timor* case (1995). See generally Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960) [hereinafter UNGA]; Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73 of the Charter, G.A. Res. 1541 (XV), Prin. VII, U.N. Doc. A/RES/1541 (XV) (Dec. 15, 1960); *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 31–33 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21); *East Timor* (Port. v. Austl.), 1995 I.C.J. 90, ¶ 102 (June 30).

118. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 124, U.N. Doc. A/2625 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

119. ICCPR, *supra* note 7, at art. 1, ¶ 1; ICESCR, *supra* note 59, at art. 1, para. 1.

120. The Conference on Security and Co-operation in Europe, *Final Act of Helsinki*, reprinted in THE CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS, 1972–1993 141 (Arie Bloed ed.); African Charter on Human and Peoples’ Rights art. 20, June 27, 1981, 1520 U.N.T.S. 217.

121. See, e.g., *Vienna Declaration and Programme of Action*, *supra* note 96, at para. 2; Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, Nov. 21, 1990, 30 I.L.M. 190; Framework Convention, *supra* note 54.

a violation of human rights and underlines the importance of the effective realization of this right.¹²²

The World Conference additionally affirmed that the right to self-determination:

[S]hall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.¹²³

This statement concurs with other international documents.¹²⁴ These considerations show the immanent tension between the claim of self-determination and the principles sovereignty and territorial integrity of the state. These tensions, in combination with other problems such as the question of defining a “people” entitled to the right of self-determination,¹²⁵ led to the search for new strategies, in which self-determination would not automatically be connected to independence. Linking the concept of ethnicity to such a potent ideology as that of self-determination increases the probability of great disorder and violent ethnic conflict.¹²⁶ It constitutes a permanent provocation to war.¹²⁷

As a result, the post-colonial interpretation of the concept of self-determination has changed over time and includes now the right to possessing a different identity and enjoying a significant degree of control over the affairs of the group. Self-governance today can be distinguished in external and internal self-determination. While external self-determination embraces the traditional notion of secession and independence, internal self-determination has a more domestic focus and is linked to democratic principles of participation. The CERD states on this issue:

122. *Vienna Declaration and Programme of Action*, *supra* note 96, at para. 2.

123. *Id.*

124. *See, e.g.*, Friendly Relations Declaration, *supra* note 118, at 124. The declaration states “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States 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.” *Id.*

125. *See generally* Gaetano Pentassuglia, *State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal Review*, 9 INT’L J. ON MINORITY & GROUP RIGHTS 303 (2002) (illuminating a debate on the definitions of “peoples”).

126. *See* Mohammed Ayoob, *State Making, State Breaking, and State Failure, in TURBULENT PEACE: THE CHALLENGES OF MANAGING INTERNATIONAL CONFLICT* 127, 135 (Chester A. Crocker et al. eds., 2001).

127. William Pfaff, *Invitation to War*, 72.3 FOREIGN AFF. 97, 99–100 (1993).

In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, i.e. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, governments are to represent the whole population without distinction as to race, colour, decent [sic], national, or ethnic origins. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation.¹²⁸

The HRC confirmed the internal aspect of self-determination in its General Comment No. 12 on Article 1 of the ICCPR.¹²⁹ Self-determination should thus be viewed as a means to an end, which is a democratic, participatory political and economic system in which the rights of individuals and the identity of ethnic communities are protected and actively promoted. In most instances, self-determination does not mean statehood or independence, but the assignment of necessary power to ethnic groups to control and influence matters of direct relevance to them, while at the same time bearing in mind the legitimate concerns of other segments of the population and the state itself.¹³⁰ S. James Anaya writes that self-determination is increasingly understood as a “configurative principle or framework complemented by the more specific human rights norms that in their totality enjoin the governing institutional order.”¹³¹ Thomas Franck goes even further by speaking of an emerging “right to democratic governance.”¹³² This is supported by Asbjørn Eide, who concludes that “[d]emocracy is thus clearly a part of the right to self-determination. What is less clear is whether groups have a right to some local self-government, or autonomy within the state, on the basis of the right to self-determination.”¹³³ It has to be noted, however, that democracy by definition is majority rule, which is in itself counterproductive to empowering

128. UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 21, ¶ 4, U.N. Doc. CERD/48/Misc.7/Rev.3 (Mar. 15, 1996).

129. HRC, General Comment No. 12, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

130. Hurst Hannum, *Rethinking Self-Determination*, in INTERNATIONAL LAW AND THE RISE OF NATIONS: THE STATE SYSTEM AND THE CHALLENGE OF ETHNIC GROUPS 214, 243 (Robert J. Beck & Thomas Ambrosio eds., 2002).

131. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 99, 99 (2d ed. 2004).

132. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992).

133. *Possible Ways and Means*, *supra* note 62, at para. 88.

minorities. Special measures have thus to be approved to reach the goal of internal self-determination for ethnic groups.¹³⁴

The primary understanding of the right to self-determination today is based on the reconciliation of the principles of state sovereignty with the promotion of peace and democracy within and among societies. An advanced interpretation of self-determination assumes the accommodation of individual and group interests as a way of responding to international and sub-national claims of peoples. Internal self-determination rights such as participation, power-sharing arrangements, and autonomy play an important role in the settlement of ethnic claims. It is hoped that by giving the members of ethnic groups the possibility to maintain and express their group identity there is no need to give them their own state.¹³⁵

A. Participation

One of the most common demands of ethnic minorities linked to self-determination is the request to effectively participate in the internal affairs of a state. Human Rights Council general comment number 23 on Article 27 provides for “measures to ensure the effective participation of members of minority communities in decisions which affect them.”¹³⁶ Article 25 of the ICCPR, which does not specifically refer to minorities, reads:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

1. To take part in the conduct of public affairs, directly or through freely chosen representatives,
2. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors,
3. To have access, on general terms of equality, to public service in his country.¹³⁷

The obligation of states to provide full participation to all of its citizens and accordingly, to all ethnic groups, has two aspects: First, the government must be comprised of all ethnic groups, and not just one. Second, the participation of the different groups must be effective.¹³⁸ It is not enough to incorporate formal participation, such as the right to vote for all citizens, if the majority always outvotes the minority. States are required to develop appropriate and effective methods of participation for persons belonging to minority groups, meaning that

134. See *infra* Part 3.1.

135. See STEFAN WOLFF, *ETHNIC CONFLICT: A GLOBAL PERSPECTIVE* 35 (2006).

136. Office of UN Human Rights Council, *supra* note 8, at para. 7.

137. ICCPR, *supra* note 7, at art. 25.

138. See, e.g., *Minority Declaration*, *supra* note 50, at art. 2, para. 3; Copenhagen Document, *supra* note 54, at para. 35; and Framework Convention, *supra* note 54, at art. 15.

minorities have an actual voice in the decision-making process. This includes, for example, the availability of informational materials and voting sheets in minority languages, the prohibition of gerrymandering, and the prevention of political discrimination against any group.¹³⁹ On the other side, securing a balance between giving minorities a vote and avoiding discrimination against the majority is an integral element of building a healthy minority-majority relationship.¹⁴⁰

If a minority is not adequately represented or consulted in the political affairs or in legal proceedings of a state, the risk persists that unrepresented bodies will seek to pursue objectives or actions that are not supported by or in the interests of the minority or the community as a whole. It is therefore desirable to include some formal procedures in national legislation to ensure that the full range of opinions and claims are represented in the implementation of minority rights and duties. Such measures include consultation, participation in elected bodies, and involvement in the preparation of national and regional programs.

The Human Rights Committee suggested in *Länsman v. Finland*¹⁴¹ and *Mahuika et al. v. New Zealand*¹⁴² that meaningful forms of direct consultation provide at minimum a way to enable minority groups to participate in the decision-making process. However, the way in which participation is granted must be determined by the state. In *Marshall v. Canada*,¹⁴³ concerning the right to directly take part in the conduct of public affairs under Article 25, paragraph (a) of the ICCPR, the authors represented an indigenous group that complained about the violation of their right to participation in public affairs. They claimed that the Canadian government failed to consult the group on subjects that directly affect their interests and those of the group as a whole because they had not been invited to a constitutional conference on aboriginal matters.¹⁴⁴ The Committee concluded that "it cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives" and that "[i]t is for the legal and constitutional system of the State party to provide for the modalities of such participation."¹⁴⁵ Consequently, the HRC stated that participation at the conference was not subjected to unreasonable restrictions and that the complaint does not reveal a violation of Article 25 of the ICCPR.¹⁴⁶ Article 25, paragraph (a) can thus not be understood as a right of ethnic minorities to choose the modalities of participation in the conduct of public affairs. Most other minority rights

139. See UN Human Rights Commission, General Comment No. 25, ¶ 12, U.N. Doc. A/51/40 (1996).

140. *Possible Ways and Means*, *supra* note 62, at para. 67.

141. UN Human Rights Commission, Communication No. 671/1995, ¶ 10.5, U.N. Doc. CCPR/C/58/D/671/1995 (1996) (addressing complaint of *Länsman v. Finland*).

142. UN Human Rights Commission, Communication No. 547/1993, ¶ 9.6, U.N. Doc. CCPR/C/70/D/547/1993 (2000) (addressing complaint of *Mahuika v. New Zealand*).

143. UN Human Rights Commission, Communication No. 205/1986, ¶ 3.2, U.N. Doc. CCPR/C/43/D/205/1986 (1991) (addressing complaint of *Marshall v. Canada*).

144. *Id.* at paras. 3.1, 4.2, 6.

145. *Id.* at para. 5.4.

146. *Id.* at para. 6; see also Pentassuglia, *supra* note 125, at 318–19.

instruments link effective participation of minorities to their compatibility with “national legislation,”¹⁴⁷ the “decision-making procedures”, or “policies.”¹⁴⁸

In societies with deep ethnic divisions, competition for political power often results in domination by the majority group. Groups that fear marginalization mobilize for action that might threaten other groups. In order to avoid ethnic conflict, some countries have sought to balance power among different groups and to give groups the right to participation through democratic power-sharing. The most prominent power-sharing model for deeply divided societies is Arend Lijphart’s consociational structure,¹⁴⁹ which introduces four markers of ethnic power-sharing. These include (1) a grand coalition, namely the joint exercise of governmental power; (2) proportionality in representation in government; (3) segmental autonomy, for example for educational or cultural matters; and (4) mutual veto rights, which means that the minority can veto on issues important to the group.¹⁵⁰

It is important to emphasize the potential of consociational arrangements for democracy and human rights. Consociation is the preferred model for power-sharing when the international community is involved in ethnic conflict resolution, as the examples of the power-sharing agreements in Afghanistan, Macedonia, Bosnia and Herzegovina, and Northern Ireland show.¹⁵¹ Consociational agreements in these cases address claims to self-determination between ethnic communities by institutionally recognizing more than one group, establishing minority-friendly democratic institutions, and provide minorities with the right to determine their own affairs and to participate in public decision-making on the state level. In addition, power-sharing arrangements are often combined with territorial autonomy, which is one of the most important ways to protect and empower ethnic minorities.¹⁵²

Nevertheless, from an international legal point of view, power-sharing practices can pose difficult questions and undermine essential human rights ideals.¹⁵³ First and foremost, the idea of power-sharing “contrasts sharply with the static absolutism of rights, the processes of negotiation and compromise, of winning some and losing some.”¹⁵⁴ Second, similar to other minority protection regimes but to a greater extent, “they explicitly differentiate among the members of groups on the basis of characteristics such as race, religion, and language” instead

147. See Minority Declaration, *supra* note 50, at art. 2, para. 3.

148. See Copenhagen Document, *supra* note 54, at paras. 33, 35.

149. See generally AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (1977).

150. See *id.* Belgium, Malaysia, Canada, India, and Nigeria are seen as typical examples. More recently, consociational structures were included in the 1998 Peace Agreement in Northern Ireland.

151. BRENDAN O’LEARY, *Debating Consociational Politics: Normative and Explanatory Arguments*, in FROM POWER SHARING TO DEMOCRACY: POST-CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES 1, 2 (2005).

152. *Id.* at 39 (discussing territorial solutions such as autonomy).

153. Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1545–46 (1991).

154. Anne-Marie Slaughter, *Pushing the Limits of Liberal Peace: Ethnic Conflict and the “Ideal Polity”*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 128, 133 (David Wippman ed., 1998).

of giving all individuals equal rights.¹⁵⁵ Power-sharing models “have the effect of favoring [one share of the population] over another on the basis of their membership in an ethnic group or, at least, on the basis of their residence in an ethnically defined subnational political unit.”¹⁵⁶ Third, ethnic power-sharing models restrict the participation rights of members of the majority. Consociational practices are acceptable as long as the differential distribution of power for the benefit of the ethnic groups does not infringe too much on the rights of the majority. Consociational arrangements should not be seen as discriminatory rights for ethnic minorities, but as an opportunity for empowerment of ethnic groups to reach a so-called “equality in fact”.¹⁵⁷ And finally, because of the difficult election procedures and allocation of voting districts, consociational settlements violate the right to free movement and residency within a state as laid down in Article 12, paragraph 1 of the ICCPR.¹⁵⁸ Consociational arrangements require some measures to exclude members of other ethnicities from residing in the minority region in order to prevent population movements from undermining proportions.¹⁵⁹ However, similar to minority provisions, state practice accepts schemes that are designed to protect the ethnic identity of minorities.¹⁶⁰

The claim by ethnic groups to participate in the state’s decision-making processes is often connected with demands to determine their own affairs. This implies the devolution of power to various degrees to the benefit of one or more minority groups, ranging from regimes of segmental or “cultural” autonomy to territorial autonomy with expanded mandates. Autonomy can be viewed as a way of enhancing protection for minorities. The CSCE Copenhagen Document states that autonomy is one of the appropriate means to protect the identity of minorities and to secure effective participation.¹⁶¹

Depending on the structure of the state and the size and situation of the minority, different models of autonomy can be used.¹⁶² In cases in which minorities are widely dispersed or not numerous enough to justify the creation of an autonomous region, functional or segmental autonomy may constitute an appropriate alternative. This may involve the delegation of administrative powers

155. David Wippman, *Practical and Legal Constraints on Internal Power Sharing*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 211, 231 (David Wippman ed., 1998).

156. *Id.* at 232.

157. *Id.*

158. ICCPR, *supra* note 7, at art. 12, para. 1. (“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”)

159. YAEL TAMIR, LIBERAL NATIONALISM 158 (1993).

160. See KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 187 (2002); see also Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. OF INT’L L. 178, 180 (1992).

161. *Copenhagen Document*, *supra* note 54, at para. 35.

162. For a more detailed discussion see UN Comm’n on Human Rights, Sub-Comm’n on Promotion and Protection of Human Rights, Working Group on Minorities, *Autonomy and Minority Groups—A Legal Right in International Law?*, UN Doc. E/CN.4/Sub.2/AC.5/2001/CRP.5 (March 5, 2001) (prepared by Geoff Gilbert); see also UN CHR, Sub-Comm’n on Promotion and Protection of Human Rights, Working Group on Minorities, *Cultural Autonomy and Territorial Democracy: A Recipe for Harmonious Group Accommodation*, U.N. Doc. E/CN.4/Sub.2/AC.5/2001/WP.4 (April 25, 2001) (prepared by Asbjørn Eide).

to minorities in respect to issues of particular concern, such as education, language, traditional social and economic systems, or cultural institutions like churches. To avoid the development of two completely separate cultures within a state, it is important to complement autonomy by integrating minorities into the society as a whole and by granting them access and participation rights on the state level.¹⁶³

Territorial autonomy on a local or regional basis is likely to be the most appropriate and most demanded form of self-determination for regionally concentrated minorities living in a well-defined area. The precise degree of autonomy and the extent to which it may be different from that enjoyed by other groups or political entities within the state is a matter of political negotiation.¹⁶⁴ Several issues have to be taken into account when examining the possibilities for territorial autonomy. First, the autonomy given should be entrenched in the constitution or an international agreement so that it cannot easily be altered. This provides minorities with a certain degree of security about their status even if the political context changes.¹⁶⁵ Second, the scope of autonomy has to be clearly defined, whether it is territorial or segmental autonomy.¹⁶⁶ Third, the autonomy arrangement has to ensure that all citizens of the country enjoy equal human rights in all parts of the state. In almost every case there will be other communities with a different ethnic identity within the autonomous territory. It is thus vital to ensure that the rights of these sub-minorities are granted and that they are protected against discrimination, suppression, or exclusion.¹⁶⁷ And finally, in order to dispel the aforementioned fears of states regarding secessionist tendencies and ethnic turmoil, autonomy agreements have to ensure that the freedoms and powers given to the group are to the benefit of both the minority and the state.¹⁶⁸ States fear that cultural autonomy may lead to administrative autonomy that could be followed by more extensive claims, especially if the ethnic group is territorially concentrated. These fears are not always unsubstantiated; studies have shown that multiethnic federations make it easier for groups to secede, as federalism provides the minority with institutional and administrative resources that can be used for the struggle for independence.¹⁶⁹ Multiethnic federations are prone to break down, as the cases of

163. Hans-Joachim Heintze, *On the Legal Understanding of Autonomy*, in AUTONOMY: APPLICATIONS AND IMPLICATIONS 7, 21 (Markku Suksi ed., 1998).

164. See WOLFF, *supra* note 135, at 144.

165. If, for example, a less "minority-friendly" government is elected.

166. See Andrew Reynolds, *Majoritarian or Power-Sharing Government*, in DEMOCRACY AND INSTITUTIONS: THE LIFE WORK OF AREND LUPHART 155, 169-70 (Markus M. L. Crepaz et al. eds., 2000).

167. See QUESTIONNAIRE ON THE RIGHTS OF MINORITIES (1993), reprinted in THE PROTECTION OF MINORITIES: COLLECTED TEXTS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW 81 (1994).

168. See RUTH LAPIDOTH, AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS 169-205 (1996).

169. See John McGarry & Brendan O'Leary, *Federation as a Method of Ethnic Conflict Regulation*, in FROM POWER SHARING TO DEMOCRACY: POST CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES 263, 274-75 (2005).

Yugoslavia, the Soviet Union, Czechoslovakia, and examples in Africa and Asia (with the exception of India) illustrate.¹⁷⁰

Despite these discussed weaknesses, power-sharing arrangements and autonomy should be evaluated against the available alternatives. Autonomy and power-sharing may make some compromises on human rights ideals, but they help to avoid greater injustices and, in many cases, violent ethnic conflict and gross human rights violations.¹⁷¹ Many scholars have argued that solutions involving regional autonomy and power-sharing are effective in dealing with ethnic conflict. Ted Gurr, for instance, argues that “[n]egotiated regional autonomy has proved to be an effective antidote for ethnonational wars of secession.”¹⁷² Likewise, Kjell-Åke Nordquist observes that creating autonomy “as a conflict-solving mechanism in an internal armed conflict is both a theoretical and—very often—a practical option for the parties in such conflicts.”¹⁷³ For Gudmundur Alfredsson, autonomy and power-sharing are the most effective means of protecting a minority’s dignity and cultural identity.¹⁷⁴ Relatively stable, peaceful political circumstances are the best conditions for effective empowerment and protection of ethnic minorities.¹⁷⁵ As a result, power-sharing and autonomy constitute a compromise balancing the conflicting claims of ethnic groups for self-determination and the state’s responsibility to uphold its territorial integrity. Furthermore, because autonomy and power-sharing are flexible concepts ranging from *de facto* independence to cultural autonomy and from regional political arrangements to federations, it may be tailored to specific situations in which ethnic conflicts evolve. According to Gaetano Pentassuglia, autonomy and power-sharing schemes stand for “an inclusive human rights-based, democratic and pluralistic process, which ultimately provides the materially disaggregated individuals and groups comprising ‘the whole’ with meaningful choices on an occasional and permanent basis.”¹⁷⁶ Autonomy and power-sharing structures should never have the aim of building

170. However, other factors have to be taken into account when explaining the breakup of federations. First, some failed multiethnic federations were pseudo-federations in which the units had no *de facto* power. Second, in some cases the units were forced together (Soviet Union) or arbitrarily consolidated (former colonies). And third, both in the communist and post-colonial cases, the federations had economic problems (either regarding the system or regarding the functioning). *Id.* at 276–78; see also Brendan O’Leary, *An Iron Law of Nationalism and Federation? A (neo-Diceyan) Theory of the Necessity of a Federal Staatsvolk, and of Consociational Rescue*, 7 NATIONS AND NATIONALISM 273 (2001).

171. See Steiner, *supra* note 153, at 1547–48.

172. Ted Robert Gurr, *Peoples Against States: Ethnopolitical Conflict and the Changing World System: 1994 Presidential Address*, 38 INT’L STUD. Q. 347, 366 (1994).

173. Kjell-Åke Nordquist, *Autonomy as a Conflict-Solving Mechanism—An Overview*, in AUTONOMY: APPLICATIONS AND IMPLICATIONS 59, 59 (Markku Suksi ed., 1998); see also FEDERALISM AGAINST ETHNICITY? INSTITUTIONAL, LEGAL AND DEMOCRATIC INSTRUMENTS TO PREVENT VIOLENT MINORITY CONFLICTS (Günther Bächler ed., 1997).

174. Gudmundur Alfredsson, *Minority Rights and a New World Order*, in BROADENING THE FRONTIERS OF HUMAN RIGHTS, ESSAYS IN HONOUR OF ASBJØRN EIDE, 55, 60 (Donna Gomien ed., 1993).

175. See *id.* at 72.

176. Pentassuglia, *supra* note 125, at 323.

ethnic states, but “to live together with mutual consideration and respect for their diversity,”¹⁷⁷ thus bringing the institutions of the state closer to ethnic groups.

In sum, no general right to autonomy or power-sharing has been established in international law, whether or not in connection with internal self-determination.¹⁷⁸ There is no entitlement to autonomy for a minority group, regardless of whether it is in the context of self-determination claims.¹⁷⁹ Similarly, there is no international legal right to power-sharing beyond the participation rights of Article 25 ICCPR as described above. However, the recognition of a right for minorities to some form of autonomy or power-sharing under international law would be desirable. International institutions, in particular in Europe, see autonomy and power-sharing as policy options for states within the broader framework of participation rights. Within these limits, autonomy and power-sharing regimes can be seen as compatible with the aforementioned emerging view of internal self-determination of all people living within state boundaries (as opposed to the *de facto* majority).¹⁸⁰ Recent practice relies on special treaties that recognize autonomy and power-sharing for minorities.¹⁸¹

B. *Secession and Independence*

The most difficult claims to deal with not only politically but also legally are demands of secession and independence. Attachment to territory is particularly powerful; compromise is often looked upon as an act of treason:¹⁸² As Stefan Wolff points out: “[T]he significance of territory lies primarily in its symbolic and historical importance for the relevant groups’ ethnic identities, regardless of the extent to which claims match up with the historical record.”¹⁸³ Surrendering territories tend to be among the most disputed actions for states as it violates their right to territorial integrity and potentially weakens their power and role in the international order. As a result, secessionist conflicts tend to be very violent and involve gross human rights violations such as ethnic cleansing and genocide.

Secession has been treated favorably by international legal institutions only in a limited number of cases, which can be broken down into five major categories:¹⁸⁴

177. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération Suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101, Präambel (Switz.), available at <http://www.admin.ch/ch/d/sr/101/index.html>.

178. See generally Patrick Thornberry, *Images of Autonomy and Individual and Collective Rights in International Instruments on the Rights of Minorities*, in AUTONOMY: APPLICATIONS AND IMPLICATIONS 97, 97 (Markku Suksi ed., 1998).

179. See Douglas Sanders, *Is Autonomy a Principle of International Law?*, 55 NORD. J. INT’L L. 17, 17–21 (1986).

180. KRISTIN HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION, INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION 135 (2000).

181. PENTASSUGLIA, *supra* note 53, at 181–95.

182. Lea Brilmayer, *The Institutional and Instrumental Value of Nationalism*, in INTERNATIONAL LAW AND ETHNIC CONFLICT, *supra* note 154, at 58, 75.

183. WOLFF, *supra* note 135, at 47–8.

184. Benedict Kingsbury, *Claims by Non-State Groups in International Law*, in INTERNATIONAL LAW AND THE RISE OF NATIONS, *supra* note 127, at 161.

1. Mandated territories, trust territories, and territories treated as non self-governing under Chapter XI of the UN Charter;
2. Distinct political-geographical entities subject to *carence de souveraineté*¹⁸⁵ (the only case claimed is Bangladesh, although this case is not easy to interpret);
3. Other territories to which self-determination is applied by the parties, such as holding a referendum to determine the faith of the territory;
4. Highest level constituent units of a federal state which are in the process of being dissolved by agreement among all or the majority of the units (as was the case in the former Yugoslavia);
5. Formerly independent entities reasserting their independence with the consent of the state where its incorporation was illegal or of dubious legality (as it would be the case in Tibet).¹⁸⁶

Most secessionist entities have received minimal international recognition,¹⁸⁷ as it is illustrated by the case of the Turkish Republic of Northern Cyprus or the separatist region of Transnistria within Moldova. The recent recognition of Kosovo's independence by many members of the international community, however, will lead to a revived debate about the rules and procedures of international acceptance of secessionist units.¹⁸⁸

The issue of when secession should be treated favorably by international law leads to two major questions: (1) How should borders be drawn when allocating territory? and (2) Are there any special circumstances in which ethnic groups have the right to secede?

First, at the core of the legal debate over territory of new states or autonomous regions lies the concept of *uti possidetis*. Originating in Roman law, "*uti possidetis* was an edict that the praetor would issue to two parties claiming ownership of [the same] property, granting provisional legal possession to the possessor during the litigation."¹⁸⁹

In modern international law, the principle of *uti possidetis* provides that states emerging from decolonization inherit the colonial administrative borders that they held at the time of independence.¹⁹⁰ *Uti possidetis* determined the shape and size of

185. The idea of a *carence de souveraineté* was mentioned by India in debates within the UN. It stated that as a matter of international law conditions are suitable for independence when the "mother State has irrevocably lost the allegiance of such a large section of its people ... and cannot bring them under its sway." LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 210 (1978).

186. Kingsbury, *supra* note 184, at 161.

187. See generally ALLEN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* (1991).

188. Posting of Chris Borgen, *Kosovo's Declaration: Analyzing the Legal Issues of Secession and Recognition*, to Opinio Juris, <http://lists.powerblogs.com/pipermail/opiniojuris/2008-February/002127.html> (Feb. 20, 2008, 11:39:17 EST).

189. Steven R. Ratner, *Ethnic Conflict and Territorial Claims: Where Do We Draw a Line?*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT*, *supra* note 151, at 112.

190. UNGA RES. 1514 (XV), *supra* note 117.

former colonial territories in Latin America, Africa, and Southeast Asia.¹⁹¹ The ICJ has stated in the case regarding the *Frontier Dispute (Burkina Faso v. Mali)* that *uti possidetis* is not a special rule but a “general principle” and a “rule of general scope” in the case of decolonization.¹⁹²

There are three reasons to rely upon the principle of *uti possidetis*.¹⁹³ First, the risk of armed conflict decreases because *uti possidetis* provides a clear result. If there is not a clear rule on how to draw borders, all borders would be open to dispute. Second, the conversion of internal, administrative borders to international borders is as sensible as any other approach and far simpler.¹⁹⁴ Borders will never fit the structure and ethnic divisions of society perfectly and some minorities will always be left out. Third, *uti possidetis* is a well established rule of international law that still applies to the disintegration of states today, which was confirmed by the findings of the Commission in the case of former Yugoslavia.¹⁹⁵ The Commission rejected the separatist claims of groups within Bosnia and Herzegovina and for Kosovo by stating, “whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.”¹⁹⁶

On the other hand, there are many risks involved if the principle of *uti possidetis* is viewed as static and absolute. First, a rule on how to break up states can create a hazard regarding territorial integrity and finality of states. Ethnic separatists might argue that the world could be divided further along more administrative lines.¹⁹⁷

Second, dissolution of states along the borders defined by the *uti possidetis* principle may bring second best solutions, leaving minorities in unsatisfying conditions “on the ‘wrong’ side of the border”¹⁹⁸ with the impossibility of making even small adjustments for the benefit of minorities. The principle of *uti possidetis* should thus form only a starting point for the disposition of territories and the process of state-building, not as a fixed marker. The international community and the countries involved must see if there is a significantly better option to determine the borders and withhold recognition of new entities until agreement is reached.¹⁹⁹ In fact, new states did not in all cases assume their former administrative borders.²⁰⁰

191. See Ratner, *supra* note 189, at 113.

192. Case Concerning the Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. Rep. 565 (Dec. 22).

193. Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, in INTERNATIONAL LAW AND THE RISE OF NATIONS, *supra* note 127, at 251.

194. *Id.*

195. Badinter Commission, Opinion No. 2, *supra* note 89.

196. *Id.*

197. See Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 57, 69 (1993). This is the argument made by the Abkhazians in Georgia and the Kosovo Albanians in Serbia.

198. Ratner, *supra* note 189, at 114.

199. *Id.* at 124–27.

200. As it was for example the case for Northern Cameroons that decided to become part of the Republic of Nigeria through a plebiscite held in 1961. See Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 21–25 (Dec. 2).

Some colonies, such as Rwanda and Burundi, split when gaining independence. Other states accepted compromises departing from a strict application of the principle,²⁰¹ which was most recently confirmed by the partial international recognition of Kosovo's independence. *Uti possidetis* is not applied as a uniform practice, even though the UN General Assembly and the ICJ tried to limit the scope of colonial countries allowed to determine their own borders.

Third is the acknowledgement that internal and international borders serve totally different purposes. While international borders serve to determine the limits of territorial jurisdiction of a state, internal borders are drawn to govern a territory as a whole and to more easily administer a country. As such, the drawing of borders internally and internationally "seek efficiency and simplicity" in both cases, "but for opposing purposes."²⁰²

Fourth, it is important that border provisions are implemented by peaceful means. The prohibition of the use of force as laid down in Article 2, paragraph 4 of the UN Charter does not apply to internal conflicts;²⁰³ but a dispute over a border can become international when the entities concerned are recognized internationally. This is confirmed by the European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, which recognizes the inviolability of all frontiers that can only be changed by peaceful means and by common agreement.²⁰⁴

And finally, it is important that the people concerned have a voice in the whole process. There needs to be a form of consultation such as a referendum or conference in which all sub-state groups state their view. Any vote taken does not have to be binding, but can be viewed as a legitimization of potential actions by state and non-state actors.²⁰⁵

In sum, the application of the *uti possidetis* principle is the easiest short-term method for determining the borders of a state. In the long run however, a legal approach to separatist claims of ethnic groups should also include justice, legitimacy, and stability considerations. Any alternative will clearly be more difficult to implement than the status quo, which may lead to the conclusion that borders drawn according to the *uti possidetis* principle might mark the final

201. Regarding the determination of the border between Honduras and Nicaragua the case concerning Arbitral Award made by the King of Spain on 23 December 1906 see Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 199-200 (Nov. 18). The ICJ refused to regard *uti possidetis* as overriding compromise given the fact that the court can consider other factors. *Id.* at 215.

202. Ratner, *supra* note 189, at 116-17.

203. UN Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

204. Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, 31 I.L.M. 1486-87 (1992); see also Danilo Türk, *Recognition of States: A Comment*, 4 EUR. J. INT'L. L. 66-71 (1993).

205. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 190 (1995). It is also very common to include such provisions in peace agreements—both the destiny of Northern Ireland as part of the UK or the Republic of Ireland and the future of the South Sudanese are dependent on a democratic vote.

outlines of the state. However, neglecting the context of a certain situation may lead to greater dissatisfaction of people concerned and as a result, to more conflict and separatism. As Steven Ratner states: "Only a direct engagement of the territorial question, with all its complexities, is likely to control the breakup of states in a manner consistent with human dignity."²⁰⁶ It is thus important to find a balance between international legal rule and common sense in order to prevent conflict from emerging.

The second question of whether there are any special circumstances in which ethnic groups would have the right to secede must again be answered in a contextual way. *A priori*, minorities have no international right to secession. Article 8, paragraph 4, of the Minority Declaration states that: "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."²⁰⁷ However, there are two cases in which this denial of a right to secession for ethnic groups can be contested: first, if the group is subject to serious suppression and/or human rights violations and second, if secession is an expression of the free will of all people concerned.

First, a right for ethnic groups to secession is subject to discussion if gross human rights violations are committed against them. The core commitment to the protection of human rights and democratic principles leads to the assumption of the right to secession as a last resort when these rights are denied to members of ethnic groups in a systematic and discriminatory manner.²⁰⁸ This argument is not entirely new. In the Åland Islands case, the League of Nations Commission of Jurists denied that minorities have the right to secession except if the state is unable or unwilling to apply and enforce guarantees to fundamental protection.²⁰⁹ In a more recent scholarly debate, Thomas Franck pointed out that if a minority is denied the preservation of its cultural identity and the state fails to promote measures for political and social equality, then repression can be viewed as a form of colonialism and the group concerned has the right to external self-determination.²¹⁰ Most advocates of such a secessionist claim base their arguments on the UN Friendly Relations Declaration, which suggests a link between territorial integrity and the existence of a government representing all people living within the boundaries of the state in compliance with the principle of equal rights and the self-determination of peoples.²¹¹ The 1993 World Conference on Human Rights in Vienna reaffirmed this clause. It stated that an ethnic minority group that is subject to severe discrimination and denied access to participation in the government has the right to

206. Ratner, *supra* note 189, at 127.

207. Minority Declaration, *supra* note 50, at art. 8, para. 4.

208. See Diane F. Orentlicher, *International Responses to Separatist Claims: Are Democratic Principles Relevant?* in SECESSION AND SELF-DETERMINATION 19, 25 (Stephen Macedo & Allen Buchanan eds., 2003).

209. 1 LEAGUE OF NATIONS OFF. J., Spec. Supp. No. 3, 6 (1920).

210. See Thomas M. Franck, *Postmodern Tribalism and the Right to Secession*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3-27 (Catherine Brölmann et al. eds., 1993); see also Pentassuglia, *supra* note 125, at 310-11.

211. See Friendly Relations Declaration, *supra* note 118, at 124.

“correctional secession”, meaning that the state loses its entitlement to the protection of its territorial integrity.²¹²

However, other scholars and jurisprudence contest this view. Donald Horowitz argues that the purpose of secession, namely to create an ethnically homogenous state, is undermined as secession does not reduce conflict, violence, or minority oppression because there will be minorities within the new entity as well.²¹³ And Antonio Cassese adds that the claim of ethnic groups to secession is incompatible with the idea of the state as a territorial and political unity; it would destroy order and stability within states and lead to anarchy in the international order.²¹⁴

A more differentiated view is taken by the Canadian Supreme Court in its opinion concerning *Reference re Secession of Quebec*.²¹⁵ The Court referred to “exceptional circumstances” such as attacks on the physical existence or integrity of the group or massive violation of fundamental rights in which a right to secession might arise under the international right of peoples to self-determination.²¹⁶ However, the Supreme Court stated “it remains unclear whether this proposition actually reflects an established international law standard.”²¹⁷ Even if there were circumstances sufficient enough to create a right to unilateral secession under international law, the Quebec people were not considered to be subject to such circumstances.²¹⁸

The argument that massive human rights violations should be a reason to justify secession was confirmed by the African Commission on Human and Peoples’ Rights in the case *Katangese Peoples Congress v. Zaire*.²¹⁹ The “oppression” argument was used by the Katangese peoples to support their claim for independent statehood within the context of Article 20, paragraph 1 of the Banjul Charter, which is concerned with the right to self-determination.²²⁰ However, the Commission found that “in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question . . . the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.”²²¹ Accordingly, if there was evidence for gross human

212. Vienna Declaration and Programme of Action, *supra* note 96, at para. 2.

213. See Horowitz’s argument in Donald L. Horowitz, *A Right to Secede? in SECESSION AND SELF-DETERMINATION*, *supra* note 210, at 50–76.

214. See, e.g., CASSESE, *supra* note 207, at 123. Cassese goes so far as to “rule out any right of secession.” *Id.*

215. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.), paras. 112, 132–35.

216. *Id.* at paras. 112, 132–35.

217. *Id.* at para. 135.

218. *Id.* “The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the *amicus curiae*, an oppressed people.” *Id.*

219. *Katangese Peoples’ Congress v. Zaire*, African Commission on Human and Peoples’ Rights, Communication No. 75/92 (1995), ACHPR/LR/A/1 (1997).

220. Banjul Charter, *supra* note 54.

221. See *Katangese Peoples’ Congress v. Zaire*, *supra* note 221, at para. 6.

rights violations, the Commission would consider calling Zaire's territorial integrity into question.

As to the second question of whether the right to secession exists if it expresses the free will of the peoples concerned, international and national law provide a more explicit answer. The Canadian Supreme Court stated in its advisory opinion in *Reference re Secession of Quebec* regarding the question of whether Quebec had a unilateral right to secede that a clear expression of the democratic will of Quebecers to secede, for example through a referendum, would confer legitimacy to their request.²²² However, the constitutional commitment to federalism and democracy of Canada affects unilateral secessionist claims:

The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.²²³

And the Court went on:

The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.²²⁴

Consequently, the Court denied that Quebec could unilaterally secede and thereby dictate the terms of secession to the other parties without negotiations.²²⁵ Such negotiations ideally include three goals: incentives for mutual accommodation, a minimal risk of deadlock, and constitutional guarantees to protecting and empowering minorities.²²⁶

In sum, the predominant international legal view of the right of any group within a state to secede, regardless of the claimed reasons for secession, is that secession is neither authorized nor prohibited by international law. However, the

222. *Reference re Secession of Quebec*, *supra* note 217, at para. 87.

223. *Id.* at para. 88.

224. *Id.*

225. *Id.* at para. 91. ("We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all.")

226. *See* Orentlicher, *supra* note 210, at 33.

lack of a specific prohibition does not mean that secessionist claims are generally viewed as legitimate, given the emphasis that is put on the territorial integrity of states and the concept of the right of external self-determination attributed to the all peoples living within state boundaries. For that reason, the matter of secession is seen as part of the domestic jurisdiction of the affected state. The decision of the Canadian Supreme Court in its advisory opinion concerning *Reference re Secession of Quebec* will be trend-setting for the interpretation of secessionist claims in national and international law. If however, an ethnic group is able to create its own state out of political reasons rather than a legal right to secession, the international community is open to recognizing the new state within the limitations of certain conditions such as *uti possidetis* and the promotion and protection of human and minority rights. Kosovo's declaration of independence and other recent developments will contribute to a continuing debate over the right of ethnic groups to secession.

IV. CONCLUSION

From an international legal point of view, claims by ethnic groups pose serious questions touching upon fundamental principles of international law. The right to existence, equality and non-discrimination measures, and the question of the relationship between self-determination, autonomy and power-sharing arrangements, and secession are only the most important issues that arise. The conclusions about the nature of international legal interpretation of claims of ethnic groups can be summarized as follows.

First, the main international legal instruments do not prescribe any particular approach when dealing with claims of ethnic groups. Different approaches have been chosen by international actors and states depending on the size, history, and location (territorially concentrated v. dispersed, location near borders) of the ethnic group concerned. It is important to note that minority protection is a human rights concern regardless of its conflict potential. There is a lack of focus regarding the standards and guidelines for implementation of minority rights at the state level, especially regarding the development of procedures and capacity of national courts.²²⁷ The international community has yet to develop a coherent political and legal approach to ethnic conflict and claims of ethnic groups.

Second, active protection and favorable treatment of minorities raises a set of problematic questions. It remains unclear how to define the acceptable level of difference in treatment granted to group members in comparison to the rest of the population or other minorities, especially regarding participation rights and minority-benefiting power-sharing arrangements.²²⁸ Furthermore, certain participation regimes (notably autonomy) set obstacles to integrating the group into the larger context of the state, thereby working against the inclusive aims pursued

227. International and National Action, *supra* note 91, at para. 14.

228. See, e.g., ICCPR, *supra* note 7, at art. 25. Note the clause on access to public service "on general terms of equality." *Id.*

by participation rights. International institutions, including the UN human rights treaty-monitoring bodies, usually concentrate on the right of minorities to separate institutions or treatment as opposed to policies to promote inclusion and integration. The emphasis on empowerment of ethnic groups should be on fostering interethnic accommodation within states rather than partition and secession. Internal self-determination should be understood as a right of peoples to access political and economic power. It should be used as a synonym of democratization and power-sharing rather than the break-up of existing states.²²⁹ This is not to say that secessionist claims should not be considered at all – the international community has to be open to special cases such as decolonization, the disintegration of multicultural federations, the break-up of oppressive states, or partition desired by the population. Ethnic and national calls for—*de facto* or *de jure*—independence have been satisfied in numerous cases since in the past decades.²³⁰ Therefore, the most important task is to identify issues and scenarios in which either separatist or integrationist approaches may be most effective.²³¹

Third, claims involving territory (territorial autonomy and secession) are especially delicate to handle in international law and prone to violent ethnic conflict. Territorial claims are usually all-or-nothing matters and predominantly difficult to resolve. Ethnic separation as policy resolving ethnic conflict can encourage the break-up of states, may transform civil war to an international war, and in the end, might do nothing to resolve ethnic antagonism.²³² Furthermore, international law does generally not recognize a right to secession for ethnic groups. Only in “exceptional circumstances” as described above secession might be a feasible option under international law.

And finally and most importantly, by implementing minority rights including opportunities for ethnic minorities to participate in national decision-making processes and extensive protection guarantees, states and societies will become more stable and less prone to violent conflict, to the benefit of both majorities and minorities. Peace and stability are the necessary preconditions for an effective implementation of international legal provisions concerning ethnic minorities. On the other hand, the protection and empowerment of ethnic groups can contribute to peace and stability. As a consequence, political and legal approaches have to be combined, following a *pragmatic* approach of mixing law and politics that focuses on solving the problem at hand.

229. Ayoob, *supra* note 126, at 140.

230. UN practice illustrates this argument; where three states in Eastern Europe stood in 1989, twenty-two states are now members of the UN. In addition, the international community has recognized the independence of Eritrea and East Timor and is in the process of recognizing the independence of Kosovo.

231. See Integrative Approaches, *supra* note 90.

232. Chaim Kaufmann, *Possible and Impossible Solutions to Ethnic Civil Wars*, 20 INT'L. SEC. 136, 169–70 (1996).

