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# The Capacity of International Law to Advance Ethnic or Nationality Rights Claims<sup>†</sup>

S. James Anaya\*

## I. INTRODUCTION

In all areas of the globe, segments of humanity are clinging to bonds of race, language, religion, kinship, and custom, and are projecting those bonds into the political future. In all too many instances, recent events remind us, the interactive patterns of ethnic and national groupings are oppressed by structures of human organization grounded in the modern system of states. The native tribes of the American continents, the Quebecois, the Baltic peoples, the Eritreans, the Kurds, and the Basques are all examples of groups that have been challenging the state structures that engulf them.

Comprehensively formulated, claims of ethnic or nationality groups can be divided into two categories. One category corresponds to claims of nondiscrimination and equal treatment for the members of the group within the context of a larger social setting. Examples of such claims are in the civil rights movement that coalesced in the 1950s and 1960s in the United States and in the campaign against apartheid in South Africa. International law has provided clear support for these claims. The nondiscrimination ideal has been firmly embedded and elaborated in major international legal instruments, such as the United Nations Charter,<sup>1</sup> the Universal Declaration of Human Rights,<sup>2</sup> the International Human Rights Covenants,<sup>3</sup> and the International Covenant on the Elimination of all Forms of Racial Discrimination.<sup>4</sup>

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1. *E.g.*, U.N. Charter art. 1, para. 3 (affirming "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion").

2. *E.g.*, Universal Declaration of Human Rights art. 2, G.A. Res. 217 A(III), 3(1) U.N. GAOR at 71, U.N. Doc. A/810 (1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

3. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(1), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967) (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, Dec 16, 1966, art. 2(2), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967) (entered into force Jan. 3, 1976).

4. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, G.A. Res. 2106A (XX), 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965) (entered into force, Jan. 4, 1969).

The second category is comprised of those claims in which ethnic communities seek some degree of separation or autonomy from the rest of the population of the state in which they are located. Examples include the secessionist efforts of the Baltic peoples in the Soviet Union and attempts at greater autonomy on the part of Indian tribes of North America and other indigenous peoples around the world.

Although the words "all peoples have the right to self-determination" have made their way into the texts of major multilateral treaties,<sup>5</sup> international law has yet to clearly embrace claims for political autonomy beyond the context of classical colonialism. Still, the affirmation of self-determination of peoples has provided a wedge for ethnic autonomy claims to make their way prominently into contemporary international legal and political discourse. My comments focus on this second category of ethnic and nationality claims and on the institutional capacities of international law to embrace a theory of self-determination to uphold them.<sup>6</sup>

## II. THE HISTORICAL SOVEREIGNTY APPROACH TO AUTONOMY CLAIMS

Ethnic group claims of autonomy take on one or a combination of two basic approaches. One I will call the *historical sovereignty* approach. Under this approach, self-determination is invoked to restore the asserted "sovereignty" of an historical community that roughly corresponds to the contemporary claimant group. This approach generally accepts the premise of Western theoretical origins of a world divided into territorially defined, independent or "sovereign" states. However, this approach perceives an alternative and competing political geography based on an assessment of historically based communities. Thus, for example, representatives of North American Indian tribes often rely on assertions of pre-Columbian nationhood or sovereignty in making claims for greater political autonomy.

There are at least three aspects of international law limiting this approach. The first limitation is in the so-called doctrine of *intertemporal* law, which judges historical events according to the law in effect at the time of their occurrence.<sup>6</sup> However unfortunately, international law has operated in historical periods to validate the acquisition of territory by states regardless of the wishes of the indigenous population. Dominant earlier formulations of the doctrines of conquest and effective occupation, for example, upheld the empire building that led to the current political configuration of the Americas.<sup>7</sup>

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5. *E.g.*, International Covenant on Civil and Political Rights art. 1, *supra* note 3; International Covenant on Economic, Social, and Cultural Rights art. 1, *supra* note 3; *see also* U.N. Charter art. 1(2).

6. *See* *Island of Palmas (Netherlands v. U.S.)*, 2 R. Int'l Arb. Awards 829, 845 (1928) ("a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises. . .").

7. *See, e.g.*, 1 C. Hyde, *International Law Chiefly as Applied and Interpreted by the United States* 163-71, 175 (1922) ("states were agreed that the native inhabitants possessed no rights of territorial control which the European explorer or his monarch was bound to respect"); J. Westlake, *Chapters on the Principles of International Law* 129-66 (1894) (discussing territorial sovereignty in relation to "uncivilized" regions); *see also* Eastern

There are, of course, situations in which the doctrine of intertemporal law is not an impediment. In the situation of the Baltic republics, for instance, a quite persuasive case has been made that their forced annexation into the Soviet Union in 1940 was an illegal usurpation of the republics' status as independent sovereign states, both under contemporary norms and the norms of international law applicable at that time.<sup>8</sup> In the same vein, a good case can be made that the international law of the sixteenth through the mid-nineteenth centuries embraced the treaties concluded during that period between the European powers and many American Indian tribes.<sup>9</sup> Most of these treaties upheld the tribes' powers of self-governance, although within diminished spheres. Assessing the vitality of these treaties for the purposes of contemporary international law, however, is complicated by the intervening period in the late nineteenth and early twentieth centuries in which international law appears to have rejected the international status of treaties with non-European aboriginal peoples.<sup>10</sup>

A second aspect of international law that limits its capacity to embrace ethnic autonomy claims along the historical sovereignty approach is the matter of *recognition*. Recognition is a phenomenon of international legal process which "may validate situations of dubious origin."<sup>11</sup> That is, when a preponderance of states, international organizations, and other relevant international actors recognize a state's boundaries and corresponding sovereignty over territory, international law upholds the recognized sovereignty as a matter of traditionally held foundational principle.<sup>12</sup> International legal process thus hardly questions whether the territory was acquired by lawful means, leaving little room for groups within the cloak of a recognized sovereign to assert competing sovereignty solely on the basis of historical conditions or events.

As with the doctrine of intertemporal law, recognition may not be a major obstacle in limited circumstances. Again, the Baltics provide an example. The United States and the Western European countries declined to recognize the annexation of the Baltic republics by the Soviet Union in 1940 and established an official position of nonrecognition of Soviet

Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (determining territorial sovereignty over Eastern Greenland without regard to the indigenous Inuit population); Cayuga Indians (Gr. Brit. v. U.S.), 6 R. Int'l Arb. Awards 173, 176 (1926) (holding that an Indian "tribe is not a legal unit of international law").

8. See Materials of the International Scientific Conference on Legal Assessment of the USSR-Germany Pacts of August 23 and September 28, 1939, 39 Proceedings of the Estonian Academy of Sciences 97 (1990).

9. See Clinebell & Thompson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 Buffalo L. Rev. 666, 679-93 (1978); Morris, *In Support of the Right of Self-Determination for Indigenous Peoples Under International Law*, 29 German Y.B. Int'l L. 277, 291 (1986).

10. See *Island of Palmas*, supra note 6, at 831 ("*contracts between a State . . . and native princes or chiefs of peoples not recognized as members of the community of nations, . . . are not, in the international law sense, treaties or conventions capable of creating rights and obligations . . .*"); see also supra note 7.

11. M. Shaw, *Title to Territory in Africa* 23 (1986); see also I. Brownlie, *Principles of Public International Law* 163-64 (3d ed. 1979) (discussing acquiescence and recognition).

12. See I. Brownlie, supra note 11, at 287.

sovereignty over them.<sup>13</sup> This position apparently has not changed, even though no major power has come forward and expressly welcomed any of the Baltic nations into the community of independent states, as Lithuania, the most independence minded of them, repeatedly has requested.

A third aspect of international law that limits the historical sovereignty approach to ethnic autonomy claims, and perhaps the most significant institutional limitation, is a normative trend within international legal process toward *stability through pragmatism* over instability, even at the expense of traditional principle.<sup>14</sup> Sociologists estimate that today there are around 5,000 discrete ethnic or national groupings in the world,<sup>15</sup> and each of these groups is defined—and defines itself—in significant part by reference to history. This figure dwarfs the number of the independent states in the world today, approximately 176. Further, of the numerous stateless cultural groupings that have been deprived of something like sovereignty at some point in their history, many have likewise deprived other groups of autonomy at some point in time. If international law were to fully embrace ethnic autonomy claims on the basis of the historical sovereignty approach, the number of potential challenges to existing state boundaries, along with the likely uncertainties of having to assess competing sovereignty claims over time, could bring the international system into a condition of legal flux and make international law an agent of instability rather than stability.

Accordingly, the major contemporary international organizations and tribunals have resisted a model of self-determination that would realign state boundaries and create new ones according to a simple formula of historical community. The United Nations did not promote the decolonization of Africa and Asia through a policy of restoring precolonial political units based primarily on tribal affiliations. Rather, U.N. policy was to pursue the independence of the colonial territories whose boundaries were widely acknowledged to be artificial in relation to the indigenous population.<sup>16</sup> The Organization of African Unity also adopted this policy after some debate.<sup>17</sup>

The International Court of Justice followed in this direction in the *Western Sahara Case*.<sup>18</sup> The case involved the decolonization of the Saharan territory formerly under Spanish rule. The Court, in an Advisory Opinion, acknowledged that colonial political communities linked peoples of the

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13. B. Kaslas, *The Baltic Nations: The Quest for Regional Integration and Political Liberty* 274-83 (1976) (discussing the history of relations between the Baltic states and the Soviet Union and the reaction of the United States and Western Europe).

14. See generally L. Chen, *An Introduction to Contemporary International Law* 3-14 (1989) (discussing the importance of a global context for decisionmaking).

15. R. Stavenhagen, *Problems and Prospects of Multiethnic States*, *The United Nations University Annual Lecture Series No. 3*, at 5 (1986).

16. See C. Mojekwu, *Self-Determination: The African Perspective*, in *Self-Determination: National, Regional, and Global Dimensions* 221, 228-29 (Y. Alexander & R. Friedlander eds. 1980).

17. See *id.* at 230-31; Ramphul, *The Role of International and Regional Organizations in the Peaceful Settlement of Internal Disputes (with Special Emphasis on the Organization of African Unity)*, 13 *Ga. J. Int'l & Comp. L.* 371, 377-78 (1983).

18. *Western Sahara*, 1975 I.C.J. 12 (1975).

Western Sahara with adjoining Morocco and Mauritania through historical spheres of influence and allegiance.<sup>19</sup> But the Court held that such “legal ties” should not influence the application of the principle of self-determination in the decolonization of the Western Sahara. Instead, the Court favored a model of self-determination by which the future status of the territory would be determined through the free and genuine expression of the will of its contemporary inhabitants.<sup>20</sup>

Given all these considerations, my view is that international law cannot easily embrace claims of ethnic or nationality group autonomy primarily based on accounts of the pre-existence and wresting of sovereignty.

### III. THE HUMAN RIGHTS APPROACH TO AUTONOMY CLAIMS

A second approach, suggested by the International Court of Justice in the *Western Sahara Case*, focuses on contemporary human interaction and values, and, I believe, holds greater possibilities for the advancement of autonomy claims through international law. I will call this second approach the *human rights* approach.

Under this approach, self-determination is not linked fundamentally to historically derived “sovereign” entities which are described in somewhat static terms and projected into the future. Rather, self-determination arises within international law’s expanding lexicon of human rights concerns and accordingly is posited as a fundamental right that attaches collectively to groups of living human beings. In the decolonization context, the international community preferred a human rights approach, which succeeded in breaking down the colonial empires that extended into Africa, Asia and elsewhere. In that context, relevant actors conceived of self-determination as the right of the contemporary inhabitants of colonized territories to be free from outside domination, a right derived from notions of freedom, equality, and peace.<sup>21</sup> Independent statehood for the colonial territories, understandably, was the norm.

In applying the principle of self-determination to the context of contemporary ethnic autonomy claims within the human rights approach, other evolving human rights concepts come into play—especially the concept of cultural integrity. An emergent human right of cultural survival and flourishing within international law is signaled by the United Nations Charter,<sup>22</sup> article 27 of the Civil and Political Rights Covenant,<sup>23</sup> the

19. *Id.* at 45-49, 64-65.

20. *Id.* at 68. The Court, however, held that the “legal ties” it found did not amount to ties of “territorial sovereignty,” thus leaving open the possibility that a certain showing of historical sovereignty could govern the application of the principle of self-determination, at least in the decolonization context in which the sovereignty of the colonial powers over overseas territories no longer was propped up by the phenomenon of international recognition.

21. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961).

22. U.N. Charter arts. 13, 55, 57, and 73 (affirming cultural cooperation and development as among the purposes of the U.N.).

23. International Covenant on Civil and Political Rights, art. 27, *supra* note 3 (recognizing the right of the members of “ethnic, religious or linguistic minorities . . . to enjoy their own culture, to profess and practise their own religion [and] to use their own language”).

Convention Against Genocide,<sup>24</sup> and the UNESCO Declaration of Principles of Cultural Co-operation.<sup>25</sup> Joining the human values of freedom, equality, and peace with those represented in the principle of cultural integrity can provide potent justification for ethnic autonomy claims. In the context of indigenous peoples, for example, a U.N. study has concluded that self-governance is

an inherent part of their cultural and legal heritage which has contributed to their cohesion and to the maintenance of their social and cultural tradition . . . . Self-determination, in its many forms, is thus a basic pre-condition if indigenous peoples are to be able to enjoy their fundamental rights and determine their future, while at the same time preserving, developing and passing on their specific ethnic identity to future generations.<sup>26</sup>

Despite its appeal, the human rights approach raises a specter of destabilization contrary to international law's normative trends, if phrased in absolutist terms insisting on a right to choose independent statehood even in cases when the right-holders may in fact desire some lesser status. It is thus helpful, and perhaps imperative, to move beyond the independent statehood rhetoric if self-determination is to be meaningful in the context of most current ethnic autonomy claims.

In my view, self-determination should not be equated with a right to independent statehood. Under a human rights approach, the concept of self-determination is capable of embracing much more nuanced interpretations and applications, particularly in an increasingly interdependent world in which the formal attributes of statehood mean less and less. Self-determination may be understood as a right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics. The institutions and degree of autonomy, necessarily, will vary as the circumstances of each case vary. And in determining the required conditions for a claimant group, decisionmakers must weigh in the human rights of others. While not precluded, independent statehood will be justified only in rare instances. Such a formulation of self-determination, I believe, will advance global peace and stability consistent with international law's normative trends.

Even when understood in such nonabsolutist terms, the human rights approach to ethnic autonomy claims continues to face impediments arising from within the fabric of international law. I see two remaining, but not insurmountable, problems. First, there is the *individualistic bias* toward

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24. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1961) (defining, at article II, genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such . . .").

25. Declaration of the Principles of International Cultural Cooperation, Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its fourteenth session on Nov. 4, 1966, reprinted in United Nations, Human Rights: A Compilation of International Instruments at 409, U.N. Doc. ST/HR/1/Rev.3 (1988) (affirming a right and duty of all peoples to protect and develop the cultures throughout humankind).

26. U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Study of the Problem of Discrimination Against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 at 20 (1987) (Jose R. Martinez Cobo, Special Rapporteur).



human rights conceptions within modern international law which impedes the recognition of collective or group rights. This bias results from traditional Western liberal political philosophy that has provided the major impetus for the development of human rights in international law.<sup>27</sup> As I have discussed elsewhere, the Western liberal perspective

acknowledges the rights of the individual on the one hand and the sovereignty of the total social collective on the other, but it is not alive to the rich variety of intermediate or alternative associational groupings actually found in human cultures, nor is it prepared to ascribe to such groupings any rights not reducible either to the liberties of the citizen or to the prerogatives of the state.<sup>28</sup>

International legal and political discourse, however, has made significant movement toward greater realization of collective or group rights. An important example is in the treatment of indigenous peoples' concerns within the United Nations and its affiliate, the International Labour Organization. The recent draft Universal Declaration on the Rights of Indigenous Peoples,<sup>29</sup> developed by a working group of the U.N. Human Rights Commission, and the ILO Convention on Indigenous and Tribal Peoples,<sup>30</sup> adopted by the 1989 International Labour Conference, both address indigenous peoples' rights as rights of collectivities. Also, the African Charter on Human and Peoples' Rights<sup>31</sup> elaborates upon the group rights of the family and "peoples" as distinct from individual or states' rights.

A second limitation, related to the matter of recognition discussed above, is in the classical international law *doctrine of state sovereignty*.<sup>32</sup> The doctrine of sovereignty—together with its corollaries of territorial integrity, exclusive jurisdiction, and nonintervention—impedes the capacity of international law to regulate matters within the spheres of authority asserted by states recognized by the international community. Sovereignty is especially jealous of matters of social and political organization. I believe, however, that to the extent a claim for ethnic autonomy can be posited as a human rights concern, state sovereignty impediments can be overcome.

Within modern international law, the doctrine of sovereignty increasingly has become subject to the human rights values embraced by the international community. In a global community that remains organized

27. See generally Weston, Human Rights, in *Human Rights in the World Community: Issues and Action* (R. Claude & B. Weston eds. 1989) (discussing the Western liberal origins of modern human rights conceptions).

28. Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 Harv. Indian L. Symp. 191, 198 (1990).

29. U.N. Doc. E/CN.4/Sub.2/1989/33.

30. International Labor Organization Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Conference, Draft Report of the Committee on Convention 107 at 25-33, Provisional Record (No. 25) 76th Session (1989), in *Basic Documents In International Law and World Order* 489 (B. Weston, R. Falk, & A. D'Amato 2d ed. 1990).

31. African Charter on Human and Peoples Rights, June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 59 (1982) (entered into force Oct. 21, 1986).

32. See generally I. Brownlie, *supra* note 11, at 287-97 (characterizing sovereignty as the "basic constitutional doctrine of the law of nations").

substantially by state jurisdictional boundaries, sovereignty principles continue, in some measure, to advance human values of stability and ordered liberty. But since the atrocities and suffering of the two world wars, international law has not much upheld sovereignty principles when they serve as an accomplice to the subjugation of human rights or act as a shield against international concern that coalesces to promote human values. The proliferation of a floor of human rights norms that are deemed applicable to all states as to their own citizens and the decolonization process itself both demonstrate the yielding of sovereignty principles to human rights imperatives in modern international law.<sup>33</sup>

#### IV. CONCLUSION

International law is not easily disposed to aid autonomy claims that challenge state structures simply on the strength of alternative visions of sovereignty founded primarily on evaluations of history. Such an approach imposes great tensions upon the institutional framework of international law. International law, I believe, can best accommodate ethnic autonomy claims if they are justified on human rights grounds and avoid absolutist assertions of independent statehood. To be sure, ethnic communities are the product of both present and past conditions and events. Historical phenomena can have great relevance to the contemporary life of a community and thus be meaningful in terms of human rights. A human rights approach does not necessarily exclude consideration of historical conditions, but it refocuses such consideration into a larger assessment of the requirements for the present day realization of human values. Through its human rights discourse, modern international law is hospitable to such an assessment and its concern for the values implicated in ethnic and nationality rights claims.

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33. See Anaya, *supra* note 28, at 211-15.