

1999

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Recommended Citation

James D. Wilets, *The Demise of the Nation-State: Towards a New Theory of the State under International Law*, 17 BERKELEY J. INT'L LAW. 193 (1999).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol17/iss2/2>

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The Demise of the Nation-State: Towards a New Theory of the State Under International Law

By
James D. Wilets*

I. INTRODUCTION

It may seem premature to speak of the demise of the nation-state¹ when the last decade has seen the proliferation of ever-smaller nation-states throughout Eastern Europe and Asia and the demand for secession from national movements in countries as diverse as Canada, Yugoslavia, Sri Lanka, Indonesia, Russia, Spain and India. Nevertheless, the seemingly contradictory centrifugal forces of nationalism and the centripetal forces of confederation and federation are simply different stages of the same historical process that have been occurring since before the 17th century.² This historical process has consisted of

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1. The "nation-state" has *traditionally* been defined as "a relatively homogenous group of people with a feeling of common nationality living within the defined boundaries of an independent and sovereign state; a *state containing one as opposed to several nationalities*." (Emphasis added). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1505 (1986). For the purposes of this article, a "nation-state" will be defined as a state that functions as the juridical embodiment of the dominant national group. The problems with the traditional view and definition of the nation-state are multiple: (1) every state, no matter how homogenous, contains at least some members of other nationalities and (2) the term "nationality" is itself vague. It is commonly defined as "a large and closely associated aggregation of people having a common and distinguishing origin, tradition and language and potentially capable of or actually being organized in a nation-state." *Id.*

2. A cogent history of the development of the nation-state is provided by Professor Rokkan. Stein Rokkan, *Cities, States, and Nations: A Dimensional Model for the Study of Contrasts*, in DEVELOPMENT IN BUILDING STATES AND NATIONS II (S.N. Eisenstadt & Stein Rokkan eds., 1973). Rokkan notes that France was still engaged in nation-building as late as the 19th Century in its peripheral territories such as Brittany and Occitania. *Id.* at 84. Eugen Weber, in his work PEASANTS INTO FRENCHMEN, gives 1863 figures that show 7,426,058 Frenchmen did not speak French as their first language versus 29,956,167 who did. EUGEN WEBER, PEASANTS INTO FRENCHMAN, THE MOD-

roughly four stages: (1) the formation by force of large, multi-ethnic empires; (2) the dissolution of those multi-ethnic empires into their elemental tribes, nations or groups; (3) the evolution of one or more of the component groups into separate "nation-states," with the state emerging as the juridical embodiment of the dominant national group; and (4) the coming together of those nation-states, or national groups, into larger associations of a federative or confederate nature³ on the basis of equality and mutuality.⁴ The article will refer to this entire process as "national dissolution and reformulation."

As this article will demonstrate, the stages described in the model above are far from discrete, and the nation-states emerging from the process are themselves far from static entities.⁵ Specifically, this article will establish that many contemporary nation-states remain within the third stage of this historical process and resemble their multi-ethnic imperial predecessors. This resemblance exists to the extent that both (1) contain national minorities within their state boundaries and (2) were created by a coercive process through which subaltern nationalities were subordinated to the dominant national group's will.⁶ In fact, this article will argue that, in many cases, the process of nation-state formation has been more coercive towards subaltern national groups than the process by which multi-ethnic empires have been created. It is this reality that requires the abandonment of the nation-state as a definitional basis for the state under international law.

The process of national dissolution and reformulation can occur by the forcible or peaceful disintegration of a multi-ethnic political entity into separate political entities ("External National Dissolution"); alternatively, the process can occur *internally*, within the political framework of an existing state, through the peaceful accommodation of legitimate aspirations of ethnic and national minority groups while still preserving the political integrity of statehood ("Internal National Accommodation").

The idea formulated in this article that national dissolution and reformulation is part of a continuous, historical process was echoed by James Baker in a

ERNIZATION OF RURAL FRANCE 1870-1914, 500-501 (1976). He notes that the process of integrating certain regions such as Corsica was still ongoing in the twentieth century.

3. The Swiss Confederation is a notable early historical example of this process of confederation. Another example might be the United States, which was initially a confederation of sovereign entities. A more contemporary example would be the European Union and the emerging MERCOSUR/L union in South America.

4. The concept of initial equality and mutuality harks back to the concept of "original contract," a concept which has formed much of the theoretical foundation for our modern concepts of individual human rights and which John Locke, and more recently John Rawls, have devoted considerable attention. See generally RAWLS, A THEORY OF JUSTICE (1971).

5. The United States, for example, is a state which was originally a confederation of several smaller states. The "American" people, or nation, which emerged from that confederation has itself evolved from one that identified itself entirely as one of European origin to one that has slowly and still incompletely recognized its diverse ethnic and racial composition.

6. See, e.g., Stephen Kinzer, *Germans Plan to Make it Easier for Some to Obtain Citizenship*, N.Y. TIMES, Jan. 25, 1993, at A8, where author notes that Germany currently has a citizenship law based principally on German nationality. See also *Outsiders All*, THE ECONOMIST, Jan. 16, 1993, at 36, in which the author discusses Japan's treatment of foreign residents and current criteria of who is a Japanese national.

speech before the Berlin Meeting of the Council of Foreign Ministers of the Council on Security and Cooperation in Europe:

Evolution and devolution are not alternatives, but complementary, and indeed interdependent developments The architects of a united Europe have adopted the principle of "subsidiarity," something like American "federalism" — that is, the devolution of responsibility to the lowest level of government capable of performing it effectively. By the same token, the process of devolution in the East will lead to fragmentation, conflict, and ultimately threaten democracy if it is not accompanied by the voluntary delegation of powers to national and even supranational levels for basic matters such as defense, trade, currency, *and the protection of basic human rights — particularly minority rights.*⁷ (Emphasis added by author).

It is the thesis of this article that international law must respond to the concomitant centrifugal and centripetal forces of national dissolution and reformulation, and avoid the worst aspects of nationalism, by recognizing ethnic and national aspirations to cultural and national development *while simultaneously disassociating those aspirations from the concept of statehood.* Our concept of the state must be revised to reflect a role of the state as one which does not constitute the juridical and political embodiment of a state's dominant national group. As this article will argue, the historic and contemporary multi-ethnic nature of almost all states renders the concept of the state as the juridical embodiment of the dominant national group empirically inaccurate and normatively problematic. This article asserts that the nation-state is a legally inappropriate juridical structure to guarantee the fundamental human rights of the people living within it, including the right of its peoples to national self-determination. This revised theory of the state suggests that should a state fail to implement Internal National Accommodation, the historical reality of the process of national dissolution and reformulation dictates the historical inevitability of External National Dissolution. The normative dictates of law and justice also require that our view of the state be revised accordingly.

Contemporary models for this kind of separation of national identity and traditional functions of the state are suggested by the European Union and, increasingly, by MERCOSUR. Other examples arguably include, with varying degrees of success, Switzerland, Canada, Belgium and Finland. The success of these national models appears to be largely determined by the extent to which the original union of different nationalities was accompanied by mutuality and non-coercion. In this sense, those national unions whose original confederation of national groups lacked this mutuality and non-coercion, such as Canada,⁸ stand on less stable ground, even as they attempt Internal National Accommodation. These models nevertheless demonstrate the possibility of separating the economic and defense functions of the nation-state from its traditional function

7. James A. Baker, The Euro-Atlantic Architecture: From East to West, Address Before the CSCE Council of Foreign Ministers in Berlin (June 18, 1991), in MASTNY, at 308.

8. Gregory Marchildon & Edward Maxwell, *Quebec's Right of Secession under Canadian and International Law*, 32 VA. J. INT'L L. 583, 612 (1992) ("While New France's incorporation into the British empire in 1763 was manifestly against the will of its people, their descendants joined the Canadian federation in 1867 in more voluntary circumstances").

as the juridical embodiment of the dominant national group in a particular geographical territory.

The literature on ethnic and cultural group rights is extensive⁹ as is the literature on the rights of groups to self-determination and secession.¹⁰ To a large extent, these writings have advanced theories that modify the traditional foundation of international law as based on the absolute sovereignty of the state.¹¹ These writings recognize the significant expansion of the international law definition of self-determination to include the recognition of group rights and cultural autonomy and, in some circumstances, secession. At least some of the arguments presented in the literature have become reality as NATO Member States compelled Yugoslavia to recognize the group and individual human rights of the Albanian people to autonomy. NATO accomplished this with threats of military intervention and External National Dissolution.

This article will not attempt to replicate these discussions, but rather will expand upon them in the following two ways. First, instead of simply positing a theory that recognizes the legitimacy of the nation-state but argues for certain cultural and other group rights, this article will argue that full and adequate recognition of a state's national minorities' human rights is incompatible with the *nation-state* as the juridical embodiment of the dominant national group. To the extent full and adequate recognition of human rights of national minorities is incompatible with the *nation-state*, we must re-examine the appropriateness of that form of state structure to realize the economic, defensive and social goals of peoples living in a specific geographical territory. Second, this is not an article about the right to secession *per se*. As I will discuss, the problem with secession based solely on nationalist impulses is that the resultant nation-state will frequently be more oppressive of the national minorities of the new nation-state than the more multi-ethnic nation-state that preceded it. It is the thesis of this article that the state must be disassociated from the nation precisely because no

9. See, e.g., Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 (1991); John B. Attanasio, *The Rights of Ethnic Minorities: The Emerging Mosaic*, 66 NOTRE DAME L. REV. 1195 (1991); Robert Howse and Karen Knop, *Federalism, Secession, and the Limits of Ethnic Accommodation: a Canadian Perspective*, 1 NEW EUROPE L. REV. 269 (1993).

10. See, e.g., Heather A. Wilson, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* (1988); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Guyora Binder, *The Case for Self-Determination*, 29 STAN. J. INT'L L. 223 (1993); Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991); Richard F. Inglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, B.C. INT'L & COMP. L. REV. (1992); Derege Demissie, *Self-Determination Including Secession v. The Territorial Integrity of Nation-States: a Prima Facie Case for Secession*, SUFFOLK TRANSNAT'L L. REV. (1996); Jerome Wilson, *Ethnic Groups and the Right to Self-Determination*, CONN. J. INT'L L. (1996).

11. See generally Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, *supra* note 9; Attanasio, *The Rights of Ethnic Minorities: The Emerging Mosaic*, *supra* note 9; Wilson, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS*, *supra* note 10; Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, *supra* note 10.

national group should claim a hegemonic interest in the coercive power of the state.

While this revision of the theory of the state under international law appears radical, it is simply a logical extension of the widely accepted international legal norms currently accepted as an integral part of international human rights law, including the rights to national self-determination and freedom of assembly, association and expression. This revised theory of the state simply requires that the multi-ethnic states ultimately resulting from national dissolution and reformulation be based upon mutuality and non-coercion. Should a state fail to meet these seemingly elemental criteria for legitimacy, the state's legitimacy under international law is subject to challenge. The practical result of such an approach would not be the automatic intervention by the international legal community in any state failing to adhere to such norms, but rather the revocation of the traditional absolute juridical shield of "state sovereignty." As a practical matter, secessionist movements would have a less difficult task in establishing legitimacy as the legal representative of their nations if the pre-existing state failed to respect fundamental human rights norms. Currently, a state that violates human rights norms is held accountable (at least theoretically) under international law for the breach of those norms without suffering a challenge to its sovereignty under international law. This revised theory of the state changes that presumption of legitimacy.

Implicit in this thesis is the need to re-examine the role and purpose of the nation-state. Although the proliferation of nation-states resulting from the break-up of older, multi-ethnic countries and empires seems to suggest that the nation-state is at its apogee, the discussion in this article points out that the nation-state has historically been an aberration. The nation-state is simply one point in a historical process whereby a state ultimately changes in response to its eventual multi-ethnic character. To the extent the state does not do so through Internal National Accommodation, it will do so unwillingly through External National Dissolution. In this sense, the nation-state as the basis for a theory of the state represents an ephemeral theoretical foundation; the nation-state is, or at some time will be, incapable of accommodating the interests of all people living within it. In fact, the conflict in Kosovo is a chilling example of the possible consequences resulting from the adoption of a traditional concept of the nation-state as was done by Serbia.

It is not, however, the purpose of this article to argue that either nationalism or the concept of the state itself is obsolete. Rather, it is precisely because national and ethnic aspirations will continue to exist in the foreseeable future that there is a need for the articulation of principles addressing the consequences of those aspirations. Increasingly numerous commentators have made convincing arguments that *absolute* state sovereignty should be subordinate to internationally recognized norms of behavior, including customary international law and international human rights law.¹² Indeed, Fernando Tesón makes the Kantian

12. See, e.g., TESÓN, *infra* note 13, at 2-12; Falk, *infra* note 17, at 140-46.

argument that a state is only legitimate under international law if the state itself respects the human rights of its citizens.¹³ Under this perspective, the state is not an end unto itself, but is a tool for the realization of human freedom and happiness. Domestic justice and rule of law are necessary foundations for state recognition under international law. The thesis posited in this article is consistent with that broader proposition, but assumes a narrower focus. This article argues that the nation-state will almost always violate the larger proposition advanced by these commentators that respect for human rights, domestic justice and rule of law are necessary foundations for any state. As long as national minorities continue to exist within nation-states, a true nation-state will be unable to fully respect the human rights of *members* of those national minorities living within it.¹⁴ Since international law should not sanction this non-consensual merging of the dominant nation with the state, a different theory must be advanced for the state under international law.

The process of national dissolution and reformulation has been costly and interminable precisely because mutuality and consent have been missing from the process. If international law incorporates these concepts consistently when applying legal principles to the process of national dissolution and reformulation, instead of blindly accepting the principle of state sovereignty and the assumptions implicit in the concept of the nation-state, international stability would be strengthened and the goals of world public order furthered.

The role of international law should be the management of the process of national dissolution and reformulation to ensure the greatest degree of peace and international stability possible while simultaneously encouraging the greatest protection and expression of human rights by the parties involved in the process. This article provides examples of countries that are attempting to accomplish this through Internal National Accommodation.

Since "law" is defined as "that which is laid down, ordained, or established"¹⁵ and a "rule or method according to which phenomena or actions co-exist or follow each other,"¹⁶ the task of international law should not be the traditional one of a description or codification of power relationships among states or power élites. Rather, it should be one of an ordering of values upon which the international community agrees, and an agreement by the international community for actions that are appropriate to implement those values.¹⁷

13. See FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* 1 (1998) (arguing that "the sovereignty of the state is dependent upon the state's domestic legitimacy; therefore the principles of international justice must be congruent with the principles of internal justice").

14. *Id.* at 130 (This thesis recognizes that the human rights of national minorities are ultimately individual rights, not group rights as such. As Tesón argues "the right to self-determination is as a by-product, albeit an important one, of individual liberty").

15. BLACK'S LAW DICTIONARY 795 (5th ed. 1991).

16. *Id.*

17. See generally Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* [1795], in *THE PHILOSOPHY OF KANT* 431-76 (Carl J. Friedrich ed., 1949); RICHARD PIERRE CLAUDE & BURNS H. WESTON, *HUMAN RIGHTS IN THE WORLD COMMUNITY* 3 (1992) ("International law . . . exists, at a minimum, to maintain world order"); W. Michael Reisman & Eisuke Suzuki, *Recognition and Social Change in International Law: a Prologue for Decisionmaking*, in *TOWARD WORLD ORDER AND*

As Kant observed at the close of the 18th century, "Without a contract among nations, peace can be neither inaugurated nor guaranteed."¹⁸ The end of the Cold War and the resultant instability presents an occasion when such a conscious, deliberate and logical ordering of international principles seems especially urgent and uniquely possible.

Because this article challenges the concept of the nation-state as the primary building block of international law, it begins by discussing the inherent contradictions in the traditional definition of the nation-state. The article will then explain the need for a new theory of the state as a result of the ongoing process of national dissolution and reformulation, and then follow with an analysis of the history of nationalism, the nation-state, and the legal recognition of national group rights. The remaining sections of the article will discuss the treatment of fundamental group rights under contemporary international law and propose international legal standards necessary to protect the fundamental human rights of national, ethnic and religious minority groups¹⁹ to the greatest extent possible while furthering international stability.

II.

THE NEED FOR A NEW THEORY OF THE STATE UNDER INTERNATIONAL LAW

The need to accommodate the aspirations and claims of ethnic and national groups becomes apparent in light of recent history. As war becomes unthinkable among *stable*, democratic and liberal states,²⁰ realizing Kant's analysis of the inherent pacificity of republican government,²¹ nationalism has emerged as

HUMAN DIGNITY 403-70 (W. Michael Reisman et al. eds., 1976); W. Michael Reisman, *Sovereignty & Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990); Fernando Tesón, *The Kantian Theory of International Law*, 92 COL. L. REV. 53 (1992); Richard A. Falk, *The Role of Law in World Society: Present Crisis and Future Prospects*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 132-66 (W. Michael Reisman et al. eds., 1976).

18. See Kant, *supra* note 17, at 431-76.

19. The scope of group rights has broadened over the last forty years to include groups other than racial, ethnic or religious minorities. In this article, however, unless otherwise noted, minority groups will refer to groups whose independent identity could be a basis for political independence. These would generally include national, ethnic, racial and religious minorities.

There is considerable ambiguity as to the precise meaning of the term "minority." See generally P. THORNBERRY, MINORITIES AND HUMAN RIGHTS LAW, A MINORITY RIGHTS GROUP REPORT (1991). Proposed definitions include that of Professor Capotorti, a Special Rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities:

a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language. CAPORTORTI REPORT [ADD. I], THE CONCEPT OF A MINORITY, U.N. Sales No. E.78.XIV.1 (1960).

To this definition needs to be added, at least when speaking in a political context, those groups of people who are a majority of the population but who are specifically discriminated against.

20. The literature on the relative inherent pacificity of democratic states is extensive. See generally BRUCE RUSSETT & WILLIAM ANTHOLIS, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993).

21. See Kant, *supra* note 17, at 431-76.

the greatest threat to both internal and external national stability and world peace. Sir Michael Howard has observed that "nationalism was almost invariably characterized by militarism. Self-identification as a nation implies almost by definition alienation from other communities and the most memorable incidents in the group's memory consisted in conflict with and triumph over other communities."²²

Despite the limitations of multi-ethnic empires in realizing the democratic, religious, and national aspirations of their citizens, it must be recognized that the consequences of the breakup of those multi-ethnic empires or states through the process of External National Dissolution for world public order may be fearsome. As Chalk and Jonassohn discuss in *The History and Sociology of Genocide*,²³ the "reformist" nationalism of the new Turkish nation-state following World War I directly and deliberately led to the Armenian genocide in 1915. The ongoing bloodshed in Yugoslavia is a contemporary illustration that the costs of dissolution go beyond the parent state and the break-away group. As in World War I, the process of External National Dissolution can involve a large part of the world community as well. The violence in Kashmir and Punjab in India has cost thousands of lives and threatens the tenuous peace between Moslems, Hindus and Sikhs on the Indian subcontinent.²⁴ With the two major adversaries possessing nuclear weapons, the consequences of this conflict could have global implications.

Furthermore, sub-minorities may face increased discrimination as the emerging nation-state asserts its own identity.²⁵ The newly independent Baltic states have proposed or passed discriminatory legislation against Russians and other minorities.²⁶ Even the peaceful dissolution of Czechoslovakia has increased the fears of the Hungarian minority²⁷ and the prospect of peaceful divi-

22. Sir Michael Howard, *War and the Nation-State*, Inaugural Lecture delivered before the University of Oxford (Nov. 18, 1977), in CLARENDON PRESS OXFORD, 1978, at 9.

23. See FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE* 249-59 (1990).

24. See Edward A. Gargan, *Indian Troops are Blamed as Kashmir Violence Rises*, N.Y. TIMES, April 18, 1993, at A1. See also *Asia Watch - Punjab in Crisis*, HUMAN RIGHTS IN INDIA (Human Rights Watch, New York, 1991).

25. In the 19th Century, Lord Acton noted this possibility in his essay *Nationality*, wherein he argued that the principle of nationalism would lead to the oppression of ethnic minorities. See J.E.E.D. ACTON, *Nationality*, in *ESSAYS ON FREEDOM AND POWER* (1862).

26. See, e.g., Francis Fukuyama, *Trapped in the Baltics*, N.Y. TIMES, Dec. 19, 1992, at 23 ("Estonia has passed and Latvia has proposed discriminatory citizenship laws requiring Russians, as well as other ethnic minorities, to go through a difficult naturalization process during which they cannot vote, own property or hold certain jobs"); *EC Approves Agreements with Baltic States*, Dec. 22, 1992, available in REUTERS TEXTLINE AGENCY EUROPE ("The European Parliament approved the report by Mr. James Moorhouse on relations with the Baltic States . . . but [voiced] concern for the worsening inter-ethnic tension. Mr. Moorhouse believes that the texts on citizenship adopted by Latvia and Estonia could . . . result in violations of the basic rights of minorities").

27. See, e.g., Adrian Bridge, *Minority Fears Nationalist Upsurge in Slovakia*, THE INDEPENDENT (LONDON), Jan. 11, 1993, at 6 ("Like most of Slovakia's 600,000-strong ethnic Hungarian minority, Mr. Molnar feels threatened by the tide of Slovak nationalism which reached a climax on 1 January with the proclamation of Europe's newest independent state"); *Worries of Hungarian Minority Pose Problem for New Slovak State*, Agence France Press, Jan. 4, 1993, available in LEXIS, Nexis Library, Europe File ("Nearly 600,000 of the new state's population of five million are ethnic

sion of Canada raises similar fears for minorities living in Quebec.²⁸ Hungary has repeatedly expressed concern over the situation of their minorities living in Slovakia, Romania and Serbia. Russian forces have intervened in Tajikistan, Georgia, and Moldova, and Russian President Boris Yeltsin has suggested that Russia should be granted special powers to stop ethnic conflict in the states under the political sphere of the former Soviet Union.²⁹

The breakup of Yugoslavia provides a timely example of the dialectic between national aspirations and the international response to those aspirations. Marc Weller makes a persuasive argument that the international response to Serb and Croat quests for independence played an important role in the breakup of Yugoslavia:

The support for maintaining the territorial integrity of the [Yugoslav] federation voiced by representatives of influential states and organizations, including the United States, the European Community and its members, and the Conference on Security and Cooperation in Europe, undoubtedly strengthened Slobodon Milosevic, the Serbian leader, in his perception that flexibility was not required in negotiations, since independence for Slovenia and Croatia was not supported internationally. *Instead of offering to accept a looser confederation, the Serbian leadership had the central army declare martial law, a move that had been explicitly ruled out by the federal presidency.*³⁰

The London Times reported that "the Croats and Slovenes wanted a loose federation that would dilute Serbian influence. The Serbs wanted a tighter federation to preserve its centralized control of the economy and its dominant role in Yugoslav life."³¹ Had the Croat and Slovene desires been met through a process of Internal National Accommodation, instead of the pursuit for a "Greater Serbia," it is possible that the situation would not have deteriorated to the point where the component states of the Yugoslav Federation sought External National Dissolution with its horrific consequences.

Hungarians, whose anxieties over the past six months have risen as quickly as the Czechoslovak federation has slid to its doom"); *Plucked Velvet*, THE ECONOMIST, Dec. 26, 1992 - Jan. 8, 1993, at 63 ("Equally alarming have been recent measures to restrict the language rights of the 600,000-strong Hungarian minority in Slovakia. In October, officials started removing Hungarian language signs in border areas. In November, state television banned the use of Hungarian names for Slovak towns in Hungarian-language broadcasts. Even non-Hungarians find such actions aggressive and absurd").

28. See, e.g., Michael Crelinsten & Jack Jedwab, *Letter from Montreal: The Meaning of 'Non'*, 74 HADASSAH MAGAZINE 10-11 (1992) (authors discuss how "the debate in Quebec has produced language legislation which in fact restricts some of the rights of non-French Minorities").

29. Serge Schmemann, *Yeltsin Suggests Russian Regional Role*, N.Y. TIMES, March 1, 1993, at A7.

30. *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 570 (1992) (emphasis added).

31. Boyes & Trevisan, *Serbian Leader Puts Fate of his Party Before Nation*, THE TIMES (LONDON), Mar. 18, 1991, at 7.

III.

A BRIEF HISTORY OF NATIONALISM, THE NATION-STATE AND
LEGAL RECOGNITION OF GROUP RIGHTSA. *Nationalism and the Nation-State*

As noted above, the association of a state with a specific national group is a relatively recent historical phenomenon. States have historically tended to be multi-ethnic, consisting of a variety of national groups. Empires have, by definition, always been multinational. Daniel Patrick Moynihan argued that multi-ethnic entities such as the Habsburg, Romanov and Hohenzollern empires offered a model whereby different ethnic groups lived and traded together in relative peace.³² Frank Chalk and Kurt Jonassohn discuss the tolerant policy of the Ottoman Empire towards its minorities in *The History and Sociology of Genocide*,³³ and contrasts it with the nationalist and even genocidal policies adopted by the Turkish nation-state led by the "Young Turks".

The problem with Moynihan's and other models of the older, multi-ethnic empires is that they could not withstand the onslaught of virulent nationalism in the 19th and 20th centuries or the advent of the other ideology of the period—democracy. In fact, it could be argued that virulent nationalism and democracy are correlated. Under a democracy, the ability to exercise political power is directly correlated with the number of citizens residing in a state. If a state desires to be democratic while representing the interests of a particular national group, it must have a majority of the particular national group's loyalty. Israel faces this dilemma as it struggles to retain its democratic form of government while it deals with a large Arab minority. James B. Muldoon, a legal historian, argued that before the development of the majority-ruled nation state, minorities and majorities were not in an adversarial relationship, since being a majority did not, *ipso facto*, entitle a group to rule a political entity.³⁴ Dominance of one group over another was achieved not because of its majority status, but simply because of its sheer power.³⁵ Muldoon's observation is supported by Chalk and Jonassohn's discussion of the Burundi and Pakistani genocides in the 1970s. They argue that both genocides were precipitated by the introduction of elections, and the threat such elections posed to the politically dominant minorities.³⁶ Muldoon argues that this volatile and frequently violent connection between democracy, nationalism and minorities explains why the concept of minority rights did not fully develop until the emergence of the democratic, majority-ruled nation-state. Prior to the emergence of the nation-state, most national groups were, from a power perspective, minorities in their state regardless of their numbers.

32. See generally DANIEL PATRICK MOYNIHAN, *PANDAEMONIUM* (1993).

33. See CHALK & JONASSOHN, *supra* note 23, at 249-50.

34. See, e.g., James B. Muldoon, *The Development of Group Rights*, in *MINORITY RIGHTS* 31 (Sigler ed., 1983).

35. See generally SIGLER, *supra* note 34, at 67-69.

36. See, e.g., CHALK & JONASSOHN, *supra* note 23, at 35.

Muldoon's argument helps elucidate why a majority national group would feel more threatened by minorities under a democracy than under an autocratic system. His argument nevertheless minimizes the plight of numerous minority groups, particularly those with religious orientations, who have suffered because of their minority status in non-democratic states. Just because minority rights did not exist two centuries before, does not mean that oppression of minorities did not occur. If the individual was not protected by ideas of basic human rights until the 18th century, it should not be surprising that minority rights did not develop until even later.

While the process of political dissolution of large multi-ethnic political entities, and their reformulation into new, larger, political entities, has been ongoing for millennia, the coalescing of disparate regional groups of people into larger units as *nation-states* (as opposed to new empires), is a relatively recent phenomenon that coincides with the advent of nationalism as a universal and powerful political and social force. One has only to look at the difficulties experienced by Great Britain, Turkey, Indonesia and India (to name but a few) in their efforts to impose a nation-state on their multi-ethnic citizenry, to recognize that the "nation-state" is historically neither universal nor inevitable. Rather, the nation-state and the corollary ideology of nationalism are deliberately and consciously developed by those political leaders or élites as an ideological justification for the existence of their state.

The rise of the Young Turks in the crumbling Ottoman Empire provides one of the most salient examples of this use of nationalism. Bereft of any *raison d'être*, the Ottoman Empire was all but dead by the turn of this century. The Young Turk reformers saw in Turkish nationalism not only a way to salvage national cohesion for Turkey proper, but also a justification for ultimate Turkish control of the ethnically Turkic areas of Central Asia.³⁷

Nor is the nation-state a static construction. Recently, the process of "minoritization" has accelerated as the transnational migration of workers and refugees has turned previously homogenous nation-states into multi-ethnic ones. Germany has recently changed the previously consanguineous criteria for citizenship and Japan is also facing challenges to their traditional ethnic homogeneity as a result of this trend in international migration.³⁸

B. A Brief History of National Group Rights

It is a premise of this article that any set of international legal principles responding to the process of national dissolution must address the issue of national group rights. Although national minority group rights as a form of wide-

37. *Id.* at 249-89.

38. See, e.g., Kinzer, *supra* note 6, at A8 ("A change in citizenship laws could prove a great social and psychological step for the country, by suggesting that Germans are moving, at least legally, toward acceptance of a multi-cultural society"); See also *Outsiders All*, *supra* note 6, at 36 ("very slowly doors are opening. Japan has accepted some 8,000 refugees over the past decade . . . Because of a shortage of labor, Japanese firms [though not the big ones] have hired a growing army of imported workers . . .").

spread legal protection have only developed recently, there are examples throughout history of religious, national, and other groups receiving rights *qua* groups.

Political rights in the Middle Ages in Europe were largely predicated on the social group or class to which an individual belonged. If an individual was of the nobility, clergy, warrior, or wealthy landed classes, his or her position in society was assured. Male members were able to represent their limited political rights in the equivalent of a Parliament.

As early as the 17th century, religious group rights were granted by treaties among states. The Treaty of Westphalia of 1648 granted religious rights to the Protestant minority in Germany.³⁹ The Treaty of Oliva of 1660 guaranteed the inhabitants of Pomerania and Livonia, ceded by Poland to Sweden, the enjoyment of their existing religious liberties.⁴⁰ Article 2(3) of the Treaty of Oliva required Sweden to "maintain all the rights, liberties and privileges which they have enjoyed . . . in the ecclesiastical or the lay domain."⁴¹ The Treaty of Ryswick of 1697 protected Catholics in territories ceded by France to The Netherlands,⁴² and the Treaty of Paris of 1763, entered into by France, Spain and Great Britain, protected Catholics in Canadian territories ceded by France.⁴³ Article III of the Convention of 1881 for the Settlement of the Frontier between Greece and Turkey provides that "[t]he lives, property, honour, religion, and customs of those of the inhabitants of the localities ceded to Greece who shall remain under the Hellenic administration will be scrupulously respected. They will enjoy the same civil and political rights as Hellenic subjects of origin."⁴⁴ Similarly, Article VIII of the Convention provided that:

Freedom of religion and of public worship is secured to Mussulmans in the territories ceded to Greece. No interference shall take place with the autonomy or hierarchical organization of Mussulman religious bodies now existing, or which may hereafter be formed; nor with the management of the funds and real property belonging to them. No obstacle shall be placed in the way of the relations of these bodies with their spiritual heads in matters of religion.⁴⁵

By the 19th century, group-rights expanded to include minority groups other than those which were purely religious. The 1878 Treaty of Berlin, for example, contained provisions protecting Turks, Greeks and Romanians under Bulgarian rule.⁴⁶ Minority group protections were institutionalized as part of the Swiss Constitution in 1789. Similarly, the British North America Act of

39. LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 7 (1991).

40. See FOUQUES-DUPARC, LA PROTECTION DES MINORITES DE RACE, DE LANGUE ET DE RELIGION 75-76 (1922). See also LERNER, *supra* note 39, at 39.

41. See FOUQUES-DUPARC, *supra* note 40, at 75-6.

42. LERNER, *supra* note 39, at 394.

43. *Id.*

44. M. HURST, KEY TREATIES OF THE GREAT POWERS 1814-1914 (1972), reprinted in P. THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 25 (1992).

45. *Id.* at 25.

46. *Id.*

1867 recognized the right to separate Protestant and Catholic schools in Quebec.⁴⁷

The first truly international system of minority protection developed after World War I with the establishment of the League of Nations⁴⁸ and the recognition by many countries that World War I had been precipitated, at least in part, by minority tensions in Eastern Europe. The system of minority rights protection under the League of Nations was based on a series of treaties addressing specific minority problems in Eastern and Central Europe. These treaties contained elements of Anti-Discriminatory, Developmental, and, arguably, even Affirmative Group Rights.

The Permanent Court of Justice, in the case of *Minority Schools in Albania*,⁴⁹ was asked to give an advisory opinion as to whether an amendment to the Albanian Constitution abolishing all private schools would violate the anti-discrimination provisions of the Albanian Declaration for the Protection of Minorities of October 2, 1921. The court noted that the treaties required "equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law." The court went on to state that "[e]quality in law precludes discrimination of any kind; whereas, equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations." The language of the court should be compared with that in *Plessy v. Ferguson*,⁵⁰ which was valid law for almost 20 years after the court's decision in *Minority Schools in Albania*.

The system of minority rights protection established by the League ceased to exist after the termination of the League's Charter in 1946.⁵¹ The underlying treaties also lost their force, principally through the tacit condition of *clausula rebus sic stantibus*.⁵² This rejection of the League's system of minority protections was due in part to the role minority rights played in the irredentist claims of Nazi Germany against Poland, Czechoslovakia and several other countries. In greater part, however, this abandonment of minority protections was due to the culmination of a philosophical shift that had been occurring since the Enlightenment. The American Declaration of Independence was written in terms of the self-evident truths regarding the individual.⁵³ Analogously, the Declaration of the Rights of Man, promulgated by the French Revolution as a new political and social covenant, was based on the assumption that each person

47. BRITISH NORTH AMERICA ACT §93(2). The British North America Act was superseded by the Constitution Act of 1982 which continued the recognition of rights to religious freedom, and added further provisions regarding rights to education in either French or English. See CONST. ACT part I, §§ 2, 15 & 23 (1982), reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1989).

48. LERNER, *supra* note 39, at 11-14.

49. *Minority Schools in Albania*, 1935 P.C.I.J. (ser. H/B) No. 64, (April 6).

50. See e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896).

51. See LERNER, *supra* note 39, at 14.

52. Because the League's Charter was terminated, the treaties that were based upon the existence of the League and its Charter lost their legal foundation.

53. See THORNBERRY, *supra* note 44, at 11.

possessed inalienable political rights and that those rights were equal to those held by all other individuals.⁵⁴

This individual-based approach to human rights has continued until the present and dominates almost all principal human rights declarations. The replacement of the League with the United Nations ushered in a new, universal system of rights based principally on the human rights of the individual, rather than those of the group.⁵⁵ A study by the United Nations Secretariat in 1950 concluded, with respect to the League of Nations system of minority protection that:

This whole system was overthrown by the Second World War. All the international decisions reached since 1944 have been inspired by a different philosophy. The idea of a general and universal protection of human rights is emerging. It is therefore no longer only the minorities in certain countries which receive protection, but all human beings in all countries.⁵⁶

The universal system of individual human rights established by the United Nations has slowly, reluctantly, and only partially incorporated the concept of group rights into its system of human rights protection. There are four examples of such group rights. First, the largely universally-recognized, at least normatively, protections afforded to individuals from state and private discrimination based upon their group affiliation ("Anti-Discriminatory Group Rights").⁵⁷ This includes the somewhat less widely recognized right of freedom from private expressions of hatred. Second, rights differentiating among groups in order to protect and maintain basic characteristics that distinguish them from the majority of the population ("Developmental Group Rights").⁵⁸ Third, rights distinguishing among groups within society for the purpose of ensuring the group's

54. Muldoon, *supra* note 34, at 38.

55. See, e.g., LERNER, *supra* note 39, at 14-15; see also THORNBERRY, *supra* note 44, at 385-87.

56. Study of the Legal Validity of the Undertakings Concerning Minorities, U.N. DOC E/CN.4/367, *quoted in* THORNBERRY, *supra* note 19, at 12.

57. Examples of Anti-Discriminatory Group Rights can be found in the Universal Declaration of Human Rights, the United Nations Charter, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

For example, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 2, § 1 provides that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

58. An example of Developmental Group Rights is provided in the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE: "The participating States will protect the ethnic, cultural, linguistic, and religious identity of national minorities on their territory and *create conditions for the promotion of that identity.*" (Emphasis added). DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE 12 (1990). Para. 33 of the 1990 Copenhagen Document (no publisher or date of publication listed): "Another example is provided by Article 59bis §2 of the Belgian Constitution, which states that the Community Councils, which consist of representatives of each Belgian cultural community, shall regulate all cultural matters in its own sphere."

adequate representation in the political system ("Political Group Rights").⁵⁹ Finally, those rights accruing to members of a non-dominant group in society for the purpose of advancing their participation in the socio-economic system ("Affirmative Group Rights").⁶⁰

To the extent that the major international human rights documents and treaties developed after World War II under UN auspices have referred to members of minority groups, it has generally rather been *qua* their status as individuals.⁶¹ This skepticism towards collective group rights should not be surprising, since such rights emphasize the existence of a "group" as a political, social and juridical entity independent from the individual and from society as a whole.⁶²

From a philosophical perspective, group rights challenge the concept of natural rights accruing to an individual. Some legal commentators argue that minority cultural rights are distinguishable from fundamental human rights in that human rights are universal to all individuals, whereas cultural rights are not.⁶³ Moreover, many commentators would argue that rights are, by definition, derivative of the individual.⁶⁴ Anti-Discriminatory Group Rights are a particularly appropriate example of such a proposition. Anti-Discriminatory Group Rights aim to prevent discrimination against an *individual* because of her membership in a particular group. That right is enjoyed by particular individuals, not groups. It may also be argued that the other group rights discussed herein are similarly derivative of the individual. The right to cultural development simply means that each individual has the right to enjoy the rights to free association and free expression in any manner she chooses, assuming no injury is incurred to others by her enjoyment of such rights, and even if the participation in such rights fails to support the cultural development of the dominant national group.⁶⁵ However, there are those who would argue that granting rights to a group necessarily violates the deontological nature of individual rights.

59. Political Group Rights may range from the mandatory inclusion of equal numbers of Flemish and Walloon members of the Belgian cabinet, discussed *infra*, to requirements that legislative districts be redistricted to provide black and Hispanic majority districts, also discussed *infra*.

60. An example of an Affirmative Group Right is UNITED NATIONS DECLARATION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION art. 2, § 2 which specifically calls on States Parties to implement such Affirmative Group Rights when appropriate:

States Parties shall, when the circumstances so warrant, take, in the social economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objective for which they were taken have been achieved. 660 U.N.T.S. 195, 5 I.L.M. 352 (1966).

61. See THORNBERRY, *supra* note 44, at 385-89; see also SIGLER, *supra* note 34, at 67.

62. See generally, THORNBERRY, *supra* note 19, at 12; THORNBERRY, *supra* note 44, at 118, 241.

63. See generally ANTHONY BIRCH, NATIONALISM AND NATIONAL INTEGRATION 53 (1989).

64. See TESÓN, *supra* note 13, at 127-52.

65. One type of developmental right that arguably is not derivative of the individual is when the state takes affirmative steps to develop a state's cultural identity reflecting that of the dominant national group. This issue arises most frequently when the state establishes an official language, but it may also arise where the state simply does not affirmatively provide certain institutions for na-

It is not within the scope of this article to determine whether group rights are truly deontological rights or simply derivative of those rights that only belong to the individual. Rather, the central thesis of this article is that the nation-state itself is likely to be violative of both individual human rights and fundamental group rights, whether or not ultimately derivative of the individual.

From a political perspective, Collective Group Rights may threaten the very concept of a unified state when bringing into question the allegiance of the state's minority groups. Minority groups would then be suspected of lacking loyalty to the dominant national group culture represented by the "nation-state." Such concerns have formed the principal basis of the objections in Romania, China, Serbia, and numerous other countries to the asserted Collective Group Rights of those states' minorities. This article assumes that this political objection is precisely the reason why the theoretical underpinnings of the state under international law need to be revised. Simple modification of the existing international legal recognition of the sovereignty of the nation-state would not be sufficient.

From a juridical perspective, group rights challenge, once again, the concept of the individual being the basic juridical unit of society. Group rights may also undermine the anti-discriminatory presumption of equality of all individuals before the law. The dominant majority may be concerned at seeing its own rights affected by the exercise of group rights by national minorities. Indeed, the Romanian Constitution has enshrined this very concern in Article 6(2): "The protective measures taken by the state to preserve, develop, and express the identity of the members of the national minorities shall be in accordance with the principles of equality and nondiscrimination in relation to the other Romanian citizens." Sometimes this unease takes the form of an arguably paternalistic judicial concern that the minority group's own rights could be deleteriously affected by such group rights.⁶⁶ For example, the insistence by many African-Americans on the Developmental Group Right to maintain institutions of higher learning that are predominantly African-American challenges the integrationist juridical perspective of the American judicial system, which, under-

tional minorities that it does for the dominant groups. In the case of Romania, this issue has arisen with respect to the government's refusal to provide a Hungarian language university along with Romanian language educational institutions. The failure of the government to take these affirmative steps, or its failure to recognize other languages, may not rise to equal protection violations under national or international law, but these are clearly impediments to a national minority's cultural development.

66. Recently the Supreme Court ruled, in *United States v. Fordice*, 112 S.Ct. 2727, 120 L. Ed. 2d 575 (1992), that Mississippi's higher-education system remained separate and unequal. The Court's decision raised concerns in the African-American community regarding its effect on predominantly black schools of higher education. See, e.g., William Raspberry, *Mississippi Quarterly*, THE WASHINGTON POST, Nov. 27, 1992, at A31 ("The question that all of Mississippi seems to be wrestling with these days is how to cure that segregation without doing further damage to the victims of the original segregation"); see also *Black Universities; Delta Blues*, THE ECONOMIST, Dec. 12, 1992, at 30. But c.f. Joseph T. Durham, *Quality over Racial Identification*, THE WASHINGTON POST, Dec. 13, 1992, at C6 ("As a black person who has spent more than four decades in higher education, I do not think it heretical to suggest that the state of Mississippi may not need all the institutions—black or white—that it now has").

standably, is still trying to eliminate the pestiferous remnants of *Plessy v. Ferguson*, the Supreme Court case upholding the doctrine of "separate but equal." As a consequence, the judiciary is still resistant to the idea that differentiation is possible without discrimination.⁶⁷

From a cultural perspective, the dominant national or linguistic group in a state may simply be unwilling to see its cultural dominance challenged. This article has already discussed many instances of this concern as expressed by the dominant national groups in the United States, Serbia, Burundi, Turkey, and other states.

This article continues to argue that at least some of the above-enumerated group rights are fundamental and necessary to foster the peaceful development of multi-ethnic states on a basis of non-coercion and mutuality. Currently, international law varies in its acceptance of these rights, ranging from a widespread recognition of Anti-Discriminatory Rights to a more hesitant embrace of other collective group rights. Y. Dinstein makes the following observation regarding the distinction between individual and collective rights:

Individual human rights (for example, freedom of expression or freedom of religion) are bestowed upon every single human being personally. Collective human rights are afforded to human beings communally, that is to say, in conjunction with one another or as a group - a people or a minority. It must be stressed that collective human rights retain their character as direct human rights . . . [which] . . . shall be exercised jointly rather than severally.⁶⁸

IV.

INTERNATIONAL LAW'S RECOGNITION OF GROUP RIGHTS

A. Anti-Discriminatory Group Rights

International human rights law is unambiguous in its condemnation of discrimination. The experience of World War II made the international community painfully aware of the extent to which an individual could be the victim of discrimination solely as a result of his or her status as a member of a minority group. Accordingly, principles of non-discrimination were promulgated specifically prohibiting discrimination on the basis of certain group characteristics such as race, color, sex, language, religion, national or social origin.⁶⁹ These Anti-Discriminatory Group Rights have raised relatively little controversy⁷⁰ because

67. This concern can also be observed in the U.S. Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993) (expressing concern about color-blindness), where the Court objected to recognizing race as a permissible consideration in any governmental action, from redistricting to affirmative action, even where the purpose of such action was to benefit groups traditionally discriminated against by the government itself.

68. *Id.*

69. See, e.g., UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 2, that states: "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."

70. See Kevin Boyle, *Preliminary Considerations*, in STRIKING A BALANCE 3 (Sandra Coliver ed., 1992); see also LERNER, *supra* note 39, at 24; McDougal, et al., *Human Rights and World Public Order*, in INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 801 (Myres S. McDougal &

they essentially extend the universally recognized individual human right of freedom from arbitrary discrimination to specific groups which might otherwise not be protected by that right.

The corollary to Anti-Discriminatory Group Rights, "Negative Group Rights," consists of those rights accruing to members of a dominant group in society for the purpose of ensuring the dominant group's exclusive or preferential enjoyment of certain civil, political, human, economic, and/or social rights. An example of such a negative group right would be the system of apartheid previously existing in South Africa.

The right of racial and religious groups to enjoy Anti-Discriminatory Group Rights is now so established that it reaches the status of *jus cogens*, a norm from which derogation is prohibited.⁷¹ However, the issue of extending Anti-Discriminatory Group Rights to migrant workers has only recently begun to receive recognition;⁷² similarly, the legal rights of gays and lesbians are currently only formally recognized in parts of Europe, Canada, and a limited number of other countries.⁷³ Nevertheless, the principle of non-discrimination is widely accepted as a part of international law, even if there is some uncertainty as to whom it should be applied.

The United Nations and the International Court of Justice have both stated that the systematic discrimination practice known as apartheid can result in severe sanctions imposed by the world community against the culpable political entity, including the withdrawal of its political recognition.⁷⁴ Article 1 of the

W. Michael Reisman eds., 1991) ("It would appear that a general norm of nondiscrimination, fully expressive of these policies, is rapidly emerging as an accepted prescription of international law"); THORNBERRY, *supra* note 44, at 311 ("The concept of non-discrimination, especially on grounds of race or ethnic group, has become, almost beyond argument, part of the 'law of the United Nations'"); see also Namibia Case, 1971 I.C.J. 16.

71. LERNER, *supra* note 39, at 24.

72. See, e.g. European Convention on the Legal Status of Migrant Workers, June 8, 1977, E.T.S. No. 93. See also ILO Convention (No. 97) Concerning Migration or Employment (revised), June 8, 1949, 120 U.N.T.S. 71; ILO Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 4, 1975, reprinted in ILO INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS [1919-1981] 11 (Geneva: International Labour Organization), 1982.

73. See, e.g., Mary Williams Walsh, *Canada Moving Swiftly to Guarantee Gay Rights*, S.F. CHRONICLE, Jan. 2, 1993, at A13; see also Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1991), (wherein the European Court of Human Rights held Ireland's anti-sodomy law to violate the European Convention for the Protection of Human Rights and Fundamental Freedom), 213 U.N.T.S. 222 (1953). The Council on Security and Cooperation in Europe (CSCE) has debated whether to include gays and lesbians as a protected group in its documents. Interview with Vinca Showalter, Staff Member of the Council on Security and Cooperation in Europe, in Washington, D.C. (Dec. 20, 1992). In the United States, the legal situation of gays and lesbians is much more uncertain. See, e.g., Dirk Johnson, *Gay-Rights Vote Challenged*, N.Y. TIMES, Nov. 15, 1992, at 20 (judicial challenge to the anti-gay rights measure passed by Colorado voters is discussed).

74. See Namibia Case, *supra* note 70, wherein the International Court of Justice held that South Africa's policy of *apartheid* rendered its mandate over Namibia illegal and stated that "to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter." *Id.* at 22. See also UNITED NATIONS DECLARATION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION OF 1963 art. 5, *supra* note 60.

International Covenant on the Suppression and Punishment of the Crime of Apartheid deemed the system a "crime against humanity" and "a serious threat to international peace and security."⁷⁵ States that derogate from the principle of non-discrimination should not be afforded the panoply of rights usually granted to a member of the world community of nations. Recognition, in its official and non-official forms, should, with certain limited exceptions,⁷⁶ be withheld by the member nations of the international community. The existence of national laws that protect individuals from private expressions of hatred varies considerably from country to country. Notwithstanding, international human rights instruments unequivocally support such rights. Article 20 of the International Covenant on Civil and Political Rights limits the freedom of expression provisions of Article 19 of that same covenant by stipulating that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. This position is reflected in the constitutions and laws of the majority of the world's nations.⁷⁷

The U.S. stance runs contrary to the general international human rights position since American courts have struck down statutes that prohibit "hate expression" unaccompanied by any otherwise illegal actions.⁷⁸ The United States government, when agreeing to adhere to the International Covenant on Civil and Political Rights, specifically exempted itself from the provisions that prohibit "hate speech."⁷⁹

To address the issue of whether a country sufficiently protects the fundamental rights of its minority groups from unreasonable manifestations of hatred requires a more complex analysis than a mere examination of the country's stat-

75. The International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 U.N. GAOR Supp. 75, U.N. Doc. A/9030 (1974), reprinted in McDOUGAL & REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE*, *supra* note 70, at 796.

76. For example, to ensure world public order, it may be desirable for a state to remain a member of the United Nations or another international institution in order for the international community to exercise pressure on that state.

77. See generally Sandra Coliver, *Hate Speech Laws: Do They Work?*, in *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION* 363-73 (Sandra Coliver ed., 1992).

78. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), in which the Supreme Court struck down a St. Paul, Minnesota hate crime law as unconstitutional. The Supreme Court will hear an appeal to *State v. Mitchell*, 485 N.W. 807 (1992), later this year which addresses the constitutionality of a Wisconsin statute that enhances prison sentences for crimes that were motivated by racial hatred or bigotry. The statute at issue in *R.A.V. v. City of St. Paul* differs from that in *Mitchell* in its proscription of actions which were not in themselves otherwise crimes.

The Wisconsin statute is representative of similar hate crime statutes in California, Idaho, and several other states. See, e.g., Idaho Code §§ 18-7902, 18-7903 (1992). Such statutes define and impose criminal and civil penalties for "malicious harassment," which consists of threats "with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry, or national origin . . . by word or act . . ." Idaho Code § 18-7902. The penalties for "malicious harassment" in Section 18-7903 "do not preclude victims from seeking any other remedies, criminal or civil, otherwise available under law." Idaho Code § 18-7903.

79. The United States position appears to have been a principled one. Even the International Human Rights Law Group, hardly a quiescent party with respect to actions by the United States government on human rights matters, did not object to that specific exception. Interview with Janelle Diller, Legal Director, International Human Rights Law Group, in Washington, D.C. (Jan. 25, 1992).

utory law. A country where the rule of law is arbitrary can make a mockery of its protective laws. In Romania, for example, Article 30(7) of the country's Constitution provides that "the law prohibits provocation . . . to ethnic, racial, class or religious hatred[.]" Yet that very clause was used by the ethnic Romanian mayor of Cluj to prohibit a meeting of ethnic Hungarians in the city on the basis that the meeting would violate Article 30(7) by inciting hatred against ethnic Romanians. Similar tactics have been used by the South African government against the victims of its system of apartheid.

B. International Law's Recognition of Developmental, Political and Affirmative Group Rights

As discussed above, international law recognizes a number of Developmental and Political Affirmative Group Rights ("Fundamental Group Rights"). These Fundamental Group Rights are those rights that are essential for the continued existence of the identity and well-being of the group. Which group rights are fundamental is a highly controversial issue, particularly since group rights in general raise a number of philosophical, political, juridical, cultural, and practical problems.

The discussion below will address in greater depth some of these concerns and explore which Collective Group Rights should be viewed as fundamental. The section begins with an analysis of the traditionally special status of "pre-existing nationalities," which are national minorities that existed prior to the imposition of political jurisdiction over them by a governing state. After addressing these issues, the article focuses on how countries instituted various forms of Internal National Accommodation to resolve the conflicting rights and discusses the overarching international legal framework for group rights protection.

1. Pre-Existing Nationalities, Indigenous Peoples and Immigrants

The juridical status of minorities who occupy a territorially distinct region of a country and who never consented to the imposition of political rule by the dominant national group has traditionally differed from that of other minority groups, i.e., voluntary immigrants. The term "pre-existing nationalities" is used since the territorially distinct national group almost always preceded the political structure imposed by the dominant national group in question (although not necessarily the dominant national group itself). International law has taken the position that these "pre-existing nationalities" may possess certain pre-existing rights attendant to autonomous cultural development not possessed by other minorities.⁸⁰ The term "pre-existing nationalities" would, by definition, include indigenous peoples and any other pre-existing national or minority group, i.e., the Hungarian minority in Romania, the Basque and Catalan minorities in Spain,

80. Anthony Birch, for example, argues that "secession might well be thought justifiable if the region had originally been included in the state by force and its people had displayed a continuing refusal to give full consent to the union." BIRCH, *supra* note 63, at 64.

and the Tibetan minority in China.⁸¹ As later pointed out, the traditional legal distinctions among pre-existing nationalities, indigenous peoples, and voluntary immigrants is empirically and normatively suspect.⁸²

The Organization for Security and Cooperation in Europe (OSCE) has recognized the particular status of national minorities, providing in Paragraph 33 of the 1990 Copenhagen Document that:

The participating states will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and *create conditions for the promotion of that identity* (emphasis added).⁸³

Furthermore, paragraph 35 provides that:

The participating states note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.⁸⁴

In many respects, the rights of pre-existing nationalities under international law are converging with those enjoyed by indigenous peoples. To some extent, the definitional scope of "indigenous peoples" has been progressively expanded from one applying principally to subjects of Western colonialism⁸⁵ to one that would encompass many national minorities throughout the world. The General Conference of the International Labor Organization's (ILO) Proposed Convention Concerning Indigenous & Tribal Peoples in Independent Countries demonstrates the broad application of the term:

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

81. In Transylvania, for example, the Hungarian and Romanian nationalities existed side by side for approximately one thousand years, and the Romanians probably preceded the Hungarians since they were of Roman derivation, yet the establishment of Romanian *political* control over the Hungarians in Transylvania dates only from the end of World War I.

82. For example, even a country whose population consists of a majority of voluntary immigrants may face many of the same issues as one which is composed of pre-existing nationalities. First, if one defines the dominant nationality of the United States, for example, not as English, but as Northern European, then the United States looks much more like a nation-state. Its laws prohibiting non-whites from becoming citizens and the cultural emphasis on assimilating immigrants of non-Northern European background into a Northern European cultural mold suggests that the United States shares many of the same problematic issues in identifying the state with a particular nation as traditional nation-states such as France, Germany or Japan. Moreover, the periodic outbreaks of American nativism suggest that there is an apparently identifiable dominant American national group, leading many members of that dominant national identity to challenge any perceived threats to it, however illusory or even hallucinatory. See Lori A. McMullen & Charlene R. Lynde, *The "Official English" Movement and the Demise of Diversity: the Elimination of Federal Judicial and Statutory Minority Language*, 32 LAND & WATER L. REV. 789, 790 (1997); Juan F. Perea, *Demography and Distrust: an Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 285-86 (1992).

83. DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE (1990).

84. *Id.*

85. See THORNBERRY, *supra* note 44, at 332.

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.⁸⁶

Thus, under Paragraph (b) of the ILO Proposed Convention, the Hungarian minority living in Romania could be considered indigenous since they descended from a population which inhabited the Transylvanian region of Romania before the "establishment of [the] present state boundaries" of Romania and they "retain some or all of their own social, economic, cultural and political institutions." To the extent that the definitional distinctions among pre-existing nationalities, indigenous peoples, and voluntary immigrants has become blurred, it provides support under international law for the juridical recognition of all minority national groups, whatever their origin. As discussed previously, the juridical recognition of minority national groups is incompatible with the definition of the nation-state as the juridical embodiment of the dominant national group.

The perspective of international human rights law with respect to indigenous people, and all pre-existing nationalities by analogy, is shifting from a focus on assimilation to one of autonomous development.⁸⁷ The Working Group for Indigenous Populations of the U.N. Sub-Commission on prevention of Discrimination and Protection of Minorities has been working on a Draft Declaration on Indigenous Rights to be proclaimed by the U.N. General Assembly.⁸⁸ The Draft recognizes indigenous peoples' right to a collective existence, employs the language of respect for indigenous identity and institutions, recognizes the cultural contributions of the groups to the common heritage of humankind, and their distinctive spiritual and cultural relationship to land. The Draft also implements Developmental Rights, urging States to contribute to the maintenance of indigenous identity, self-management by the groups, and "ethno-development."⁸⁹

In many respects, the theory of the state advanced in this article would render moot the distinction among pre-existing minorities and ethnic minorities resulting from immigration. To the extent the state is no longer the juridical embodiment of the dominant national group, there is no reason why the ethnic rights of national minorities should ever be made subservient to those of the dominant national group, regardless of the origin of the national minority.

86. *Id.*

87. See generally THORNBERRY, *supra* note 44, at 353, 380. See also Council of Europe, Framework Convention for the Protection of National Minorities, 34 I.L.M. 1995; G.A. Res. and Decl. on the Rts. of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, 32 I.L.M. 911, 914 (1993); Czaba K. Zoltani & Frank Koszorus, Jr., *Group Rights Defuse Tensions*, 20 FLETCHER F. WORLD AFF. 133, 141 (1996).

88. THORNBERRY, *supra* note 19, at 18.

89. *Id.*

2. Developmental Rights and Language

The most contentious developmental group right by far is the right of a national minority to speak its own language in an official capacity. The practical problems associated with a multitude of languages in a single state⁹⁰ help explain the contradictory manner in which the international human rights community has treated different states with respect to their language policies.⁹¹ For example, Romania provides autonomy and group rights for their minority groups that surpass those granted to minorities in the United States, Japan, or Germany.⁹² Yet, Romania has been frequently attacked for, *inter alia*, its human rights record with respect to the language rights of minority groups.⁹³

The international community appears to make a distinction between countries with pre-existing nationalities and those without. In countries with pre-existing nationalities, efforts to impose a national language are perceived as techniques of assimilation, while similar efforts in countries without a substantial pre-existing nationality are seen as necessary means to promote state cohesiveness.

90. State provision of autonomous linguistic institutions, particularly schools, can entail significant financial, logistical, and other consequences for the larger society, in addition to unintended consequences for the groups intended to be protected. For example, if primary education is to be provided by the state in a minority group's native language, it could create problems for those students when they attempt to attend national institutions of higher learning that are usually conducted in the official state language. See, e.g., *Ruling Classes*, THE ECONOMIST, Jan. 9, 1993, at 34, wherein the author discusses the problem facing parents of children graduating from Tibetan language primary schools only to face tough competition for placement in Chinese language universities. Birch discusses the possibility of an "ethnic trap" if schools are "expected to provide courses in minority languages and cultures if it seem[s] likely than one overall effect of such courses would be to make it more difficult for the students to attain equality in the economic sphere." BIRCH, *supra* note 63, at 60.

91. Urmila Haksar has summarized the comments of Mrs. Eleanor Roosevelt, the chairman of the committee responsible for drafting the Declaration, in the following way: "[u]nless all citizens of a given country could speak the same language, there was the danger that public order might be disrupted" URMILIA HAKSAR, MINORITY PROTECTION AND THE INTERNATIONAL BILL OF HUMAN RIGHTS 17 (1974).

92. The Hungarian minority currently enjoys the right to separate classes in the Hungarian language for its pre-college age students. The Hungarian minority in Romania has nevertheless demanded the reopening of all Hungarian language schools closed in the last 40 years, from primary school to college level, and that entirely separate Hungarian schools (as opposed to classes) be provided to the Hungarian minority. The Hungarian minority has, quite plausibly, looked to international human rights instruments incorporated in the Romanian Constitution to support its demands, and has generally been supported in its efforts by the international human rights community.

In China, autonomous regions are provided for minorities in five regions of the country which do in fact provide considerable autonomy (even as China's overall human rights record ranks among the worst in the world). See CHARLES HUMANA, WORLD HUMAN RIGHTS GUIDE 72-75 (1992). In Tibet, for example, grade school education is provided in Tibetan and funded by the state. See *Ruling Classes*, THE ECONOMIST, *supra* note 90.

93. Gary Matthews, Deputy Assistant Secretary for Human Rights and Humanitarian Affairs, Statement before the Subcommittee On Human Rights and International Organizations of the House and Foreign Affairs Committee (1985) ("We have privately told Romanian officials for years that we are in earnest about human rights, and that human rights abuses resulting from policy or irresponsible acts by local officials are a serious matter which strain the capacity of the United States to maintain good relations.") as cited in Marietta Galindez, Using Constitutional Law and International Law to Vindicate the Rights of Linguistic Minorities Living in the United States from English Only Legislation in the American Forum 27 (unpublished manuscript) (on file with author).

This distinction, however, does not usually reflect reality. For instance, the United States has historically been one of the greatest critics of Romania's efforts to institute a national language.⁹⁴ The United States, however, has failed to recognize its own obligation under international law to protect the Fundamental Developmental Rights of its own pre-existing nationalities to language development. The United States is home to Spanish-speaking, Hawaiian, and indigenous populations that resided in the current territory of the United States before the country asserted its sovereignty over those populations. In fact, Hawaii enshrines indigenous language rights in its state constitution.⁹⁵ Despite the existence of these Pre-Existing Nationalities, various U.S. states and the federal government have undertaken legislative efforts to deny the rights of these minority groups to speak their native languages.⁹⁶ Moreover, the courts have generally been unreceptive to the argument that these laws violate the rights to equal protection and non-discrimination, although they may be more amenable to the argument that they violate the rights of language minorities to free speech.⁹⁷ In part, this attitude of U.S. courts may be reflective of the greater emphasis placed in U.S. jurisprudence on absolute rights of free speech versus the more attenuated protection afforded to minorities of freedom from discrimination based on language.⁹⁸

Despite the presence of pre-existing nationalities in the United States and other countries in the Western Hemisphere, the process by which the American "nations" were themselves created could, in part, account for this seemingly inconsistent approach to language rights. The United States itself was forged out of immigrants who spoke a multitude of languages. While there is ample historical evidence that languages other than English were used in official government documents in the early period of the United States' existence,⁹⁹ English has been generally viewed throughout U.S. history as a *sine qua non* of the creation of the American nation-state itself. The on-going debate over bilingual education¹⁰⁰ in the United States illustrates the importance many Americans,

94. *Id.*

95. Section 11-3 states: "English and Hawaiian are the official languages of Hawaii. Whenever there is found to exist any radical and irreconcilable difference between the English and Hawaiian version of any of the laws of the State, the English version shall be held binding. Hawaiian shall not be required for public acts and transactions." HAW. REV. STAT. ANN. §§ 1-13 (Michie 1997).

96. See, e.g., ARIZ. CONST. art. 28 (1989).

97. See *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1075 (1997), *vacated*, 69 F.3d 920 (9th Cir. 1995).

98. *Hernandez v. New York*, 500 U.S. 352 (1991).

99. See generally Juan F. Perea, *Demography & Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 285-286 (1992); Lori A. McMullen & Charlene R. Lynde, *The "Official English" Movement and the Demise of Diversity: The Elimination of Federal Judicial and Statutory Minority Language*, 32 LAND & WATER L. REV. 789, 790 (1997).

100. See EFCHER RHOODIE, *DISCRIMINATION IN THE CONSTITUTIONS OF THE WORLD* 203, 256 (1984) (author argues that bilingual instruction "has delayed or actually prevented the acquisition of sufficient competency in English to compete in the job market").

including some members of the minority groups in question, place on a unifying national language.¹⁰¹

Those supporting limited linguistic group rights in the United States presuppose a concept of the U.S. nation as one which is, or should be, linguistically homogenous. In fact, as noted above, there is no historical or constitutional justification for considering English as the sole language of the American nation. Nor is there a practical justification for such a limitation.¹⁰² There is little or no evidence that contemporary linguistic minorities in the United States, including native Spanish speakers, are demonstrating any greater reluctance to function in English than their predecessors.¹⁰³ Moreover, and perhaps more importantly, the requirement of linguistic assimilation is not even a practical necessity. The European Union is a dramatic example of an emerging regional structure accommodating numerous linguistic groups while still performing many of the economic and political functions of a single state. As discussed earlier in this article, Switzerland does the same, albeit on a much smaller scale.

A rule for which developmental group language rights should be considered fundamental could therefore be suggested that would require states to respect the rights of linguistic minorities in schools and other cultural institutions to their own language and to provide other means for pre-existing nationalities to function in society in their own language. France's recent efforts to revive its regional languages indicate that national minority language rights may not be so impracticable, even for a centralized country such as France.¹⁰⁴ The failure to do so not only violates principles of fairness, but can actually precipitate External National Dissolution. The *Economist*, for example, has suggested that the failure of the Sinhalese to provide Tamil language rights was directly attributable to the present civil war. The article further contends that "new countries in the former Soviet Empire, [are] now making mistakes similar to those Sri Lanka made after [its] de-colonization."¹⁰⁵ Other international law commentators have made similar arguments.¹⁰⁶

101. See, e.g., Mary Cuadrado, *Throw Away the Crutch of Bilingual Education*, N.Y. TIMES, Jan. 21, 1993, at A24 (author, Adjunct Assistant Professor of Sociology at John Jay College of Criminal Justice, argues that "[s]uccess here and in most quarters of this country depends on one's ability to be fluent in English"). But see Kenneth Kimerling, *Essential to Progress*, N.Y. TIMES, Jan. 21, 1993, at A24 (author, General Counsel to the Puerto Rican Legal Defense and Education Fund, contends that "[n]ot only are bilingual education programs essential to the progress of limited-English proficient students, but also the majority of experts agree that children in these programs are more successful in school than children enrolled only in English as a second language course").

102. See, e.g., Michael Di Chiara, *A Modern Myth: the Necessity of English as the Official Language*, 17 B.C. THIRD WORLD L.J. 101, 102 (1997).

103. HAKSAR, *supra* note 91, at 47-8.

104. See, e.g., Marlise Simons, *A Reborn Provençal Heralds Revival of Regional Tongues*, N.Y. TIMES, May 3, 1993, at A1 ("With English galloping across the Continent and a uniting Europe trying to brush away boundaries, the Government has concluded that France's regional languages enrich the national heritage rather than pose a threat to the country's identity").

105. See *Sri Lanka's Violence*, THE ECONOMIST, May 8, 1993, at 22.

106. See, e.g., Csaba K. Zoltani and Frank Koszorus, Jr., *Group Rights Defuse Tensions*, 20 FLETCHER F. WORLD AFF. 133 (1996).

The current international standard for Developmental Group Rights is articulated by Article 27 of the International Covenant on Civil and Political Rights:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Nevertheless, the beneficiaries of the rights contained in Article 27 are the individual members of the minority groups and not the groups themselves.¹⁰⁷ Furthermore, Article 27 contains no definition of the term minority, and even leaves open the opportunity for states to deny that "ethnic, religious or linguistic minorities exist" in their countries.¹⁰⁸ The rights recognized in the Article are vague—it simply prohibits certain actions against individuals and creates no affirmative obligations or Collective Rights.¹⁰⁹ The ambiguity in Article 27 was not inadvertent. The Article was only accepted by the international community because it was couched in the wording of individual rights and not of Collective Rights.¹¹⁰

Other international bodies have also taken measures to grant linguistic group rights. In 1993, the Council of Europe adopted Recommendation 1201¹¹¹ and, in 1995, it opened for signature the Framework Convention for the Protection of National Minorities.¹¹² In 1992, the United Nations General Assembly adopted the Declaration of the Rights of Persons Belonging to National Ethnic, Religious or Linguistic Minorities.¹¹³ It is not legally binding on UN Member States, but further establishes an international standard based largely on Article 27 of the ICCPR.¹¹⁴

Arguably, Developmental Group Rights may have to consist of more than simply the right of a group to be free from interference with its cultural development. Developmental Group Rights may require an affirmative obligation on

107. See Alain Fenet, *Minorities in the Order of Law*, in *MINORITY PEOPLES IN THE AGE OF NATION-STATES* 40 (Gerard Chaliand ed., 1989).

108. For example, many Latin American nations have made the claim that Article 27 only applies to certain regions of the world, of which Latin America is not one. See THORNBERRY, *supra* note 19, at 14, wherein the author cites a Chilean UN representative making the claim that the Article was "neither general in scope nor universal in application . . . and pertained only to certain regions of the world." France made a formal declaration that "Article 27 is not applicable so far as the Republic is concerned." Human Rights, International Instruments, Signatures, Ratification, Accessions, etc., U.N. Doc. ST/HR/4/REV.4, *reprinted in id.*, at 14-15.

109. *Id.* At least one commentator has argued that "minority Rights are not promoted by [Article 27]." SIGLER, *supra* note 34, at 79.

110. See Fenet, *supra* note 107, at 40.

111. Recommendation 1201, On an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, EUR. PARL. ASS. DEB. 44th Sess. 1201 (Feb. 1, 1993), as cited in Marietta Galindez, *Using Constitutional Law and International to Vindicate the Rights of Linguistic Minorities, Living in the United States, from English Only Legislation in the American Forum* (1998) (manuscript at 23, on file with the author).

112. Council of Europe, Framework Convention for the Protection of National Minorities, 34 I.L.M. 351 (1995) as cited in Galindez, *supra* note 111.

113. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 47th Sess., U.N. Doc. A/RES/47/135, DPI/1335 (1992).

114. See Galindez, *supra* note 111, at 24.

the part of a state to help guarantee those rights. To illustrate, the Norwegian Parliamentary Committee investigating the applicability of Article 27 to the Developmental Group Rights of the Sami people of Scandinavia made the following observation:

Protection of minorities is not primarily a question of assuring the minority a living standard comparable to that of the majority population. Crucial for the protection of a minority is the protection of its culture. The minority must get necessary means to maintain and transfer to new generations its own culture. It is not enough that the members of a minority as individuals are given a fair living standard from an economic point of view. If their unique culture is extinguished, they will cease to exist as a people.¹¹⁵

If only individual human rights are guaranteed by a state, there is every reason to expect the assimilation of a particular minority group's identity into that of the majority. The continued viability of a minority group can only be assured if a substantial number of the group is free to develop culturally in an autonomous fashion from that of the majority.¹¹⁶ The concept of autonomous cultural development strikes the majority of states in the world as dangerous since the modern state is based on the traditional concept of the nation-state. Since one of the principal purposes of a state is to provide protection for its inhabitants, that protection should apply equally to all people living within it, minorities and majorities alike.¹¹⁷

3. Fundamental Political Group Rights

Article 25 of the International Covenant on Civil and Political Rights states the every citizen shall have the right, without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage . . . guaranteeing the free expression of the will of the electors[.]¹¹⁸

Nevertheless, genuine and free elections may not be sufficient to protect minority groups from the tyranny of the majority. Arthur Lewis, in his book *Politics in West Africa*,¹¹⁹ discusses the problems associated with majority rule in tribal dominated societies in Africa and argues that coalition governments are essential in West African tribal-based governments, since otherwise entire tribes would be deprived of the economic, political, and other such benefits of govern-

115. See HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 375 (Abdullahi Ahmed An-Na'im ed., 1992).

116. For the Hungarian minority in Romania, remedial integration is not even an issue. The conflicts over group rights center around Hungarian demands for separate schools and the ability to conduct their lives entirely in the Hungarian language.

117. This assertion is in fact at the heart of one of the controversies over the meaning of "all peoples" in Article 1(1) of the International Covenants, which states that "All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."

118. See also UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 21, containing a similar provision.

119. See W. ARTHUR LEWIS, *POLITICS IN WEST AFRICA* 78 (1965).

ment.¹²⁰ Without a coalition government, the losing party or tribe will seek power through undemocratic means.

This principle is obviously not limited to Africa. The polarization of Belgian society between its Walloon and Flemish communities hindered Belgium from democratic development until the country integrated Walloons in governmental decision-making. This was achieved despite the fact that the Flemish were the majority and could have completely dominated the government.¹²¹ The Constitution was ultimately designed to provide for a fifty-fifty parity between Walloon and Flemish Ministers.¹²² Similarly, The Netherlands faced deep divisions among Catholics, Protestants, and non-religious Socialists residing in the country.¹²³ The Netherlands developed a policy of cooperation among the different segments of society, ensuring that no one segment felt completely detached from the political process.¹²⁴

In the United States, the post-World War II civil rights debate has, until recently, been principally centered around ensuring individual equality before the law through integration.¹²⁵ The principle of political equality before the law has, however, led the Supreme Court to interpret the Voting Rights Act of 1965 (as amended)¹²⁶ as requiring that districts be reapportioned to ensure that racial minority voters be fairly represented.¹²⁷

These rulings only provide a very limited form of group rights, although they do recognize the political rights of groups *qua* groups. They are designed to eliminate the lingering effects of slavery and racism and thus are more anti-discriminatory in effect than reflective of a group rights jurisprudential approach.

120. *Id.* at 51, 65.

121. For example, 12 of the last 13 governments have been led by a Fleming. See MINORITY RIGHTS GROUP, MINORITIES AND AUTONOMY IN WESTERN EUROPE 20-22 (London: Minority Rights Group, 1991).

122. See BELGIAN CONST. art 86bis which provides: "[W]ith the possible exception of the Prime Minister, the Council of Ministers comprises an equal number of French-speaking and Dutch-speaking ministers."

123. See generally MINORITY RIGHTS GROUP REPORT, *supra* note 121, at 27-30.

124. *Id.*

125. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1953), wherein the Supreme Court held that, at least in the "field of public education, separate but equal has no place." *Id.* at 494. The Court repudiated the segregationist doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld a Louisiana statute barring persons from occupying railroad cars other than those to which their race had been assigned.

126. The Voting Rights Act of 1965, as amended, is based on Congress's power to enforce the Fifteenth Amendment and its constitutionality was upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), in which the Court held "as against the reserved powers of the states, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324.

127. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982) (Court held that evidence of discriminatory effect was sufficient to render a reapportionment plan invalid and that the form of at-large, county-wide elections for county commissioners in Burke County, Georgia, was unconstitutional). See also *Connor v. Finch*, 431 U.S. 407 (1977) (Court held that the district court's reapportionment plan impermissibly diluted black voting strength in Hinds County, Mississippi by unnecessarily fragmenting black population concentrations in the city of Jackson).

Clearly, it is difficult to arrive at a universal rule for what constitutes a Fundamental Political Group Right. A simple, albeit vague rule, would be that the elections must, to a significant degree, permit the *entire* electorate to play a meaningful role in public affairs and the political process. To the extent the political system does not effectively permit representation of a minority group, it does not reflect the “will of the people”¹³⁰ and is therefore contrary to the fundamental political rights of members of the minority group.

4. Fundamental Affirmative Group Rights

International human rights instruments permit the existence of Affirmative Group Rights so long as they are not maintained “after the objective for which they were taken has been achieved.”¹³¹ Having established that Affirmative Group Rights are *permitted* under international human rights law, the issue arises as to whether such rights are Fundamental Collective Rights.

Since international human rights law neither prohibits nor requires such national policies, the issue can only be resolved on a nation-by-nation basis, particularly since each nation's experience with the various beneficiaries of Affirmative Group Rights varies in significant ways. For example, it could be argued that affirmative action may be morally required in the United States where the judicial system and all branches of government themselves played a role in maintaining the institutions of slavery, segregation, and indigenous oppression. It would also seem to be justified in India, where the problems with the untouchables are of a pervasive nature.

A number of nations have recognized this principle, including Malaysia, India, Pakistan, Philippines, and Canada.¹³² Section 15(2) of the Canadian Charter of Rights and Freedoms, Part One of the 1982 Constitution, specifically exempts Affirmative Group Rights from the non-discrimination provisions contained elsewhere in the Charter. India has also instituted a wide range of affirm-

128. In India, the Constitution has effectively guaranteed the untouchable caste 77 out of 522 seats in its legislative body. In New Zealand, the Constitution has reserved four out of 80 seats for the Maori. CLAIRE PALLEY, *CONSTITUTIONAL LAW AND MINORITIES* 16 (1978).

129. *Id.* Under this system, a certain number of seats are reserved for each national or ethnic group, but citizens vote in common, requiring a certain degree of support from other communities.

130. See UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 21 ("the will of the people shall be the basis of the authority of government").

131. See INTERNATIONAL COVENANT ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION art 2, § 2.

132. See generally RHOODIE, *supra* note 100, at 71-83.

ative action programs to assist the advancement of untouchables and other disadvantaged minority groups in society.¹³³

Contrary to the trends in other countries, U.S. courts have increasingly struck down Affirmative Group Rights.¹³⁴ The position of U.S. courts is all the more surprising given the prominent role the judicial branch played in perpetuating the very institutional racism that Affirmative Group Rights are designed to remedy.¹³⁵

Nevertheless, it would be difficult to find affirmative action principles, which are "fundamental" in the sense the term is used in this article, although such policies may be indicia of a country's good faith efforts at seeking Internal National Accommodation of its minority conflicts. In other words, it is possible that a country could accomplish Internal National Accommodation without granting specific Affirmative Group Rights. In countries with long histories of state and institutional racism or caste and social discrimination, that assumption is open to increased doubt.

V.

A REVISED THEORY OF THE STATE AND ITS IMPLICATIONS FOR THE RIGHT TO SECESSION

As indicated above, contrary to some commentators work, this article does not specifically propose a theory of secession.¹³⁶ The theory contained herein does, however, contain implications for the right to secession. The revised theory of the state proposed herein would suggest that the international community should respect the sovereignty of the parent state *unless* the parent state fails to respect the Fundamental Group Rights of the secessionist minority group, and the secessionist minority itself complies with international standards of conduct and human rights. The principal circumstance in which the revised theory of the state proposed in this article would be tested is in the case of a minority group attempting to secede from the parent country. As amply demonstrated in Bosnia, Kosovo, Sri Lanka, and the former Soviet Union, these secessionist efforts are currently among the greatest sources of instability in the post-Cold War world. The new theory of the state proposed in this article would have two principal consequences. First, the conceptual separation of the nation and the

133. *Id.* at 78-80.

134. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

135. *See, e.g.,* *Scott v. Sanford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

136. *See* BIRCH, *supra* note 63, at 53. Birch has suggested four situations in which secession is justified, at least from a "liberal" perspective: (1) the situation where a region had been originally included by force and the people had never given their consent to that occupation (closely related to the concept of pre-existing nationalities discussed above); (2) if national governments fail to protect "the basic rights and security of the citizens of the region;" (3) if the political system of the country fails to "safeguard the legitimate political economic interests of a region" (such a failure to safeguard the political and economic interests must consist of a systemic distortion of normal economic patterns such as that which occurred in East Pakistan prior to the creation of Bangladesh); (4) if national governments ignore or reject an explicit or implicit bargain between regions. The normative approach used by Birch is helpful in exploring the various justifications that may exist for a group's secession, but it does not address the realm of the possible, at least under international law.

state would render the secession of a national minority less important, particularly if the seceding national minority remains connected to supranational bodies that assume many of the traditional functions of the state. For example, were the Walloon minority in Belgium to secede, the economic, military, and social consequences would be relatively minor, assuming that the new state continued to belong to NATO and the European Union, and it recognized the Fundamental Group Rights of the new Flemish minority. The Euro would remain the official currency, NATO would still provide for defense, and the European Union would continue to be the primary economic market and provide, along with the Council of Europe, the juridical human rights protections of all individuals and groups in Wallonia. To the extent that the two principal nationalities of Belgium have already co-existed with extensive autonomous national development, the social dislocation and change in everyday life would be relatively minor.

This devolutionary process is currently taking place in the United Kingdom, as well as other countries within the European Union. As the *Economist* observed in late 1999, "Britain [has] launched a daring experiment in devolution. For the first time since 1707, the Scots now have their own Parliament in Edinburgh, and the Welsh their own national assembly in Cardiff."¹³⁷ The same article observes that "A state that has been highly centralised is passing power downward (to regions and nations such as Scotland, Wales and Northern Ireland), sideways (to the Bank of England . . .) and upward (to the European Union)."¹³⁸ As Scottish writer Susan Dagherly notes, "[I]f Westminster's importance wanes, Brussels will become the axis for a federation of regions ranging from Scotland in the north to Catalonia in the west and Estonia in the east."¹³⁹

This casual approach to secession is quite different from that presently existing under international law. No widely accepted international human rights treaty or document gives minorities within a sovereign nation the right to secede from the parent nation.¹⁴⁰ Even in exceptional circumstances, such as those existing in Yugoslavia where the Serb national majority committed abominable crimes against the Albanian minority, the implicit embrace by NATO countries of the Albanian claim for independence has been greeted with widespread skepticism as to the legitimacy of the claim under international law. To the extent the NATO war against Yugoslavia has, in fact, created a new rule of interna-

137. *Undoing Britain*, THE ECONOMIST, Nov. 6, 1999, at 3 (the author notes that the Union Jack "reminds Britons that they are not so much a nation, and certainly not an ethnic nation, as a political union of separate nations").

138. *Id.* at 5.

139. *Federalism Will Hold the Union Together* (Evening News Scotland, Nov. 3, 1999).

140. See, e.g., Fenet, *supra* note 107, at 39. See also SIGLER, *supra* note 34, at 78 (secession is not actually condoned by international law; the dismemberment of a state is not a right). For an insightful analysis of self-determination under human rights law, see Lung-Chu Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198 (W. Michael Reisman & Burns H. Weston eds., 1976), wherein the author argues that a reappraisal of our approach to self-determination is warranted: "The crucial test in granting or rejecting a claim for self-determination is greater approximation to the goals of human dignity, considering the value impact not only upon the aspiring group directly involved, but also upon the existing entity of which it is a part and the surrounding larger communities, including the global community." *Id.* at 244.

tional relations, that rule has not yet been incorporated into customary and positive international law.

Article 1, para. 2 of the United Nations Charter refers to "the principle of equal rights and self-determination of peoples[.]"¹⁴¹ Analogously, Article 1 of the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights both commence with the statement that "all peoples have the right of self-determination." Yet, the term "peoples" has universally been construed so as not to include minorities within its definition.¹⁴² In practice, the "right of self-determination" has been interpreted by the international community as the right of colonized peoples to gain independence from the Western parent country,¹⁴³ not the right of minorities to secede from a parent country.¹⁴⁴ One commentator has even concluded that "perhaps the truth is that self-determination has little to do with human rights."¹⁴⁵

It should not be surprising that the principal international human rights treaties deliberately excluded the principle of minority self-determination. States have traditionally refused, outside of colonialism, to accept a principle that would threaten their universally recognized right to virtually absolute territorial integrity.¹⁴⁶

Second, the recognition of a national group under international law, as opposed to a *nation-state*, means that under the revised theory of the state proposed herein, "sub-minorities" should have greater recognition of their rights under international law than they presently enjoy. This is critical because the process of national dissolution and reformulation may result in a new nation-state which is more intolerant of the minorities living within it than was the original multinational parent state. A secessionist movement is usually driven by nationalism and an attempt to create a new "nation-state" based on the national identity of the seceding minority. The problem with this process is that once one accepts the premise that the "nation-state" is the fundamental unit of the world community, there is no end to the process. It is difficult to prevent further subdividing

141. See U.N. CHARTER art. 1, para. 2.

142. But see THORNBERRY, *supra* note 44, at 216-17, wherein the author advances the argument that a self-determination movement should comprise both minorities and majorities. The author concludes, however, that "[i]t is probably in advance of the opinions of most State Parties." *Id.*

143. See Declaration of the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960), which has been widely regarded as embodying customary law regarding self-determination. See also Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 46 (1985).

144. See Gerard Chaliand, *Minority Peoples in the Age of Nation-States*, in MINORITY PEOPLES IN THE AGE OF NATION-STATES, *supra* note 107, at 4.

145. See THORNBERRY, *supra* note 44, at 217.

146. See generally FINAL REPORT OF THE INTERGOVERNMENTAL CONFERENCE ON INSTITUTIONAL ADMINISTRATIVE AND FINANCIAL ASPECTS OF CULTURAL POLICIES (Venice, August 24 - September 2, 1970) Ch. 1, UNESCO, SHC/MD/13 (1970). But see Lung-Chu Chen, *supra* note 140, at 242, wherein the author provides a compelling refutation of the principle of absolute territorial integrity ("If blind adherence to 'territorial integrity' results only in massive deprivations of human rights in that territory, the regime has already lost its *raison d'être*. Without the allegiance of the people living in the territory, 'territorial integrity' is hollow and empty").

by groups until the state consists of one elemental minority group. This process is now underway both in the former Yugoslavia and former Soviet-Union and is unlikely to fully stop until its logical conclusion.¹⁴⁷

The nationalism of the seceding group may itself lead to intolerance of sub-minorities residing within the secessionist group's new territory. The exclusionary nationalism of the seceding minority group often contrasts with the multinational character of the parent state, which, by definition, must be multinational since the parent state contained at least the seceding minority. Therefore, while the parent state's human rights record may have been far from spotless, it is often the case that the parent state made some attempt to accommodate the minorities living within its borders.¹⁴⁸ This contrasts with the situation of a minority group within a seceding state, where there may be much less tolerance of ethnic and national minorities. Examples of this problem have been discussed above with respect to Slovakia, Croatia, Quebec, the Baltic states, Singapore, *ad infinitum*.

Under the present international legal order, an *absolute* right to secession under international law would lead to a highly unstable world order with no concomitant gain in human rights protection. The right of national minorities to international recognition of their independence should therefore be conditional upon the failure of the parent country to recognize the group's most fundamental human rights. If the parent country does not respect the Fundamental Group Rights of the secessionist minority group, recognition should be extended to that minority and it should be granted the status of at least a belligerent or possibly of a provisional government. International standards of conduct and human rights would then apply to the secessionist minority.¹⁴⁹ Arguably, the theory proposed herein would help provide a way out of the legal, political, and practical morass created by secession. However, by dissociating the nation from the state, the reasons for secession become less compelling.

Just as citizens of a state benefit from the protection their country provides against foreign aggression, a group may benefit from international protection when it acquires recognition. International rules of recognition can therefore

147. See e.g., *The Post-Soviet World, The Resumption of History*, THE ECONOMIST, Dec. 26, 1992, at 67, 69 ("The force of nationalism may mean that ever smaller ethnic groups become the prime unit in which people organise themselves").

148. Czechoslovakia provides a good example of a parent country whose human rights record was better than that of the newly independent minority in the state of Slovakia. Other countries with dismal human rights records nevertheless score relatively high with respect to minority group rights (to the extent that they respect anyone's human rights). For example, China has one of the worst human rights records in the world, yet it scores relatively high in the degree of local autonomy granted to many ethnic groups. CHARLES HUMANA, *WORLD HUMAN RIGHTS GUIDE* 72-73 (1992). Romania also suffers from a less than stellar human rights record, yet one of the principal complaints brought by the Hungarian minority is that the government does not create Hungarian-speaking schools but only provides separate classes for Hungarian-speaking students. *Id.* at 269. While the claims of the Hungarian minority are not to be dismissed, their rights to state supported separate education go beyond the rights granted to minorities in other countries.

149. See MYRES S. McDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVES* 549 (1981) (discussing the applicability of international law of force to non-state entities).

have a powerful impact on previously internal processes of a state in the midst of a civil war.¹⁵⁰ Traditionally, international legal scholars have focused on "objective" criteria of a putative state, arguing that recognition should be predicated upon the following characteristics: "territory, people, political organization, and, of late, the capacity to fulfill international obligations."¹⁵¹ On the other hand, W. Michael Reisman and Eisuke Suzuki argue that varying levels of recognition (or "legal personality") could be ascribed to a "claimant group" with the goal of emphasizing "optimum community goals."¹⁵²

Since the international community has already acknowledged the limitations on state sovereignty on the basis of a wide variety of factors, including the adherence of the sovereign to human rights norms,¹⁵³ it would seem reasonable to synthesize those limitations on sovereignty with the international law regarding recognition.

Nevertheless, in order not to cavalierly dismiss the disruptive impact of the process of External National Dissolution, it would be helpful to examine the actual consequences of a rigorous application of the principles described herein. Certain democratic states, such as Belgium, Switzerland, Canada, and India have established political systems that permit and even encourage autonomous cultural, linguistic, and national development among their pre-existing nationalities. The system of extensive Developmental Group Rights and territorial autonomy will be termed the "Maximal Group Rights Paradigm."

Countries included in the Maximal Group Rights Paradigm share at least two important characteristics: (1) they are democratic, although not necessarily in the strictly majoritarian sense; and (2) the primary ethnic or national groups occupy geographically distinct territories within the country. Switzerland, Belgium, Canada, India, and Spain have had, however, varying degrees of success in keeping their countries together. I would argue that Switzerland's success is largely predicated on the fact that its confederation was created on the basis of mutuality: the different "nations" of Switzerland came together as equals to form the union.¹⁵⁴ In this respect, the creation of Switzerland reflects

150. *Id.* at 523-25 (noting the claims to recognition as an insurgent or belligerent as forms of recognition which have important consequences for the seceding party, the party resisting secession and the third party granting recognition).

151. *Id.* at 506.

152. Reisman & Suzuki, *supra* note 17, at 446.

153. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

154. In many respects, Switzerland is the most optimistic example of the successful working of the process of national dissolution and reformulation. In 1847, the Catholic cantons seceded from the Helvetic Republic, but rejoined the Republic under the new Swiss Constitution of 1848, which established a federation of autonomous cantons. The Constitution was an effort to reconcile the religious and national tensions among the different Swiss groups and divided Switzerland into 22 cantons, each of which exercises an unprecedented degree of local control. For example, each canton is free to establish a "National Church" which operates as the official church for that canton, supported by subsidies from the cantonal government. Consistent with Article 50 of the Constitution, which guarantees the free exercise of religion, Article 49 prohibits compulsion to join a National Church or mandatory payment of taxes to a church of which one is not a member. There are four national languages in Switzerland: German, French, Italian and Romanche, and all but Romanche are official languages. Each canton has the power to choose its own "sovereign" lan-

the original "social contract" invoked by political theorists such as John Locke and John Rawls to justify natural rights.¹⁵⁵ Canada, on the other hand, was, in many respects, a somewhat forced union with its roots in the victory of Great Britain over France during the Seven Years' War. Until recently, the relationship between Quebec and the rest of Canada was characterized by social, political, and economic domination by English-speaking Canada over French-speaking Quebec. The same can be said for Belgium, where the French dominated the Flemish majority for the greater part of the country's existence.¹⁵⁶ Likewise, in Spain, the group rights granted to the Catalan and Basque national minorities were granted by the government not as an original compact entered into by the two parties on the basis of mutuality, but as an effort by the central government to forestall further violence and social unrest.

In at least four cases—Belgium, Canada, India, and Spain—there is no assurance that the process of Internal National Accommodation undertaken by those states will prove ultimately successful. The argument can be made that the consequences of the failure of Internal National Accommodation to hold the constituent nations together would be relatively small: an independent Quebec would likely maintain its economic links with the rest of Canada, and probably retain a unified currency as well as an open border. The same could be said for Belgium, which has the benefit of belonging to the European Community. If Belgium were to dissolve, the component elements would continue to be parts of the European Community, and economic linkages would presumably remain intact. In both countries, there is little reason to expect that dissolution would be accompanied by violence. In this respect, therefore, it could be argued that even the specter of secession would have only limited consequences for world public order. Whether or not the consequences of dissolution are as limited as the above argument would suggest, the process of Internal National Accommodation in democratic countries that respect Fundamental Group Rights should not require a response by the international community. Partially, this is because

guage and to dictate the language of school instruction, although Swiss citizens do have the right to speak their own languages wherever they live.

The Swiss system provides a workable system for dealing with the deep chauvinistic feelings that still run deep among the different national groups. For example, on September 24, 1978, after a Jurassiens-led separatist movement, Swiss voters approved cantonal status for the Roman Catholic French speaking area of Jura, a relatively small area completely surrounded by a German speaking canton. It became Switzerland's 23rd canton. The different groups in Switzerland, like those in Canada, recognized that a system of non-discrimination was insufficient for the different national groups to develop, since the French and Italian speakers were still substantially outnumbered by the German speaking population. Each national region perceived a need to establish certain Developmental Group Rights simply to maintain its own cultural identity.

155. See generally RAWLS, *supra* note 4.

156. Belgium, a nation of over 9,000,000 people, is divided into three principle linguistic groups: a French-speaking group (Walloons); a Flemish speaking group (Flemings); and a German speaking group. The Constitution, created in 1831, ignored the existence of any separate cultural or linguistic regions. See SIGLER, *supra* note 34, at 113-14. The Walloons dominated Belgium politically until World War I, principally through economic limitations on voting which discriminated against the Flemings. *Id.* at 114. After World War I, universal male suffrage was adopted, which helped to equalize the political status of the Flemish majority and, by 1973, the Belgian Constitution was revised to reflect the geographical division of Belgium into its four linguistic regions.

there is no alternative rule the international community could adopt that could improve the process, except perhaps through a requirement that the secessionist state recognize the Fundamental Group Rights of its own minority before it obtains full recognition by the international community. In part, this is because the democratic nature of Canada and Belgium dictates that a system of group rights was the only resolution to their internal national conflicts.

In the case of India and other countries, it is reasonable to suppose that External National Dissolution would be accompanied by violence. In India, the last subdivision of the Indian subcontinent resulted in tens of thousands of deaths. Some Basque separatists also have not hesitated to employ violent means to obtain independence. As discussed above with respect to the other countries represented by the Maximal Group Rights Paradigm, the fact that violence would likely accompany the breakup of India, and possibly Spain, does not vitiate the principles articulated herein. There is little international law can do to protect world public order from the consequences of dissolution. Foreign intervention to keep India together against the will of significant portions of its population would be as ludicrous as attempting to reconstruct the Austro-Hungarian Empire. The rule proposed in this article simply adds the principle of respect for human rights to the harsh reality of External National Dissolution.

The revised theory proposed herein would arguably result in an international response encouraging Internal National Accommodation, but accommodating (and perhaps supporting) External National Dissolution if the failure to accomplish the former would result in human rights violations. The above stated principles therefore will not pose a threat to any state that currently upholds basic international human rights norms, and will only encourage secession in those situations where it would benefit the world public order.

VI.

THE IMPLICATIONS OF THE REVISED THEORY OF THE STATE FOR WORLD PUBLIC ORDER

As ever smaller nation-states form federations or confederations with other nation-states to further their economic and security goals, their national rights will be recognized under a system that distinguishes the rights of nations from the rights of states. Smaller nations will thereby be afforded some measure of international protection when they enter unions with larger nations, and countries with minorities present in other states and territories may obtain some assurance that the rights of their nationals will be respected.

National, ethnic, and other minority groups perceive a need for protection against dominant groups and require institutions for the development of their unique cultures. The nation-state has been the principal instrument for the protection of national rights in a world system plagued by instability. With an effective system of internationally recognized group rights, the state will become less relevant as a guarantor of those national rights. In a world where migration cannot and should not be prevented, and where the existence of national minorities and indigenous peoples (interpreted in the broadest sense) are a reality, the

concept of the "nation-state" as defined by 17th Century theorists becomes less logical, and morally less defensible. In its place, the state as an association of national groups bound together for mutual security and economic benefit, and enjoying a shared communal history and attachment to a specific land becomes more relevant as the basis for statehood. If the state takes on the more limited role of guaranteeing security and encouraging economic integration, then larger political entities are possible without compromising the collective rights of national groups.

The countries of the European Community, to cite an instance, will not lose their sense of diverse national identities even as the Community continues to unify on economic, monetary, and security matters. Canada is a country that is making a valiant attempt to come to terms with the historical lack of mutuality and consent associated with the union of its three largest ethnic groups—French, English, and indigenous peoples. This is evidenced by the continued willingness, however equivocal, of Quebec to remain in the Canadian union despite centuries of ethnic animosity. If, in fact, Quebec does secede, it will not be because of the failure of Canada to engage in Internal National Accommodation, but because historical animosity proved too great. Assuming a widespread, profound movement for secession among a strong majority of the residents of Quebec, it would be difficult for the Canadian government to deny the Quebecois the right to secede.¹⁵⁷ One would hope that ultimately an independent Quebec could enter into confederate arrangements with its neighbors, incorporating many of the traditional functions of statehood such as defense and economic integration. Such an association would be structured on the basis of mutuality and non-coercion and arguably would prove more enduring.

VII. CONCLUSION

As long as peoples are kept together by force and coercion, there is little hope of a stable world order. Only when individuals and peoples come together in multi-ethnic political entities on a basis of mutuality and non-coercion, and create institutions that respect their fundamental human rights, can the process of violent national dissolution and reformulation end.

157. See Richard G. Dearden, *Can the Government of Quebec Break up Canada Unilaterally under International Law?*, INTERNATIONAL LAW NEWS 1, 16 (1999) (noting that the Supreme Court of Canada ruled that "the other provinces and the Federal Government, could not . . . unilaterally deny the right of the Government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, provided that, in doing so, Quebec respects the rights of others").