

## Protecting minorities in International Law

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## Introduction

The problem of minorities dominates political conflicts. Of the minority problems, ethno-nationalism poses one of the gravest threats to peace and security. Asbjorn Eide argues "that one of the most serious contemporary threats both to peace and to human rights is the ideology of ethno-nationalism, and that the best way to counter this threat is an ap-proprate and effective minority or group protection..." States and international organizations must find a way to deal with group conflicts. The judiciary can provide a critical means of group protection. Agreements over finding some role for the courts in minority protection come readily. Disagreements abound over the specific role of courts.

Should courts protect all individuals and not specific groups? Should courts protect the identity of minority groups? I propose to show how the problems become more tractable with a reorientation of our thinking. The conceptual reorientation consists of giving priority to the negative aspects of the minorities' problem, the problems of injustice. The full import of a focus on injustice will become more apparent in the process of the analysis undertaken here. At this stage, I can only indicate some general features of a theory of injustice. While many bicker over the meaning of justice, considerable agreement has formed around a condemnation of forms of injustice. The international community has picked out group harms from the injustices found throughout the world and loudly condemned these with a surprisingly unified voice.

This does not mean that everyone agreed or that the condemnations could not have been even more vociferous and widespread. However, we must not lose sight of a major humanitarian achievement. For example, a highly diverse international community joined in a denunciation of the Holocaust and, more recently, in condemning the suffering inflicted upon the Kurds in Iraq. We must at least act upon our collective sense of wrong. As a first step in devising an attack on injustice, we need to focus on harms, especially those harms unleashed against groups. International law needs a theoretical structure for handling the immense and critically important problem of minorities.

The core thesis is that adjudicatory mechanisms can get a great deal of mileage out of a group harm principle. The principle is that courts ought to protect people from and prevent actual and threatened harm based on individuals' perceived or actual group affiliation. There is nothing mysterious about the harm in question. It ranges from killing, torturing to less severe forms of discrimination and deprivation of conditions needed to lead fulfilling lives. Minority problems become more tractable if we focus on group harm. In international law, jurists have created conundrums by trying to define minorities in some positive fashion. Searching for definitive features to encompass all minorities exacerbates problems. By relying on questionable subjective and objective factors, the proposed definitions of minorities yield imprecise, underinclusive and overinclusive results. To correct the defects we do not need a more precise a priori definition. Rather we only need to develop an empirical assessment of present and past cases of group harm. The international community will then have a more sensible framework for adjudicating conflicting minority claims. The

strategy of defining minorities negatively, in terms of harms inflicted upon them, also enables us to distinguish two related notions, people and indigenous people.

International law should expand the concept of people beyond those subject to colonial domination so as to include dis-advantaged groups. Under highly restrictive conditions, some minority people would have a right to secession. In addition, a group harm analysis reveals the unique group harms inflicted upon indigenous peoples, whose tie to land gives them a different status than minorities. A group harm analysis provides the judiciary with a viable framework for addressing a wide range of group conflict issues. To undertake a group harm analysis the courts need a two stage inquiry.

First, they need to determine whether a group is disadvantaged. In other words, have members of the group historically and currently been victimized because of their group affiliation?

Second, the courts need to assess the allegations of the particular harms (individual and group) alleged in the complaint. Adopting a group harm framework helps us to unravel the complex relationship between minority protection and minority entitlements.

The United Nations International Covenant on Civil and Political Rights provides excellent illustrations of the complex interplay between a protective provision (Article 26) and an entitlement one (Article 27).

I contend that judicial entitlements to groups depend upon first adopting protective measures on findings of group harm. A group harm framework fits into many different kinds of adjudicatory devices. The amorphous, quasi-judicial Human Rights Committee serves as a test of the viability of a group harm approach. Overall, despite criticisms from minority groups the Committee has taken a defensible group harm approach. A history of the minorities' problem provides a context before launching upon this normative venture in international law.

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## **I. History of minority protection**

The Eurocentric story most often told about minority protection has its own biases. The narrative ignores customary humanitarian law in Africa, where some tribes "took pride in according respect and human rights to women, children, and old persons." In Asia, foreigners often historically received protection. In Europe, religious minorities first achieved protection from their sovereign through treaties. In 1606, the Protestant minority in Transylvania attained free exercise of religion through a Treaty between the King of Hungary and the Prince of Transylvania. In 1648, the Treaty of Westphalia, between France and the Holy Roman Empire, granted similar freedoms to Protestants.

The Congress of Vienna (1815) not only promoted religious freedom for Christian

denominations but also had provisions aiming at the improvement of the civil status of Jews. The 1815 Polish constitution was "the first modern document giving international status to a [non religious] minority group." States, such as the signatories to the Treaty of Berlin in 1878, made religious freedom a condition of state recognition. The minorities' issue loomed large after World War I. The Congress of Oppressed Nationalities met in Rome a year before the Paris Peace Conference. The United States and Great Britain refused a Japanese pro-proposal to extend the League's provisions to include equal protection of all nationals. Instead, the League adopted a treaty system.

Although the League of Nation's Covenant did not contain any provisions protecting minorities, the League's system incorporated treaties that protected designated minorities. The Minorities Treaties empowered the League Council to receive petitions, conduct fact-finding investigations, and issue directives to those nations not in compliance. Five states--Albania (1921), Lithuania (1922), Latvia (1923), Estonia (1923), and Iraq (1932)--had to submit assurances on minority protection as a condition for admission to the League. The avowed purpose of all these minority provisions was to avoid forced assimilation. The League Council devised a mechanism for petitions from individuals or associations acting on behalf of a minority, but minorities had to rely on the unlikely willingness of the major powers to act for them. The League regarded minority questions as largely political and sought to avoid legal approaches. The League devised rules to exclude the newly formed German Republic from crucial political deliberations over minority petitions. World War II brought an end to the League and the treaty system, although a few minority protection treaties still developed, for example, the treaties between Austria and Italy in 1946 and 1969 concerning South Tyrol. After World War II, minority protection became an anathema despite Jewish and other groups calling for it during and after the war. Oddly enough, the victorious powers refused to accept a draft treaty for minorities' protection submitted by Hungary to the 1946 Peace Conference in London.

The creation of the United Nations ushered in a new approach centering on individual human rights. The United Nations Charter does not contain a provision on minorities. Even amidst the rubble of the Holocaust, few made any connection between punishing genocide and preventing group harm. Many saw the word "minority" as a term of opprobrium, symbolizing a curse to be avoided rather than as an entity in need of protection. The establishment, in 1946, of a Sub-Commission (of the United Nations Commission on Human Rights) on Prevention of Discrimination and Protection of Minorities, represented a noteworthy concession to minority groups. A report on minorities submitted by Special Rapporteur Francesco Capotorti on behalf of the Sub-Commission still stands today as one of the most definitive works on minorities. Only recently, the seeds sown by the Sub-Commission have begun to bear fruit. One final historical period deserves attention. Despite the trend in the literature to blame the Soviet system for current minority problems, "[t]here is no direct correlation between the social system existing in a country and the attitude of the authorities to minorities living in the territory of the state." Rein Mullerson provides two examples of the positive treatment of minorities within the Soviet bloc. The former German Democratic Republic (GDR) passed a resolution protecting the

linguistic rights of the 70,000 Sorbs (Wends). Similarly, the World Directory of Minorities in 1990 praised the efforts of the former Yugoslavia for adopting five official languages (Serbo-Croat, Hungarian, Slovak, Romanian, and Ruthenian) for the Vojvodina province. Mullerson does not deny Soviet attacks on the Chechens, the Ingushies, the Crimean Tartars, the Volga Germans, and the Meskhetian Turks under Stalin or the more recent (1984-85) attacks on Turks in Bulgaria. He only wants to demonstrate that the Soviets are not alone in their treatment of minorities. Most countries receive mixed reviews on their handling of minority issues. As recently as 1959, for example, the inhabitants of certain Greek villages were asked to confirm publicly that they did not speak Macedonian in 1959. There may be a more sobering lesson than the balancing that Mullerson calls for. Those calling for a system of minority protection may be advocating nothing more than the moderate minority rights granted within the Soviet bloc. In any event, let us leave these political musings aside and return to the definition story.

In international law, everyone agrees that no one can agree on a definition of minorities. Some even counsel the abandonment of the definitional quest. Alfredsson and de Zayas do not think that a precise definition of minorities is necessary since "the answer is known in 90% or more of the possible cases." Unfortunately, we cannot be so sanguine since controversy seems to underlie the minorities' question. Although the UN has not adopted any single definition, the most widely accepted definition of a minority is Capotorti's proposal mentioned earlier.

His study explores the implications of Article 27 of the Covenant on Civil and Political Rights. He defines a minority as a group numerically inferior to the rest of the population of the 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.

Jules Deschênes offered an alternative to Capotorti's definition: A group of citizens of a state, constituting a numerical minority and in a nondominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by collective will to survive and whose aim is to achieve equality with the majority in fact and in law.

Thornberry, a leading commentator on the status of minorities in international law, sees little difference between the two, opting for the first. He predicts that "it is doubtful if any international instrument will depart greatly from this [Capotorti's] line of approach."

On the basis of that prediction, I will confine myself to Capotorti's definition. However, it is critical to note that both definitions presume a positive identity of minority groups. Capotorti's definition deserves more close scrutiny. One obvious difficulty with Capotorti's definition, readily acknowledged by him, is that the term "minority" connotes a numerical minority. The status of blacks under apartheid in South Africa serves as a glaring historical example of a disadvantaged but numerical majority. Actually, the "number's game" does not

pose a problem except for a relative threshold to serve as rough benchmark for the critical numerical mass needed to constitute a minority. Normally, a group of 2 would not count as a minority whereas those groups numbering in the thousands generally would cross the threshold point. Some commentators try to excuse the unfortunate choice of the term "minority" by cautioning that the term covers minorities at risk, which captures almost all groups that should be the focus of international concern. The suggestion seems reasonable, but it then becomes incumbent for the analyst to specify what "at risk" means. Not every risk should trigger judicial intervention.

The Capotorti definition presents more telling problems than the numerical difficulties. It supposedly captures those groups in need of protection by identifying the characteristics of the groups. Accordingly, those groups possess ethnic, religious, and linguistic characteristics that differentiate them from the dominant group or groups. A number of problems doom this strategy. These problems arise because the definitions attempt to characterize minority groups positively instead of negatively. Indeed, a negative identity strategy overcomes the problems described below.

#### **a. Lack of precision**

What are ethnic, religious, and linguistic characteristics? The 5,000 discrete ethnic groups defy precise differentiation. What characteristics differentiate ethnic groups from other groups and from each other? Some have used tradition as the glue that holds together a minority. The Greco-Bulgarian Communities case, the Permanent Court of International Justice declared that By tradition... the "community" is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with spirit and traditions of their race and rendering mutual assistance to each other. All attempts to construct a definition, whether they use tradition or some other conceptual glue, have been unduly saddled with the burden of positively identifying a minority group worthy of judicial protection. Tradition is just as susceptible to social construction and political manipulation as any other so-called unifying idea. Cultural identity does not always naturally evolve within traditions.

Examples from Thailand, which (except for a slight interlude) changed its name from Siam in 1939, vividly illustrate the nebulous state of ethnicity and its handmaidens, culture and tradition. This case proves an easy one because the political construction of Thai identity became so blatant in the 1940's. Royal edicts helped to forge Thai identity, prescribing Thai characteristics. The Cultural Mandates went so far as to require authentic Thai husbands to kiss their wives before going to work. Politics forged Thai identity. Language faced a similar fate. The notion of a Thai language promotes a particular dialect among competing dialects in Central Thailand. Should everyone whose language fits within the Thai language family be classified as Thai? The 15 million speakers of the Zhuang and

Bui languages of Guangxi and Guizhou provinces do not refer to their language as Thai. Do they qualify as Thai in spite of their self-definition to the contrary? Depending how one classifies dialects, Lao, not Thai, ranks as the largest first language in Thailand. It proves difficult to find ways of positively identifying dominant groups like Thais to say nothing of non-dominant ones.

Other ethnic groups, such as the Chinese, get defined relative to this politically constructed Thai identity. To illustrate the ephemeral nature of ethnic identity consider that Chinese immigrants retain their ethnic identity if they remain in business but lose it if they join the civil service. So, minority groups as well as the dominant group get constructed. Negative definitions do not fall victim to problems of precision. Ways of negatively isolating a minority group may fail to meet every standard of precision except one: the perpetrators of the harms know clearly how to identify group members. Perpetrators often make mistakes by attacking the wrong victim. The Chin case provides a dramatic example of mistaken identity on a small scale. In 1973, enraged by Japanese automotive manufacturing competition, two males brutally beat Chin, who they thought was Japanese. Chin's self identity as a Chinese American proves irrelevant to the case. However Chin positively identified himself, he was Japanese. The Chin case symbolizes the brutal definitiveness of prejudice.

#### **b. Underinclusive**

The categories "ethnicity, religion, and language" leave many plausible candidates for judicial protection out of the picture. International instruments use many group identifiers: race, alienage, gender, sexual orientation, physical or mental disability, class, economic status, national origin, social origin, and descent. Article 27 does not allow for any of these to serve as a basis for group identity. While many of these types of groups receive protection from non discrimination in Article 26, there is no prima facie reason for denying members of these groups the rights of self identity accorded in Article 27. It is unclear why anyone who speaks a minority language should receive preferential treatment over those whose group affiliations revolve around sexual orientation. Language, as a feature of group identity, is no more worthy of protection than sexual orientation. Moreover, drawing lines around some groups privileges those groups. While it proves difficult to prove that any group deserves anything, group protection becomes easier to justify when it comes on the heels of group harm. Group characteristics become worthy of protection in relation to their role in group harm. Group harm, in effect, picks out those characteristics worthy of protection. Race (whatever that is) becomes a feature used by individuals to demand protection because race closely tracks discriminatory harm.

#### **c. Overinclusive**

The UN definition yields a proliferation of minority groups. Aruba, for example, with a population of 60,000 has 40 "minorities" with no majority if we use UN criteria. Presumably, all forty groups would qualify not only for judicial protection but also for state entitlements under Capotorti's

scheme. Letting the number of minority groups proliferate creates not only definitional but also legal and political nightmares. A low threshold for qualifying as a minority results in flooding courts with group claims. Further, a low threshold sends a signal to those who might not have otherwise thought of themselves as an ethnic group. Differentiating groups in terms of group harm need not result in a proliferation of groups. It all depends on how demanding we make the harm. If the idea of harm includes almost anything an individual verbalizes about group members, then group formation becomes an easy task. However, we cannot and would not want to protect individuals and their groups against every conceivable harm. We would want to make at least some headway in addressing the worst forms of group harm. A more serious worry than the proliferation of groups and their claims is that we fail to address even the most outrageous forms of group harm.

#### **d. Subjective factors**

Intuitively, it seems that a definition of minorities should allow for self-definition, that is, a subjective factor. Nevertheless, allowing for subjective factors creates underinclusive and overinclusive obstacles. First, let us see how including subjective factors can make a definition of minorities underinclusive. In response to Capotorti's draft proposal, a number of governments urged him not to ignore the desire expressed by the minority group to pre-serve its traditions and characteristics as an essential part of the definition of minority. The Yugoslav Government expressed an insightful reservation about the need to include a subjective factor in the definition of minority. They noted that the subjective factor excluded a harm component. Historical experiences have shown that the "indifference" of the members of minorities towards their national origin, position, and rights are, as a rule, the consequence of the social and other circumstances in which they live. Failure of a group to exhibit a sense of solidarity may constitute grounds for protection, since the failure could have resulted from harm, rather than as grounds for not meeting the criteria for a minority. The degree to which individuals try to hide their group identity may provide a measure of how much protection they need. Further, a person may not know her or his so-called ethnicity or have any familiarity with the traditions and customs of the ethnic group and still be negatively treated as a member of an ethnic group. [U]ntil precisely those months [during which the Italian Fascists began promoting the idea of racial purity] it had not meant much to me that I was a Jew: Within myself, and in my contacts with my Christian friends, I had always considered my origin as an almost negligible but curious fact, a small amusing anomaly, like having a crooked nose or freckles; a Jew is somebody who at Christmas does not have a tree, who should not eat salami but eats it all the same, who has learned a bit of Hebrew at thirteen and then has forgotten it. The critical factor is not what minority groups say about themselves. Rather it is how others treat them. Alternatively, if courts give subjective factors too much weight, then members of almost any collectivity have an opportunity to construct a group identity and demand protection and entitlements from the state. Later, I will describe a good example of suspicious self-identifying aborigines in Tasmania. The



negative identification strategy, by focusing on the perpetrators, largely ignores subjective factors of effected group members. The subjective perceptions of group members do play a role in assessing the harm, perceived or otherwise. However, self-definition should not qualify as a condition for a minority.

#### e. Objective factors

"Objective factors" refer to agreed upon external characteristics of the groups. The definitional problem cannot be solved by devising a more precise definition that overcomes the underinclusive and overinclusive problems. From a legal standpoint, there are no objective renderings of the groups in question. Any attempt at a definition based on group characteristics will fail primarily because it focuses the legal spotlight in the wrong direction. The main problem is not how to construct predetermined definitions of protected groups but rather how to protect members of groups from harm. For legal purposes, these groups, in a sense, get defined by the harm. The dynamics of the positive group identification process do not always draw distinct boundaries around membership. The forces of negative group identity clearly separate the Them from the Other. The more we demand objective criteria for group identity and the more solidity we require for groups, the less the laws reflecting these demands will protect loosely knit groups such as migrant workers, refugees, and immigrants. Migrant workers in the United States have many cultures, religions, and languages. Migrants have little sense of solidarity as migrants. Yet, they constitute a group, at least as characterized by the dominant culture, which has a sad history of negative treatment of migrants. Migrant workers should have a right to an identity even if many aspects of the identity are pluralistic.

The Spanish speaking migrants from Guatemala and the French speaking ones from Haiti should have the opportunity to enjoy their cultures, religions, and languages, as migrant workers for migrancy (and not national origin) serves as a (negative) group determinant. This is not to say that positive ethnic, religious, and linguistic identities do not have an important role to play in society and politics. However, we need to distinguish the issue of where the law should intervene. The law should play a prominent role in protecting vulnerable groups from harm. Moreover, legally valorizing a group has serious drawbacks. Thornberry and other commentators see Article 27 as demanding positive action on part of states for minorities. Does each minority group, then, have an equal claim on state resources? Is the state required to give all vying minority groups an equal share of the resources? Is the state required to assist the identity formation and maintenance of all minority groups, including hate groups, which many find reprehensible? Is the state thereby obligated to provide resources for those group practices it finds objectionable, such as, female circumcision? Within a positive group identity framework, which places a premium value on groups as such, we would have to answer each of these questions affirmatively. Otherwise, the state would have to treat one group more favorably than another. If a state must engage in differential treatment of groups, a more plausible basis for making distinctions among

groups is the differences in harms experienced by each group and not the strength of competing positive group identities.

Canada provides an excellent example of what happens when a state grants entitlements to certain groups. Although Canada has made a constitutional commitment to multiculturalism in Section 27 of the Charter, it has constitutionalized bilingualism by making English and French the official languages. Linguistic ethnic minorities have complained that Canada's bilingualism harms them. Granting linguistic rights to the English and the French has not united the country. The rights to linguistic identity for Poles and Ukraine's in Canada should count along with the rights of the French speaking minority. Yet, if Canadians grant all linguistic minorities rights to linguistic identity by constitutionalizing language rights for all ethnic minorities, they will not solve their linguistic minorities' problem. Group harm provides a framework for developing a solution.

We can give a group harm interpretation to the equality provisions of Section 15 of the Canadian Charter. Section 15(1) prohibits discrimination on a number of non exhaustive grounds, which could include the prohibition of discriminatory treatment based on language. If Section 15 is read in tandem with Section 27, then ethnic minorities could not only challenge discrimination based on language, they could also argue for affirmative measures (such as the right to receive an education with public funds in their language where sufficient numbers of minorities exist) to help them overcome the disadvantage. This approach does not give all linguistic minorities parity since they experience different degrees of harm. It does, however, address cases of harm experienced by linguistic minorities. Alfredsson and de Zayas, cited at the beginning of this section, correctly highlight the futility of seeking a definition of minorities. Definitions lead us to seek necessary and sufficient conditions for a term. The definitional strategy demands precision in an area fraught with fuzziness. We already know minorities without definitions to guide us. Alfredsson and de Zayas do not tell us how we know them. That sets the challenge for the next section.

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## II. Knowing minorities

To determine whether a group legally qualifies as a minority we need to know what groups have been and are being harmed. Even on a world scale, the problem is not as formidable as it might sound. Ted Robert Gurr has provided a global view of disadvantaged minorities. Gurr uncovers the historical causes of disadvantaged status, and I will quote him at length: The inequalities that divide disadvantaged minorities from advantaged or dominant groups are the enduring heritage of four major historical processes: conquest, state building, migration,

and economic development.

Every people who established an empire or settled frontiers, who conquered nonbelievers or civilized natives, who built a modern state, did so at the expense of weaker and less fortunate peoples. Ethnic immigrants have provided functionaries for colonial bureaucracies, labor for plantation economies, workers for industrial revolutions, and menials for the service economies of postindustrial societies. All the common types of minorities at risk had their origins in one or more of these historical processes. History provides the first place to begin looking for minorities. There we shall uncover an irony. International law has difficulty defining minorities precisely because minorities are so visible. To a large extent, sovereign states, the bulwarks of international law, created minorities. Yet, as noted in Capotorti's report, many countries, citing the non-recognition of minorities within their internal laws, denied the existence of minorities. Most Latin American countries found the term inapplicable since, for example, "[i]mmigrants are treated the same as Brazilians." The French Government could not recognize "the existence of ethnic groups, whether minorities or not." Thailand found that the translation of "minority" has "no social and cultural connotation whatsoever." The states' refusal to recognize minorities involves maintaining privilege.

Politically, it should not surprise us that the concept of minorities has become problematic. Intellectually, we should express dismay at how the political has duped our intellectual ability to see the contours of minority groups. In a sense, Gurr's coded analysis tells us what we already knew. Take the following sampling: "discrimination weighs most heavily on indigenous peoples and ethnoclasses." Ethnoclasses are "ethnically or culturally distinct peoples, usually descended from slaves and immigrants, with special economic roles, usually of low status" (p. 18). "The five million Roma of Eastern and Western Europe have the highest demographic stress ratings of any communal groups in the region" (p. 49).

Defining minorities poses a non-problem. The historical record of oppression unleashed by dominant groups locates minorities for us. Defining minorities in positive terms serves as a divisive and diversionary enterprise. The definitional game inevitably leaves out some minorities whose grievances deserve a hearing. Positively defining minorities detracts from the crucial issue at hand, namely, stemming the tide of group harm. If group harm represents the primary concern, then we need to turn to it directly. The project of determining group harm does not confront the same problems encountered by defining minorities. The phrase "positive minority" will remain an amorphous one since it stems from an admixture of characteristics "proposed" through dominant group forces and by the bearers of the traits themselves. The process leaves great leeway for political manipulation and social construction. In contrast, group harm has stark manifestations. The wounds of group harm do not always appear before the naked eye. Psychological scars, self-hatred, and other more subtle effects of group harm may take a more trained eye to uncover, but quickly these more subtle manifestations become readily apparent as well. The process of looking for group harms lends itself less easily to political manipulation and social construction than the minority definition enterprise.

Generally, we do not need to fear, what the statisticians call, false positives and

false negatives with a group harm analysis. If we overlook the "Afro-Cubans who in 1912 were the victims of a virtually forgotten pogrom," the fault lies not with the conceptual tools but rather with how far we take the analysis. The underinclusive and overinclusive problems found in trying to positively identify minorities tie directly to the conceptual tools of necessary and sufficient conditions employed therein. Typically, definitions demand finding a few traits that minorities must have and a few others that minorities cannot do without. Alternatively, minorities consist of a cluster of features or, what the philosopher Ludwig Wittgenstein called, a "family resemblance." Yet, the definitional strategy will not tolerate "fuzzy sets" since it demands a way of making a definitive determination. The legal definitional demand for precision cannot match the reality of murky situations. Group harm is better able to handle the jello-like reality. True, as with any concept, we need to indicate what activities fit and what do not. However, we can set a pragmatic threshold for when harm becomes judicially cognizable as well as upper ranges where judicial intervention becomes imperative and a lower range where it becomes counter-productive. Finally, subjective and objective factors constitute a welcome interplay for the harm analysis and not an obstacle as they do for the definitional strategy. Self-reports of victimization carry considerable but not determinative weight. Definitionally, objective factors consist of questionable features of groups, whereas a harm analysis treats them as more discernible and less questionable effects on a group and its members. So, we choose a characterization of minority based not on group characteristics but on the consequences of group harm. Since harm establishes the contours of the group, I will use the term "disadvantaged group."

Before outlining a judicial approach to group harm, the next section explores the relationships among minorities, peoples, and indigenous people.

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### III. Other groups: people and the indigenous

Within international law, minorities or disadvantaged groups remain distinct from "peoples" and from indigenous peoples despite considerable overlap.

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## 1. Peoples

The term "peoples" occurs in a number of international law documents. The UN Charter (Article 1, paragraph 2, and Article 55), a 1960 General Assembly Resolution 1514 and the 1966 International Covenants on Human Rights-- all ascribe a right of self determination to people. In Western Sahara, the International Court confirmed the principle of self determination of peoples.

People have a right to self determination, but minorities do not. Contrary to this common interpretation, international law should extend the notion of people to include disadvantaged groups. A cursory glance at UN documents shows that any characterization of "peoples" will have to reflect its tie to self determination, which, in turn, the UN has used in conjunction with the concept of the territorial integrity.

After first accepting a principle of self determination, the UN restricted the peoples to which the principle applied to those under colonial domination. However, strong currents, inside and outside the UN, exist for expanding the restriction on people beyond the colonial context. The European Community Arbitration Committee on Yugoslavia, for example, indicated that the right of self determination extended beyond the colonial situation. However, the Commission refused to extend the right to ethnic groups.

The question remains: how can we find a middle ground between granting self determination to people under colonial domination and allotting rights of secession to all ethnic and other groups? First, we need to recognize degrees of self determination, ranging from granting voting rights to all peoples within a sovereign territory, through allowing groups certain degrees of autonomy, to secession. The Sandanistas gave autonomy rights to the indigenous people on Nicaragua's east coast without guaranteeing secession rights. Likewise Quebec enjoys autonomy rights within Canada. If we take "self-determination" in the extreme sense of "secession," then minorities-as-people should have access to this procedure as a last resort. Group harm should serve as the primary but not exclusive grounds for secession. The more severe the group harm (and the less political power of the group), the stronger the case for secession, provided a number of conditions, listed below, are met. Before I develop the analysis, I want to note a prudential or pragmatic argument against liberally construing the right of secession so that it applies to ethnic groups. Granting secession rights to each and every ethnic group creates a discombobulation of overlapping political units.

As Ernest Gellner, in his classical study *Nations and Nationalism*, states, "not all nationalisms can be satisfied, at any rate not at the same time." Sakharov, for example, proposed to divide the USSR into 53 national units, but then 67 national minority groups and over 700 smaller ethnic groups would lack their own national unit. Further, dividing the world into small ethnic nations does not hold the key to world peace." "Whenever the international community purports to rescue an ethnic group from the "prison house of nations" by recognizing a new nation, it probably has only created a county jail for minorities." In short, the costs of a wholesale right of determination for all ethnic groups would be prohibitive.

A group harm analysis meets the pragmatic challenge and provides a useful framework for examining the question of secession. Accordingly, secession is justified if

- (a) there was a demonstrated and severe injustice inflicted upon members of a disadvantaged group;
- (b) the disadvantaged group resides within a definable territory in the state;
- (c) the sovereignty over the territory occupied by the disadvantaged group has relatively few encumbrances.

Condition (a) serves as one ground for secession. While there might be other justifications, such as, the right to preserve a group's cultural identity, injustice (in the form of group harm) provides a strong ground for secessionist's claims. In assessing a minority group's claims, we should give priority to the purported injustices suffered by members of the group. I shall support the priority thesis by defending two related claims: First, preventing harms takes priority over promoting goods. Second, group harms are worse than other types of injustices.

I shall develop the arguments by using Allen Buchanan's work on Secession, the most systematic treatment of the issue to date. Buchanan makes a case for a right to secession on a number of grounds. Surprisingly, he has relatively little to say about, what I take to be the most important ground, namely, group harm. In what follows, I shall examine two grounds proposed by Buchanan: right to preserve a cultural and discriminatory re-distribution. Buchanan claims that cultural preservation succeeds in justifying succession as a matter of right under the following conditions: (1) The culture in question must in fact be imperiled. (2) Less disruptive ways of preserving the culture must be unavailable or inadequate. (3) The culture in question must meet the minimal standards of justice. (4) The seceding cultural group must not be seeking independence in order to establish an illiberal state, that is, one which fails to uphold basic civil and political rights and from which free exit is denied. (5) Neither the state nor any third party can have a valid claim to the seceding territory.

Buchanan finds that the Quebec case does not satisfy conditions (1), (2), and (5). Yet, (1) and (2) are vague enough to leave considerable room for debate. Many people in Quebec find their culture imperiled and see secession as the only alternative. Otherwise, the recent referendum held in Quebec would have never gotten on the ballot. He uses condition (5) as a limiting one to prevent too many groups arguing for secession on grounds of cultural preservation. The case for cultural preservation strengthens when tied to group harm. If Quebec could show that its culture became imperiled because of a discriminatory disparate impact experienced by its citizens in their capacity as Quebecois, then Quebec would have a stronger case for justifying secession than if Quebec based its claim primarily on grounds of cultural preservation. Whatever we might think about preserving a particular culture, the case for preservation becomes particularly acute when we can link the preservation to systematic harm directed at the group. For Buchanan, it is important to determine whether the culture is imperiled.

For my analysis, group harm and not cultural integrity holds the key. Not all threats to a culture constitute harms. Discriminatory redistribution poses a

different set of problems. Buchanan defines discriminatory redistribution as "implementing taxation schemes or regulatory policies or economic programs that systematically work to the disadvantage of some groups, while benefiting others, in morally arbitrary ways (p. 40). By generally characterizing groups, Buchanan's formulation omits disadvantaged group injustice. The omission comes to haunt Buchanan's analysis as evidenced by the considerable space he de-votes to the issue of the Haves seceding from the HaveNots. He finds that "it is justifiable for the better off to secede simply in order to pursue their prosperity more effectively, unimpeded by the constraints, that being in the same state with the worse off has imposed on them, without basing their justification for secession on any charge that they, the better off, have suffered an injustice" (p. 120). Buchanan fails to acknowledge the very real possibility that the idea of Haves may itself contain an injustice, an in-justice not suffered by the Haves, but one directed at the HaveNots by the Haves.

Discriminatory redistribution makes sense as a ground for grievance, possibly including secession, when it is part of a discriminatory pattern disproportionately felt by disadvantaged groups. Buchanan wrongly separates economic discrimination from, what he would call, moral discrimination and fails to incorporate disadvantaged groups into his notion of discriminatory redistribution. The argument for the justification of Southern secession on grounds of discriminatory re-distribution is inextricably linked to the grave injustice of systematically subjecting minorities to grave injustices. We cannot separate the Southern states' argument of wrongful economic loss against the Northern states from the institution of slavery that made the South's economic system possible.

The arguments from cultural preservation and from discriminatory redistribution gain strength when coupled with an argument from harm to disadvantaged groups. This does not imply that the arguments for cultural preservation and discriminatory redistribution can never stand alone. It only means that if they stand alone, they rank beneath more powerful arguments that connect them to questions of harm to the disadvantaged. I propose that the judiciary interpret the term "people" to include "disadvantaged groups" when it appears in the UN documents noted above.

The conditions under which the term "people" gets applied to non-disadvantaged groups are often political (legislative) non-judicial situations. Otherwise, the judiciary gets thrown into the position of determining, in cases where group harm is not evident, whether a particular culture is worth preserving. The judiciary is not equipped to handle that kind of determination. Alternatively, the judiciary is equipped to assess claims of harm. The judicial approach should be substantive and not merely procedural. Buchanan sees the problem of the biased referee as tipping the scales in favor of a procedural model of a constitutional right to secede over a substantive one. In the procedural model, a group need only meet specified procedure hurdles (for example, three quarters of the residents of the seceding territory must vote for secession after a designated waiting period) to invoke a right of secession. In the substantive model, a group has to prove substantive claims, such as harm to its members. Courts are more likely to exhibit a bias under the substantive than under the procedural model since national courts are creatures of the state whose sovereignty substantive claims

challenge. An independent judiciary circumvents, as Buchanan recognizes, the biased referee difficulty. An external, international court would more likely exhibit independence than an internal, state court. The alternative procedural model would allow for situations where procedural hurdles can be met for weak or even objectionable moral reasons. So, Buchanan has provided another strong ground for an international tribunal to adjudicate substantive secession claims. I have simply tried to indicate the power of a group harm approach. It helps bring clarity to an array of issues. It puts the idea of cultural integrity in perspective. The need to preserve a culture becomes a mandate in cases of severe harm directed against a group. Secession offers a remedy of last resort in certain cases of group harm.

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## 2. Indigenous peoples

Defining "indigenous people" proves almost as difficult as defining "people" or "minorities."

The international legal community's attention to indigenous claims followed a similar pattern to that accorded to minorities. The Moari of Aotearoa (New Zealand) and the Haudenosaunee (Iroquois) unsuccessfully petitioned the League of Nations in the 1920's. Indigenous issues received little international attention until the International Labor Organization adopted the Convention of Indigenous Populations of 1957. Partly in response to indigenous movements in the 1970's the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities commissioned The Study of the Problem of Discrimination Against Indigenous Populations by Special Rapporteur José R. Martínez Cobo. The ten-year study resulted in the establishment of a Working Group on Indigenous Populations, which meets annually in Geneva.

The UN Working Group on Indigenous Populations developed the most widely used definition of the term indigenous: "...descendants of the original inhabitants of conquered territories possessing a minority culture and recognizing themselves as such." This definition has many of the same problems encountered by Capotorti's attempt to define "minorities."

I will briefly survey the problems as applied in this case to the case of defining indigenous people.

First, the definition suffers from the same imprecision that infected the characterization of a minority culture. An indigenous population may possess little of its culture and be in the process of trying to regain it. Further, as we saw in the section on minorities, specifying the elements of a minority culture can prove difficult.

Second, the definition is underinclusive since it ties indigeneity to conquest when, in fact, other mechanisms, such as treaties, took the place of direct



conquest.

Third, the definition casts an overinclusive net because many groups would qualify by self-definition.

Cornstassel and Primeau provide a telling example of the Tasmanian aboriginals. Indeed, a small isolated population of women and whalers survived the genocide in 1847. However, from 1971 to 1976, the number of self-identifying aboriginals increased from 671 to 2,942. Ironically, the numbers included individuals of exclusively European stock whose ancestors committed the genocide. Finally, we have the pragmatic argument that granting rights and self-determination to indigenous peoples would create havoc for a world order based on sovereign nation states.

The term indigenous, however defined, describes more than 5,000 groups with a population estimated between 230 and 300 million contained within roughly 160 discrete territorial units. If every indigenous group claimed self-determination, then, allegedly, we would have an unmanageable plethora of nations. The pragmatic argument need not detain us. Ironically, the pragmatic argument overlooks the pragmatics of the situations. Given the dissemination and powerlessness of most indigenous groups, few groups could hope to muster enough power and resources to forge themselves into a successful nation state. This does not mean, however, that the cries for self-determination should go unheeded. As noted above in our discussion of peoples, self-determination does not necessarily mean secession as a sovereign state. Self-determination includes a complex set of relationships that indigenous peoples could have to the dominant nation state and to other nations. We seem to have reached the same impasse in trying to define indigenous people as we did in trying to define minorities. All the approaches meet with difficulties. Nevertheless, one distinguishing, commonsensical feature of indigenous peoples stands out, stemming from the word "indigenous" itself.

Chief Justice Marshall, writing for the United States Supreme Court, referred to Indian tribes as "domestic dependent nations." The idea of an Indian nation points to a unique feature of indigenous peoples that distinguishes them from minorities. This feature is that they constitute the original peoples of given territories. Many UN documents refer to historic continuity, which differentiates indigenous peoples from other groups.

Article I(1)(b) of the International Labor Office's (ILO) Convention No. 107 provides: (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the population which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than the institutions of the nation to which they belong.

Original occupation of a territory is the single feature that connects indigenous peoples to group harm since, in almost every case, the harm inflicted upon them stems from the original usurpation of territory. The issue of original inhabitation distinguishes indigenous peoples from minorities. Indigenous peoples unlike

minorities claim original in-habitation. Secession claims may arise out of demands by minorities, but they do not initially define the relationship between the minorities and the nation state in a way that they do for indigenous people. The territorial standard would exclude some examples of groups qualifying as indigenous merely through self identification. The Bastars (Boer) community, with their colonial ancestry, of the Walvis enclave in Namibia recently sought recognition as an indigenous group and sent a representative to the UN indigenous rights conference.

The original occupation of territory provides a distinguishing feature of indigenous peoples, and it serves as a ground for indigenous claims to sovereignty. Group harm gives further impetus to the sovereignty claim. We must assess the original and current treatment and status of indigenous peoples. To see how the group harm principle would operate in concrete cases let us turn to the case of the Malays. Van Dyke's analysis of the Malays demonstrates further problems with giving priority to positive identity. He opts for considering the Malays an indigenous people rather than as a separate race or ethnicity since "when the contrast is with the Chinese and Indians, the Malays are the bumiputra" (sons of the soil)." In other words, the Malays occupied the territory before the Chinese or Indians. The Malaysian Constitution defines a "Malay" as "a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom..." Given that native peoples were present before the coming of the Malays, it seems odd to call the Malays indigenous. Yet, even if we accept the designation of indigenous for the Malays, the crucial factor for the judicial protection issue is not the indigeneity of the Malays but rather the group harm experienced by the Malays. That one group preceded another does not in itself provide legal and moral grounds for giving peoples special treatment. The Malays have constitutionally ensconced their privilege position. Malay is now the official language and Islam, the state religion. Preferences and quotas exist for Malays in government and universities. Most disturbingly, questioning these policies in public or even in Parliament has become a punishable offense. It will not suffice to try to justify these acts on the basis of bumiputra status. The requirement of original habitation disqualifies the Malays as well as the Bastas from indigenous status.

Original habitation, regardless of percentage of the population, would qualify the Fijians, who comprise 44 percent of the population in Fiji, as indigenous. Generally, original habitation associates with group harm, although this is not always the case. Indigenous people have an identifier in original habitation that minorities lack. The First Comer identifier makes a moral difference since generally First Comers have suffered irreparable harm at the hands of Later Comers. Indigeneity and group harm forge a close link.

We have done the necessary preliminary conceptual work to outline how the judiciary may make use of these distinctions.

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#### IV. Judicial framework: group harm analysis

A group harm analysis involves a two stage inquiry by a court. The term "group" is preferable to "minority" since it avoids the inevitable as-sociation of numbers with minorities. A court needs to analyze the nature of the group in question and then to evaluate the harm at stake in the particular case.

As we will see below, a court should not completely separate the group identity phase from the harm issue. Group identity revolves around group harm. Problems arise when courts try to assess group identity independent from a determination of group harm. Not all groups qualify for judicial protection, and of those that do qualify some would receive greater protection than others. After the court establishes that the claimants belong to a disadvantaged group, then it would assess the nature of the harm.

Many courts have difficulty dealing with group harm since so much legal analysis presumes an individual, and not a group, sense of harm. Nevertheless, courts, armed with a historically and sociologically informed understanding of the dynamics of group harm, can grade the severity of the harms. Even if courts insist that only individuals can be harmed, then the analysis given below is still acceptable with a few minor modifications.

Let us look at the two stages of judicial inquiry in greater detail.

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##### 1. Disadvantaged group

First, a court must determine whether members of a disadvantaged group are making the claim. This stage of the inquiry is similar to suspect class analysis within Equal Protection jurisprudence by the United States Supreme Court. The Court, during the 1970's, developed a scheme whereby it gave legislation and administrative acts involving race and alienage heightened scrutiny and those involving gender and illegitimacy intermediate level of review and protection. This proposal goes one step further than the suspect class scheme promoted in cases before the U.S. Supreme Court.

For the most part, the Court accepts the thesis that any individual discriminated against because of race, alienage, gender, or illegitimacy should qualify for judicial protection. So, whites and males can claim discrimination on the basis of the factors of race and gender respectively since judicial protection depends upon general group characteristics.

Here, I am proposing that courts first determine which groups qualify as disadvantaged. The notion of disadvantaged implies a relationship of dominance since a disadvantaged group only makes sense relative to an advantaged group. Therefore, a dominant group would seldom if ever qualify as disadvantaged. This does not mean that members of advantaged groups never receive judicial protection. It only implies that they generally would not receive the protection because of their group membership. They may receive it as individuals according to principles of fairness or on some other grounds. On this analysis, whites and males could claim discrimination but only on general grounds of fairness or on grounds of harm to an individual, where group membership is irrelevant to the analysis. This approach can circumvent problems of comparatively dominant groups making discrimination or entitlement claims on the state. Placing a determination of disadvantaged status at the forefront of the analysis helps to avoid problems of reverse discrimination. The plausibility of avoiding the reverse discrimination issue connects with the role of the judiciary. If all harms are on par, then the judiciary should protect white males as well as black females from discrimination.

If some harms are worse than others, then the judiciary should first attend to the more telling harms. I contend that the harms associated with disadvantaged groups deserve greater judicial scrutiny than those connected to dominant groups because disadvantaged group harm is worse than advantaged group harm. In fact, the notion of "advantaged group harm" makes little sense. The term "advantaged" cancels out the attribution of group harm since an advantaged group, by its very nature, stands relatively aloof from harm. One of the things that distinguishes an advantaged group from a disadvantaged group is its ability to parry harm. An analysis at the group level should precede an investigation into the particular allegation of individual harm. The particular harm alleged by an individual only makes sense given the context of a person's identification with a disadvantaged group. We do not fully understand a person's harm if we fail to see that harm as part of a person's disadvantaged group status. Further, the group status, at least the aspect of group status attended to by judiciary, is largely a matter of external attribution, that is, external rules and regulations and non-group members determine group membership.

The idea of a disadvantaged group depends upon context. An advantaged group in one setting may be a disadvantaged group in another. The Arab minority in Israel may have more political rights and prosperity than ordinary citizens of Syria. Yet, "[t]he crucial point is that the Arab citizens of Israel face more political restrictions and economic barriers than either Ashkenazi or Oriental Jews." How does the judiciary determine whether a group qualifies as disadvantaged? A court would examine the past and present treatment of the group by others within the state. Past ill-treatment of a group usually carries over into the present. In short, the court would look at group harm to determine group identity.

In other words, has the group, in effect, been identified through the harms inflicted upon it? A court's judgment regarding the disadvantaged status of a group revolves largely around deciding whether the group has a negative identity sufficiently harmful to warrant judicial intervention on behalf of members of the

group. Within the confines of the judiciary, a court's first focus should be on the group's negative identity and not on positive group identity. A court should examine how the more dominant groups construct the identity of the group in question. A court should not focus on how the group positively defines itself or with so-called objective features of the group (solidarity).

A court's primary responsibility is to prevent and compensate for harm and not to promote entitlements of one group at the expense of another. Any judgment whether a group qualifies as disadvantaged is always open to challenge. However, the disputability of claims does not imply that all claims are relative or that a claim is not defensible. Some writers challenge the claim that women constitute a disadvantaged group because in most societies women make up a majority of the population. The charge has an answer. If we examine carefully the record of harms inflicted upon women, we would readily conclude that women qualify as a disadvantaged group, not in spite of their numbers but rather, in part, because of their numbers. Women's power does not reflect their numbers. Other writers, even those sympathetic to the attempt to locate disadvantaged groups, question the comparability of groups.

How can a court, or anyone for that matter, determine whether one group is more disadvantaged than another? Yet, justifiable comparisons come readily to mind. Take three groups in the Slovak Republic, the Roma, the Hungarians, and the Slovaks living in areas of Slovakia with a majority Hungarian population. Using any number of indicators (infant mortality, longevity, etc.) the Roma is a more disadvantaged group than the Hungarians, and the Hungarian minority in the Slovak Republic is more disadvantaged than the Slovaks. Admittedly, courts may have trouble comparing the disadvantaged status of some groups. However, it is important to promote a judicial scheme that would protect at least the most disadvantaged groups. Courts can justifiably determine the most vulnerable groups.

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## **2. Group harm: individual**

Second, the court must determine whether the claimant has suffered harm and to decipher the severity of the harm. The problem is not determining group identity but rather deciphering the group dynamics underlying an individual's harm. What constitutes group harm? Harmful intent or purpose should not be a necessary component of the harm. Rather a finding of harmful effect should suffice. Of the four human rights treaties that contain explicit definitions of discrimination ("harm," in the sense employed here), none require intent or purpose. Courts should expand their analyses of group harm.

Courts need to retain a focus on the individual but expand on how individual harm connects with group harm. Even if courts confine their concern to direct

harms to individuals, they cannot justifiably ignore the social aspects of individual harm. Physical and psychological dimensions of individual pain and suffering contain important social components. Genocide and torture represent two of the most brutal kinds of direct harms individuals can experience because of their group membership.

Further, individual harms can be indirect as well as direct. Direct harm to another individual because of that individual's group membership (beating of Turks in Germany) or differential impact on members of a disadvantaged group through the implementation of a policy (immigration rules) can indirectly harm a person by enhancing the vulnerability to suffering. The concept of harm in international relations stands in need of reformation as the following example illustrates.

The Convention Against Torture defines behavior constituting torture as:

"[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The use of "he" is not entirely inadvertent since the definition promotes a model of a government agent inflicting pain upon a single male prisoner to procure information from him. If we look closer at harms in the world, we will find women and children at the center of "widespread and apparently random terror campaigns by both governmental and guerrilla groups in times of civil unrest or armed conflict." The pain and suffering associated with terror does not immediately come under the definition of torture. The following also fail to qualify as torture: genital mutilation performed in state run or state sponsored facilities, forced sterilization, trafficking in women through prostitution, pornography, and mail-order-bride networks. The judiciary should lead the way in bringing the spot-light on the complex and horrifying ways that harms manifest themselves.

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### 3. Group harm: group

The judiciary may be asked to consider a group's claim to group harm rather than an individual's. The harm in this case primarily affects the entire group and not only a few individuals. For example, a band in Canada may claim that its hunting or property rights have been abridged. The court then needs to decide who

represents the group. Legal systems confer legal personality on entities thereby recognizing the entities as possessing rights and duties enforceable at law. A number of arguments can be put forth against recognizing disadvantaged groups as legal persons.

International law does not recognize the legal personality of disadvantaged groups. The International Court of Justice left open the issue "where a group, whether composed of states, of tribes or individuals, is claimed to be a legal entity distinct from its members." However, the Court takes procedural capacity as a test for granting legal personality to a group. In the case of non-individual entities, the Court held that the claimant will have to be in "such a position that it possesses, in regard to its members, rights which it is entitled to ask them to respect."

Disadvantaged groups, in their unorganized state, are not in a position to ask their members to respect certain rights. The legal notion of class serves as a middle ground between giving groups legal personality and an approach that would restrict claimants to individuals. Since 1966, the federal courts in the United States have used a routine certification procedure to determine, among other things, that "the representative parties will fairly and adequately protect the interests of the class."

Rule 23(a) of the Federal Rules of Civil Procedure sets forth the prerequisites for a class action--numerosity, commonality, typicality, and representativeness. Class actions for disadvantaged groups would confront insuperable problems--at least they seem insurmountable. After all, how could any individual or select group of individuals represent an entire disadvantaged group? Further, it strains the imagination to say nothing of a court's resources to think of the judiciary trying to rid the world of harms inflicted upon disadvantaged groups. The difficulties begin to fade if we allow the particularity of the harm to limit the nature of the class for a particular adjudication.

Let me explain through a concrete case that came before the Supreme Court of the United States in 1982, *General Telephone Company of the Southwest v. Falcon*. The General Telephone Company passed over Falcon for a promotion. Falcon filed a memorandum in favor of certification of "the class of all hourly Mexican American employees." The District Court certified a class including Mexican-American applicants for employment who had not been injured. Yet, the alleged harm in this case was regarding promotion, not hiring. The Supreme Court objected to the certification of a class since Falcon complained of promotion and not hiring practices and he failed to provide evidence of the overall disparate impact on Mexican Americans of the promotion practices. As the concurrence aptly noted, Falcon's evidence belied his class claims in that "7.7% of those hired by General Telephone between 1972 and 1976 were Mexican-American while the relevant labor force was 5.2% Mexican-American."

The Falcon case provides a good example of the relationship between group harm and group identity, and it illustrates how a court may reasonably approach the problem of disadvantaged groups through the mechanism of class action. Not all Mexican Americans qualified as members of the class even under Falcon's own proposal for class certification, which limited the class to hourly wage earners

within the Mexican American group. The Court demanded that the contours of the class fit the harm of promotional deprivation and not spill over into hiring. So, the judiciary should protect those who can least protect themselves. The accusation that the judiciary constitutes a non-democratic (counter-majoritarian) institution misses the mark.

Rejecting judicial activism because of the court's non-democratic character is tantamount to objecting to a governmentally sponsored welfare agency because its appointed members did not compete in an election. At least some part of government should dedicate itself to eradicating injustice, and insulating humanitarian functions from the direct vicissitudes of electoral politics can be a condition for maintaining that function. Finally, looking at judicial protection of the disadvantaged from afar should help to dispel an argument close to home. Critics of judicial activism charge that a court's paternalistic (or maternalistic) attitude and protectionist policy stigmatize members of protected groups. If stigmatization refers to a psychological state of recipients of judicial protection, then the argument may hold, but the resulting state of affairs does not undermine judicial protection as long as judicial measures play some role in overcoming the disadvantaged status of the group.

While concerns with the democratic nature of the judiciary and its paternalism do not loom large in international law, they will no doubt arise. So, in outlining a more active role for adjudicatory mechanisms in international law, we should prepare a rigorous defense, which I have tried to initiate here.

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## V. Minority protection and entitlements

The relationship between group protection and group entitlements finds a vivid illustration in the relationship between Articles 26 and 27. The history of the Sub-Commission on Prevention of Discrimination and Protection of Minorities will illuminate the problem with the relationship between the prevention of discrimination and the protection of minorities.

The Sub-Commission suggested the following guidelines in drafting the articles:

1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.

2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for the equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.

The protection belongs equally to individuals belonging to such groups and wishing the same protection. It follows that differential treatment of such groups



or individuals belonging to such groups is justified when it is exercised in the interest of their contentment and the welfare of the community as a whole... If a minority wishes for assimilation and is debarred, the question is one of discrimination and should be treated as such.

These guidelines clearly link the prevention of discrimination with the protection of minorities: "the protection of minorities is the protection of non-dominant groups."

The italicized phrase makes a crucial association between prevention and protection by limiting protection not to any minority but to non-dominant groups, that is, (taking "non dominant" to mean "disadvantaged" or "subordinate") to those groups deemed to have been harmed or vulnerable to harm. It is noteworthy also that the Sub-Commission refers to groups rather than to minorities. The Secretariat later issued a memorandum commenting on the Sub-commission's formula. The memorandum effectively undermined the formula by severing the relationship between the preventive and protective functions. The memorandum emphasized fundamental differences between prevention and protection, concluding that the two had to be handled differently.

By focusing on the differences, the memorandum paved the way for decoupling prevention and protection, a separation later reflected in the final drafting of Articles 26 and 27. I do want to suggest that the Secretariat's memorandum led directly to the bifurcation of prevention and protection. Many other factors contributed, including the desire of many countries to sidestep any examination of their own minorities' problem.

The United Kingdom opposed the Sub-Commission's proposal to investigate actual conditions and to limit its studies to general and not country-specific conclusions. So, the intent was not so much to bypass the protection of minorities as it was to sap the prevention of discrimination of any strength. The final version of Article 26 reads as follows:

All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Thornberry and others interpret Article 26 as largely negative, requiring only that a state should not engage in discriminatory activity, and Article 27 as positive, demanding positive state action to ensure equality by bolstering group identity. However, Article 26 makes negative and positive demands upon states. The phrase "in this respect" connects the first sentence on equality with the second sentence on discrimination, and the second sentence clearly not only prohibits discrimination it also "guarantees to all persons equal and effective protection." In this way, Article 26 links the prohibition of discrimination with a substantive, and not merely procedural or formal sense of, equality: "the legislature must refrain from discrimination when enacting laws, however, it is also obligated to prohibit discrimination by enacting special laws and to afford effective pro-

tection against discrimination."

Article 27 reads:

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.

Commentators differ over how to interpret Article 27. Some analysts see Article 27 as a group protection device. Other commentators see Article 27 as only protecting individuals and not groups. Another group of analysts, including Thornberry, sees Article 27 as granting entitlements to minorities. Article 27, contrary to Thornberry's defense of Special Rapporteur Capotorti, does not create positive state obligations. The phrase "minorities shall not be denied the right..." obligates state parties to refrain from the interference with the group identification process. States cannot prevent a minority from using its own language, running its own schools, etc. States should also protect the minority from interference from other groups as well. However, states do not have any positive duties to guarantee entitlements to minorities. States should not, contrary to Thornberry, "take such measures as are necessary in order to assist the minority to preserve its values." According to Thornberry, "failure to allow minority languages to be taught in schools and universities when a minority desires this would, prima facie, be a breach of Article 27" (p. 197). The lack of positive duties for the state does not entail state passivity. To the contrary, a group harm approach opens the way for heightened state concern for groups. Positive state action comes predicated on the finding of group harm. The state should take positive action to promote a group's language if failure to do so would result in harm. Failing to provide translation services for newly landed immigrants for example takes on a greater importance than providing bi-lingual education for members of well-entrenched, stable minorities.

The Human Rights Committee adopted the group harm approach in the Breton language cases. Separating the protective from the preventive functions creates its own problems. For example, "programs to protect minorities can become shields behind which racial discrimination is perpetuated under the pretext of differential treatment." Connor Cruise O'Brien aptly characterizes this worry: "When we are told to respect the cultures of groups we are being told to respect things which may include, for example, the Hindu Caste system, the treatment of women in Islam and a number of other cultures, female circumcision in certain cultures, ostracism of twins...and so on."

Thornberry proclaims that the "Covenant's answer is that no individual against his or her will can be coerced into acceptance or adoption of such practices in the interests of group solidarity or continuity" (p. 205). This is more wishful thinking than anything else on Thornberry's part. Although other protective rights granted in the Covenant take precedence over Article 27, the Covenant does not explicitly or implicitly proscribe cultural practices such as female circumcision. By setting Article 27 aside as a separate protective measure, Thornberry unwittingly provides a framework for not only justifying but also for requiring the state to promote cultural practices necessary for minority group's identity,

irrespective of their harmful effects.

Female circumcision provides an example of the benefits of giving primacy to the group harms in Article 26 over the group identity claims of Article 27. Female circumcision or genital mutilation "can have many physically and psychologically debilitating effects on women and girls." Defenders of these practices among, for example, the Kikuyu of Kenya and the Darod of Somalia use the justification of tribal identity. The practice is clearly discriminatory in the strong sense of harming individuals because of their group affiliation. Further, preserving cultural identity may result in condoning some harms due to group affiliation, namely, those harms resulting from regressive cultural practices.

Members of the Lyackson Indian Band in British Columbia, Canada, forcibly captured David Thomas, a band member, and initiated him into the ceremony of spirit dancing, during which they assaulted, battered, and wrongfully confined him without his consent. A Canadian court, rejecting the band's claim to a collective Aboriginal right to continue their traditions, found that the band members had violated Thomas's individual right to personal security. Thomas, an ascriptive member of the band, did not have the freedom to exit. Fortunately, he did have recourse to the courts, which provided him protection from the group harm he experienced as an internal minority. In a manner similar to the history of Article 26, the original purpose behind Article 27 was also undermined.

During the 5th Session (1949) for drafting Article 27, it was agreed that while Article 26 "contained a general prohibition of discrimination, differential treatment might be granted to minorities to ensure them real equality of status with the other elements of the population." So, Article 27 was originally intended to strengthen Article 26 by permitting differential treatment to victims of discriminatory harm. Subsequent drafting of Article 27's provisions diverted the drafters from the original purpose, particularly when it came time to define minorities. Differential treatment was then afforded only to "separate or distinct groups, well-defined and long established on the territory of a State." But why should only stable and well-defined groups receive differential treatment? Some states worried that extending the scope of Article 27 too far would artificially awaken the minority consciousness thereby undermining assimilation and ultimately the stability of the state.

Thornberry offers the most cogent case for strengthening Article 27 independently of Article 26. Thornberry sees Article 27 as protecting a right to a distinct identity. He sees the protection of minorities as implying "a permanent set of arrangements to protect the culture, language and religion of the minority" (p. 126). He argues that international law should recognize minority groups in a positive fashion. One pragmatic consideration speaks against this argument, namely, it places international law in an unnecessary entanglement over distribution of entitlements.

Article 27 valorizes culture, religion, and language. Why should these features and not others receive any heightened judicial attention? Why should ethnic, religious, and linguistic minorities receive special treatment? The answer may lie in recognizing culture, religion, and language as some of the ways that give diversity to humankind. However, they are not the only ways, nor are they

always the best ways of promoting diversity. Diversity regarding sexual orientation, physical features and abilities, and political beliefs represent just a few of the ways in which diversity manifests itself.

I take it that individuals with a sexual orientation different from the dominant culture do not qualify as an ethnic, religious, or linguistic minority. Gays generally do not have different religions and languages from the dominant society, and we would have to stretch the idea of culture to say that they have a different culture. I do not want to deny that the gay community has distinctive features. It does not, however, easily fit under the international law treatment of an ethnic minority enjoying its own culture. There are no prima facie reasons why those groups fitting into the more traditional definitions of culture should more readily receive special protection than other groups such as gays.

Indeed, this discussion exemplifies just the type of divisive debate engendered by a separate Article 27 where one group vies against others for protection. In some sense, all "minorities" or "disadvantaged groups" deserve recognition--in the sense that they should not be harmed as a group. The lowly status of minority rights is in part due to the ideology of human rights taking prominence over minority interests and rights. However, it is also because anti-discrimination principles enshrined in Article 26 are not sufficiently tied to entitlements provisions of Article 27. Article 26 is not a precondition of Article 27, nor are the two complementary. Rather the entitlements of Article 27 must be based on harms established in Article 26. Thornberry wrongly sees the right to identity as a sufficient condition for the protection of minorities and nondiscrimination as a necessary condition. To protect some minorities from some group harms, we might have to resort to the entitlements contained in Article 27. The debate over prevention and protection becomes pointed in the applied setting of an examination of the decisions by the Human Rights Committee.

### *Applications*

The Human Rights Committee (HRC) helps to implement the International Covenant on Civil and Political Rights, adopted by the United Nations and put into force by 89 parties in 1976. The HRC can serve as a model for adjudicating claims by minorities. Besides periodic reports on human rights from the parties, the HRC hears individual complaints. The Committee considers the admissibility and merits of individual complaints without any oral hearing. The Committee may suggest interim measures, but the Optional Protocol does not explicitly provide for friendly settlement of disputes.

The Committee strives to reach a decision by consensus. The Committee's decision is not binding on the parties. The HRC has many procedural shortcomings. Oral hearings and binding decisions would enhance human rights and the protection of minorities. However, the Committee's jurisprudence also needs addressing. If the Committee places its focus on harm, then its jurisprudence for individual claimants can serve as a model for others to follow. According to Article 32 of the Vienna Convention on the Law of Treaties, preparatory work, described in the previous section, has a secondary place. The practice of the Human Rights Committee will have the greatest weight. However, the HRC and other international adjudicatory organs should take the legislative history seriously. Indeed, the HRC should adopt the original purpose behind

Articles 26 and 27. Coupling differential treatment to group identity is the only sensible interpretation for the HRC to follow.

Article 26 of the International Covenant on Civil and Political Rights, UN 1966 states that "the law shall prohibit any discrimination...." "Any discrimination" can be interpreted in a number of ways: (1) as literally any distinction, or (2) as a certain distinction.

*"Any distinction."* The Committee has rejected an interpretation that would make any unequal distinction legally cognizable. For example, in *B. v. The Netherlands*, the Committee refused to develop a differential treatment analysis that would have distinguished between two groups of physiotherapists, those directly notified of the lack of certain insurance obligations and those indirectly notified.

*"Certain distinctions."* Article 26 specifies that it "guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This wording seems to distinguish the attributes that would make distinctions questionable and objectionable. An immediate difficulty revolves around having to specify the attributes. What about attributes not included in the list? The Committee's approach to the problem has been to determine whether the distinction falls within the "other status" of the article. In *Gueye v. France*, the Committee found that the distinction between retired soldiers of Senegalese nationality and retired soldiers of French nationality fell within the "other status" clause. The HRC has recognized minorities in only four cases: the Maliseet Indians (Lovelace) in Canada, the Sami (Kitok) in Sweden, the Lubicon Lake Indian Band (Lubicon Lake Band), and the Romani minority in Finland.

The first two decisions proved particularly noteworthy. Sandra Lovelace, a Maliseet Indian, lost, in accordance with Section 12(1)(b) of the Indian Act of Canada, her Indian status when she married a non-Indian. The tribe denied her the right to return to the Tobique Reserve after her divorce. The HRC found a violation of Covenant Article 27. The Committee concluded that "[w]hatever may be the merits of the Indian Act in other respects, it does not seem...that to deny Sandra Lovelace the right to reside on the reserve is reasonable or necessary to preserve the identity of the tribe..." Yet, the Lovelace case is more appropriately treated as an Article 26 case. In an individual opinion, the Tunisian expert Bouziri correctly interpreted the Indian Act as gender-specific discrimination and thus in violation of Articles 2, 3, and 26. The tribe would not have treated a male Indian in the same way. An Indian man who marries a non-Indian woman does not similarly lose his status as a Maliseet Indian.

If we combine the gender discrimination issue with the Committee's reasoning, some disturbing results emerge. The Committee implied that it would accept denials of individual rights if it could be shown that the denial was a reasonable or necessary means to preserve tribal identity. So, tribal identity could justify some forms of gender discrimination. In a similar case, *Kitok v. Sweden*, Ivan Kitok left his traditional Sami village for three years, thereby losing his right, under Swedish law, to engage in traditional reindeer husbandry. The Committee upheld the exclusion, finding that it was "necessary for the continued viability

and welfare of the minority as a whole." However, by emphasizing the positive protective measures taken by the state the Committee skirted an important group harm issue in the case. Since reindeer breeding constitutes an essential part of Sami identity, the law effectively made it more difficult for those Sami not engaged in reindeer husbandry to maintain their identity.

The government estimated that those with Sami rights to breed reindeer numbered 2,500 out of a total Sami population of between 15,000 and 20,000. So, the state granted entitlements to a small portion of an indigenous minority group, thereby helping to doom the majority Sami to an assimilated fate. One of the problems with minority entitlements is that they may benefit only a small segment of the entire minority group. The Kitok case raises other problems of determining group membership. The Sami people themselves determine membership in Sami villages. Kitok did not thereby qualify for membership. The Committee noted its concern that the Reindeer Husbandry Act ignored "objective ethnic criteria in determining membership of a minority." This would indicate that the Committee would question any indigenous group determining its own membership criteria. However, the Committee correctly avoided the group identity question, allowing the case to turn on the issue of harm. Accordingly, the Committee noted that "Kitok is permitted albeit not as a right, to graze and farm his reindeer, to hunt and to fish." In short, the Committee did not find Kitok sufficiently harmed to warrant interference in tribal affairs.

The HRC sometimes treats Article 26 as if it were only an accessory right, dependent upon other rights granted in the Covenant, and not an independent right. For example, the Mauritian Women case clearly dealt with gender-specific distinctions contained in the Immigration and Deportation Act of Mauritius, which granted the alien wives of Mauritian men an unlimited residency right, whereas the alien husbands of Mauritian women were required to obtain official residence permits. The Committee found violations of Articles 2(1), 3, and 26 in relation to Articles 17(1) and 23(1). The Committee began treating Article 26 as an independent right in the Netherlands discrimination cases in *Broeks and Zwaande Vries*. In these cases, the Committee found gender-specific discrimination in the Dutch Unemployment Benefits Act, which required married women but not married men to prove that they were "breadwinners" in order to receive support. The Committee does not treat every gender-specific or other group-based distinction as discriminatory.

For example, in *Vos v. the Netherlands*, it found the distinction according to gender in the General Disablement Benefits Act reasonable. The HRC in the Breton cases adopted a group harm approach to language. For example, in *Dominique Guesdon v. France*, Guesdon argued that Belgium violated his freedom of expression by requiring to plead his legal case in French rather than in Breton, his first language. In another similar Breton case (*T.K. v. France*), the Committee found that "no irreparable harm would be done to the author's substantive case by using the French language to pursue his remedy" since Guesdon had exhibited fluency in French. Although it has not given an in-depth analysis, the Committee has effectively employed a group harm approach to language by first determining the prevalence of a group harm under Article 26. If Article 27 had a status independent of Article 26, then the Committee would be

wrong in its analysis.

Fernand de Varennes rejects the Committee's analyses in the Breton cases because the right to freely express ourselves in our own language is "one of the most sacred and cherished freedoms of a democratic society." Denying individuals the right to express themselves in their native tongue can constitute a harm, but most likely it would not rise to the level of a group harm. In the words of United States Supreme Court jurisprudence, linguistic minorities do not qualify as suspect classes. Placing a positive obligation on states to protect and promote languages would unduly burden states. Nigeria for example has 250 native languages. So, Article 27 leads to derivative and not to direct rights to positive state action. An anti-discrimination principle underlies Article 27, but it may not be adequate to the task of protecting the groups.

Let us examine the claim that anti-discrimination fails to do full justice to minorities." The problem does not lie in the anti-discrimination principle itself but rather in how it is interpreted. Like many judicial organs, including the United States Supreme Court, the HRC gives prominence to anti-discrimination in the sense of making distinctions that are not reasonable and objective along lines of race, gender, etc. The emphasis on the formal distinctions and classifications obscures the real issue at stake, namely, the group harm. The important question is not whether someone unjustly falls within the grips of a classification but whether the person experiences harm because of group affiliation.

The Preamble to the UNESCO Declaration on Race and Racial Prejudice (November 27, 1978) captures the harm sense of discrimination: Noting with the gravest concern that racism, racial discrimination, colonialism and apartheid continue to afflict the world in ever-changing forms, as a result both of the continuation of legislative provisions and government and administrative practices contrary to the principles of human rights and also of the continued existence of political and social structures, and of relationships and attitudes, characterized by injustice and contempt for human beings and leading to the exclusion, humiliation and exploitation, or to the forced assimilation, of the members of disadvantaged groups. The Human Rights Committee should take harm as its modus operandi.

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## Conclusions

Minorities have never fared well internationally. The plight of minorities has never been so urgent. Adjudicatory mechanisms could play a critical role to alleviate the harm experienced by innocent minorities. The quests for positive identities, however noble in certain contexts, has impeded judicial resolution of minority problems. Minorities, by their very nature, create issues of exclusion and inclusion. The reality of minority formation dooms any conceptual attempt

to impose limits on what counts as a minority and what does not.

A definition demands precision. The political reality of minorities yields not only imprecision but also a phenomenon that defies clarity. The amorphous nature of minorities stems, in part, from the fact that unpredictable political forces, unleashed primarily by dominant power factions, play a significant role in determining the ever-changing confines of the minority category. The intellectual frustration experienced by those involved in delineating the necessary and sufficient conditions for minority status may find comfort in how minority problems unfold historically. It takes incredible naiveté and blindness not to see the pain and suffering inflicted upon individuals because of how others perceive their minority status.

Individuals throughout the world suffer egregiously because of their group affiliation. Adjudicatory mechanisms and institutional structures must address group harm. No single institutional structure can resolve the plight of minorities, but a judiciary, ideally at an international level, does have the tools to address group harm and to bring justice to the situations. First, the judiciary needs to decipher whether a purported minority constitutes as a disadvantaged group. A court would look at the history, sociology and politics that shaped a minority group. Then, a court would turn to a determination of the alleged harm in the particular case.

An approach to the minority question based on group harm resolves the conflict between provisions providing for prevention of harm to minorities and those protecting group identity. A state may have many reasons for sanctioning positive group identity. Granting entitlements to groups gets a strong justification if the reason for it stems from an attempt to prevent present or future group harm. In an ideal world, a court would protect all minorities from present and future harm, sanction entitlements to those minorities facing grave harms, grant secession rights to a few minorities in specialized circumstances, and bestow land rights and autonomy to indigenous peoples. True, the ideal world stands far in the distance.

Yet, civilization demands not only a vision of a better world but also the steps towards making that world a reality. This analysis may seem too normative for those with a more practical bent. However, as the illustrations from the Human Rights Committee show, a group harm framework easily adapts to existing international adjudicatory institutions. Group harms demand our focused attention and concerted action.



