JUSTICE, LEGITIMACY, AND SELF-DETERMINATION

MORAL FOUNDATIONS FOR INTERNATIONAL LAW

ALLEN BUCHANAN

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CHAPTER 9

Intrastate Autonomy

1. Intrastate Autonomy and Transnational Justice

The isolate and proliferate strategy

In the preceding chapter I argued for combining a rather restrained, justice-based view of the unilateral right to secede, the Remedial Right Only Theory, with a much more supportive stance toward forms of self-determination within the state. Uncoupling the right to secede from the legitimate interests that groups may have in various forms of intrastate autonomy is liberating. It allows groups to get what they need without the risks involved in secession, and it should make states more receptive to legitimate claims for autonomy by assuring them that they can respond to these without implicitly recognizing a minority group’s right to secede.

Here I want to elaborate the second prong of the isolate and proliferate strategy by clarifying what it means to say that the international legal order should support intrastate autonomy. The chief question I seek to answer in this chapter is this, then: Under what conditions should the international community involve itself in the creation, maintenance, or restoration of intrastate autonomy regimes?

This chapter should forestall the charge that the normative theory of secession set out in the preceding chapter gives short shrift to the value of self-determination. What that theory rejects is the conflation of self-determination and independent statehood, not the importance of self-determination. In this chapter I argue that the international legal order ought to acknowledge the importance of self-determination by supporting intrastate autonomy. I also wish to make it clear that quite apart from the role that international law
should play. I believe that individual states should generally give serious consideration to proposals for intrastate autonomy, for a number of different reasons. For one thing, as I have argued all along in this volume, there is nothing normatively or practically privileged about the idea of the unitary state. Breaking the grip of the unitary state paradigm enables us to explore various forms of political differentiation within existing state boundaries.

I will begin with a more specific question: When, if ever, do intrastate autonomy regimes fall within the domain of transnational justice? The former and latter questions are distinct for this reason: Principles of transnational justice lay down the standards that the international legal order ought to require states to meet in their internal affairs as a matter of international law; but international actors may have legitimate interests in influencing what goes on within states, even when it is not a matter of transnational justice. The chief difference is that the principles of transnational justice limit and thereby partly define sovereignty, and therefore can provide grounds for forcible intervention in extreme cases. Beyond the domain of transnational justice there may be cases in which it would be permissible and even commendable for the international community to exert diplomatic efforts in support of intrastate autonomy, but in which the use or threat of force would not be justified.

I will first make the case for including in the domain of transnational justice the monitoring and enforcement of intrastate autonomy regimes under certain rather exceptional circumstances. Then, in the last section of this chapter, I will suggest that even where principles of transnational justice do not require it, there are cases in which the international community might play a constructive role by providing diplomatic support and economic inducements or pressure to encourage the creation and well-functioning of intrastate autonomy regimes.

When aspirations to autonomy are not valid claims of justice

The arguments of the preceding chapter show that it is important to distinguish between legitimate interests that groups may have in securing various forms of intrastate autonomy and valid assertions of the right to autonomy. Even when a group does not have a valid claim of justice to intrastate autonomy, there may be good reasons for it to
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Seek it. Decentralizing government functions can be more efficient, can make for more meaningful democratic participation, and can better serve the interests of minorities that believe they have insufficient influence in the broader, state-wide political processes. For all of these reasons and more, intrastate autonomy is often a worthy goal.

However, for an aspiration to intrastate autonomy to be a candidate for being supported by a legal regime of transnational justice, it must express a valid claim of justice. It is important to distinguish then between cases where the international legal order may support or even ought to support intrastate autonomy and cases in which the commitment to justice obliges the international legal order to include a demand for intrastate autonomy within the realm of transnational justice and therefore to require the state to accept the arrangement.

The analysis of the preceding chapter indicates that there are several circumstances in which a group’s claim to some form of intrastate autonomy ought to be acknowledged as a valid claim of transnational justice in international law. The first is where the group is entitled under international law to secede, but chooses instead to opt for self-determination that falls short of full independence. The second is where the state has granted self-government to a group within the state, but an appropriate international legal process has determined that the state has persisted in wrongly violating the autonomy arrangement in some fundamental way.

A third circumstance in which intrastate autonomy arrangements may fall within the domain of transnational justice is where the granting of autonomy to a group within the state is the best prospect for stopping persistent and serious rights violations by the state. In an imperfect system in which more direct attempts to end discrimination against a minority group have failed, it may be justifiable for the international legal order to demand that the state grant the group autonomy, even if the rights violations have not reached a level of severity sufficient to justify the group’s seceding. (Thus it is conceivable that the worst ethnic cleansings of Kosovar Albanians by Serb forces and the death of many Serbs during the NATO intervention of 1999 might have been prevented if the international community had acted earlier to require Serbia to reinstate the autonomy status of Kosovo, which had been revoked by the Milošević government.)
Later in this chapter I will argue that there is a fourth circumstance that can justify international legal acknowledgment of a right to intrastate autonomy: the need to honor the valid claims of indigenous peoples to rectification of past injustices and their continuing effects.

_Distinguishing the grounds for a right to autonomy from those for a right to secede_

From the perspective of institutional design that takes incentives seriously, there is much to be said for making the remedial grounds for international legal acknowledgment of a group's right to intrastate autonomy somewhat less demanding than those for the international legal right to secede. For one thing, if the standards were the same, discontent minorities would be prone to conclude that they might as well opt for secession. This would be unfortunate, given the international legal order's legitimate interest in stability and the greater risk of violence that secession usually entails. For another, as Donald Horowitz rightly emphasizes, secession often simply creates a new problem of minority oppression, as the dominant group among the secessionists now have their own state with which to oppress minorities within it. In contrast, where a group that is a minority within the state achieves autonomy rather than full independence, the state will usually still be able to exert some control over how the autonomous region treats its minorities and the majority in the autonomous region will have incentives not to oppress its minorities. For both of these reasons, it makes sense for the international community to require a lesser level of minority rights violations for the recognition of a right to autonomy than for a right to secede. By recognizing a right to autonomy, it may be possible to avoid the issue of secession.

_Intrastate autonomy and the protection of individual rights_

It is disappointing that the growing literature on intrastate autonomy regimes and power-sharing arrangements is seldom clear as

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The issue whether such arrangements are needed only because current political structures are not effectively protecting minorities against violations of their individual human rights, especially their rights against discrimination on ethnic or religious grounds, or for other, nonremedial reasons. There are in fact two quite different ways to regard intrastate autonomy and power-sharing regimes and to justify support for them by principles of transnational justice.

On the one hand, as I maintain, so far as justice is concerned they could be regarded as largely or even exclusively a remedial matter, as responses to failures to protect minorities from various forms of discrimination and violations of other human rights. On the other hand, they could be regarded as being required as a matter of justice even in the absence of human rights violations. The general thrust of my critiques in the previous chapter of various arguments for self-determination for nations and cultural groups as such is that the international legal order ought to regard intrastate autonomy regimes as remedial devices, as backups for failures to protect individual human rights (and as an optional remedy in the case of forcible annexations of sovereign territory), not as something to which groups have a right simply because they are nations or partake of a distinct culture or are distinct "peoples."

Again, to avoid misunderstanding, let me stress that I am not saying that demands for intrastate autonomy ought only to be taken seriously when they are claims of justice or that self-determination is valuable only as a remedy for injustice. Self-determination can be extremely valuable for many reasons, as I have repeatedly observed. My point is a much more focused one about what international law should require of states. It is a point about the scope of transnational justice, not about the value of self-determination.

There are many things that states can do that would largely obviate the need for intrastate autonomy regimes, or at least would undercut the claim that groups have a claim of justice to such arrangements. First and most important, states can provide better protection of individual human rights against discrimination, especially in

employment, education, and basic health care and public health measures, but also against discrimination in access to political participation. Second, for some groups it will be necessary to undertake measures to counteract the continuing effects of past violations of these individual human rights, for example through special subsidies for education or employment, various types of affirmative action programs for minorities, and so on. Third, as I noted in the preceding chapter, states can and should do much more to jettison the particular cultural baggage attached to public ceremonies, holidays, and other items in the public space that minority cultural group members find alienating if not insulting. Even if it proves impossible for the state to be completely “culturally neutral,” the more egregious instances of favoring one culture or religion or ethnic group or nationality over others can be eliminated and in some states already have been.

I am not denying that in some cases the individual rights of members of minority groups can best be protected by some form of intrastate autonomy for the group. I shall argue below that this often may be the case for indigenous peoples. But if the case for autonomy is that the minority group is suffering human rights violations, it is a mistake to begin with proposals for intrastate autonomy. Instead, the presumption should be that more must be done to protect minorities by respecting their individual rights, including those individual rights that empower and protect communities, such as the right to religion, to wear distinctive cultural dress, and to engage in cultural rituals and ceremonies, as well as the right against all forms of political, educational, and economic discrimination and exclusion.1

There are several weighty reasons for concentrating first and foremost on the protection of individual human rights. First, respect for rights generally is not likely to be enhanced by proliferating rights unnecessarily. If conscientious efforts to strengthen protections of individual human rights will do the job, there is no reason to create new autonomy rights. There is also the risk that by shifting our attention to the problem of choosing from a large and complex menu of alternative autonomy regimes we will be distracted from the

1 Hurst Hannum emphasizes the importance of better compliance with individual human rights norms in Autonomy, Sovereignty, and Self Determination, 4, 75, 125, 118.
crucial task of holding states accountable for their primary role of protecting the basic human rights of all their citizens. Furthermore, the creation of autonomy regimes does not itself guarantee that human rights will be respected; in some cases it merely creates a new locus of political power in which those who were the oppressed can become the oppressors. (Recall, for example, that in the century between the end of the American Civil War and the passing of key Federal Civil Rights legislation in 1964 and 1965, the autonomy of Southern states within the federal system legitimized the creation of a regime of institutionalized racism.)

Finally, there is the additional risk, which I explored in some detail at the end of Chapter 8, that if autonomous units within the state have considerable control over revenues and other resources within their boundaries, they will act in ways that impede state efforts to implement distributive justice. In a world in which the state is the only thing approaching an effective agent for distributive justice, this is a serious consideration.

The many forms of intrastate autonomy

A rich and burgeoning literature catalogs the varieties of extant, as well as feasible but yet untried, intrastate autonomy regimes. These range from consociationalism to various forms of symmetrical and asymmetrical federalism to forms of "personal" rather than territorially based rights of self-government. There is in fact an indefinitely broad range of what might be called political rights or rights of collectivities in which rights of self-administration shade off into genuine rights of self-government and rights to participate in decision-making regarding economic development in a group's region shade off into state-like jurisdictional rights to create rules defining property rights.

Nothing general can be said about which sort of autonomy regime is appropriate. Understood as remedies for failures to protect human rights of minorities, intrastate autonomy regimes must be...
selected and modified to provide an appropriate response to the particular violations that have occurred, given the social and cultural context and the resources available. The point is that once we realize that the various elements of sovereignty can be unbundled, there is in principle a very wide range of alternative intrastate autonomy regimes.

II. Indigenous Peoples’ Rights

Indigenous peoples’ rights and the philosophy of international law

There are two reasons why a moral theory of international law should address the topic of indigenous peoples’ rights (apart from the fact that advocacy of indigenous peoples’ rights is becoming more prominent in international legal discourse). (1) Some advocates for indigenous peoples’ rights see them as including group rights that constitute a challenge to the fundamentally individualistic framework of the dominant individualist conception of human rights. (2) The need to protect the interests of indigenous peoples provides perhaps the strongest case for international legal support for intrastate autonomy. Unfortunately, many international legal theorists—especially those who are Europeans—have tended to underemphasize the importance of indigenous peoples’ rights. This chapter is designed in part to help remedy that deficiency.

With regard to (1) I will show that although a proper protection of the rights of indigenous peoples will require changes in international law, it is an exaggeration to say that achieving this protection requires a radical revision of the conceptual framework of human rights theory and practice. There is no reason to conclude that taking indigenous peoples’ rights seriously requires abandoning the idea that the international legal order should be grounded in individual human rights or requires embracing the view that a new conception of group rights must be incorporated in it. The main thrust of this section, however, is to support (2), by showing how international legal support for intrastate autonomy for indigenous groups can serve the goals of rectificatory justice.

Rights of peoples, not just of persons

Consider first the thesis that the case of indigenous peoples shows that the conceptual framework of individual human rights that I have
employed in earlier chapters is inadequate. Key documents in the
discourse of indigenous peoples' rights seem to proceed on this
assumption. Throughout the UN Draft Declaration on the Rights
of Indigenous Peoples, various rights are ascribed to indigenous
peoples, not to individual indigenous persons. This choice of words
is deliberate; it implies that at least some of the rights set forth in the
document are group rights. Because it interprets the Draft's refer-
ce to rights of peoples as signaling the assertion of group rights,
the United States government has argued for revising the wording
of the declaration so that only individual rights are recognized.6

The putative group rights of indigenous people are of at least two
sorts: rights of self-government, usually understood as rights to
intrastate autonomy rather than as rights to independent statehood,
and rights to "cultural integrity," understood to include not only
rights against interference with cultural activities, but also rights to
positive actions by states to help indigenous peoples not only to pre-
serve but "strengthen" their cultures and determine the direction of
their cultural development.7

My concern in this chapter is primarily with rights of self-
government, because the goal is to understand the role that support
for intrastate autonomy regimes should play in a theory of transna-
tional justice. Since the justice-based approach to the moral theory
of international law I have advanced in this volume rests on a con-
ception of individual human rights, it is necessary to clarify and
evaluate the charge that such a normative framework cannot accom-
modate the legitimate claims of indigenous peoples.

Group rights in international law8

During the League of Nations period, between the two World Wars,
international law included what might be regarded as group rights,

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6 Working Group Established in Accordance with United Nations Commission
Doc, E/CN.4/1999/82 at 42. See also Cindy Holder, 'Cultural Rights in the UN
Draft Declaration on the Rights of Indigenous Peoples', unpublished manuscript
(University of Victoria, British Columbia).

7 Articles 15, 29, 33, and 34 of the UN Draft Declaration on the Rights of
Indigenous Peoples relate to intrastate autonomy and articles 9, 10, 12, 13, 14, 16,
17, 24, 25, and 26 relate to cultural integrity. For discussion of these articles, see
Holder, 'Cultural Rights'.

8 This subsection is drawn from Buchanan and Galowe, 'Philosophy of
International Law', 892-7.
chiefly in the form of cultural rights for certain national minorities, but lacked clear norms specifying individual rights. Parity because the concept of minority rights was discredited by Hitler’s appeal to the alleged violations of the rights of ethnic Germans in Czechoslovakia and Poland as a pretext for invasion, minority rights were at first accorded at best a minor role in the new international legal order forged by the United Nations in 1945.

Instead, until very recently the domain of transnational justice in the UN Charter era consisted almost exclusively of individual human rights, combined with the recognition of a “right of self-determination of peoples” that in practice has been restricted to “saltwater” decolonization. (The category of international, as distinct from transnational, justice has traditionally consisted until recently of the rights of states, which at least according to the notion of popular sovereignty might be described as group rather than individual rights.) There is some indication, however, that greater attention to the rights of minorities is emerging, especially in the area of indigenous peoples’ rights.

The chief issue for a moral theory of international law, then, is whether the Charter era’s near exclusive focus on individual rights is defensible, or whether in addition to the rights of states and the right of self-determination of colonized peoples, it ought to be supplemented with a richer menu of group rights. More specifically, if new group rights are to be included in international law, should they be understood as basic rights, coordinate with the most fundamental individual human rights, or as being in some way derivative? And if group rights and individual human rights conflict, which should be accorded priority?

Different senses of ‘group rights’

My aim here is not to provide a comprehensive theory of group rights or even a catalog of all the different rights that are sometimes referred to as group rights. It is necessary, however, to clarify what is meant by group rights in the present context.

Unfortunately there is no fixed usage for the term. The following quite different senses can be distinguished.

(1) Group rights are those that cannot be wielded (i.e., exercised, waived, or alienated) by an individual as an individual, on his own
beholders. They can only be wielded on behalf of a collectivity through some collective mechanism, either through a majority vote in the case of a direct participatory democracy, or by the authorized representatives of a collectivity. When such rights are wielded by authorized representatives of a collectivity those representatives do not wield the rights as individuals, on their own behalf. The paradigm example of a group right in sense (1) is a right of self-government enjoyed by a state or by a federal unit or municipality or some other collective entity within the state.

(2) Group rights are those that are ascribed primarily to groups, rather than to individuals—group rights are said to be rights possessed by groups. Thus if a group right in sense (2) is violated, it is to the group as such, not to its members as individuals, that apology, restitution, or compensation is owed. The first concept of group rights, (1), distinguishes them from individual rights according to who or what wields the right; group rights in this sense cannot be ascribed to individuals as such. The second, (2), distinguishes them from individual rights according to whom the possessor of the right is.

Although senses (1) and (2) are logically distinct, they usually go together. Thus the reason that a right of self-government for a collectivity such as an Indian tribe or the people of a canton or province is a group right in sense (1), a right that cannot be wielded by an individual as such, on his own behalf, is that it is a right possessed by the collectivity. If no individual possesses the right, then no individual can wield it as an individual, on his own behalf.

(3) A group right is one whose justification appeals to the interests of all or most of the members of a group, not just to the interests of an individual. For example, a right to vote might be ascribed to each individual in a polity (individuals are possessors of the right and wielders of this right), but the justification for this ascription might appeal to the interests that all members of the polity have in having broadly-based participation in government. Appeals to the interests of any given individual or subset of the group might not be sufficient to justify ascription of the right.

For a right to be a group right in sense (3) one need not assume that groups have interests that are not reducible to the interests of

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their members. The point of sense (3), rather, is that the justification for the right appeals to the interests of all or most members of the group. Furthermore, (3) leaves open the question of whether the right is a group right in sense (1), that is, whether it is to be wielded by individuals as such, on their own behalf.

It is important to recall, as I noted in Chapter 3, that international law, like all domestic legal systems, already includes group rights in sense (1). All the rights of states are group rights in the sense of rights that cannot be wielded by individuals as individuals, on their own behalf. No individual, as an individual, can exercise the sovereignty-constituting rights of the United States, or France, or Thailand, and so on.

So it is preposterous to say that the recognition of group rights in sense (1) for indigenous peoples or any other collectivities such as national minorities challenges the framework of international law. Indeed, until this century international law consisted almost exclusively of group rights in sense (1)—namely, the rights of states. Nor is there anything conceptually novel about saying that individual states or international law, or both, ought to recognize that indigenous groups or national minorities have group rights in sense (2), that is, that they should be regarded as possessors of rights of self-government. This is no more problematic, from a conceptual point of view, than saying that the people of the United States have rights of self-government.

So if what indigenous peoples or national minorities are asking for when they demand group rights is rights of self-government, there is nothing conceptually radical about this. They are simply demanding that some of the rights that states traditionally possess should be ascribed to them and wielded by their authorized agents, on their behalf.

As noted above, advocates of indigenous peoples' rights typically call for recognition not only of rights of self-government, but also a right to cultural integrity, and frequently regard the latter as a "group" or "collective" right. If this means that the right to cultural integrity is a group right in sense (3), then, as with senses (1) and (2), no radical revision of the individualist framework of the justice-based conception of international law is required. Perhaps it is true that the justification of the right to cultural integrity appeals not just to the interest of any single indigenous person but rests on the
cumulative moral weight of the interests of all or most individuals in the group. The same may be true of various rights ascribed to the people of the United States or the people of France, including, for example, the right to exercise some control over who becomes a citizen and perhaps the right to vote as well.

The ascription of group rights to indigenous peoples could only challenge the conceptual framework of an individualistic moral theory of international law if group rights are understood in sense (2)—if groups are understood to be the possessors of the rights in question, where the reference to groups is not simply shorthand for saying that the right is a right of each member of the group. To understand why this is so, it is important to emphasize that the so-called individualist conceptual framework is only individualistic in a justificatory sense: According to moral individualism in the justificatory sense, all justifications for ascriptions of moral and legal rights (and duties) must be grounded ultimately on consideration of the well-being and freedom of individuals.

Justificatory individualism is compatible with the view that groups are 'real'—that not all the properties of groups can be reduced to the properties of individuals who are members of the groups. As I emphasized in Chapter 1, it is a justificatory, not an ontological, view. In addition, individualism as a view about justification of rights assertions is also obviously compatible with the ascription of rights in both sense (1) and sense (3): having institutions that allow certain rights to be wielded only by representatives of collectivities, not by individuals on their own behalf (including rights of self-government), can be justified exclusively by appeals to the well-being and freedom of the individuals who are members of the collectivities; and justifications for rights assertions that appeal to the interests of all or most members of a group are nonetheless justifications that rest on considerations of the freedom and well-being of individuals.

The only remaining question is whether individualism in the justificatory sense is compatible with group rights in sense (2), rights whose possessors are groups. It clearly is, if the sense (2) group rights are legal rights; but not if they are moral rights.

There are sound individualistic justifications for having laws that designate certain collectivities as possessors of rights. For example, business corporations are possessors of rights in all Western-style domestic legal systems, but this does not entail that corporations are moral entities in their own right and hence proper subjects for the ascription of moral rights. But to assert that a collectivity, as opposed to an individual, is a possessor of a *moral*, as distinct from a legal, right is incompatible with justificatory individualism because regarding a collectivity as a possessor of moral rights assumes that collectivities are moral subjects, and hence the kinds of things that have interests that can serve as the ultimate ground for moral justifications.

Justificatory individualism rejects this latter view, asserting instead that only the interests of individuals can serve as the ultimate ground of moral justification, that only individuals are moral subjects. But this only shows that justificatory individualism is incompatible with groups possessing moral rights, not that it rules out moral justifications for designating groups as possessors of legal rights or as wielders of rights.

There are, then, two quite different ways to understand the assertion that the rights of indigenous peoples include group rights in sense (2), rights that are possessed not by individuals but by collectivities. It can be understood as an assertion that international (and domestic) law should designate indigenous collectivities as possessors of legal rights. This is the view I endorse. Or it can be understood as claiming something further and much more problematic: that indigenous collectivities ought to be designated as the possessors of legal rights *because* they are the possessors of corresponding moral rights. That is the view I reject. Only the second assertion, not the first, is incompatible with the justificatory individualism that underlies the justice-based approach of this book.

Justificatory individualism rightly rejects as implausible if not outright incoherent the notion that groups are possessors of moral rights and hence on a par, morally speaking, with individual human beings. When the justificatory individualist speaks of the interests of groups this is shorthand for the interests of the members of the group.

This is quite compatible, however, with understanding that individuals can have certain interests only by virtue of being members
of a group. And it in no way implies that the interests of the individuals who are members of the group are exclusively individualistic interests in the sense of being egoistic.

To assert that indigenous collectivities, or any collectivities, are the possessors of moral rights is not only implausible; it is also entirely unnecessary from the standpoint of devising institutions for protecting the interests of indigenous peoples. To see why this is so, in the next section I sketch the main arguments for according indigenous peoples rights of intrastate autonomy under international law. Once the force of these arguments is appreciated it becomes evident that there is a strong case for including intrastate autonomy, and therefore legal group rights of self-government, for indigenous peoples, within the domain of transnational justice. But nothing in these arguments depends upon the problematic assumption that indigenous groups are subjects of moral rights.

III. Justifications for Intrastate Autonomy for Indigenous Peoples

There are four distinct and mutually compatible justifications for developing international legal rights to intrastate autonomy for indigenous peoples. First, the creation of intrastate autonomy regimes for indigenous peoples can be required as a matter of rectificatory justice, in order to restore the self-governance of which these peoples were deprived by colonization. Second, intrastate autonomy can provide a non-paternalistic mechanism for protecting indigenous individuals from violations of their individual human rights and for counteracting the ongoing detrimental effects of past violations of their individual human rights or those of their ancestors. Third, it may be necessary to establish or augment institutions of self-government for indigenous groups in order to implement settlements of land claims in cases where lands that were held in common were lost due to treaty violations. Fourth, rectificatory justice can require measures to protect indigenous peoples from the detrimental effects of the disruption of the indigenous customary law that defined and supported their ways of life. However, the best remedy may not be to incorporate indigenous customary law into the state's legal system. Instead, equipping indigenous peoples with powers of self-government that include the right to make new laws
for themselves better accords with the fact that their cultures are
dynamic and should not be frozen by attempts to restore customary
law that no longer best serves their interests. 43

As these four arguments are explained below it will become clear
that they all fall under the category of remedial justifications. None
of them assumes that nations or peoples or "distinct societies" or
cultural groups as such have moral rights to intrastate autonomy. And
none implies that there is a special, *sui generis* category of
indigenous peoples’ rights. In each case the argument could also
apply to groups that are not classified as indigenous. It just so
happens that the circumstances that make the arguments applicable
probably most often obtain in the case of indigenous peoples.

These four justifications for intrastate autonomy for indigenous
peoples appealed to the need to remedy violations of individual human
rights, including the rights to property held with others in systems
of customary property rights, and to restore self-governance that
was unjustly destroyed. It follows that the case for international legal
recognition of intrastate autonomy for indigenous peoples does not
require anything approaching a fundamental revision of the basic
conceptual framework of the international legal order. Instead of
being seen as a radical challenge to that framework, the struggle for
self-government for indigenous groups should be seen as a long-
overdue reformist movement aimed at achieving a more consistent
and impartial application of the existing international legal system's
most normatively appealing principles, those that emphasize the
importance of individual human rights.

*Restoration of self-government*

In some cases the destruction of indigenous self-governance by
colonial incursions is both relatively recent and well documented.
Here the case for intrastate autonomy is in basic principle no more
problematic than the case for restoring sovereignty to states that
have been unjustly annexed. Although it may be true that the sort
of self-governance enjoyed by indigenous peoples was not state-
hood in the sense defined by international law, rectificatory justice
requires that they be restored to some form of self-government.

And to the extent that previous indigenous self-government was territorially based, rectification requires intrastate autonomy over a portion of the state's territory. As Margaret Moore has noted, the wrong done to indigenous peoples is the same as that perpetrated against colonized peoples generally: They were forcibly incorporated into a polity controlled by another group, even though they already enjoyed their own governance institutions.\(^{12}\)

However, as Jeremy Waldron and others have argued, it is one thing to say that rectificatory justice requires the restoration of some forms of territorially based autonomy, but quite another to say that the right to control a portion of territory trumps all considerations of distributive justice and is impervious to all claims based on long-standing expectations under the principle of adverse possession.\(^{13}\) Waldron's point is that it is unreasonable to hold that vast lands upon which millions of people who had nothing to do with the destruction of indigenous self-government now depend should be returned to the exclusive control of a relatively small indigenous group, even if it is true that the indigenous group previously exercised some sort of control over all of that territory and was the victim of unjust conquest. The need to rectify injustices to indigenous peoples must somehow take into account the demands of distributive justice regarding the larger society in which indigenous peoples find themselves.

This is not to say that the claims of indigenous peoples to restoration of some sort of territorially based self-government can be dismissed. The problem is how to reconcile the competing claims of rectificatory and contemporaneous distributive justice.

It should be emphasized that moral limitations on claims of restoration are not unique to the case of indigenous peoples. They apply equally to cases where states recover their sovereignty after having been unjustly annexed. Neither the reasonable expectations of persons who had nothing to do with the annexation nor the requirements of distributive justice can be ignored in the process of restoring sovereignty. A proper balancing of rectificatory and


Part Three. Self-Determination

Contemporaneous justice claims will result in some, perhaps many cases in the conclusion that an indigenous group is entitled to intrastate autonomy as the best means of rectifying the unjust destruction of their self-government, though the scope of self-government may be limited by the need to take legitimate expectations and the demands of distributive justice into account.

Self-government as a nonpaternalistic mechanism for preventing human rights violations and for combating the continuing effects of past human rights violations

Indigenous individuals often suffer violations of their human rights, especially in the form of economic discrimination and exclusion from political participation. In some cases the state is the violator of their rights, but perhaps more frequently nowadays the state allows private entities and individuals within the state to violate them. In addition, indigenous individuals frequently complain that they are not accorded equality before the law, suffer discrimination at the hands of the police, and face special difficulties in using legal processes to defend their rights and interests. At least for the foreseeable future, there are likely to be circumstances in which according indigenous groups rights of self-government is the most effective way, or even the only practicable way, to reduce violations of individual human rights, combat more subtle forms of discrimination, and guarantee effective access to legal processes.

Like African-Americans and members of other groups that have undergone centuries of human rights violations, indigenous individuals frequently suffer the ongoing ill effects of past injustices. The most cogent rationale for affirmative action policies in employment and in admission to institutions of higher education is that these measures are needed to counteract the continuing effects of past injustices. The same basic rationale can support the establishment or strengthening of intrastate autonomy for indigenous peoples, in cases where the groups in question (unlike African-Americans) are territorially concentrated on lands whose occupation and use is an

1 See Holder, 'Cultural Rights'.

important aspect of their ongoing efforts to throw off the burden of a history of injustices.

Establishing or strengthening indigenous self-governance, including tribal courts, in order to reduce current human rights violations and counteract the effects of past violations has the added virtue that it responds to the problem in a nonpaternalistic fashion, by equipping indigenous peoples themselves with the institutional resources to ensure that their rights are protected and to strive to overcome the disadvantages resulting from historical injustices. Too often in the past even the better-intentioned efforts of others have been ineffective or even counter-productive because of a failure to understand the needs of indigenous peoples or to identify the measures for preventing violations of their rights that are feasible, given their distinctive cultural beliefs and practices. Thus the case for intrastate autonomy as a mechanism for preventing human rights violations and counteracting the continuing effects of past violations rests both on the severity of the problem of discrimination and its ongoing effects and the demonstrated deficiencies of nonindigenous governments to respond adequately to it.

**Self-government to facilitate the implementation of land claims settlements**

When indigenous peoples succeed in their struggles to regain lands that were taken from them in violation of treaties, institutions of self-government may be needed to determine the ultimate disposition of the lands. Since the lands were typically in some sense held in common, it would be inappropriate to return particular portions of the land to individual members of the group.

It would be a mistake, however, to assume that if the lands that were unjustly taken in the past were held in common, they must ultimately be held in common after they are returned. Instead, it may be in the best interests of the members of the group if the land is allocated in a system that includes both some common property and some individual ownership.

The group’s customary rules of common ownership (assuming they are known or can be recovered) may not be a suitable guide for making these crucial decisions about how the hard-won resource is to be used effectively under modern conditions. If the group lacks
the institutions of self-government needed to make fair and effective decisions about how to dispose of land returned as a rectification of treaty violations, it may be necessary to create them. For these institutions to function effectively, they must receive legal recognition by the state. If the right to self-government under these circumstances is recognized in international law, this may encourage states to accept and even help facilitate the creation of institutions of self-government for indigenous peoples.

*Self-government as a superior alternative to the incorporation of indigenous customary law in the state’s legal system*¹⁵

The fourth and final justification for international legal support for indigenous intrastate autonomy flows naturally from the third. Generally speaking, self-government appears to be a more suitable device for indigenous peoples to protect their legitimate interests, including their interests in protecting their cultures, than incorporating indigenous customary law into the state’s legal system. In the intact traditional societies in which they are found, customary legal systems change over time through the cumulative actions of the members of those societies. But when such societies have suffered severe disruption and the ordinary processes by which custom evolves have been destroyed or damaged, to attempt to incorporate into the state’s legal system what are said to be customary rules at a particular time is to treat the indigenous culture as frozen and fixed.

Intrastate autonomy regimes that include significant powers to create new laws are more consonant with the fact that indigenous cultures, like all other cultures, can and must change in response to new situations. Moreover, there is another risk attendant on attempting to incorporate indigenous customary rules into the state’s legal system: Such a strategy typically underestimates the degree of disagreement that can exist in indigenous groups about what the customary norms are or should be, especially when these groups have suffered severe cultural disruption.

Here state actors who propose to protect indigenous groups by incorporating their customary rules into the state’s legal system face

a dilemma. If they rely on some persons within the indigenous group to determine what the existing customary rules are, without ensuring that the opinion they glean is representative, they may unwittingly support one subgroup (a self-styled elite, or the self-proclaimed interpreters of the authentic culture), and fix within the state’s legal system a conception of indigenous life that does not serve the interests of all members of the group. But if they rely upon some institution of representation within the group in order to determine authoritatively what the customary rules are that are to be incorporated in the state’s legal system, then they can be accused of undercutting the ability of the group to continue to make and revise its rules and thereby impose unacceptable constraints on future generations. This uncomfortable dilemma can be avoided if the group is accorded the rights of self-government needed to make and revise laws as the culture develops over time.

It is no doubt true that the institutions of self-government that states are likely to accord indigenous peoples will be at least somewhat alien to them, even if they are offered a wide range of alternatives, including some that are more consonant with their culture and traditions. However, if the severe cultural disruption that indigenous people typically have suffered has already gravely damaged their system of customary law or prevents it from evolving to adapt to an environment that is radically different from that in which it was formed, self-government may still be the lesser evil.

IV. Basic Individual Human Rights as Limits on Intrastate Autonomy

When the case can be made that intrastate autonomy for indigenous groups or for other minorities is necessary for protecting their members’ human rights, or for rectifying past injustices, or for countering the ongoing effects of past injustices, international law ought to recognize a right to self-government. This is the most straightforward, justice-based case for international legal acknowledgment of the right to intrastate autonomy for indigenous peoples.

However, some have worried that granting intrastate autonomy might lead to exercises of political power within indigenous communities that violate individual members’ human rights. They tend
to be especially concerned about violations of rights against gender discrimination.

It would be disingenuous to deny that rights of intrastate autonomy will ever be exercised in ways that violate basic individual human rights. What I would like to point out, however, is that this is a problem of government in general, not of indigenous or minority self-government. Wherever there is political power, there is the risk that it may be exercised in such a way that the rights of some individuals within the political community may be violated. In that sense there is no special problem of a conflict between individual rights and indigenous self-government.

I have argued that in cases where effective protection of the individual human rights of indigenous persons requires it, international law should support indigenous self-government as a matter of transnational justice. But as I argued in Part One, the core of transnational justice is the requirement that all states do a creditable job of respecting the most basic individual rights.

On that view the same rationale that provides the strongest case for intrastate autonomy for indigenous peoples, the protection of basic human rights, also imposes limits on the ways in which the powers of self-government may be exercised by anyone, including indigenous peoples. International law should hold the state responsible, as a matter of transnational justice, for seeing to it that the exercise of powers of self-government by indigenous peoples or other groups within the state is compatible with discharging its responsibility for ensuring that all its citizens enjoy basic human rights.

Thus the nature of the justification for intrastate autonomy for indigenous peoples makes a difference as to how to respond to conflicts between the exercise of powers of self-government and respect for individual human rights. If, as I have suggested, the rationale for intrastate autonomy is remedial, where the chief concern is the rectification and prevention of human rights violations, then at least in principle the limits of intrastate autonomy are clear. If, in contrast, one argues—as I have not—that international law ought to support intrastate autonomy for indigenous peoples because doing so is necessary to preserve their cultures, there can be a fundamental conflict of values between respect for cultural preservation and respect for individual human rights, with no indication of how it might be resolved even in principle.
V. International Support for Intrastate Autonomy: Beyond the Requirements of Transnational Justice

So far I have advanced a view about the circumstances in which international law should acknowledge legal rights to intrastate autonomy for groups within states, including self-government for indigenous peoples. This view is much more supportive of intrastate autonomy and to that extent much more sympathetic to self-determination than existing international law. I will conclude this chapter by suggesting that beyond the realm of what should be required as a matter of transnational justice, international law should even further encourage self-determination for minorities within states.

The crucial point is that the establishment or maintenance of intrastate autonomy may be valuable both to those who seek autonomy and others, even if the group in question has no right to self-government. In such cases, though it would be unjustifiable for the international community to infringe sovereignty by forcing the state to institute an autonomy regime, it may nevertheless be fitting to apply diplomatic pressure and economic inducements.

Given the potential of intrastate autonomy regimes for (1) improving efficiency and meaningful democratic participation, for (2) avoiding situations in which minorities believe they are a permanent minority without significant political influence, and for (3) preventing conflicts between groups within the state from escalating to the point of serious human rights violations (including those that typically occur when secession is attempted), there may be a substantial number of cases in which the international community, utilizing the resources of international legal institutions, should encourage autonomy agreements while refraining from seeking to mandate them.

There are several ways in which international legal institutions can encourage states to take seriously the possibility of intrastate autonomy arrangements. For example, the UN High Commissioner on National Minorities and the UN Working Group on the Rights of Indigenous Peoples could continue and increase their efforts in this regard, and regional organizations could also play a beneficial role.

If, as I have suggested, international law distinguished more clearly between the limited (remedial) right to unilateral secession
and the various legitimate interests that groups can have in intrastate autonomy—and if loose talk about "the right of self-determination of peoples" is gradually expunged from international legal discourse—such efforts might well bear fruit. Uncoupling secession from self-determination, as I proposed in the previous chapter, would pave the way for a more supportive role for international law regarding intrastate autonomy.

This chapter completes Part Three, Self-Determination, and with that the theoretical core of the book. In Part Four, I first summarize the central argument of the book and list the major proposals for reform that I have advanced in earlier chapters on the basis of it (Chapter 10). I then begin to explore the complex and neglected issue of the feasibility and morality of international legal reform (Chapter 11).