

# Decolonizing Law: Identity Politics, Human Rights, and the United Nations

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I don't care about the colour of the foot pressing on my neck—I  
just want to remove it.<sup>1</sup>

—Wole Soyinka

## INTRODUCTION

Talk of reforming the United Nations has been around for almost as long as the institution itself has been in existence.<sup>2</sup> The report on U.N. reform that appeared in December 2004, however, has added electricity and urgency to such talk. It now appears that for the first time since the U.N. Charter was adopted in 1945, the idea of constructive and tangible change in the U.N. system is receiving serious attention from a wide array of national and international actors.<sup>3</sup> The vast majority of the reforms currently proposed are either structural or procedural in nature, designed to make the U.N. both more efficient and more accountable in the implementation of policies and the performance of various duties. Enhanced efficiency and accountability are undoubtedly necessary and legitimate dimensions of U.N. reform. However, in and of themselves, they are not sufficient to guide the U.N. toward a more effective and relevant role in international affairs. Also long overdue for reform is the U.N.'s general framework for protecting individual and group identities. In this regard, only a complete and radical restructuring of the

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1. *Tackle the Monster of Zimbabwe, Says Soyinka*, STAR (S. Afr.), July 21, 2005, at 3, available at [http://www.int.iol.co.za/index.php?set\\_id=1&click\\_id=84&art\\_id=vn20050721063232260C876920](http://www.int.iol.co.za/index.php?set_id=1&click_id=84&art_id=vn20050721063232260C876920).

2. For general scholarship outlining problems with the U.N. and discussing the history of the demand for institutional reform, see Maurice Bertrand, *The Historical Development of Efforts to reform the UN*, in UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLES IN INTERNATIONAL RELATIONS 420 (Adam Roberts & Benedict Kingsbury eds., 1993); Derk Bienen, Volker Rittberger & Wolfgang Wagner, *Democracy in the United Nations System: Cosmopolitan and Communitarian Principles*, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 287 (Daniele Archibugi et al. eds., 1998); John Quinn, *The General Assembly into the 1990s*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 55 (Philip Alston ed., 1992); James Crawford, *The UN Human Rights Treaty System: A System in Crisis?*, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 1 (Philip Alston & James Crawford eds., 2000).

3. See Report of the High Level Panel on Threats, Challenges, and Change, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld>.

institution's approach and vision will resolve the complex issues and create a framework for effective and consistent human rights justice that will endure in the decades to come.

#### I. HUMAN RIGHTS AND IDENTITY POLITICS IN THE U.N. SYSTEM

As the U.N.'s multiple weaknesses have slowly revealed themselves in the past six decades, the need for a fundamental project of reform has become increasingly evident. The institution's problems truly came to the fore following the end of the Cold War when the Security Council and General Assembly attempted to reassert their relevance in the international community. Many of the actions associated with this renascent sense of purpose, such as the authorization of humanitarian intervention, quickly approached the limits of what international law or the U.N. Charter could legitimately designate as permissible. It quickly became clear that if the U.N. is to regularly engage in such actions, comprehensive changes need to be implemented within the institution.<sup>4</sup>

Redressing the deficiencies in the current framework of human rights is a crucial part of this larger and more comprehensive project of U.N. reform. Unlike the authorization of humanitarian intervention or the democratization of U.N. procedure, both of which are currently under discussion and debate, no one questions *whether* the U.N. should be involved in the area of human rights. Ever since its inception, the U.N. has been expected to support and advocate human rights. In fact, for many, the Universal Declaration of Human Rights is nearly as important as the U.N. Charter itself in defining the purpose and parameters of U.N. principles. There are, of course, a variety of regional instruments and organizations designed to protect and promote human rights. But the U.N. has always been the normative center of gravity for the global human rights framework. Unless the U.N. reforms its human rights framework such that it is perceived as consistent and fair in application to all states and international actors, the reforms in other areas (such as humanitarian intervention) will suffer. New norms and policies in other areas will be called into question or seriously weakened as they, too, will be seen as only selectively applicable. Of course, reforming the human rights regime without addressing other problems would also be short-sighted. Without adequate attention to other problematic areas, the U.N. will continue to lack the credibility to enforce and apply the principles of human rights. Human rights reform is, therefore, an essential element in the establishment of a revitalized and relevant U.N., able to exist as a cornerstone of a more just and secure global order.

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4. See Edwin M. Smith, *Collective Security, Peacekeeping, and Ad Hoc Multilateralism*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 81, 87-93 (Charlotte Ku & Harold K. Jacobson eds., 2003); Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 177 (J. L. Holzgrefe & Robert O. Keohane eds., 2003).

And yet, the field of human rights has always been one of the most problematic elements of the U.N. system in terms of the discrepancies between rhetoric and practice; compliance remains incomplete and enforcement remains inconsistent at best.<sup>5</sup> It is painfully clear that many gaps still remain in the protective framework that human rights instruments are intended to provide. However, as this Article will argue, expanding the scope and number of human rights, or strengthening the existing enforcement mechanisms, will not fix the serious weaknesses of the human rights system at least as they relate to the formation and protection of human identities. Instead, what is needed now is a new conception of how the individual is constructed and protected by human rights instruments, and how the individual interacts with, and participates in, complex societies through historical time and geographic space.

Much of this process of self-construction and self/society interaction is encompassed in the phrase “identity politics.” This phrase, understood in multiple ways, has taken on a variety of meanings, some more precise and constructive than others. For the purposes of specificity and consistency, I will use that term to mean the interaction between four different, but not necessarily mutually exclusive, spheres of political action. First, I refer to the collective set of actions by which groups enter the political process, nationally or internationally, to make rights claims on the basis of identity. Second, the term denotes the act of creating new instruments or re-interpreting existing human rights documents to support or protect various facets of human identity. Third, there is the process by which individuals and groups construct their identities with the express purpose of using such identities to assert claims of recognition in, or enhanced protection from, the framework of human rights law. Fourth, and finally, I understand the term to mean the process of contestation and deliberation by which states and other actors support or deny claims for recognition. The field of identity politics is a rich and dynamic area of political action, and it requires an equally rich and dynamic human rights framework to ensure that fairness and justice are achieved in the complex and highly charged world of identity formation and contestation.

Unfortunately, the U.N. system and the human rights instruments associated with it have shown little imagination in understanding the interwoven and changing architecture of the individual self. There has also been a similar and simultaneous misunderstanding of the ways in which an individual moves through the society of which he or she is, or feels, a part. The result has been an incomplete and often ineffective framework based on a confused understanding of the relationship between individual and group rights, which in turn has sometimes led to an inconsistent and unfair application of hu-

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5. See Michael J. Glennon, *Sometimes a Great Notion*, 27 WILSON Q. 45 (2003); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 107–34 (2005); MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* 43–44 (1999).

man rights law.<sup>6</sup> The current framework has great difficulty in evaluating and facilitating the interaction between individual and group identities. As a result, there have been both endless accusations that the U.N. privileges some individuals and groups more than others, and bitterly contested claims of self-determination rights based on often-dubious claims of historical or cultural authenticity.

To be sure, the incredible sensitivity associated with discussions of identity-based human rights is one of the difficulties in achieving a comprehensive program of reform within the U.N. In dealing with the topic, which is in essence a cluster of very complex issues, the capacity to offend or to be misunderstood is sufficiently great that the U.N., as a diplomatic forum, is unlikely to take a strong stance. The sensitivity surrounding identity politics creates obstacles to constructive reform, often by precluding any meaningful debate. For instance, questioning the appropriateness of reparations for Western involvement in the African slave trade can be perceived as tantamount to the denial of slavery, or, at the very least, as an overt and insensitive act of racism. Similarly, questioning the current status of indigenous or minority rights can seem like “blaming the victim,” or a mean-spirited backlash by dominant groups who seek to deny justice to marginalized communities.<sup>7</sup> Some who debate whether this or that historical injustice ever occurred are undoubtedly motivated by racism or other forms of chauvinism. However, there are just as many who wish to engage with these issues because they wish to ensure fairness, equality, and dignity among individuals and cultures.

At the very least, then, we can start with the following basic premise: if one of the goals of reforming the U.N. system is to provide greater human rights protection to prevent the exploitation, mistreatment, or oppression of vulnerable individuals and groups, we must first create a new framework of understanding for individual and group identities. This new framework must be able to evaluate identity claims and the rights they presumably generate. In addition, the new framework must be consistent in its treatment of all individuals and groups, regardless of their historical, cultural, or political pedigree. The only way for that to happen is for international law in general, and the U.N. in particular, to confront the very idea of adjudicating historical injustice and to re-evaluate the putative link between the imperialist endeavors of the past and present day human rights struggles which relate to identity formation.

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6. For an overview of the current U.N. framework for human rights, see Hurst Hannum, *Human Rights, in THE UNITED NATIONS AND INTERNATIONAL LAW* 131 (Christopher C. Joyner ed., 1997).

7. For one example of the frustrating near-impossibility of constructive debate, see CAROL M. SWAIN, *THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION* (2002). Swain's choice of title is unfortunate as it gives the impression that non-white groups somehow seek and desire integration but are denied this due to the machinations of new white nationalists. A better and more accurate approach would have been to focus on the new *ethnic* nationalism, as many of the attitudes documented by Swain are common to all ethnic groups in the United States, not merely whites.

## II. IMPERIALISM, COLONIALISM, AND HUMAN RIGHTS

In spite of occasional claims that the U.N. system has moved firmly beyond the era of decolonization, many strongly believe that the identity issues that engage human rights law are still derived from, or related to, the experience of European imperialism and colonialism.<sup>8</sup> Closely connected and in parallel, it is also widely believed that most forms of human rights protection that privilege the individual over his or her group are grounded in norms and values that are derived from European and Western culture.<sup>9</sup> While scholars and activists have debated whether or not this individualist view is the most constructive approach to rights related specifically to issues of identity, the scholarly debate has not been able to transform or radically influence current human rights practice within the U.N.<sup>10</sup>

Much of the current human rights regime emerged at a time when the U.N. was also witnessing the process of decolonization; a process that included some toleration for decolonized states who attempted to bend the rules of international law. The toleration was likely motivated by a sense of sympathy for the suffering that these newly independent states had endured for decades, and sometimes centuries, under European colonial rule.<sup>11</sup> Although that sympa-

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8. See, e.g., Theo van Boven, *The Experience of the Committee on the Elimination of Racial Discrimination*, in *DISCRIMINATION AND TOLERATION: NEW PERSPECTIVES* 165, 166 (Kirsten Hastrup & George Ulrich eds., 2002) (noting that in the early years of the Committee on the Elimination of Racial Discrimination, "Racism and racial discrimination were seen in the context of white colonial rule and as inherent in patterns of white domination . . ."). Van Boven argues further that "[t]oday the situation is no longer the same," but this conclusion is certainly debatable. *Id.* See also PAUL KEAL, *EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES: THE MORAL BACKWARDNESS OF INTERNATIONAL SOCIETY* 114–22 (2003); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005); LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900* (2002); A. W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2004).

9. See Inoue Tatsuo, *Liberal Democracy and Asian Orientalism*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 27 (Joanne R. Bauer & Daniel A. Bell eds., 1999); Nikhil Aziz, *The Human Rights Debate in an Era of Globalization: Hegemony of Discourse*, in *DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA* 32 (Peter van Ness ed., 1999); Martin Chanock, "Culture" and Human Rights: *Orientalising, Occidentalising and Authenticity*, in *BEYOND RIGHTS TALK AND CULTURE TALK: COMPARATIVE ESSAYS ON THE POLITICS OF RIGHTS AND CULTURE* 15 (Mahmood Mamdani ed., 2000); Farhat Haq, *Jihad over Human Rights, Human Rights as Jihad: Clash of Universals*, in *NEGOTIATING CULTURE AND HUMAN RIGHTS* 242 (Lynda S. Bell et al. eds., 2001); Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 19 (Abdullahi Ahmed An-Na'im ed., 1992).

10. See Deborah Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 *SYRACUSE J. OF INT'L L. & COM.* 21 (1992); Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 *SOC. & LEGAL STUD.* 337 (1996).

11. For instance, both the taking of Goa by India (1961) and of East Timor by Indonesia (1975) seemed to contravene international law. However, the incidents were not wholeheartedly condemned on the grounds that India and Indonesia were acting in part to undo the effects of European imperialism. This has created dubious precedent. See SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 305 (1996) ("[H]as the contemporary denial of the right of conquest on the one hand, and the acceptance of the right of self-determination on the other, not had the unintended effect—as the Goa case demonstrates—of encouraging wars and conquest, by

thy may have been understandable at the time, it has left behind a problematic legacy of inconsistent legal precedent in the way human rights are applied and enforced in the international community. This legacy has two elements, both of which are central to the analysis presented here. First, there is an enduring belief that many of the human rights violations based on identity issues in formerly colonized countries are “excusable” since they are remnants of the legacy of European imperialism.<sup>12</sup> Secondly, there is the questionable position that the only imperialism worth examining in understanding identity crises and conflicts in the international community is that of the Europeans.<sup>13</sup> If one of the purposes for reform in the U.N. is to reconstitute the human rights framework to provide equal protection and respect for the individual and his or her society, both of these views must be rejected and replaced with new and more universal standards.

The most recent illustrative example of how this type of thinking has permeated human rights rhetoric and policy is the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance held in Durban, South Africa in August and September 2001.<sup>14</sup> The majority of countries in attendance were former colonies of European empires. During the proceedings, rather than tackling the contemporary problems of global racism and intolerance, these participants spent much of the conference attempting to find new ways to attribute the persistence of current problems to European imperialism. That this would become a theme of the Durban Con-

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stripping the established order of its legitimacy to the extent that it is based on ancient conquest, while affording a *casus belli* on grounds of self-determination for states with irredentist claims seeking to expand their own borders?”).

12. This is a position often associated with leaders such as Robert Mugabe of Zimbabwe, whose authoritarian leadership and the human rights violations associated with it are often attributed simultaneously and contradictorily to the legacy of European imperialism and resistance to that legacy. See BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* 254 (2003) (noting that “Third World leaders, scholars, and activists have leveled charges of neocolonialism and imperialism against human-rights discourse and decried its Western roots . . .” while lauding non-Western social movements that seek justice while opposing “Western” human rights ideology as a form of “resistance”).

13. For an example of how other imperialisms are not examined or questioned to the degree of European imperialism, see, for example, PETER BURNS, *THE LEIDEN LEGACY: CONCEPTS OF LAW IN INDONESIA* (2004). For variations on the argument that misinterpretations, misunderstandings, and self-serving distortions of “indigenous” law by European colonial authorities left a legacy of injustice and inefficient judicial systems for postcolonial states and peoples, see, for example, RADHIKA SINGHA, *A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA* (1998). On the other hand, though Chinese legal tradition was equally imperial, self-serving, and hegemonic to local forms of legal practice, today it is accepted unproblematically as a culturally appropriate variant for contemporary China and almost as an indigenous form of legal resistance to Western models. See, e.g., RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* (2002). Yet at the same time there are many elements of the Chinese legal system that fit comfortably with contemporary human rights norms and Western practice. See Andrew J. Nathan, *Redefinitions of Freedom in China*, in *THE IDEA OF FREEDOM IN ASIA AND AFRICA* 248 (Robert H. Taylor ed., 2002).

14. See World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Durban, S. Afr., Aug. 31–Sept. 8, 2001, *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, U.N. Doc. A/Conf.189/12 (Jan. 1, 2002) [hereinafter Report of the World Conference Against Racism].

ference became evident at the outset, with the opening remarks of South African President Thabo Mbeki, who reminded the delegates of their responsibility to eradicate “the legacy of a centuries long experience of slavery, colonialism and racial domination.”<sup>15</sup> The purpose of the conference became blurred as many countries took advantage of the opportunity to advance historical claims for compensation from former European imperialist powers.<sup>16</sup> As is often the case in discussions of racism, most countries in attendance either denied outright that they had any problems with racism or discrimination, or, when evidence to the contrary was overwhelming, attempted to absolve themselves of any direct responsibility by transferring the blame to the experience of European imperialism. For example, when opponents of slavery in contemporary Africa tried to condemn the continued complicity of many African nations in the practice of slavery, or when they tried to introduce discussion of other historical slave trades (such as the Arab slave trade in Africa), they were ignored, given a lukewarm response, or even lectured at about the need to strengthen African unity.<sup>17</sup> Similarly, when India’s Dalits (“outcastes”) attempted to condemn the practice of caste discrimination as the world’s oldest system of apartheid, they encountered a staunch refusal by the official Indian delegation to discuss the issue. The Dalits were instead treated to a sanitized history lesson and told that “descent based” discrimination does not qualify as racism.<sup>18</sup>

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15. South African President Thabo Mbeki, Welcome Address of the President of South Africa, Thabo Mbeki, at the Opening of the NGO Forum of the World Conference Against Racism (Aug. 28, 2001). Note that in his speech, Mbeki presumes it self-evident that only European imperialism produced such a historical legacy.

16. Chris McGreal, *Africans Angry at Refusal to Debate Slavery Reparations: Western States Urge Racism Summit to Tackle Present-Day Injustices*, GUARDIAN (London), Sept. 1, 2001, at 16. (“The tone of the opening speeches reflected the key differences between western countries, which argue that the conference should focus on plans of action to combat modern day discrimination, and the developing world, led by the Africans, which wants deeper scrutiny and acknowledgement of past racial injustice and its legacy.”)

17. See Tom Lantos, *The Durban Debacle: An Insider’s View of the UN World Conference Against Racism*, 26 FLETCHER F. WORLD AFF. 31, 38 (2002) (“Significantly, however, there was little effort to address the Indian Ocean slave trade or the trans-Saharan slave trade involving Arab peoples.”) See also Ofeibea Quist-Arcton, *Slavery Issue Struggles to Get a Hearing in Durban*, [allafrica.com/stories/200109040564.html](http://allafrica.com/stories/200109040564.html) (Sept. 4, 2001). One can also see this line of thinking in the recent example of Niger. In March 2005 the government of Niger scheduled a ceremony in which some 7000 slaves were to be set free. Unfortunately, the government had not realized that by scheduling such an event, it was effectively admitting the widespread existence of slavery in Niger. Worried about the embarrassment that would ensue, the government hastily cancelled the event and released a statement denying that slavery existed in Niger. Leaders of human rights and anti-slavery groups in Niger were subsequently arrested and jailed. See *Niger: The Government Says Slavery No Longer Exists, the Slaves Disagree*, IRIN NEWS, June 24, 2005, [http://www.irinnews.org/report.asp?ReportID=47813&SelectRegion=West\\_Africa](http://www.irinnews.org/report.asp?ReportID=47813&SelectRegion=West_Africa); *Confusion Over Niger Govt Stance on Slavery*, AFROL NEWS, Mar. 7 2005, <http://www.afrol.com/articles/15847>.

18. While many Indian activists sympathized with the lower caste and Dalit stance, the official Indian position was one of complete denial. In the words of India’s Junior Foreign Minister Omar Abdullah, caste discrimination had nothing to do with race discrimination because if it did, it “makes India a racist country, which we are not.” *Indian groups raise caste question*, BBC NEWS, Sept. 6, 2001, [http://news.bbc.co.uk/1/hi/world/south\\_asia/1528181.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1528181.stm). See also Press Release, Human Rights Watch, Indian Government Tries to Block Caste Discussion (Feb. 22, 2001), <http://hrw.org/english/docs/2001/02/22/india270.htm>. On the issue of caste discrimination and Dalits, see generally OLIVER MENDELSON & MARIKA VICZIANY, *THE UNTOUCHABLES: SUBORDINATION, POVERTY AND THE STATE IN MODERN INDIA* (1998);

Evidence of the attempt to portray global racism solely as a product and legacy of European imperialism and colonialism is also to be found in the final report of the World Conference on Racism. The section on the causes of global racism, for instance, informs us that “colonialism has led to racism, racial discrimination, xenophobia, and related intolerance, and ... Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences.”<sup>19</sup> In other words, the Durban delegates declared that global racism and related forms of discrimination can almost always be traced back to European colonialism. According to the Durban Conference, then, even when racism is prevalent among Africans, Asians, or indigenous peoples, it is to be more “properly” understood as the legacy of European colonialism.<sup>20</sup> Of course, not everyone is convinced by these selective readings of the repressive past and present, and the aftermath of the Durban Conference on Racism has been characterized by disillusionment, disagreement, and distrust.

The intent of the points made above, and what follows below, is *not* to overlook or deny the suffering and trauma inflicted by the experience of European imperialism. Rather, it is to point out that when it comes to issues of identity, European imperialism is merely one factor contributing to the dismal state of human rights observance and protection. Put differently, European imperialism is best seen as a European variant of what has, in fact, been a global historical phenomenon shared rather depressingly at one time or other by almost all cultures and societies. Is it, then, wholly accurate and fair for India to denigrate the legacy of the British Empire while celebrating the contributions of the more “indigenous” Mughal Empire or of Vijayanagara?<sup>21</sup> Likewise, in all of the diplomatic and legal maneuvering over the tensions between Taiwan and China, why is there no mention of the fact that Taiwan was made a part of China only through China’s imperialist expansion and through Chinese colonialist policies which included the displacement of aboriginals by Chinese settlers?<sup>22</sup> This process, if examined more closely, is found to be remarkably similar to the oft-criticized European imperialism. Or why seek

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R. S. Khare, *Elusive Social Justice, Distant Human Rights: Untouchable Women's Struggles and Dilemmas in Changing India*, in *CHANGING CONCEPTS OF RIGHTS AND JUSTICE IN SOUTH ASIA* 198 (Michael R. Anderson & Sumit Guha eds., 1998); SUSAN BAYLY, *CASTE, SOCIETY AND POLITICS IN INDIA FROM THE EIGHTEENTH CENTURY TO THE MODERN AGE* (1999).

19. Report of the World Conference Against Racism, *supra* note 14, ¶ 14.

20. See Gay McDougall, *The Durban Racism Conference Revisited*, 26 *FLETCHER F. WORLD AFF.* 135, 138 (2002) (“These government declarations on the past are critical not only in their condemnation of slavery and colonialism, but also in the way they link these tragedies to the problems of racism, racial discrimination, xenophobia, and related intolerance that exist today. Governments acknowledged that slavery and colonialism were root causes of contemporary racism and declared that the effects of slavery and colonialism continue to significantly impact the lives of descendants of victims today.”).

21. See generally JOHN F. RICHARDS, *THE MUGHAL EMPIRE* (1996); BURTON STEIN, *VIJAYANAGARA* (1989).

22. See MELISSA J. BROWN, *IS TAIWAN CHINESE? THE IMPACT OF CULTURE, POWER, AND MIGRATION ON CHANGING IDENTITIES* (2004); EMMA J. TENG, *TAIWAN'S IMAGINED GEOGRAPHY: CHINESE COLONIAL TRAVEL WRITING AND PICTURES, 1683–1895* (2004).

reparations for only one version of the slave trade while ignoring all others? Unless the U.N.'s human rights mechanism is prepared to address these and other similar questions, any attempt to adjudicate the historical past will remain incomplete, unfair, and unjust.

There is more to these examples than merely illustrating the difficulties of addressing historical injustices from a human rights standpoint. Much of the impetus for establishing group protection in the form of minority and indigenous rights came from the desire to redress past wrongs or to provide some guarantee that the traumatic experiences of the past would not reoccur. But given that the record of historical injustices has been incompletely and unevenly examined, the human rights framework that addresses issues of group identity has generated inconsistencies. These, if left unaddressed, will over time create new claims and counter-claims of injustice and unfairness. Such claims will, in turn, threaten the integrity of the entire system of human rights protection. Unless the U.N. and international law can offer a compelling reason to focus only on one variety of imperialism and not on others, and unless it can also offer a definitive date as to how far back into history we should go to settle questions of historical injustice, this route should be abandoned entirely. Since it is unlikely that any specific and non-arbitrary historical point can be established before which there is impunity, and after which there can be justice and reparations, the issue of adjudicating injustices in the past and strengthening human rights in the present should, at the very least, be separated.<sup>23</sup> We may not be able to adequately adjudicate the past, but that does not mean that a reformed U.N. human rights framework cannot find a way to build a better present and future.

### III. MISUNDERSTANDING SELF-DETERMINATION: SELF AND SOCIETY

The issues of setting the chronological parameters of historical injustice and of determining the cultural parameters of imperialist exploitation, might seem to be abstract matters of debate with little practical value in facilitating the U.N. reform process. However, those matters are directly linked to the current framework for protecting highly vulnerable groups through human rights instruments. More specifically, the framework of human rights instruments that relate to peoples' rights, understood more specifically as minority and indigenous rights, is largely derived from the desire to protect and empower those groups and societies who suffered the excessive dislocation and distress of historical or imperialist injustice. As Thomas Musgrave points out, "Amongst many Third World states decolonization is considered to be the only aspect of self-determination which has attained legal status.

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23. For one attempt to establish a theory of restitution for historical injustice, see ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000).

This approach to self-determination necessarily means that the term ‘people’ must be defined solely within the context of decolonization.”<sup>24</sup>

Yet here, too, there is considerable confusion and inconsistency in the human rights regime as it relates to identity issues. Such confusion exists because there is often no clear distinction made between the protection of an individual, *as an individual*, against state intrusions, and the empowerment of an individual *as a member of a group* whose cultural practices are seen as worthy of special protections not available to other groups.<sup>25</sup> The inconsistency between these two types of human rights protection can only be resolved in the process of reforming the U.N. if the institution is willing to answer definitively a number of fundamental questions. Can an individual hold both types of rights simultaneously? Are some persons entitled to more human rights protection than others, and if so, is this inherently unfair?<sup>26</sup> Do the standards by which a person claims groups rights unwittingly undermine the rights protecting individual identity? To answer these questions, the process of U.N. reform must revisit some fundamental elements of identity construction within the human rights framework.

Broadly speaking, the elements determining self and group identity fall into two categories, each of which relies upon a different regime of human rights instruments for protection. The first category consists of those characteristics that are *elective*. By this I mean elements of our identity that we have consciously and intentionally chosen as a part of who we are. Political ideology, occupation, artistic perspective, and perhaps more controversially, sexual orientation, would fall into this category. In this case, human rights instruments are designed to protect the choices we make, either by maximizing the number of potential available choices, or by offering us *ex post* protection for the identity we have elected.<sup>27</sup> The second category consists of those elements that are *ascriptive*. These are the parts of our identity that we are born with and did not and, in fact, cannot choose. Human rights instruments are thus designed to protect individuals or groups from unfair punishment or discrimination based on immutable characteristics for whose adoption the identity-bearer is not responsible. This category includes character-

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24. THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 149 (1997). Particularly in relation to minority rights, this was not originally, but later became, the preferred approach for formerly colonized and postcolonial nations in the post-war period.

25. See Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, in THE RIGHTS OF MINORITY CULTURES 31 (Will Kymlicka ed., 1995); Russel Barsh, *Indigenous Peoples and the Idea of Individual Human Rights*, 10 NATIVE STUD. REV. 35 (1995); Anna Yeatman, *Who is the Subject of Human Rights?*, in CITIZENSHIP AND CULTURAL POLICY 104 (Denise Meredyth & Jeffrey Minson eds., 2001).

26. For one attempt to answer this question, see Gillian Triggs, *The Rights of “Peoples” and Individual Rights: Conflict or Harmony?*, in THE RIGHTS OF PEOPLES 141 (James Crawford ed., 1988).

27. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (Articles 18, 19, 22, 23, and 25 guarantee of freedom of conscience, expression, association, marriage, political participation); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (Articles 6, 8, 10, 13 guarantee of rights to work, unionization, marriage, and education).

istics such as race, ethnicity, gender, and more problematically (as discussed below), religion.<sup>28</sup>

Another way of understanding these two categories is to say that elective identities consist of all potential choices of who we want to be, and by definition constitute a category of elements that are perennially open to individuals for both entrance and exit. Alternatively, ascriptive identities are those that we acquire at birth, that are closed, and that an individual cannot readily enter or exit.

The difficulty is that the current human rights regime has been unable to reconcile these two categories such that it is fair and just to both in equal measure.<sup>29</sup> While one part of the regime promotes openness and an expansion of the choices through which we determine the quality of our lives, another part strengthens categories that preclude choice, are closed to outsiders, and are therefore inherently discriminatory.<sup>30</sup> Part of the process of reform must surely include a re-alignment of these two categories of identity and the human rights instruments designed to protect them.

Aside from these categories, there are also two different approaches to the idea of self-formation, each addressed by different aspects of the human rights regime. Each aspect, when examined, is seen to pull in a different direction, resulting in unresolved tension. The first approach privileges the individual over the community, setting as its primary human rights goal the defense of the individual, providing her or him with the necessary skills and opportunities to learn how to make the best choices, and protecting those choices once they are made.<sup>31</sup> The “just society,” according to this view, is the amal-

28. See, e.g., ICCPR, *supra* note 27, art. 27 (minority rights); Framework Convention for the Protection of National Minorities, Jan. 2, 1998, 34 I.L.M. 351; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 212 (Articles 1 and 2 guarantee of non-discrimination based on race, color, descent, or national or ethnic origin); Indigenous and Tribal Peoples Convention, June 27, 1989, 28 I.L.M. 1384; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (Article 1 guarantee of non-discrimination based on gender); Convention on the Prevention and Punishment of the Crime of Genocide, Jan 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (Article 2 protection of national, ethnic, racial, or religious group).

29. It is worth noting that not all elements of identity can be collapsed into these two categories. There is, for instance, the status of “refugee” which is neither ascriptive (putting aside the circumstance of birth in a refugee camp) nor elective. Even in the case of refugees, however, the U.N. has great difficulty dealing with this complex form of identity. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1996). For a critical approach on the consequences of the failure of the U.N. and the international community to understand the special status of being a refugee, see ARTHUR C. HELTON, *THE PRICE OF INDIFFERENCE* (2002).

30. This contradiction can be seen clearly, for instance, in the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, UNESCO, <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> [hereinafter UNESCO Convention]. While the resolution calling for the drafting of the Convention recognizes “the principle of openness of each culture to all other cultures,” UNESCO, *Desirability of Drawing up an International Standard-Setting Instrument on Cultural Diversity*, 32 C/52 Resolution 34, Oct. 17, 2003, the Convention itself claims that cultural diversity is expressed in ways that are “passed on within and among groups and societies.” *Convention, supra*, art. 4(1). The Convention paradoxically seeks to protect distinct cultures (closed boundaries) and promote intercultural dialogue (open boundaries).

31. For one example of this approach, see THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND*

gamation of these informed individuals, who collectively cultivate social formations that expand upon and protect an increasingly complex array of individual identity choices. Conversely, the second approach privileges the community over the individual. Proponents of this position believe that the primary goal of human rights should be to protect and preserve various communities, because it is from the norms and values of such communities that individuals learn to make the best choices as individuals.<sup>32</sup> According to this view, without the community there can be no self-determined individual. In the latter approach, the “just society” is one that conveys its values and traditions to successive generations, providing them with a safe, secure, and morally enriched environment in which to make well-informed life choices so as to contribute to the social life of the community.

The uneasy tension between these two approaches, as well as the tension between protecting and cultivating elective and ascriptive elements of identity, can perhaps best be explored by investigating the current state of human rights protection in two areas: minority rights and indigenous peoples’ rights. The two rights regimes share a number of problems. For instance, the current human rights framework cannot adequately address the extent to which groups who enjoy cultural protection may engage in practices that violate the human rights of their own individual members, or that discriminate against outsiders.<sup>33</sup> I deal with specific examples below.

### A. *Minority Rights*

Minority rights are predicated on several assumptions that have not been rigorously tested within the current human rights framework.<sup>34</sup> In the most basic sense, minority group rights are intended to preserve the culture, language, beliefs, and value system of a minority culture by shielding them

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SOCIETY IN THE AGE OF INDIVIDUALISM (1999).

32. See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

33. All of the major human rights treaties contain non-discrimination clauses. See ICCPR, *supra* note 27, art. 2(1); ICESCR, *supra* note 27, art. 2(2); American Convention on Human Rights art. 1(1), Nov. 22, 1969, 1144 U.N.T.S. 144; African Charter on Human and Peoples’ Rights art. 2, June 27, 1981, 1520 U.N.T.S. 217. Decisions handed down by the adjudicatory committees of each treaty have clearly assumed that discrimination is unidirectional or vertical, from majority or dominant groups toward minority groups. Horizontal discrimination between minority groups remains largely unexamined. See, e.g., MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 184–90* (1995) (noting that States have at least some obligations to provide equality of opportunity to minority groups in relation to majority groups, but making no mention of equality among or within minority groups).

34. For the U.N. minority rights framework, see Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. Doc. A/Res/47/135/Annex, 32 I.L.M. 911 (Dec. 18, 1992) [hereinafter *Minority Rights Declaration*]; Asbjørn Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/AC.5/2001/2 (Apr. 2, 2001); Asbjørn Eide, *The Framework Convention in Historical and Global Perspective*, in *THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES* 25 (Marc Weller ed., 2005).

from the assimilative pressures exerted by the dominant group within a state.<sup>35</sup> Because minority rights emanate from the state, peculiarities sometimes arise. For example, there is always the possibility that a minority group residing in two different states can receive degrees of protection widely differing from one another.<sup>36</sup> As long as the regime of minority rights remains state-centered, the possibility of disparate protection can lead to other human rights concerns. Such concerns would include illegal immigration to states with better human rights safeguards, refugee flight from countries with poor minority rights protections, and acts by diasporic minority groups who wish to limit the influx of immigrants of the same ethnic group from other states, so as to preserve the minority protections they have been afforded.<sup>37</sup>

Any new human rights framework that emerges out of the process of U.N. reform must address several of the fundamental assumptions on which the minority rights system rests. One assumption worth revisiting is that majority groups are always and necessarily dominant, and as such they automatically seek to dominate over other groups.<sup>38</sup> Based on this assumption, the claim has often been made that there is an obligation for majority or dominant cultures to respect minority cultures. Yet there is no compelling reason why the obligation should not be reciprocal. Why, for example, is the obligation to respect expressed in terms of relative size rather than, say, of ethical behavior?<sup>39</sup> Why not protect all cultural groups equally, regardless of

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35. Definitions of what legally constitutes a minority vary considerably. For working definitions, see Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev.1: Sales No. E.91.XIV.2 (1979); Jules Deschênes, *Proposal Concerning a Definition of the Term "Minority"*, U.N. Doc. E/CN.4/Sub.2/1985/31 (May 14, 1985).

36. See Romani Rose, *Sinti and Roma as National Minorities in the Countries of Europe*, 3 OSCE OFF. FOR DEMOCRATIC INSTITUTIONS AND HUM. RTS. BULL. 40 (1994/1995) (discussing the situation of Roma people in Europe). See also Marie Lecomte-Tilouine, *Ethnic Demands within Maoism: Questions of Magar Territorial Autonomy, Nationality and Class*, in *HIMALAYAN PEOPLE'S WAR: NEPAL'S MAOIST REBELLION* 112 (Michael Hutt ed., 2004); Brian C. Shaw, *Aspects of the "Southern Problem" and Nation-Building in Bhutan*, in *BHUTAN: PERSPECTIVES ON CONFLICT AND DISSENT* 141 (Michael Hutt ed., 1994) (both discussing ethnic Nepali groups who are engaged in ethnic conflicts and dispute in Nepal, but then lumped together as "Nepalis" in India and Bhutan).

37. See Tom Gallagher, *Conflicts between East European States and Minorities in an Age of Democracy*, in *RADICAL ETHNIC MOVEMENTS IN CONTEMPORARY EUROPE* 31 (Farimah Saftary & Stefan Troebst eds., 2003); Johannes van der Klaauw, *Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce?*, in *IRREGULAR MIGRATION AND HUMAN RIGHTS: THEORETICAL, EUROPEAN, AND INTERNATIONAL PERSPECTIVES* (Barabara Bogusz et al. eds., 2004).

38. See, e.g., GAETANO PENTASSUGLIA, *MINORITIES IN INTERNATIONAL LAW* 57 (2002) (indicating that even at the initial discussions about minority rights within the U.N. framework, one of the central markers of identification for minorities, and one which has remained consistent, has been their non-dominant position). Note that for claiming minority rights, a group need not prove that it is non-dominant. Rather, the underlying assumption is that minority groups are inherently non-dominant and, therefore, may claim protection against the dominant majority.

39. See, *Minority Rights Declaration*, *supra* note 34, art. 1(1) (requiring that states "protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and . . . encourage conditions for the promotion of that identity.") In calling on states to protect minorities, the Declaration assumes that states are controlled by majority groups. This may not be the case. For example, the percentage of the population of the United States that can claim some form of minority protection is slightly higher than sixty percent. JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 327 (2002).

relative size? Merely because one group is demographically larger does not necessarily imply that there is an intention to dominate or exploit groups that are demographically smaller; that is, majority cultures do not oppress by mere existence but rather by specific acts which must be shown to represent the collective will of the group. Without systematic evidence to that end, the promotion of minority rights can, in effect, require majority cultures to alter or constrain their own cultural patterns in ways that minority cultures are not required to do.

And where inter-cultural respect is the main concern, there seems to be just as much of an obligation for majority cultures to respect and understand the needs of minority cultures as there is for minority cultures to understand and respect the needs of other minority groups and the majority cultures with whom they coexist.<sup>40</sup> To determine whether additional human rights protection is warranted, we cannot readily assume that all majority cultures are hegemonic, just as we cannot assume that the values and beliefs and practices of all minority cultures should be immune from scrutiny.<sup>41</sup> All cultures share a propensity to discriminate, and so all should be equally open to investigation, examination, and adjudication.

A more consistent approach would instead extract the general principle of law from the idea of minority rights, namely that one culture does not possess any inherent right to intentionally harm or otherwise undermine any other—the communitarian expansion of the liberal human rights creed for individuals—and apply this uniformly to all forms of cross-cultural and inter-cultural interaction. Currently, the minority rights framework only considers significant the relationship between each minority culture and the singularly dominant culture. The framework lacks the effective capacity to address situations when a minority culture is oppressed, exploited, or otherwise discriminated against by another minority culture.<sup>42</sup> In such situations, there is no constructive or effective way to deal with the discriminatory relationship between the minority groups.

In such situations there seems to be a default assumption that the majority culture ultimately bears the responsibility to adjudicate fair relations be-

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40. See AMINAH MOHAMMAD-ARIF, SALAAM AMERICA: SOUTH ASIAN MUSLIMS IN NEW YORK 253 (2002). Mohammad-Arif documents the complexities of inter-group discrimination in multicultural environments. While Muslims in the United States certainly face some discrimination at the hands of the majority culture, they also exhibit their own discriminatory sentiments through a sense of “moral superiority” over the host culture. Paradoxically, segments of the minority group take on the persona of a dominant majority group, even as they claim rights against it.

41. See, e.g., the controversial thesis put forth by Fox and Nolte, that democratic states are under no obligation to tolerate anti-democratic actors who do not subscribe to the majority values and may in fact exclude them from parts of the political process. Gregory H. Fox & George Nolte, *Intolerant Democracies*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 389 (Gregory H. Fox & Brad Roth eds., 2000).

42. See Leslie Green, *Internal Minorities and Their Rights*, in GROUP RIGHTS 101 (Judith Baker ed., 1994); Gurpreet Mahajan, *Can Intra-group Equality Co-exist with Cultural Diversity? Re-examining Multicultural Frameworks of Accommodation*, in MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 90 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005).

tween all minority groups. This can, in turn, force upon majority cultures the (perhaps unfair) burden of having to understand every other minority culture, no matter how numerous they may be, while members of the minority cultures have only the much simpler task of understanding the norms and values of their own cultural group. In sum, while the minority rights framework has at least some capacity to deal with a situation where majority culture *A* discriminates against minority culture *B*, it seems unable or unwilling to address the equally unjust situation where minority culture *B* discriminates against minority culture *C*, or where minority culture *B* discriminates against subgroups comprising its own membership.

To better understand the inconsistencies, consider, for instance, the following statement by Sandra Fredman:

[I]t is often misleading to characterize a minority culture as sexist or inegalitarian. This assumes that the dominant subgroup within the minority culture may legitimately assert the values of the culture. Yet such views may well be highly contested within the group: women in the group may themselves be voicing a dynamic within the group which has as much of a right to be heard as any other.<sup>43</sup>

This assertion is deeply problematic. If dominant groups in a minority culture cannot speak for the minority as a whole, then the same must also hold true for majority cultures. It thus becomes uncertain whether a dominant group may ever be held collectively responsible (and collectively punishable) for any of its actions, past or present. Furthermore, if the minority culture is internally contested, then it is unclear which parts of the culture should be protected. Lastly, if gender equality is not a part of the minority culture's values, then to offer an equal place to the voices of women may itself be an act of value hegemony by an outside culture.

The current framework for minority rights is also only partially able, or even wholly unable, to address conditions of rapid demographic transition. Since the current systemic assumption is that smaller size translates directly to potential vulnerability and, in turn, triggers enhanced human rights protection, how are we to analyze situations where a former majority group suddenly or gradually becomes a minority? Will the former minority group suddenly have to abandon its rights to the "new" minority? One could argue that in such cases, what really matters is not numerical size but cultural dominance. But such a response is deeply unsatisfactory because the current human rights framework lacks, in a legally meaningful way, a method for assessing what constitutes cultural dominance and discerning whether that dominance is based on intentional discrimination or is merely a byproduct of divergent cultural values.

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<sup>43</sup> Sandra Fredman, *Combating Racism with Human Rights: The Right to Equality*, in *DISCRIMINATION AND HUMAN RIGHTS* 9, 36–37 (Sandra Fredman ed., 2001).

The framework of minority rights also has no endpoint. By this I mean that there is no clear time at which a vulnerable group ceases to be considered as such. It is similarly difficult to measure when the situation for a minority culture has so improved that the special protections afforded to it, on the grounds that its cultural practices are threatened by the majority culture, can be scaled back or ended. Minority rights, once granted, are often assumed to be granted in perpetuity, without an ongoing reassessment of the situation or of the relationship between the majority and minority cultures.

The current framework on minority rights also has difficulty addressing issues that deal with diasporic or transnational identities. What happens, for instance, when members of a hegemonic and dominant group in one country begin to migrate to other countries where they maintain close ties with their original country and, yet, also seek minority rights protections in their country of settlement? Should minority rights for immigrant groups be contingent upon that group's respect for minority rights in countries where they are the majority?<sup>44</sup> Perhaps the situation of an immigrant group in one country is entirely separate from the situation of that group in its country of origin. However, if that is the case and the two groups are to be viewed as completely distinct, is it then required that immigrant groups seeking minority rights in a host country demonstrate their separation by severing their ties with their country of origin?<sup>45</sup>

Furthermore, how do we address diasporic minority communities benefiting from, or actively encouraging, acts of discrimination in countries where their groups form a majority? Though it is widely acknowledged as wrong to penalize all members of a particular minority group for the actions of only a certain subsection of that group, majority groups are often held collectively responsible for the discrimination inflicted upon minority groups. In this, we are once again confronted with the issue of differential and inconsistent standards in the minority rights framework.

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44. For instance, a small but significant number of South Asian immigrants to the United States offer generous financial support to Hindu extremist groups in India seeking either to expel non-Hindu minorities from the country or to convert them to Hinduism. This creates a divide in the South Asian immigrant community between those who support religious tolerance, whether in India or America, and those who feel that supporting such groups will somehow protect India from the deleterious consequences of multiculturalism they perceive in the host country. For critical views, see Arvind Rajagopal, *Non-Resident Nationalism*, FRONTLINE (India), Mar. 26, 2004, at 127; VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* 133–56 (2000).

45. See Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, in *THE RIGHTS OF MINORITY CULTURES* 331–32 (Will Kymlicka ed., 1995) (arguing that immigrants should only be bound by the same restrictions as non-immigrant citizens, and that restrictive citizenship, especially by First World countries in relation to Third World immigrants, is tantamount to “feudal privilege”). This argument implies that enjoyment of the benefits of citizenship by immigrant groups need not entail any renegotiation of cultural identity.

### B. Indigenous Rights

Like minority rights, the indigenous rights regime is designed to protect cultures that are considered different and distinct from those around them. However, unlike minority rights, indigenous rights are not necessarily contingent upon the demographic size of the group. Instead, they are based upon a group's historical claim to "pioriness" vis-à-vis groups that arrived later, be they a majority or minority. In that sense, it would seem that indigenous rights trump minority rights, though it is unclear whether the human rights framework actually intended to establish such a hierarchy of identity rights or whether this is simply one more unfortunate byproduct of an inconsistent and perhaps poorly designed system of human rights protections.<sup>46</sup>

Since the legal significance of historical "pioriness" never has been definitively established, and since the only "pioriness" that seems to matter, at least in the origins of indigenous rights, is in relation to European colonization, the "pioriness" of indigenous groups has always been problematic.<sup>47</sup> This, too, has created an unfortunate, unjust, and unintended hierarchy of rights, insofar as indigenous groups in countries colonized and settled by Europeans and their descendants seem to enjoy greater recognition of their status and rights than do indigenous groups in lands colonized and settled by non-Europeans. For example, Malaysia's indigenous tribal groups that were initially displaced and dispossessed of their lands by ethnic Malay colonizers often find themselves unable to make distinct indigenous rights claims. This is because the dominant ethnic Malay community, who colonized the land prior to the arrival of Europeans, is also able to claim indigenous status. While the official policy is that the ethnic Malay and tribal groups are both indigenous *bumi-putera* ("sons of the soil"), the reality is that the non-Muslim tribals face severe discrimination and have little recourse for justice.<sup>48</sup>

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46. A recent example of the assumption that indigenous rights trump minority rights is to be found in Fiji, where in 2000 a group of indigenous Fijians led a coup against the "multicultural" government headed by Mahendra Chaudhry, a member of the minority ethnic Indian community. The coup was based on the belief that minorities cannot claim rights that would threaten the dominant status of the indigenous community. See COUP: REFLECTIONS ON THE POLITICAL CRISIS IN FIJI (Brij Lal & Michael Pretes eds., 2001). An even more vexing challenge occurred in 1998 in the Solomon Islands during an uprising in Guadalcanal by an immigrant community from a nearby island. The uprising was part of a dispute as to whether one indigenous community could be "more indigenous" than another, and hence claim stronger rights. See JON FRAENKEL, *THE MANIPULATION OF CUSTOM: FROM UPRISING TO INTERVENTION IN THE SOLOMON ISLANDS* (2004).

47. The Special Rapporteur on Discrimination against Indigenous Populations describes indigenous populations in part as "having a historical continuity with pre-invasion and pre-colonial societies." Theo Van Boven, *Discrimination and Human Rights Law: Combating Racism*, in *DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM* 111, 118 (Sandra Fredman ed., 2001) (quoting The Special Rapporteur, *Study of the Problem of Discrimination against Indigenous Populations*, vol. V-Conclusions, Proposals and Recommendations, ¶ 379).

48. See Kirk Endicott, *Indigenous Rights Issues in Malaysia*, in *AT THE RISK OF BEING HEARD: IDENTITY, INDIGENOUS RIGHTS, AND POSTCOLONIAL STATES* 142, 145 (Bartholomew Dean & Jerome M. Levi eds., 2003); Victor T. King, *Indigenous Peoples and Land Rights in Sarawak, Malaysia: To Be or Not to Be a Bumiputra*, in *INDIGENOUS PEOPLES OF ASIA* 289 (R. H. Barnes, et al. eds., 1995); Andrew Harding, *Practical Human Rights, NGOs and the Environment in Malaysia*, in *HUMAN RIGHTS APPROACHES TO EN-*

Aside from “priorness,” indigenous rights also imply a much higher degree of separation from other cultures; so much so, in fact, that unlike other minority cultures, members of indigenous groups who want or need to take part in the way of life of other cultures can often legally lose their indigenous status. Whereas minority groups seek to interact freely with the majority culture while maintaining some protection from intrusions, indigenous groups often seek a type of autonomy that allows them to remain separate from, and indifferent to, the other majority or minority groups around them. In contrast to the cultural minority groups, it is the protection of a way of life, and not the fairness of intercultural interaction, that is at issue for aboriginal groups.

However, the current framework of indigenous rights has not been able to effectively address the extent to which the *protection* of a way of life results in the *imposed ossification* of a way of life. Indigenousness (or indigenous authenticity) is often measured by the degree to which an individual abides by the indigenous group’s culture and practices. Yet the protected way of life is typically representative of the group’s culture only at a particular moment in time. The indigenous rights framework can therefore severely and uniquely curtail the ability of the indigenous group to change and adapt to new ideas and new forms of interaction. Indigenous rights may trump minority rights, but the increased protection seems to come at the cost of freezing the indigenous culture in a particular historical moment and binding it tightly to a bundle of cultural practices often defined by indigenous elites. This restrains the indigenous culture from adapting to new opportunities and circumstances.

The Ivan Kitok case, decided by the Human Rights Committee in 1988, reveals some of the flaws of the indigenous rights framework and exposes some of the limits it places on indigenous people.<sup>49</sup> Kitok was a member of the Sami indigenous group in Sweden and, as such, had inherited traditional rights to herd and breed reindeer. He challenged a Swedish law that denied such inherited rights to a Sami who engaged in any other (nontraditional) occupation for a period of three years or longer. Kitok alleged that the Swedish law violated Article 1 (self-determination) and Article 27 (minority rights) of the International Covenant on Civil and Political Rights. The Swedish government argued that requiring the Sami to continue to engage in traditional and indigenous activities, to the exclusion of other lucrative occupations, was necessary to protect the integrity of the Sami culture. The Human Rights Committee expressed concern about the difficulty in determining what constitutes an ethnic identity, but it nevertheless agreed with the Swedish government’s position that such laws are “necessary for the continued viability

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VIRONMENTAL PROTECTION 227 (Alan Boyle & Michael Anderson eds., 1996). Similar inconsistencies occur in places like India, Nepal, and Bangladesh, where dominant groups argue that all citizens are equally indigenous as a result of European imperialism, and on this basis reject indigenous claims for justice for their suffering at the hands of pre-European colonization and dispossession.

49. Kitok v. Sweden (197/85), Human Rights Committee, CCPR/C/33/D/197/1985 (July 27, 1988).

and welfare”<sup>50</sup> of the Sami minority. Although the Committee allowed Kitok to return to his Sami occupations, he no longer enjoyed them as a matter of indigenous right, but rather as a courtesy of Swedish law as it applied to all Swedish citizens.<sup>51</sup>

The system of preserving indigenous cultures was designed largely to protect such communities from the types of cultural predation that took place during the traumatic phase of contact with European imperialists and settlers. Aside from the uneven application of indigenous rights that this historical anomaly has produced (discussed above), there is another problem with the way indigenous rights have been conceived in the current human rights framework. The indigenous rights regime generally only examines the behavior of groups, cultures, and nations that originally marginalized and undermined indigenous peoples. It then seeks to protect and restore the ways of life of those indigenous and oppressed communities as if to reverse historical wrongs. Yet the actions of the indigenous groups themselves prior to the arrival of European imperialists remain largely unscrutinized. In the rare instance when they are examined, the indigenous practices that are deeply questionable from a human rights perspective are often excused or overlooked on the grounds that such communities already have suffered disproportionately.

One recent analysis of indigenous Māori history, for instance, denounces the tendency of *pakeha* (“white”) colonial history to erase the resistant voice of the Māori in the “grand narrative” of white dominance and expropriation of indigenous land:

As the colonizing power of the nineteenth century, the Pakeha believed that the landscape could be tamed, and the savage domesticated and assimilated. The social paradigm had no place for resistance, or for the emancipatory struggle of the Māori, which ushered in the postmodern world of multiple discourses, negating the grand narrative of the Pakeha.<sup>52</sup>

The analysis continues with a brief overview of pre-colonial indigenous history, noting that the various Māori groups were organized as “micro states” and “fought each other in defence of territory, resources, and women.”<sup>53</sup> Defeated groups were “driven from their land” and “absorbed by others, thereby losing their identity as well as their land.”<sup>54</sup> Should there not, therefore, be emancipatory narratives from subjugated or forcibly assimilated Māori groups to negate the Māori grand narrative as well?

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50. *Id.* ¶ 9.8.

51. *Id.*

52. Ranginui J. Walker, *Maori Sovereignty, Colonial and Post-Colonial Discourses*, in *INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA AND NEW ZEALAND* 108, 108 (Paul Havemann ed., 1999).

53. *Id.* at 109.

54. *Id.*

Similarly, while Native American groups sometimes engaged in slavery, ethnic cleansing, and other injustices against other indigenous groups, their actions are ignored in favor of the more restrictive and selective examination of indigenous oppression by non-indigenous groups.<sup>55</sup> In Australia, aboriginal populations have long histories of discrimination against outsiders, and yet such actions seem to disappear behind the more important matter of European discrimination against aboriginals.<sup>56</sup> The Māori, too, still refer to all non-Māori in New Zealand as *pakeha*, which ironically lumps all European descendants and contemporary Asian immigrants into one category of “ethnically other.”<sup>57</sup>

Is it appropriate then to maintain a rights regime that is so historically inaccurate and legally inconsistent? If the U.N. is seriously committed to the process of reform and hopes to create a human rights framework that will remain viable and fair in the coming decades, it must create new human rights standards that can be applied consistently to all cultures. These universally acceptable standards must also be able to determine what constitutes an act of historical injustice and an appropriate remedy. International law expects and requires that similar situations generate similar judgments and decisions, and there is no reason to exempt human rights law from this requirement of fairness and consistency.

#### IV. THREE PROBLEMS FOR REFORM: ASSIMILATION, RELIGION, AND EDUCATION

The complexities surrounding U.N. reform, identity politics, and human rights are not strictly limited to the renegotiation of the boundaries and contours of peoples’ rights. Such complexities also extend to other constitutive elements of identity that are integral to indigenous and minority rights, but which are not unique to them. Three of these elements are particularly important in restructuring the framework of human rights law because they are

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55. See DEAN R. SNOW, *THE IROQUOIS* 67, 75 (1994) (noting that Susquehannock tribes were forced off their lands by an Iroquois alliance aiming to achieve local trade dominance and that, elsewhere, the St. Lawrence Iroquois were eliminated by “Mohawks, Hurons, and others,” also with the goal of dominance in local trade that included a lucrative trade with the newly arrived French traders). See also LELAND DONALD, *ABORIGINAL SLAVERY ON THE NORTHWEST COAST OF NORTH AMERICA* (1997) (discussing Native American slavery).

56. See Ian S. McIntosh, *Reconciling Personal and Impersonal Worlds: Aboriginal Struggles for Self-Determination, in AT THE RISK OF BEING HEARD: IDENTITY, INDIGENOUS RIGHTS, AND POSTCOLONIAL STATES*, *supra* note 48, at 303 (noting that while an outsider seeking to join an aboriginal clan might be granted certain privileges, she or he “never enjoys complete membership status within a clan.”). McIntosh continues: “In precolonial times, an outside Aborigine, a shipwrecked Indonesian fisherman, or other non-Aborigine might be given a place within an [Aboriginal] family and even marry. Rarely would they be given an Aboriginal name, participate in ceremonies, or have access to the inner sanctum of tribal life, and even less frequently would mortuary rites be performed in their honor. More often than not, the outsider would be killed upon reaching old age or before then.” *Id.* at 304.

57. ANDREW SHARP, *JUSTICE AND THE MAORI: THE PHILOSOPHY AND PRACTICE OF MAORI CLAIMS IN NEW ZEALAND SINCE THE 1970S* 64–69 (1997). See also MASON DURIE, *TE MANA, TE KĀWANATANGA: THE POLITICS OF MĀORI SELF-DETERMINATION* (1998).

ambiguous or particularly “unstable” markers of identity. In addition, each of the three raises issues common to all forms of identity construction as related to human rights protection. I am here referring to assimilation, religion, and education.

### A. *Assimilation*

In most of the literature regarding the relationship between rights and human identity, assimilation is a negatively regarded concept. The process is said to be inherently oppressive, invariably resulting in the loss of minority cultures that come face-to-face with majority groups.<sup>58</sup> In fact, many cultural minority and indigenous groups perceive of their own special rights collectively as a right “not to assimilate.” The right to one’s own culture almost becomes a right not be influenced in any way by another culture.<sup>59</sup> This proposition is problematic at best.

First, by what standard are we to evaluate the difference between culture lost and culture changed? All cultures are continuously changing, transforming and adapting. Despite the concept of “indigenous” cultures, very few such groups have practices that truly have existed since time immemorial. Second, many minority cultures have sought to resist assimilative pressure by strengthening and delineating their own internal identity and encouraging members of the community to embrace and celebrate those values.<sup>60</sup> But “embracing” and “celebrating” can themselves often be euphemisms for the assimilation of members of minority groups to a standardized and largely artificial version of the minority culture. Here, the impossible idea of “authentic” culture is key. Ironically, what began in earnest as an attempt to create a vibrant multiculturalism by limiting the majority culture’s assimilationist tendencies has transformed into similarly oppressive community-specific demands for assimilation.

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58. For the American context, see Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944 (2004); Anita Christina Butera, *Assimilation, Pluralism and Multiculturalism: The Policy of Racial/Ethnic Identity in America*, 7 BUFF. HUM. RTS. L. REV. 1–2 (2001).

59. See Avishai Margalit and Moshe Habertal, *Liberalism and the Right to Culture*, 64 SOC. RES. 491 (1994); LI-ANN THIO, MANAGING BABEL: THE INTERNATIONAL LEGAL PROTECTION OF MINORITIES IN THE TWENTIETH CENTURY 177 (2005) (“rights to identity are implicitly anti-assimilationist”); KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 130 (2005) (summarizing the preservationist ethic in human rights culture: “Assimilation is figured as annihilation.”); ROGER MAAKA & AUGIE FLERAS, THE POLITICS OF INDIGENEITY: CHALLENGING THE STATE IN CANADA AND AOTEAROA NEW ZEALAND 278 (2005) (challenging the suggestion that indigenous rights imply a need to assimilate to dominant-culture human rights norms, because such a view “does not allow minorities to uphold traditions contrary to prevailing laws or U.N.-defined human rights.”).

60. See, e.g., Danielle Conversi, *Autonomous Communities and the Ethnic Settlement in Spain*, in AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES 122, 135 (Yash Gahi ed., 2000) (“Assimilation is not an exclusive prerequisite of dominant cultures. Small cultures need to assimilate newcomers if they are to survive.”); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 120 (2004) (Making a distinction between political and cultural integration: “Cultural communities are built around their members’ adherence to values, norms and traditions that bear a prescriptive value for their identity . . .”).

The dual goal of a reformed human rights framework, then, perhaps should be to protect ascriptive identities from violent and coercive discrimination and assimilation, while minimizing the overall value of ascriptive characteristics such as race and ethnicity. This would encourage a trend toward complex and elective identities. When ethnicity and race are removed as significant elements of identity, little motivation will remain to erect discriminatory structures based upon them.

This suggestion returns us to one of the centerpieces of Will Kymlicka's theory of liberal minority rights, namely that minority cultures deserve special protections and freedom from assimilation since individuals' life decisions are often based on culturally specific criteria.<sup>61</sup> The problem with the assimilation ideal, the argument goes, is that it ultimately forces all minority cultural groups to make decisions based on the values of the dominant culture: values which are often cloaked as "neutral" or "reasonable." The process of assimilation thus benefits dominant majorities while disproportionately harming minority groups. The conclusion proposed is that minority groups be protected to preserve a normative resource base from which individuals in a community may draw when making meaningful decisions.

But who is to say that the most meaningful standards by which individuals make decisions must necessarily be derived from their own culture? The so-called "right to exit"<sup>62</sup> implies that individuals have the right to leave their own culture, presumably for a state of unencumbered individuality. But the right can just as easily be exercised by a desire to enter into another culture. Perhaps the "right to exit" is, then, meaningful only if it guarantees a simultaneous and reciprocal "right of entry." Individuals can and should be free to acquire multiple cultural identities, and the human rights protections afforded to cultures should entail an obligation to accept such cultural immigrants as full-fledged members of their own community. Otherwise, the protected minority cultures would practice the same type of discrimination they have resisted with the assistance of various human rights protections, creating yet another unsustainable inconsistency.

The right to enjoy one's own culture should perhaps then be altered and expanded to include the right to enjoy a culture of one's own choice, to enjoy multiple cultures, or even the right to claim another culture (or multiple other cultures) as one's own. The Universal Declaration of Human Rights recognizes "the right freely to participate in the cultural life of the community,"<sup>63</sup> while the International Covenant on Economic, Social, and Cultural Rights

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61. WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 17–66 (2001).

62. See Daniel M. Weinstock, *Beyond Exit Rights: Reframing the Debate*, in *MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY*, *supra* note 42, at 227 (discussing critically the "right to exit").

63. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., art. 27, U.N. Doc. A/810 (1948).

recognizes the right of everyone “to take part in cultural life.”<sup>64</sup> Neither document specifies that this enjoyment must occur solely within one community, or only within the community of one’s birth. Certainly, the idea of the legal acquisition of cultural identity is not something to be adopted lightly. However, this proposal can potentially evolve into an idea similar to dual cultural citizenship. Provided that an individual accepts the values of a given community, participates in its cultural life, learns its language, and uses its values to make meaningful decisions on a consistent basis—in short, provided that the individual becomes a full member of the community by assimilating at least in part to its ways of life and world-view—there is no sustainable and compelling reason to deny that person membership in the community or communities of her or his choice. Ultimately this would help to transform culture from an ascriptive and exclusive identity to an elective and inclusive one.

### B. *Religion*

Religion is one of the more unstable identity markers. International law has a tendency to treat religion as an ascriptive and permanent element of identity. This can be seen, for instance, in the Convention on the Prevention and Punishment of the Crime of Genocide, which protects groups based on elements of identity they cannot escape and have not chosen. In that document, groups are protected from genocidal intentions based on factors such as race, ethnicity, national origin, and *religion*, but not based upon factors such as political ideology.<sup>65</sup> This would seem to place religion into a category different from political ideology or other elective variables. Instead, religion is treated as an immutable marker of identity akin to race or ethnicity.<sup>66</sup> And yet, other human rights instruments make it clear that religion is clearly a matter of choice for the individual, and that the individual should be free and unfettered in determining the religious community to which he or she would like to belong.<sup>67</sup>

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64. ICESCR, *supra* note 27, art. 15(1)(a).

65. See Genocide Convention, *supra* note 28, art. 2; WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 132–37 (2000) (explaining that while the General Assembly approved the Universal Declaration on Human Rights, which recognized the right to change religions, upon adopting the Genocide Convention most State Parties to the drafting of the Genocide Convention continued to treat religion as a non-voluntary category akin to race or ethnicity).

66. For a discussion of the strong parallels between minority religions and minority rights, see Eileen Barker, *The Protection of Minority Religions in Eastern Europe*, in PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 58, 77 (Peter G. Danchin & Elizabeth A. Cole eds., 2002) (“If the arrival of new or alien religions results in things being done of which we do not approve, but which are not covered by the law, it may be necessary to introduce new laws, to protect children born into some movements, perhaps. But in a democratic society that claims all its citizens are equal before the law, such new laws should apply equally to all, be they Orthodox, Catholic, Lutheran, or Muslim, Seventh-Day Adventist, Krishna devotee, or Scientologist.”). This would imply that minority rights should not be special rights, but rights equally applicable to all.

67. See Malcolm Evans, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 202 n.44 (1997) (pointing out that although Article 18 of the ICCPR deals with religious freedom and the right to

The right to enter a religious community also implies a corresponding right to leave a religious community. However, this right has been questioned in recent years, particularly by some schools in the Islamic legal tradition. In such traditions, apostasy is closely related to a charge of blasphemy, both of which can carry a punishment of death.<sup>68</sup> The central issue here is not to determine which, if any, of the world's religions conform to international human rights standards. Instead, the point is to draw attention to the current human rights framework's treatment of religious identity, and the inconsistencies that will have to be addressed if the U.N. is to be taken seriously as a promoter and defender of human rights.<sup>69</sup>

Another crucial issue to be addressed here centers on the complex and conflicting implications of several different human rights tenets. An underlying assumption of the religious freedom guarantees in documents such as the ICCPR,<sup>70</sup> as well as the provisions in the Convention on the Rights of the Child ("CRC") that provide for the education of children so as to develop respect for human rights,<sup>71</sup> is that when individuals attain the age of majority they will be free to make choices and bear full responsibility for their consequences.<sup>72</sup> Yet most children around the world have been raised within a particular religious tradition and, of those, many have likely not had the opportunity, for one reason or other, to explore the tenets and ways of life of other traditions.<sup>73</sup> The implication here is that children have not, in fact, been taught that religion is a matter of free choice, and that they have been raised in such a manner as to heavily bias any choice they may make regarding matters of faith when they reach an age where they should be free to explore their own religiosity.<sup>74</sup> This would, in turn, imply that raising children ex-

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change one's religion, nonetheless "precise wording to this effect was expressly excluded from the text and it is open to the interpretation that it allows an individual to continue a faith, to adopt a faith, but not abandon a faith already held."). See also Sophie C. van Bijsterveld, *Freedom of Religion: Legal Perspectives*, in *LAW AND RELIGION* 299 (Richard O'Dair & Andrew Lewis eds., 2001).

68. See YOHANAN FRIEDMANN, *TOLERANCE AND COERCION IN ISLAM: INTERFAITH RELATIONS IN THE MUSLIM TRADITION* 121–59 (2003) (discussing apostasy); MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (2003); Perry S. Smith, *Speak No Evil: Apostasy, Blasphemy and Heresy in Malaysian Shariah Law*, 10 *J. INT'L L. & POL'Y* 357 (2004).

69. See Natan Lerner, *Religious Human Rights under the United Nations*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES* 79 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (addressing the status of religion in the U.N. human rights framework).

70. ICCPR, *supra* note 27, art. 18(2).

71. Convention on the Rights of the Child, art. 29(b), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

72. With the exception of Article 6(5) specifying an age threshold for the application of the death penalty, the age of majority is not explicitly defined in the ICCPR. The age of majority is therefore left for the State Parties to define, so long as the minimum is not set "unreasonably low" or does not violate other human rights treaties of which the state is a party. ICCPR General Comment No. 17, U.N. Doc. HRI/GEN/1/Rev.1 at 23 (1994).

73. Article 14(2) of the CRC calls on State Parties to "respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child" in relation to religion, but does not authorize or require parents or guardians to raise a child within only one religious tradition. CRC, *supra* note 71, art. 14(2).

74. There is some tension in the international human rights framework on this point. For instance,

clusively within one religious tradition, especially where that tradition is considered ascriptive by the family or the group, may violate the human rights of the child.

What all of this amounts to is that a reformed human rights framework must decide about the role religion will play in the formation of human identity. If the role is indeed an ascriptive one, and religion is akin to ethnicity or race, then human rights instruments must be adjusted accordingly and the idea of religion as a free choice would have to be greatly curtailed in the rhetoric of human rights. On the other hand, if religion is an elective characteristic and a matter of free choice, then all religious communities must be asked to create rights of free exit and free entrance, and children, regardless of the religious tradition of their family or group, must be exposed, in a fair and objective manner, to the tenets of all other religions in order to best prepare them for choices regarding spiritual matters. Indeed, the best interests of the child might just require either a non-religious or a multi-religious upbringing, so as to minimize coercive bias in the choice of a religion. Alternatively, if religion can be both ascriptive and elective, the human rights framework will need greater clarity in determining the contexts in which it is either one or the other, and it will need to eliminate the potential inconsistencies that this ambiguous definition of religion may generate.

### C. Education

If religion is to be treated as a truly elective variable, it implies at a minimum that a child would have to be educated equally in the tenets, values, and practices of every major world religion. Herein lies one of the other major weaknesses of the current human rights framework as it relates to human identity. While education is often promoted as a crucial element in the toolkit used to construct human identity, there are virtually no instruments in the structure of human rights law that regulate or mandate the *content* of that education.<sup>75</sup> All that currently exists are a few requirements that nations and groups educate their children in a way that enhances respect for “human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.”<sup>76</sup> Even when such provision exist, they are immensely

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Article 18(4) of the ICCPR requires states to respect the wishes of parents and guardians seeking “to ensure the religious and moral education of their children in conformity with their own convictions.” ICCPR, *supra* note 27, art. 18(4). Yet Article 24 of the ICCPR seems to require states to provide education to all children in conformity with the civil and political rights contained in the ICCPR itself, including freedom of religion. *Id.* art. 24

75. For critical approaches to the relationship between education and human rights, see Ken Booth & Tim Dunne, *Learning Beyond Frontiers*, in *HUMAN RIGHTS IN GLOBAL POLITICS* 303 (Tim Dunne & Nicholas J. Wheeler eds., 1999); Betty A. Reardon, *Human Rights as Education for Peace*, in *HUMAN RIGHTS EDUCATION FOR THE TWENTY-FIRST CENTURY* 21 (George J. Andreopoulos & Richard Pierre Claude eds., 1997); Douglas Hodgson, *The International Right to Education and Education Concerning Human Rights*, 4 *INT’L J. CHILD. RTS.* 237 (1996). See generally, DOUGLAS HODGSON, *THE HUMAN RIGHT TO EDUCATION* (1998).

76. See CRC, *supra* note 71.

vague, offering few clues about how they are to be interpreted or enforced uniformly across cultures.<sup>77</sup>

This leads to a truly egregious inconsistency in the current human rights framework, and yet surprisingly little constructive investigation has occurred in this field. Its importance stems in part from the way in which minority rights and indigenous rights are often granted. Almost without exception, recognized cultural minorities and indigenous groups demand to educate children in their own language, to create and utilize various media to disseminate cultural values and cultural history, and to write their own history in a way that corrects the negative stereotypes assigned to them by the outside cultures in whose midst these indigenous or minority groups exist.<sup>78</sup>

The problem surrounding such rights is that there is almost no regulation of the way in which indigenous or minority cultures represent themselves. While it is implicitly accepted that majority cultures must not intentionally and knowingly misrepresent the values, beliefs, and history of indigenous or minority groups, denigrate their culture, or promote negative stereotypes, there is no concomitant requirement that minority cultures get their own history right. Likewise, there is no requirement that minority or aboriginal cultures refrain from misrepresenting other cultures, including the majority culture that allegedly oppressed or marginalized them in the first place.<sup>79</sup>

The point worth stressing here is that education plays a powerful formative role in influencing self-perception and the perception of other cultures. Since inter-cultural understanding is so central to identity, cultural education, whether by dominant or minority groups, must be held to a consistent standard. This would imply that nations or cultures can write their own histories, but only in such a way that is internally and externally fair. Native American groups can certainly write the history of their own oppression, but must also write about the oppression that Native Americans inflicted upon one another. Islamic cultures can surely deconstruct the history of European orientalism and colonization,<sup>80</sup> but must also write the history of Islamic imperi-

77. While the ICESCR mandates that education is to “strengthen the respect for human rights and fundamental freedoms” and “promote understanding, tolerance and friendship among all nations and all racial, ethnic and religious groups,” art. 13(1), it, like the Universal Declaration of Human Rights and the ICCPR, also leaves considerable leeway for parents to choose a religious and moral education for their children “in conformity with their own convictions.” ICESCR, *supra* note 27, art. 13(3).

78. Such demands often give rise to rights, which are embedded in various human rights instruments. See, e.g., Minority Rights Declaration, *supra* note 34, art. 4(2) (“States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs. . . .”); see generally APPIAH, *supra* note 59, at 208–12.

79. See Sonia Smallacombe, *On Display for its Aesthetic Beauty: How Western Institutions Fabricate Knowledge About Aboriginal Cultural Heritage*, in POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES 152, 157 (Duncan Ivison et al. eds., 2000) (noting that “[d]ominant colonial ideologies are inherent in Australian institutions, which is reflected in the difficulty the latter have in understanding the experiences of many marginalized groups.”). Australian institutions may get it wrong, but this does not necessarily mean that any response from aboriginal communities is therefore unquestionably right.

80. See generally EDWARD SAID, ORIENTALISM, 1978.

alism and their own complicity in the misrepresentation and denigration of other, non-Islamic groups. China can certainly protest when Japan rewrites its imperial history in a way than minimizes Japanese violence against the Chinese,<sup>81</sup> but must also write of the violent and imperialist Chinese expansion that has characterized much of Chinese history.

In the interest of affording due respect to the achievements of every culture, showing solemn awareness of the mistakes that nearly every culture has made, and ensuring uniformity, it is imperative that human rights instruments begin to regulate cultures' self-representation as much as the representation of other cultures.<sup>82</sup> Honesty and accuracy in history, particularly as it is taught to the young, just might be the key to reducing cultural antagonism around the globe.<sup>83</sup>

## V. CONCLUSION

The idea of "decolonizing" law, as it has been presented here, is not intended to deny the traumatic experience of European imperialism. Instead, the aim has been to point out our inability and unwillingness to constructively redress all forms of historical injustice, and to argue that focusing on the centrality of one experience at the expense of others distorts the perspective of human rights justice and weighs it down with questions about the past that are in many ways simply unanswerable. An approach that is consistent in design and application is the one thing that will give a reformed human rights framework the integrity it needs to ensure a condition of human dignity and security. A reformed human rights framework will be on more solid footing if it is based on what is legally compelling in the present, and not on what is historically disputed from the past. The U.N., in its reforms, will need to

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81. On the controversy surrounding Japanese history textbooks, see Kathleen Woods Masalski, *Examining the Japanese History Textbook Controversies*, JAPAN DIG. 1 (Nov. 2001); Jennifer Lind, *Think Again: Japanese Textbooks Whitewash the Country's History*, FOREIGN POL'Y, Aug. 2005, at 23.

82. Note that the goal here may not necessarily be a "true" history, given that historical truths are often difficult if not impossible to establish. Rather, the hope is to incorporate dissident and critical voices in a historical narrative so as to prevent the use of chauvinistic rhetoric by minority and majority cultures alike, which frequently leads to stereotypes and discrimination.

83. There are many examples of how misreading or distorting history can have very real effects on the quality of human rights protection. In Rwanda, for instance, many historians have found it convenient to argue that the genocide of 1994 was the direct legacy of European colonialism. See MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 9 (2001) (arguing that "the Rwanda genocide needs to be thought through within the logic of colonialism"). However, others have argued that such narratives are merely complicit in a form of propaganda and disinformation started by authorities in Rwanda in order to hide the postcolonial origins of the genocide. See JOHAN POTTIER, *RE-IMAGINING RWANDA: CONFLICT, SURVIVAL AND DISINFORMATION IN THE LATE TWENTIETH CENTURY* (2002); see also JOHN POWERS, *HISTORY AS PROPAGANDA: TIBETAN EXILES VERSUS THE PEOPLE'S REPUBLIC OF CHINA* (2004) (assessing the misuse of history on both sides of that conflict); 2 MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION* (1987); *BLACK ATHENA REVISITED* (Mary R. Lefkowitz & Guy MacLean Rogers eds., 1996) (offering corrective responses to misuses of history); KEITH WINDSCHUTTLE, *THE FABRICATION OF ABORIGINAL HISTORY* (2002); *WHITEWASH: ON KEITH WINDSCHUTTLE'S FABRICATION OF ABORIGINAL HISTORY* (Robert Manne ed., 2003) (offering critical responses to Windschuttle).

reorient human rights toward contemporary legal principles and away from historical correctives, at least in the short term.

There is always the possibility of returning to these questions, of course, when and if the U.N. is prepared to deal with all acts of historical injustice and to define specific historical parameters beyond which history is simply non-judiciable. New theoretical frameworks are slowly being proposed that may help this endeavor. Duncan Ivison, for instance, has proposed a form of “post-colonial liberalism” that seeks to remove identity-based justice from its current impasse toward an arrangement of “complex mutual coexistence,”<sup>84</sup> opening inter-group borders and encouraging mutual understanding and mutual examination of the messiness of group justice.<sup>85</sup> Yet this raises the immediate question of what, if anything, is postcolonial about such an arrangement. By labeling any new regime of human rights justice as postcolonial, we remain mired in discourses in which one event, European imperialism and colonialism, defines the universal present. For all the talk of incorporating new voices into the language of global justice, this is strangely Eurocentric.

To decolonize law is therefore to liberate it from historical debates that only hinder the task of providing human rights justice to those who presently need it most. Once a stable and consistent legal framework is created to ensure a secure and fair environment for the construction and enjoyment of individual and group identities, and perhaps only then, can such individuals and groups return to the question of what to make of an unjust past in which we are all far more complicit than we often care to admit. No amount of human rights reform at the U.N. can truly undo the past. But without some fundamental changes, the possibility of equality, justice, respect, and dignity within and between the various segments of society will prove as depressingly elusive in the future as it has in our collective past.

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84. DUNCAN IVISON, POSTCOLONIAL LIBERALISM 2 (2002).

85. *Id.*