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# People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law

Feisal Hussain Naqvi

*Fried, Frank, Harris, Shriver & Jacobson*

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# People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law

FEISAL HUSSAIN NAQVI\*

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\* Associate, Fried, Frank, Harris, Shriver & Jacobson, New York; J.D., 1994, Yale Law School. This Article is dedicated to my wife Ayeda, without whose love and support it would never have been completed.

## INTRODUCTION

The Kalash Kafirs, an ethnic group of 2500 people, live in three remote mountainous valleys in Pakistan. The last remnants of the fabled Kafirs of the Hindukush, who as recently as 1896 numbered more than 100,000, the Kalash are an island of paganism in a sea of hostile Muslims. Their culture, little changed over the past 3000 years, will probably not survive beyond the next few generations, besieged as it is by modernity as much as by missionaries.

If left to fend for themselves, the Kalash as a distinct group will soon disappear. It seems difficult to imagine that they could preserve their identity and culture given the increasingly determined attempts to convert them. Their survival will probably depend on whether the government of Pakistan decides it can forgo the revenues generated by their status as tourist displays. Whatever the motive, preservation of the Kalash as a distinct people will require a series of affirmative measures. Moreover, given the dire economic straits within which Pakistani governments function, their protection will require treating them preferentially.

Today, concern for indigenous people is as much a part of Western political orthodoxy as is concern for the environment. Recently, this concern has manifested itself primarily through what some term the emerging international law norm regarding the rights of indigenous peoples. This norm, at the very minimum, safeguards the right of communities to exist as distinct units of human interaction. More functionally, application of this norm requires consideration of the land rights and political self-expression of indigenous peoples. Indeed, the steps that need to be taken with respect to the Kalash are consistent with this emerging norm. However, the thesis of this Article is that, as currently conceptualized, this norm provides no basis for arguing that international law obligates Pakistan to help the Kalash survive as a distinct ethnic and religious group.

Advocates of indigenous rights justify the preferential treatment of indigenous groups either as compensation for historical suffering and a disproportionately disadvantaged present condition, or by expanding individual entitlements to include a right to cultural integrity and development. However, the core concern of the indigenous rights norm—in this case, the right of the Kalash to continue existing as a distinct unit of human interaction—is implicated even when these justifications are of no use. Thus, one cannot argue that the Kalash deserve preferential treatment because they are worse off than other ethnic or religious minorities in Pakistan. It is true that the Kalash's quality of life as measured by such objective criteria as literacy rates, income, and access to health care is shockingly low. However, the quality of life of most Pakistanis, as indicated by those same statistics, is just as deplorable. From a comparative perspective, the Kalash are no more deserving of government aid than many other equally impoverished Pakistani citizens.

Similarly, one cannot justify preferential treatment because the Kalash are victims of colonial oppression. Unlike the Latin American and North American indigenous peoples, no easy distinction between settler and native, right and wrong, applies here. The Kalash are just one of many equally indigenous groups, and one has only the vagaries of history to blame for the beleaguered survival of this once proud culture. Moreover, Pakistan is essentially unconnected to the events most responsible for the current condition of the Kalash: the massacre and forcible conversion of the Kafirs of the Hindukush in 1896. An Afghan king perpetrated those acts with the active connivance of the British Empire.

Though Pakistan may have succeeded to the obligations of the British legally, asking it to atone for the sins of its colonial masters is hardly justifiable.

To the extent that scholars have tried to develop legal foundations for an indigenous rights norm which would protect the right of indigenous communities to continue their distinct existence, those foundations are somewhat dubious. Though some indigenous rights theorists base their arguments on an expansive reading of instruments such as the International Covenant for Civil and Political Rights ("ICCPR"), the explicit text of the ICCPR itself, the *travaux préparatoires*, or even subsequent interpretation and state practice regarding the ICCPR, does not support them. Similarly, the expansion of individual entitlements to include such "Third Generation" rights as the right to development and the right to cultural integrity suffers in that the international community does not generally recognize such rights as binding legal obligations requiring affirmative action. More importantly, because "Third Generation" rights are individual and not collective rights, they are inherently incapable of providing a basis for distinguishing between the cultural integrity or developmental rights of members of one community and members of another. Rhetorically, one may ask: Do the cultural integrity rights of the Kalash somehow require greater attention than the cultural integrity rights of other individuals?

One is forced to conclude that the indigenous rights norm provides no basis for arguing that the Kalash deserve government support to preserve their status as a distinct community. Two possible avenues result: The first would admit no distinct norm of indigenous rights. In this case, "indigenous rights" merely refers to the application of universal human rights to particular groups. Indigenous peoples deserve aid not because they are a distinct community, but because they are disproportionately poor: the fact that they are "indigenous" is irrelevant except to the extent that it affects the way in which the remedy for their poverty is to be framed. Similarly, indigenous peoples deserve aid not because they are distinct, but because they are victims who deserve compensation from the successors of their victimizers: the fact that they are "indigenous" is irrelevant except that the label identifies a particular set of events as the acts of victimization.

The second avenue would reconceptualize indigenous rights on a truly universal basis. Indigenous rights must be conceived so that the continued existence of a community as a "distinct unit of human interaction" is protected as a worthwhile end in itself. In other words, communities have a right to continued and distinct survival which is as precious to them as the right to continued existence is to any individual. This right of communal survival will be found in international law by expanding the right of all peoples to self-determination. That is, self-determination should not be limited to the right of individuals to a government of their choice and therefore limited to concerns of political autonomy or sovereignty, but should include the right of a community to define itself. In other words, the right of self-determination includes, at an irreducible minimum, the right of a community to exist, if not entirely on its own terms, then at least in a manner that preserves its distinct identity.

This Article does not argue that this second avenue is normatively superior to the idea that there is no distinct norm of indigenous rights. Instead, this Article argues that the rhetoric of indigenous rights is at odds with its present conceptual foundations, and it presents an alternative framework which is consistent with both international law as well as the right of indigenous communities to continue as "distinct units of human interaction."

As such, this Article is divided into two major parts. The first part provides an historical overview of the Kalash by tracing their progress from their first appearance in recorded history to the present. It then gives a detailed picture of the Kalash today, in particular the pressures and difficulties facing them, as well as the measures they and the Pakistani government are taking to preserve their identity and way of life.

The second part gives an historical overview of how indigenous peoples and minorities have fared as subjects of international law over the centuries, starting with the discovery of the Americas by the Spaniards and finishing with the League of Nations and the minority treaties. It then examines how post-World War II developments in the law of international human rights have affected indigenous peoples. The Article concludes by examining the efforts made by indigenous rights advocates to construct an international norm.

In the last part, the Article draws together all of these various strands to show how both the post-World War II human rights framework in general and the current development in the rights of indigenous peoples in particular cannot provide a specific answer to why Pakistan owes a duty to help the Kalash. The international human rights regime, by taking an obsessively individualistic approach, does not properly address indigenous rights. Current ideologues are doing themselves a disservice by justifying indigenous rights entirely in terms of historical or comparative analyses that are not universally applicable. If indigenous rights are to be construed as truly universal rights, then the conceptual basis of human rights must be expanded to address not only the value of an individual's life, but also the value of a community's life, separate and distinct from that of its members.

## I. AN INTRODUCTION TO THE KALASH

### *A. The Kalash in History*

In 1890, the British had been in India for over three hundred years, the last forty or so as rulers from the peaks of the Khyber to the tip of the Deccan peninsula to the hills of the headhunting Nagas in Burma. There was still one area, however, that (frustratingly for the British) bore more than a passing resemblance to those vast emptinesses on medieval maps, which inventive cartographers had populated with dragons and mermaids. Kafiristan, (literally, "Land of the Pagans") a remote mountain fastness wedged between the Pamirs and the Hindukush, even as late as 1885 had never been visited by a European.<sup>1</sup> Daunted by its reputation, travelers either had chosen to bypass it or had failed to penetrate it. One traveler, W.W. McNair, disguised himself in native clothing and stained his skin with walnut juice to reach the Kafirs but was rebuffed. His conclusion, as presented to the Royal Geographical Society, was that after Kafiristan no other areas would be left to explore.<sup>2</sup>

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1. The first documented penetration of Kafiristan was by a British expedition in 1885, led by Colonel William Lockhart. Louis Dupree, *Nuristan: "The Land of Light Seen Darkly"*, AMERICAN UNIVERSITY FIELD STAFF: SOUTH ASIAN SERIES, Series C, Vol. 25:6, 1974, at 3; Schuyler Jones, *An Annotated Bibliography of Nuristan (Kafiristan) and the Kalash Kafirs of Chitral* (pt. 2), 43 HIST. FILOS. MEDD. DAN. VID. SELSK. 1, 17-20 (1969). The only sustained exploration came in 1890 when the British dispatched Sir George Scott Robertson to the area. His book, SIR GEORGE SCOTT ROBERTSON, *THE KAFIRS OF THE HINDUKUSH* (photo. reprint 1970) (n.p. 1896), offers the only detailed portrait of the Kafirs prior to their forcible conversion in 1896.

2. W.W. McNair, *A Visit To Kafiristan*, 6 PROCEEDINGS OF THE ROYAL GEOGRAPHICAL SOCIETY 1-18 (n.s.) (1884).

Little was known except that the people were pagan, ferocious, and fond of wine. Ignorance led to fear, and Kafiristan's reputation was "as terrible as it was imprecise."<sup>3</sup> the Kafirs were "huge as giants, speaking an unknown language, clad in black, with hearts as dark as their clothes."<sup>4</sup> Even a usually restrained English traveler to Afghanistan noted that "[t]he Kaffirs live in a most barbarous state, eating bears and monkeys."<sup>5</sup> Where these mysterious wild people had come from was another continuous source of speculation for European ethnologists. Many authors agreed with the local myth that the Kafirs were the descendants of Alexander's army. One writer claimed they were a lost tribe of Jews who had "entirely forgotten their law, and had fallen into idolatry,"<sup>6</sup> another that they were the last remnants of a once vast Central Asian Christian community,<sup>7</sup> a third that they were "the modern representatives of that very ancient Western race, the Nysæans—so ancient that the historians of Alexander refer to their origin as mythical."<sup>8</sup>

However, as more recent scholars have pointed out, "The mystery of origins excites the imagination, but in the attempt to force the pieces of an ethnic puzzle into place and to square cultural coincidences, fantasy takes precedence over precision."<sup>9</sup> In fact, linguistic and ethnographic research indicates that the Kafirs were originally part of the Aryan hordes that swept down from the steppes of Central Asia to conquer the plains of India around 2000 B.C.<sup>10</sup> Instead of continuing on with the invaders, they decided to linger on the southwestern side of the Hindukush mountains,<sup>11</sup> where they were met a thousand years later by the advancing armies of Alexander the Great.<sup>12</sup> According to Kafir legends, the Kalash's military performance was so impressive that Alexander asked for a contingent to fight with him in his Indian campaign.<sup>13</sup> "The Kafir[s] sent between 1,000-2,000 young men, who did yeoman service as scouts for Alexander in the Battle of

3. JEAN-YVES LOUDE & VIVIANE LIEVRE, *KALASH SOLSTICE* 3 (1988).

4. HILDA HOOKHAM, *TAMBURLAINE THE CONQUEROR* 189 (1962).

5. 1 ALEXANDER BURNES, *TRAVELS INTO BOKHARA* 166 (London, 1834).

6. 2 JOSEPH WOLFF, *TRAVELS AND ADVENTURES OF THE REV. JOSEPH WOLFF* 37 (1861).

7. GUSTAV KRIST, *ALONE THROUGH THE FORBIDDEN LAND* 164 (1938).

8. T. H. Holdich, *The Origin of The Kafir of the Hindu Kush*, 7 *GEOGRAPHICAL J.* 42, 49 (1896).

9. LOUDE & LIEVRE, *supra* note 3, at 10.

10. *Id.* at 11-12; *see also* Dupree, *supra* note 1, at 2 ("Although much remains to be studied in Nuristan, I believe the people may ultimately be found to represent the easternmost remnants of the first major explosion (3rd-2nd millenniums B.C.) of Indo-European speakers from South Russian and Central Asia . . ." (emphasis in original)).

11. Loude and Lievre note:

The ancestors of the Dards, of purely Indian tongue, must have abandoned the migration in its later stages, for "it does not seem necessary to go further back than Vedic Sanscrit to explain the forms one finds" in their languages. They apparently took over the pasture land, and then the rugged territories, to the north of the present city of Peshawar.

According to Kalash tradition, their first settlement was established in a land called Tsyam, which their later movements would suggest lay somewhere to the south of present-day Nuristan. Consequently they could not have crossed the barrier of the mountains or penetrated into the subcontinent.

LOUDE & LIEVRE, *supra* note 3, at 13 (quoting G. Fussman, *Pour une Problematique Nouvelle des Religions Indiennes Anciennes*, 265 *J. ASIATIQUE* 23 (1977)).

12. While the encounter between the Kafirs and Alexander has been memorialized in legend, there are also scholars of repute who agree that the pagans mentioned in Alexander's dispatches were the progenitors of today's Kalash Kafirs. *See, e.g.*, Holdich, *supra* note 8, at 49. On the other hand, another author points out:

Records relating to Alexander's campaign in the Hindu-Kush region, south of Chitral, speak of skirmishes with pagan tribes with customs and beliefs similar to those of the Kalash. But it may be borne in mind that the Kalash alone were not pagans at that time. The entire Afghanistan, particularly its eastern parts, were inhabited by pagan races and the Kho (and maybe several other) tribes of Chitral were also following a culture with customs and beliefs very similar to that of the Kalash and other pagan tribes.

Wazir Ali Shah, *Notes on Kalash Folklore*, in *CULTURES OF THE HINDUKUSH* 69 (1970) (Karl Jettmar & Lennart Edelberg eds., 1974).

13. Dupree, *supra* note 1, at 2.

Jhelum and in hundreds of smaller skirmishes<sup>14</sup> and who subsequently returned to Kafiristan bringing with them many elements of Greek culture.<sup>15</sup>

Alexander's armies were only the first of many the Kafirs were to face. During the seventh century, Kafiristan came under the sway of the T'ang dynasty (A.D. 618-906)<sup>16</sup> and legend has it that when the Arabs fought the Chinese in Turkestan during the seventh century, a small party came to Chitral and fought the Kafirs.<sup>17</sup> This first contact between Islam and the pagan Kafirs proved telling because from then on the Kafirs were most often a footnote to the exploits of Muslim conquerors. The first of these conquerors, Sultan Mahmud of Ghazni, took the time in 1020 to "reduce to obedience" a defiant group of Kafirs in between his famed seventeen invasions of India.<sup>18</sup> Three centuries later, Tamurlane made several forays against the Kafirs,<sup>19</sup> for by then "it was considered a work of religious merit to exterminate these Kafirs."<sup>20</sup> The founder of the Moghul dynasty, Babur the Conqueror, invaded Kafiristan twice, in 1507 when he plundered expedition rice fields in the valley of Biran and again in 1514.<sup>21</sup>

An unremitting hostility between the Kafirs and the surrounding lowland tribes of Afghanistan, which had converted to Islam by the eleventh century, resulted in Kafiristan's being cut off from the world:

14. *Id.*

15. *Id.* The extent of Greek influence over Afghanistan is disputed but at least one author has argued that the Greek satrapy of Paropamisadae included parts of Kafiristan. See generally W.W. TARN, *THE GREEKS IN BACTRIA AND INDIA* (1951).

16. Halfdan Siiger, *Ethnological Field-Research in Chitral, Sikkim and Assam*, 36 *HIST. FILOS. MEDD. DAN. VID. SELSK.* 32-33 (1956); see also VINCENT A. SMITH, *THE OXFORD HISTORY OF INDIA* 174 (photo. reprint 1961) (Percival Spear ed., 3d ed. 1958) ("For a few years, from 661 to 665 [A.D.], China enjoyed unparalleled prestige, [Kafiristan (Kapisa or Ki-pin) was a province of the empire,] and the ambassadors in attendance at the imperial court included envoys from the Suwat Valley and from all the countries extending from Persia to Korea.")

17. See LOUDE & LIEVRE, *supra* note 3, at 20.

18. MUHAMMAD NAZIM, *THE LIFE AND TIMES OF SULTAN MAHMUD OF GHAZNA 74-75* (1931); see also LOUDE & LIEVRE, *supra* note 3, at 20.

19. EDWARD G. BROWNE, *HISTORY OF PERSIAN LITERATURE UNDER TARTAR DOMINION* 193 (1920).

[I]n the spring of 1398, he [Tamurlane] set out on his Indian campaign, instigated thereto, as asserted in the *Zafar-nāma*, by his desire to promote Islām and crush idolatry, and by the accounts which reached him of the toleration shown by the Muslim rulers towards their Hindū subjects and neighbours. After some preliminary operations against the Afghāns . . . of the Suleymān Kūh and the *Siyā-pūsh* ("Black-robed") heathen of Kāfiristān, he crossed the Indus on Muharram 12, 801 (Sept. 24, 1398) and proceeded to carry fire and sword into India.

*Id.* (footnote omitted). Other authors, however, have painted a more revealing picture of Tamurlane's exploits:

[Tamurlane] affected to take revenge for the many cruelties inflicted by the Kafirs to their helpless Muslim neighbours; but the text of the (adapted) autobiography makes it clear that the expedition was planned and executed as an adventurous exploit of man-hunting, in order to show that brave soldiers would fight their way even into completely unknown and bewildering territory. In fact, the usual skull-towers were erected in some places; but one of the detachments fell into an ambush and was massacred, so "victorious retreat" was advisable.

1 KARL JETTMAR, *THE RELIGIONS OF THE HINDU-KUSH: THE RELIGION OF THE KAFIRS* 13 (Adam Nayyar trans., 1986) (citation omitted). Jettmar's account is confirmed by Dupree who quotes a section of Tamurlane's memoirs which indicate that the Kafirs successfully ambushed Tamurlane's forces at one point and that Tamurlane himself was lucky to escape with his life. However, the attempt only raised the Conqueror's ire and his subsequent notes indicate that his intention was "the extermination of the infidels." Dupree, *supra* note 1, at 20-21 (quoting HENRY M. ELLIOT, *THE HISTORY OF INDIA AS TOLD BY ITS OWN HISTORIANS* 13-16 (John Dawson & Susil Gupta eds., 1963) (edited from the posthumous papers of Sir H.M. Elliot)); see also HOOKHAM, *supra* note 4, at 185-201.

20. William Anderson, *An Attempt to Identify Some of the Places Mentioned in the Itinerary of Hiuan T'sang*, 16 *J. ASIATIC SOC'Y BENGAL* 1183, 1196 (n.s.) (1847).

21. Nurul Zaman Ahmad Auj, *Mughal Expeditions Against Kafirs*, *NATION FILES*, June 18, 1989. Babur, in fact, spends more time discussing Kafir winemaking skills than their military prowess and comes to the unflattering conclusion that they did not deserve their reputation—a conclusion shared by a later writer who noted that "I have had the opportunity of tasting the best brand of this classical liquor [and] . . . it is not of a high class. It reminded me of a badly corked Chablis, which it much resembled in appearance." Holdich, *supra* note 8, at 49.

[T]he singularity of Kafiristan and other mountain areas indeed is preconditioned by geography but became really effective when the surrounding lowlands were conquered by the expanding force of Islam. A bar was laid which was not opened before the conversion of the mountain valleys themselves. For Kafiristan proper this means an isolate development between the 11th and the 19th centuries A.D. Before the 2nd millennium A.D. the exchange of men and ideas went much easier.<sup>22</sup>

Of course, Kafiristan's isolation and its reputed terrors served for some only as an invitation to glory. The Jesuits of Agra, for example, obtained permission in the 1670's to undertake a mission to Kafiristan. The experiences of the chosen emissary, a certain Father Gregorio Roiz, are not recorded with the exception of a single paragraph in the annual report sent to Rome in 1678. In that paragraph, he concludes with respect to the Kafirs that "owing to their great dullness and greater barbarity I did not find dispositions in them for receiving the Faith, nor did I discover any indications that, as the Armenians had told us, they had been Christians at one time."<sup>23</sup>

Still, the geographic isolation of Kafiristan and the tenacity with which the Kafirs defended their territory preserved their island of paganism in a sea of hostile Muslim tribes. For one thing, the main military weapon of the time, armed cavalry, was largely ineffective against their mountain retreats. More importantly, the tribes of Afghanistan (then, as now, unparalleled in their fratricidal tendencies) were hardly ever able to mount a coordinated attack on the Kafirs.<sup>24</sup> However, both of these factors had changed considerably by 1890. Under Amir Abdul Rahman, the Afghani tribes had not only been cowed into unity, but the Amir's army had the most modern technology the British had to offer.

This is not the place to examine the convoluted history of 19th-century Afghanistan, but a few points must be underscored. British interest in shoring up India's hitherto largely ignored western frontier with Afghanistan only emerged in 1807 when Alexander of Russia and Napoleon tentatively discussed invading India via Persia.<sup>25</sup> The joint invasion was wildly impractical, but Charles Miller notes "it seldom required much more than even the accidental blink of an alien eye in the direction of the subcontinent to spread panic through British cabinets and deprive otherwise keen-minded British statesmen of rudimentary common sense."<sup>26</sup> The immediate result of this panic was a treaty of friendship in 1809 between the British and Afghanistan's current ruler, Shah Shuja. The defeat of the French at Waterloo eliminated them as a possible source of worry, but English interest in Afghanistan continued to increase due to Russia's expansionist aims. In 1838, the arrival of a Russian envoy in Kabul alarmed the British to the point that Baron Auckland, the Governor-General of India, was authorized by the

22. Karl Jettmar, *Iranian Influence on the Culture of the Hindukush*, in *CULTURES OF THE HINDUKUSH*, *supra* note 12, at 39 (citation omitted).

23. SIR EDWARD MACLAGAN, *THE JESUITS AND THE GREAT MOGHUL* 126 (1932). Alexander Gardner, a British soldier who served in Ranjit Singh's army, notes in his memoirs that when he visited Kafiristan between 1825 and 1830, the Kafirs told him two Europeans had lived in their country in approximately 1770 and had either died in captivity or been murdered by the Kafirs under the supposition that they were evil spirits. Gardner's hypothesis is that the two must have been missionaries. ALEXANDER GARDNER, *SOLDIER AND TRAVELLER* (Hugh Pearse ed., Edinburgh & London, W. Blackwood & Sons 1898). According to Schuyler Jones, Gardner's memoirs were the inspiration for Rudyard Kipling's famous short story, "The Man Who Would Be King." Jones, *supra* note 1, at 58-59 n.155.

24. According to Jettmar, the original area inhabited by Kafirs was much larger than that of present day Nuristan, and so Afghan attempts prior to 1896 had succeeded in converting those non-Nuristani Kafirs but had failed against the Nuristanis. I JETTMAR, *supra* note 19, at 14-15.

25. CHARLES MILLER, *KHYBER: BRITISH INDIA'S NORTH WEST FRONTIER* xv (1977).

26. *Id.*



secret committee of the East India Company's Board of Directors to "interfere decidedly in the affairs of Afghanistan."<sup>27</sup> Accordingly, a small issue between the two nations was exaggerated into a quarrel<sup>28</sup> and a large invading force was sent off to Kabul to replace Dost Mohammed, the Amir of Afghanistan, with a ruler more amenable to outside control.<sup>29</sup> The British were initially successful, entering Kabul on August 6, 1839,<sup>30</sup> but a series of colossal military blunders and a fatal underestimation of the degree to which their presence inspired resentment culminated several years later in the annihilation of almost the entire British force.<sup>31</sup>

This stain on British honor had to be avenged. After the aptly named Army of Retribution had salvaged some pride by blowing up the Kabul bazaar,<sup>32</sup> it was decided that the prudent course was to restrict British ambitions to the east of the Indus and "leave it to the Afghans themselves to create a government amidst the anarchy which [wa]s the consequence of their crimes."<sup>33</sup> The fruits of this policy, dubbed "masterful inaction,"<sup>34</sup> were to last for thirty years, but by the 1870's a new and more interventionist "Forward Policy" was on the rise. The result of this pigheadedness was another invasion of Afghanistan in 1878.<sup>35</sup> This time, the British were somewhat more successful in the military field,<sup>36</sup> but still no wiser as to what to do with Afghanistan. The eventual solution decided upon was to establish a new ruler, "not only acceptable to the people . . . but submissive to the British will"<sup>37</sup> and the candidate selected was the grandson of Dost Muhammad, Amir Abdur Rahman.

Amir Abdur Rahman's biggest sorrow perhaps was his fervent belief that "had he lived in an earlier age and not been crushed . . . like an earthenware pot between the rival forces of England and Russia, [he] might have founded an Empire, and swept in a tornado of blood over Asia and even beyond it."<sup>38</sup> Deprived by history of any chance of emulating Ghengis Khan,<sup>39</sup> he concentrated on transforming Afghanistan from "a henhouse of squabbling headmen into something like a sovereign state."<sup>40</sup> Abdur Rahman's methods were not for the meek: he once confessed to an English visitor that he had ordered the execution of more than 100,000 Afghans, punishments which included not only the routine sentence of being shot to death by the muzzle of Kabul's daily gun but more

27. *Id.* at 30.

28. The reasons provided in the "Simla Manifesto" were that Dost Mohammed had made an unprovoked attack on Ranjit Singh and, with reference to the siege of Herat, that the Afghans in concert with Persia had "avowed schemes of aggrandizement and ambition injurious to the security . . . of India." *Id.* at 32. However, the charges were "unfounded, if not downright fabrications" and "the siege of Herat had been lifted." *Id.*

29. *Id.* at 33.

30. *Id.* at 42.

31. The original Army of the Indus had included almost 17,000 soldiers, *id.* at 35, of which no more than a handful survived the final battle on January 13, 1843. As Miller notes, "Exactly one hundred years and one month later, Singapore fell to the Japanese. Until then, no British army in Asia would submit to so resounding a humiliation . . ." *Id.* at 79. For a description of the retreat from Jalalabad, see generally *id.* at 43-86.

32. *Id.* at 85.

33. *Id.*

34. *Id.* at 89.

35. *Id.* at 170.

36. As in the previous instance, British forces wound up besieged and encircled. However, unlike their previous debacle, the British this time managed to avoid being slaughtered and to hold out until relief forces arrived. *Id.* at 197-200.

37. *Id.* at 205.

38. *Id.* at 229.

39. Amir Abdur Rahman's view of himself should not be idly dismissed. Louis Dupree, one of the greatest modern scholars of Afghanistan, concluded that "had [Abdur Rahman] been born a hundred years earlier, this charismatic leader would probably have followed the patterns of previous Central Asian emperors, and expanded as far as force and intrigue could carry him." LOUIS DUPREE, AFGHANISTAN 417 (1973).

40. MILLER, *supra* note 25, at 225.

inventive judgments such as having bandits skinned alive at a leisurely pace.<sup>41</sup> The Afghans were no strangers to rough justice, but Abdur Rahman's sentences were carried out on a more massive scale than any previous attempts. Whether as a result of his methods or otherwise, the Amir succeeded in uniting the country to a far greater degree than any previous ruler.

But one fact Abdur Rahman could not escape was that he had only two options, to join the British sphere of influence or the Russian. Since the Amir believed the Russians to be incorrigible haters of Islam, "[t]o be a pawn of London and Calcutta rather than a serf of St. Petersburg seemed to him the lesser of two evils."<sup>42</sup> And in 1885, when Russian jingoism resulted in border skirmishes with the Afghans,<sup>43</sup> the resulting coziness between the Amir and the British led to the Amir's army being presented with new artillery pieces as well as twenty thousand of the most modern breech-loading rifles.<sup>44</sup> The Russian attack on Afghanistan never materialized but the Amir's army was ready to face all challenges. The only challenge before them, however, was the continued boundary dispute between the Afghans and the British. This dispute was abruptly settled with the signing of the Durand Treaty in 1893 which attempted "[t]o delineate once and for all British and Afghan responsibilities in the Pushtun area."<sup>45</sup>

Since the Durand Treaty essentially consisted of a grand concession by the Amir of a vast amount of territory to the British,<sup>46</sup> historians have been at a loss ever since to explain why the Amir would take such a step. Some have hypothesized that the Amir was so "bamboozled" by the British negotiator that he was unaware of the exact amount of property he was conceding.<sup>47</sup> Others argue that the Amir intended his concessions to be only temporary and not a permanent cession of sovereignty.<sup>48</sup>

One factor generally overlooked is that the British also tacitly agreed to recognize Kafiristan as part of the Afghan sphere of influence and fair game for the Amir's hitherto suppressed expansionist ambitions. As one contemporary author argued, "Kafiristan was the purchase-money for value supposed to be received."<sup>49</sup> Indeed, for Amir Abdur Rahman, the subjugation of the independent Kafirs served a number of purposes:

By its surrender the Ameer [sic] was able to recover in the eyes of his subjects, and more especially in the eyes of the priesthood, some of the disgrace involved by the surrender of tribesmen who had so earnestly pleaded not to be made over to the English. He would accomplish that which all previous Sovereigns had failed to do; and he would become, and would go down in history as, a great champion of the Faith.<sup>50</sup>

Moreover, wholly apart from the defeat and conversion of so many infidels, "the [A]mir feared that the occupation of the Pamirs by Russia and of Chitral by Britain might

41. *Id.* at 223.

42. *Id.* at 229.

43. The Panjdeh Incident, which for a while threatened to prompt a world war between England and Russia, occurred on March 30, 1885, when Russian and Afghan troops clashed over possession of a frontier oasis. The dispute was eventually solved peaceably but it certainly pushed Abdur Rahman irretrievably into the British camp. See MILLER, *supra* note 25, at 234-38; see also DUPREE, *supra* note 39, at 422-25.

44. MILLER, *supra* note 25, at 237-38.

45. DUPREE, *supra* note 39, at 426.

46. MILLER, *supra* note 25, at 241.

47. MILLER, *supra* note 25, at 241 (citing W.K. FRASER-TYTLER, *AFGHANISTAN* (1950)).

48. DUPREE, *supra* note 39, at 425-27.

49. Neville Chamberlain, *Our Treatment of the Kafirs*, 81 *SATURDAY REV.* 494-96 (1896).

50. *Id.*

endanger the integrity of Afghanistan through the still independent Kafiristan."<sup>51</sup> Thus, when the Amir sent his armies into Kafiristan in the winter of 1895, he was indeed killing two birds with one stone. "[T]he Kafirs were no match for the [A]mir's government, owing to their small number (60,000), their primitive weapons (spears, bows, arrows, and some rifles),<sup>52</sup> and the inroads of Islam into parts of their lands . . . ."<sup>53</sup> The attack occurred in the winter of 1895-1896, so the Kafirs could not, as they had in the past, escape to the high meadows with their cattle.<sup>54</sup> Consequently, "[t]hey had to fight in the valleys against troops well equipped with modern guns produced in Afghanistan by the British Government."<sup>55</sup> The resulting casualties were correspondingly lopsided. According to one source, 10,000 Kafirs were killed by Abdur Rahman's troops as compared to only 600 Afghan soldiers.<sup>56</sup> A postinvasion census by Amir Abdul Rahman only recorded 24,000 people as compared to preinvasion population estimates ranging from 200,000 to 600,000.<sup>57</sup> Accurate eyewitness reports of what actually transpired are practically nonexistent, but the Amir's usual reaction to any hint of opposition was extremely bloody:

Killing of the insurgents . . . was not only inevitable; it was made a duty for the army. The army officers were explicitly authorized to destroy the insurgents and to seize their property by any means available. *Kalla minars* (heaps of skulls) were erected from the heads of the fallen insurgents and their skulls raised on spears to impress others not to follow their examples. It was a common practice to send captured ringleaders on to Kabul in chains and to keep others and their sons as hostages. Crops and villages were burnt, trees cut, [forts] destroyed, movable property seized, and new forts for the army built in the lands of the insurgents. The defeated insurgents were heavily fined and women often dishonored.<sup>58</sup>

Some writers claim the Amir's forces were comparatively "gentle" in their treatment of the Kafirs.<sup>59</sup> Perhaps in comparison to his normal methods, these observations might be true, but from a modern perspective, there is nothing mild about the massacre of hundreds and the forcible conversion of thousands.<sup>60</sup> Surprisingly, when reports of these actions began filtering back to the British public, there was a considerable degree of

51. HASAN KAWUN KAKAR, *GOVERNMENT & SOCIETY IN AFGHANISTAN* xxiv (1979). The Amir also gave the following rationale for the invasion of Kafiristan to Sir T. Salter Pyne, a British diplomat stationed at Kabul:

There are no trade routes allowed by the Kafirs through their country, I wish to open trade routes through it. For this I have several reasons. First, in case of complications arising from a source from which there is always a possibility of danger, I wish to be able to push my troops rapidly through Kafiristan instead of being compelled to fight my way through. Secondly, Afghanistan proper is essentially a sterile country of mountains and stones. The valleys of Kafiristan are fertile and well-watered, but owing to the animosity existing for generations between the Afghans and Kafirs they yield no results. This is very detrimental to the Kafirs, who are one of the poorest races in the East.

Jones, *supra* note 1, at 139 (quoting Letter from Sir T. Salter Pyne dated January 20, 1896).

52. KAKAR, *supra* note 51, at xxiv. While the author here uses the word "rifles," Robertson's account of the Kafirs only mentions them as being in the possession of antiquated matchlocks or jezails. *See generally* ROBERTSON, *supra* note 1.

53. KAKAR, *supra* note 51, at xxiv.

54. 1 JETTMAR, *supra* note 19, at 16.

55. *Id.*

56. Jones, *supra* note 1, at 119-20 (quoting Translation of a Letter from Hospital Assistant Shah Mir Khan of the Kabul Agency to the Secretary to the Government of India, Foreign Department (Dec. 14, 1895)).

57. Hermann Wagner & Alexander Supan, *Petermanns Mitteilungen aus J. Perthes' Geographischer Anstalt*, 22 ERGANZUNGSHEFT NR. 101, at 72 (1892).

58. KAKAR, *supra* note 51, at 63 (footnotes omitted).

59. *See, e.g., id.* at xxiv. ("Compared with rebellious Muslim tribes the defeated Kafirs were treated mildly . . . .").

60. *See generally* A Missionary, *The Amir's Paen, The Mitai Valley and Kafirs*, 2 IMPERIAL AND ASIATIC Q. REV. & ORIENTAL & COLONIAL REC., 278-90 (3d series).

public outcry over what one author described as the news that “the brethren of the European, the remnants of a prehistoric culture—and that, too, the prototype of our own—the tribes that for a thousand years have so bravely resisted Muhammadan slave-raids . . . have been handed over by Christian, missionary, and ‘righteous’ England to inevitable extermination.”<sup>61</sup> Associations such as the Aborigines Protection Society and the British and Foreign Anti-Slavery Society also wrote angry letters to the India Office demanding that it protest the subjugation of the Kafirs.<sup>62</sup>

But for every bleeding heart, there were any number of calculating proponents of realpolitik. One writer to the *London Times*, for example, argued that “the Kafirs have no claim on our sympathy unless we conceive it to be our mission to support a community of robbers and women of easy virtue simply because they have paler faces than their neighbours, and have called themselves the brothers of the Feringhee.”<sup>63</sup> Even among British officers familiar with the area, there was not much sympathy for the Kafirs. As Colonel Algernon Durand, the architect of the Durand Treaty and a long-time veteran of the Frontier, noted:

Personally I did not expect the *dénouement* to come so soon as it did, but I cannot say I was sorry when it did come. The only real cause of sorrow, when the Amir conquered the country, lay in the unscientific character of his methods, which destroyed the possibility of fully studying the Kafirs before their conversion to Mahomedanism. . . . From the archaeological point of view, the fact that a fanatical Mahomedan soldiery has swept over Kafiristan, and subdued it, gives much cause for grief. But the sentimentalism which in the Kafir saw the noble savage stretching out his arms to welcome his brother Aryan, the Englishman . . . was born of ignorance. The Kafir was a savage, pure and simple . . .<sup>64</sup>

Why the Kafirs qualified as greater “savages” than the Afghanis is not a question the good Colonel addresses. He could have saved his “scientific” pity for the Kafirs, though, because the Amir’s armies were not to succeed in wiping out paganism in the Hindukush—for despite his threat to break off negotiations over the boundary demarcation unless he had “the whole of Kafiristan to its last house,”<sup>65</sup> one group of Kafirs, the Kalash, were ensconced safely in valleys on the British side of the Durand Line.

How did the Kalash come into a position of safety? Prior to the 10th century, the Kalash were merely one of the many Kafir tribes, jostling for supremacy, caught in the perennial Afghan struggle for tribal power. Little is known about where the Kalash actually lived. Kalash mythology centers around a city by the name of Tsiam, but this city has yet to be identified conclusively.<sup>66</sup> In the struggle for survival, the Kalash emerged at the bottom of the pecking order, and at some point around the 10th or 11th century, “they were pushed northwards into Chitral by the Bashgali Kafirs, who in their turn had been forced to leave their own valleys by other strange tribes from the West.”<sup>67</sup> Driven out of their original homeland, the Kalash sought refuge in the network of secondary

61. G. W. Leitner, *Dardistan in 1895*, 10 IMPERIAL AND ASIATIC Q. REV. & ORIENTAL & COLONIAL REC. 24-48 (2d Working Series 1896).

62. See, e.g., Jones, *supra* note 1, at 183-206.

63. *The Kafirs of the Hindukush*, THE TIMES (London), Feb. 11, 1896.

64. ALGERNON DURAND, THE MAKING OF A FRONTIER 187-88 (1977).

65. Jones, *supra* note 1, at 15 (quoting a report dated January 7, 1896 by Sir William Lee-Warner, Secretary in the Political Department, India Office, 1895-1902, on Kafiristan).

66. Shah, *supra* note 12, at 69.

67. *Id.*

valleys on the border with Chitral and even managed briefly to capture the city of Chitral.<sup>68</sup> This state of affairs was not to last for long though:

Regrouped under the banner of Islam[,] . . . the Kho routed the Kalash and drove them out of Chitral, relegating any who remained, but who refused conversion, to the three valleys of Birir, Bumburet and Rumbur. There the fugitives joined other Kalash, themselves only recently arrived. In their weakened state they lost their independence, pledged allegiance to the king of Chitral, paid taxes in kind and in coin and submitted to forced labour.<sup>69</sup>

In the valleys where they were now confined, the Kalash in turn subjugated the indigenous people who had been living there.<sup>70</sup> No trace of these people—called “Balalik” in Kalash folklore—has survived, though it is not known whether that is due to their extermination or gradual incorporation.<sup>71</sup> In the meantime, though, the Kalash were allowed to keep their paganism despite a Muslim overlord because under Islamic law, the only people who may be enslaved are either those who are born into slavery or non-Muslims,<sup>72</sup> and in this way the Chitralis ensured themselves a steady supply of slave labor.<sup>73</sup> The Kalash valleys were therefore “set aside as personal preserve and property of the Mehtars [the local rulers of Chitral] who protected the Kalash against jealous mullahs and landgreedy nobles . . . .”<sup>74</sup> In return for this protection, the Kalash had to pay special taxes and perform labor, particularly household work (a tradition which was still active as late as 1963<sup>75</sup> and formally abolished only in 1972).<sup>76</sup>

Since the other independent Kafir tribes saw no reason not to raid their helpless coreligionists, the Kalash were caught in a very tough position: “on the one hand the Kafirs, . . . stock-raiders and collectors of murderous exploits for the sake of glory; on the other hand the Chitrali, who held them to ransom and drained them economically through servitude.”<sup>77</sup> Given the importance attached to independence in Afghani culture, it is no surprise that the Kalash were looked down upon by the other Kafir tribes—so much so that when Robertson passed through their valleys in 1890 he described them as

68. The Kalash capture of Chitral is still commemorated in their seasonal celebrations. LOUDE & LIEVRE, *supra* note 3, at 21. Exact dates are difficult to discern because “[r]eference to Kalash Rulers at Chitral proper is available only in respect of the last one, named Bulesing, who is said to have been defeated and ousted from Chitral proper by the Rais invaders in 1320 A.D.” Shah, *supra* note 12, at 70. Loude and Lievre, however, maintain that the Kalash domination of Chitral occurred in the 15th or 16th centuries. LOUDE & LIEVRE, *supra* note 3, at 21.

69. LOUDE & LIEVRE, *supra* note 3, at 21-22. This statement by Loude and Lievre is confusing, since other historical authorities indicate that there was a considerable gap between the defeat of the last Kalash ruler of Chitral proper in 1320, and the last independent Kalash king, Raja Wai, who according to Wazir Ali Shah, was not defeated until 1540. Shah, *supra* note 12, at 24.

70. LOUDE & LIEVRE, *supra* note 3, at 21-22.

71. *Id.*

72. See KAKAR, *supra* note 51, at 174.

With the inability of the rulers of Afghanistan to wage war against the non-Muslims of India and to obtain slaves as did their predecessors before the nineteenth century, there began a marked shrinkage in the source of slaves, which, in accordance with the Islamic law, were birth in slavery and capture in *dar al harb*.

*Id.* The phrase “*dar al harb*” means “the Land of War,” that is, “traditionally, the term is used to indicate those territories where the faith of Islam does not reign.” ISLAMIC DESK REFERENCE 79 (E. Van Donzel ed., 1994).

73. LOUDE & LIEVRE, *supra* note 3, at 22.

74. Shah, *supra* note 12, at 71.

75. Halfdan Siiger, *Shamanism Among the Kalash Kafirs of Chitral*, 5 FOLK 295, 298 (1963) (noting that complete separation between the Chitralis and Kalash was impossible to maintain because “some Kalash men have annually to go to Chitral City to work for the Mehtar of Chitral”).

76. ALAUDDIN, KALASH: THE PARADISE LOST 201-02 (1992).

77. LOUDE & LIEVRE, *supra* note 3, at 22.

“not the true independent Káfirs of the Hindu-Kush, but an idolatrous tribe of slaves subject to the Mehtar of Chitrál, and living within his borders.”<sup>78</sup>

Subservient the Kalash may well have been, but ironically, it was this very lack of independence that was to protect their identity. Since the Amir’s forces could not cross the Durand Line, and since the Kalash were subjects of the Mehtar of Chitral, Abdur Rahman had to content himself with the forcible conversion of merely the vast majority of the Kafirs. However, when fleeing Kafirs sought to join the safety of the Kalash, Abdur Rahman was quick to act, writing to the Viceroy to ask that the road of escape to Chitral be strictly closed, “so that not a single Kafir may go there, but that they may remain in peace and quiet in their own native places.”<sup>79</sup> The Amir’s fears of British interference were baseless though because the British representative in Chitral had already been urging the Mehtar to expel refugee Kafirs.<sup>80</sup> Eventually, the Foreign Office permitted refugees already arrived to stay but decided to prevent other refugees from entering. Thus, only 1600 Kafirs managed to find shelter in the Kalash valleys.<sup>81</sup>

By the end of 1896, the rest of Kafiristan had been completely subjugated. Though the Amir publicly claimed that Kafirs were not being forcibly converted to Islam,<sup>82</sup> the truth was different and the British were well aware of it. One report notes that “[t]he Amir has forbidden the killing of Kafir children under seven years of age, but no Kafir above that age will be shown any mercy unless he agrees to embrace the Muhammadan religion.”<sup>83</sup> However, as Kakar notes, “Large scale conversion was attempted after Kafiristan was overrun, but in a society that was still basically Kafir, it proved difficult.”<sup>84</sup> Abdur Rahman’s solution was to send in armed mullahs, but the mullahs themselves had to be protected, not only because some Kafirs continued to be attached to their idols, but because unfortunately the mullahs often took Kafir women, including some who were already married, for their own use.<sup>85</sup> However, despite the occasional massacre of mullahs, as in 1901 when twenty were killed in a single night,<sup>86</sup> “persuasion accompanied by occasional intimidation remained the official policy with regard to the conversion.”<sup>87</sup> Kakar concludes that the policy largely succeeded though “the complete replacement of the Kafir religion by Islam was still to be a matter of the future.”<sup>88</sup> For example, in early

78. ROBERTSON, *supra* note 1, at 4.

79. Jones, *supra* note 1, at 130 (quoting Trans-Frontier Memoranda, Letter No. 4 (Jan. 8, 1896)).

80. *Id.* at 125 (quoting Telegram No. 10 from the Resident in Kashmir to the Assistant Political Officer in Chitral (Jan. 3, 1896)).

81. *Id.* at 251 (quoting Trans-Frontier Memoranda, Letter No. 101 (July 7, 1897)). The figure cited in this letter referred to the number of Kafir refugees in Chitral at the beginning of June, 1897. However, by the beginning of July, 1897, only 630 Kafir refugees remained in Chitral, while the rest had decided to return to Kafiristan. *Id.* at 252 (quoting Trans-Frontier Memoranda, Letter No. 119 (August 4, 1897)). This figure of 630 refugees is the last contemporaneous accounting available of the number of Kafir refugees in Chitral.

82. *Id.* at 139 (“I do not want to make these people Mahomedans by force. . . . As a follower of the Prophet I cannot make them Mahomedans unless their hearts are so disposed.” (quoting from The Situation in Afghanistan, dated January 20, 1896 in a volume of letters from India)).

83. *Id.* at 120.

84. KAKAR, *supra* note 51, at 151.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

1901 several Kafir elders offered sacrifices at their shrines following the rumored death of Amir Abdur Rahman.<sup>89</sup> One can hardly blame them.<sup>90</sup>

The Kalash, in the meantime, remained as they had for the past five centuries in their condition of semislavery to the Mehtar of Chitral. Because Chitral was one of India's many princely states, the British played only an advisory role in its administration. Nor did any of this change when the British left the subcontinent in 1947. Chitral became part of the newly independent state of Pakistan, but in effect the only visible difference was that a Pakistani civil servant replaced the British political agent in Chitral. As an autonomous princely state, the government's writ theoretically did not affect Chitral. In practice, though, the political agent also doubled as the Prime Minister of Chitral, so the arrangement was in many ways only a proxy for government rule. Eventually, the Pakistani government tired of this arrangement, and in 1969 Chitral ceased to be a tribal agency and was converted into a "district administered by a Deputy Commissioner."<sup>91</sup> In 1972, the title, privileges, and privy purse of the Mehtar were abolished,<sup>92</sup> with slavery and unpaid labor outlawed.<sup>93</sup> The Kalash were now citizens of Pakistan, theoretically on par with all other citizens, and entitled under the Pakistani Constitution to the most enlightened set of rights.<sup>94</sup>

### B. The Kalash Today

According to the most recent (1988) survey of the Kalash valleys, their total population was approximately 6200, of which about 2500 were counted as Kalash and 3700 as Muslim.<sup>95</sup> Of the Muslim population of 3700, 1030 were descendants of Kafir refugees who had fled Kafiristan in 1896, while the number of Kalash converts was 1193. Of the remaining number, 474 were descended from the original Muslim residents of the valleys, while the final 1020 had immigrated to the valleys from outside areas.<sup>96</sup> Since previous censuses of the North West Frontier Province do not include any detailed estimates of the Kalash, it is difficult to tell how the population of the Kalash has fluctuated over time, though it may be noted that in 1956 a Danish ethnographer estimated the number of Kalash Kafirs at approximately 3000,<sup>97</sup> a figure which has been corroborated by other scholars.<sup>98</sup>

89. *Id.*

90. A report by Louis Dupree on Nuristan (formerly Kafiristan) published in 1971, however, concluded that "[t]he Nuristani have seen the light of Islam, but only fuzzily practice the true religion, and have incorporated Kafir motifs and mysteries into their brand of Islam." Dupree, *supra* note 1, at 19.

91. ALAUDDIN, *supra* note 76, at 201.

92. *Id.*

93. *Id.* at 202.

94. Maureen Lines adds the following:

Until Pakistan's independence in 1947, the Kalash, who for centuries had supplied the royal harem, were virtual slaves to the Mehtar and were subjected to forced labour. In addition, the story goes, they were forbidden to visit the town of Chitral in clean clothes and were required to wear hats with beads and feathers to differentiate them from the Moslems, hence the reason Kalash men still decorate their Chitrali hats.

MAUREEN LINES, BEYOND THE NORTH-WEST FRONTIER 209 (1988).

95. ALAUDDIN, *supra* note 76, at 74.

96. *Id.* at 208-09.

97. Siiger, *supra* note 16, at 12; see also Halfdan Siiger, *Two Indigenous Peoples of the Hindukush-Himalayan Regions*, 12 TEMENOS 93, 94 (1976).

98. See, e.g., Louis Dupree, *Introduction to ROBERTSON, supra* note 1, at 1 (estimate of 3000-4000). Paolo Graziosi, however, in his 1969 census, found only 1391 Kalash, while in 1955 he had found nearly 2000 Kalash. Paolo Graziosi, *The Wooden Statue of Dezalik; A Kalash Divinity, Chitral, Pakistan*, 61 MAN 149, 150 n.4 (1961).

## 1. Kalash Society and Its Environment

The Kalash valleys of Bumburet, Birir, and Rumbur are all narrow valleys at altitudes between 4875 and 7800 feet.<sup>99</sup> Bumburet is approximately twelve miles long; the other valleys are somewhat shorter and narrower. The soil in the valleys is "mixed with stones and boulders; low in clay content and, due to extreme dryness, very low in organic matter and nitrogen; and low to adequate in phosphorus and potassium. They have a low water-holding capacity and are highly susceptible to leaching when irrigated."<sup>100</sup> Precipitation is low at the lower altitudes, rarely exceeding 200 millimeters a year, but there is considerable snowfall at the higher altitudes. Though neither land nor water is scarce per se, "the real scarcity is of flat land with access to dependable water supply and in close proximity to the settlement (village)."<sup>101</sup>

"The farming systems can be described as arable crops mixed with (fruit and forest) trees and livestock."<sup>102</sup> These systems are interdependent in that "animals are needed for manure to improve crop yields and provide power to plow [while] livestock in turn depend on fodder and straw from crops in the harsh winter months."<sup>103</sup> Similarly, "[t]he highest altitudes provide snow and ice for irrigation; the intermediate altitudes provide pastures for animals and timber for fuel; and the lowest altitudes provide sites for human settlements and cultivation of crops with a growing season long enough for crops to reach maturity."<sup>104</sup> Because the land can only support one crop a year,<sup>105</sup> the Kalash are increasingly dependent on livestock. This creates "heavy demands on forage from trees, shrubs, and grasses that are highly seasonal."<sup>106</sup> The final result is that "[t]he pasture and forest economy—and with it the fragile environment—is being threatened by overgrazing and overharvesting, reflecting poor management of common property and the increasing pressure of population without investment in conservation and plantation."<sup>107</sup> Thus, "[l]ike the other inhabitants of the hilly terrain of the northern areas, people of [the Kalash] valleys also happen to be barely subsistence agriculturists."<sup>108</sup>

While such acute scarcity of resources might be expected to result in radical inequalities in the distribution of resources, there is generally "a high degree of economic homogeneity"<sup>109</sup> helped in part by "a visible sense of reciprocity . . . [which] developed in response to the need to accommodate a hostile physical environment in the mountains."<sup>110</sup> In addition, the Kalash avoid gross inequalities of wealth by emphasizing the need for feasting in order to gain prestige. As one author notes, "From childbirth to death, every occasion is a demand for feast."<sup>111</sup> Loude and Lievre elaborate on what they refer to as a "society of competitive feasting":<sup>112</sup>

99. LINES, *supra* note 94, at 196.

100. MAHMOOD HASAN KHAN & SHOAB SULTAN KHAN, *RURAL CHANGE IN THE THIRD WORLD* 9 (1992).

101. *Id.* at 9-10.

102. *Id.* at 10.

103. *Id.*

104. *Id.* at 10-11.

105. ALAUDDIN, *supra* note 76, at 173.

106. KHAN & KHAN, *supra* note 100, at 11.

107. *Id.*

108. ALAUDDIN, *supra* note 76, at 173.

109. KHAN & KHAN, *supra* note 100, at 1.

110. *Id.*

111. ALAUDDIN, *supra* note 76, at 215.

112. Jean-Yves Loude & Viviane Lievre, *Report on the Kalash Culture*, reprinted in ALAUDDIN, *supra* note 76, 273.



If we consider the marriage rules, the funeral traditions, the feasting competitions, [and] the numerous religious ceremonies throughout the year, we may assert that the whole Kalash culture is based on an excessive production of wealth (cattle breeding and agriculture) in order to distribute the surplus among the people to please the supernatural beings and to strengthen the social structure.

....

... The purpose of any Kalash man is to spend and to spread his wealth among his community in order to return the glory and reputation that will follow him after death.<sup>113</sup>

The Kalash religion is in considerable flux today as it struggles to deal with the intellectual challenge of a surging Islam. There is considerable dissension even among the Kalash as to what the contours of their religion are; any attempt to delineate those contours is bound to be ambiguous.<sup>114</sup> A modern form of the proto-Aryan Vedic pantheon,<sup>115</sup> the Kalash religion includes a creator god, Dezau (akin to the Indo-Aryan Zeus)<sup>116</sup> and below him a number of divinities associated with particular areas, each celebrated and honored through particular rituals.<sup>117</sup> The Kalash also worship spirits, fairies, demons, and the souls of deceased ancestors.<sup>118</sup> The Kalash see their entire physical environment as not just inanimate matter, but rather permeated with these spirits. There are gods associated with human fertility, the protection and fecundity of goats, the protection of livestock, the protection of the population, the protection of the family and the home, and the prosperity and fertility of the fields, while the fairies are the guardians of the wild sheep and ibex and govern the success of hunters.<sup>119</sup> Worship of these divinities is both individual and communal, and the Kalash calendar is demarcated by a series of feasts at which the Kalash consecrate various gods.<sup>120</sup>

Access to the divinities is open to individuals, but the Kalash have shamans, known as dehar, who translate and transmit the desires of the divinities to the population. The shamans are central to the persistence of Kalash culture:

The institution formed by successive intermediaries has always held a central position in the elaboration, evolution and resistance of the Kalash's symbolic system. . . . From generation to generation, the Kalash shamans, dehar, have been serving their society, doing the duties expected of them. They have guided their community from its original country, Tsyam, to the present Nuristan and thence to the Chitral area. They have justified successive and forced Kalash migrations through god's orders. They have revealed the benevolent pressure of unknown gods or settled old divinities on the new subdued lands. They knew how to make "real" the chosen places of settlement, giving

113. *Id.* at 273.

114. To take one example, Loude and Lievre present a detailed portrait of the polytheism of the Kalash in LOUDE & LIEVRE, *supra* note 3, but Maureen Lines notes that "[a]lthough most anthropologists consider it to be polytheistic because of its many deities, fairies, evil spirits, strange rites and animal sacrifices, the Kalash themselves, according to Saifullah Jan of Rumbur . . . believe in one supreme God—one creator of the universe." LINES, *supra* note 94, at 188.

115. Loude and Lievre elaborate on the nature of the Kalash religion as follows:

The Kalash alone, after being subjected to Moslem proselytism on the one hand and murderous Kafir raids on the other, remained faithful to their polytheistic religion. The names of their gods, by their very etymology, are indicative of a clear link with the Vedic Pantheon . . . . Nevertheless, it would be idle to imagine a descent from the Indo-Aryans in a straight line through the ages, hermetically sealed to outside ideas or innovations, reproducing ideally primitive rites. But without going to such extremes, it is reasonable to attempt a comparison between the ritual gestures of the Kalash, their relationship with the divine, their social organisation, and those initially current among the Indo-Aryans.

LOUDE & LIEVRE, *supra* note 3, at 15.

116. *Id.* at 348.

117. *Id.* at 348-56.

118. *Id.*

119. *Id.* at 354.

120. See generally *id.* at 357-59 for an account of the winter Chaumos feast.

them meaning within an organization based on the opposition between purity and impurity, men and women, up and down. They have laid down the rules for seasonal feasts, arranged essential and joyful meetings between gods, spirits, ancestors and living beings.<sup>121</sup>

Marked by an obsessive division between pure and impure, the religion enables the Kalash to see themselves as pure and outsiders as impure, which in turn leads them to shun contact.

This purity/impurity dichotomy also has important gender consequences and lies at the root of the generally inferior position of Kalash women. In 1890, Robertson remarked that "Kafir women are practically household slaves."<sup>122</sup> While matters have improved, only men are allowed to take part in such activities as animal husbandry and hunting; women are relegated to such activities as cooking, cleaning, and other household functions.<sup>123</sup> What differentiates this occupational dichotomy from similar patterns in northern Pakistan is that the exclusion of Kalash women is tied into the purity/impurity division:

This cultural inequality derives from the sexual prejudice inherent within this patriarchal society. As in many other communities, the pretext is a woman's natural biological specificity[,] i.e. the blood of menstruation and parturition. These manifestations are treated as permanently impure and temporarily extremely impure during their periods and childbirth.<sup>124</sup>

The result of this ritual phobia is that all Kalash women are confined to houses of seclusion, called "bashali" or "bashalini," and isolated from the villages during menstruation and following childbirth<sup>125</sup> for as little as twenty-one days to as long as three months depending on the valley.<sup>126</sup> Aside from their temporary exclusion from the community, the "permanent impurity attached to women"<sup>127</sup> provides the theoretical underpinnings for their systematic marginalization. Thus women may not be hunters or livestock herders because "[i]n this pastoral society of transhumant goat husbandry, men are related to the pure world of the mountains and their products."<sup>128</sup> Women "are not allowed to approach or enter the altars of the Kalash pantheon's deities located in the upper reaches valley"<sup>129</sup> since those altars are "pure" and would be contaminated by the presence of women. They also "do not take part in general worship where men offer animal or vegetable gifts to the gods, [or] pray and eat the male-goat meat at the altar itself."<sup>130</sup> The impurity of women also excludes them from being shamans and holding any positions of social importance.<sup>131</sup> Consequently, the Kalash religion is "mainly a

121. Jean-Yves Loude, *The Kalash Shamans' Practice of Exorcism 2-3* (unpublished manuscript prepared for the 2d International Hindu Kush Cultural Conference) (on file with the *Indiana Law Journal*).

122. ROBERTSON, *supra* note 1, at 530.

123. Viviane Lievre, *The Status of Kalash Women in the Religious Sphere 2* (unpublished manuscript prepared for the 2d International Hindu Kush Cultural Conference) (on file with the *Indiana Law Journal*).

124. *Id.* at 2.

125. *Id.* One side effect of this ritual seclusion is the prevalence of arthritis among women. Moreover, as Alauddin explains, "[D]uring their sojourn to Bashalini, they cannot change their dress or have any bedding to sleep upon. . . . If any one dies there in that polluted condition, the body is not brought home. It is just thrown in the river." ALAUDDIN, *supra* note 76, at 181.

126. Lievre, *supra* note 123, at 2.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. LOUDE & LIEVRE, *supra* note 3, at 52-53 ("A woman cannot achieve glory, but she contributes to its achievement by a man, her husband or her father, depending on circumstances.").

masculine cult of communication with the divinities wherein the religious practitioners are exclusively male."<sup>132</sup>

The only scholar to have studied the condition of Kalash women also notes that Kalash folklore contains several myths categorized as "primordial fault of a woman,"<sup>133</sup> that are "essential to the ideology of the rules elaborated by successive shamans."<sup>134</sup> However, she concludes that "the idea of women's culpability is not original to the Kalash tradition but borrowed from their Islamic neighbors."<sup>135</sup> However, this thesis has several problems. First, Kalash contact with Christians was nonexistent until 1890 and has been minimal ever since. Of course, centuries of antagonistic cohabitation with Muslim neighbors has affected the Kalash and the Kafirs. However, the Koranic retelling of the expulsion from paradise differs from the Biblical version in that the Koran does not affix the blame for eating the forbidden fruit solely upon Eve, but upon both Adam and Eve. As such, while there may be considerable institutional hostility towards women in Islam and the Sharia, certainly the expulsion from paradise is not a basis for that hostility. I would submit that Lievre may be scapegoating the Muslims for what are patriarchal tendencies common to all peoples in the area. Certainly, their paganism does not mean the Kalash are any less capable of sexual chauvinism.<sup>136</sup> A better explanation is simply that the Kalash, like the other tribes of Afghanistan and Northern Pakistan, are intensely patriarchal. One might note that both the Kalash and the Muslims in the valleys are extremely reluctant to educate female children<sup>137</sup> and that physical abuse of women is common to both groups.<sup>138</sup> Further, the Kalash (in contrast to the Muslims) do not recognize any rights of inheritance for women.<sup>139</sup>

132. Lievre, *supra* note 123, at 3-4.

133. *Id.* at 7.

134. *Id.*

135. *Id.*

136. Lievre's alternative explanation for the inferior status of women is that they have been used as scapegoats for the various afflictions of the Kalash:

Kalash society has often been in danger and had to face enemies. . . . Resisting conversion has been a constant battle for them, especially during the wave of forcible conversions imposed on their Kafir neighbors in Afghanistan (presently Nuristan) in 1896. So they felt isolated and circled by a dominant ideology and religion. As they were willing to preserve their own beliefs and ceremonies, successive shamans have tended to strengthen the inner structure of their vulnerable community. As women are considered to be potentially disruptive, the shamans have restricted their liberty, and increasingly control their activities. Impure, they have been excluded from religious functions and ceremonies; guilty, they have provided convenient scapegoats.

Lievre, *supra* note 123, at 9. However, this point in turn only begs the question of *why* women have been made the scapegoats for the various travails of the Kalash.

137. ALAUDDIN, *supra* note 76, at 152-53.

The reluctance to send girls for schooling, by Kalash and Muslims both, is not entirely due to the absence of separate schools for girls everywhere. The statements in fact appear to be half-truths. In the entire country, there is a lack of emphasis upon female education. In the rural areas particularly, the collective conservatism on this point is being diluted only at a snail's pace. Moreover, there is a persistent emphasis upon segregation of girls in educational institutions. Among the rural working class, this emphasis is not understandable as the major part of out-door work is performed by women who obviously are not segregated. . . . An over-emphasis upon duplication of schools, for males and females separately, at this stage of educational development, can only be interpreted as a cunning device to protect collective conservatism against educating the girls.

*Id.*

138. *Id.* at 156 (describing "prevalent practice of wife bashing").

139. *Id.* at 159.

A Kalash widow does not inherit anything as the inheritance is purely patrilineal and confined only to the male heirs. Abdul Khaliq explains that a widow had no claim to any part of her deceased husband's property but she can live in the house and enjoy full rights of maintenance till [sic] she chooses to re marry[sic], which she can, after the husband's final funerary feast about a year after his death. This choice is seldom exercised if she is no more considered to be young or if she has children to look after and take pride in looking after them. This is comparable to the codified Hindu Law in Pakistan and India,

This Article does not intend to judge Kalash culture; rather, it merely notes how it relates to other cultures. As such, the only point to be noted from the preceding discussion is that women in Kalash society are inferior in terms of social privileges and responsibilities. This inferiority is reinforced by, and indeed an integral part of, a religious system which characterizes women as permanently impure. But the Kalash religion is not uniformly hostile to women. For example, the Kalash do not display any of the obsession with female virginity that so marks Muslim society in Pakistan, and women are accepted as having the authority not only to initiate marriages but also to dissolve them. In fact, several authors have noted that the Kalash attitude towards extramarital affairs is considerably more relaxed than those of their Muslim neighbors, and that elopements are quite common.<sup>140</sup> Ironically, this comparative sexual liberation of Kalash women accounts for the biggest problems the Kalash face today.

There is a persistent myth among young Pakistani men regarding the promiscuity of Kalash women, and every summer hordes of oversexed youths can be found in the valleys, ogling the women and in many cases proceeding to more physical sexual harassment, including rape.<sup>141</sup> While the incidence of rape in Pakistan is tragically high in all areas, the persistence of incidents in the Kalash valleys also has much to do with a complete confusion of cultural messages. In Pakistani culture generally, dancing is an activity which is associated with prostitution. In addition, women face a great deal of societal pressure to veil themselves; women who do not veil themselves in public are stigmatized as promiscuous. Finally, because the Kalash valleys are among the few places in Pakistan where wine is consumed openly, many Pakistanis perceive the area as a sensual paradise where anything goes.<sup>142</sup> The fact that "the dances are in no way lascivious and the Kalash 'wine' is virtually undrinkable does not deter entertainment-starved Punjabis."<sup>143</sup>

Though lecherous tourists represent the most aggressively undesirable aspects of tourism, there are more subtle issues at work as well. For example, the influx of tourists has led to a large number of Kalash women willing to pose for photographs and perform ceremonial dances in return for payment.<sup>144</sup> Given that the dancing ceremonies possess

according to which a Hindu widow has full claims, alongwith others, on the property in the joint family for her lifetime. Only she cannot claim division of her share. She has no right to alienate any such property or any portion of such property through sale, gift or will or any other process.

*Id.*

140. See, e.g., Lievre, *supra* note 123, at 2.

141. While I have yet to get any detailed reports of incidents involving tourists and Kalash women, all scholars who deal with the present day situation of the Kalash refer to it. See, e.g., Loude & Lievre, *supra* note 112, at 274 (noting that "some drastic measures must be taken in order to stop the waves of local muslim tourists chasing Kalash women, pinching them in the dark, forcing them to be photographed").

142. See, e.g., Salman Rashid, *Where the Yarkhun is Young*, NATION FILES, Dec. 17, 1987, which relates the following story:

Two young men from Peshawar who had ridden with me from Ayun and who in the beginning had been rather evasive about the reason of their excursion eventually confided they had heard of Kafir promiscuity and had come to Bumboret with the hope of "verifying" these rumours. For two days they promenaded up and down the valley doped to their eyeballs on hashish (I was cordially invited to join their nocturnal binges). On the third day they made a rather disparaging report on Kafir prudery and left quite disappointed.

See also Stuart Fraser, *Kalash Kafirs: Under External Cultural Pressure*, NATION FILES, May 31, 1988 (mentioning myth of supposed availability of Kalash women).

143. Robert Adams, *Princess Flies into Tribal Row*, SUNDAY TELEGRAPH (London), Sept. 22, 1991, at 3.

144. Rashid, *supra* note 142 ("A stage has now been reached where the first sight of a camera prompts a toneless, 'das rupiah.'"). The offer to dance in exchange for cash is, however, not a new development. In 1970, a traveler noted that [v]isitors are naturally anxious to see and photograph the Birir Kalash and the curious shuffling dance common to most of the Kafirs. The women of Birir have been quick to exploit this pleasant and effortless source of revenue, for they are now ready to appear automatically and dance to order at the rate of one

deep religious significance, the Kalash have banned it, reviling it as a "form of prostitution"<sup>145</sup> and the equivalent of "going to the zoo."<sup>146</sup> While dancing is quite often the only source of income for Kalash women,<sup>147</sup> the commercialization of the Kalash culture is difficult to justify even in economic terms:

The tourist who visits the valleys, quite obviously, comes to see the Kalash and their living. However, it is the non-Kalash who prosper economically because they own almost all the hotels that the tourists live and eat in; they alone own the jeeps the tourists travel by and they alone own the small grocery shops in the area. The Kalash are too poor and too subdued to profit even in a field which should strictly be theirs.<sup>148</sup>

The exclusion of the Kalash from the economic benefits of the tourist trade has another side effect: the influx of Muslim entrepreneurs and adventurers also increases the influence of Islam in the valleys. The clash between Islam and the Kalash is, in itself, not a new phenomenon, but as noted earlier, the Kalash used to be protected by the Mehtar of Chitral and their own obscurity.<sup>149</sup> Moreover, those Kalash who converted to Islam tended to be naturally tolerant of their pagan neighbors, and respectful of their traditions. Thus, while distinct trends in the Kalash religion show the impact of Islam,<sup>150</sup> by and large the Kalash were able to protect their distinct identity. The tourist boom, however, has led to the influx of large numbers of more militant Muslims who do not wish merely to live and let live. Older Muslim residents and converts to Islam were not only related by blood to the Kalash but tolerant to the extent that they even participated in their rituals. The distinct identity of the valleys was thus continued because "[t]hese Muslims had still much more in common with their Kalash compatriots than with adventurers from outside."<sup>151</sup>

Islamic pressure on the Kalash is now overt and blatant. Not only are the Kalash bombarded with exhortations to convert broadcast from loudspeakers attached to the minarets of mosques, but even local schoolteachers often join up with missionaries to

rupee each.

ELIZABETH BALNEAVES, *MOUNTAINS OF THE MURGH* 77 (1972).

145. Adams, *supra* note 143, at 3 (quoting Saifullah Jan, Chitral council member), available in LEXIS, News Library, ARCNWS File.

146. *Id.*

147. *Id.*

148. M. Shakil Durrani, *Kalash Kafirs—The Urgent Need to Save a Vanishing People*, reprinted in ALAUDDIN, *supra* note 76, at 283, 286.

149. See *supra* text at notes 22-24, 74-78.

150. The impact of monotheism is most clearly seen in the way that the Kalash have reoriented their religion from pantheism towards a pseudo-monotheism in which the role of the creator god, Deza, is emphasized. As such, the Kalash have stopped referring to their most prominent divinity as Deza, and instead now refer to him as "Khodai" which is a word of Persian origin and is used by Muslims to refer to Allah. Other signs of "creeping Islamization" include the discovery in the 1950s of a "holy book" written on birch bark and a growing practice of Kalash pilgrimages to the tombs of Muslim saints asking for intercessionary help. See, e.g., Loude, *supra* note 121, at 10-11, which explains:

The increase in mental disorders such as nervous breakdown, hysteria and apathy is typical of these recent confusing decades. Formerly, the Kalash used to explain it as the kidnapping of half the soul by angry fairies. Today, the Kalash healers confess that they are powerless to cure madness. Therefore, the Kalash are begging for new therapeutics outside the society. They now go and visit the Muslim *ziarat* where holy men have been buried and where some *perikhan* used to perform as exorcists. The Kalash have recourse to Muslim exorcists because they think that foreign evil has to be overcome by foreign healers who know better about the source of the impurity. The main consequence of this new credit being given to their neighbor's literate healers is the loss of influence of the Kalash's literate ones. Nowadays, this new attraction from the Chitrali world is one of many reasons for the vanishing of the shaman's vocation.

151. ALAUDDIN, *supra* note 76, at 216-17.

pressure Kalash schoolchildren<sup>152</sup> by constantly referring to the Kalash religion in degrading and demeaning terms. In one case, a teacher even refused to promote Kalash students from one grade to the next unless they converted.<sup>153</sup> The end result is a staggering discrepancy between the numbers of Kalash and Muslim children attending school. In 1988, there were a total of 646 Muslim students as compared to 77 Kalash students.<sup>154</sup> The dynamics of this problem are such that it perpetuates itself:

The Kalash children being in a minority in the school are discriminated against by the other children who are accustomed to their elders discriminating against the Kalash. Since the Kalash are poor and discriminated against they don't go to school and since they are not educated they remain economically and socially backward resulting in the prevalent prejudices against them.<sup>155</sup>

Apart from problems inherent in trying to survive as the sole representatives of a beleaguered culture, the Kalash are also enticed to convert by economic incentives and other bribes.<sup>156</sup> Deeply in debt to Muslim moneylenders, many Kalash men are quite often in great need of money. However, if a Kalash man converts, he is usually given cash (presumably in celebration) by his new brethren—often a substantial amount—which some of the new converts use to reacquire their mortgaged property.<sup>157</sup> As for the women,

[m]arried Kalash women are encouraged to leave their husbands and children, convert to Islam and then marry Muslims. These women are an easy target [e]specially because the new Muslim husbands are wealthier than the Kalash and can ensure the women a more secure and easy life. There is a tradition amongst the Kalash that when a man marries another person's wife, he pays the ex-husband twice what he (the ex-husband) paid at the time of his marriage. . . . However when the Kalash girl converts and marries a Muslim, the latter is under no obligation to pay anything to the former husband . . . .<sup>158</sup>

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152. *Id.* at 229-30.

Working on a low budget, the school-teachers who were drawing their salaries regularly, are paid a little extra to promote missionary work while on official duty. This turns the schools into missionary centers, at no great cost.

This has been responsible for the withdrawal syndrome of the Kalash youngsters from the local schools. Compulsory teaching of Islamic studies (which is not prescribed by the State for non-Muslims), slanderous remarks against Kalash religion, Kalash boys and girls, and blackmail while awarding marks in the final test, are enough to scare the Kalash students and their guardians from the houses of education established and being paid for by the State.

*Id.*

153. Durrani, *supra* note 148, at 285; see also ALAUDDIN, *supra* note 76, at 230 ("There is one subject that is compulsory for every student. One cannot be promoted to the next class unless he passes that subject. By learning that subject, one becomes a Muslim.")

154. ALAUDDIN, *supra* note 76, at 231.

155. Durrani, *supra* note 148, at 285.

156. One story recounted by Loude and Lievre is of a prominent Kalash elder who was induced to convert in the following manner after being struck down with serious illness:

The Islamic doctors surrounding him during his illness, had told him that hell really existed and that all pagans would go there to be burned and tortured however good they had been in their lifetime. The sick man had been greatly affected by this, and had panicked; no one had said such things before. The mullahs had added that conversion would cure him and save him. Terrified by the prospect of hell, which gave death a hitherto unsuspected visage of horror, he had promised to change his religion.

It so happened that he had recovered. The mullahs had seen to it that he carried out his promise; there must be no question of back-sliding, since he would at once lose the life he had just regained.

LOUDE & LIEVRE, *supra* note 3, at 108.

157. ALAUDDIN, *supra* note 76, at 33; see also Fraser, *supra* note 142 (confirming that Kalash men convert to avoid repaying loans).

158. Durrani, *supra* note 148, at 286-87.

According to Pakistani law, a woman's conversion to Islam automatically annuls her marriage.<sup>159</sup> It should be noted that despite all of these indirect pressures, there was until very recently almost no record of any violent abuse of the Kalash's rights. Pakistan, however, is far less tolerant now, and what may be a forerunner of coming events happened in 1993 when "[t]he effigies for celebration of the Joshi festival and the ritual of their pledging their continuing loyalty to Suchis, the spirits of the mountains, were all hacked to pieces by ardent Muslims on a self-appointed mission to eliminate idolatry."<sup>160</sup> There are also reports of forced conversions.<sup>161</sup>

Despite the many religious and social pressures, the Kalash argue that "if any official assistance is to be given, the Kalash would point to economical (sic) improvement as the only way to religious freedom."<sup>162</sup> The single biggest economic issue facing the Kalash is that many of them had been enticed or coerced into selling their lands and walnut trees, often for ludicrously low prices. Records of such transactions show instances where Kalash had bartered away a canal of land, or a cluster of fruit trees, for as little as a cotton shirt or a woolen hat.<sup>163</sup> In numerous instances, outsiders took advantage of illiterate Kalash landowners by preparing fraudulent documents of mortgage or sale and then tricking them into stamping their fingerprint on it.<sup>164</sup> A number of these transactions have been challenged in court, but the decisions have not been to vacate the deeds, but to allow the land to be redeemed at the current market price.<sup>165</sup> Since these prices are often prohibitive, "those who used to own the land are now working as wage-labourers on the same land for the absentee landlords or the trading money lenders."<sup>166</sup>

This restriction of economic opportunities is further exacerbated because Muslims own nearly all private institutions and refuse to hire Kalash, a prejudice which carries over into the public sector where the Kalash are not considered even for the most minor and unskilled positions.<sup>167</sup> In 1986, out of a total of 108 government jobs in the Kalash Valleys, only 20 were filled by Kalash.<sup>168</sup>

159. HUMAN RIGHTS COMM'N OF PAKISTAN, STATE OF HUMAN RIGHTS IN PAKISTAN 1993: AN INTERIM REPORT 100 (1993) [hereinafter HRCPI].

160. *Id.* at 29.

161. *Id.* The reason forced conversions are such a serious problem is because apostasy, the reversion of a convert to his old faith, is punishable by death under Islamic law. An example is the death sentence pronounced on Salman Rushdie by Ayatollah Khomeini. As one Kalash remarked:

"Why do I call conversion a death? It is because when a Kalash converts to Islam, he has no choice to become Kalash again. Though there are some converts who wished to come out of Islam. They were threatened to death by the muslims. Therefore, after becoming muslim, a Kalash convert has no choice but to remain muslim or die. There was an incidence of such a death of a Kalash female in our Valley."

ALAUDDIN, *supra* note 76, at 224.

162. Loude & Lievre, *supra* note 112, at 1.

163. ALAUDDIN, *supra* note 76, at 32.

164. *Id.*

165. *Id.* at 32-33.

166. *Id.* A survey of land transactions confirms this point. Out of the total transactions involving the Kalash, 134 involved the sale of land, while only 18 involved the purchase of land. By comparison, 116 Muslim transactions were for the purchase of land, with only 67 for the sale of land. As of 1986, Muslims owned 9270 canals of land while the Kalash owned merely 4969. *Id.* at 111.

167. *Id.* at 34. Shakil Durrani gives one explanation as to why this happens:

The Kalash find it virtually impossible to get even low paid jobs in his own area; in local schools and dispensaries situated right in his territory; he is not even recruited for the menial jobs of *Behishtti* (watercarrier), *Chowkidar* (Security Man) or an office orderly. Un-like [sic] the other Chitralis he is too poor, too uneducated, too un connected [sic] and too subdued to find himself a job in the Gulf States or even in the developing districts. The only option he has[] is to work on his lands or shepherd his goats which barely ensures him a subsistence living with no promise for improvement.

Durrani, *supra* note 148, at 284.

168. ALAUDDIN, *supra* note 76, at 57.

One final source of economic pressure on the Kalash is the rapidly increasing rate of deforestation in the valleys. Unlike most areas in Pakistan where deforestation is due largely to population pressures, deforestation in the Kalash valleys has more to do with the cutting of trees by outsiders for lumbering. Deforestation not only has severe economic consequences, but the lack of forest cover also reduces water retention and increases soil runoff and erosion, which in turn lead to flooding:<sup>169</sup>

If no steps are taken, the valley of Birir will be destroyed within the next few years. Geologically, this Kalash Valley is very narrow with eroded soil raising the riverbed. As Birir river rises, it has begun cutting into the sides of the mountain—perched on its banks is Guru village, the largest in the valley, and its very foundations are being eroded.<sup>170</sup>

## 2. The Structure of Kalash Representation

Since the Kalash constitute only a few thousand people in an overwhelmingly Muslim nation of 120 million, one would have expected their interests to have been consistently ignored. Fortunately, this is not the case. The Pakistani government has taken steps to help the Kalash; however, the adequacy of those steps is a separate issue. As a starting point, one may note that in the case of the Kalash at least, the many institutional provisions in both the executive and legislative branches have not been entirely useless.<sup>171</sup>

Besides the Federal Ministry of Religious Affairs and Minority Affairs, there is also a Federal Advisory Council for Minorities Affairs. This council, which includes all the elected minority representatives in the national and provincial assemblies as well as other prominent members of minority groups, is entrusted with making recommendations on policy issues as well as other specific matters. At a lower level, Minority Committees for each district include representatives of local minorities, the government authority in charge of minority issues, and the chief administrator of that district. Finally, under the Local Bodies system of government, there are reservations for minorities at every administrative level from the District Council down to town committees. Minority groups may elect representatives to each of these bodies in order to protect their interests in education, health care, and also infrastructure items such as roads and irrigation channels.<sup>172</sup>

The federal government's monetary contributions have also been significant. In 1974, the government set up a Pakistan Minorities Welfare Fund with an initial endowment of two million Rupees, which in 1982 was increased to seven million Rupees. Ever since, regular disbursements have been made through the Member of the National Assembly who represents the Kalash. Notable initiatives by the government include a stipend to several Kalash azis (priests), the construction and repair of cultural and community

169. See, e.g., LINES, *supra* note 94, at 183 (noting loss of land due to flooding).

170. Maureen Lines, *Disappearing Kalash, Disappearing Forests*, NATION FILES, Jan. 25, 1990.

171. Although this may sound like damning the Pakistani government with faint praise, it is not; other minorities in Pakistan, such as Hindus, Christians, and Ahmedis, have certainly been more institutionally oppressed than the Kalash.

172. ALAUDDIN, *supra* note 76, at 24-25. In 1991, the chief administrator of the District established a "Kalash Foundation" which essentially consists of the most prominent bureaucrats with responsibility for the Kalash, legislative representatives of the Kalash at both the national and the district level, and two Kalash members. There is no comparable body for any other minority group in Pakistan. However, this foundation was the brainchild of Mr. Shakil Durrani, then Commissioner of the Malakand division and the former Deputy Commissioner of Chitral. At last word, he had been transferred to some other position in the North West Frontier Province ("NWFP") bureaucracy and it is not clear how well the Foundation has continued to function in his absence.



centers, the construction and improvement of Bashalini and irrigation channels,<sup>173</sup> as well as the construction and repair of bridges, flood protection barriers, and community halls.<sup>174</sup>

More importantly, the government has authorized loans on extremely generous terms to the Kalash so that they may redeem their mortgaged trees and fields from outside parties.<sup>175</sup> The government has also moved on the legal front. Apart from allowing the Kalash to redeem their mortgaged lands, a standing executive order now forbids the purchase of land or any new construction by people from outside the valleys.<sup>176</sup> Laws also forbid the forcible conversion of any Kalash<sup>177</sup> and ban the cutting of trees by outsiders.<sup>178</sup> In response to complaints about abuse by school teachers, exclusively Kalash schools have been opened, at least at the primary level.<sup>179</sup> At least one secondary school for boys had been constructed and one for girls was being planned.<sup>180</sup> Further, a team of French anthropologists has been working on school books for the Kalash to provide the Kalash with a positive view of their culture.<sup>181</sup>

### C. Conclusion

Despite the government's initiative and decisions, the position of the Kalash remains precarious. First of all, as in many Third World countries, the "[l]egal rights of such relatively isolated, weak and poor individuals and groups . . . mean much less in practice than they seem to promise."<sup>182</sup> So while the Kalash theoretically enjoy political representation, this hardly guarantees that their interests will actually be protected. As one author notes, the interests of Kalash representatives, "like those of men of property and business everywhere, are self-centred [sic]. They have shown little inclination to organise their vulnerable community . . . to resist the onslaughts from outside."<sup>183</sup>

The Kalash have been lucky in that at least for part of the past decade, the most important civil servants in the area have been dedicated professionals who have taken a sincere interest in their advancement. However, the administrative structure in Pakistan remains heavily subordinate to political interests, with predictable results. Thus, while there is a complete ban on logging in the Kalash forests, "[c]orruption . . . has succeeded in breaking the ban—unless the North West Frontier government strictly enforces this order wood will continue to be exported from Chitral."<sup>184</sup> A recent conference concerning environmental conditions in the Kalash valleys noted that "[c]ontrol of timber extraction by the Pakistan Forestry Commission is seriously hampered by repeated 'special permits' authorized by central government authorities, escalating at an alarming rate over the past

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173. ALAUDDIN, *supra* note 76, at 24; *see also* LINES, *supra* note 94, at 183 (noting that government has given money to the Kalash to build "three new water channels in each of the three valleys, thereby increasing the arable land of each valley to approximately 10,000 acres," and that "[t]he government is also financing the laying of water pipes so that each village will have safe, fresh spring water on tap").

174. A list of such expenditures is presented in ALAUDDIN, *supra* note 76, at 26-27.

175. *Id.* at 33.

176. *Id.* at 238.

177. LINES, *supra* note 94, at 191.

178. Lines, *supra* note 170.

179. ALAUDDIN, *supra* note 76, at 232.

180. LINES, *supra* note 94, at 182.

181. Loude & Lievre, *supra* note 112, at 278.

182. ALAUDDIN, *supra* note 76, at 202.

183. *Id.* at 213.

184. Lines, *supra* note 170.

two years."<sup>185</sup> There was "an urgent need for immediate control and limitation of current timber extraction if forest resources are to be maintained as a source of profitable industry, and if the serious local effects of deforestation are to be averted."<sup>186</sup>

Nor has the tree repurchase program been a success. While the original concept was that the proceeds of the loan recovery would be recirculated to the Kalash,<sup>187</sup> so far the plan has stalled because the owners of the trees have refused to sell at anything less than prohibitive rates, certain owners have used violence,<sup>188</sup> the Kalash have almost completely failed to repay loans,<sup>189</sup> and many Kalash have used the loan proceeds for purposes other than buying back the land, such as spending on feasts and consumer goods:

Many of the farmers who have taken such loans have not used the money for the intended purpose. The money has been spent to meet expenses of death and marriage rituals. Some have constructed houses. Another popular use of the loan money among young Kalash is to buy new clothes, shoes and cassette players.<sup>190</sup>

In the meantime, the trickle of religious conversions continues to break down the Kalash community. Part of the reason for the devastating impact of conversion is that the new Muslims normally forsake their old communities. Thus, the converts no longer live with their old families, a break which is then accentuated when they marry other Muslims. The establishment of a separate family also means that ancestral lands need to be divided so that the convert can construct a separate house for his new family.<sup>191</sup>

Predictions of the imminent demise of the Kalash have often proved to be overstated, but certainly the prospects are not good. The combination of economic, social, and religious factors means that the Kalash are facing a much more formidable threat than they have ever faced before. The Pakistani government measures have so far not been significantly effective. The question then arises: Do the Kalash deserve to be saved? In a world of limited governmental and administrative resources, do the Kalash deserve to be given preferential economic treatment? In the following section, I intend to show that neither international law in general nor the norm of indigenous rights in particular, as presently conceptualized, provides an answer. And if such an answer is to be found, one must first locate within international law a basis for arguing that the preservation of a collective identity is a right as inherent and precious to all peoples as the right to life is for all individuals.

185. Resolutions of Kalasha Research Co-operative Concerning Environmental Problems in the Kalash Valleys of Chitral at the Second International Hindukush Cultural Conference, Resolution 3(a) (Sept. 19-23, 1990), *reprinted in* ALAUDDIN, *supra* note 76, at 269 app. C.

186. *Id.* at 269.

187. ALAUDDIN, *supra* note 76, at 33.

188. *Id.* The details as narrated to Alauddin by the Kalash are as follows:

"Some young men left the valley and went to the cities of Pakistan to earn enough to redeem the mortgage made by their fathers and grandfathers. . . . They had to spend many years away from home. In a few cases, they were successful in getting their trees and land back. Some were unable either because the money demanded by the mortgage was very high or the mortgagee threatened to kill the mortgagor or the male members of his family. There were two such cases in Birir Valley. In one, the mortgagor was killed and in the other, he was kidnapped and never came back home. . . . The mortgagees are muslim and mostly from Ayun."

. . . .

"[The] Govt. should directly arrange to get our mortgaged trees, land and pastures back from the outsiders. It will save us from risking our lives in the process."

*Id.* at 223.

189. *Id.*

190. *Id.* at 197.

191. *Id.* at 51.

## II. INTERNATIONAL LAW AND THE RIGHTS OF THE KALASH

### A. *The Rights of Minorities and Indigenous Peoples* (1500-1947)

#### 1. The Law of Nations and the Rights of Indigenous Peoples

The appearance of indigenous peoples as a subject of international law can be traced back, as one might expect, to the discovery of the New World by Spanish adventurers. Early publicists therefore dealt largely with the issue of whether Spanish subjugation of the Indians could be legitimated under the then-existing structure of accepted practices between nations. More precisely, were the Indians a sovereign people and entitled to the respect due to such entities in international law, or was conquest and colonization of their lands justifiable?

Given the great number of apologists for imperialism, of particular interest is Francisco de Vitoria, the theologian who challenged Spanish claims to Indian lands based on his understanding of natural and divine law.<sup>192</sup> He argued that the Indians were the true owners of their lands and that their subjugation could not be justified in terms of papal authority. To him, "discovery" of the Indians was not sufficient to confer title upon the Spaniards. "[Discovery] in and by itself . . . gives no support to a seizure of the aborigines any more than if it had been they who had discovered us."<sup>193</sup> De Vitoria was only the first to deny the prevalent argument that mere occupation conferred title over inhabited lands. Later, Blackstone recognized occupation only with respect to deserts or uncultivated land<sup>194</sup> while Grotius used natural-law-based arguments to debunk Portugal's claims to the East Indies.<sup>195</sup>

With the development of positivism in the 19th century, however, international law gradually came to be understood as operating not on a normative level above states, but rather as being defined by the actual practice between states.<sup>196</sup> As European colonialism grew ever more rapacious, the need to provide some figleaf for expansionism dissipated; instead, colonial expansion was often justified in very simple terms of racial superiority.<sup>197</sup> By the early 20th century, the theory that indigenous peoples had no status

192. FRANCISCO DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* 127-28 (1964) (J. Bate trans., 1917); see also Maureen Davies, *Aspects of Aboriginal Rights in International Law*, in *ABORIGINAL PEOPLES AND THE LAW* 16, 20-23 (Bradford W. Morse ed., 1985); Douglas Sanders, *The Re-emergence of Indigenous Questions in International Law*, 1983 *CAN. HUM. RTS. Y.B.* 3, 4-5.

193. DE VITORIA, *supra* note 192, at 27-28.

194. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*107-08.

195. HUGO GROTIUS, *THE FREEDOM OF THE SEAS* 13, 16-18, 21 (Ralph D. Magoffin trans., 1916); see also 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 550 (Francis W. Kelsey trans., 1925) ("Equally shameless is it to claim for oneself by right of discovery what is held by another, even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit. For discovery applies to those things which belong to no one.").

196. S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 *HARVARD INDIAN LAW SYMPOSIUM* 191, 204. This article by Anaya generally provides the most complete exposition of the development of international law with regard to the treatment and rights of indigenous peoples.

197. See, e.g., JOHN WESTLAKE, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* 141-43 (1894), quoted in Anaya, *supra* note 196, at 205.

When People of the European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes, which may prevent that life from being disturbed by contests by different European powers for supremacy on the same soil, and which may protect the natives

or rights in international law prevailed.<sup>198</sup> Even decisions now thought to be quite progressive for their time, such as those of the Cayuga Indians tribunal, presumed that a “tribe is not a legal unit of international law.”<sup>199</sup> Others simply defended the lack of rights awarded to indigenous peoples as a consequence of the “European” nature of international law.<sup>200</sup>

The point is that indigenous peoples were of more than fleeting concern not because publicists sought to mandate minimum standards to protect them from the massive violation of their rights, but because European domination needed to be reconciled with the prevalent international law regime. However, whatever the difference among scholars, the overall result was a conception of international law that provided no obstacle to imperialist ambitions:

With tribal peoples deemed incapable of enjoying status or rights in international law, international law was able to supply the rules governing the patterns of colonialization and ultimately to legitimate the colonial order, without any consequences arising from the existence of aboriginal peoples. For international law purposes, indigenous lands prior to any colonial presence were considered legally unoccupied and accordingly cloaked in the legal jargon of *terra nullius* (vacant lands). Under this fiction, discovery could be employed as a means of upholding colonial claims to indigenous lands and bypassing any claim to possession by the natives in the “discovered” lands. . . . [T]here was no longer any need to pretend conquest where war had not been waged, or to rely on the rules of war where it had.<sup>201</sup>

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in the enjoyment of a security and well-being at least not less than they enjoyed before the arrival of the strangers. Can the natives furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and want of it. . . . The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out. Accordingly international law has to treat such natives as uncivilised.

*Id.*

198. See, e.g., MARK F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 20 (1926). Lindley himself takes a fairly sympathetic position with respect to the rights of indigenous peoples, but in analyzing the general consensus of publicists, he admits that his position is in a minority:

[E]xtending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one. But that, and especially in comparatively modern times, a different doctrine has been contended for and has numbered among its exponents some well-known authorities; a doctrine which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit, and, in its most advanced form, demands that such peoples shall have progressed so far in civilization as to have become recognized as members of the Family of Nations before they can be allowed such rights.

*Id.*

199. *Cayuga Indians (Gr. Brit. v. U.S.)*, 6 R.I.A.A. 173, 176 (1926); *Island of Las Palmas Case (Neth. v. U.S.)*, 2 R.I.A.A. 829, 858 (1928) (referring to “native princes or chiefs of peoples not recognized as members of the community of nations”).

200. See, for example, the following explanation put forward by one scholar as to why international law did not apply to indigenous peoples:

It is scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilisation.

WILLIAM E. HALLS, *A TREATISE ON INTERNATIONAL LAW* 47 (A. Pearce Higgins ed., 8th ed. 1924).

201. Anaya, *supra* note 196, at 209.

## 2. International Law and the Rights of Minorities

In contrast to the rigorous denial of rights to indigenous people, the treatment of minorities was often a more genuine issue in the years preceding World War II. International interest in the protection of minorities is, in fact, often traced back to the treaty of Westphalia in 1648<sup>202</sup> and sometimes even earlier. Capotorti, for example, cites the Treaty of Vienna in 1606, whereby the King of Hungary and the Prince of Transylvania guaranteed religious freedom to the Protestant minority in Transylvania.<sup>203</sup> Other prominent instances include the Congress of Vienna in 1815, the 1876 Treaty of Berlin, which included protection for the "traditional rights and liberties" enjoyed by the religious community of Mt. Athos in Greece, and the 1881 Convention for the Settlement of the Frontier between Greece and Turkey.<sup>204</sup> However,

such agreements [can] just as easily be seen as recognizing the power of certain political groups rather than religious rights per se. Religion was certainly the most significant distinction among most groups until at least the eighteenth century, and most of the early provisions for the protection of minorities were concerned with what today might be viewed as freedom of religion rather than group rights.<sup>205</sup>

While the "wilderness of single instances,"<sup>206</sup> in which states had chosen to protect the particular rights of minorities using treaties, never quite merged into a comprehensive scheme, it did eventually lead to the "minority treaties" at the end of World War I; these still represent "the most conscious and comprehensive attempt to protect ethnic and other minorities through international legal means."<sup>207</sup>

As might be expected, the League of Nations minority treaties were not really very different in either spirit or legal methodology from earlier efforts to protect minorities. The aim of the treaties was "to protect the identity of peoples or nations, in the way that the law of self-determination or decolonization would later seek to do. In other contexts, they were more concerned with the religious, cultural, or linguistic rights of groups which were minorities even within the territory they inhabited."<sup>208</sup> The minority treaties thus evidence the first international recognition of the right of all peoples to self-determination.

202. Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431 (1991).

203. FRANCESCO CAPORTI, *STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES* at 1, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979).

204. For a detailed examination of treaties dealing with minorities, see generally JAY A. SIGLER, *MINORITY RIGHTS* (1983).

205. Hannum, *supra* note 202, at 1431.

206. PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 25 (1991).

207. Hannum, *supra* note 202, at 1432. These treaties can be divided into three groups. The first group included those which were dictated by the victorious allied powers to the defeated Axis forces, such as the treaties with Austria, Hungary, Bulgaria, and Turkey. The second group included "either new states created out of the dissolution of the Ottoman Empire or states whose boundaries were altered specifically to what President Wilson referred to as 'self-determination.'" This group included Czechoslovakia, Greece, Poland, Romania, and Yugoslavia. In addition, special measures relating to minorities were included in the final political settlements relating to Aland, Danzig, the Memel Territory, and Upper Silesia. *Id.*

208. James Crawford, *The Rights of Peoples: Some Conclusions*, in *THE RIGHTS OF PEOPLES* 159, 161 (James Crawford ed., 1988).

### 3. Conclusion

International law regarding minorities and indigenous peoples in this period focused almost exclusively on the issues of sovereignty and self-determination. However, while indigenous peoples were denied any right to self-determination and, indeed, denied even any status as a “unit of international law,” there was a long and vibrant history of European powers recognizing precisely such concerns amongst themselves by way of bilateral treaties granting autonomy and/or other special treatment privileges to distinct groups.

It may be an oversimplification to blame this dichotomy entirely on racism, but

[i]t was primarily in the European arena that concepts of minority rights and nationalism developed in the nineteenth and early twentieth centuries. The colonial empires were notorious for ignoring ethnic, linguistic, or other “national” considerations, leaving such complexities to be dealt with by the independent states that emerged from decolonization. While African and Asian nations or ethnic groups may often have been set against one another by colonial powers, there seems to have been no concern for the protection of “minorities”—unless it was the consolidation and protection of the privileges of the white colonist.<sup>209</sup>

One may still argue that, despite its faults, the League of Nations system for the protection of minorities should still be hailed for having incorporated the principle of special treatment for minorities into international law. However, the consensus among scholars is that the minority treaties did not create customary international law:

[T]here is evidence on the limited scope of the League system of treaties in its practice and intentions. As noted, the League system was political and humanitarian in its purposes. The States were effectively obliged to participate in it as a result of wartime defeat, or as a condition of receiving additions of territory or recognition of their independence. There was no intent to establish a universally applicable minorities system, least of all one applicable to the Powers.<sup>210</sup>

This has led at least one scholar to conclude that “the post-war world started, as it were, with a *tabula rasa* in the matter of tolerance and encouragement of minorities”<sup>211</sup> so that, unless restrained by a particular treaty, “[s]tates could act as they pleased in relation to their populations.”<sup>212</sup>

#### *B. The Rights of Minorities and Indigenous Peoples (1947-1994)*

##### 1. The Human Rights Revolution

The establishment of the United Nations and the promulgation of the Universal Declaration of Human Rights led to a sea change in the international community’s approach to the rights of minorities and indigenous peoples. From a broad perspective, the most obvious difference was that the positivist view of international law as practices governing relationships between nations gave way to a new vision of universally

209. Hannum, *supra* note 202, at 1434 (footnote omitted).

210. THORNBERRY, *supra* note 206, at 113.

211. *Id.*

212. *Id.*

applicable rights and privileges. While the normative dimension was restored to international law, the dichotomy between the rights of the individual and the rights of the state remained. Thus, the new constitutive documents of the post-World War II international regime (the United Nations ("U.N.") Charter and the Universal Declaration of Human Rights) operated almost entirely on the assumption that rights were to be conferred "on individuals as individuals, rather than as members of groups."<sup>213</sup>

Indeed, the individualist focus of the postwar international regime was the product of a very deliberate choice. As several scholars have noted, provisions relating to the rights of minorities were rejected during the drafting of the Universal Declaration of Human Rights. For example, the Sub-Commission on Prevention of Discrimination and Protection of Minorities submitted the following article:

In States inhabited by well defined ethnic, linguistic or religious groups which are clearly distinguished from the rest of the population and which want to be accorded differential treatment, persons belonging to such groups shall have the right as far as is compatible with public order and security to establish and maintain their schools and cultural or religious institutions, and to use their own language and script in the press, in public assembly, and before the courts and other authorities of the States, if they so choose.<sup>214</sup>

This half-hearted provision to protect minorities' rights was excluded from the draft declaration sent to the General Assembly.<sup>215</sup> Later, when the Third Committee of the General Assembly examined the draft, articles regarding minorities' rights were proposed by Denmark, Yugoslavia, and the USSR but were similarly rejected.<sup>216</sup> Instead, the declaration was adopted without any such article, and the matter was referred back to the Sub-Commission for further investigation.<sup>217</sup>

The international community had not completely forgotten about minorities or indigenous peoples. However, the rights of minorities and indigenous peoples were seen as issues of sovereignty and political power thought to be resolved by the prominence given in the United Nations Covenants on Human Rights to the resolution that "[a]ll peoples have the right of self-determination."<sup>218</sup> Hurst Hannum explains:

Instead of adopting the League of Nations approach of attempting to resolve the territorial-political problems posed by the existence of minority groups within a state[,] . . . the drafters of the United Nations Charter seemed to assume: 1) that European and other minorities would be satisfied if their individual rights, particularly those of equality and nondiscrimination, were respected; and 2) that reference to the principle of self-determination would be adequate to resolve the problem of colonialism.<sup>219</sup>

In other words, the adoption of the Universal Declaration of Human Rights meant that the focus of the international community was upon a minimum level of human rights that would, at least theoretically, be available to all people, irrespective of color, creed, race, or sect. But by providing for human rights for everyone, "[t]he effort to create equality

213. Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219, 1241 (1991).

214. THORNBERRY, *supra* note 206, at 134 (quoting U.N. Doc. E/CN.4/SR.52 ¶ 9).

215. *Id.*

216. *Id.* at 134-35.

217. *Id.* at 137.

218. PATRICK THORNBERRY, *MINORITIES AND HUMAN RIGHTS LAW* 5 (1987) (quoting United Nations Covenants on Human Rights).

219. Hannum, *supra* note 202, at 1434-35.

between minorities and majorities . . . lost much of its purpose . . . ”<sup>220</sup> Andrés Baka points out:

It is, on the whole, generally accurate that compared with the League of Nations system the United Nations’ complex human rights system “considerably enlarges the scope of individual rights, including the negative rights of minorities[, b]ut in the insistence on equal rather than exceptional rights for minorities, the United Nations system represents a substantial reduction in international commitment to minority rights.”<sup>221</sup>

Moreover, the distinction between minority rights and self-determination was increasingly suppressed after 1945 so that while the international community began to recognize the rights of all peoples under colonial rule to self-determination, “minorities guarantees were regarded with great suspicion, and the principle of minority rights, to the extent that it found expression at all, was regarded as a consequence of individual rights rather than of the rights of particular communities or groups.”<sup>222</sup> As a result of this move away from minority rights, the United Nations has scarcely dealt at any level with the question for more than forty years.<sup>223</sup>

The only exception to this general indifference is the right to self-determination, a right not only enshrined in the United Nations Charter, but one that can genuinely be described as customary international law. In the orthodox sense, self-determination means the right of a people to have an independent and sovereign state of their own.<sup>224</sup> Since the principle of self-determination without any limits points only to an endless process of subdividing states, international law includes the equally authoritative principle that the territorial integrity of established states must never be compromised. This contradictory situation of two legal principles with equal and opposite effects has produced two schools of thought.

The first tries to resolve this impasse by differentiating the peoples who deserve self-determination from those who do not.<sup>225</sup> The second one, to which most indigenous rights theorists adhere, argues that self-determination does not necessarily require all the attributes of a sovereign state, but may be satisfied by more limited forms of autonomy.<sup>226</sup> Neither of these—as will be explored more fully later—is particularly useful in the context of the Kalash. It is neither desirable nor feasible for the Kalash to have their own state; moreover, the Kalash are such a tiny minority that not even a limited form of political autonomy would be feasible.

220. Asbjørn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 NOTRE DAME L. REV. 1311, 1319 (1991).

221. Andrés B. Baka, *The European Convention on Human Rights and the Protection of Minorities Under International Law*, 8 CONN. J. INT’L L. 227, 230-31 (1993) (alteration in original) (quoting Robert G. Wirsing, *The United States and the International Protection of Minorities*, in *THE DYNAMICS OF HUMAN RIGHTS IN U.S. FOREIGN POLICY* 157, 165 (Natalie K. Hevener ed., 1981)).

222. Crawford, *supra* note 208, at 161.

223. Hannum, *supra* note 202, at 1444. Hannum goes on to note: “It requires only two pages of a 350-page report on the United Nations human rights activities to describe the United Nation’s [sic] work in the area of minority rights (apart from questions of discrimination).” *Id.* at 1435 n.15 (citing UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS at 243-45, U.N. Doc. ST/HR/2/Rev.3, U.N. Sales No. E.88.XIV.2 (1988)).

224. Anaya, *supra* note 196, at 214-15 (“U.N. practice has resulted in the preponderant view that self-determination means a legal right of independent statehood for territories under rule by overseas colonial powers, regardless of the doctrinal bases of sovereignty claimed by the foreign powers over the territories.”).

225. See, e.g., John H. Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669, 673 (1978) (identifying minimum requirements for statehood under Article I of the Montevideo Convention: “a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states”).

226. Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT’L L. 127, 142 (1991).



## 2. Developments in Minority Rights Since 1947

Two major multilateral documents dealing with the rights of minorities have emerged since 1947. The first, the Genocide Convention of 1947, is not limited to minorities. It delineates collective rights of peoples which apply to minorities. For the Genocide Convention to be called into effect, there must be an affirmative showing of "intent" by a party to exterminate, in whole or in part, a particular people.<sup>227</sup> Because the Pakistani Government is not actively trying to exterminate the Kalash, and because the Kalash are in no danger of physical extinction (as compared to cultural extinction), the Genocide Convention offers them no protection. Thus, that document is not applicable to this Article's search for a rationale that justifies the preferential treatment of indigenous groups.

The second document is the International Covenant on Civil and Political Rights ("ICCPR"), or more precisely, Article 27 therein, the only exception<sup>228</sup> to the international community's general hostility towards recognizing a collective right of minorities to distinct treatment.<sup>229</sup> As Thornberry points out, this article is not just "the only expression of the right to an identity in modern human rights conventions intended for universal application," but also "the first real attempt in the history of international law to provide such a universal right."<sup>230</sup> Article 27 reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>231</sup>

While this provision appears directly applicable to the Kalash, several preliminary issues must be addressed. First, Pakistan is not a signatory to the ICCPR, and therefore can be judged against the standards in the ICCPR only if those standards can be considered part of customary international law. Second, even if we assume, *arguendo*, that Article 27 is customary international law, the clear language of Article 27 only obligates states to refrain from activities or actions which would have a negative impact on the cultural or religious identity of minority populations. Article 27 does not, at least on its surface, provide a basis for arguing that states are obligated to take positive measures to prevent the identity and cultures of minorities (including indigenous peoples) from being attacked or eroded by external forces.

227. See James Crawford, *The Rights of People: 'Peoples' or 'Governments'?*, in *THE RIGHTS OF PEOPLES*, *supra* note 208, at 55, 59 n.7 ("The requirement of intent has led to arguments that the disappearance of indigenous groups as a more or less direct effect of government policies is not genocide because unintended . . ."); Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 *AM. J. INT'L L.* 369 (1984).

228. Hurst Hannum argues that the Convention on the Elimination of All Forms of Racial Discrimination also counts as a "[p]ositive conventional obligation." Hannum, *supra* note 202, at 1444.

229. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 179 [hereinafter ICCPR].

230. THORNBERRY, *supra* note 206, at 142.

231. ICCPR, *supra* note 229, 999 U.N.T.S. at 179.

### 3. The Rights of Indigenous Peoples in the Postwar International Human Rights Regime

The United Nations first formally dealt with indigenous populations through General Assembly Resolution 275 (III) of May 11, 1949, which asked the Economic and Social Council, with the assistance of various specialized agencies, to investigate the condition of the "aboriginal populations of the States of the American continent."<sup>232</sup> However, this resolution "was prompted more by the Cold War and the prospective development of the South American interior than by studied concern for the welfare of indigenous communities."<sup>233</sup> The International Labor Organization ("ILO"), on the other hand, had been addressing the issue since its inception. A Committee of Experts on Native Labor was set up as early as 1926, and a number of early conventions dealt with indigenous peoples.<sup>234</sup> The ILO's biggest contribution, however, came in 1957 with Indigenous and Tribal Peoples Convention Number 107 ("Convention No. 107"), the international community's first instrument to address comprehensively and specifically the needs of indigenous and tribal peoples.<sup>235</sup>

Conceptually, Convention No. 107 is interesting because it lumps indigenous peoples together with tribal and "semi-tribal" peoples.<sup>236</sup> Indigenous peoples have rights, therefore, not by virtue of their history of oppression or colonization, but because they pose a special developmental problem. Article 1(a) declares that the Convention applies to peoples "whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community."<sup>237</sup> Article 3, which mandates the adoption of special measures "for the protection of the institutions, persons, property and labour of these populations," contains the proviso that these measures are only necessary "so long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong."<sup>238</sup>

It is precisely because of this initial choice of conceptual viewpoints that Convention No. 107 presumes that the correct approach towards indigenous and tribal peoples is to integrate them into the mainstream as soon as possible. Article 2(1), for example, declares

232. U.N. GAOR 275 (III), 3d Sess. 1949, at 19, U.N. Doc. A/900 (1949).

233. Russel L. Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369, 370 (1986), quoted in NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 103 (1990).

234. See LERNER, *supra* note 233, at 105; see also HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 77 (1990). These Conventions included the Convention Concerning the Regulation of Written Contracts of Employment of Indigenous Workers, June 27, 1939, 40 U.N.T.S. 281; the Convention Concerning Penal Sanctions for Breaches of Contract, June 27, 1939, 40 U.N.T.S. 311; the Convention Concerning the Regulation of Certain Special Systems of Recruiting Workers, June 20, 1936, 40 U.N.T.S. 109; the Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55. A study on the living conditions of indigenous and tribal peoples was also published in 1953. ILO, INDIGENOUS PEOPLES: LIVING AND WORKING CONDITIONS OF ABORIGINAL POPULATIONS IN INDEPENDENT COUNTRIES (1953).

235. Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted June 26, 1957, 328 U.N.T.S. 247 [hereinafter Convention No. 107]; see also Recommendation No. 104: Recommendation Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, in ILO, CONVENTIONS AND RECOMMENDATIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE 1919-1966, at 909 (1966).

236. Article 1(2) defines "semi-tribal" as those "groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community." Convention No. 107, *supra* note 235, 328 U.N.T.S. at 250.

237. *Id.*

238. *Id.*

that “[g]overnments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.”<sup>239</sup> In short, the controlling principle behind ILO Convention No. 107 was congruent with the individualist focus of the post-1947 human rights legal framework. The best way to assure the rights of a particular group was first to guarantee a set of individual rights to all individuals, and then to try and make that group indistinguishable from the general populace.

Nevertheless, Convention No. 107 did delineate a number of rights aimed at protecting the existing character of indigenous peoples. For example, Article 13(1) mandated that states were to respect “[p]rocedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned.”<sup>240</sup> Article 13(2) added that states were to make arrangements “to prevent persons who [were] not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of those populations to secure the ownership or use of the lands belonging to such members.”<sup>241</sup> However, “the protective regime [of Convention No. 107] is temporary and transitional, intended only to ameliorate the harsh consequences of rapid loss of [indigenous peoples’] culture during the integration process.”<sup>242</sup>

The problem is that while “directed integration of the kind contemplated by Convention No. 107 was viewed as progressive in the 1940’s and 1950’s, in the context of indigenous peoples it is readily apparent that state programmes of this nature have had ethnocidal consequences.”<sup>243</sup> The problem of state coercion is exacerbated in that Convention No. 107 leaves little residual political power to indigenous or tribal peoples, but instead greatly limits their decisionmaking autonomy. Thus, while on the one hand Article 11 recognizes collective ownership of land,<sup>244</sup> Article 12 declares that indigenous peoples may be dispossessed of their ancestral territories “for reasons relating to national security, or in the interest of national economic development.”<sup>245</sup> Similarly, Article 7 declares that “[t]hese populations shall be allowed to retain their own customs and institutions,” but then restricts this privilege to only those instances “where these [customs and institutions] are not incompatible with the national legal system or the objectives of integration programmes.”<sup>246</sup>

In the final analysis, even though Convention No. 107 represents a significant acknowledgment of particular rights, it has come under heavy criticism for its “assimilationist” approach and for the degree to which it subordinates the interests of indigenous peoples to “national” interests. The utility of the Convention is further limited by the fact that it has only been ratified by twenty-seven states (including Pakistan) and “within those few states, its effectiveness as a guarantee of indigenous rights is

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239. *Id.*

240. *Id.* at 258.

241. *Id.*

242. Howard Berman, *The International Labor Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labor Conference*, REV. INT’L COMM’N OF JURISTS 41, 48 (1988).

243. *Id.*

244. Convention No. 107, *supra* note 235, 328 U.N.T.S. at 256.

245. *Id.*

246. *Id.* at 254.

questionable."<sup>247</sup> Thus, contemporary scholars have not been kind in reviewing Convention No. 107's impact. Thornberry's conclusion that "it is as much of a contribution to the cultural destruction of [indigenous] groups as it is to their salvation"<sup>248</sup> is echoed by other scholars:

Rather than providing a source of rights for indigenous peoples seeking to retain their territorial, political, social, and cultural integrity, the instrument mandates the gradual integration of indigenous individuals into national societies and economies, thus legitimizing the gradual extinction of indigenous peoples . . . Indeed, Convention No. 107 has been an embarrassment to the ILO.<sup>249</sup>

### III. DEVELOPMENT OF THE INDIGENOUS RIGHTS NORM

#### A. Introduction

The international law framework of human rights in the years following World War II was, if not hostile, certainly indifferent to the particular situation of indigenous peoples. Indeed, this regime's basic assumption—that rights were only exercised by and bestowed upon individuals—emphasized universal applicability of only the most elementary human rights. The sole international instrument addressing indigenous peoples thus approached their problems from an individualist perspective and presumed their distinctive existence and culture to be more of an obstacle to development than a legacy to be preserved. To the extent that international law recognized the rights of peoples as a collective, it granted them the right of self-determination. However, the fragility of most newly independent states and the danger of widespread irredentism meant that the application of this right outside the context of decolonization was quite problematic. Apart from the right to self-determination, international law only granted groups the right not to be murdered en masse and the right not to be discriminated against.

Despite this unpromising situation, one increasingly expressed viewpoint asserts an "emerging norm" relating to the rights of indigenous peoples under international law.<sup>250</sup> The substantive content of the norm, though not clearly defined, reveals a recognition by domestic governments of "the special needs of indigenous populations for cultural protections, recognition of indigenous land rights, welfare rights (e.g., housing, education and health-care), and self-rule."<sup>251</sup> As Anaya puts it, "[t]he core idea of the right of self-defined indigenous communities to continue as distinct units of human interaction has taken root internationally, making any discussion of their assimilation into larger

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247. André Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 VAND. J. TRANSNAT'L L. 703, 717 (1990); see also *id.* at 717 n.70 ("[M]ore than 25 years after its adoption, there is little difference between the countries which are and are not bound by it, and such differences as exist are not always in favour of the States parties to it." (quoting JOSÉ R.M. COBO, UNESCO, COMM'N ON HUMAN RIGHTS, SUB-COMM'N ON PREVENTION OF DISCRIMINATION & PROTECTION OF MINORITIES, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1987) [hereinafter COBO REPORT 1986]) (alteration in Lawrey)).

248. THORNBERRY, *supra* note 206, at 395.

249. Berman, *supra* note 242, at 48-49.

250. See, e.g., S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1 (1991); Anaya, *supra* note 196; Torres, *supra* note 226, at 155-56 ("The statements and interactions of relevant parties involved in aboriginal questions provide evidence of the emergence of an indigenous norm in the 1980s.")

251. Torres, *supra* note 226, at 156.

societies virtually obsolete among social science and legal experts and even government representatives.”<sup>252</sup>

More importantly, this norm is not just a negative right of indigenous communities to be left alone. The “norm cannot be fulfilled by mere state nonintervention in indigenous cultural affairs; it requires positive measures by the state to foster and preserve indigenous traditions.”<sup>253</sup> The 1983 Cobo Report elaborates even further on the obligations of the host state:

“The fact that the State has clear positive responsibilities in matters of cultural rights is generally recognized today. . . . While of course, individuals, groups and communities have primary roles in the development of their own culture, it has been recognized that at least some form of financial assistance is needed from the local, regional and national authorities in order to maintain adequate improvement of economic and social conditions and the rate of technical developments which will make it possible for everyone, without discrimination, to take part in the cultural life of his community and that of the nation at large.”<sup>254</sup>

Discussion of the “emerging norm” has focused more on the substantive content of the norm rather than on the basis for its emergence. To the extent, however, that such conceptual bases can be isolated, they can be placed into three categories. First, a number of legal arguments have been advanced as supporting the development of an indigenous rights norm. Second, various nonlegal rationales have been elaborated by particular indigenous rights advocates as justifying an indigenous rights norm. Third, a number of multilateral conventions and instruments have been developed in recent years regarding the rights and status of indigenous peoples.

### *B. Legal Arguments Supporting the Emergence of an Indigenous Rights Norm*

In general, theorists support an indigenous rights norm either in reference to the right of self-determination or by expanding the purview of individual rights to include other rights, such as the right to development and cultural integrity. In reference to self-determination, the general argument has been that self-determination should not be seen as a rigid concept, either statehood or nothing, but as a concept covering a full spectrum of possibilities ranging from full statehood to limited forms of political autonomy.<sup>255</sup> Accordingly, the right to self-determination governs the right of peoples to determine the political process by which choices affecting their lives are made.

252. Anaya, *supra* note 196, at 219 (footnote omitted).

253. Torres, *supra* note 226, at 159.

254. *Id.* at 159 n.163 (quoting JOSÉ R.M. COBO, UNESCO, COMM’N ON HUMAN RIGHTS, SUB-COMM’N ON PREVENTION OF DISCRIMINATION & PROTECTION OF MINORITIES, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.3 ¶ 12 (1983)).

255. *Id.* at 142 (“Self-determination can take a variety of forms along a spectrum from autonomy in particular subject matters such as cultural concerns, to full political autonomy, in which indigenous populations establish their own governments, design their own political systems, and enforce their own laws.”); *see also* Anaya, *supra* note 196, at 219 n.121 (quoting an indigenous representative as stating that self-determination for them meant not statehood, but “the right to control our territories, our resources, the organisation of our societies, our own decision-making institutions, and the maintenance of our own cultures and ways of life”); Dean B. Suagee, *Self-Determination for Indigenous Peoples at the Dawn of the Solar Age*, 25 U. MICH. J.L. REF. 671, 692-93 (1992) (distinguishing between external self-determination, that is the right to choose to be recognized as an independent state, and internal self-determination, that is the right of autonomous self-government).

With respect to development, for indigenous peoples this right necessarily incorporates the “right to . . . develop . . . past, present and future manifestations of their cultures.”<sup>256</sup> In other words, in the context of indigenous peoples, this right necessarily means the right to control the processes and priorities of development.

Finally, with respect to cultural integrity, Anaya argues that “[t]he new body of international law concerning indigenous peoples intersects with and in significant part extends from a generally applicable human rights norm of cultural integrity.”<sup>257</sup> This norm, he argues, has not only been a feature of European treaties since the Peace of Westphalia, but is presently affirmed in Article 27 of the ICCPR.<sup>258</sup> According to Anaya, it “cover[s] all aspects of [the] indigenous group’s survival as a distinct culture . . . [and requires] states to act affirmatively to protect the cultural matrix of indigenous groups and not simply to refrain from coercing assimilation or abandonment of cultural practices.”<sup>259</sup>

### *C. Nonlegal Arguments Supporting an Indigenous Rights Norm*

#### 1. The Restorative Paradigm

The restorative paradigm rests on a number of contentions: first, that “[d]espite variations in the specific political and historical circumstances surrounding nondominant native populations, nearly all indigenous groups share a common set of problems”;<sup>260</sup> and second, that only “[a]s a direct consequence of European colonial expansion [have] indigenous peoples . . . been deprived of their independence, their land, and their right to choose their role in the modern state”.<sup>261</sup>

These problems largely result from the nature of the relationship between colonizers and conquered indigenous populations. The colonizers, in order to benefit from local resources and to establish effective political power over the territory, often took the land away from the natives.

Furthermore, as the colonial powers began to consolidate power, they found it expedient to impose their way of life on native groups whose traditions they often considered primitive. . . . As an ultimate result of this dynamic between colonizer and colonized, the native populations were stripped of their land, their traditions were besieged, and their political autonomy was dramatically circumscribed.<sup>262</sup>

The ultimate contention is “that individuals who have been persecuted as a group should be acknowledged as a group in any public remedies.”<sup>263</sup> The restorative paradigm presents

256. Dalee Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, 3 *TRANSNAT’L L. & CONTEMP. PROBS.* 13, 27 (1993) (quoting *Discrimination Against Indigenous Peoples; Report of the Working Group on Indigenous Populations on Its Tenth Session*, U.N. ESCOR Comm’n on Human Rights, 10th Sess., Annex I, at para. 8, U.N. Doc. E/CN.4/Sub.2/1992/33 (1992) [hereinafter *Draft Declaration*]) (alteration in original).

257. Anaya, *supra* note 250, at 15-16.

258. *Id.* at 16 (construing ICCPR, *supra* note 229).

259. *Id.* at 17.

260. Torres, *supra* note 226, at 133.

261. Lawrey, *supra* note 247, at 762.

262. Torres, *supra* note 226, at 133 (footnote omitted).

263. Carol Weisbrod, *Minorities and Diversities: The “Remarkable Experiment” of the League of Nations*, 8 *CONN. J. INT’L L.* 359, 376 (1993) (citing Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107 (1976)).

a neat logical progression: all indigenous peoples suffer today from the same problems, which are results of their colonization by settler nations who continue to dominate the state's apparatus of power; therefore, it is only equitable that the state should "atone" and compensate the indigenous peoples for all that they have suffered.<sup>264</sup>

## 2. The Comparative Rationale

An additional rationale focuses not on the history of colonization but on the fact that "indigenous people are still among the most severely disadvantaged groups in their states."<sup>265</sup> Preferential economic treatment for them is based upon the argument that they deserve the same minimum economic welfare standards as other groups, and that, in turn, achieving this goal requires affirmative action:

Where a State legislates to advance the interests of indigenous peoples or minorities by . . . adopting affirmative employment programs, such measures often attract the criticism that they are discriminatory or that they violate the principle of equality . . . It has, however, been accepted by international and domestic tribunals that . . . "the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal[.] . . . To treat unequal matters differently according to their inequality is not only permitted but required."<sup>266</sup>

### D. Multilateral Instruments and Indigenous Rights

Although the main international body dealing with the rights of indigenous peoples was the ILO, the approach taken by Convention No. 107 was so unacceptably assimilationist<sup>267</sup> that "[i]ndigenous peoples and human rights NGO's . . . avoided attempting to utilize the restricted though excellent review procedures of the ILO for fear of giving any credibility to the substantive provisions and general orientation of the

264. Garth Nettheim, *'Peoples' and 'Populations'—Indigenous Peoples and the Rights of Peoples*, in *THE RIGHTS OF PEOPLES*, *supra* note 208, at 107, 123. Nettheim states:

In essence, the land rights claim is a claim for restitution. It presupposes either that indigenous people remain on their traditional lands or that they can be returned to it. For many indigenous people this is not possible, either because the links with the land have been irrevocably lost or because the land has passed to others. For those who cannot require return of traditional lands other forms must be found by way of restitution, reparation, compensation, or (to use Colin Tatz's potent analogy) atonement. The basis for such claim is the same as the basis for the primary land rights claim, and is particular to indigenous people. So, too, is a claim for compensation for the effects of dispossession in the past, even for those people who can regain traditional lands.

*Id.*

265. Lawrey, *supra* note 247, at 762; see also Robert K. Hitchcock, *International Human Rights, the Environment and Indigenous Peoples*, 5 *COLO. J. INT'L ENVTL. L. & POL'Y* 1, 5 (1994) (arguing that because indigenous peoples are found in disproportionate numbers below the poverty line, "the situations faced by indigenous peoples merit significant international attention and remedy"); Torres, *supra* note 226, at 140 ("Indigenous populations, like other ethnic minority groups, are currently the victims of discrimination and are denied essential goods and rights by their respective states."). For an example, see S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 *GA. L. REV.* 309, 317 (applying the comparative approach to indigenous Hawaiians and noting that they "comprise the most economically disadvantaged and otherwise ill-ridden sector of the Islands' population").

266. Gillian Triggs, *The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?*, in *THE RIGHTS OF PEOPLES*, *supra* note 208, at 141, 147-48 (quoting South West Africa Cases (Second Phase) (Eth. v. S. Afr., Liber. v. S. Afr.), 1966 I.C.J. 6, 305-06 (July 18) (Tanaka, J., dissenting)).

267. See Lee Swepton & Roger Plant, *International Standards and the Protection of the Land Rights of Indigenous and Tribal Populations*, 124 *INT'L LAB. REV.* 91 (1985).

instrument."<sup>268</sup> As a result, "the past decade's growing political mobilization of indigenous peoples has focused on the possibility of coordinated action by the United Nations."<sup>269</sup> Additionally, as advances in global communications and increased media awareness led to greater sensitivity, states, NGOs, and various agencies began "to recognize that a solution to these problems required a separate exploration from minority rights in general."<sup>270</sup> The result of these trends was that, in 1982, the advisory Sub-Commission to the United Nations Commission on Human Rights established a Working Group on Indigenous Populations and, more importantly, commissioned a study on discrimination against them. In 1985, the Working Group was mandated to draft a Universal Declaration of Indigenous Rights.<sup>271</sup>

In the meantime, the ILO, becoming more aware of dissatisfaction with Convention No. 107, had begun a review of that instrument. In 1986, an ILO-convened meeting of experts concluded that "[t]he Convention's integrationist approach [was] inadequate and no longer reflect[ed] current thinking," and they recommended a thorough and immediate revision, based on the principle that indigenous peoples "should enjoy as much control as possible over their own economic, social and cultural development."<sup>272</sup> A formal revision procedure was thus established,<sup>273</sup> and in 1989 revised Convention Number 169 ("Convention No. 169") was adopted at Geneva.

While Convention No. 169 is certainly an improvement, the ILO's decision to revise the Convention has not met with unanimous approval.

While the problems with Convention 107 are glaring, it is not entirely clear why the ILO determined to resuscitate the instrument at this time. Since 1982, United Nations human rights organs have been engaged in standard-setting on indigenous rights with the active participation of indigenous peoples and NGO's. As a specialized agency with a limited and defined mandate relating to labour issues, the ILO seems poorly positioned to concern itself with the fundamental indigenous rights issues that have emerged in the U.N. process: self-determination, territorial integrity including resource rights, and cultural integrity. . . . Although the ILO unquestionably has humane reasons for seeking to update its standards, the insistence on a thematically comprehensive Convention by a limited agency clearly indicates no small element of bureaucratic territoriality as a prime motivating factor.<sup>274</sup>

However, whether pure altruism or the desire to protect its own turf inspired the ILO, the preamble to Convention No. 169 recognizes specifically "the aspirations of these [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and

268. Berman, *supra* note 242, at 49.

269. Russel L. Barsh, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209 (1990).

270. Torres, *supra* note 226, at 153.

271. *Draft Declaration*, *supra* note 256. The Universal Declaration on Indigenous Rights is still in draft form. However, for this Article's purposes, it may be noted that the Draft Declaration recognizes among the rights of indigenous peoples: "[t]he collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities" (para. 6); "[t]he collective right to protection against genocide" (para. 7); "[t]he right to preserve their cultural identity and traditions and to pursue their own cultural development" (para. 8); and "the right to adequate financial and technical assistance, from states and through international cooperation, to pursue freely their own . . . cultural and spiritual development" (para. 14).

272. Barsh, *supra* note 269, at 210 (quoting Convention No. 107).

273. The revision procedure included the circulation of "a series of formal questionnaires among governments and the establishment of a tripartite drafting committee at both the 1988 and 1989 International Labour Conferences in Geneva." *Id.*

274. Berman, *supra* note 242, at 49.



religions, within the framework of the States in which they live"<sup>275</sup> and then notes that "in many parts of the world these [indigenous] peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live."<sup>276</sup>

Thus, the revised convention does not have a comparative viewpoint. Indigenous peoples should be given special attention not because they are economically disadvantaged but so they may "maintain and develop their identities, languages and religions."<sup>277</sup> Under Article 2, governments must develop, "with the participation of the peoples concerned, [a] co-ordinated and systematic action to protect the rights of these peoples"<sup>278</sup> and promote "the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions."<sup>279</sup> Article 4 mandates that "[s]pecial measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned."<sup>280</sup>

While by no means the only ones, the Draft Declaration of Indigenous Rights and the revised Convention No. 169 are certainly the most prominent examples of recent international standard-setting activity. Other initiatives include the nomination of 1993 as the International Year for the World's Indigenous People,<sup>281</sup> the reference to indigenous rights in the 1992 Rio Summit,<sup>282</sup> and other declarations of indigenous rights.<sup>283</sup> One author concludes: "These developments in the international arena have begun to have an effect on indigenous peoples' political movements at the national level. United Nations activities have not only added to the strength of conviction of national movements, but are beginning to open up opportunities for concrete aid."<sup>284</sup>

#### IV. PROBLEMS WITH THE INDIGENOUS RIGHTS NORM

The previous Part examined the various possible bases for the development of an indigenous rights norm. This Part argues that those bases either do not deal directly with the value of cultural preservation, or that the rationales utilized by them are not universally applicable, as is shown by their application to the specific context of the Kalash. This Part also contends that, to the extent that indigenous rights advocates have supported the emerging norm using international law, the provisions they rely upon are neither generally accepted as being part of international law nor are their interpretations justified given traditional standards of scholarship.

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275. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) (1989), *reprinted* in Barsh, *supra* note 269, at 237.

276. *Id.*

277. *Id.*

278. *Id.* at 239.

279. *Id.*

280. *Id.* at 240.

281. G.A. Res. 164, U.N. GAOR, 45th Sess., Supp. No. 49, at 277, U.N. Doc. A/Res/45/164 (1990) (proclaiming the International Year of the World's Indigenous People).

282. Russel L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 45-48 (1994) (arguing that the principles of indigenous self-determination and cultural integrity were affirmed by the Rio Declaration).

283. See, e.g., Torres, *supra* note 226, at 156-57 (declarations of indigenous rights include Resolutions of the Inuit Circumpolar Conference, Resolutions of the First Congress of Indian Movements of South America, Recommendations of the Fourth Russel Tribunal on the Rights of the Indians of the Americas, and the San Jose Declaration of 1981).

284. Barsh, *supra* note 282, at 86.

### A. Problems with the Legal Arguments

#### 1. Third-Generation Human Rights and Their Application

The norm of cultural integrity and the right to development do not provide a reason for the preferential treatment of the Kalash. These standards confer individual rights, albeit only on members of particular groups, but they do not provide a rationale for distinguishing the rights of any one particular group from a different group's. For example, the right to cultural integrity is conceptually indistinguishable from other individual-oriented human rights norms in that it expands state obligations to preserve cultural matrices. Conceptually, therefore, the right to cultural integrity and the right to development can be regarded as part of a "third generation"<sup>285</sup> of human rights based on human solidarity which expands the economic entitlements of individuals. Though the most well known of these is the "right to development," one author has proposed that they should also include the right to a reasonable environment, economic development, international peace and security, the common heritage of mankind, communications, and humanitarian assistance.<sup>286</sup>

International reaction to attempts to expand the human rights pantheon to include economic rights has not been encouraging.<sup>287</sup> The United States, for example, partially justified its withdrawal from the United Nations Educational, Scientific and Cultural Organization ("UNESCO") on the basis that UNESCO's emphasis on economic rights, such as the right to development, "tend[ed] to strengthen the prerogative of a non-democratic State, at the expense of the human rights of individuals."<sup>288</sup> One commentator has been even harsher in his assessment:

One does not have to accept the view that international human rights are a closed category to regard some of the suggestions for the elaboration of 'solidarity rights' as mere novelties, apparently proposed for the sake of finding something new to say. The excessive generality and the disregard for content demonstrated in some of the elaborations of new rights not only raise questions about individual proposals, but reflect badly on the notion of a 'third generation' of rights as such. Their relation to existing human rights is also problematic. If proposals for a right to development can be elaborated and supported without any obvious content first being attributed to that right, how can one be confident of the content of existing rights?<sup>289</sup>

Leaving aside the lack of scholarly consensus, the point is that expanding the basket of individual entitlements still does not address why the Kalash alone deserve preferential economic treatment. Since the right to cultural integrity and the right to development are conceptualized as universally applicable rights of individuals, they are applicable to all ethnic groups within a particular state. This becomes a problem in the context of the

285. Crawford, *supra* note 208, at 159.

286. Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435 (1981).

287. U.O. Umzurike, an African legal scholar, notes:

The right to development . . . appears not to have attained the definitive status of rule of law despite its powerful advocates . . . . The negative duty not to impede the development of States may go down well; the positive duty to aid such development in the absence of specific accords, is a higher level of commitment that still rests on nonlegal considerations.

U.O. Umzurike, *The African Charter on Human and Peoples' Rights*, 77 AM. J. INT'L L. 902, 907 (1983).

288. Triggs, *supra* note 266, at 142 (quoting report by the U.S. State Department assessing UNESCO).

289. Crawford, *supra* note 208, at 159.

Kalash because "the Third World state is usually an historically derived heterogeneous collectivity thrown together by the processes of colonialism and welded together by the bitter struggles of nationalist anti-colonialism,"<sup>290</sup> and Pakistan is certainly no exception to that rule. Besides the four major ethnic groups in Pakistan (Punjabis, Baluchis, Sindhis, and Pashtuns), a vast number of minor ethnic groups including Braghuis, Jats, Gujars, Baltis, Rajasthanis, Hindus, Sikhs, Wakhis, Swatis, Chitralis (Khos), and Hunzakuts (Burushashki speakers) vastly outnumber the Kalash.<sup>291</sup>

As a poor country, Pakistan is certainly in no position to provide even the minimum level of human rights guaranteed in the U.N. Charter, let alone an expansive laundry list of economic entitlements. Moreover, even to the extent that these rights are economically feasible, the right to cultural integrity and the right to development cannot provide a rationale as to why the "cultural matrix" of the Kalash is any more worthy of special solicitude than that of larger and equally indigenous groups. Thus, the right to cultural integrity is capable only of giving a general value to the preservation of distinct cultures; what it does not provide is any rationale for determining whether one particular culture is more in need of government subsidy than any other. In fact, operating on the assumption that all cultural matrices are of equal value, the cultural integrity norm actually militates against aid to the Kalash since, from a strict utilitarian perspective, the same expenditure could be used to protect the cultures of much larger communities.

## 2. Article 27 and the Norm of Cultural Integrity

Pakistan is not a signatory to the International Covenant on Civil and Political Rights. Under the classical understanding of international law, Pakistan is therefore under no obligation to observe the terms of the Covenant. Article 34 of the Vienna Convention on the Law of Treaties provides that "[a] treaty does not create either obligations or rights for a third State without its consent."<sup>292</sup> However, the terms of Article 27 may still apply to Pakistan if it can be argued that Article 27, or the Covenant on Civil and Political Rights as a whole, constitutes customary international law. As Article 38 of the Vienna Convention acknowledges, a rule set forth in a treaty may become binding upon a third state as a customary rule of international law.<sup>293</sup>

Whether or not the ICCPR constitutes customary international law is not an issue on which publicists agree. Thornberry, for example, concluded after an exhaustive review that "Article 27 . . . appears to be a right granted by treaty without wider repercussions in customary law."<sup>294</sup> Dinstein, on the other hand, argued that Article 27 is "declaratory in nature and reflects a minimum of rights recognised by customary international law,"<sup>295</sup> while Anaya concluded that Article 27 is evidence of "a generally applicable human rights norm of cultural integrity."<sup>296</sup>

The process by which certain rights come to be consecrated as part of customary international law and thereby binding on all states has attracted a great deal of scholarly

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290. Marshall W. Murphree, *Ethnicity and Third World Development: Political and Academic Contexts*, in THEORIES OF RACE AND ETHNIC RELATIONS 153, 157 (John Rex & David Mason eds., 1986).

291. For population figures of minorities, see ALAUDDIN, *supra* note 76, at 24.

292. Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 1155 U.N.T.S. 331, 341.

293. *Id.* art. 38, 1155 U.N.T.S. at 341.

294. THORNBERRY, *supra* note 206, at 246.

295. Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L.Q. 102, 118 (1976).

296. Anaya, *supra* note 250, at 15-16.

attention. The classical expression of this process is described by Oppenheim: "Wherever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary International Law."<sup>297</sup> A less tautological view of this process is described by McDougal, Lasswell, and Chen:

[T]he creation of customary law[] involves the generation of expectations about policies, authority, and control by cooperative behavior, both official and nonofficial. The perspectives among peoples, especially among their effective decision makers, are crystallized in such a way that certain past uniformities in decision and behavior are expected to be continued in the future. The technical requirements for establishing a customary prescription in international law are . . . generally observed to include two key elements: a 'material' element in certain past uniformities in behavior and a 'psychological' element, or *opinio juris*, in certain subjectivities of 'oughtness' attending such uniformities in behavior.<sup>298</sup>

To determine whether Article 27 is part of customary international law, we must first examine whether the "material element" exists in the shape of "patterns of communicative behavior involving physical episodic conduct" and whether this element is supported by the required *opinio juris*.<sup>299</sup> In examining the existence of the "material element," what we must address first is whether these patterns must be deduced solely from the actions of states, or whether other actors can also be seen as authoritative. Anaya, for example, takes an extremely aggressive view on this point:

[I]nteractive patterns around concrete events are no longer considered the only—or even necessarily required—material elements constitutive of customary norms. With the advent of modern international intragovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in dialogue to come to terms on international standards. It is now understood that express communication, whether or not in association with concrete events, is a form of practice that builds customary rules, and that communication may itself bring about a convergence of understanding and expectation about rules even in advance of a widespread corresponding pattern of physical conduct.<sup>300</sup>

This view is excessively deferential in its attitude towards the authoritative effect of the pronouncements of scholars and other nongovernmental actors and is logically flawed. It is one thing to admit that in an age of instantaneous global telecommunications, agencies may function as authoritative actors in the constitutive process of customary international law. However, agencies and other nongovernmental actors fulfill this role precisely because they act as governmental representatives (or because states may choose, in certain circumstances, to defer to their authority) and not as authoritative actors in their own right. McDougal and his colleagues recognize this point by noting that the recognition of a particular practice as authoritative depends on the perspective of "effective decision makers."<sup>301</sup> Similarly, Article 38 of the Statute of the International Court of Justice defines "international custom" as a source of international law only to the extent that it is "evidence of a general practice accepted as law."<sup>302</sup>

297. 1 L. OPPENHEIM, *INTERNATIONAL LAW* 27 (H. Lauterpacht ed., 8th ed. 1955).

298. MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 269 (1980).

299. Anaya, *supra* note 250, at 8-9.

300. *Id.* at 9.

301. MCDUGAL ET AL., *supra* note 298, at 269.

302. Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055 (1945).

This is not to deny that international agencies or even nongovernmental agencies on occasion serve as originators and framers of customary international law. However, such nonstate actors function only as reliable indicators of state practice or of normative rules and provisions that states consider binding. A nonstate actor, such as an NGO, acting independently in its own right, is not a source of international law. Thus, McDougal may argue that "the evidences which decision makers may consult in order to ascertain past behavior and subjectivities include . . . the writings of publicists,"<sup>303</sup> but he also admits that these "evidences" are relevant only in that they "present[] an authentic picture of the practice of states in their international dealings."<sup>304</sup> Anaya's dismissal of state practice as unnecessary for the formation of customary international law is, therefore, considerably overstated.<sup>305</sup>

Assuming then that a rule of customary international law is essentially a rule of state practice, to analyze whether Article 27 constitutes customary international law, one must first examine the text and the history of the ICCPR to unearth the understanding of the signatory parties.<sup>306</sup> According to Thornberry, however, not only did the ICCPR delegates not see themselves as "creating, by a magical process of transmutation, an 'instant' customary law,"<sup>307</sup> but, unlike the drafters of the Genocide Convention, did not even indicate in the Covenant or the language of Article 27 that they were merely restating or confirming preexisting customary law.<sup>308</sup> Furthermore, he notes that many states, France being one prominent example, declared very clearly that they did not see Article 27 as applying to them.<sup>309</sup> Thornberry therefore concludes that Article 27 is "a right granted by treaty without wider repercussions in customary law."<sup>310</sup>

Anaya reaches a different conclusion by relying on various U.N. resolutions<sup>311</sup> as well as recent decisions by the U.N. Human Rights Committee<sup>312</sup> and the Inter-American

303. MCDUGAL ET AL., *supra* note 298, at 269-70.

304. *Id.* at 270.

305. For a more elaborate critique along these same lines, see Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 607 n.2 (1984) ("There may be an uncomfortably close parallel between the authority of the [General] Assembly and that asserted in Lewis Carroll's *Alice in Wonderland* by the Red Queen who majestically proclaimed that 'words mean what I say they mean.'").

306. THORNBERRY, *supra* note 206, at 242 ("The clearest case of a treaty claiming to generate rules of customary law is where the text or the *travaux préparatoires* contain statements that the treaty is declaratory of [international law] . . .").

307. *Id.* at 243.

308. *Id.* at 243-44.

309. *Id.* at 245. France's reservation to Article 27 declared: "In the light of Article 2 of the Constitution of the French Republic, the French Government declares that Article 27 is not applicable so far as the Republic is concerned." *Id.* Since Article 2 is only a nondiscrimination principle, Thornberry concludes that "[o]ne is inclined, therefore, to take the French reservation for what it is, a negative view of Article 27, and further evidence that it is not a universal right." *Id.*

310. *Id.* at 246. Anaya reaches a different conclusion from Thornberry based upon U.N. resolutions and several recent decisions by certain tribunals that Article 27 not only constitutes customary international law, but that it also imposes affirmative obligations upon all states. A closer analysis of the relevant decisions, however, shows that the tribunals did not rely on Article 27 as a binding source of obligations on a nonsignatory (in this case Brazil), but rather relied on Brazilian legislation to justify the decision in favor of affirmative obligations to protect the Yanomami. Peripheral dicta of this sort can hardly form the base of binding obligations on state parties, especially if one, in contrast to Anaya, adopts a realistic view of customary international law. As Thirlway notes in his treatise, "*opinio necessitates* in the early stages is sufficient to create a rule of law, but [the rule's] continued existence is dependent on subsequent practice accompanied by *opinio juris*, failing which the new-born rule will prove a sickly infant and fail to survive for long." H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 56 (1972). This necessary state practice has yet to occur.

311. See, e.g., Declaration of the Principles of International Co-operation, UNESCO's Standard-Setting Instruments (U.N. Economic, Scientific & Cultural Organization) IV.C.1 (Nov. 4, 1966) (proclaiming in Art. I.1 that "[e]ach culture has a dignity and value which must be respected and preserved").

312. Ominayak & Lubican Lake Band v. Canada, in *Annual Report of the Human Rights Committee 1990*, U.N. Doc. A/45/40, vol. II, app. A. (1990). The case is analyzed and discussed in Dominic McGoldrick, *Canadian Indians, Cultural Rights and the Human Rights Committee*, 40 INT'L & COMP. L.Q. 658 (1991).

Commission on Human Rights of the Organization of American States.<sup>313</sup> A closer analysis of the relevant decisions, however, shows that none of these tribunals relied on Article 27 as a binding source of obligations on a nonsignatory. Two of the three cases involved signatories of the ICCPR—Canada and Nicaragua—and therefore, any discussion of whether Article 27 constitutes customary international law in those decisions is pure dicta. In the case involving the Yanomami Indians of Brazil, the Inter-American Commission did not rely on Article 27 as much as it did on the obligations binding upon Brazil as a result of its own domestic legislation.<sup>314</sup>

However, whether Article 27 constitutes customary international law is in many ways subordinate to what the obligations imposed by Article 27 actually are. If there is merely a negative duty of noninterference with minority cultures, then Article 27 is only a narrow restatement of broader customary law. However, if Article 27 imposes a positive duty upon governments to protect and encourage minority cultures, then the issue becomes far more pressing.

The argument in favor of a “strong” interpretation of Article 27 is presented most forcefully by Francesco Capotorti, the Special Rapporteur to the Sub-Commission on Discrimination Against Minorities. He “adopts the positive interpretation of Article 27 by arguing that the Article *must* add something to the rest of the text in accordance with the principle of efficacy in the reading of international instruments.”<sup>315</sup> Since “[n]either the non-prohibition of the exercise of . . . [cultural rights] by persons belonging to minority groups nor the constitutional guarantees of freedom of expression and association are sufficient for the effective implementation of the right of members of minority groups” to preserve and develop their own culture,<sup>316</sup> Article 27 requires “active and sustained intervention by States.”<sup>317</sup>

Capotorti’s second argument is that Article 27 is closer in spirit to the rights set out in the International Covenant on Economic and Social Rights (“ICESCR”) than it is to those in the ICCPR. This distinction is important. Thornberry notes that “whereas civil and political rights require the State to refrain from certain types of action against individuals,

313. Yanomami Case, Case 7615, Inter-Am. C.H.R. 24, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985) [hereinafter Yanomami Case]; Inter-American Comm’n Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/ser. 4V/II.62, doc. 10 rev. 3 (1983); *Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/ser. L/VII.62, doc. 26 (1984).

314. See, e.g., Yanomami Case, *supra* note 313, at 27-31. At the same time, the Commission did clearly declare that, “for historical reasons and because of moral and humanitarian principles, special protection for indigenous peoples constitutes a sacred commitment of states.” The Commission elaborated:

International law in its present state, and as it is found clearly expressed in Article 27 of the International Covenant on Civil and Political Rights, recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.

*Id.* at 31.

315. THORNBERRY, *supra* note 218, at 7 (emphasis in original).

316. CAPOTORTI, *supra* note 203, Add. 2, para. 213.

317. *Id.* Add. 2, para. 217. Capotorti has also argued:

[The] *raison d’être* of Article 27 is the need to make, for the benefit of minorities, special provision which is capable of ensuring that they receive genuinely equal treatment compared with the other inhabitants of the State, and this calls for a number of specific protective measures over and above the treatment guaranteed, without distinction, to all. If the intention had been to restrict the protection of members of minorities to the enjoyment of certain freedoms, this would not have required a special clause.

Francesco Capotorti, *The Protection of Minorities Under Multilateral Agreements on Human Rights*, in *MINORITIES IN NATIONAL AND INTERNATIONAL LAWS* 218, 237 (Satish Chandra ed., 1985).

an expression of the *status negativus libertatis*, economic, social, and cultural rights require the State to act positively on behalf of the right holders."<sup>318</sup> Capotorti reasons:

[A]mong the rights referred to in Article 27, at least one goes beyond the range of civil and political rights; the right of members of minorities to enjoy their own culture in community with the other members of their group seems to be involved not merely with freedom of expression but rather more with the right to education and the right to take part in cultural life, which are provided for in under the Covenant on Economic, Social and Cultural Rights . . . It is, accordingly, clear that, at least in the field of culture, the States are under a duty to adopt specific measures to implement Article 27 in the same way as they are in the case of the provisions on cultural rights under the Covenant guaranteeing them.<sup>319</sup>

Capotorti's position does not recommend itself. To the extent that he relies on the similarity between cultural rights and the rights guaranteed in the ICESCR, Capotorti's argument suffers from the fatal flaw that Article 27 is found not in the Covenant on Economic, Social and Cultural Rights, but rather in the Covenant on Civil and Political Rights. Thornberry, who finds Capotorti's position "logical and literal," tries to gloss over this problem: "[T]he siting of a particular human rights norm in a 'civil and political rights' context does not completely determine the character of the obligation generated by it."<sup>320</sup> One may grant Thornberry that the situs of the article should not preclude any argument about the nature of the obligations under that article, but for Capotorti to then leverage the tenuous "familial" relationship between Article 27 and other cultural rights into affirmative state obligation is academic bootstrapping of a high order.

Further, the law is often very different from what it "ought" to be. As Tomuschat points out, "One may easily agree with . . . Capotorti[] that the negative formulation of Art. 27 'does not meet the requirements of the situation.' But this statement is just a maxim of legal policy which does not rest on fully reflected foundations."<sup>321</sup> Even if one admits that mandating that states take certain affirmative measures would best serve minorities, one must also admit that the protection of minorities is not the only criterion to examine. States are always protective of their sovereignty, and obligating them to take measures runs against the grain of international law, even in its post-World War II incarnation. And in a world of limited resources, such mandates remove states' ability to utilize their resources in other ways.<sup>322</sup> As the continuing debate in the United States over affirmative action demonstrates, there exists little consensus regarding the legal or moral validity of such solicitude for the rights of a minority .

318. THORNBERRY, *supra* note 206, at 181.

319. Capotorti, *supra* note 317, at 237.

320. THORNBERRY, *supra* note 206, at 181.

321. Christian Tomuschat, *Status of Minorities Under Article 27 of the U.N. Covenant on Civil and Political Rights, in MINORITIES IN NATIONAL AND INTERNATIONAL LAWS*, *supra* note 317, at 31, 49 (footnote omitted).

322. As Tomuschat explains:

Above all, one has to bear in mind that, as one of the components of the CCPR, Art. 27 is designed to find world-wide application. Thus, account has to be taken of the specific problems of Third World countries. As far as Africa is concerned, it has been reported, for instance, that in Nigeria not less than 250 native languages exist. It is simply unrealistic to assume that the competent public authorities could take affirmative action for the benefit of all those linguistic communities. On the other hand, there is no obstacle of any kind which would prevent authorities from tolerating the use of those languages and their manifold dialects. The same is true of the cultural life of the different communities. Stretching the scope of Art. 27 to encompass positive obligations could lead in the last analysis to an outright breakdown of its guiding value and hence to a total loss of credibility. Art. 27 will be more effective if it is restricted to a hard core of obligations easily to be complied with.

*Id.* at 49 (footnote omitted).

Capotorti's argument that Article 27 is unnecessary unless understood as mandating affirmative measures is also overstated. In one of its more famous cases, the short-lived Permanent Court of International Justice ("PCIJ") dealt with the issue of minority schools in Albania,<sup>323</sup> a signatory to one of the League of Nation's treaties protecting the rights of minorities. In 1933, Albania banned all private schools, including those run by ethnic minorities.<sup>324</sup> This measure had been challenged in the PCIJ as restricting minority rights, to which Albania had responded that it was only obligated not to discriminate against minorities; it was under no special duty to protect them.<sup>325</sup> The PCIJ disagreed, asserting two requirements for the protection of minorities:

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.<sup>326</sup>

While this particular section is often cited to show how the state is obligated to take particular measures, the actual judgment in the case is that a state may not take affirmative measures which have a disparate impact on minorities. This interpretation is the correct understanding of Article 27. Not only does it avoid the efficacy of interpretation problem raised by Capotorti, but it has the added benefit of comporting with the judgment of a number of scholars (as analyzed below) who have concluded that Article 27 does not impose affirmative obligations on states.

Finally, the curiously framed language of Article 27 itself most clearly presents the case against a "positive interpretation." In contrast to the vast majority of articles which use the mandatory "shall,"<sup>327</sup> Article 27 only states that individuals belonging to identifiable minorities "shall not be denied the right . . . to enjoy their culture." This negative language clearly contemplates a less demanding commitment.<sup>328</sup> Moreover, as several scholars have established, the negative formulation of Article 27 was chosen deliberately and with full knowledge of the kinds of inferences that would be drawn from such phraseology.<sup>329</sup> Tomuschat concludes that "it is difficult to see a convincing

323. *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64 (Apr. 6).

324. *Id.* at 13-14.

325. *Id.* at 15.

326. *Id.* at 17.

327. See, e.g., ICCPR, *supra* note 229, art. 6.1, 999 U.N.T.S. at 174 (mandating that no one be arbitrarily deprived of life); *id.* art. 7, 999 U.N.T.S. at 175 (prohibiting torture); *id.* art 8.1, 999 U.N.T.S. at 175 (prohibiting slavery).

328. Jacob Robinson, *International Protection of Minorities: A Global View*, 1 ISR. Y.B. HUM. RTS. 61, 89 (1971) (stating that Article 27 represents a "classic example of restrictive toleration of minorities").

329. THORNBERRY, *supra* note 206, at 179 ("The suggestion of a limitation on the State's obligations towards minorities is borne out to a large extent by the *travaux préparatoires*."); Tomuschat, *supra* note 321, at 48 ("It should be noted . . . that the negative formulation was chosen deliberately."). In the Third Committee of the General Assembly, the delegate of Mexico argued that the article should be drafted in a positive and not a negative way because it "was not sufficient that minorities should merely 'not be denied' certain rights; they should be given special protection since they often needed it." THORNBERRY, *supra* note 206, at 179 (quoting record of U.N. debates on Article 27). Moreover, "[t]he total drafting record of the Covenant reveals that suggestions and amendments more demanding of State action to support minorities were rejected." *Id.* For example, a proposal by the former USSR suggesting that "[t]he State shall insure to national minorities the right to use their native tongue and to possess their national schools, libraries, museums and other cultural and educational institutions" was rejected as placing too onerous a burden on states. *Report of the Ninth Session of the Commission on Human Rights*, U.N. ESCOR 16 Sess., Supp. No. 8, Annex III, at 55, U.N. Doc. E/CN.4/L.222 (1953), quoted in Tomuschat, *supra* note 321, at 48. A similar draft article presented by Yugoslavia was also withdrawn.



justification for given [sic] a broader construction to Art. 27 by requiring States to give positive assistance to minorities.<sup>330</sup>

Since Article 27 does not impose affirmative obligations upon states, the most one can argue is that it imposes a heightened duty of nondiscrimination on states, so that states may not take measures which would have a disproportionate impact on minorities. However, because negative rights are not relevant in this particular context, the search for a legal source to preserve the Kalash must move on to other grounds.

## B. Problems with the Nonlegal Arguments

### 1. The Restorative Paradigm

The obvious problem with the restorative paradigm is that it only works if one restricts the definition of indigenous peoples (as indeed some authors do) to “those groups colonized by Western or other settler states and who have lost their [external] sovereignty while maintaining a distinct cultural identity.”<sup>331</sup> This may be generally true of the indigenous peoples of the Americas, but as we have seen, it is not easy to make any colonizer/settler distinctions in the case of the Kalash. Indeed, history shows that the Kalash themselves are invaders. They originated in Central Asia, settled in Afghanistan, and only in the 14th and 15th centuries migrated to the areas they presently occupy. Moreover, it is not always easy to portray the Kalash as helpless victims. The lands that the Kalash occupied were not *terra nullius*, but populated by the Balalik, an indigenous people whom the Kalash subjugated and who eventually either died out or were exterminated. The Kalash also fought and briefly subjugated the other indigenous tribe of the area, the Kho of Chitral, before eventually succumbing to the Chitralis. It is true that the Kalash were subjects of the Chitrali Mehtars for many centuries, but it is also true that they managed to keep their identity and their culture alive during those centuries because the Mehtars protected them (for whatever reason) from other Muslims eager to convert them. In particular, had the Kalash not been subjects of the Mehtar, they too would have been forced to suffer the fate met by all the other Kafir tribes of the Hindukush; that is, during the Kafiristan campaign of 1896 they would have been either killed by Abdur Rahman’s troops or forced to convert to Islam.

From an analytical perspective, the restorative paradigm is merely a specialized version of the “first in time” rule of property ownership, which depends for its moral force upon a simple division into indigenous and settler, the oppressed and the oppressor.<sup>332</sup> It does

THORNBERRY, *supra* note 206, at 179.

330. Tomuschat, *supra* note 321, at 49; *see also* SIGLER, *supra* note 204, at 79 (“The Covenant represents a minimalist version of minority rights. Minority rights are not promoted by such a provision. Minorities are not given special economic, social, or political advantages, nor is their position made secure against majority culture, language, or religion.”); Antony Anghie, *Human Rights and Cultural Identity: New Hope for Ethnic Peace?*, 33 HARV. INT’L L.J. 341, 344 (1992) (“It is now established that Article 27 only requires the state to desist from interfering with minorities wishing to practice their own culture. The state is not legally obliged to actively support minority cultures.”); Dinstein, *supra* note 295, at 118 (“[Article 27 is] declaratory in nature and reflects a minimum of rights recognized by customary international law. The fundamental concept, once more, is that of prevention of forced assimilation (a ‘melting-pot’) and preservation of the separate identity of the minority.”); Joseph B. Kelly, *National Minorities in International Law*, 3 DENV. J. INT’L L. & POL’Y 253, 270 (1973) (“At the most, international law currently gives minority groups the right to be tolerated.”).

331. Suagee, *supra* note 255, at 680 n.22 (quoting Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660, 663 n.4).

332. Nettheim, *supra* note 264, at 112-13.

not provide a generally applicable rationale of why cultural identity must be upheld by a state. I do not mean to diminish the tragedy of the indigenous groups of the Americas as a result of the "discovery" of the New World, but one cannot draw such categorical conclusions in all cases, as can be seen by examining the convoluted history of the Kalash.

One possible retort to this criticism is that peoples such as the Kalash are not "indigenous," but rather "tribal," and that only those peoples are "indigenous" who have been colonized by Western nations. However, that would only prove that indigenous rights as currently conceptualized do not protect the value of cultural preservation as universally applicable. Instead, indigenous rights would only be a subset of the ever-increasing phenomenon of "victim's rights." Moreover, indigenous rights are claims for the preservation of a distinct people, and it seems specious to decide whether a particular people should survive or perish based upon its historical background. Historical inequities may provide a rationale as to why a particular group of people deserve to be given special treatment, but that rationale is completely separate from whether indigenous peoples have a right to preserve their cultural identity.

Indeed, international practice certainly has not much distinguished between "indigenous" and "tribal" peoples. ILO Convention No. 169 applies to both "indigenous" and "tribal" peoples and sees their problems as sufficiently alike to demand the same solutions. In fact, the definition of "indigenous" used in Convention No. 169 was specifically amended to include groups like the Sami of Lapland who did not qualify otherwise as indigenous peoples.<sup>333</sup> The same broad approach underlies the most generally accepted definition of indigenous peoples, that given in the Cobo Report:

[T]hose which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>334</sup>

According to one author who cites the Cobo study as an authoritative definition, the category of indigenous peoples "is generally understood to include not only the native tribes of the American continents but also other culturally distinctive non-state groupings, such as the Australian aboriginal communities and tribal peoples of southern Asia, that similarly are threatened by the legacies of colonialism."<sup>335</sup> And as another author notes, "The best evidence of this distinct cultural identity results from indigenous peoples identifying themselves as such."<sup>336</sup>

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333. Barsh, *supra* note 269, at 217. Convention No. 169 has also been applied in practice to tribal peoples in India despite the contention by the Indian government that the Convention only applied to people who could show possession of the land from time immemorial. *Id.* at 212.

334. JOSÉ R.M. COBO, UNESCO, COMM'N ON HUMAN RIGHTS, SUB-COMM'N ON PREVENTION OF DISCRIMINATION & PROTECTION OF MINORITIES, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, U.N. DOC. E/CN.4/SUB.2/1986/7/ADD.4 ¶ 379 (1983).

335. Anaya, *supra* note 250, at 4.

336. Williams, *supra*, note 331, at 663 n.4.

## 2. The Comparative Paradigm

With respect to the comparative paradigm, the Kalash may live in miserable conditions—poverty, illiteracy, and little health care—but they are certainly no worse off than most Pakistanis. More particularly, it is impossible to distinguish the Kalash, in terms of their standard of living, from any of the other inhabitants of the general area which they occupy.<sup>337</sup> Pakistan, by any measure, is poor. Moreover, it is a country that due to political constraints spends 40% of its budget on military defense and only 3% on education and health programs combined.<sup>338</sup> It goes without saying that Pakistan would be a far better place if those percentages were reversed, and indeed it is coming under increasing pressure from international lenders to change its spending habits.<sup>339</sup> Leaving political observations aside, Pakistan indisputably has no shortage of people whose living standards need to be improved, and at least as far as objectively quantifiable living conditions are concerned, one cannot argue that the Kalash are any more economically or socially disadvantaged than a large percentage of Pakistan's population. Moreover, there are as many Kalash who have converted to Islam as there are Kalash who continue to follow their traditional customs. Is it really justifiable for one group of people to receive government aid while another is excluded solely because of their religion? This is not merely a hypothetical issue. Over 68% of institutional loans given in the Kalash valleys were made to the Kalash even though Muslims outnumber Kalash in the valleys.<sup>340</sup>

## 3. Other Problems Inherent in the Indigenous Rights Norm

The inability of the Kalash (or of other indigenous groups) to adapt to the demands of modern life is not unique to the Kalash: Cultures change and mutate every day. For example, there is much concern in the United States about the gradual demise of small-town life in the Midwestern states. There, as elsewhere, communities and a way of life which had survived for hundreds of years are now disappearing in response to the pressures of modernity. All cultures change, many of them in ways that people of a culture do not prefer. But “[c]ultural change and assimilation are, of course, inevitable processes in human history. It is not necessary to list examples of vanished cultures to understand this fact. International law, like municipal law, cannot attempt, Canute-like, to roll back the tide of cultural development.”<sup>341</sup>

Even if Pakistan had unlimited resources to spend on protecting the cultural integrity of the Kalash, is this necessarily a good idea? The Kalash discriminate heavily against women and, indeed, consider them to be ritually impure; women exist as instruments of glory for the male members of the tribe. They are not allowed any positions of social

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337. See, e.g., KHAN & KHAN, *supra* note 100, at 16-20 (reporting statistical analysis of general demographic characteristics of Gilgit, Chitral, and Baltistan).

338. Amja Waheed, *Deteriorating Economic Conditions of Pakistan*, ECON. REV., Feb. 1993, at 11, available in LEXIS, NEWS Library, ARCNWS File.

339. Shada Islam, *Supply and Demands: Donors Keep the Pressure on South Asia*, FAR EASTERN ECON. REV., May 11, 1995, at 69, available in WESTLAW, All News Plus Database; Alistair Lyon, *World Bank: Pakistan Faces Massive Challenges*, J. COM., May 23, 1995, available in WESTLAW, All News Plus Database.

340. ALAUDDIN, *supra* note 76, at 106.

341. THORNBERRY, *supra* note 206, at 141.

power, nor are they allowed to have any say in political, legal, or religious affairs. As a result, their educational opportunities are severely restricted.

However, identifying those aspects of Kalash culture that do not accord with our "enlightened" conception of human rights leads down a slippery slope. Cultural relativists aside, most people would agree that the position of women in the Kalash culture ought to change. But if we judge their gender relations, can we not also judge their religious choices? Is it not possible to argue that it is actually in the best interests of the Kalash to be converted to Islam? States make judgments about what the appropriate models of social organization are all the time. In Pakistan, for example, the Ayub government passed a law in 1961 which liberalized divorce requirements and made it much easier for women to divorce men. Most scholars applaud this measure, but the perennial threat by Islamic fundamentalists to repeal this law causes much concern.<sup>342</sup> However, if it is not only possible but laudable for Pakistan to give Muslim women rights that do not accord with orthodox Islamic law, should not Kalash women also be given rights not in accordance with Kalash practices?

On the other hand, it appears incongruous that the international community should accept a distinct people's disappearance with equanimity and yet still be roused to fury by the disappearance of a particular species of animal or a patch of rainforest. Is there not something wrong if we conclude that the Kalash would have more of a right to preservation if they were a particular species of mountain goat? For example, the hunting of the houbara bustard, a rare endangered bird species favored for target practice by Arab sheiks, is a *cause celebre* among environmentalists in Pakistan who argue vehemently and loudly that the species must be preserved even if it alienates the extremely wealthy oil sheiks who come to hunt it.<sup>343</sup> So, if preservation of bird species is an imperative, then why not that of human species?

Loude and Lievre respond that "[t]he importance of the Kalash resides not in their numbers . . . but in their fidelity to a mode of thought which, if more thoroughly understood, should throw light upon the zones of obscurity that still becloud much of our knowledge of ancient India."<sup>344</sup> Similar arguments, in fact, are constantly being made on behalf of indigenous peoples whose survival is seen as essential to the preservation of the environment in their areas.<sup>345</sup> Such arguments, however, fail for two reasons: First, understanding the development of Sanskrit is hardly the most pressing concern, and with all due respect to the Kalash, anthropological study of their rituals is not likely to produce the equivalent of a cure for cancer. Second, and more importantly, to view the Kalash as just another resource for the scientific world is to demean their dignity and to deny them

342. See, e.g., WOMEN OF PAKISTAN: TWO STEPS FORWARD, ONE STEP BACK? 57-60, 105 (Khawar Mumtaz & Farida Shaheed eds., 1987).

343. Mary A. Weaver, *Our Far Flung Correspondents: Hunting with the Sheikhs*, NEW YORKER, Dec. 14, 1992, at 51.

344. LOUDE & LIEVRE, *supra* note 3, at 6.

345. Consider, for example, the statement made by Austrian President Alois Mock who remarked at the World Conference on Human Rights: "We know that the indigenous peoples who live in the most fragile environments of our world, possess the key for future survival." *Mme. Rigoberta Menchu Tum Propose la Creation D'un Haut Commissariat Pour les Populations Autochtones*, U.N. PRESS RELEASE, No. DH/V/406 (U.N., New York, NY), June 21, 1993, at 2, quoted in Barsh, *supra* note 282, at 44 n.44; see also Hitchcock, *supra* note 265, at 14-20 (discussing interrelationship between protection of indigenous peoples and protection of the environment); Thomas S. O'Connor, Comment, "We Are Part of Nature": *Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 193, 203 (1994) (noting that recent recognition of indigenous rights is tied to awareness "by outsiders of the enormous wealth of knowledge possessed by indigenous peoples about their environment; knowledge that is lost when their cultures, languages, and ways of life are destroyed").

their innate humanity. Human beings are not rats in a laboratory experiment, to be protected when desirable and to be discarded when useless. The "last thing we need is a law of indigenous peoples' human rights that romanticizes indigenous peoples and situates them permanently in a primitive subsistence state as guardians of the rainforest."<sup>346</sup>

Logically, such thinking leads us nowhere. How many Kalash do we actually need to preserve in order to keep their scientific value intact? Assuming their culture can be definitively and exhaustively catalogued, would they then be no longer worth saving? These questions have no proper answers because the premises underlying them are fundamentally misguided. If the Kalash deserve protection, it must be because they—as a people—have a collective fundamental right to continued existence, and not because they are possibly rewarding subjects of scientific inquiry.

#### V. A NEW APPROACH

The difficulty in formulating a convincing rationale for the preservation of the Kalash arises from the fact that all of these theories about the rights of indigenous peoples are essentially products of an individual-centered jurisprudence. Though valid in many contexts, these theories have significant limitations when it comes to determining, in the abstract, the right of a distinctive community to continue to exist as a particular unit of human interaction. For such a theory to be formulated, it must perforce deal with the rights of a community as a community, and not just with the rights of individuals who are members of that community.

However, international law recognizes only two collective rights: The right to physical existence and the right to self-determination, neither of which, as currently understood, are of any help. The solution lies in expanding and reorienting our understanding of the concept of self-determination so that it is understood not only as the right of a people, but also as the duty of a state with respect to a particular people.

The right to self-determination has unfortunately always been presented in somewhat absolutist terms. Either an ethnic group is a "people," in which case it has the right to a sovereign state with all its attendant benefits and burdens, or alternatively, there is absolutely no recognition of the distinctive nature of its culture. Since the principle of self-determination, if followed to its logical extreme, would lead to a never-ending balkanization of existing states, the principle of self-determination is countered in international law with the principle of the territorial inviolability of states. This has led, as one author has put it, to a "semantic blockage", that is, a situation where it is impossible to give any meanings to the operative terms involved that retain some resemblance to ordinary usage and at the same time leave the norms mutually consistent."<sup>347</sup>

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346. Robert A. Williams, Jr., *Discussant for the Session: "Human Behavior and Global Change"*, 9 ARIZ. J. INT'L & COMP. L. 199, 202 (1992). A more elaborate critique of the portrayal of indigenous peoples in the international legal literature is presented by Chris Tennant who argues that "the figure of the noble primitive, by locating a utopian alternative to modernity, supports critiques of the modern relationship with the environment, of modern individualism and alienation, and of the contemporary global order." Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993*, 16 HUM. RTS. Q. 1, 10-11 (1994).

347. David Makinson, *Rights of Peoples: Point of View of a Logician*, in THE RIGHTS OF PEOPLES, *supra* note 208, at 69, 82.

One attempt to clear this blockage has been to identify certain objective standards which can be used to distinguish peoples worthy of self-determination from those who are not. Clinebell and Thomson, for example, defined the minimum requirements for statehood as including a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other States.<sup>348</sup> However, even by these standards, there is no basis for arguing that the right to self-determination could have any conceivable impact on the situation of the Kalash. Not only are they far too small a group, but they are a minority even within the three valleys that they now inhabit.

Generally speaking, the effort to identify objective factors which would differentiate peoples worthy of statehood from others who are not has met with disfavor. As one author explains, "Characterizing the right to self-determination in such an absolute way may be counterproductive because doing so gets in the way of fashioning real-world arrangements to ensure the survival of indigenous peoples."<sup>349</sup> Some scholars therefore argue that self-determination is of questionable relevance outside the context of decolonization,<sup>350</sup> and one author goes so far as to say that "it is time for international lawyers to bite the bullet and say that the era of self-determination, insofar as it implies that independence is at stake, is over."<sup>351</sup>

A second attempt out of the "semantic blockage" has been to "radically weaken[] the force of the notion of self-determination so that it covers any form of devolution or partial autonomy" in order to permit "a corresponding widening of the notion of a people to cover a very broad range of collectivities."<sup>352</sup> Thus, "[s]elf-determination can take a variety of forms along a spectrum from autonomy in particular subject matters such as cultural concerns, to full political autonomy, in which indigenous populations establish their own governments, design their own political systems, and enforce their own laws."<sup>353</sup> This notion has also been endorsed by indigenous advocacy groups, one of which made the following statement:

"[W]e define our rights in terms of self-determination. We are not looking to dismember your States and you know it. But we do insist on the right to control our territories, our resources, the organisation of our societies, our own decision-making institutions, and the maintenance of our own cultures and ways of life."<sup>354</sup>

In itself, the emphasis on self-determination for indigenous peoples is not new. However, the right to self-determination has more commonly been seen as stemming from "principles of self-government such as those embodied in the American Declaration of Independence and the French Declarations of the Rights of Man and of the Citizen."<sup>355</sup> As such, the right to self-determination, no matter how broadly construed, has always been interpreted as referring to the form or process of political decisionmaking.<sup>356</sup> Thus,

348. Clinebell & Thomson, *supra* note 225, at 673-76.

349. Suagee, *supra* note 255, at 692.

350. Lawrey, *supra* note 247, at 707 ("One collective right is that of all individuals to self-determination, but its application outside the context of decolonization remains highly problematic, with no accepted application to indigenous peoples." (footnote omitted)).

351. Hannum, *supra* note 202, at 1457.

352. Makinson, *supra* note 347, at 82.

353. Torres, *supra* note 226, at 142.

354. Anaya, *supra* note 196, at 219 n.121 (quoting statement made during the 75th Session of the International Labour Conference in Geneva by a representative of the National Coalition of Aboriginal Organisations).

355. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 179 (1991).

356. See, e.g., Anaya, *supra* note 265, at 326 (distinguishing between the constitutive and ongoing aspects of self-determination); Suagee, *supra* note 255, at 692-93 (discussing internal and external self-determination).

even in the context of the Draft Declaration of Indigenous Rights, self-determination is seen as concerning “(1) the right to participate in the development of national indigenous policies; (2) the right of indigenous communities to determine the structure and character of their own institutions; and (3) the right of indigenous peoples to run their own internal affairs.”<sup>357</sup>

The proposal here though is to look at the right to self-determination not just from the perspective of to what “peoples” are entitled, but in light of Hohfeld’s observation that “one person’s right must mean another person’s duty.”<sup>358</sup> The question is who has the duty to provide the right to self-determination. In a classical context, this “duty” is basically the obligation of the colonial state to dismember itself. However, widening the concept of self-determination in turn widens the scope of state obligations to protect the right of self-determination by granting some limited degree of autonomy to parties deserving it. The right to self-determination envisioned here, at an irreducible minimum, encompasses both the right of all ethnic and indigenous communities to continue to exist, in Anaya’s words, as “distinct units of human interaction,”<sup>359</sup> and the duty of host states to protect that distinct status.

Though international law cannot attempt to freeze the process of cultural change, “it can attempt to locate processes of change in the general context of human rights, so that members of groups can play a part in the development of their heritage and choose the basis on which their culture can adapt to the world.”<sup>360</sup> Recognition of this right imposes a duty on the state to accommodate and preserve particular communities. Even if a community is too small to demand realistically even the most limited degree of partial autonomy, the right to self-determination—that is, the right of a community to choose the basis on which its culture changes—must still be preserved and exercised on its behalf by the host state as part of its obligations to that community.

This theory of collective rights has the added benefit of being compatible with the general political context of Pakistan. As noted earlier, Pakistan’s population is dominated by four major ethnic groups and, politically, Pakistan is a federation consisting of four states, each in turn dominated by one of four major ethnic groups (the Punjabis in the Punjab, the Sindhis in Sindh, the Baluchis in Baluchistan, and the Pushtuns in the North West Frontier Province), and each group is in a position to control its cultural development through its democratically elected legislature. Whatever direction the culture takes, it is supposedly determined by the people. Members of indigenous groups like the Kalash do not have similar control over their destiny. As William Kymlicka notes with respect to Canadian indigenous groups:

The point isn’t that aboriginal people care more about cultural community than others. We all care about the fate of our cultural community . . . . Aboriginal fears about the

357. Lawrey, *supra* note 247, at 765-66 (citing UNITED NATIONS, WORKING GROUP ON INDIGENOUS POPULATIONS, DISCRIMINATION AGAINST INDIGENOUS PEOPLES: FIRST REVISED TEXT OF THE DRAFT UNIVERSAL DECLARATION ON RIGHTS OF INDIGENOUS PEOPLES, at 4-8, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989)).

358. Crawford, *supra* note 227, at 55. The idea of obligating the state with respect to indigenous populations is not new. In fact, a 1988 U.N. report noted: “What indigenous self-determination requires is the recognition of a duty by States to make structural accommodations and to secure entitlements for the indigenous peoples within their borders in order that each may continue its unique existence according to its desires.” DISCRIMINATION AGAINST INDIGENOUS PEOPLES: ANALYTICAL COMPILATION OF OBSERVATIONS AND COMMENTS RECEIVED PURSUANT TO SUB-COMMISSION RESOLUTION 1988/18, at 14, U.N. Doc. E/CN.4/sub.2/33/Add.1 (1989), *quoted in* Lawrey, *supra* note 247, at 763 n.345. Self-determination, by its very nature as a right, obligates states to make structural adjustments.

359. Anaya, *supra* note 196, at 219.

360. THORNBERRY, *supra* note 206, at 141.

fate of their cultural structure, however, are not paranoia—there are real threats. The English and French in Canada rarely have to worry about the fate of their cultural structure. They get for free what aboriginal peoples have to pay for; security of their cultural structure. That is an important inequality, and if it is ignored, it becomes an important injustice.<sup>361</sup>

The question then becomes whether this theory of community entitlements fares any better than an individual entitlements model. In other words, is it fair under this analysis to extend preferential economic treatment to one particular group and not to others? The short answer is yes. There is no other group of people in Pakistan whose identity is in as much danger as that of the Kalash. As for other groups which seek cultural security, political discourse in Pakistan with respect to the rights of many such groups has always tended to focus on their right to political autonomy. There is thus a long-standing demand by the inhabitants of the southern Punjab that a separate Seraiki-speaking province be established, and more recently the Mohajir community has been advocating the division of Sindh so as to gain a zone of political autonomy. Additionally, most of the minor ethnic groups, such as the Wakhi, the Swatis, the Hunzakuts, and the Baltis, are all located in northern parts of Pakistan. Until recently, the federal bureaucracy governed this area directly. However, in April, 1994, the Bhutto government established a legislative council that allowed residents of the area to govern themselves. To the extent that these residents feel that their cultural integrity is threatened, their communities have been politically empowered to protect themselves. The Kalash do not, and realistically cannot, have this degree of empowerment. The state must therefore preserve their right of distinct communal existence for them.

Of course, merely acknowledging the right of communities to continue as distinct units of human interaction does not untangle many of the very complicated issues implicated by the situation of the Kalash. This Article does not answer what the proper balance between the competing priorities of cultural preservation and individual human rights ought to be. Other problems arise from the inherent ambiguity in the concept of a "people." It is far easier to bestow rights upon peoples or communities than to decide precisely which individuals are part of that collectivity. For example, should the government of Pakistan restrict its affirmative measures to the Kalash who are still pagan, or should it also include recent converts within its scope? Finally, what does it mean to preserve a community's distinct identity? Are the Kalash to be kept like flies encased in amber, or should they be exposed to the outside world, and if so, to what degree? This Article does not—and is not intended to—supply the answers to these and many other questions. The aim here is to clarify the issues and the competing priorities at stake so that the debate over the rights of indigenous peoples can go beyond accusations against the West.

#### CONCLUSION

The continued survival of the Kalash obviously depends on considerations very different from those discussed in this Article. One such consideration is visible in the recognition that "the unique Kalash people are a foreign exchange resource of the country. Nothing in Pakistan, not even the Khyber, holds the fascination for the Western

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361. Will Kymlicka, *Liberalism, Individualism, and Minority Rights*, in *LAW AND THE COMMUNITY* 181, 198 (Allan C. Hutchinson & Leslie J.M. Green eds., 1989).



or the Japanese tourist as the Kalash Kafirs.”<sup>362</sup> At the same time, intolerance is now at a higher level than ever in Pakistan, and it remains to be seen whether the desire of the federal government to preserve this “valuable source of foreign exchange” outweighs its fear of Islamic fundamentalists seeking to strike yet another blow for bigotry. Certainly, history is not with the Kalash.

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362. Durrani, *supra* note 148, at 283.