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Non-Territorial Autonomy, Multiple Cultures and the Politics of Stateless Nations

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Sovereignty, Identity, and Change in International Norms: A Reconceptualisation of National Self-determination as Non-Territorial Autonomy

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In this paper I first present a succinct (but hopefully comprehensive) picture of the existing definitions of the notions of "sovereignty" and of "self-determination" as they are used in politics and in law. I draw on the historical background of international relations to see how self-determination has developed as a human right in time, illustrating the legal sources that exist on the matter ('who' is entitled to determine 'what'?). I then attempt to draw a theoretical re-conceptualization of the concept based on a contextual approach in which history, jurisprudence and IR are employed to try to understand this challenging and ever compelling topic, and take a stab at widening the current debate by suggesting that the so-called right to Internal Self-Determination, and particularly Non Territorial Autonomy can, and should, be interpreted as a human right. Such cultural and group rights not only need not be in conflict with national sovereignty, but, quite to the opposite, should be regarded as one of the state's foundational cornerstones.

> "There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until present day, has never had a meaning which was universally agreed upon."[1]

Concepts and definitions: a theoretical assessment

Self-determination, sovereignty, the role of communities and states, and the question of boundaries have always been at the center of international relations—but possibly even more so in the last quarter of a century: in no other time as in the aftermath of the Cold War have there been more struggles, debates and conflicts revolving around the assertion of what has been defined by the Association of Humanitarian Lawyers as "an individual and collective right to freely determine political status and [to] freely pursue [...] economic, social and cultural development."[2]

The 20th century has witnessed the creation (or emergence, depending on whether the phenomenon is seen as driven by conscious activity or unwilled occurrences) of an unprecedented number of new countries. Virtually every country celebrates an "independence" or "national" day, and an overwhelming majority of countries deploys a

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[1] Lassa Oppenheim, *International Law* 66, Sir Arnold D. McNair ed., 4th ed. 1928.

[2] Karen Parker, "Understanding Self-Determination: The Basics", Presentation to the First International Conference on the Right to Self-Determination, United Nations, Geneva, August 2000.

considerable amount of resources to seek recognition by other countries (by establishing embassies, diplomatic relations etc.) and participate to international organizations such as the United Nations[3]. Almost every year the United Nations admits new members.

UN membership, however, is conditional upon the precondition of statehood[4], but what this entails is less than obvious – particularly because it is the very admission to the UN, or to one or more of its specialized agencies, that, according to the UN Secretariat, formally acknowledges a State as a State, from the point of view of the international community: "those States became members of specialized agencies, and as such were in essence recognized as States by the international community."[5] On the other hand, a population might have a shared culture, a government, institutions, a thriving economy, a currency, even formal membership to economic international bodies such as the International Monetary Fund (IMF) and the World Trade Organization (WTO) – Taiwan and Hong Kong, even though they are two very different cases, are a case in point – and still have no 'formal' recognition, thus no international status. Since the lack of recognition by the international community[6] prevents an entity (or 'nation') from signing treaties, waging wars, establishing diplomatic relations – in short, it bans it from international existence– most nationalisms are founded on the political principle that the political and the national unit should be congruent[7]: in Motyl's words, nationalism is a political ideal (or a belief system) that views statehood as the optimal form of political existence for each nation[8].

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[3] In this paper the terms 'country' and 'state' are used interchangeably. The term 'United Nations' might instead, ironically, be misleading, as it is, in fact, a congregation of states (or countries), and not of nations.

[4] Art. 4.1 of the United Nations charter recites: "Membership in the United Nations is open to all peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

[5] See the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc. ST/LEG/7/Rev.1, 1999. A number of objections can be (and have been) raised in regard to the UN's membership admission policy: both Ukraine and Belarus were among the 51 founding countries of the UN Charter in 1945, despite the fact of being administrative subunits of the USSR at the time, and Namibia was admitted to the ILO while still occupied by South Africa in 1978.

[6] International legal sovereignty, differently from domestic sovereignty or interdependence sovereignty, deals with the issues of authority and legitimacy, but not with that of control over its territory. Somalia, for instance, might retain little control over large parts of its land and population, but remains nonetheless an internationally recognized country, and, while it might be considered to be a 'weak state' or even a 'failed state' at the domestic level, it is not losing any bit of its international and diplomatic 'stateness'. For the sake of convenience, I will generally use whether a country is represented or not in the international organization of the United Nations to assess its recognition by the international community.

[7] Ernest Gellner, *Nations and Nationalism* (Oxford: Blackwell Publishing, 2006), p. 1.

[8] Alexander J. Motyl, *Revolutions, Nations, Empires: conceptual limits and theoretical possibilities* (New York:

Classifying a given nation as a "country" or "state" is thus not only an academic exercise. It has moral implications, as there is an agreement in most of the contemporary world that, whatever it means, statehood is a normatively preferable condition. This classification also has practical consequences, as nowadays the international system makes the availability of significant benefits contingent upon an assessment of an entity's condition as a 'nation-state.'[9]

Moreover, of the 134 conflicts that are currently taking place, 127 are intrastate conflicts, the majority of which are conducted in the name of some variation of nationalism and/or of claim to self-determination[10]. The near disappearance (or at least the decreased probability) of interstate wars, and the rise of "war amongst the people,"[11] mark a paradigm shift in the approach to the understanding of conflicts, and call for a reflection on who the actors of these conflicts (the "people" which seek to usurp state prerogatives by elections, violence, ideological persuasion or political compromise) are. Why do non-state actors want so badly to acquire state attributes?

John Breully's answer to this question would be that the conquest of national sovereignty – and the recognition of sovereignty by other states– equals to political power. In Breully's opinion, nationalism is, above and beyond all else, about politics, and politics is about power. Because he sees power as being, first and foremost, about the control of the state, the focus of his most important work, *Nationalism and the State*, is concerned with relating nationalism to the objects of obtaining and using state power[12]. While the statement that power is the sole currency of politics is questionable, *Nationalism and the State* makes an important point in identifying nations' aspirations to statehood as the quest for *legitimate* power. The term 'legitimate', in this context, has little or nothing to do with a country's form

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Columbia University Press, 1999), p.79.

[9] The terminology, in this paragraph, is borrowed from Guillermo O'Donnell's definition of democracy in Introduction in *Democratic theory and comparative politics* (Notre Dame, Indiana: University of Notre Dame Press, 2000), p. 5.

[10] See www.un.org for a list of ongoing armed conflicts.

[11] This term was coined by two European general officers, General Rupert Smith (United Kingdom) and General Vincent Desportes (France). For an analysis of how the strategic level, operational level and tactic level are changing in contemporary conflicts as opposed to classic interstate ones, see Stéphane Dosse, "The Rise of Intrastate Wars: New Threats and New Methods," in *Small Wars Journal* , August 25, 2010.

[12] John Breully, *Nationalism and the State* (Chicago: The University of Chicago Press, second edition, 1993).

of government or democratic institutions[13], but everything to do with a pragmatic approach to authority. In practice, while it is quite possible for states that have already been recognized as such to retain their international legal sovereignty (their formal juridical independence) even when they lose their domestic sovereignty (the formal organization of political authority within the state, coupled with the ability of public authorities to exercise effective control within the borders of their own polity)[14] –meaning that a breakdown in governance does not negate statehood– the same reasoning does not apply the other way around: obtaining control over a certain territory and population is often not sufficient to enter in relations with other states, and maintaining such power becomes an extremely problematic and risky business, when such authority is not 'protected' by the legitimacy of statehood. In the words of one United States Supreme Court decision, "Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another one within its own territory."[15] Which is to say, on the flip side, that it is quite acceptable for any government to interfere with the internal affairs of an entity which is not a "sovereign state."

Legitimacy, as noted by Allen Buchanan, has both a normative and a sociological meaning[16]. To say that an institution is legitimate in the normative sense is to assert that it has the right to rule (even though the ruling might not be in accordance with the best interests of everyone who is subject to its rule)[17], and it represents one of the core, if relatively recent, principles of international relations, that of state sovereignty.

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[13] For the purpose of analyzing the question of sovereignty and of self-determination, Samuel Huntington's consideration that "The most important political distinction among countries concerns not their form of government but their degree of government " seems to be quite appropriate. See Samuel Huntington, *Political Order in Changing Societies* (New Haven and London: Yale University Press, 1968), p. 1. Emphasis added.

[14] As noted above, certain states as The Democratic Republic of the Congo, or Somalia, for instance, or often referred to as 'failed states,' but the fact of having serious issues in maintaining what is still considered to be the main feature of a state, the monopoly of force, has not undermined their statehood in international forums.

[15] The case is Underhill vs. Fernandez , quoted in Stephen D. Krasner, *Power, the state, and sovereignty: essays on international relations* (New York: Routledge, 2009), p. 196.

[16] See Stephen D. Krasner, *Power, the state, and sovereignty: essays on international relations* (New York: Routledge, 2009), pp.179-220. The birth of state sovereignty is generally linked to the 1648 peace of Wesphalia treaties, but the prominence of the nation-state did not really take over the concept of empires until the end of World War I.

[17] Allen Buchanan, *Human Rights, Legitimacy, and the Use of Force* (New York: Oxford University Press, 2010), p. 105.

As said, self-determination, sovereignty, and nationalism are increasingly important concepts in international law, human rights debates, and policy-making. In the study of the politics of 'stateless nations' nationalism and statehood are particularly important and powerful notions: the nation, it has been said, is not only one self-categorization among others, but essentially a form of "how category is categorized"[18].

Eric Hobsbawm, Ernest Gellner, Benedict Anderson and the constructivist school they inspired claim that, talking about nations, the emphasis should be put on psychological perceptions, rather than on tangible 'external' attributes (such as racial characteristics). As opposed to states' tendencies to resist anything that seems to diminish their control over a given territory, this perspective raises the idea of collective identity as socially constructed—of having the conscious conviction of belonging to what Benedict Anderson calls an "imagined community"[19]—and raises a threefold question: what is distinctive about nation-states, and how did nationalism come about as a factor "whose force in shaping and reshaping the modern world is so obvious, and which yet remains obdurately alien and incomprehensible to those who are not possessed by it"[20]? Does a minority that is ethnically and culturally homogeneous necessarily favor secessionist movements, and what alternatives are there for minorities to the redrawing of territorial borders? What are the most significant variables to be taken into account in this regard—does it depend on each singular case or is there a lowest common denominator that can be regarded as a precondition for a people's claim to external self-determination as opposed to NTA?

Alexander Motyl, in his exploration of the origins, reproduction and effects of nationalism, describes national identity as a set of beliefs that a group of people hold to be true about themselves. Such knowledge claims (the particular way in which people see themselves,

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[18] Michael Billig, *Banal Nationalism* (London: SAGE Publications, 1995), p. 68. On a similar note, About twenty years ago Ruggie argued that the modern system of states, as it has developed in the 19th and 20th century, existed on a deeper and more extended temporal plane than the world's "time" order—a concept of 'fluidity' involving "attributes that structure expectations and imbue daily events with meaning for the members of any given social collectivity". Thus the remaking of the modern system of states, compared to that of eras as attributes *of a time*, "involves a shift not in the play of power politics but of the stage on which that play is performed".

[19] Benedict Anderson, *Imagined Communities* (New York: Verso, revised edition, 1991).

[20] R.I Moore, Editor's preface to the first edition, in Ernest Gellner, *Nations and Nationalism* (Oxford: Blackwell Publishing, 2006), p. x.

that Motyl refers to as "national propositions") do not need, in this author's view, to be put forward by elites, but rather they evolve from the ontological and epistemological claims (the "lifeworld propositions") that a group of people share in order to see themselves in a particular way, say, as having or as not having an identity[21]: if national identity consists of knowledge claims in a form of belief construction, and a nation is a group of people who hold certain propositions about themselves to be true, lifeworld is the sum total of everything that makes a people a nation— not just traditions and historicity, but also beliefs, assumptions, theories, customs, legends, songs, stories, dances, jokes, superstitions, prejudices, tastes, attitudes. However, as deeply rooted as these 'building blocks' of nationalism might be, and whether or not political elites play a role in shaping a sense of nationhood related to statehood, we cannot ignore that about one third of the countries that are currently on the map are less than fifty years old, and that most of them are multi-national, multi-ethnic states. We can thus agree with Raphael Chijioke Njoku in concluding that ethnic, as well as political identities are fluid, and that sharp differences can emerge at every level of societal organization—among kinship, ethnic, and national communities as well[22]. But what, then, is the theoretical significance of the terms 'nation' and 'nationalism'? Are they still useful terms to explain a political issue or are they only a rhetorical tool used for populist purposes?

According not only to the 'constructivist' school, but also to Elie Kedourie (who traces the origins of nationalism to Immanuel Kant's notion of will and self-determination[23]) and Motyl (who systematically tries to disprove all existing approaches to nationalism, be it primordialist[24] or constructivist[25]), one minimum common denominator that all scholars agree a nation must hold, in order to be a nation, is "a group of people who believe in two

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[21] Alexander Motyl, *Revolutions, Nations, Empires. Conceptual Limits and Theoretical Possibilities* (New York: Columbia University Press, 1999), p. 73.

[22] Raphael Chijioke Njoku, "Nationalism, Separatism, and Neoliberal Globalism. A Review of Africa and the Quest for Self-Determination since the 1940s" in Don H. Doyle Ed., *Secession as an International Phenomenon* (Georgia: edited by Don H. Doyle, University of Georgia press, 2010), p. 340.

[23] Brendan O'Leary, "In Praise of Empires Past. Myths and Method of Kedourie's 'Nationalism'" in *the New Left Review* No. 18, Nov-Dec 2002.

[24] According to primordialism, nations are temporally transcendent human communities with immutable properties immanent in life itself.

[25] According to constructivism, nations and national identity are invented or imagined: in either case, they are artificial constructs put forward by elites, and therefore contemporary and malleable.

things: that their group, as a group, has a place in history[26], and that their group differs from other existing groups in ways other than historicity."[27] But if 'people' is neither an ethnic concept, nor strictly a population of a geographical region traceable to a territorial unit, then self-determination requires for more than merely making decisions or electing those who make decisions. As Motyl puts it, nationalism, obviously, is about nations, but it is about much more than that: the practice of self-governance requires that a people have the shared belief that they are engaged in the process of governing themselves. Ultimately, self-determination is about the authorship of decisions, as it marks the difference between making particular decisions and recognizing particular decisions as one's own.

Because 'nationalism' is both a descriptive and prescriptive term, it can be used either as a source of state legitimacy, but also as a political word with instrumental use. The two most pressing issues in addressing this subject in relation to self-determination is that 1) the terms themselves (nationalism and self-determination) are under question and 2) there is no agreement as to "how far" we can go in national self-determination or autonomy. Therefore, while Weber's definition of state[28] remains widely accepted, the concept of political nationalism that aspires to statehood (or to some 'softer' form of autonomy) must be analyzed in depth to make sense of its cultural and voluntaristic components.

This will be the departing point of this paper, which focuses on the conceptual underpinnings of the phenomenon of self-determination in the context of human rights and of international relations. I will begin by addressing the relevance of the principle of self-determination and of statehood, and of why the meaning we choose to attribute to these definitions are theoretically significant for both international law and international relations. The broader goal of this paper is to look at nationalisms in relation to the claim-right to self-determination and to analyze how the international community is reacting to this phenomenon, by addressing the issue of recognition of an entity as a state in international law, and weighting what the alternatives to external self-determination are,

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[26] Where history is not to be understood only in terms of the past, but can be seen in terms of a glorious future.

[27] Alexander Motyl, *Revolutions, Nations, Empires. Conceptual Limits and Theoretical Possibilities* (New York: Columbia University Press, 1999), pp. 76-77.

[28] According to Weber, the state is such if it holds the monopoly of violence over a given territory and population.

particularly with respect to non-territorial autonomy.

The relevance of the concept of self-determination in international relations

Sovereignty has been the organizing principle of international relations since the XVII-XVIII century (most scholars trace it to the peace of Westphalia, but it was not codified until 1758)[29], and while the concept of sovereign equality can be (and has been) used in different ways[30], the emergence of a vision of global governance has not, in essence, modified the 'rules' of sovereign equality and of the inviolability of borders as general principles that are accepted as legitimate by the international community. Yet, in this regard, the normative endeavors that have developed in the last decades offer a new perspective with which to approach the normative dimension of international law standardization. Generally speaking, if the main purpose of international relations is the analysis of state behavior and of power politics (even though non-state actors and international organizations seem to play an increasingly relevant role in shaping international regimes and dynamics), the objective of international law is to serve as a framework to assess, set, and codify rules of behavior amongst states to provide order and predictability at an international legal level. In international law, we can distinguish the operating system –which is comprised of the functional aspect, the rules, structure and framework– from the normative system –which is instead concerned with the values, goals and norms of the international community–. Because the framework (operating system) in which nations-states operate in international law is not hierarchical, but horizontal, even though the interests of influential states might help an emerging norm or principle to get more visibility, all countries are, in this particular field, sovereign, equal, and join treaties by consent. In this context, the scheme of allocating political authority and power works both ways: by assessing and interpreting international rules and norms, international law actively contributes to shape international relations.

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[29] The concept of the equality of states was first introduced in international law by Vattel in Le droit de gens, See Emmerich de Vattel, "Book I: Of Nations Considered in Themselves" in *The Law of Nations or the Principles of Natural Law*, 1758, accessed at http://www.lonang.com/exlibris/vattel/

[30] The four main categorizations are international legal sovereignty, westphalian sovereignty, domestic sovereignty, and interdependence sovereignty.

The Politics of Human Rights

As interdependence became "thicker and quicker"[31] as a consequence of globalization growing "faster, cheaper and deeper"[32], in order to answer the questions (1) what political means are used to influence state behavior in foreign affairs? and (2) what are the ways in which countries act in order to deal with conflicting interstate and intrastate interests, and to provide some reliable structure for the international system to operate with some level of predictability?, it has become more and more obvious that issues concerning the politics of nations-states and international law cannot be addressed separately.

International organizations such as the United Nations are central in establishing norms, policies, and rules which become part of the international legal system; and while it is true that enforcement at the international level, in order to achieve compliance by violators, depends on consent and on horizontal pressure applied by parties to an agreement, it is impossible nowadays to understand international politics without taking into account the "rule of law" in global affairs[33]. In this context, the key 'novelty' in both international relations and international law has been the growing exponential importance, over the past half century, acquired by human rights- the rights and freedoms that, according to the Universal Declaration of Human Rights, everyone is entitled to[34]. As a matter of fact, they have come to be regarded as such fundamental rights that increasingly the answer to the question "Why should we try to subject international relations to the rule of law?" is (according to Buchanan, amongst other scholars) that doing so is necessary not only for the sake of peace amongst states, but also for justice, where justice is understood, first and

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[31] Joseph S. Nye, Jr., *Understanding international conflict: an introduction to theory and history* (New York: Longman classics in political science, sixth edition, 2007), p. 207.

[32] Thomas Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (New York: Farrar, Straus and Giroux ed., 1999), pp. 7-8.

[33] To quote professor Jonathan I. Charney, "law exists because the society as a whole considers its rules to be legitimate and to embody binding legal obligations. See Jonathan I. Charney, "The Role of IGOs in Global Governance" in *Toward Understanding Global Governance. The International Law and International Relations Toolbox , ACUNS Reports and Papers* (Ed. By Charlotte Ku and Thomas G. Weiss, 1998, No. 2), p. 56. On a similar note, Louis Henkin in his *How Nations Behave* (New York: Columbia University Press, 1968), p. 47, has famously stated "[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."

[34] Art. 2 of the Universal Declaration goes: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty. "

foremost (though not exclusively) as the realization of human rights. And within the subject of human rights, while group rights are still widely regarded as 'secondary' as opposed to individual human rights, indigenous peoples, minorities and national groups have often, by insisting on the need for fundamental rights to be collective, challenged the internationally held assumption that human rights mean only individual civil rights. The idea of cultural survival for people with native or aboriginal status cannot be singled out as individually based, but the achievement of cultural survival helps to reinforce rights among individuals by contributing to a realization of 'self' that is deeply rooted in people's minds, as well as in their customs and traditions. Self-determination, therefore, becomes a political right that is crucial to, and deeply linked with, both cultural survival and human security[35].

But while the claims of certain national groups have seen a positive, and at times proactive, attitude of the international community[36], most want-to-be states –Abkhazia (officially part of Georgia), Nagorno-Karabakh (claimed by Azerbaijan), Northern Cyprus, Palestine, Somaliland, South Ossetia, Taiwan, Transnistria, just to name a few– have not seen any sign of acknowledgment/recognition by the international community. What are the factors and the interplay among states, which eventually lead to a common (or not, as is often the case) foreign policy towards the recognition of a new state? What makes different states view certain independence claims as legitimate rather than threatening?

My main hypothesis is that the evolving international perception of human rights is leading to a change of states' normative behavior towards state sovereignty, and that this affects, amongst other things, the way that the principle of self-determination is perceived, fought for, and implemented. But the point I wish to make in this paper is also that we need to *qualify* the right to self-determination in order to shed light on the interplay between the two faces of sovereignty –the nation and the state.

I believe a re-visitation of the concept of self-determination to be both theoretically necessary to understand the shift that has been occurring in international law over the last

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[35] Tom G. Svensson, "Right to Self-Determination: A Basic Human Right Concerning Cultural Survival. The Case of the Sami and the Scandinavian State" in *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus* (Ed. Abdullahi Ahmed An-Na'im, University of Pennsylvania Press,1992), pp.363-367.

[36] Since 1990, 33 new countries have been internationally recognized and admitted to the UN. Fifteen new countries became independent with the dissolution of the USSR in 1991, five from the dissolution of Yugoslavia, and a number of microstates (most of which with a population that is below 10,000 people) have been accepted as independent sovereign states.

decades, and useful as a tool to observe how classical international relations (IR) theories (realism, liberalism and constructivism) apply to this notion – and whether they are still suitable frameworks to interpret an international political reality in which sovereignty (if interpreted as in Bodin's classic definition: "the absolute, perpetual power of the state, superior to laws"[37]) does not always overlap with formal juridical independence[38].

Therefore, the main question I address is: what are the sociopolitical conditions fostering the process of recognition of the principle of self-determination as a human right by the international community, of certain groups as nations, and of certain entities as legitimate nation-states?

Self-determination in international law, and its interpretations

In analyzing the issue at hand, almost all of the terminology reflected in the title of this panel (stateless nations, multiculturalism, non-territorial autonomy) appears to be somewhat problematic, by which I mean that most terms do not have an univocal meaning. Self-determination is a particularly murky concept, as it has been used in a number of different circumstances, ranging from secession (Bosnia and Herzegovina, Slovakia) to "imperfect de-colonization" (Indonesia, East Timor), from indigenous communities (Navajo, Cree, Zapatistas) to administrative subunits (Kosovo, Chechnya). "Everybody pays lip-service to [the principle of self-determination] as the constitutive principle of international order," Stanley Hoffmann has observed, "and yet it is fraught with so many uncertainties that it is a major source of strife and a major invitation to external intrusions."[39]

What is self-determination—a social domain, a type of institution or practice, a normative condition, a moral ideal? The UN Charter points out two meanings of the term self-determination, to which I refer to as internal and external self-determination[40], and are

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[37] Jean Bodin, *De la République, traité de Jean Bodin, ou traité de gouvernment* (Paris: Quillau Publishers, 1756), p. 266.

[38] For a list of the requirements that a state "as a person of international law" should possess in order to qualify for statehood see the *Montevideo Convention on the Rights and Duties of States* (1933), art. 1, accessed at http://www.cfr.org/publication/15897/montevideo_convention_on_the_rights_and_duties_of_state s.html.

[39] Stanley Hoffman, "The Problem of Intervention," in Hedley Bull ed., *Intervention in World Politics* (Oxford: Clarendon Press, 1984), p. 14.

[40] Some scholars, such as Maivan Clech Lam and Christian Tomuschat, believe the international right law of self-determination to be a unitary one, and that by its very nature international law does not concern itself

both legally based in the Preamble to, and in the first and fifty-fifth articles of, the United Nations' Charter.

First (internal self-determination), a state is said to have the right of self-determination in the sense of having the right to choose freely its political, economic, social, and cultural systems[41]. Second (external self-determination), the right to self-determination is defined as the right of a people to constitute itself in a state or otherwise freely determine the form of its association with an existing state[42]. The debate around whether self-determination can be looked at as an emerging norm of customary law, or whether it is doomed to remain an aspirational, vague concept, hierarchically subordinated to the existing states' right to self preservation, has become so relevant that Norway, in 2002, submitted a proposal to qualify the reference to the right of self-determination contained in paragraph 15 of the preamble to the Draft Declaration at the WGDD (the Working Group on the draft declaration of the rights of indigenous peoples)[43]. "Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination," the qualifier adds:

> "yet nothing in this Declaration shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples."

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with internal political subdivisions. Clech Lam's position is grounded in her concern that labels such as 'political participation and autonomy' water down the principle, falling short of granting the right of self-determination. All the same, the use of the expression "internal self-determination" by international, as well as domestic courts and international organizations make it difficult to avoid the term. For instance, the UN General Assembly called the apartheid in South Africa a violation of self-determination, which in that case could only have meant internal self-determination. For a jurist opinion on the use of the term 'internal' and 'external' self-determination see Christian Tomuschat Ed., *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993), and Maivan Clech Lam, "Indigenous Peoples' Rights to Self-Determination and Territoriality," in *Human Rights in the World Community*, Richard Pierre Claude and Burns H. Weston ed. (Philadelphia: University of Pennsylvania Press, 2006).

[41] Art.1, paragraph 2 of the UN Charter states: "The purpose of the United Nations are: [...] To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take the appropriate measures to strengthen universal peace."

[42] See art. 55 of the UN Charter: "With a view to the creation of conditions of stability and wellbeing which are necessary for peaceful and friendly relations amongst nations based on the respect for the principle of equal rights and self-determination of peoples, the United Nation shall promote: [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

[43] The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on 13 September 2007, and is accessible at http://daccessods. un.org/TMP/1791046.html

This is not an isolated example: at times states can be willing to grant (nominally, at least) the right to autonomy (which carries no technical meaning in international law, and therefore leaves a great deal of power to the interpretation of the single states), otherwise called 'internal self-determination', but are hardly ever willing to compromise with (let alone commit to) anything that might alter states' territorial integrity[44].

According to the Encyclopedia Britannica, self-determination refers to the process by which a group of people, usually possessing a certain degree of national consciousness, form their own state and choose their own government:

> "As a political principle, the idea of self-determination evolved at first as a by-product of the doctrine of nationalism, to which early expression was given by the French and American revolutions. In World War I the Allies accepted self-determination as a peace aim. In his Fourteen Points—the essential terms for peace—U.S. president Woodrow Wilson listed self-determination as an important objective for the postwar world; the result was the fragmentation of the old Austro-Hungarian and Ottoman empires and Russia's former Baltic territories into a number of new states."

This definition rightly points out the fact that the UN's predecessor, the League of Nations, had also recognized the principle of self-determination; but it was only after World War II that the idea received its strongest acknowledgment and affirmation. The mandate of the trusteeship system as it worked between the First and the Second World War, while it bore some of Wilson's fourteen points' 'moral imposition,' came with no legal obligation. During this period, for example, Sweden claimed the Aaland islands from Finland based on the principle of self-determination (and the population of the island was indeed, at the time, mainly Swedish) but the matter was rejected, based on the reasoning:

> "Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War […] positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognizes the right of other States to

[44] With respect to dependent territories, the UN Charter asserts in articles 73 and 76 that administering authorities have the obligation to promote political self-government for the inhabitants of theses territories but does not elaborate further on the meaning of 'self-government' (which has generally come to be interpreted as the right to independence, but only for ex colonies). See UN article 73, paragraph (a) and (b), which explicitly point at the goal of advancing self-government for those peoples that "have not yet attained a full measure of self-government," and paragraph (b) of art. 76.

> claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of exclusively, an attribute of the sovereignty of every State which is definitely constituted."[45]

But even though after World War II promotion of self-determination among subject peoples became nominally one of the chief goals of the United Nations, the principle of self-governance has not been applied evenly nor consistently. This has at least in part to do with the rules (or lack thereof) of how a state 'comes into being' (which James Crawford refers to as a "mixed question of law and fact"[46]), in part with logics of consequences (or international power politics and expedience), and in part with logics of appropriateness (the idea that political actions and behaviors are the consequence of perceived rules, roles, and identities)[47]. Because actors (states as well as non-states) never conform entirely with the logic of appropriateness, but they also engage in purely instrumental behavior generated by a logic of expected consequences, it is highly unlikely that we will see a recognition of Palestine, Taiwan, or Tibet as independent, sovereign states anytime soon, if ever—but this doesn't make what Krasner calls 'organized hypocrisy' the norm[48]. The difficulty of the principle of self-determination translating into recognition is a problem of international institutional design and of political will, but also of changing perceptions of legitimacy at the international level: conquest is no longer an 'acceptable' means of altering borders, but despite the modern nation-state being a polity whose borders and citizens are much more precisely demarcated than those of the political entities that preceded it, states' borders continue to change, and, perhaps most importantly, a number of devises such as NTA have been coined to allow minorities *within* the state unit to voice their rights, needs

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[45] The Aaland Islands Report of International Commission of Jurists, 1920, accessed at www.ilsa.org/jessup/jessup10/basicmats/aaland 1.pdf

[46] See James Crawford, "Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States" in Guy S. Goodwin-Gill and Stefan Talmon Eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Claredon Press, 1999), p. 95.

[47] James March and Joahn Olsen have defined the logics of expected consequences as logics that "see political actions and outcomes, including institutions, as the product of rational calculating behavior designed to maximize a given set of unexplained preferences", while they describe the logic of appropriateness as a perspective that sees human action as driven by rules of appropriate or exemplary behavior, organized into institutions: "Rules are followed because they are seen as natural, rightful, expected, and legitimate. Actors seek to fulfill the obligations encapsulated in a role, an identity, a membership in a political community or group, and the ethos, practices and expectations of its institutions." James March and Johan P. Olsen, "Institutional perspectives on political institutions" in *Governance* , No.9, 1996, pp. 247-264.

[48] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

and aspirations.

To recap, when self-determination was regarded as a political principle but not as right, it implicitly referred to a homogeneous group that shared ethnicity, language and/or culture. This conception shifted to being interpreted as a territorial right to independence for former colonies in the second half of the twentieth century, and has only recently moved towards the idea of a right of every people defined ethnically, culturally or religiously to have their own independent state, even though this paradigm has not yet been recognized by international law[49].

As noted by Hurst Hannum, the tension between self-determination and national sovereignty is an issue that, for better or for worst, will not disappear as a matter that has the potential to create serious conflicts in the future. Yet, both sovereignty in international relations (particularly in regard to the phenomena of regionalization) and sovereignty as a subject of international law have undergone some serious changes in the last few decades that might contribute to establish some sort of compromise, if not a reconciliation, between the two principles (state sovereignty and self-determination). In international law, the change in direction towards intrastate or mixed conflicts has been accompanied by a shift towards protecting combatants as well, and we have seen a convergence between humanitarian law and human rights law. Since World War II there has also been a shift from state-to-state aspects of international humanitarian law to individual criminal responsibility, a development that has been re-enforced by the ad hoc tribunals of Rwanda and ex-Yugoslavia. The problem remains, even in a deeply integrated world, in which there are new centers of authority moving both across and above the level of the nation-state, and 'norm entrepreneurs' seem to have been successful in creating a human rights regime (at least for what concerns serious, systematic violations), how can the problem of authority and legitimacy be addressed? For instance, what makes it so that the rights affirmed in treaties, agreements and other constructive arrangements between countries and indigenous peoples, *in some situations*, constitute a matter of international concern,

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[49] Hurst Hannum suggests that the concept of human rights has already passed through two phases and is now entering a third one. See Hurst Hannum, "The Right of Self-Determination in the Twenty-First Century," in *Human Rights in the World Community*, Richard Pierre Claude and Burns H. Weston Ed. (Philadelphia: University of Pennsylvania Press, 2006).

interest, responsibility and character?[50]

In the attempt to sketch a non-ideal theoretical approach to global (in)justice, Seyla Benhabib has pointed out the three main problems that structure the current debates on human rights and global justice[51]: (1) the problem of universal vs. special ties, or ties to compatriots, (2) the problems that have to do with the causes of poverty (and indeed, the question on whether an entity could be an economically viable state is one that comes up almost without exception when dealing with independency claims), and (3) the problem to do with who is responsible for human rights. These are all problems that require a theoretical normative framework, and that again have to do with issues of authority and legitimacy. Why, and on what basis do human beings have rights against the state, society or other individuals? What are these rights, and can groups claim them as a group rather than as individuals[52]? How can we transition from these very general concepts of human rights to the practical conceptions of the same?

In other words, how is the jurisgenerativity[53] of law at play now in states? And how can we know when something is legitimate, and in what sense can legitimacy create sovereignties?

Legitimacy can be seen in a few different ways, namely as *outcome* legitimacy, *process* legitimacy, and *source* (value-based) legitimacy, that some authors call 'shared beliefs' legitimacy. The Organization for Economic Co-operation and Development identified, in 2010[54], a fourth category: *international* legitimacy (i.e. recognition of the state's external

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[50] See paragraph 12 of the Draft Declaration's preamble (Draft report of the working group established in accordance with Commission on Human Rights resolution 1995/32).

[51] Seyla Benhabib, International Human Rights and Democratic Sovereignty, conference organized by the Center for Global Ethics and Politics at the Ralph Bunche Institute for International Studies, Graduate Center of New York, on February 10, 2011.

[52] Most scholars believe that group rights emerge only to articulate individual rights collectively, or when the rights of groups of a certain people/category/class, i.e. workers, women, minorities or indigenous communities become suppress, denied or neglected. While it is true that in their emergence and acceptation human rights are, first and foremost, the rights of the individual, there is no reason why they should not coexist with the concept of political and cultural autonomy for those peoples who emphasize the collectiveness of human dignity, and do not recognize the individual as the only acceptable basis for political governance.

[53] Behabib adapts to her own purposes Robert Cuver's term jurisgenerativity. It means the laws capacity to create a normative universe of meaning that can often escape the provenance of formal lawmaking. In Benhabib's discourse, it represents an extra-legal, utopian, normative possibility: it points to a moment of unrealized potential, something that is in the future.

[54] See the Organization for Economic Co-operation and Development (OECD), "The State's Legitimacy in Fragile Situations. Unpacking complexity", in *Series: Conflict and Fragility* (OECD Publications, 2010), p. 10. The PDF version is available online at www.oecd.org/publishing.

sovereignty and legitimacy.)

These distinctions are significant, as people's ideas about what constitutes legitimate political authority have changed in time and space, and are fundamentally different in formal, rules-based western states and in non-western states. A cultural relativity approach, though, while it might help us understand a population's reaction to certain international norms or institutions, does not solve the problem of both defining who the "peoples" are, and what they are entitled to "determine" according to the principle of self-determination on a 'universal' level. This leaves unanswered a significant incongruity: by saying, basically, that there is a right to self-determination for some peoples, the application of the principle as it is used nowadays[55], conflicts with International Law's (and Human Right's Law in particular) universality.

Since this paper represents not the search for an alternative to the existing inconsistencies in the field, but an attempt to understand and come to terms with them, I will settle on one definition that seems to best serve the purposes of analytical clarity, but that will of course leave some scholars unhappy. In regard to statehood, there are two main approaches to assess its legitimacy, one based on international recognition (which is reflected by UN membership), and one rooted in the fulfillment of the political criteria of the Montevideo Convention. The position hereby adopted relates to first, for the following reason: despite the fact that some states might at times declare that they don't recognize the moral authority of the UN, numerous analysis on states' compliance with international law support Inis Claude's consideration that the UN has come to be regarded, and used, as a dispenser of politically significant approval or disapproval of the claims, policies, and actions of states, including (but going far beyond) their claims to status as independent members of the international system[56]. In this sense, one of the UN's major political functions (if not the major one) is that of conferring (or denying) collective legitimization to

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[55] Canada's Supreme Court conclusion regarding Quebec's secession is quite telling of most states' approach to the right of self-determination: "The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination — a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right of external self-determination […] arises in only the most extreme of cases and, even then, under carefully defined circumstances." For the whole document see *Judgments of the Supreme Court of Canada*, 2 S.C.R. 217, August 20, 1998, accessed at http://csc.lexum.umontreal.ca/en/1998/1998scr2-217/1998scr2-217.html

[56] Inis L. Claude, Jr., "Collective Legitimization as a Political Function of the United Nations", in *International Organization* (Cambridge University Press, 1966), p.1.

states (and therefore to governments). The fulfillment of the Montevideo criteria– that is, the qualifications of a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states[57],– on the other hand, a part from being more subject to interpretation, and not seldom regarded as a product of Roosevelt's 'good neighbor' policy aimed at reassuring Latin American states from US intervention[58], was signed by 'only' nineteen states (three of which with minor reservations). I have previously argued that having control over a certain population and territory is not always sufficient to achieve statehood. Not only is it not sufficient (entities that meet the Montevideo criteria may be denied status as states on the rationale that their existence violates the territorial integrity of another state-Northern Cyprus, for instance-, or that they are illegitimate -Southern Rhodesia or the Bantustans in Southern Africa are good examples of this-), but in certain circumstances it might not even be necessary (not all of the numerous microstates that were admitted as members to the UN in the nineties have full control over their external of even internal affairs). John Quigley argues that "If the Montevideo criteria control, then recognition may not be of great import. An entity would be a state if it qualifies under the criteria. On the other hand, it may be that recognition trumps the Montevideo criteria, rendering them irrelevant, or at least putting them in a subsidiary position. If an entity is widely recognized as a state, it becomes difficult to argue that it is not a state by reference to the Montevideo criteria."[59] Or, to put it even more bluntly, other states and institutions outside a state have to accept the claim of sovereignty, otherwise it is worthless[60].

But why is this important? Ultimately, state legitimacy matters because it provides the basis for rule by consent rather than by coercion. Lack of legitimacy is a major contributor to state fragility, because it undermines the processes of state-society bargaining that are central to building state capacity. In this sense, fulfilling Montevideo's requirements to be a

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[57] *Convention on Rights and Duties of States*, Art. 1, Montevideo, December 26, 1933.

[58] See US Secretary of State Cordell Hull, Some of the Results of the Montevideo Conference: Address by the Honorable Cordell Hull, Secretary of State, before the National Press Club (Washington: US Government Printing Office, February 10, 1933), p. 4.

[59] John Quigley, *Statehood of Palestine. International Law in the Middle East Conflict* (Cambridge: Cambridge University Press, 2010), p. 226.

[60] Carsten Wieland, *Thousands of Years of Nation-Building? Ancient Arguments for Sovereignty in Bosnia and Israel/Palestine* (New York: Columbia University Press), p.1, electronic version accessed at ece.columbia.edu/research/intermarium/vol6no3/wieland.pdf

state 'as a person of international law' does not count much, if one of the main sources of international law (the international community via the UN's Security Council binding resolutions) does not recognize the said state: the lack of international recognition might actually undermine the control of the perceived 'illegal' government over its territory and population, eventually leading to the loss of one or more of the Montevideo Convention's requirements. Yet surprisingly, relatively little attention has been paid to what we might call the 'international community' legitimacy in the fields of nationalism and of state-building (the relationship between external and internal legitimacy), assuming that legitimacy would automatically result from improved state performance.

Some scholars[61] have drawn a parallel between the individual human person and the state, in order to examine behaviors and norms that govern interaction and the compliance with international norms, looking at both (the individual and the state) as moral agents[62]. Like individual human persons, states are (1) physically embodied (in their population, territory and infrastructure) beings whose survival and welfare require protection and provision; (2) agents in that they are able to act to promote and protect their survival and welfare and in that they are able to form, revise, and promote an idea of their national interests; and (3) moral beings in that they are able to identify and act in accordance with moral standards of reasonable interaction, including standards of justice and fair cooperation. Other scholars[63] argue that there is a significant difference between legal rights –laws that only apply to states, such as international treaties – and moral rights –which are the claims of the people, such as the principle of self-determination, and human rights in general. In the latter case, the underlying assumption is that 'moral' rights are less "real" than 'legal' rights. A. Belden Fields and Wolf-Dieter Narr, for example, write: "people are not born with [human rights]. [...] People may be born with the potential for rights; they may long for them consciously or unconsciously; and they may struggle for them. But human rights are norms and practices

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[61] See Thomas Nagel, "The Problem of Global Justice" in *Philosophy and Public Affairs*, Vol. 33, Issue 2, March 2005, pp. 113-145, and James Nickel and David Reidy, "Relativism, Selfdetermination, and human rights" in *Democracy in a Global World: Human Rights and Political Participation in the 21st Century* (Deen Chatterjee, ed., Rowman and Littlefield, 2007).

[62] Nickel and Reidy, cit., claim that just as natural persons include sociopaths who are seriously deficient in their moral capacities, artificial corporate persons include states and organizations that are seriously deficient in their moral capacities because of disorganization or tyrannical leadership.

[63] See Maurice Cranston, *What are Human Rights*? (London, The Bodley Head, 1973), p. 5, and A. Belden Fields and Wolf-Dieter Narr, "Human Rights as a Holistic Concept" in *Human Rights Quarterly*, No.14, 1992.

which can be achieved only if proper historical circumstances are created." There is little doubt that it is only the process of state making that can ultimately transform the moral claims of human rights into legal and social realities in a particular country, by internalizing human rights law in the domestic rule of law. But while this distinction (between moral and legal) was certainly relevant half a century ago, the boundaries between moral and legal rights have become, in the past decades, extremely blurry: even the most strenuous defenders of states as entities that are morally entitled to retain their territorial boundaries, are generally willing to conceded a remedial right to secede in extreme cases in which the state treats its citizens sufficiently unjustly (though there is no agreement on the gravity of human rights violations that this requires).

As Simon Chesterman[64] points out, what is missing here is an account of human rights as *practice*, an account explaining the transformations that have taken place in the way human beings talk and are talked about as possessors or violators of these rights. And, crucially, such an account must be of some practical as well as critical utility — not necessarily in the sense of providing an a justification of a stance or an action program, but as facilitating a conversation between the subjects of these rights.

Rene Cassin, one of the main drafters of the Universal Declaration of Human Rights, defined 'the science of human rights' as "a particular branch of the social sciences, the object of which is to study human relations in the light of human dignity while determining those rights and faculties which are necessary as a whole for the full development of each human being's personality."[65] One important contribution of Chesterman is taking this definition and applying a contingent approach to it, asserting that human rights are not about origins but about change, and that we must look at the emergence of norms as part of the interpretive community of their formation:

> "[…] for a fully reflexive human rights regime, sensitive to (but not obsessed with) difference, it must finally be about change in the way that these standards come to be formed […] Rights, in the end, are a rhetorical tool. But […] it is precisely this ongoing rhetoric that lays the only meaningful foundation for the project of human rights —a project that constitutes our

[64] Simon Chesterman, "Human Rights as Subjectivity: The Age of Rights and the Politics of Culture" in *Millennium: Journal of International Studies*, No. 27, 1998, p. 98.

[65] Gary B. Melton, "The Law Is a Good Thing (Psychology Is, Too): Human Rights in Psychological Jurisprudence" in *Law and Human Behavior*, Vol. 16, No. 4 (August 1992), pp. 381-398.

human selves as moral agents, ethical subjects, and political beings."[66]

Despite the breadth and depth of the existing scholarship on nationalism, rarely (with a few notable exceptions such as Robert Mccorquodale, Allen Buchanan, David Raic and Ephraim Nimni) is the principle of self-determination regarded as a human right. Particularly, the theoretical universality of self-determination as a human right v. its practical selectivity, which lies upon the problematic relation legitimacy-authority, has seldom been addressed in a systematic way[67]. Far more effort has been made to use the concept of self-determination against the principle of sovereignty: which is a fair starting point, and to some extents an inevitable one, but cannot account for the transformation that is taking place in international law if it is not put into relation with both the perception and reality of human rights. History is ample proof that with critique, consideration and concern, the inconceivable can rapidly become reality, but "whoever ventures on the enterprise of setting up [a people's institutions] must be ready, shall we say, to *change human nature*"[68]. The interplay between internal and external legitimacy is an important issue for the study of statehood, as well as for cultural and group rights; however, it remains under-theorized. Therefore the question raised by Rousseau and Herder[69] is still relevant: what should link people to a state and what constitutes membership in a given group of people?

Sovereignty, identity, and change in international norms

Although the role and appearance of the nation-state, as well as the use of the term 'nationalism', has changed substantially in respect to globalization, it appears to be everything but an out-dated concept[70]. Scholars and politicians are polarized around the

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[66] Simon Chesterman, cit.

[67] As noted by Buchanan, the distinction between the right to secede understood as (1) a right to throw off the existing state's control and attempt to achieve the status of being a legitimate state and as (2) the right to be recognized as a legitimate state under international law is often ignored in moral theorizing about secession. See Allen Buchanan, cit., p. 334. As explained, I privilege the (2) criteria in assessing whether or not a state has achieved independence.

[68] Jean-Jacques Rousseau, *The Social Contract, or Principles of Political Right* (Translated by G. D. H. Cole, public domain, 1762) p. 84, accessed at http://www.constitution.org/jjr/socon.htm, emphasis added.

[69] Susanne Wiborg, "Poltitical and Cultural Nationalism in Education. The ideas of Russeau and Herder concerning national education" in *Comparative Education* , Volume 36, No. 2 (2000), pp. 235-243.

[70] See Brad R. Roth, "Whatever Happened to Sovereignty? Reflections on International Law Methodology" in *Toward Understanding Global Governance. The International Law and International Relations Toolbox*, ACUNS

notion of self-determination, particularly on whether the right to self-determination confers upon part of the population of an existing state a right to separate itself from the state. The International Court of Justice (ICJ) has condemned particular declarations of independence[71], but has also recognized that there is no prohibition to a group *attempting* to constitute a fully independent, primary political unit that will be recognized as such by the international system (even though it might leave it up to existing states to accord legitimate statehood status to the group, depending upon whether the new unit it constitutes meets certain requirements)[72]:

> "During the second half of the twentieth century, the international law of self-determination developed in such a way as to create the right of independence for the peoples of non-self-governing territories, and peoples subject to alien subjugation, domination and exploitation. […] A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases. […] Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. […] [But] the scope of the principle of territorial integrity is confined to the sphere of relations between States."[73]

By answering negatively the question of whether the authors of the declaration of independence of Kosovo acted in violation of Security Council resolution 1244 (1999)[74], however, the ICJ has not necessarily made things clearer: by saying that declaring independence is not, in principle, illegal, it does not make the practice of doing so legal, either—nor are the political consequences of declarations of independence that do not fall

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Reports and Papers (edited by Charlotte Ku and Thomas G. Weiss, 1998, No. 2), pp. 69-101.

[71] See, inter alia, Security Council resolutions 216 (1965) and 217 (1965) concerning Southern Rhodesia; Security Council resolution 541 (1983) concerning Northern Cyprus; and Security Council resolution 787 (1992) concerning the Republika Srpska.

[72] Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), p. 344.

[73] Accordance with International Law of the unilateral declaration of independence of Kosovo, *Advisory Opinion*, General List no. 141, July 22, 2010, I.C.J. Reports 2010, p. 30, paragraphs 79, and 80; emphasis added.

[74] Some of the participants in the proceedings suggested that the question posed by the General Assembly was not, in reality, a legal question. According to this submission, international law does not regulate the act of making a declaration of independence, which should be regarded as a political act. In the section "Jurisdiction" of the Advisory Opinion the Court argued that it was able to respond to the GA's question by reference to international law without the need to enquire into any system of domestic law.

under art. 73 and 76 of the UN Charter addressed. In this context, the internal legitimacy of sovereignty plays an important role for the ethno-national political elites[75] when pursuing their political ideal of a nation-state. It provides them with arguments for their political program, particularly if the goal of self-government is challenged by external actors on the international level. Because the nation as representative of the people has become, in the last century, the main form of legitimization of the state[76]—and because it is 'the people' that provide the justification of claims to self-determination and therefore to statehood, the fundamental problem remains that of "producing the people", as numerous scholars have pointed out[77]:

"More exactly, it is to make the people produce itself continually as national community. Or again, it is to produce the effect of unity by virtue of which the people will appear, in everyone's eyes, "as a people," that is, as the basis and origin of political power."[78]

Who the people are, then, and what constitutes national identity, is the crucial problem tied to the threshold of independence and sovereignty claims. In this regard my argument is that we should not necessarily treat (state, nor peoples') interests and identities as given, but rather look into how globalization has affected and continues to affect states' and peoples'

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[75] There is an ongoing debate about the merits of `elite' and `mass' approaches to the study of nations and nationalism. On the one hand macro-analytical approaches emphasize the role of elites in creating nations (this has been the most widely accepted approach, which sees elites as "historic agents" who consciously create and promote a sense of national identity); on the other hand, the everyday actions of ordinary citizens and their role in sustaining nations and a sense of national identity form the focus of micro-analytic studies. Anthony D. Smith, author of numerous works on nationalism and President of the Association for the Study of Ethnicity and Nationalism at the LSE, claims these are really complementary approaches: the former approach employs a concept of `historic nationhood' to explain the development of nations and nationalism, while the latter prefers a concept of `everyday nationhood' to explain their reproduction and persistence.

[76] Such position has been questioned by some scholars, who see nationalism and self-determination as doctrines that 'pretend' to provide a workable theory of political legitimacy: Kedourie, in his *Nationalism*, tries to make a case for past empires, claiming that the only criterion of governmental legitimacy should be that of "good" government, rather than of "self" government: "[Nationalism] pretends to supply a criterion for the determination of the unit of population proper to enjoy a government exclusively its own, for legitimate exercise of power in the state, and for the right organization of states…[it] holds that humanity is naturally divided into nations, that nations can be known by certain characteristics which can be ascertained, and that the only legitimate type of government is national self-government." See Elie Kedourie, *Nationalism*, 4th edition, (Oxford, Blackwell, 2000). But, leaving aside the debate on the 'morality' of nationstates, Kedourie (nor any other author that I am aware of) has provided a convincing and viable alternative for modern politics and societies.

[77] See Ronald Grigor Suny and Michael D. Kennedy Ed., *Intellectuals and the Articulation of the Nation* (The University of Michigan Press, 2001).

[78] Etienne Balibar, "The Nation Form: History and Ideology" in Etienne Balibar and Immanuel Wallerstein, *Race, Nation, Class: Ambiguous Identities* (London: Verso, 1991), p. 86.

perception of identity and interests. Realism's shortcoming is its failure to do this. Liberalism's failure resides in the fact that it has attempted to explain cooperation and international regimes by focusing on process, but without paying attention to systemic variables. Therefore, because realists and liberalists share the undertaking of an anarchical international society and of the positivist premise that 'things' (identities and interests) 'are things', social constructivism is more useful of a framework when analyzing an aspect of international politics that has traditionally been taken for granted—precisely that of the importance of a shared identity and of the meaning of words, through which we don't just define, but actively help construct reality.

From this perspective, because ideas, norms and institutions are socially constructed, interplay between theory and practice is necessary, and by accepting and defining, thus creating, the 'rules of the game', international organizations, individuals and national groups, as well as states, acquire a huge power: that of potential for changing normative behavior by bending or even breaking the rules.

States, as individuals, tend to act in ways that reinforce their expectations, and they do not always follow pre-ordinate strategies: while tactics and particular narratives might be intentionally orchestrated to reinforce or create a sense of collective national identity (which almost without exceptions has claims over territory)[79], because interaction works both ways, allowing power to flow up and down, and because both the actors and the environment change in the making of interconnections by reacting and adapting to the new introductions, the system that constantly changes and emerges anew from international (founded on local dimensions) social dynamics is both complex, different from the sum of its parts, and often unpredictable.

This is where the principle of self-determination, and particularly self-determination as a human right recognized by international law, comes back into the picture: addressing the need to adopt some conceptualization of the ontological and epistemological relationship between the states and the international system (or, more generally, between social actors and societal structures) to explain social behavior, Alexander Wendt's main argument is

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[79] "Let us begin at the very beginning: politics is about rule. We can define the most generic attribute of any system of rule as comprising legitimate dominion a spatial extension. I use the term spatial extension advisedly, to drive home the point that it need not assume the form of territorial states."

basically that <u>what individuals and groups most want is not security or power or wealth, but recognition of, and respect for, their rights</u>. And since that can only be realized under law, it is in the international law realm that we must look for solutions to the state sovereignty v. human rights problem.

(Tentative) Conclusions: a Relative Autonomy of the Nation?

Kedourie, in the preface to the second edition of his Nationalism wrote that:

> "Noticing the first edition, some reviewers have remarked that I do not attempt to discuss whether nationalists should be conciliated ore resisted. A decision on such an issue is necessarily governed by the particular circumstances of each individual case, and whether its consequences are fortunate or disastrous will depend on the courage, shrewdness and luck of those who have the power to take it. For an academic to offer his advice on this matter is, literally, impertinent: academics are not diviners, and it is only at dusk, as Hegel said, that the owl of Minerva spreads its wings."[80]

While it would be both impossible, 'impertinent' and useless to try and 'predict' in which direction (or directions) nationalisms will go, and how the international community will respond to this phenomenon in the future, some conclusions can be drawn from the analysis of the developments of the last decades.

Even though various difficulties have been encountered in the attempts to formulate a definition of people, of self-determination and of minority in international law, which protects the territorial integrity of states, the question "from whom?" must be asked. The answer, given international law's simultaneous support for the self-determination of peoples, can only be: from other states[81]. Even though it seems than that no general justification for secession on ethno-national principles will be forthcoming, linkages between human security, internal self-determination and peace building in recent years have challenged the classical conception of 'national security' to the point that federalism and high levels of autonomy are more widely (both internationally and by states) accepted as a means to avoid ethnic conflicts and civil wars: in Bosnia-Herzegovina, for instance, the

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[80] Elie Kedourie, Nationalism , revised with afterword (London, 1985).

[81] Maivan Clech Lam, "Indigenous Peoples' Rights to Self-Determination and Territoriality", in Human Rights in the World Community, Richard Pierre Claude and Burns H. Weston Ed., 2006.

new system of government has been the central element addressing self-determination[82], and seemingly a number of cross-border and supranational arrangements have been created to address the British-Irish issue.

In this regard, a lot of effort has been put lately (particularly after ethnic conflicts that have caused mass massacres, such as those that took place in Srebrenica and Rwanda) into exploring political solutions in order to handle the changing size and composition of states by peaceful means. Indeed, it is no easy task. As Prince of Liechtenstein Hans Adam II has stated it in his preface to Danspeckgruber's book,

> "A workable approach must be a compromise; otherwise it has no chance of winning international acceptance. But there is room for compromise only if the idea of autonomy is accepted as a solution. […] A gradual approach to self-determination avoids situations in which new states are created with leaders who have no experience in self-government. […] Decentralization of power may often be the only way to bring decisions nearer to the people and to make the state itself more efficient."[83]

The idea of cultural survival for people with Aboriginal status cannot be singled out as individually based, but the achievement of cultural survival helps to reinforce rights among individuals by contributing to a realization of 'self' that is deeply rooted in people's mind as well as in their customs and traditions.

<u>But do collective identity and human rights need 'territory' in order to be respected?</u>

The fact that when it comes to decision-making, self-determination can lead to autonomy is not, per se, a threat to individual human rights, nor necessarily to the State. What Svesson identifies as "the structural framework for action" —that is, environmental conditions and social circumstances— tends to constantly (and more and more rapidly with globalization) vary over time, but there is no reason why such continuous adaptations cannot coexist with the concept of political and cultural autonomy (which does not entail a competition for absolute control of, and authority over a given territory or 'landbase')[84] for those peoples who emphasize the collectiveness of human dignity and do not recognize the individual as

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[82] Christine Bell, *Peace Agreements and Human Rights*, New York: Oxford University Press, 2000.

[83] Prince Hans Adam II of Liechtenstein, Foreword in Wolfgang F. Danspeckgruber, *The Self- Determination of Peoples: Community, Nation and State in an Interdependent World*, Lynne Rienner Publishers, 2002, p.XI.

[84] Article 3 of the UN Declaration on the Rights of Indigenous Peoples, 2007, states: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

the only acceptable basis for political governance. Such balance can be achieved by the officially recognized State by putting forward some guarantees for its minorities that enable it to retain sovereignty while respecting its citizens and appreciating the national characteristics and qualities contributed to world culture by the different nations: namely support for the indigenous language and culture; secured access to land and water required to maintain aboriginal-specific modes of production and quality of life; and participation in the decision-making process concerning the people's social life—that is, National-Cultural Autonomy (or Non Territorial Autonomy). In Lemkin's words, the world represents only so much culture and intellectual vigor as are created by its component national groups[85].

Gradual acceptance and recognition of land rights claims put forward by indigenous minorities have been labeled by some authors 'development law', as opposed to the classical 'property law' and 'administrative law.'[86] Bringing the perspective of culture into the uni-dimensional acknowledgement of sameness or equality promoted legally by international law through its human rights instruments is a fundamental step towards articulating and promoting the right of people to be culturally unique and distinct from any other people in the world, without tromping upon the said individual civil and political rights[87]. To quote a Native person belonging to the Plains Cree, "To us Indians human rights is a matter of daily survival; it is the right to food, to firewood and to fresh water, but above all it is the right to our customs. If we are denied these rights we are denied human rights, as we see it."[88] On a similar note, Greenfeld stated that "national identity is, fundamentally, a matter of dignity; and gives people reasons to be proud" and generates a 'guaranteed status'."[89]

In short, it seems that more often that not secessionist claims are, on the one hand, a last

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[85] Raphael Lemkin, *Axis Rule in Occupied Europe: Analysis, Proposals for Redress* (Washington DC, Carnegie Endowment for International Peace, 1944) p.80.

[86] *Human Rights and Anthropology*, ed. Downing and Kushner, (Cambridge, in Cultural and Survival Report 24, 1988).

[87] Richard Falk, "Cultural Foundations for the International Protection of Human Rights" in *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus*, ed. Abdullahi Ahmed An-Na'im, (University of Pennsylvania Press,1992), pp.44-60.

[88] Tom G. Svensson, "Right to Self-Determination: A Basic Human Right Concerning Cultural Survival. The Case of the Sami and the Scandinavian State" in Human Rights in Cross-Cultural Perspectives. A Quest for Consensus, cit, p.364.

[89] Liah Greenfeld, *Nationalism and the Mind: Essays on Modern Culture*, (Oxford: Oneworld, 2006), p. 486.

resort for abused minorities, and on the other hand a self-fulfilling prophecy for the states that fear for their territorial integrity. In reaching a compromise on autonomy decentralization, in most cases, need not be territorial, but rather cultural and based on identity: all considered, it is quite likely that many of the existing exacerbated situations of peoples advocating for independence would be content to accept a less threatening right to internal self-determination in the form of NTA, if they were granted substantial cultural autonomy and real guarantees of rights and representation.

To frame the issue as sovereignty versus human rights is therefore to ignore that sovereignty can itself be characterized as a human right, and indeed—given common Article 1 of the two main human rights covenants—as the first human right: self-determination in this context has meant statehood for dependent peoples, and free pursuit of economic, social, and cultural development has meant nonintervention in the internal affairs of less developed countries. As Roth put it, "the inviolability of the collectivity can be, and has been, understood not as the negation of the rights of individuals, but as a prerequisite to the realization of the values that all other rights seek to further."[90]

[90] Brad R. Roth, "Whatever Happened to Sovereignty? Reflections on International Law Methodology" in Toward Understanding Global Governance. The International Law and International Relations Toolbox , ACUNS Reports and Papers (Ed. By Charlotte Ku and Thomas G. Weiss, 1998, No. 2), p. 99.