

A critical analysis of the self-determination of peoples

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Summary

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Introduction

Over the last few years, the demand for the self-determination of peoples has once more acquired considerable force. In consolidated states no less than in states that are falling apart, more or less dominant political groups have appealed to self-determination to support their own political projects. Such demands have pursued a variety of goals, ranging from the attainment of multilinguism to greater tolerance for the religions, habits and customs of minorities and even the review of borders and the setting up of new states. Different often-contradictory aspirations have thus been grouped under the single banner of self-determination.

If we take a closer look at such demands, we find that ‘the right to self-determination’ spans three very different categories. The first is the self-determination of colonial peoples, which is how the term is used in the United Nations Charter and in many other sources of international law. The entire world political community supports this meaning, bar a few deplorable exceptions. The second meaning is associated to secession, and encompasses the demands of minorities which intend to break away from the state they belong to, has been the one most in vogue since the end of the Cold War and also the one most directly associated with the armed conflicts and civil wars of the last decade. It is the second meaning, in particular, that clashes against the concept of state sovereignty. The third meaning, finally, refers to certain ethnic or cultural groups which, albeit intending to continue

to remain part of the state they belong to, wish to achieve given collective rights. This latter is the most innovative meaning and, in democratic states especially, has triggered a fierce debate.

Albeit all theoretically and politically valid, the three meanings hide political and intellectual pitfalls. In all three, self-determination is a subjective right which fails as yet to be precisely matched by a body of law. The thesis I argue here is that to be put into full effect, the right to self-determination cannot be self-assessed by conflicting political communities. If this is the case, the outcome will likely reflect the power of the contending parties rather than the interest of the peoples. In order to retain its validity, the concept of self-determination should be fitted into a legal system far broader than that of single states and even of interstate law. If it is to play a progressive role in the global community, self-determination requires a cosmopolitan legal order. Without such an order, the principle risks being out-of-date and reactionary, stirring up particularist and chauvinistic demands contrary to fundamental human rights.

Such a cosmopolitan legal order is unlikely to be achieved shortly. But even in the absence of such an order, I suggest that third and independent parties should assess the conflicting claims of political communities regarding self-determination.

This paper is organised as follows. The following section asks what a people is from the point of view of political and institutional organisation and concludes that the concept is evasive and ambiguous, which is precisely why the idea of equalising 'state' and 'people' is as unfeasible as it is pernicious. The following sections take into account the three meanings of the concept of self-determination and demonstrate how each will benefit from a cosmopolitan legal order. Though the essay is prevalently critical, the conclusions suggest a way of recovering all that is viable in each of the three meanings of the self-determination of peoples by urging the conflicting parties to accept the judgement of third and independent authorities.

Some milestones in the relationship between states and peoples

The concept of the self-determination of peoples is founded on the premise that peoples themselves are the holders of given rights. This means instituting rights different from those recognised to both states and individuals. The problem is by no means a new one: on various occasions in the evolution

of meta-state law,² the need has been perceived for legal categories different from state public law and interstate public law. The Romans, the Spaniards at the time of the discovery of the New World and the European States before and after the French revolution felt the need to guarantee certain rights to 'peoples' even if they were devoid of a 'state'.

At the beginning of the XX century a major divide between 'states' and 'peoples' took place. At the end of World War I, analogous terminology was used by the Bolsheviks and by President Wilson, both of whom preached the self-determination of peoples, albeit with slightly different meanings. The Bolsheviks referred, above all, to self-determination from the inside, believing that the principal factor of division among peoples was the dominion of autocratic governments and a minority oppressing the majority of the population. President Wilson, instead, promised he would achieve the self-determination of peoples from the outside, partly by redefining borders to create state communities that were, as far as possible, culturally, ethnically, geographically and linguistically homogeneous.

At the Paris Conference, Wilson had to mediate on the issue with the views and interests of European governments. The Bolsheviks, who at least on this point might have proved precious allies, were kept out. Leaving aside the self-interest that eventually prevailed, Wilson's rationalistic principles also had to come to terms with history and geography. It thus emerged that the self-determination of peoples could not technically entail the creation of one state for every people. In a Europe built round nation-states, new states were created with very strong ethnic minorities: Czechoslovakia, Yugoslavia, Poland and the Baltic republics became new countries in which different peoples were forced to live together.³

The great powers were not totally incompetent, however, and at the Paris Conference they had the governments of the new states pledge to recognise and guarantee given rights to minorities. The new states also had to accept a limitation on the exercise of their sovereignty domestically, allowing the new-born international institution, the League of Nations, to act as a guarantor of the rights of minorities. As Arendt has noted, to speak of minorities and their rights and, indeed establish that an

² By meta-state law, I mean law different from the law in force inside states. This includes different categories which have emerged in the history of legal thinking, such as the law among states and supra-state law.

³ See the vivid account by H. Arendt, *The Origins of Totalitarianism*, London, The Trinity Press, 1950, especially ch. 9, section I: 'The Nation of Minorities and the Stateless People'.

institution external to states was necessary to guarantee such rights actually meant declaring a condition of political minority for minorities.

No less significant is the case of Germany on which the Peace of Versailles imposed many international obligations (reparations, first and foremost) but, paradoxically, no obligation to protect ethnic minorities. The birth of the Weimar Republic, proud to be founded on the guarantee of individual rights, seemed to indicate that, at least on one point the Paris Conference had got things right, and that in Germany it was enough to be a citizen of the state to have one's own individual rights respected. Yet it was precisely in Germany that the rights of a people, the Jews, who until a few years previously could be considered fully integrated in the German state, were outrageously violated.

It was arguably because the memory of the blundering evaluations of the Paris Conference were so fresh that, after the tragedy of World War II, the Charter of the United Nations was much more cautious in accepting the dichotomy between states and peoples. By 'peoples', it refers principally to those of the Third World which ought, in or more or less distant future, to have become states (see, for example, art. 73). It failed, instead, to address the problem of ethnic minorities inside pre-constituted states. If it was the United Nations' intention to protect given rights of peoples, they did so through the protection of the individual rights established in the Universal Declaration and subsequent acts.⁴

Peoples and their self-determination

⁴ I do not address here John Rawl's approach to the law of peoples (*The Law of Peoples*, Harvard University Press, Cambridge, Mass., 1999), since his analysis is explicitly designed to describe a "particular political conception...that applies to the principles and norms of international law and practice" (p. 3). In other words, Rawls does not address in his research how political communities have been established and how they could or should be modified, but only how political communities should interact among each other. I think that his approach would have been better described by the terms "the political philosophy of inter-state law". The debate generated by Rawl's theses is critically reviewed in S. Caney, 'Cosmopolitanism and the Law of Peoples', *Journal of Political Philosophy*, vol. 10, no. 1, 2002, pp. 95-123.

The concept of self-determination is one which arouses a great deal of sympathy; no one in the contemporary world is in favour of the 'hetero-determination' of a people any more. But for the concept of the self-determination of peoples to have an accomplished meaning, it is also necessary to define exactly what a people is. The fact is that no notion could be vaguer. Ever arbitrary, the definition of 'people' has become all the more so today, now that the entire planet is subdivided into compound states. When we refer to a state, there is no ambiguity involved: we know what its borders are, what the law in force there are and, in many cases, which international laws it has pledged to respect. States can be defined, classified and counted. Any definition, classification and count of peoples will involve a much higher degree of subjectivity.

Yet the fact that it is so easy to identify a state fails to solve the problems of the global community. States are in fact increasingly less capable of representing individuals in the international sphere. It is by no means a coincidence that, in the course of the last half century, we have seen progressive erosion of the oligarchic power that states had acquired in international politics. We have thus seen local bodies beginning to have international programmes, non-government organisations increasingly assuming an unofficial and often also official role, individuals and organised groups beginning to perform political activities at transnational level and national liberation movements taking on a role in the international community and within its organisations. This explains why, as Richard Falk has noted,⁵ the notion of the peoples' rights is necessarily in tension with sovereign states. That peoples have a voice and representation in world political life in parallel with their voice and representation as subjects or citizens of a particular state is thus a source of wealth, but this does not necessarily imply that each claiming 'people' should become a state.

All the states on the planet represent peoples imperfectly in two different senses: on the one hand, they can represent more than one people (the United States comprise dozens of peoples, a fact which has become a motive for national pride). On the other, states do not necessarily represent a people *in toto*, in the sense that the members of that people may be citizens of more than one state. By Irish, for example, we may refer to citizens of Eire or of the United Kingdom or of the United States.

An objective criterion to define what a people is has never existed, nor ever will. Language, religion, race and shared faith fails to provide a solid method to identify the boundaries of a people. Basques,

⁵ Cf. R. Falk, 'The Rights of Peoples (In Particular Indigenous Peoples)', in J. Crawford (ed.), *The Rights of Peoples*, Oxford University Press, Oxford, 1988.

Northern Irish, Palestinians, Kurds, Armenians, Georgians, Quebecois, Serbs, Croats, Chechens, Aborigines, Luxemburgers, American Indians, Sardinians, Ladins, Val d'Aostans - which of these is a people? We could go on *ad infinitum* - Catholics and Protestants, Arabs and Jews, Arsenal and Tottenham fans, Walloons and Flemings, Scots and Welsh. Which of these deserves to be defined a people?

From the cultural and sociological point of view, nothing can stop any community which recognises itself in a given identity from defining itself as a people. What is at stake is not the fact that the Irish identify with St Patrick's Day, that foot-ball supporters identify with the colours of their team, or that the Scots wear kilts. The faculty to do so belongs in fact to the sphere of individual liberty.

The Italian legal philosopher Ferrajoli⁶ has argued that to recognise a people as a subject of the law is not necessarily to recognise its sovereignty, thereby favouring its becoming a state. He also has suggested we grant to any collective group that asks for it the faculty to feel like a 'people'. Such liberality risk being empty, however, if no specific right is associated with the definition of a 'people'. Above all, it risks entering into conflict with the rights granted to individuals. Does a 'people', for example, have the faculty to exclude other subjects? Was it legitimate for the majority of German citizens of the Aryan race to decide that a minority of citizens of the Jewish race could not belong to the German people and be deprived of their German citizenship? The question is a rhetorical one and there is, of course, widespread agreement on such extreme cases. Yet the problem becomes much more complex when, on the basis of the notion of the right of peoples, given collective rights are demanded for some citizens but not for others.

One state, one people?

If there were one state for every people in the world, and if each of these peoples lived solely and exclusively within the boundaries of its own state, it would not be necessary to resort to the notion of people's rights. The traditional notions of state and interstate law would suffice per se, and the concept of self-determination would be valid exclusively inside and not outside states. Yet history

⁶ L. Ferrajoli, 'Il diritto all'autodeterminazione nell'età della globalizzazione', in Fondazione Internazionale Lelio Basso (ed.), *Il diritto all'autodeterminazione dei popoli alle soglie del 2000*, Rome, 1999.

and geography force us to take account of the fact that state and people do not coincide. The UNO boasts 189 independent members, but there are about 600 active linguistic communities and more than 5,000 ethnic groups in the world.

The idea of matching states with peoples is a very old one; this was indeed the political programme of Joan of Arc in the early fifteenth century. During and after the Napoleonic Wars, when the formation and suppression of states had become an exercise for military academies, many thinkers believed it was possible to solve the problem of European political disorder by creating states that could represent homogeneous ethnic and linguistic communities.

But already during the Napoleonic period, it was very difficult to trace an ethnic, linguistic, cultural and religious identity and associate it to given territories. Two centuries after, the accentuation of globalisation, the large-scale migrations and the subdivision of the territory into territorial states have made impossible to identify states with peoples. Let us try to imagine what it would take to form 600 linguistically homogeneous states, or, going even further, to create 5,000 politically and ethnically homogeneous communities. The international community would have no major problem in assimilating such a transformation: the diplomatic system, intergovernmental organisations, the United Nations included, would continue to work with 600 or even 5,000 member states instead of 189. In short, the interstate system would be able to work even with a much larger number of members.

Problems would arise, above all, inside states, which would have to redraw their frontiers and hence do violence to their history and geography. In other words, it would be necessary to resort on an unprecedented scale to means that are out of the question such as war, ethnic cleansing, forced deportation or even genocide. Hardly anyone today would be prepared to accept such methods.⁷ In short, the idea of redrawing the frontiers of states to make them correspond to a 'people' is simply unthinkable.

This does not mean that states as they stand are the ideal political solution to serve the needs and interests of individuals and peoples. Yet it will never be possible to cure a state's maladies merely by

⁷ It is certainly disturbing to note that, to have political communities in conformity with his principle of nationality, a brilliant thinker such as David Miller is prepared to suggest recourse to a sort of preventive ethnic cleansing. Cf. D. Miller, 'Secession and the Principle of Nationality', in J. Couture, K. Nielsen and M. Seymour (eds), *Rethinking Nationalism*, University of Calgary Press, Calgary, 1998. The solution is the exact opposite: i.e., the formation of state political communities eligible to host several cultures and nationalities.

redefining its frontiers and modifying the way in which its population is constituted. The present limits of the state have to be solved much more radically, taking measures both internally and externally: on the one hand, making the state itself a truly multiethnic and multicultural political community; on the other, making it part of a world community founded on legality and co-operation.

The three meanings of 'self-determination of peoples'

The concept of the self-determination of peoples harbours too many perils. More precisely, it is fair to point out that the subjective right to self-determination, can be interpreted in at least three different ways, as:

- i) The right of colonial peoples to become a state;
- ii) The right of minorities of a state (or more than one state) to become an autonomous (or to join another) state;
- iii) The right of ethnic minorities to benefit from certain collective rights.⁸

The three different categories are obviously interconnected, and a given people can assert its rights by using any one of the three meanings as circumstance demand. A people can, for example, demand certain collective rights from its own state (third meaning), and if such demands are ignored or even repressed, it can claim political independence as a means of achieving such rights (second meaning). This is the case of the Kurds, who have exerted pressure to establish themselves as a sovereign state directly proportional to the repression which states (whether Turkey, Iraq, Iran or Syria) bring to bear on their cultural, religious and linguistic identity. On the basis of the policy it implements towards minorities, a state may thus find itself having to deal with demands of the second or third type.

⁸ This taxonomy is different from those suggested by D. Ronen, *The Quest for Self-Determination*, Yale University Press, New Haven, 1979, pp. 9-12, and A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, Cambridge University Press, Cambridge, 1996, pp. 316-317. It unifies similar categories and takes into consideration the internal/external relationship in each.

Demands of the first and third type may also be alternative one to another. Some of the peoples colonised by European powers have not asked to become autonomous states because they are satisfied with the degree of domestic self-determination allotted to them. Greenland, for example, continues to be an autonomous territory of the Danish crown precisely because, thanks to the autonomy it has achieved on the basis of the third point, it has no desire to become an independent state.

It is difficult - admittedly, more in theory than practice - to draw a clear line of demarcation between the first meaning and the second. Many nationalist political movements which aspire to independence (certain Basque factions, Catholics in Northern Ireland, for example) argue that they have been colonised. It is nonetheless possible to note a difference between an ethnic minority within a state and a colonised people. In the first case, the state recognises the same rights and duties to the ethnic 'minority' as it does to the ethnic 'majority', whereas, in the second case, the state envisages certain rights and duties for the 'colonised' and others for the 'colonisers'. On the basis of this distinction, it is possible to argue that the coloured population of South Africa was part of the first category at the time of apartheid, whereas the Basques are part of the second.⁹

The following sections discuss these three different meanings.

The right of colonial peoples to form a state

It is no coincidence that the principle of self-determination has returned to the fore in the post-war year as a reaction to the colonial dominion of western states. In the Fifties, Sixties and Seventies, the principle of self-determination was interpreted mainly as the right of peoples to become states, a reiteration of the conceptual and legal categories used to reorganise European society after World War I.¹⁰ 'Nearly 100 territories designed as colonial under Chapters XI and XII of the UN Charter

9 A Basque separatist would argue that Spain fails to guarantee equality of treatment to Spaniards and Basques. Likewise, in Northern Ireland, a Catholic would argue that, with respect to a Protestant, he or she suffers economic and social discrimination. Yet, no matter how far the distinction between the first and second category is subjective, in the majority of cases, it allows us to classify the cases considered.

10 See the excellent overview in A. Cassese, *Self-Determination of People. A Legal Reappraisal*, cit. The crowning moment of this phase was the Charter of Algiers. Cf. F. Rigaux, *La Carta d'Algeri*, Edizioni cultura della pace, S. Domenico di Fiesole, 1988.

have become independent and have been admitted to the United Nations', recalls James Crawford.¹¹ In other words, the largest membership of the UN is associated to this meaning of self-determination.

In cases such as those of India or Algeria, self-determination meant allowing such peoples to become sovereign states against the states that had conquered them. Britain and India or France and Algeria had no cultural, geographical, ethnic or religious affinities, and the rights granted to Indian or Algerian citizens were very different from those granted to British or French ones. In such cases, the notion of a people's right takes on a provisional configuration. As soon as the people in question wins its sovereignty, the right of peoples is replaced by state and interstate law.

The process of decolonisation has gone a long way over the last half century, and has been crowned by remarkable successes in terms of the achievement of formal sovereignty by Third World states. Yet, today, precisely because all colonial peoples have become states, it is possible to review the story of their self-determination with a pinch of criticism. The liberation movements, which aspired to become states, sought to achieve self-determination externally. During national liberation struggles, there was much less talk about achieving self-determination internally.¹² Even world public opinion, which rallied in favour of Indian and Algerian independence and the respect of the sovereignty of states such as Vietnam and Cambodia, demanded self-determination achieved from the outside, confiding in the fact that, once it had been achieved, the liberation movements in question would allow it from the inside too.

At best, over-stressing ways of achieving *internal* self-determination when these peoples were under the colonial yoke would have appeared paternalistic; at worst, it would have seemed an instrumental means of conserving the imperialist dominion. There can be no doubt that Indians and Algerians had something to learn from the democratic systems in force in the United Kingdom and in France. But the matter was secondary and subordinate to the indisputable demand of these countries to pursue their own self-determination from the outside. Moreover, 'noble' western liberal democracies ceased

11 James Crawford, 'State Practice and International Law in Relation to Secession', *The British Yearbook of International Law*, vol. 69, 1999, p. 90.

12 By 'internal self-determination', I mean the possibility for citizens to participate in the choice of government and the formulation of their own policies; in other words, the democratic system. Cf. D. Held, *Democracy and the Global Order*, Polity Press, Cambridge, 1995, p. 147.

to be taken seriously as models of democracy by peoples of the Third World at the very moment in which they sullied themselves with colonial crimes.

Now that, at least formally, the decolonisation process is over, hypocrisies abound with regard to self-determination processes. The first is that of the western states which used to apply high degrees of self-determination internally (it is worth reflecting on the fact that countries of the great democratic revolutions - the United Kingdom, France and the United States - were also the main colonialists and, later, imperialists), but denied the same internal self-determination to the peoples they had initially dominated. Their approach, indeed, also cast a sinister light on the way in which countries exerted their power internally (how many times has it been repeated that a people which oppresses another cannot be free?). The second hypocrisy is that of national liberation movements which, after fighting to achieve their own self-determination from the outside, conquering power and setting themselves up as states, have often resorted to force to prevent self-determination from developing internally and established dictatorial regimes.

In short, the decolonisation has proven that external and internal self-determination do not necessarily coincide, a fact which has often created considerable political difficulties. For years, world public opinion supported certain liberation movements to assert the right of peoples to self-determination from the outside (suffice it to mention the tragic case of Cambodia), but it was forced suddenly to back off when it saw that they were denying the right of peoples to self-determination from within.

The full self-determination of peoples would have meant achieving both the external and the internal version. Today we have to admit that, unfortunately, the process of decolonisation has achieved many successes of the first kind but far fewer of the second. It is not hard to understand why successful examples of internal self-determination - that is, of democracy - have been so few and far between. A political authority to control a blatantly internal question such as that of form of government has always been conspicuous by its absence. It would have clashed against the dogma that both colonial states and liberation movements shared: state sovereignty. What authority could the British or French or Americans, often brutal masters the day before, credibly advise Indians, Algerians, Vietnamese or Cambodians to adopt the institutions which characterise a modern representative democracy?

The notion of the right of peoples to self-determination could only have been asserted to the full with legal norms and institutions empowered to interfere in the internal affairs of states. Such legal norms and institutions cannot receive their legitimacy from states alone, since states - democratic states included - tend to establish relations with the outside that are founded on self-interest as opposed to

legality. The international institutions themselves, the UNO first and foremost (even though it played a very important role in the decolonisation process) proved incapable of helping peoples who were becoming states to achieve internal self-determination. Tied as it is by the principle of sovereignty and non-interference, the UNO has only a few, often blunt, arms at its disposal to defend peoples from their own dictators.

One further aspect needs to be stressed. Albeit often opposing western colonial powers with arms, national liberation movements accepted the frontiers they had inherited from those powers even when they were established arbitrarily. What made India a homogeneous political community? Why did it become one single state and not, for argument's sake, three or 25 different states? In the event of divergences within local communities, who, in the final analysis, was called to solve them? Kaveli Holsti is not wrong when he points out that, 'The elites who led independence or national liberation movements under the doctrine of national self-determination often had no nation to liberate. Rather, they had a collection of communities that, aside from their dislike of colonialism, had little in common, and certainly no common identity'.¹³

Even in the widely accepted case of the self-determination of colonial peoples, it thus emerges that the notion of the right of peoples is not enough to solve two essential problems: that of internal self-determination and that of the redefinition of existing frontiers. It would appear apt therefore to fit it into a broader legal framework, that of a fully-fledged cosmopolitan legal system.

The right of minorities to form a state

In the previous section, I examined cases, now no longer controversial, of peoples whose aspiration was to put an end to colonial dominion and become states. Since the 1980s, however, another type of demand has gained weight; that of ethnic, linguistic, religious or simply cultural minorities which aspire to become states.¹⁴ Croatians, Cecens, Basques, Quebecers, Scots and even Padanians have

13 Cf. K. J. Holsti, 'The Coming Chaos? Armed Conflict in the World's Periphery', pp. 283-310 in T.V. Paul and J.A. Hall (eds), *International Order and the Future of World Politics*, Cambridge University Press, Cambridge, 1999.

14 Cf. the carefully pondered review by A. Buchanan, 'Theories of Secession', in *Philosophy and Public Affairs*, vol. 26, 1997, pp. 31-61. On the capacity of some groups to become 'imaginary' ethnic communities, see the fundamental observations of B. Anderson, *Imagined Communities. Reflections on the Origins and Spread of Nationalism*, Verso, London, 1983. I thus find that the

invoked the right of peoples to secede from their state of origin and become autonomous states. Even more complex is the story of peoples such as the Kurds whose territory is split up among a number of different states.

In a few fortunate cases, new states have been formed and recognised without conflict.¹⁵ In many others, the aspirations of some peoples to become autonomous clashed with other aspirations. In the most controversial cases, which, sadly, have multiplied since the end of the Cold War, demands for secession have provoked civil wars and bloody conflicts. This is not surprising if we bear in mind that the configuration of modern states is such that any secession is bound to generate a new ethnic minority.¹⁶ It is no coincidence that the few cases of separation without bloodletting (Slovakia from the Czech Republic or Slovenia from Yugoslavia, for example) have been the ones in which no significant ethnic minority was present inside the new state in the making. Until we reach the paradoxical point of one state for every individual, we shall have to come to terms with multiethnic political communities.

The former Yugoslavia was the tragic ‘laboratory’ for this process. There we witnessed a spiral in which: 1) the Yugoslav state denied the rights of some ethnic majorities; 2) the same ethnic minorities thus sought to set themselves up as states to protect their identity; 3) but, at the same time, they denied the rights of the ethnic minorities inside them. Hence a vicious circle in which the only way of settling scores was with arms and violence.¹⁷

All the groups that took part in the conflict in the former Yugoslavia appealed to the right to self-determination of their own people. Those who wanted the separation of Croatia or Kosovo claimed the right of the Croat or Kosovar people to form a sovereign state, those who wanted to conserve the federal state appealed to the rights of the constituent Serbian minorities in Croatia and Kosovo,

criterion proposed by D. Miller, *op. cit.*, to judge the requests of secessionist groups on the basis of their national identity is not solvable in theory and in practice.

15 Crawford, ‘State Practice and International Law’, *op. cit.*, p. 86, draws a useful legal distinction between secession, which is unilateral, and devolution or grant of independence, which follows an agreement among the parties.

16 As Habermas has noted, establishing new borders serves only to produce new minorities. Cf. J. Habermas, *Kampf um Anerkennung im Demokratischen Rechtsstaat*, Suhrkamp Verlag, Frankfurt a. M., 1996.

17 See M. Kaldor, *New and Old Wars*, Polity Press, Cambridge, 1999.

those who wanted to form an independent Bosnian state appealed to the right of the Bosnian people, those who wanted a union of Serbians appealed to the right of the Bosnian-Serbian people, and so on. Alas, the appeal to the principle of self-determination failed to offer practical solutions.

All the various counterpoised demands for self-determination were met in the most brutal and traditional way possible: by resorting to military force to conquer sovereignty. Each ethnic community, real or presumed, fought with every ounce of energy to achieve sovereignty over a given territory. The international community proved incapable of proposing solutions that would, at one and the same time, define the borders of states and guarantee the rights of ethnic minorities and individuals. The international community¹⁸ was even less capable of imposing peace and the respect for human rights within each political community.

The lesson we have learnt from the former Yugoslavia and the wave of ethnic nationalism that we have witnessed over the last decade is that a people's claim to form an autonomous state does not necessarily solve the problem of respect for individual rights. What was lacking was a super partes arbitral power capable of providing a peaceful solution and guaranteeing each community. The legitimacy and functionality of the claims of the various ethnic groups should have been based on three criteria.

i) A people's effective intention to become an autonomous state. Its demand for secession must be deemed null and void if the majority of the citizens involved make no deliberate claims of this kind. The cases of the 1990s demonstrate how scarcely representative political groups can claim to speak on behalf of a people and adopt a deliberate strategy to create tension and force a majority relatively insensitive to a secession to take sides. If it is established that the majority of the population effectively intends to form an autonomous state, the demand has to be pursued on the basis of existing constitutional norms.¹⁹ If they are not envisaged in, or even banned by, the constitutional systems, as in the Italian case, it is necessary to activate the channels envisaged by the international system.

18 The Yugoslav case illustrates how vague is the notion of 'international community'. See C. Brown, 'International Political Theory and the Idea of World Community', in K. Booth and S. Smith, in *International Relations Theory Today*, Polity Press, Cambridge, 1995.

19 On the need to contemplate the right to secession (or, to adopt the terminology suggested by Crawford, the grant of independence), see Daniel Weinstock, 'Constitutionalising the Right to Secede' *Journal of Political Philosophy*, vol. 9, no. 2, 2001, pp.182-203.

ii) Protection of individual rights and minorities. It is impossible to form a new state without preventively guaranteeing the rights of groups which, in the state to be, would constitute ethnic minorities. The problem of a minority that feels oppressed cannot be solved by turning it into an oppressive majority. Even the fight for territory might become much less fierce if, before discussing the possible formation of new states or the modification of frontiers, the contending parties were to agree on guarantees designed to protect individual and collective rights. In the many republics that sprang up after dissolution of the Soviet Union, the resident Russian populations were oppressive majorities one day and oppressed minorities the next. To put it bluntly, sacrificing one people in place of another is no way of asserting a right.

iii) Monitoring and control by supranational institutions. A state's secession of a region cannot be considered as merely an internal problem. Where sharp conflict exists between the state and ethnic groups aspiring to autonomy, the main element for a peaceful settlement - reciprocal mutual trust - is lacking. In such cases, the international community has to make a jurisdictional and arbitral intervention. It is unlikely that problems such as the delimitation of new boundaries and the attribution of rights to minorities can be solved peacefully without the intervention of a third super partes political authority. Two questions remain unsolved, however: a) What legal principles must such an authority be based on? b) Which international community institutions should perform such interventions?

So far, the international community (i.e., the community of sovereign states and their inter-governmental organisations, including the United Nations) has been rather reluctant to take a more active role in issues concerning secession. The review by Crawford shows that the international community is reluctant to 'accept unilateral secession outside the colonial context. This practice has not changed since 1989, despite the emergence during that period of 22 new States. On the contrary, the practice has been powerfully reinforced'.²⁰

It is no surprise that the international community, composed by states' representatives, is unwilling to recognise new states without the prior consent of the states they belonged to. For states, sovereignty should be respected and interference should be avoided. But such a passive role is not necessarily a good thing: it leaves, in fact, conflicting parties (that is, existing states on the one hand and movements for independence on the other hand) with no other choice than to use force. The world community could be much more helpful in intervening as an ex-ante arbitrator whenever frontiers are

20 Crawford, *op. cit.*, p. 114.

redrawn, and as a guarantor of individual rights and minorities, rather than with an ex-post recognition of the de facto condition.

Rights of peoples as rights of minorities

A third and final meaning of self-determination is the one used by groups which demand not to become states, but simply to achieve the recognition and protection of given collective rights. Such peoples do not question the fact that they belong to their state of origin, yet, in so far as they are minorities, they believe valid reasons exist for obtaining special protections. In this meaning, the rights of peoples are claimed mainly from the territorial state of belonging. This is the case of some indigenous peoples – for example, Aboriginals in Canada, the United States, and Australia.²¹ Similar situations also arise when ethnic communities settle in foreign countries, as in the cases of the Turkish community in Germany or the Arab community in France. The migrations of the contemporary era and the increasingly populous ethnic communities in foreign countries (Berlin is now the second largest Turkish city in the world) will make this type of claim increasingly frequent. The principle of self-determination is not associated with a request to form a state but is, instead, addressed at the state of belonging to achieve, for example, the right to decide which language one wishes to be educated in, autonomy for given cultural or religious norms and so on.

In the era of globalisation, if states do not opt for ethnic cleansing or isolationism or the forced standardisation of minorities, they are obliged to become multi-cultural and multi-ethnic.²² This meaning of the right of peoples is thus an important legal instrument for helping states to manage communities with sharply different cultural traditions and values.

21 A number of essays are dedicated to these cases in Crawford, *The Rights of Peoples*, cit.

22 This is the learnt lesson received from Canadian scholars such as W. Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Clarendon Press, Oxford, 1995; J. Tully, *Strange Multicplity. Consitutionalism in an Age of Diversity*, Cambridge University Press, Cambridge, 1996; C. Taylor, *The Politics of Recognition*, Princeton University Press, Princeton, 1992; A.-G. Gagnon and J. Tully (eds), *Multinational Democracies*, Cambridge University Press, Cambridge, 2001.

This third meaning of right of peoples concerns not so much international law as internal public law.²³ When internal public law does not provide sufficient cases protection, minorities can seek protection also in international law and institutions.²⁴ A state is founded on the equality of citizens before the law, though, as members of given peoples, some citizens could receive additional rights that others are not entitled to. Cases of this kind are highly topical: in Alto Adige, German-speaking Italians receive from the state given benefits which are not received by Italian-speaking citizens. In Canada and Australia, Aborigines have rights that are not enjoyed by other citizens. No matter how far this meaning of the right of peoples presents itself as a subset of human rights, it risks entering into conflict with the notion in so far as it counterpoises individual rights against collective ones.²⁵

Furthermore, guaranteeing the rights of ethnic minorities may create conflicts with the communities in which such minorities live. In France and Germany, some French and German citizens of Arab origin and Muslim religion applied for the right to send their daughters to school wearing the chador. Albeit with some reluctance, often stronger among the liberal and progressive public opinion, the request was granted. But should European countries be just as tolerant, if French Muslims claim the right to practise infibulation? And what if their requests were to go even further and they were to demand the right to stone adulterous wives? And, more importantly, who is going to decide?

It is sufficient here to point out that the conflicts between the norms of a state and the claims of special ethnic and cultural communities inside them will tend to increase. A truly multiethnic and multicultural state ought to envisage methods of tackling and solving these conflicts internally. Yet, at the same time, it is hard to imagine minorities being prepared to recognise sufficient legitimacy to

23 Although, as rightly stressed by Iris M. Young, 'Self-determination and Global Democracy', in I. Shapiro and S. Macedo (eds), *Designing Democratic Institutions*, New York University Press, New York, 2000, some ethnic minorities within states could also claim to have an autonomous voice in international organisations (as in the case of the Roma people in Europe).

24 For an analysis of these cases, see Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law', in Philip Alston (ed.), *Peoples' Rights*, Oxford University Press, Oxford, 2001.

25 In this context of self-determination, Iris M. Young, 'Two Concepts of Self-Determination', in Austin Sarat and Thomas R. Kearns (eds.), *Human Rights: Concepts, Contests, Contingencies*, University of Michigan Press, Ann Arbor, 2001, pp. 25-44, differentiates between non-dominating and non-interference.

state institutions. A French Court which has to pronounce itself on the chador will be seen by Muslim minorities as being over-respectful of the cultural traditions of its own people. There can be no doubt that judicial institutions representing the citizens of the world would be more authoritative. To be entirely valid, this meaning of self-determination requires some cosmopolitan law and institutions capable, as the need arises, of establishing which norms need to be allowed for minorities and which banned.

How to deal with self-determination?

I have sought to cover the various meanings which the concept of self-determination of peoples can have. I have identified three in particular. Table 1 summarises my argument. In all three cases, the principle of self-determination has a strong political rationale, but it emerges that it is contradictory to allow political communities to self-assess their right to self-determination. In such conditions, different views are very likely to lead to the recourse to violence.

Table 1 - Different meanings for the self-determination of peoples

Subjective right claimed	Paradigmatic historical cases	Objective law inside states	Supra-state objective law
<i>Right of colonial peoples to become states</i>	India, Algeria, Angola, etc. Nearly 100 UN member countries.	Existing: lacking. The independence of colonial peoples has generally been the result of a conflict.	Existing: Charter of United Nations, Pacts on civil and political rights, Pacts on economic, social and cultural rights, and subsequent developments.
<i>Right of peoples to secession from state</i>	Achieved: Republics of the former Soviet Union, Slovakia, Slovenia, Croatia, Macedonia etc. 22 new states since 1989. Claimed: Kosovo, Basque Countries, Quebec, Scotland, Curds, Padania etc.	Existing: generally not envisaged save as outcome of conflict. In some cases, envisaged in the constitutional system (eg, Canada). To be claimed: creation of procedures to evaluate the legitimacy of the secession, consultation of majorities and minorities, protection of human rights, sharing of resources.	Existing: absent. The international community recognises peoples only if they have risen or following the conquest of a given territory. To be claimed: Arbitral activity of international institution in redefining controversial frontiers and guaranteeing protection of human rights in new states.
<i>Right of peoples as minorities inside the state</i>	Native populations: Australian aborigines, Indigenous peoples in the United States and Canada etc. Ethnic minorities: Basques, Quebecers, South Tyroleans etc. Immigrants: Turks in Germany, Arabs in France, Albanians in Italy etc..	Existing: in some states collective rights are envisaged to protect minorities. To be claimed: creation of institutions and procedures designed to periodically match the rights of minorities with those of majorities.	Existing: The right of minorities is mainly considered an internal affair of sovereign states. To be claimed: monitoring and evaluation of minorities' claims for protection of their cultural and political identity.

Is there any way to allow the requests for self-determination to be addressed in a non-violent way?

An ideal way would be to devolve competencies about self-determination to cosmopolitan legal

institutions that should represent the views of citizens of the world as much as they represent that of states and single peoples. These institutions can be understood as a reformed World Court or a new World Parliament.²⁶ They will have the advantage to be impartial, and to be seen as such, by the different peoples. These institutions will be more inclined to deliberate according to the general interest rather than particular interests. It is however unlikely that such institutions will be established in the near future.

But even in absence of such a cosmopolitan institutional setting, there are methods that can be used to minimise the recourse to violence. This implies that the contending communities should accept the independent assessment of third parties. Let see how this can work for each of the three meanings singled out.

The first meaning, that of the right of a people to become a state, is the one evoked by national liberation movements. It is a meaning which has been crowned with success mainly in the decolonisation process. Its value is provisional seeing that it conspires to override itself: more precisely, at the moment in which peoples achieve self-determination externally, they form states and thus replace the vindicated right of people with the law of a state. The problem of external self-determination ought, however, to have been combined with that of internal self-determination. Historical experience shows, in fact, that the liberation movements, which achieved self-determination externally, were often unprepared to grant internal self-determination. Peoples in decolonised countries ought to have drawn advantage from legal norms and institutions offering, at one and the same time, arguments in favour of independence from the outside and democracy from the inside. Independent institutions should have helped in this process. When the bulk of the decolonisation occurred, the UN were reluctant to interfere in internal affairs of the new-born states and the values of democracy were not yet universally shared as they are today.

On the basis of the second meaning, the right of peoples refers instead to cases in which ethnic or cultural groups ask to secede from the state they belong to or else to become a state themselves. It is extremely difficult to establish when such requests are legitimate, since redefining the boundaries of

²⁶ The prospects for such global institutional buildings are discussed at length in D. Archibugi and D. Held (eds), *Cosmopolitan Democracy. An Agenda for a New World Order*, Polity Press, Cambridge, 1995; D. Held, *Democracy and the Global Order*, cit.; D. Archibugi, D. Held and M. Köhler (eds), *Re-imagining Political Community. Studies in Cosmopolitan Democracy*, Polity Press, Cambridge, 1998; B. Holden (ed.), *Global Democracy*, Routledge, London, 2000.

states necessarily means creating new minorities. This process demands that, in the first place, the rights of individuals and minorities are guaranteed, and that the arbitral and jurisdictional function of settling the opposing claims of ethnic groups is exercised by impartial institutions. It would be certainly an advantage if Constitutions will include 'a duly constrained right to secede'²⁷ since this will allow existing states to deal with the issue autonomously. But only a few Constitutions allow for it. Third parties can help in avoiding a vicious circle where discrimination of minorities leads to radicalism and viceversa. Third parties should suggest practicable solutions on boundaries, individual and collective rights and the ways to guarantee them. It will be an enormous progress if the parties involved, that is, states on the one hand and separatist groups on the other hand, will be willing to listen and follow the advice of independent parties. But this will require, on the one hand, that states are willing to give up their sovereignty and independent parties their claims to a self-assessment on their rights.

The third meaning touches on the collective rights which given ethnic groups claim from the state they belong to (and from which they have no intention of seceding). This is a problem more of public law than of interstate law, and the supporters of multiculturalism have had a lot to say about it. In this meaning, some collective rights may clash with individual rights. In this case too, third parties could play an important function, maintaining the right balance between people's collective rights and individual rights. This will allow the state to inform its norms and policies on the basis of an external opinion, and the minority groups to feel that their claims are not assessed by state-institutions only.

In the Northern Ireland case third parties had a positive role. The British government involved the Irish government since 1985 in the talks, explicitly assuming that the Northern Ireland question was not under the exclusive British sovereignty. The parties involved also relied on the mediation of the American government. In 1996, the peace talks were headed by the US ex-Senator George Mitchell. Other senior officers took a role in monitoring the peace agreements, including the Canadian General John de Chastelain, who was responsible for monitoring the disarmament of the para-military troupes. This led to the Good Friday Agreement of 1998, which is still a milestone of the peace process.²⁸ Of course, third parties alone cannot solve non-violently a crisis without the

27 Daniel Weinstock, *op. cit.*, p. 202.

28 For an overview on the Northern Ireland process, see Sean Byrne, 'Consociational and Civic Society Approaches to Peacebuilding in Northern Ireland', *Journal of Peace Research*, vol. 38, no. 3, 2001, pp 327-352; Joseph Ruane and Jennifer Todd, 'The Politics of Transition? Explaining

willingness of conflicting communities. But often opposite communities can be induced to search for a positive solution if this is mediated by a third party.

Political Crises in the Implementation of the Belfast Good Friday Agreement', *Political Studies*, vol. 49, 2001, pp. 923-940; Paul Mitchell, Brendan O'Leary and Geoffrey Evans, 'Northern Ireland: Flanking Extremists Bite the Moderates and Emerge in Their Clothes', *Parliamentary Affairs*, vol. 54, pp. 725-742.

Conclusions

I wanted to point out that the noble and necessary principle of self-determination of peoples is becoming the opening for a new form of tribalism²⁹ and it is encouraging some of the most reactionary tendencies present in contemporary society. If we wish to prevent it, we need to include its demands in a legal framework shared both by the community claiming self-determination and by the community that is rejecting it. The legal orders of single states as well as the interstate system are insufficient. It is thus necessary to change it in such a way as to give space to these demands. Liberal democracies are making significant steps to envisage in their legal systems both the collective rights of minorities and norms to regulate the devolution of some regions (see the significant case of Canada vis-à-vis Quebec). Progressive states can develop constitutional norms both to deal with independence claims and to guarantee collective minority rights.

Elsewhere we have outlined the ambitious project for cosmopolitan democracy, ideally eligible to examine the demands of various peoples for self-determination. But even without a cosmopolitan legal order, the parties to the case which appeal to self-determination ought to accept the principle whereby their claims have to be examined by impartial institutions. This simply means accepting the principle that no one can be a judge of their own case. It would of course be helpful for the parties to the case (be they the Russian state and the Cecen secessionists, the Spanish state and the Basque secessionists, the indigenous populations of North America or Australia) are prepared to accept the independent opinion of third-party organisations and respect their sentences.

Existing judicial institutions, such as the International Court of Justice, are not always suitable since, in so far as they are an expression of the interstate system, they are depositories of the principle of constituted sovereignty which, in general, is precisely what the principle of self-determination sets out to subvert. Without fully-fledged cosmopolitan institutions (representing, that is, citizens directly without the intermediation of their state), the parties to the case could turn to the intergovernmental organisations which they trust. An organisation potentially capable of performing this function is the

²⁹ As pointed out by T. Franck, 'Postmodern tribalism and the right to secesion', in C.M. Brolman, R. Lefeber and M.Y.A. Zieck (eds), *Peoples and Minorities in International Law*, Martinus Nijhoff, Dordrecht, 1993.

Permanent Court of Peoples.³⁰ If, no less than collective groups or the states which are opposed to it, the collective groups which appeal to the principle of self-determination were prepared to hear an impartial opinion, we would already be on the road to the peaceful solution of conflicts.

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³⁰ G. Tognoni (ed.), *Tribunale permanente dei popoli. Le sentenze: 1979-1998*, Bertani editore, Verona 1998.