

# A Critical Analysis of the Self-determination of Peoples: A Cosmopolitan Perspective

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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. Statistics on the issue tell us that at the beginning of 2003 there are 22 ongoing armed conflicts for self-determination, 51 groups using conventional political means to pursue self-determination, and 29 groups using militant strategies short of armed violence.<sup>1</sup> Such demands have pursued a variety of goals, ranging from multilingualism 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 exceptions. The second meaning, associated with secession, encompasses the demands of minorities which intend to break away from the state they belong to, and has been the 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 with the concept of state sovereignty. The third meaning, finally, refers to certain ethnic or cultural groups which, although intending to remain part of the state they belong to, wish to achieve certain 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 it is, 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 soon. But even in the absence of such an order, I suggest that independent third parties should assess the conflicting claims of political communities regarding self-determination.

This paper is organized as follows. The first section seeks to provide a definition of a “people” from the point of view of political and institutional organization and concludes that the concept is evasive and ambiguous – which is precisely why the idea of matching “states” and “peoples” is as unfeasible as it is pernicious. The following sections take into account the three meanings of self-determination and demonstrate how each would benefit from a cosmopolitan legal order. Though the essay is predominantly 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 judgment of independent third 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 recognized for both states and individuals. The problem is by no means a new one: on various occasions in the evolution of meta-state law,<sup>2</sup> the need has been perceived for legal categories different from state public law and interstate public law. The Romans, the Spanish at the time of the discovery of the New World, and the European states before and after the French Revolution all felt the need to guarantee certain rights to “peoples” even if they lacked a “state.”

At the beginning of the twentieth century, a major divide emerged between “states” and “peoples.” At the end of World War I, both the Bolsheviks and President Wilson 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 minorities oppressing majorities. President Wilson instead promised he would achieve the self-determination of peoples from the outside, partly by redrawing 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 between 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 of nation-states, new states were created with sizable ethnic minorities: Czechoslovakia, Yugoslavia, Poland, and the Baltic republics became new countries in which different peoples were forced to live together.<sup>3</sup>

The great powers were aware that this could lead to problems, and at the Paris Conference they had the governments of the new states pledge to recognize and guarantee certain rights to minorities. The new states also had to accept a limitation on the exercise of their sovereignty domestically, allowing the newborn international institution, the League of Nations, to act as a guarantor of the rights of minorities. As Arendt noted, to speak of minorities and their rights, and indeed establish that an institution external to states was necessary to guarantee such rights, actually meant declaring a status 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 individual rights respected. Yet it was precisely in Germany that the rights of a people, the Jews, who until a few years before could be considered fully integrated into the German state, were outrageously violated.

It was arguably because the memory of the inconclusive 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 referred principally to those of the Third World, which ought, in a more or less distant future, to become states (see, for example, Article 73). It failed, however, to address the problem of ethnic minorities inside already existing states. If it were the United Nations' intention to protect certain rights of peoples, they did so through the protection of the individual rights established in the Universal Declaration and subsequent acts.<sup>4</sup>

### **Peoples and their Self-determination**

The concept of self-determination arouses a great deal of sympathy; no one in the contemporary world is in favor of the "hetero-determination" of a people. But, for the concept of self-determination of peoples to acquire an accomplished meaning, it is necessary to define exactly what is meant by a people. The fact is that no notion could be more vague. 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 law is in force, and, in many cases, which international laws it has pledged to respect. States can be defined, classified, and

counted. Any definition, classification, and enumeration of peoples will be much more subjective.

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 less and 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 programs, non-governmental organizations increasingly assuming an unofficial and often also official role, individuals and organized groups beginning to perform political activities at transnational level, and national liberation movements taking on a role in the international community and its organizations. This explains why, as Richard Falk has noted, the notion of peoples' rights is necessarily in tension with sovereign states.<sup>5</sup> That peoples have 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 self-proclaimed "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 comprises dozens of peoples, a fact which has become a source of 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 for defining a people has never existed, and never will. The efforts of individual scholars may help,<sup>6</sup> but the acid test will not come from a shared academic definition, but when such definitions are taken for granted by conflicting political communities. Language, religion, race, and shared faith fail to provide solid methods for identifying the boundaries of a people. Basques, 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 deserves to be defined as a people?

From the cultural and sociological point of view, nothing can stop any community which recognizes 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 football supporters identify with the colors 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 Luigi Ferrajoli has argued that to recognize a people as a subject of the law is not necessarily to recognize its sovereignty, and thereby favor its becoming a state.<sup>7</sup> He also has suggested we grant to any collective group that asks for it the faculty of feeling like a "people." Such liberality risks

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 a right 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, 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 peoples' rights. The traditional notions of state and interstate law per se would suffice, and the concept of self-determination would be valid exclusively inside and not outside states. Yet history and geography force us to take account of the fact that states and peoples do not coincide. The United Nations boasts 191 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 program 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 with a given territory. Two centuries later, the accentuation of globalization, large-scale migration, and the subdivision of territories into territorial states have made it 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 assimilating such a transformation: the diplomatic system, intergovernmental organizations, the United Nations included, would be able to work with 600 or even 5,000 member states instead of 191. 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.<sup>8</sup> 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 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, through both internal and external measures: 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 cooperation.

### **The Three Meanings of “Self-determination of Peoples”**

The concept of the self-determination of peoples harbors too many perils. However, 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.<sup>9</sup>

The three different categories are obviously interconnected, and a given people can assert its rights by using any one of the three meanings as circumstances demand. A people can, for example, demand certain collective rights from its own state (iii), and if such demands are ignored or repressed, it can claim political independence as a means of achieving such rights (ii). This is the case of the Kurds, who have exerted pressure to establish themselves as a sovereign state in direct proportion 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 its policy towards minorities, a state may thus find itself having to deal with demands of the second or third type.

Demands of the first and third type may also be alternatives to one another. Some of the peoples colonized 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 or Catholics in Northern Ireland, for example) argue that they have been colonized.

It is nonetheless possible to note a difference between an ethnic minority within a state and a colonized people. In the first case the state recognizes 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 “colonized” and others for the “colonizers.” On the basis of this distinction, it is possible to argue that the non-white population of South Africa was part of the first category at the time of apartheid, whereas the Basques are part of the second.<sup>10</sup> 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 returned to the fore in the postwar years as a reaction to the colonial dominion of western states. In the 1950s, 60s, and 70s, 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 reorganize European society after World War I.<sup>11</sup> “Nearly 100 territories designed as colonial under Chapters XI and XII of the UN Charter have become independent and have been admitted to the United Nations,” recalls James Crawford.<sup>12</sup> In other words, the largest group of UN members comes from the achievement of self-determination in this meaning.

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, state and interstate law replace the right of peoples.

The process of decolonization has come 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.<sup>13</sup> Even world public opinion, which rallied in favor 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, confident 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 preserving the imperialist

domination. 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 to be taken seriously as models of democracy by peoples of the Third World when they sullied themselves with colonialism.

Now that, at least formally, the decolonization process is over, hypocrisies abound with regard to self-determination processes. The first is that of the western states with high degrees of internal self-determination (it is worth reflecting on the fact that countries of the great democratic revolutions – the United Kingdom and France – were also the main colonialists) denied the same internal self-determination to the peoples they dominated. Their approach, indeed, also cast a sinister light on the way in which they 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, attaining 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, decolonization 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’ assertion of 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 decolonization 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 clearly internal question such as that of the form of government has always been conspicuous by its absence. It would have clashed with the dogma that both colonial states and liberation movements shared: state sovereignty. On what authority could the British, French, or Americans, often brutal masters the day before, credibly advise Indians, Algerians, Vietnamese, or Cambodians to adopt the institutions which characterize 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 UN first and foremost (even though it played a very important role in the decolonization 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 UN has only a few, often blunt, weapons 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."<sup>14</sup>

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, most 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 that aspire to become states.<sup>15</sup> Croatians, Chechens, Basques, Quebeckers, Scots, and even Padanians have 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 recognized without conflict.<sup>16</sup> 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.<sup>17</sup> 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 minorities; 2) these ethnic minorities thus sought to set themselves up as states to protect their identity; but, at the same time, 3) they denied the rights of the ethnic minorities inside them. Hence a vicious circle developed in which the only way of settling scores was with arms and violence.<sup>18</sup>

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 Serbian minorities in Croatia and Kosovo; 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 win 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 on the one hand define the borders of states, and on the other hand guarantee the rights of ethnic minorities and individuals. The international community was even less capable of imposing peace and respect for human rights within each political community.

The lesson we have learned 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 those 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 of creating tension and forcing a relatively indifferent majority 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.<sup>19</sup> 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.

- 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 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 – mutual trust – is lacking. In such cases, the jurisdictional and arbitral intervention of the international community is needed. 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.

However, two questions remain unsolved: a) What legal principles must such an authority be based on? b) Which institutions of the international community should perform such interventions?

So far, the international community (i.e., the community of sovereign states and its intergovernmental organizations, 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.”<sup>20</sup>

It is no surprise that the international community, composed of states' representatives, is unwilling to recognize new states without the prior consent of the states they belong 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 conflicting parties (that is, existing states on the one hand and independence movements 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 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 certain collective rights. Such peoples do not question the fact that they belong to their state of origin, yet insofar 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 to which they belong. This is the case of some indigenous peoples, e.g., Aborigines in Canada, the United States, and Australia.<sup>21</sup> 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 growing ethnic communities in foreign countries 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 to the existing state 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 our age, states do not have much choice: either they opt for ethnic cleansing, isolationism, and the forced assimilation of minorities, or for multicultural and multi-ethnic integration policies.<sup>22</sup> 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.

This third meaning of the right of peoples concerns not so much international law as internal public law.<sup>23</sup> When internal public law does not provide sufficient protection, minorities can also seek protection in international law and institutions.<sup>24</sup> 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 state 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 latter insofar as it counterpoises individual rights against collective ones.<sup>25</sup>

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 Muslims sought to go to school wearing the chador. Albeit with some reluctance, often stronger among liberal and progressive public opinion, the request was often granted. But should European countries be as tolerant if French Muslims claim the right to practice infibulation?<sup>26</sup> 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 ethnic and cultural communities inside them will tend to

increase. A truly multi-ethnic 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 recognize the legitimacy of national institutions. A French court which has to pronounce 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 minority claims need to be allowed and which banned.

### **How to Deal with Self-determination?**

I have sought to cover the various meanings that can be applied to the concept of self-determination of peoples. I have identified three in particular. Table 1 summarizes my argument. In all three cases, the principle of self-determination has a strong political rationale, but it contradicts the political community's right to self-determination. In such cases, different views are very likely to lead to the recourse to violence.

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 transfer competencies concerning self-determination to cosmopolitan legal institutions that would represent the views of citizens of the world as much as they represent that of states and single peoples. These institutions could be understood as a reformed world court or a new world parliament.<sup>27</sup> They would have the advantage of being impartial, and being seen as such, by different peoples. These institutions would be more inclined to deliberate according to the general interest rather than particular interests. It is unlikely, however, that such institutions will be established in the near future, since states still dominate the world political stage.

But even in absence of such a cosmopolitan institutional setting, there are methods that can be used to minimize recourse to violence. This implies that the contending communities should accept the independent assessment of third parties. Let us look at how this could work in each of the three types of cases discussed above.

The first case, that of the right of a people to become a state, is the one evoked by national liberation movements. It has been successful mainly in the decolonization process. Its value is provisional, since 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 liberation movements which achieved self-determination externally were often unprepared to grant internal self-determination. Peoples in decolon-

TABLE 1 *Different Meanings of the Self-Determination of Peoples*

Subjective right claimed	Paradigmatic historical cases	State law	Supra-state law
<i>Right of colonial peoples to become states</i>	India, Algeria, Angola, etc. Nearly 100 UN member countries.	Lacking. The independence of colonial peoples has generally been the result of 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.	Existing: generally not envisaged save as outcome of conflict. In some cases, envisaged in the constitutional system (eg, Canada).	Non-existent. The international community recognizes peoples only if they have seceded or following the conquest of a given territory.
	Claimed: Kosovo, Basque Countries, Quebec, Scotland, Kurds, Padania, etc.	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.	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.	Existing: in some states collective rights are envisaged to protect minorities.	Existing: The right of minorities is mainly considered an internal affair of sovereign states.
	Ethnic minorities: Basques, Quebeckers, South Tyroleans, etc.	To be claimed: creation of institutions and procedures designed to periodically match the rights of minorities with those of majorities.	To be claimed: monitoring and evaluation of minorities' claims for protection of their cultural and political identity.
	Immigrants: Turks in Germany, Arabs in France, Albanians in Italy etc.		

ized countries ought to have taken advantage of legal norms and institutions offering, at one and the same time, arguments in favor of independence from the outside and democracy from the inside. Independent institutions should have helped in this process. When the bulk of decolonization occurred, the UN was reluctant to interfere in the internal affairs of the new states and the values of democracy were not as universally shared as they are today.

In the second case, the right of peoples refers instead to ethnic or cultural groups' demand to secede from the state they belong to and become states themselves. It is extremely difficult to establish when such requests are legitimate, since redefining the boundaries of 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 certainly be an advantage if constitutions included “a duly constrained right to secede”<sup>28</sup> since this would allow existing states to deal with the issue autonomously. But only a few constitutions allow for it. Third parties can help avoid a vicious circle where discrimination against minorities leads to radicalism and vice versa. Third parties should suggest practicable solutions on boundaries, individual and collective rights, and the ways to guarantee them. It would be enormous progress if the parties involved, i.e., states on the one hand and separatist groups on the other hand, would be willing to listen and follow the advice of independent parties. But this would require states to be willing to give up their sovereignty, and independent parties their claims to self-assess their rights.

The third meaning touches on the collective rights that 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 on the subject. Here, 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 would allow the state to decide 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 played 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 exclusive British sovereignty. The parties involved also relied on the mediation of the American government. In 1996, 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 paramilitary troops. This led to the Good Friday Agreement of 1998, which is still a milestone of the peace process.<sup>29</sup> Of course, third parties alone cannot solve a crisis without the willingness of conflicting communities. But often opposed communities can be induced to search for a positive solution if it is mediated by a third party.

## **Conclusions**

I have sought to point out that the principle of self-determination of peoples is becoming the opening for a new form of tribalism<sup>30</sup> and is encouraging some of the most reactionary tendencies in contemporary world society. If we wish to prevent this, we need to include its demands in a legal framework shared by both the community claiming self-determination and the community opposing it. The legal orders of single states as well as the interstate system are insufficient. It is thus necessary to change them 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 claims of independence as well as to guarantee collective minority rights.

Elsewhere I have outlined the ambitious project for cosmopolitan democracy, which would ideally examine the demands of various peoples for self-determination. But even without a cosmopolitan legal order, the parties to self-determination claims ought to accept the principle that 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 if the parties (be they the Russian state and Chechen secessionists, the Spanish state and Basque secessionists, the indigenous populations of North America, Australia, New Zealand, and Oceania and the relevant states) were prepared to accept the independent opinion of third-party organizations and respect their judgments.

Existing judicial institutions, such as the International Court of Justice, are not always suitable, since, insofar as they are an expression of the interstate system, they are depositories of the principle of 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 could turn to the intergovernmental organizations they trust. An organization potentially capable of performing this function is the Permanent Court of Peoples.<sup>31</sup> If the states and 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 resolution of conflicts.

#### NOTES

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1. I use the data collected by David Quinn and Ted Robert Gurr, "Self-determination movements: Origins, strategic choices, and outcomes," in Month G. Marshall and Ted Robert Gurr, eds., *Peace and Conflict 2003: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy* (College Park, MD: Center for International Development and Conflict Management, University of Maryland, 2003).

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 Hannah Arendt, *The Origins of Totalitarianism* (London: Trinity, 1950), esp. ch. 9, section I: "The Nation of Minorities and the Stateless People."

4. I do not address here John Rawls' approach to the law of peoples (*The Law of Peoples* (Cambridge, MA: Harvard University Press, 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” (3). In other worlds, 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 Rawls’ theses is critically reviewed in S. Caney, “Cosmopolitanism and the Law of Peoples,” *Journal of Political Philosophy* 10, no. 1 (2002): 95–123.

5. Cf. Richard Falk, “The Rights of Peoples (In Particular Indigenous Peoples),” in James Crawford, ed., *The Rights of Peoples* (Oxford: Oxford University Press, 1988).

6. See, e.g., David Miller’s attempt in *On Nationality* (Oxford: Clarendon, 1995).

7. 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).

8. 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. David Miller, “Secession and the Principle of Nationality,” in *Citizenship and National Identity* (Cambridge: Polity, 2000). The solution is the exact opposite: i.e., the formation of state political communities eligible to host several cultures and nationalities.

9. This taxonomy is different from those suggested by Dov Ronen, *The Quest for Self-Determination* (New Haven: Yale University Press, 1979), 9–12, and Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1996), 316–17. It unifies similar categories and takes into consideration the internal/external relationship in each.

10. 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.

11. See the excellent overview in Cassese, *Self-Determination of People*. The crowning moment of this phase was the Charter of Algiers. Cf. François Rigaux, *La Carta d’Algeri* (S. Domenico di Fiesole: Edizioni cultura della pace, 1988).

12. James Crawford, “State Practice and International Law in Relation to Secession,” *The British Yearbook of International Law* 69 (1999): 90.

13. 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. David Held, *Democracy and the Global Order* (Cambridge: Polity, 1995), 147.

14. Kalevi J. Holsti, “The Coming Chaos? Armed Conflict in the World’s Periphery,” in T.V. Paul and John A. Hall, eds., *International Order and the Future of World Politics* (Cambridge: Cambridge University Press, 1999), 283–310.

15. Cf. the carefully pondered review by Allen Buchanan, “Theories of secession,” in *Philosophy and Public Affairs* 26 (1997): 31–61. On the capacity of some groups to become “imaginary” ethnic communities, see the fundamental observations of Benedict Anderson, *Imagined Communities. Reflections on the Origins and Spread of Nationalism* (London: Verso, 1983). I thus find the criteria proposed by David Miller to judge the requests of secessionist groups on the basis of their national identity insoluble in theory and in practice.

16. Crawford, “State Practice and International Law,” 86, draws a useful legal distinction between secession, which is unilateral, and devolution or grant of independence, which follows an agreement among the parties.

17. As Habermas has noted, establishing new borders serves only to produce new minorities. Cf. Jürgen Habermas, *Kampf um Anerkennung im Demokratischen Rechtsstaat* (Frankfurt/Main: Suhrkamp, 1996).

18. See Mary Kaldor, *New and Old Wars* (Cambridge: Polity, 1999).

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* 9, no. 2 (2001): 182–203.

20. Crawford, "State Practice and International Law," 114.
21. A number of essays are dedicated to these cases in Crawford, ed., *The Rights of Peoples*.
22. This is the learnt lesson received from Canadian scholars such as Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon, 1995); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1996); Charles Taylor, *The Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1992); A.-G. Gagnon and James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001).
23. Although, as rightly stressed by Iris M. Young, "Self-determination and Global Democracy," in Ian Shapiro and Stephen Macedo, eds., *Designing Democratic Institutions* (New York: NYU Press, 2000), some ethnic minorities within states could also claim to have an autonomous voice in international organizations (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: Oxford University Press, 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, Contexts, Contingencies* (Ann Arbor: University of Michigan Press, 2001), 25–44, differentiates between non-dominating and non-interference.
26. As a matter of fact, infibulation is a criminal offence in the majority of western countries. See <http://www.unfpa.org/index.htm>.
27. The prospects for such global institutional buildings are discussed in an increasingly vast literature. See, for example, Daniele Archibugi and David Held, eds., *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity, 1995); David Held, *Democracy and the Global Order*; Daniele Archibugi, David Held, and Martin Köhler, eds., *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Cambridge: Polity, 1998); Barry Holden, ed., *Global Democracy* (London: Routledge, 2000).
28. Weinstock, "Constitutionalising the Right to Secede," 202.
29. 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* 38, no. 3 (2001): 327–52; Joseph Ruane and Jennifer Todd, "The Politics of Transition? Explaining Political Crises in the Implementation of the Belfast Good Friday Agreement," *Political Studies* 49 (2001): 923–40.
30. As pointed out by Thomas Franck, "Postmodern tribalism and the right to secession," in C.M. Brolman, R. Lefeber, and M.Y.A. Zieck, eds., *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff, 1993).
31. Gianni Tognoni, ed., *Tribunale permanente dei popoli. Le sentenze: 1979–1998* (Verona: Bertani editore, 1998).