

# **Sovereignty Challenged**

The Changing Status and Moral Significance of  
Territorial Boundaries

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## Acknowledgements

The work with this thesis started in May 1993, when I was granted a scholarship from the Ethics Programme of the Norwegian Research Council. My workplace in the period May 1993 to October 1993 was, however, the International Peace Research Institute in Oslo (PRIO). I wish to thank both the Ethics Programme and PRIO.

From May 1993 to November 1999 I held a position as research fellow at the Department of Political Science, University of Oslo. I am grateful to the Department for providing me with a scholarship, as well as offering working conditions that proved conducive to completing the thesis.

Many friends and colleagues have read and commented upon the entire thesis, or parts of it. My supervisors, Knut Midgaard and Stein Tønnesson, have encouraged me and provided thorough comments on draft versions of all the articles. They have both made numerous valuable suggestions on how to improve the structure of the articles as well as the quality of the arguments.

In addition to these two, I especially wish like to thank four persons: Raino Malnes, Thomas Pogge, Lars Fjell Hansson and Andreas Føllesdal. Raino Malnes deserves my special gratitude for supporting my work when it was needed most, as well as commenting upon draft versions of all but one of the articles, and numerous earlier versions of the introduction. My affiliation with the Ethics Programme made it possible to have Thomas Pogge read draft versions of all parts of the thesis. I doubt that I have managed to respond to all your suggestions, Thomas, but I have learned a great deal from our discussions. Lars Fjell Hansson has been pointed out some of the problems with earlier versions of all the articles and been an important source of benevolent criticism as well as support for many years. The same goes for Andreas Føllesdal, who has also organised many informal settings where thoughts can be discussed in a friendly atmosphere before they are put on the paper.

Draft versions of all parts of the thesis have been presented to members of the ARENA seminar group in normative political theory. Draft versions of three of the articles, as well as the introduction, have been presented to participants at the Colloquium of the Ethics Programme. I thank you all for stimulating discussions and helpful suggestions. Other friends and colleagues have also taken the time to read and comment on parts of the thesis. Among those who deserve a “thank you” for help and advice are Elisabeth Bakke, Lothar Brock, Else Grete Broderstad, Nils Butenschøn, Alexander Cappelen, Tom Eide, Erik Oddvar Eriksen, Eli Feiring, Dagfinn Føllesdal, Bernt Hagtvet, Helge Høibraaten, Tore Lindholm, Audun Lona, Hilde Nagell, Nils Oskal, Eli Skogerbø, Henrik Syse, and Øyvind Østerud.

Thanks also to Susan Høivik, who edited the language in the four articles, and to Chris Ennals, who edited the language in the introduction.

Øyvind Sørby has kindly provided technical assistance with the PC on more than one occasion.

Needless to say, the responsibility for remaining errors and shortcomings rests with the author alone.

Last, but not least, I want to thank my husband, Lars Normann Mikkelsen, and our two children, Ingrid and Sigurd, for their love, invaluable support and patience.

Oslo, January 2000

Anne Julie Semb

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## **Introduction<sup>1</sup>**

The purpose of this introduction is to give a brief presentation of the main topics of the thesis and their interrelations. The thesis consists of four articles. The first article deals with UN authorised interventions, the second with secession, the third with strategies for reconciling the political one with the cultural many, and the fourth and final with Norwegian policy vis-à-vis the Sami minority. Each of the articles focuses on a separate issue, and each of them contains several separate arguments. Thus, each article can be read separately. But even if all the articles can be read without reference to the others, they are nonetheless linked to each other. Hence the main purpose of this introduction is to clarify the relationship between the four articles, as well as explaining how each of them relates to the overall purpose of the thesis.

All of the articles in the thesis relate to the issue of sovereignty and the question of the foundation and significance of boundaries. It is the aim of this thesis to identify and discuss some of the important conflicts that may arise between a state's claim to sovereignty on the one hand and competing normative concerns on the other. There may be many such competing concerns. One such concern is the idea of universal human rights, i.e., that all individuals, regardless of place of residence or citizenship status, possess inviolable rights. Another concern that may conflict with a state's claim to sovereignty is the idea that the territorial boundaries of sovereign states should, as far as possible, encompass individuals who want to live under the same government. In order to identify these conflicts, I have chosen to focus on specific issues, such as interventions, secessions and the question of how the public authorities of a sovereign state ought to respond to ethno-cultural pluralism. In addition to identifying conflicts, I will suggest how they ought to be resolved.

I shall now present some basic aspects of the issue of state sovereignty and the corresponding issue of the foundation and significance of territorial boundaries between sovereign states. Then I shall briefly present each of the articles and relate them to each other. The last part of this introduction will be devoted to the question of

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<sup>1</sup> The author wishes to thank participants at the Colloquium of the Ethics Programme under the Norwegian Research Council, Andreas Føllesdal, Lars Fjell Hansson, Raino Malnes, Knut Midgaard, Hilde Nagell, Tore Nyhamar, Thomas Pogge, Henrik Syse, Marianne Takle and Stein Tønnesson for numerous valuable comments to earlier drafts. The responsibility for remaining errors or short-comings rests with the author alone.

how to proceed when undertaking normative analysis. There is no agreement on the question of method for normative analysis. I shall approach this question by presenting and critically discussing Michael Walzer's proposition that what we should do when undertaking a normative analysis is to interpret the moral world. Having pointed at some apparent problems with this proposition, I shall present what I consider to be the most important elements of a method for normative analysis, that is, a method for arriving at convincing arguments for why, e.g., a particular institutional arrangement is more acceptable than another institutional arrangement.

### *1. State sovereignty*

A sovereign state may be understood as a state that is eligible to participate in inter-state affairs on a regular basis. Following Alan James' definition, I shall take the defining feature of a sovereign state to be constitutional independence (James 1986). This is to say that what sets sovereign states apart from other political units is that the constitution of a sovereign state is not part of a wider constitutional scheme. The formal condition of sovereignty is thus of a legal kind and signifies that formal decision-making competence resides within the state. Sovereignty in the sense of constitutional independence is not to be viewed on a par with functional or actual autonomy: The fact that a state is sovereign, in the sense that its constitution is not a part of a wider constitutional scheme, does not mean that it has control over all those factors that in a significant way affect its domestic life.

One should, however, be careful to distinguish between the question of what is the defining feature of sovereign states on the one hand and the question of what is implied by the fact that some states have acquired constitutional independence on the other. Having proposed an answer to the first of these questions, I now turn to the question of the significance of state sovereignty. What is implied by the status as sovereign? Sovereignty is often held to have a dual reference, and a distinction may consequently be made between what may be termed internal sovereignty and external sovereignty. Internal sovereignty may be defined as "supremacy over all other authorities within that territory and population" (Bull 1995: 8), meaning that the state's institutions have final authority on a territory that is confined by territorial boundaries between sovereign states and over the people who inhabit that territory. Internal sovereignty is thus to be understood as supreme authority: no citizens can

appeal against the state's decisions to a higher authority. External sovereignty, on the other hand, concerns not the state's relationship to its own population and territory, but to external actors. External sovereignty may be defined as "not supremacy, but independence of outside authorities" (ibid.). Sovereign states claim exclusive jurisdiction over a territory and a population. To be sure, a state may voluntarily assume obligations under international law, and these measures may restrain a state's legitimate decision-making power. But if such obligations are enforced by external agents, the state's external sovereignty is violated. The claim for independence of external actors, such as other states or international organisations, is expressed in the right to protection under the principle of non-intervention and the right to territorial integrity.

According to the notion of internal sovereignty, the territorial boundaries between sovereign states define which state has final authority on what territory and over what population. According to the notion of external sovereignty, there are certain matters that are properly regarded as internal affairs and thus should not be interfered with by external actors: What goes on inside the boundaries of a sovereign state is not the legitimate affair of external actors, such as other states or inter-state organisations.

Hedley Bull claims that both internal and external state sovereignty exist "both at a normative level and a factual level" (1995: 8). I take this claim to mean, first, that sovereign states have a legitimate claim to supreme authority over a territory and a population as well as independence from outside authorities. The claim further seems to mean that sovereign states actually exercise such supremacy and independence. As will become clear, I believe the claim that internal and external sovereignty exist at a normative as well as factual level needs to be modified. Such a claim is, in some important respects, not valid as a factual statement. Moreover, the claim for supremacy and independence is sometimes not well-founded from a normative point of view. This does not mean that no such thing as a sovereign state exists. It implies, however, that the fact that a state has acquired constitutional independence does not necessarily give that state a factual or well-founded claim to final authority or independence.

The criterion for acquiring status as sovereign state is that the state in question has obtained constitutional independence. As will become apparent in the articles, a

state's claim to final authority and independence of external actors may sometimes conflict with other important values. The values that may conflict with final authority and independence are of various sorts, including many that will not be dealt with in this thesis, such as attempts at reducing cross-border pollution. I will focus on some pertinent conflicts, and I will argue that they ought sometimes to be resolved by according priority to values that may violate the internal and external sovereignty of the state.

## *2. The articles and the relationship between them*

The first article deals with the UN practice of authorising interventions. Interventions constitute a temporary infringement on a state's external sovereignty. The article on interventions has as its title "The New Practice of UN Authorised Interventions: A Slippery Slope of Forcible Interference?" This article has a twofold aim: First, to depict what seem to be the emerging criteria for justified interventions; and second, to discuss whether by relaxing the principle of non-intervention, the UN may be caught on a slippery slope of forcible interference.

I demonstrate that the principle of non-intervention has been challenged on the basis of international human rights, on the basis of considerations concerning *de facto* statehood, and on the basis of democratic governance. I thereby question the assertion implied by external sovereignty that what goes on inside the territorial boundaries of sovereign states is not, as a matter of fact, the concern of external actors.

But is this change to be cherished or deplored? One reason for being critical towards relaxing the principle of non-intervention is that once interventions are allowed for specific and normatively defensible purposes, it may prove impossible, or at least very difficult, to establish barriers towards a further softening of the principle, which may have intolerable consequences. What may be a morally acceptable response to, for example, massive violations of basic human rights or the breakdown of state authority, may thus turn out to have unavoidable and intolerable consequences at some later stage. I argue that the practice of giving a moral justification for an intervention in situation A, creates pressures for intervening in other situations that are similar to situation A. There is also the danger that the UN will further expand the requirements to be met before the principle of non-intervention applies. However, the composition of the UN Security Council as well as the decision-making procedures

whereby decisions concerning the authorisation of use of force are taken constitute restraints, if not stopping-points, along the slippery slope. This reduces the risk of entering it in the first place.

One line of thought addressed in this article is the following: The UN practice of authorising interventions may lead to a general change in attitudes towards the use of force in inter-state relations. This may make states more prone to intervene in situations where the use of force has not been authorised by the Security Council, because one or several of the permanent members of the Council block a decision. At the time of writing (October 1999), less than seven months have passed since NATO bombed targets in Kosovo, as well as in other parts of the Former Republic of Yugoslavia – without prior authorisation from the UN. Why would a prior UN authorisation of such an action make a difference from a normative point of view, if states' claim to protection under the principle of non-intervention is seen to be ill-founded and thus a prerogative that may be overruled when, e.g., the state in question does not safeguard the human rights of its inhabitants? I believe the most convincing argument that can be made for the need to obtain UN authorisation prior to such operations is that respect for human rights in general and the right to life in particular implies caution with regard to use of force in inter-state relations. And there is the danger that by intervening without prior authorisation from the UN, NATO may contribute to reducing the barriers for the use of force in such relations. And it seems to me that the need for obtaining an authorisation from the Security Council represents a stronger institutional guarantee against abusive use of force in inter-state relations than do appeals for caution to NATO or other organisations. But I readily admit that the situation in Kosovo highlights some serious dilemmas, and that the question of authorisation is one that defies easy answers.

States' claim to sovereignty is based on territorial boundaries. But do all existing states have a well-founded claim to territorial integrity? The answer to this question depends on what factors ought to determine the location of boundaries between sovereign states. The answer is important, since it will tell us which interests count, from a normative point of view, in determining reasonable claims to statehood. This is the question that lies at the heart of the second article, which I have called "The morality of secession". Secessions constitute a permanent loss of territory and the people who reside on that territory, and secessions thus also challenge states' claim to

external sovereignty. In this article I systematically discuss and compare two sets of arguments that can be put forward to justify secessions. I term these arguments *community arguments* and *justice arguments* respectively. Both sets of arguments hold that the state, in order to have a well-founded claim to territorial integrity, must satisfy some basic moral requirements, but the nature of the requirements differs between the two sets of arguments. According to the national community argument, the territorial boundaries between sovereign states ought to encompass one and only one nation. On the other hand, it is the common denominator of the various justice arguments that state boundaries should be drawn in such a way as to be instrumental in realising basic values of justice.

Secessions normally challenge state sovereignty in the name of nationality, and the increase in the number of secessions mirrors Anthony D. Smith's observation that "the legitimating principle for politics and state-making today is nationalism" (1986: 129). Can this development be defended from a normative point of view? One condition for such a development to be acceptable is that strong reasons exist for there being congruence between the territorial boundaries of states and national settlement patterns. A nation may be defined as

A portion of mankind [that] are united among themselves by common sympathies that do not exist between them and any others – which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be governed by themselves or a portion of themselves exclusively (Mill 1861/1991: 391).

When the territorial boundaries between sovereign states coincide with national settlement patterns, it is therefore individuals' desire to be politically associated with some people rather than others that determines the location of boundaries. Granting existing states an *a priori* right to territorial integrity may consequently conflict with the value of letting individual choices of community determine the location of territorial boundaries. In the article on secession, I also discuss – and defend – the arguments that the cause of democracy and, albeit not without qualifications, the cause of social justice are served by the existence of a common national identity among a state's citizenry. Moreover, some nations devoid of statehood have been

extremely vulnerable to persecution, although occasional UN authorisations of interventions for the purpose of protecting national minority groups weaken the proposition that possession of statehood is a necessary condition for protection against persecution. Still it seems reasonable to conclude that there is a high probability that nations are more secure when they have a state of their own. I argue that strong arguments exist for according national minorities who are territorially concentrated in an area where few non-nationals reside, a right to secede. Such a right would strengthen the bargaining position of such minorities vis-à-vis existing states. Paradoxically, however, this may make it more likely that a satisfactory solution could be agreed upon that leaves the internationally recognised boundaries intact.

To grant existing states an *a priori* right to territorial integrity may also conflict with human rights, as this rules out territorial division as one possible solution to severe human rights conflicts. Human rights are rights that one holds simply by virtue of being a human. Therefore human rights are held universally. One of the most basic ideas underlying the idea of human rights is that fundamental justice is not relative to particular cultures or to state boundaries. By specifying minimum requirements that all institutions should satisfy, human rights provide a critical standard against which existing political decisions and practices can be measured. Human rights can be claimed, even when there is no legal basis for them in the state one belongs to. This has been termed “the possession paradox” by Jack Donnelly (1985): One ‘has’ and ‘has not’ a right at the same time. The possession paradox is due to the fact that human rights are primarily rights on the state. It is the responsibility of states to safeguard the human rights of the population that resides inside the territorial boundaries of the state in question. One reason, then, why state boundaries carry moral significance is that they signify which state is responsible for protecting the human rights of the individuals who reside inside the boundaries of that particular state.

In practice this means that the human rights that individuals *actually* enjoy for most practical purposes depend on whether they reside on this or that side of a state boundary. At first glance, it would seem that the effective realisation of the idea of human rights requires the abolition of state boundaries and the corresponding institutionalisation of some kind of global power or world government. There is, however, one very important reason why we should be sceptical to the idea that the

institutionalisation of a world government would be instrumental in bringing about a world in which the human rights of all individuals are satisfied. This reason is that the existence of a world government with exclusive jurisdiction over all of the world's territory and population would leave us with no place to take refuge, should we become subjects of human rights violations.

It would seem, then, that the remedy for human rights abuse is not to transcend state sovereignty. We also do not have particularly good reasons for believing that the proper remedy for human rights abuse is to give up the sovereignty principle. Thomas Hobbes characterised life under conditions of statelessness as one of “continually feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short” (Hobbes 1651/1986: 186). Such conditions are not confined to the 17<sup>th</sup> Century. Commenting upon the situation in Kosovo in the aftermath of the NATO intervention in March 1999, Timothy Gatten Ash (1999) claimed that “If you occasionally wonder why we need states at all, you should visit a place like Kosovo that has none. This has advantages, of course. For example, you do not need to worry about speeding fines. But you can also get robbed or killed at night, and no one will take any notice”.

It is my contention that human rights can be effectively realised in a state system, and that the absence of a readily available and normatively acceptable alternative to such a system should not be deplored. To be sure, state power has all too often been the source of severe threats to individuals. Research suggests that state power has been a far more important source of threat to humankind in the 20<sup>th</sup> Century than has wars (Rommel 1994). What Rommel terms our century's *megamurderers* (states who have killed, aside from warfare, more than 1,000 000 persons), alone bear direct responsibility for the death of more than 151,000 000 persons. The comparable number of persons killed in wars (civil wars and inter-state wars) in this century up to 1987 was about 38,500 000. If one adds the figures for the victims of states which have killed less than 1,000 000 persons, the total number of victims of democide amounts to more than 169,000 000 (ibid.: 3).<sup>2</sup> Estimates such as these are, to be sure, uncertain, not to say dubious. What remains undisputed is that state power kills. But it seems to me that the most effective remedy for such a situation is neither to transcend nor to dissolve state sovereignty. The most effective remedy for such a situation is

rather to create a state system consisting of responsible states, that is, states willing and able to secure the human rights of their inhabitants. Thus, one important aim of a normative analysis is to critically assess the extent to which an institutional scheme granting all existing states an unconditional right to territorial integrity provides incentives for states to remain or become committed to safeguarding the human rights of their citizens. I fail to see how a state system devoid of a right to secede provides strong enough incentives for states to take human rights seriously. I consequently hold that an existing state may forfeit its claim to territorial integrity by failing to safeguard the human rights of all its citizens. I argue that the case for secession arises when (i) a state conducts massive human rights violations against a part of the citizenry; (ii) that part of the citizenry live territorially concentrated in an area administered as a province or another sub-section of the state; (iii) when the prospects of popular revolt are dim; and (iv) the UN has failed to take adequate action to protect the victims of human rights violations.

In the article on secession, I argue that there ought to be congruence between state boundaries and national settlement patterns. In the third article, which has been given the title “How to Reconcile the Political One with the Cultural Many”, I argue that there is no necessary conflict between this claim and the existence of – and corresponding need for – accommodating ethno-cultural pluralism *within* the nation. In this article I take the existing location of boundaries for granted and discuss the question of how the state ought to respond to ethno-cultural differences in the population that resides within its borders. A distinction is made between the question of how to create congruence between state boundaries and national settlement patterns under conditions of ethno-cultural pluralism on the one hand, and the question of how to respond to groups who have developed a national consciousness on the other.

I discuss several strategies for making national identities compatible with a fairly wide range of ethnic and religious identities. Some nations are indeed depicted as communities that transcend ethnicity. But also when the national culture has been shaped by the dominant ethnic group, national identities may be compatible with a fairly wide range of ethnic and religious identities. I identify two strategies aimed at making national identities more hospitable to ethnic and religious pluralism, and I term these strategies *the rights strategy* and *the public debate strategy* respectively.

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<sup>2</sup> The term democide includes both genocide, politicide and mass murder (Rommel 1994: 3).

The former strategy aims at making the national culture hospitable to ethnic and religious minorities by institutionalising some special rights for such minorities. The latter strategy aims at making the national culture hospitable to ethnic and religious minorities by way of an open discussion on the meaning of the national identity in question. I argue that both strategies face some important challenges with regard to limiting the kind of cultural pluralism that is to have a well-founded claim for being accommodated in, e.g., legislative processes. The question of establishing legitimate limits is far more important than the question of whether the state ought to follow the rights strategy or the public debate strategy. But once these limits have been established, it seems to me that although the public debate strategy has some attractive features, the rights strategy is likely to provide a more robust defence for ethnic and religious pluralism within the nation, while at the same time preserving the distinctness of the national culture. It is worth noticing that the right to enjoy one's culture in company with others is an important part of the International Covenant of Civil and Political Rights. If a state fails to safeguard this right, a case for secession may therefore arise.

The normative landscape changes, however, when markers of ethnicity have become the basis for incompatible national identities in the population. The state in question is then not a multi-cultural or multi-ethnic nation-state, but a multi-national state. As will be remembered, in the article on secession I argue that the territorial boundaries of sovereign states ought to encompass one and only one nation. Sometimes, however, efforts at building and sustaining a common national identity among co-citizens have failed, while no drawing or redrawing of boundaries can create congruence between state boundaries and national settlement patterns. Under such conditions, we have little choice but to try to look for institutional solutions that seem capable of securing that individuals who have a common national identity enjoy some degree of self-government, even if these institutional solutions fall short of sovereign statehood. Some such institutional solutions imply that decision-making competence is dispersed rather than being concentrated in one institution. This in turn means that sub-section A of the total citizenry has no political appeal against decisions taken by institution X, while sub-section B of the total citizenry has no political appeal against decisions taken by institution Y. I suggest that two factors determine whether a proposed solution is a normatively acceptable way of responding to conditions of multi-

nationality, namely the settlement pattern of the respective groups and the degree of antagonism between these groups.

The purpose of the first three articles is *evaluative*. In these articles I assess whether current institutional schemes and political practices can be defended from a normative point of view. In the fourth and final article the perspective changes somewhat. This article deals with Norwegian policy vis-à-vis the Sami minority. The aim of this article is not to assess whether this policy can be defended from a normative point of view. Rather the aim of this fourth article is to examine the actual impact of international norms on contemporary policy-making in Norway, in a situation where the existence and particular location of Norway's territorial boundaries are taken for granted. This article is hence an example of an empirical study on norms.

In this article I argue that particular international norms, most notably Article 27 of the International Covenant on Civil and Political Rights and ILO Convention 169, have affected – and are about to affect – the shaping of Norwegian policy towards the Sami. Such norms considerably limit the scope of majoritarian political decision-making in Norway with respect to the Sami minority. I also discuss some of the mechanisms that may account for how it is that international norms affect domestic political decision-making. International norms have given the Sami minority some degree of immunity against unconstrained majority rule. Even if it is the case that the Norwegian Parliament, the *Storting*, still has almost exclusive decision-making competence with regard to Sami matters, the powers of the *Storting* are constrained by international norms. Thus even if the Norwegian state's institutions still claim final authority with regard to Sami matters, obligations under international law severely constrain the range of possible decisions which can be made by these institutions.

### *3. Method for normative analysis*

#### *a. Normative versus positive analysis*

A distinction can be made between positive and normative political analysis. The difference between them is mainly one of different purpose. Whereas positive analysis has a descriptive and explanatory purpose, normative analysis has an evaluative purpose. To be sure, normative analysis often relies on empirical knowledge, such as knowledge of how existing institutions distribute benefits and burdens. And

perceptions of what is right and what is wrong also sometimes affect political decision-making. Normative analysis thus often relies on empirical premises, and perceptions of right and wrong can have profound effects on institutional design or political decision-making. But whereas the purpose of an empirical analysis is description and explanation, the purpose of a normative analysis is to assess the degree to which particular institutions, practices or decisions can be defended, from a moral point of view.

The purpose of the first three articles in this thesis is evaluative, and these articles are studies within the discipline of normative political theory. It is the aim of a normative political analysis to assess whether particular institutional arrangements, political practices or particular political decisions are justifiable, from a moral point of view. This is also so when the issues are phenomena such as UN authorised interventions, secession and the question of how the state ought to respond to ethno-cultural differences in the population.

#### *b. Method for normative analysis*

The epistemological status of moral statements is contested. Here I will leave aside the question whether moral statements are truth-claims or merely expressions of emotional reactions. Instead I will concentrate on the topic of normative method, that is, the question of how one should proceed when seeking well-founded answers to normative questions.

There is little agreement on the question of normative method. Within the field there are several methodological positions, that is, positions that offer more or less accurate guidance on how to proceed in order to carry out a well-founded normative political analysis. It is the aim of this section to discuss how to proceed when one is to carry out a normative analysis. I will start by presenting and discussing one methodological proposition, namely Michael Walzer's proposition that what we should do when we undertake a normative analysis is not to construct new ethical principles, but rather to interpret what already exists. Then I will point at some short-comings of this proposition, and go on to suggest an alternative way of approaching normative questions.

One way to begin the philosophical enterprise, Walzer holds, is to “walk out of the cave, leave the city, climb the mountain, fashion for oneself (...) an objective and universal standpoint” (1983: xiv). An alternative, and presumably better way of doing philosophy, is “to interpret to one’s fellow citizens the world of meanings that we share” (ibid.), i.e., that what we should do when we engage in normative analysis is to interpret the moral world. A successful normative analysis is one that provides us with the most accurate interpretation of a set of shared meanings of the phenomenon to be studied. The task of the scholar is partly to describe the practices and institutions that relates to the subject matter, and, more importantly, to discern people’s beliefs about those practices and institutions. The notion of “shared meaning” should be broadly understood. It embodies what Walzer takes to be the shared meaning (in a literal sense) of the phenomenon in question, e.g., what it means to be an American. But the notion of shared meaning goes wider than that. Once the shared meaning of the subject matter is revealed, the just distributional criteria follow readily, Walzer holds.

Walzer has chosen an interpretative method in works that include such diverse issues as, e.g., the justifiability of humanitarian interventions, the just distribution of medical care and education, as well as regimes of toleration. Why is it that he has chosen to proceed by way of interpretation rather than by way of some other method? It seems to be possible to identify two closely connected arguments for the choice of this method.

The first argument is connected to Walzer’s view that justice is relative to particular cultural understandings. By this he means that the legitimacy of, e.g., a particular political system can only be judged according to the popular will in that state. Moral values must be founded on the values and lifestyles that characterise each culture rather than be abstracted from it. Joshua Cohen has described this belief as one asserting that “there is nothing more to the correctness of values for a particular community than that those values are now embraced by that community” (1986: 458). In order to present an argument about the rightfulness of a particular institutional arrangement, we have to inquire into the shared understanding of that particular arrangement in that particular community. Does the institutional arrangement enjoy popular support? The focus should not be on the confused and messy processes that precede the formation and preservation of those shared understandings, but on the shared understandings themselves. And since the criteria for determining the

legitimacy of institutional arrangements are laid down by the popular will, the appropriate method in normative political theory is one that aims at depicting the exact content of this will.

The second argument is an argument to the effect that an interpretative method also, perhaps counter-intuitively, offers the best basis for social criticism. Social criticism is always measured in inches, Walzer holds, and it is simply not correct to say that social criticism requires distance and detachment, either emotionally or intellectually, or both. In order to acquire critical force, in the sense of being politically efficacious, morality must be comprehensible to the people whose actions we want to criticise. The best social critic is neither intellectually nor emotionally detached; she is rather “one of us” - a connected critic. A disconnected critic is rather depicted as an enemy, and since one expects enemies to criticise, this kind of criticism (usually) does not have much force.<sup>3</sup>

There are several problems with the method proposed by Walzer, some of which are more relevant to this thesis than others. The interpretative method does not imply particular substantial choices about, e.g., political institutions. The method does, however, presuppose shared understandings and beliefs about such institutions, or about goods that are to be distributed. But more often than not, there is no shared meaning about a particular phenomenon to lay bare. To illustrate this point, let us consider the phenomenon of cultural diversity. To be sure, the citizens of a state may sometimes share some beliefs about the value of cultural diversity. Equally often, however, the value of cultural diversity is deeply contested. And in the latter case, the interpretative method will leave us with no determinate answer to questions such as how to reconcile the political one with the cultural many in a morally acceptable way. It would seem that Walzer fails to take seriously the diversity of understandings on such issues inside the state, and instead proceeds on the assumption that what characterises just political institutions and arrangements is that they correspond to the majority understanding. This would imply that there are no moral reasons for immunising questions pertaining to cultural diversity from the realm of majority decisions, unless this is in accordance with the beliefs of the majority. This is a clearly problematic standpoint from a minority perspective. Moreover, the very notion that the minority has certain rights that are independent of the wishes of the majority

population seems to make no sense from the point of view of an interpretative method.

It would seem, then, that conducting a normative analysis by way of an interpretative method deprives us of the possibility of regarding what may be termed *partial tyrannies* as illegitimate governments. The approach has us examine the popular will in order to establish criteria by which we may determine the legitimacy of e.g. the political system. When the popular will is indeterminate, the method seems to have us rely on the majority understandings. This is to say that there is nothing unjust about a political system or political practice that has been shaped by a dominant ethnic group or a religious tradition, as long as such institutions and practices enjoy support from the majority population. And if we are to stick closely to the interpretative method, we are in no position to require that these majority understandings fulfil certain substantial criteria, such as adherence to human rights standards, before we are willing to regard them as well-founded moral yardsticks against which we may judge the legitimacy of a political system.

It is, moreover, perfectly possible to envisage a situation in which the demands from minorities for, e.g., less culture-specific legislation are denied. It is also perfectly possible to envisage situations where members of, e.g., religious or ethnic minorities are discriminated against, or even persecuted, and in which this practice proceeds with the tacit or express consent of the majority population. If adequate protection is not given to minorities, popular sovereignty may degenerate into a tyranny of the majority against minorities. And while the interpretative method deprives us of the possibility of establishing limits to the criteria that are laid down by the popular will, such limits are critical.

Interestingly enough, Walzer does not stick to his own methodological tenets when discussing the relationship between minorities and majorities. When Walzer discusses how it is possible to encompass a pluralist society within an overarching political structure, he makes the claim that

[t]here is nothing necessarily unjust about these connections between nationality or faith on the one hand and political institutions and

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<sup>3</sup> See Walzer (1987) for such an argument.

practices on the other, so long as ethnic and religious minorities are protected and the rights of citizenship are fully available to their members” (1992:13, italics added).

The point in this connection is not whether the claim is morally sound or not, but whether Walzer is entitled to claim it, if he is to stick to an interpretative approach. I believe he is not. First, we do not have convincing reasons for believing that there is a “shared” meaning on issues such as these. And second, even if a shared meaning has been established, we do not have any good *a priori* reasons for believing that this understanding is based on the idea that ethnic and religious minorities ought to be protected, and that they ought to acquire citizenship status. Walzer therefore introduces the requirement that ethnic and religious minorities ought to be protected and should enjoy a full range of citizenship rights on an *ad hoc* basis. And if he were to argue for this standpoint, he would have to leave the interpretative method and embark on a project that involves some degree of systematic efforts at separating existing beliefs into valid and invalid ones.<sup>4</sup>

An approach that fails to go beyond ordinary beliefs and sentiments fails to provide us with independent standards against which existing beliefs, practices and institutions can be assessed; this is not satisfactory. Moreover, existing beliefs are often conflicting or inconsistent, so the pressure to move beyond existing beliefs may also come from within those beliefs themselves. Existing beliefs about issues related to state sovereignty, such as intervention, secession or ethno-cultural pluralism, are clearly both conflicting and inconsistent, which demonstrates the need for moving beyond such beliefs. When seeking answers to normative questions, such as whether secessions can be justified on a normative basis, or what would be an acceptable strategy for integrating members of ethnic minorities into the larger nation, we do not merely want to know what people believe is right or wrong. We rather want to know whether they have good reasons for believing what they do, that is, whether such existing beliefs are well-founded or not. This is not to say that existing beliefs play no role at all in normative reasoning. The difference between an interpretative approach on the one hand and an approach that aims at distinguishing between those existing

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<sup>4</sup> The weaknesses with an interpretative method are particularly evident when the topic of discussion is the relationship between minorities and majorities, but the objections against this method seem valid for most other subject matters as well.

beliefs that are well-founded and those that are not is not that the former takes account of existing moral conventions, whereas the latter does not. The difference between them is rather, as has been pointed out by Joshua Cohen (1986), disagreement about where to *end* the philosophical enterprise, not where to *start* it.

I take it that the aim of a normative analysis is to make an effort at providing convincing arguments for why a specific institutional arrangement, a particular way of acting etc. is acceptable or unacceptable, from a moral point of view. But how should we, then, proceed if we want to assess whether a particular normative standpoint is well-founded or not? If we want to assess whether a particular normative standpoint can be justified, the task of moral justification must be crucial. We need to determine whether a normative argument produces a valid reason for doing X. Thus, this thesis builds on the assumption that a normative standpoint is not well-founded unless we are ready to accept the reasons stated in defence of this particular standpoint. In principle, every step one takes in order to arrive at a convincing moral standpoint could be regarded as part of a method for normative analysis. In the following I will present some of the most important parts of such a method.

One crucial precondition for arriving at a convincing argument for X is that important concepts are defined, so that the reader will not be in doubt about the meaning of the terms employed. This point may sound trivial, but it is not. If, e.g., we are to answer the question whether interventions are sometimes justified in inter-state affairs, we need to know whether the concept is broadly or narrowly defined, as different definitions may yield different conclusions to the question posed. Lack of conceptual clarity may consequently be a source of misunderstandings. Throughout the thesis I will therefore define concepts that do not have an obvious meaning at the outset.

As was stated in the previous section, a normative standpoint is not well-founded unless we are ready to accept the reasons offered in defence of this particular standpoint. These reasons may, however, be of various kinds. Thus, if we are to make an effort at providing convincing arguments for why, e.g., a particular institutional arrangement is worth aiming at, we need to take a wide range of ethically relevant considerations into account. An important part of a method for normative analysis is thus to identify such ethically relevant concerns. Such concerns constitute the premises of normative arguments. As will become apparent throughout the thesis,

normative arguments can rely on two kinds of premises. First, a normative argument may rely on one or several empirical premises. One example of such a premise is John Stuart Mill's claim that the existence of a common national identity in the population increases the probability that democratic institutions prove viable. Normative arguments often rely on presumed knowledge, e.g., about how existing institutional arrangements safeguard important interests, and can benefit considerably from, e.g., the social sciences. And second, a normative argument may rely on one or more normative premises. Since our objective is to produce convincing arguments as to why, for instance, we ought to accept a particular institutional arrangement, both kinds of premises ought, as far as possible, to be made explicit, as this makes the argument more transparent. The validity of the empirical premises ought to be established. Is it, for instance, the case that the existence of a common national identity in the population increases the probability that democratic institutions prove viable?

The normative premises in a normative argument often take the form of a normative principle. How can we proceed if we want to assess the validity of a proposed normative principle? One way of achieving support for the proposed principle is by way of explanation. One can, for instance, explain why a normative principle is valid by demonstrating that more general principles support the proposed principle. One example of such an effort at explaining a normative principle is Brian Barry's effort at explaining why it is that the principle of nationality ought to determine the location of state boundaries and thus the composition of the citizenry of a state. Barry holds that this way of justifying the composition of the citizenry is the only justification that is consistent with what he terms the individualist principle, which he defines as the principle that "the only way of justifying any social practice is by reference to the interests of those people who are affected by it" (1991: 158-159.).<sup>5</sup> Efforts at justifying the composition of the citizenry of a sovereign state on the basis of ethnicity, on the other hand, fail to satisfy the individualist principle. In this way, the more general principle supports the proposed normative principle.

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<sup>5</sup> Barry modifies his statement by arguing that some versions of cultural nationalism cause trouble for the individualist principle.

Another, perhaps more widespread, way of assessing the validity of a normative principle is by way of appeal to what may be termed “considered judgements”.<sup>6</sup> One then deduces the implications of this principle. Are the implications in accordance with our considered judgements? A normative principle will be supported by our considered judgements if the implications of this principle are in accordance with such judgements.

But what are we to do if the implications of a normative principle do not match our considered judgements? One alternative is to say that if the implications of a normative principle run counter to our considered judgements, the credibility of the normative principle is undermined. But a normative principle cannot be rejected out of hand, even if some of the implications that may be derived from this principle do not match our considered judgements. If a normative principle is to be rejected, it must be because one can propose an alternative normative principle whose implications better match our considered judgements. A second alternative is to say that if the implications of the normative principle do not match our considered judgements, it is the considered judgements that must yield. A third alternative is the one proposed by John Rawls, who has suggested that the proper method for a normative analysis is to try to achieve reflective equilibrium between normative principles and judgements about particular cases. This is to say that when our considered judgements do not match the implications of a normative principle, we should move back and forth between principles and considered judgements, modifying and adjusting both principles and judgements about specific cases until we reach what has been termed a “reflective equilibrium”. One tries to achieve reflective equilibrium by testing normative principles against judgements about particular cases, but also by testing judgements about particular cases against normative principles. When reflective equilibrium is achieved, there is therefore consistency between the normative principles and the considered judgements. Other things being equal, the credibility of a normative principle is strengthened if there is consistency between the proposed principle and considered moral judgements about different phenomena.

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<sup>6</sup> The term “considered judgement” is borrowed from Rawls (1972). Rawls says that our considered judgements enter “as those judgements in which our moral capacities are most likely to be displayed without distortion” (ibid.: 47). Considered judgements are thus to be understood as judgements arrived at under favourable conditions. See Rawls (ibid.), pp. 47-48.

Norman Daniels (1979) has elaborated on this method, which he terms “narrow reflective equilibrium”. In his opinion, the fact that there is consistency between principles and considered judgements does not imply that the principles are justified. Moral justification is, in Daniels’ view, not a matter of seeking coherence between beliefs at these two levels, but of seeking an equilibrium point that involves (i) a set of considered moral judgements, (ii) normative principles, and (iii) a set of relevant background theories.<sup>7</sup> The background theories can be of various kinds. Daniels himself employs the Rawlsian theory of justice as an example of how background theories can play a role in normative justification. Daniels asks why we should accept the contract and its various constraints as a reasonable device for selecting between competing conceptions of justice, and proposes that the arguments for accepting the contract can be viewed as inferences from relevant background theories, such as “a theory of the person, a theory of procedural justice, general social theory and a theory of the role of morality in society (including an ideal of a well-ordered society)” (1979: 260). According to Daniels, it is these background theories that persuade us to accept the Rawlsian contract apparatus.

If the relevant background theories can show that a proposed normative principle is more acceptable than an alternative principle for another reason than that the principles match our considered judgements, then the relevant background theories have provided independent support to the normative principle. Thus the background theory should not be mere re-formulations of those considered judgements involved when assessing the credibility of a normative principle. If relevant background theories are to provide independent support to normative principles, the scope of these theories should reach beyond the set of considered judgements against which the strength of a normative principle is assessed (1979: 259). When there is coherence between this ordered triple sets of beliefs, we have achieved what Daniels terms “wide reflective equilibrium”.<sup>8</sup>

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<sup>7</sup> The term “theory” is to be loosely understood. Sometimes the relevant background theories may be theories in a strict sense of the term, but sometimes the relevant background theories are more accurately described as background assumptions. I take it that such background theories may also include some basic principles that are often considered imperative to all normative justification, such as the right to life.

<sup>8</sup> According to Daniels (1979: 257, footnote 2), the distinction between narrow- and wide reflective equilibrium is implicit in some parts of Rawls’ work, and explicit in other parts of it.

Why is it that references to background theories can play a role in normative justification? If such theories are to provide independent support for normative principles, it must be because the *content* of such theories strengthens the credibility of the proposed principle. This is clear when Daniels discusses the example of utilitarianism. Daniels holds that the traditional way of criticising utilitarianism is to derive unacceptable moral judgements about, for example, punishment, from general utilitarian principles. Another line of criticism against utilitarianism could be to argue that the utilitarian uses a principle that would be acceptable only for distributing goods between life-stages of one person, for the distribution of goods between different persons. A third line of criticism against utilitarianism could be to argue that the utilitarian's criterion of personal identity is weaker than the one used by, for example, John Rawls. The utilitarian would therefore treat interpersonal boundaries as metaphysically less deep and accord less moral weight to such boundaries than would Rawls. What these latter two lines of criticism have in common is that their arguments for why utilitarian principles are not acceptable take the form of inferences from theories about the person. Daniel summarises his discussion of this example in this way: "The problem between the utilitarian and the contractarian thus becomes the (possibly) more manageable problem of determining the acceptability of competing theories about the person, and only one of many constraints on that task is the connection of the theory of the person to the resulting moral principles" (1979: 263).

This summary makes it clear that it is the assessment of the content of the background theory that ultimately determines whether such theories provide independent support for a normative principle. But insofar as background theories can show that a proposed normative principle is more acceptable than another normative principle for another reason than that the principle matches our considered judgements, the background theory has provided independent support for the normative principle: We have more reasons to accept the normative principle. Moreover, those reasons are reasons at different levels of generality, which seems to me to be a strength.

In practice, it may be hard to achieve wide reflective equilibrium. The Oxford Dictionary of Philosophy defines reflective equilibrium as "a state in which all one's thoughts about a topic fit together; in which there are no loose ends or recalcitrant

elements that do not cohere with an overall position” (1996: 323-34).<sup>9</sup> This requirement is indeed demanding, and I do not claim to have fulfilled it in the sense that the thesis presented here is devoid of loose ends or recalcitrant elements.

As will become apparent throughout the thesis, background theories do play a role in the normative arguments set forth. When I advance arguments intended to bring out the relative strengths and weaknesses of different normative principles, some of these arguments will take the form of inferences from background theories. By this I mean that relevant background theories will often be an important part of the argument for why one principle is more acceptable than another. One such background theory that has informed many of the arguments set forth is the assumption that sovereign states are important sources of protection of individual interests, and that a world consisting of sovereign states is not necessarily a morally unacceptable state of affairs. However, institutional schemes may improve the moral quality of the state system by giving states stronger or weaker incentives for becoming or remaining instruments to the satisfaction of important individual interests.

The notion of a wide reflective equilibrium is, moreover, useful in the sense that it may sharpen our awareness about how we argue. Do we mainly focus on a set of considered moral judgements, on the relationship between such judgements and normative principles, on the relationship between normative principles and background theories, or on the relationship between all three levels of beliefs? When assessing the strength or weakness of a normative principle, the focus in this thesis will be both on the relationship between normative principles and background theories, as well as the relationship between normative principles and considered judgements about specific cases.

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<sup>9</sup> The Dictionary does not distinguish between narrow- and broad reflective equilibrium.

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# The New Practice of UN-authorized Interventions: A Slippery Slope of Forcible Interference?

## 1. Introduction

The philosophical discussion of *Just War* has concentrated on two separate questions. First, what, if any, are the legitimate reasons for engaging in war (*jus ad bellum*)? Second, what is it justifiable to do, and against whom, when fighting a war (*jus in bello*)? The topic of this article, which is the changing scope of the principle of non-intervention, is rooted in the tradition of *jus ad bellum*. Whereas the principle of non-intervention was previously honoured as the most appropriate principle for the regulation of inter-state relations, several specific concerns have recently been referred to as justifications for interventions.<sup>1</sup> This suggests that the scope of the principle of non-intervention in the internal affairs of sovereign states has undergone important modifications since the end of the Cold War. The scope for justified resort to force in particular circumstances has expanded accordingly.

This article has a twofold aim. First, to depict what seem to be the emerging criteria for justified interventions.<sup>2</sup> Second, to discuss the danger that by relaxing the principle of non-intervention, we end up on a slippery slope of forcible interference. One reason for a critical stance towards a relaxation of the principle is that once we allow interventions for specific and normatively defensible purposes, it will be difficult to establish barriers against a further loosening of the principle of non-intervention, which might have intolerable consequences.

The principle of non-intervention is being challenged not only on the basis of human rights, but also on the basis of considerations concerning *de facto* statehood as well as democratic governance. It is no longer the case that the principle of non-intervention applies generally whenever the traditional condition of sovereignty has been met. The recent UN Security Council practice of authorising interventions suggests that states lose their claim to protection under the principle of non-intervention if one or more of

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<sup>1</sup>In this article the concept of intervention will be narrowly defined. By “intervention” I mean deliberate use of military force in order to compel another government to act or refrain from acting in a certain manner.

<sup>2</sup>I do not intend to discuss changes in the principle pertaining to premature diplomatic recognition of secessionist attempts. Such recognition may certainly be seen as a violation of an established state's right to territorial integrity. The act of diplomatic recognition does not *per se* involve the use of force, however, and is consequently not dealt with here.

the following conditions apply: (i) the state engages in systematic violations of human rights; (ii) it is incapable of protecting human rights due to breakdown of state authority; (iii) the government in power is unlawfully constituted. When these conditions have been present, the Security Council has considered the situation a “threat to the peace” and thus has the legal powers to authorise enforcement measures under Chapter VII of the UN Charter.

I will start by examining the foundation and scope of the traditional principle of non-intervention, and then go on to describe the ways in which recent UN authorised interventions deviate from this principle.<sup>3</sup> Then I want to discuss the dangers of the slippery slope. The “slippery slope” argument is frequently invoked by critical opponents when a practice is changed so as to allow something rather than nothing. Arguing that the concept of “threat to the peace” has expanded considerably, I will discuss the danger that the conception of what is considered such a threat will be subject to *wider* interpretations than has so far been the case. Then I discuss the danger that the conception of what constitutes a “threat to the peace” will be subject to *other* interpretations than has so far been the case. A wide range of situations may be termed such a threat, thus justifying frequent resorts to force. I suggest several such candidates. It would seem that it is difficult to establish stopping-points along the slippery slope by suggesting substantial criteria for when force may legitimately be used.

This, however, does not necessarily mean that it is impossible to get off the slippery slope. The relevant actors’ perceptions of what can be achieved by using force, weighed against the likely costs of such operations, are likely to serve as restraints against limitless relaxation of the principle of non-intervention. Furthermore, the composition of the Security Council and the decision-making procedure of that body seem to make the slope of interventions somewhat less slippery. It may be argued, however, that once there has been an attitudinal change with regard to interventions, and UN authorised interventions have become widely accepted, then there will be the danger that also interventions not authorised by the UN will become accepted as well. As long as decisions concerning use of force are subject to the strict voting procedures of the

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<sup>3</sup> The most important political developments that made this change possible were the dissolution of the Soviet Union and the end of the Cold War.

Security Council, however, the slope of UN authorised interventions is not as slippery as it may seem, and this reduces the risk of entering it in the first place.

## 2. *The traditional doctrine of non-intervention*<sup>4</sup>

The UN Charter does not contain an *explicit* and specific rule of non-intervention. What it does contain is a general prohibition on the “...threat or use of force against the territorial integrity or political independence of any state...”<sup>5</sup> Note that the UN Charter does not prohibit the use of force *per se*. It makes a fundamental distinction between offensive and defensive resort to force, and the prohibition refers only to the former. According to Article 51, states do have a right to self-defence, both individually and collectively.

In stating that the use of force for offensive purposes is illegal, the UN Charter joins other 20th-century legal documents such as the 1919 Covenant of the League of Nations and the 1928 Kellogg-Briand Pact in attributing legality to the use of military force if and only if it is employed in self-defence.

The only article in the UN Charter that deals explicitly with interventions is Article 2(7):

Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>6</sup>

This Article does not, however, concern the relations between individual states. It applies only to the UN itself, and is designed to regulate the relations between the UN and its constituent member-states. The crux of the Article is its emphasis on domestic

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<sup>4</sup> The following two sections are based on Semb (1992).

<sup>5</sup> Article 2(4) reads *in extenso*: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

<sup>6</sup> Since the principle of non-intervention between the UN and its constituent member-states is explicitly subordinated to the enforcement measures under Chapter 7, we need to clarify the previous use of these measures. My intention here is not to look at what may be seen as unproblematic cases for the UN. I do not deal with the situations in which there has clearly been a threat or breach of the peace, as in cases of cross-border use of force by one state against another. On two occasions, the Security Council has acted under Chapter 7 and imposed mandatory economic sanctions due to denial of internal self-determination (McCoubrey and White 1992). The sanctions against Southern Rhodesia 1966–79 and against South Africa 1977–90 were imposed on these states because of the policy of racial segregation and subordination of the black majority to the white minority.

jurisdiction – on the right of sovereign states to control their own internal affairs. Internal affairs in UN member-states have not been deemed to be within the organisation's competence. This prohibition is, however, qualified by the reference to Chapter VII. If the situation is one that constitutes a “threat to peace, breach of the peace, or act of aggression”, then the Security Council has the powers to authorise enforcement measures according to Article 41 or 42.<sup>7</sup>

Although the UN Charter, strictly speaking, lacks an explicit principle of non-intervention that applies to the behaviour of states towards each other, the UN General Assembly has adopted a negative attitude to interventions. The *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty* (GA Resolution 2131 (XX), 1965) and *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (GA Resolution 2625 (XXV), 1970) state the prohibition in an unambiguous way:

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.<sup>8</sup>

These resolutions reaffirm the principles of sovereignty and non-intervention in what amounts to an unqualified general principle of non-intervention.

### ***3. Sovereign statehood***

The close connection between the traditional doctrine of non-intervention and the principle of state sovereignty makes it necessary to identify what is required of a state for it achieve sovereign status and thus enjoy protection under the principle of non-intervention.

Adopting the phrase used by Alan James, I shall take a state's constitutional independence to be the feature that gives it sovereign status and thereby protection

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<sup>7</sup> Article 39 reads *in extenso*: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

<sup>8</sup> Quoted from GA resolution 2625 (XXV), 1970.

under the principle of non-intervention (James 1986). A state is thus sovereign by virtue of meeting a requirement of a legal nature: It is an independent entity in terms of its own constitution. This definition of sovereignty makes no reference to the *de facto* attributes of statehood. As pointed out by Robert H. Jackson (1990), attempts at defining sovereignty in terms of the *de facto* attributes of statehood might lead us to deny sovereignty to a considerable number of states that are normally considered as sovereign, but that are a long way from possessing something that even resembles “effective government”. Sovereignty has, in principle, been unrelated to empirical attributes such as territorial control, a permanent population and an effective government. This is not to deny that most sovereign states have also possessed these features – it merely means that it has not been by virtue of these *de facto* attributes that they have been sovereign.

Non-intervention, then, has traditionally been regarded as a logical sequel to sovereignty in the sense of constitutional independence: “If sovereignty, then non-intervention” (Vincent 1986:113). The principle has protected the rights of all sovereign states to determine their own political, social, economic and cultural systems, without outside interference.

The principle of non-intervention has consequently been independent of a state's physical capabilities. A considerable number of states have claimed the right to not be intervened against, even if they have been unable to meet the minimum requirements for a government to be considered effective. But the principle has also been independent of a state's domestic legitimacy, that is, the government's legitimacy in the eyes of the population. When principles of international law have conferred rights on sovereign states, they have done so *sub modo* – subject to the rule that “the actor on behalf of the State, and the agency to which other States are to look for the observation of the obligations of the State and which is entitled to activate its rights, is the government of the State” (Crawford 1988: 55).

To summarise, the traditional doctrine of non-intervention has applied generally to all states that have met the legal requirement of constitutional independence. It is the government of a state that has been entitled to activate that state's rights.

#### ***4. Current challenges to the principle of non-intervention***

The above description of the traditional principle of non-intervention does not seem to capture its present status and scope, however. Recent authorisations of interventions by the UN suggest that the principle of non-intervention has undergone important changes. Is it no longer the case that states have a right not to be intervened in, solely by virtue of their constitutional independence? It would seem that states now have to pass a test considerably more severe in order to enjoy protection under the principle of non-intervention.

What is the current scope of the principle of non-intervention? To this we turn in the next section. I will argue that the practice of international interventions since the intervention in northern Iraq in April 1991 indicates that the scope has, *in principle*, been significantly decreased. The principle of non-intervention is currently facing three challenges: the challenge from the requirements of universal human rights, *de facto* statehood and democratic government.

##### *4.1 The universal human rights challenge*

The doctrine of non-intervention, as traditionally understood, has in practice served as a shield against external efforts at terminating gross and systematic violations of universal human rights. This is demonstrated by the extreme case where “the sovereign territorial state claims, as an integral part of its sovereignty, the right to commit genocide, or engage in genocidal massacres, against peoples under its rule” (Kuper 1981: 161). Such a 'right' is, to be sure, not stated in any document, but the implication of the traditional doctrine of non-intervention is that states do not lose their claim to protection under the principle of non-intervention, even if human rights violations have assumed genocidal proportions.

This is not to suggest that human rights have been regarded as domestic affairs in the sense that they have never been a proper issue for inter-state relations. And the UN Charter contains several provisions that deal with human rights. Suffice it here to mention Article 1(3), which says that the purpose of the UN is to “...achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;...” The Universal Declaration of Human Rights from 1948 as well as the two International Covenants of Human Rights from 1966 confirm the universal

character of human rights. However, the UN has traditionally let the prerogatives of state sovereignty take precedence over those of human rights when the two have come into conflict. That the requirements of human rights have been subordinated to the principle of non-intervention is clearly demonstrated by the UN's reaction to Vietnam's intervention in Cambodia in 1979, which toppled Pol Pot's genocidal regime. The Vietnamese-installed regime, whose human rights violations were far less massive than those of Pol Pot, was not recognised as legitimate, so representatives of the overthrown genocidal regime continued to occupy Cambodia's chair in the UN General Assembly until the Paris Peace Agreement in October 1991 – from June 1982 as part of the Coalition Government of Democratic Kampuchea (CGDK).<sup>9</sup>

More recently, however, it would seem that the order of priority between the prerogatives of state sovereignty and the requirements of human rights has been reversed. The single most important event that triggered the recent debate on the legitimate scope of the principle of non-intervention was the Iraqi suppression of the Kurdish revolt in northern Iraq in the aftermath of the Gulf War.<sup>10</sup> The situation for the Kurds triggered a debate on the interpretation of Article 2(7) in connection with attempts at designing appropriate UN responses to 'crimes against humanity'. French Foreign Minister Roland Dumas said that the situation of the Kurds ought to spur the UN to discuss the principle of non-intervention: "I believe that the Kurdish crisis could act as a detonator. (...) When new crimes exist, why should not rules of law be planned to respond to these crimes?" (*International Herald Tribune*, 5 April 1991). The Security Council did, however, avoid the politically explosive question of redefining the content of Article 2(7), by stressing the cross-border implications of the humanitarian crisis and the magnitude of the sufferings as arguments for intervention.

On 5 April 1991 the Security Council passed Resolution 688, which "...condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in the Kurdish populated areas, the consequences of which threaten international peace

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<sup>9</sup> The Coalition Government of Democratic Kampuchea (CGDK) was made up of three parties that were opposed to the Phnom Penh regime.

<sup>10</sup> To be sure, the debate on the legitimate scope of the principle of non-intervention is not a new one. See e.g. Franck & Rodley (1973); Lillich (1973); Brownlie (1974); Lillich (1974) and Kuper (1984) for proposals to assert the legal right to humanitarian intervention. Also within the field of moral philosophy, the status of the principle of non-intervention relative to contending values such as human rights has been hotly contested. See e.g. Walzer (1977, 1985); Doppelt (1978) and Luban (1985).

and security in the region...” In a speech before the Security Council, a Turkish representative said that

[T]here is no way in which what is going on in northern Iraq can be justified as an internal affair of that country. Given the scale of the human tragedy and its international implications, this Council cannot allow itself to be relegated to the role as a mere spectator as these calamitous events unfold...[B]efore concluding, I would like to make it very clear that in calling for a meeting of the Security Council it was not our intention to interfere in Iraq’s internal affairs. We recognise Article 2, paragraph 7 of the Charter, and believe that it should be scrupulously observed. The steps we have taken have been taken because of the threat posed to the stability, security and peace of the region by Iraq’s methods of repression.”<sup>11</sup>

Iraq’s representative heavily criticised the draft resolution, calling it a “flagrant illegitimate intervention in Iraq’s internal affairs and a violation of Article 2 of the Charter of the United Nations which prohibits intervention in the internal affairs of other states.”<sup>12</sup> Yemen’s representative strongly contested the view that the refugee situation did in fact pose a threat to the stability and the peace in the region:

There is no conflict or war taking place across the borders of Iraq with its neighbours. The draft resolution also refers to political developments within Iraq, but according to Article 2 of the United Nations Charter it is not within the Council’s purview to address internal issues in any country...[t]he whole issue is not within the competence of the Security Council. The Security Council is mandated only to safeguard international peace and security. In our view, the draft resolution sets a dangerous precedent that could open the way to diverting the Council away from its basic functions and responsibilities for safeguarding international peace and security and towards addressing the internal affairs of countries.<sup>13</sup>

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<sup>11</sup> S/PV.2982 5 April 1991, p. 6–7. Turkey was not a member of the Security Council at the time, but had requested to be invited to participate in the discussion of the item on the Council’s agenda without the right to vote.

<sup>12</sup> S/PV.2982 5 April 1991, p. 17. Iraq was also not a member of the Security Council at the time, but had also requested to be invited to participate in the discussion of the item on the Council’s agenda without the right to vote.

<sup>13</sup> S/PV.2982 5 April 1991, p. 28–30.

Resolution 688 was adopted by ten votes, against the votes of Cuba, Yemen and Zimbabwe, with China and India abstaining. It was followed by Operation Provide Comfort, in which French, British and US forces were deployed to create “safe havens” for the Kurdish refugees.

There is some dispute about the legal status of this intervention. Resolution 688 stops short of invoking Chapter VII, and it does not contain the expression “...to use all necessary means...”<sup>14</sup> James Mayall warns that “it would be imprudent in practice, and wrong in theory, to generalize from the international obligations towards the Kurds in favour of an international enforcement mechanism for human rights wherever they are abused” (1991: 428). Still, international lawyers have argued that the action on behalf of the Kurds was a watershed (Chopra and Weiss 1992: 110). Subsequent events were to show that the intervention in northern Iraq could not be conceived of as an isolated incident.

#### *4.2 The challenge from requirements for de facto statehood*

As will be remembered from the outline of the defining features of sovereign statehood, a state’s right not to be intervened in has been a corollary of its constitutional independence rather than its effectiveness. Robert Jackson has suggested that there exist two radically different foundations of sovereignty in inter-state relations (Jackson 1990). The first one is made up of the empirical attributes that developed through the process of state formation in Europe and in some other parts of the world, such as Japan, Thailand and Ethiopia. The second one is the result of the process of unconditional de-colonisation, which made sovereignty an externally granted right rather than a reflection of an internal reality. According to this view, states survive either by virtue of their will and capacity to remain sovereign, or by virtue of the externally granted right to territorial integrity and political independence – that is, by virtue of the principle of non-intervention.

The UN’s involvement in Somalia, however, suggests that it may no longer be the case that “quasi-states” enjoy protection under the principle of non-intervention.<sup>15</sup> The

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<sup>14</sup> China had made it clear that it would have vetoed the resolution if it had been more intrusive (Damrosch 1993: 104).

<sup>15</sup> The term “quasi-states” is borrowed from Jackson (1990), and denotes states whose empirical qualities are shaky.

Security Council's involvement in Somalia started as a response to a request from Somalia's representative to the General Assembly. The Security Council took several steps, the most important of which was the launch of a traditional peace-keeping operation in Somalia (UNOSOM), focused on humanitarian aid. Faced with the breakdown of state power, the UNOSOM forces proved unable to fulfil their mandate. International relief efforts were subject to robberies, and relief workers were attacked. The ensuing humanitarian crisis was immense.

In a letter of 29 November 1992, UN Secretary-General Boutros Boutros-Ghali addressed the situation in Somalia in the following manner:

At present no government exists in Somalia that could request and allow [the] use of force. It would therefore be necessary for the Security Council to make a determination under Article 39 of the Charter that a threat to the peace exists, as a result of the repercussions of the Somali conflict on the entire region, and to decide what measures should be taken to maintain international peace and security (quoted from Roberts 1993: 440).

On 3 December 1992, the Security Council unanimously adopted Resolution 794, which expresses grave concern for the humanitarian situation in Somalia and declares that the Security Council determines "...that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security...". Further, the Council "[acts] under Chapter VII of the Charter of the United Nations [and] authorises the Secretary General and Member States co-operating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."<sup>16</sup> The representative from Zimbabwe stressed that the situation in Somalia was a unique one that warranted a unique approach. He further emphasised that "[a]ny unique situation and the unique solution adopted create of necessity a precedent against which future, similar situations will be measured. Since the situation in Somalia is the first of its kind to be addressed by the Council, it is essential that it be handled correctly."<sup>17</sup> The representative from Ecuador noted that "In Somalia there is no Government that can be

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<sup>16</sup> Paragraph 8 reads in extenso: "Welcomes the offer by a Member State described in the Secretary General's letter to the Council of 29 November 1992 (S/24868) concerning the establishment of an operation to create such a secure environment;" (The member state referred to is the USA.)

<sup>17</sup> S/PV.3145, 3 December 1992, p. 7.

the interlocutor of the United Nations for the purpose of agreeing upon a humanitarian-assistance operation...” and instead conferred sovereignty on the Somali people: “But the Somali people – solely sovereign in respect of its destiny – is our interlocutor, and we are heeding its call.”<sup>18</sup> The UK representative stated that “[t]he international community has no wish to intervene in the internal affairs of [Somalia], but...it cannot stand by and permit a humanitarian crisis of this magnitude to continue.”<sup>19</sup> A few days later the US-led United Task Force (UNITAF) began Operation Restore Hope.

This intervention may be seen as a response to the immense humanitarian crisis that had been generated by the breakdown of state power in Somalia.<sup>20</sup> There is no doubt that Somalia was without an effective government with territorial control at the time that the Security Council authorised Operation Restore Hope. Internal conditions in Somalia were closer to anarchy than to empirical statehood. In that sense, Operation Restore Hope in Somalia was an intervention in a state-less society.<sup>21</sup> No government existed that could secure human rights, or consent or object to the operation.

But traditionally, the right not to be intervened in has been independent of a state's empirical attributes. If the principle should apply only to those states that fulfil the requirements for empirical statehood, many existing states would be without protection from the principle. And if current practice suggests that the principle of non-intervention is based on empirical rather than juridical statehood, in the sense that the Security Council may deem lack of empirical statehood a “threat to the peace”, which possibly may justify UN-authorized use of force, the scope of the principle is further reduced and the scope of possible justified interventions further enlarged. The Austrian representative noted that Resolution 794 implied a further reduction of the scope of the principle of non-intervention:

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<sup>18</sup> S/PV.3145, 3 December 1992, p. 13.

<sup>19</sup> S/PV.3145, 3 December 1992, p. 35.

<sup>20</sup> I borrow the distinction between systematic human rights violations and humanitarian crisis from Donnelly (1993: 607). The distinction refers to differences in the causes of human suffering rather than to differences in the magnitude of the suffering itself. In the case of systematic human rights violations, the source of human suffering is the state. In the case of humanitarian crisis, the suffering stems from other sources, such as absence of statehood, or natural catastrophes.

<sup>21</sup> Some authors, like Jack Donnelly (1993) and Adam Roberts (1993), seem reluctant to employ the term “intervention” when the target is a state-less society. As the defining feature of sovereignty is of a legal nature, I see no reason why the term should not be used in situations like that in Somalia.

Sharing the Secretary-General's assessment that the situation in Somalia is intolerable and that it has become necessary to review the basic premises and principles of the United Nations effort in Somalia, the Security Council has now taken a more determined approach under Chapter VII of the Charter. By doing so, the Council is fulfilling its responsibility towards the afflicted population in Somalia and is acting upon its claim on international solidarity. This bold new step is also a further development of steps the Council has taken in recent times in its resolutions 678 (1990), 688 (1991) and 770 (1992).<sup>22</sup>

And as will be shown in the next section, the scope of possible justified interventions came to be expanded even further. In the case of Haiti, the Security Council was to adopt an even broader understanding of what situations constitute a “threat to the peace”.

#### *4.3 The challenge from requirements for democratic rule*

The traditional doctrine of non-intervention draws a distinction between the existence of a sovereign state and hence the application of the principle of non-intervention on the one hand, and the question of who exercises sovereign power on behalf of whom on the other. This distinction is vital: it implies that the international legitimacy of a state is not derived from that state's domestic legitimacy.

As mentioned in footnote 6, there are two notable exceptions to this general rule. On two occasions, considerations about a particular government's domestic legitimacy have been central in determining these states' standing among other states. The Security Council has twice acted under Chapter VII and imposed mandatory economic sanctions on states due to their denial of internal self-determination (McCoubrey and White 1992). The sanctions against Southern Rhodesia 1966–79 and against South Africa 1977–90 were, however, imposed on these states due to their policy of apartheid and subordinating the black majority to the white minority. Thus, they had implications only for racially segregated states. Moreover, these enforcement measures were imposed under Article 41 rather than Article 42, and consequently did not involve the use of military force.

This is not to say that international law is devoid of references to the domestic legitimacy of states. Indeed, it has been suggested that there is an emerging right to

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<sup>22</sup> S/PV.3145, 3 December 1992, p. 31.

democracy in international law (Franck 1992). This in turn indicates that we can no longer conceive of a particular state's system of governance as being solely a part of that state's internal affairs:

This newly emerging 'law' – which requires democracy to validate governance – is not merely the law of a particular state that, like the United States under its Constitution, has imposed such a precondition on national governance. It is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organisations (Franck 1992: 47).

Franck examines three related generations of rules concerning democratic rule, the latest of which is the right to free and open elections.<sup>23</sup> The Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights contain provisions about the right to take part in the government of one's country. The Charter of the Organization of American States (OAS) also contains provisions regarding democratic government, and the OAS Ministers of Foreign Affairs and the Organization's Permanent Council have adopted various resolutions that affirm that states in the region are entitled to democratic rule. Another regional organisation, the Conference on Security and Co-operation in Europe (CSCE) has also been engaged in attempts to specify the contents of the right to participate in free elections.<sup>24</sup> At the Copenhagen Meeting in June 1990 it was confirmed that the CSCE regarded as inalienable rights both the right to participate in free elections and the right to live under a government that is "...representative in character, in which the executive is accountable to the elected legislator or the electorate..."<sup>25</sup> At the CSCE Paris Meeting in November 1990, the leaders of 34 member-states unanimously approved an extraordinary Charter, which states that the member-states are committed "...to build, consolidate and strengthen democracy as the only system of government of our nations..."<sup>26</sup> According to Franck, the Charter builds on the assumption that "...electoral democracy is owed not only by

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<sup>23</sup> The other two are (i) the right to self-determination, and (ii) freedom of expression. I concentrate on the right to free and open elections, as I find this most relevant to the present discussion.

<sup>24</sup> The CSCE changed its name to the Organization for Security and Co-operation in Europe (OSCE) at the Budapest Summit in 1994.

<sup>25</sup> Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, 29 June, 1990, quoted from Franck (1992: 66).

<sup>26</sup> Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, 21 November, 1990, Preamble, quoted from Franck (1992: 67).

each government to its own people, but also by each CSCE state to all the others...” (Franck 1992: 68). At the Moscow Meeting of the CSCE, representatives from the member-states unanimously confirmed that “...issues relating to (...) democracy (...) are of international concern...”<sup>27</sup> This may be interpreted to mean that the commitments regarding the human dimension of the CSCE are to be conceived of not only as internal affairs of the participating states, but also as matters of legitimate concern to the other participating states.

Whether a particular government is democratic or not is thus not to be seen as a matter of the “internal affairs” of a state. The crucial point for the present purposes, however, is that traditionally states have not lost the claim to protection under the principle of non-intervention, even if they have failed to meet the standards of democracy. The right to protection from forcible intervention has applied to democratic and non-democratic states alike. As will be shown in the next section, the Haitian case suggests that this may no longer hold.

The presidential elections in Haiti on 16 December 1990 were monitored by both the OAS and the UN. The civilian Jean-Bertrand Aristide received 67% of the vote, and was inaugurated on 7 February 1991.<sup>28</sup> Almost eight months later, on 29 September, he was ousted from office in a military coup. The coup was widely condemned, and the new government was not recognised by the OAS nor by the UN General Assembly. The Security Council termed the situation a “threat to the peace” in Security Council Resolution 841 of 16 June 1993, and economic sanctions were imposed on Haiti under this resolution. The sanctions were made more extensive under Resolution 873 of 13 October 1993 and Resolution 917 of 6 May 1994. These sanctions did not, however, lead to the resignation of the non-democratic government nor its president.

On 31 July 1994, after three years of unsuccessfully trying to restore democracy through economic sanctions, the UN Security Council adopted Resolution 940. In this resolution, the situation in Haiti was termed a “threat to peace and security in the region”. The resolution further condemned the “illegal *de facto* regime”, and went on

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<sup>27</sup> Conference on Security and Co-operation in Europe, Document of the Moscow Meeting of the Conference of the Human Dimension of the CSCE, 3 October, 1991, quoted from Franck (1992: 68).

<sup>28</sup> Voter turn-out was 75%.

to state that the Security Council, acting under Chapter VII of the United Nations Charter, hereby authorised member-states to “...form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership [and] the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti...”

The resolution, which was sponsored by the USA, Canada, Argentina and France, was passed by 12 votes to none, with Brazil and China abstaining. It states that a UN peace-keeping force may be deployed at some unspecified date, when the Security Council judges the conditions to be appropriate. In a speech before the Security Council, the Mexican representative strongly objected to the draft resolution:<sup>29</sup> “The actions proposed in the draft resolution are not, strictly speaking, provided for in the Charter. Indeed, the crisis in Haiti, in our opinion, is not a threat to the peace, a breach of the peace or an act of aggression such as would warrant the use of force in accordance with Article 42 of the Charter.”<sup>30</sup> He also pointed out that the draft resolution was devoid of references to any time-frame for the proposed action. He took this to indicate that “a kind of *carte blanche* has been given to an undefined multinational force to act when it deems it to be appropriate. This seems to us an extremely dangerous practice in the field of international relations.”<sup>31</sup> The representative from Cuba also heavily criticised the draft resolution text, calling it “misuse of Charter VII of the Charter” and terming it “Chronicle of an Invasion Foretold”.<sup>32</sup> Brazil's representative drew attention to paragraph 4 in the resolution, which contains language similar to that in Resolution 678 (1990) regarding the Iraqi invasion of Kuwait. In his view, the situation that preceded the Gulf War differed fundamentally from the situation in Haiti and therefore did not set a precedent for forcible action against Haiti: “That was a situation of a totally distinct political and legal nature, in a different political and regional context resulting from the

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<sup>29</sup> Mexico was not a member of the Security Council at the time, but had requested to be invited to participate in the discussion of the item on the Council's agenda, without the right to vote.

<sup>30</sup> S/PV.3413, 31 July 1994, p. 4

<sup>31</sup> S/PV.3413, 31 July 1994, p. 5.

<sup>32</sup> S/PV.3413, 31 July 1994, p. 5–6. Cuba was also not a member of the Security Council at the time, but had requested to be invited to participate in the discussion of the item on the Council's agenda, without the right to vote.

invasion of one country by another, an act which gave rise at the time to the strongest reaction by the international community.”<sup>33</sup>

US troops entered Haiti on 19 September 1994. However, on 18 September an agreement had been reached between a mission led by former US President Jimmy Carter and the military-appointed President Emile Jonassaint and Lt.-Gen. Raoul Cédras, head of the three-member military junta. Under this agreement, the junta was prepared to yield power. The agreement further required “close co-operation” between Haitian military and police forces and the US military mission. The action that followed the next day was thus formally consented to by the junta, and so cannot be termed an intervention in the strict sense of the term. The major practical effect of the agreement was that the US troops did not meet armed resistance when entering Haiti. The crucial point for the present purposes, however, is that Security Council Resolution 940 did in fact authorise the use of force for the purpose of compelling the junta to resign, which implies a further loosening of the principle of non-intervention.

Resolution 940 questions the validity of the *sub modo* way of conferring rights on states that was referred to in section 3. According to the resolution, *de facto* governments are not automatically entitled to activate the state's rights. This is also the case when what is at stake is the right not to be intervened in. Rather than regarding *de facto* governments as holders of the state's rights, sovereignty is here considered to be vested directly in the people. If the government has not been granted the right to rule by the people, but rules contrary to the will of the population, should the state that it leads be granted the right to not be intervened in? Security Council Resolution 940 goes a very long way towards answering this question in the negative. If the government in power does not represent the popular will, but rather suppresses it, then a military intervention that could bring an end to this suppression can, in principle, be justified.

This paves the way for the possibility of using force in order to overthrow an illegitimate regime. If the Security Council defines this situation as a “threat to the peace”, the state can no longer rely on protection under the principle of non-intervention. This confirms the third major challenge to the principle of non-intervention and constitutes a further reduction of its scope.

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<sup>33</sup> S/PV.3413, 31 July 1994, p. 9.

## 5. UN-authorized intervention – a slippery slope of forcible interference?

We have seen that the UN Security Council has expanded the concept of “threats to the peace” and thus widened the scope for justified resort to force. Cosmopolitan philosophers have long argued for what they have regarded as the need to restrict the scope of the principle of non-intervention. Focus has most often been on the need to allow the requirements of human rights to take precedence over those of state sovereignty in situations where the two cannot easily be reconciled. In the following, we will focus on one particular kind of argument against interventions that is frequently invoked when discussing what actions are morally acceptable – the “slippery slope” argument. This argument is often invoked when a practice is changed so as to allow for *something* rather than *nothing*. Thus it would appear highly relevant when discussing the changes that pertain to UN-authorized interventions.

The slippery slope argument is structured as follows: (i) If we allow A, then B will necessarily or very likely follow; (ii) B is morally unacceptable; therefore (iii) we must not allow A either (van der Burg 1991: 42). The argument proposes that there is a contrast between “...a tolerable solution to a *problem now before us* and an intolerable result with respect to some currently hypothetical but potentially real *future state of affairs*” (Schauer 1985: 365). The problem now confronting us and the proposed solution to this problem (the A in the outline above) may be termed the “instant case”, whereas the state of affairs that we fear and want to avoid (the B in the outline above) may be termed the “danger case”.<sup>34</sup>

Ernst Haas (1993) has invoked an argument against UN-authorized interventions which resembles a slippery slope argument. He adopts a very wide concept of intervention that includes actions ranging from retaliatory economic sanctions and economic conditionality to military intervention. The slippery slope that Haas warns against is the “likely progression of steps that begin with humanitarian intervention and end with enforcement measures under Chapter VII of the Charter” (1993: 65). Still, his argument is not posed as a general warning against any kind of involvement. Haas instead wants to “save the UN's legitimacy for situations that can be improved by multilateral action by preventing the organization's sliding down the slippery slope illustrated by the cases

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<sup>34</sup> I borrow the terms “instant case” and “danger case” from Schauer (1985: 365).

of Somalia, Bosnia and Cambodia” (1993: 65). The argument then turns out to be a warning against ineffective UN involvement, be it forcible or not. That is indeed a sound warning – but is no slippery slope argument against UN involvement.

In order to evaluate whether the slippery slope argument produces a valid objection to relaxing the principle of non-intervention, we should specify the A and the B in the argument. We also need to specify the mechanisms that are believed to make the slope slippery – that is, the mechanisms that make B unavoidable, or very likely to happen, once A is allowed. The A in the current argument is the application of a certain legal provision, namely the powers the Security Council has to consider and define a situation as a “threat to the peace”, and, if deemed necessary, to authorise the use of military force to “maintain or restore international peace and security”. What, then, is the “danger case”, the B that could be very difficult or even impossible to avoid once the Security Council has narrowed down the scope of the principle of non-intervention by authorising interventions for specific purposes?

There may be several answers to this question. Here I want to turn to what is often taken to be an inherent tension between justice and order in international relations. The unconditional principle of non-intervention implies what Hedley Bull (1971) has termed a “conspiracy of silence” on matters such as the rights and duties of citizens of other states and the lack of democratic political institutions and procedures. To be sure, the principle as such neither encourages nor justifies human rights violations or undemocratic governments. But it implies that human rights violations or the existence of an undemocratic government should not be allowed to imperil inter-state order by providing reasons for states to use force against each other. When the requirements of order conflict with those of justice, the unconditional principle of non-intervention solves the conflict by subordinating the latter to the former. The principle may thus be seen as one expression of what Chris Brown (1992: 129) has called “the consensus for peace” – the view that peace between states is a desirable state of affairs and that resort to force is to be avoided at any cost.

When the Security Council has embarked on a process of reducing the scope of the principle of non-intervention by letting the domestic injustice in states serve as a reason for authorising the use of force, it may be very difficult to prevent a further loosening of the principle of non-intervention. This may ultimately provide a flood of interventions

and thus drastically increase the use of force in inter-state relations. What seems to be acceptable or even desirable solutions to immediate problems of large-scale human rights violations, humanitarian crisis and non-democratic regimes may prove to have unavoidable and intolerable consequences at some later stage. This, at least, is the charge of the slippery slope argument.

In describing the mechanisms that are believed to make the slope slippery, we may distinguish between two versions of the general argument: the logical or conceptual version, and the empirical or psychological version (van der Burg 1991: 43). The mechanisms differ between the two versions. The conceptual version of the argument says that once the Security Council has allowed A, then there is a high probability that it will end up accepting B as well, as one cannot make a distinction between A and B. The psychological version says that once the Security Council has allowed A, it will sooner or later accept B as well, due to psychological processes. I shall consider both forms of the argument, starting with the logical or conceptual version.

### *5.1 The conceptual slippery slope argument (the “line-drawing” argument)*

The conceptual or logical version of the slippery slope argument holds that once the Security Council has allowed A, there is a high probability that it will end up accepting B as well, as one cannot draw a logical distinction between situation A and situation B. The use of the term “logical” in relation to the realm of human actions is certainly disputable and thus warrants a comment. The use of the term “logical” shall not be taken to imply that an actor is morally obliged to intervene in situation B, even if that actor has intervened in situation A, and situation A and B are indistinguishable. The use of the term “logical” is rather founded on the assumption that when an intervention in situation A is justified on a moral basis, this creates pressures for intervening in situation B as well, when situations A and B are indistinguishable. Does the logical slippery slope argument produce a valid argument against relaxing the principle of non-intervention?

#### *5.1.1 The challenge from human rights*

As has been shown, the UN has expanded the conditions to be met before the principle of non-intervention applies. The first challenge to the principle of non-intervention concerns human rights. One version of the logical slippery slope argument says that situation A is indistinguishable from situation B. Taken as an argument against allowing interventions

for the purpose of terminating human rights violations, it may be stated as follows: When it is established that violations of human rights may constitute a “threat to the peace”, thus warranting intervention, there are a great many situations that also qualify for external intervention. When an intervention is justified on the basis of the need to terminate gross and systematic violations of human rights (situation A), this will create pressures for intervening in a wide range of other situations in which human rights are being violated (situation B). This is all the more so since the intervention may be considered a precedent and thus itself serve as a reason for future interventions to terminate human rights violations. As a result, the principle of non-intervention is further relaxed and the range of possible justified interventions is further enlarged. In the following, I will examine whether this version of the logical slippery slope argument produces a valid argument against relaxing the principle of non-intervention.<sup>35</sup>

I shall term a situation in which an intervention would be justified an “intervention situation” and a situation in which it would not a “non-intervention situation”. There have been numerous attempts at specifying criteria for when an intervention could be carried out in the case of gross violations of human rights. Richard Lillich (1974: 248) includes the *immediacy* and the *extent* of the human rights violations among the criteria for judging the legitimacy of a unilateral humanitarian intervention.<sup>36</sup> Michael Walzer has suggested that an intervention is in principle justified when it is a response to actions that “shock the moral conscience of mankind” (1977: 107). Criteria such as these are imprecise. It is not clear whether the gravity of the situation refers to the number of people killed, the fact that the killings and other atrocities take place solely or mainly among one sub-group of the population, such as ethnic or religious minorities, or the fact that the atrocities have taken place for a considerable period of time. None of these suggestions leave us with any clear-cut criteria for deciding when the situation is grave enough to justify intervention. Criteria such as these suggest that interventions should be triggered only in extreme situations, and that cases of “ordinary repression”

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<sup>35</sup> My intention here is to look at the matter in terms of principles. The justifiability of any particular intervention will depend on several additional concerns that will not be addressed here – the prospect of success with minimal loss of life, implications for the balance of power in the region, etc.

<sup>36</sup> The crucial question of when the situation is so grave as to allow for an intervention is, however, one that also has to be answered by the Security Council, and is consequently relevant for collective interventions as well as unilateral ones.

do not qualify. They are, however, not very helpful in specifying a line of demarcation between an intervention situation and a non-intervention situation.

To be sure, it is not difficult to make a distinction between a situation in which several hundred thousand people are threatened with extinction (situation A) and one in which one thousand individuals have their human rights violated (situation B). The version of the logical slippery slope argument that says that situation A is indistinguishable from situation B carries little force when applied to violations of human rights. This version of the argument is, however, not the only one to be considered. The problem in the present context is rather that there is a continuum between the former and the latter situation. And there is a second version of the slippery slope argument that deals with situations of this kind – the *(n-1) argument*.<sup>37</sup> In the context of interventions the argument may be stated approximately like this: Even though it is possible to make a distinction between A (a situation in which, say, 500,000 people have their human rights systematically violated) and B (a situation in which 1,000 people suffer the same fate), it is not possible to make such a distinction between 500,000 people and 499 999, between 499 999 and 499 998, 499 998 and 499 997, ...1002 and 1001, 1001 and 1000. The distinction between A and B breaks down, because any cut-off point along the continuum between A and B will necessarily be arbitrary. Therefore, if the Security Council authorises interventions to terminate gross and systematic violations of human right, there is a high probability that it will authorise interventions to terminate less severe situations as well. This means that the scope of justified interventions is enlarged, with no limitations.

It has been suggested that one solution to the problem of the grey zone between A and B is to draw a sharp line between cases that are allowed and cases that are not (Williams 1985: 133).<sup>38</sup> In the context of interventions, the argument is that while the (n-1) argument produces a valid argument against the possibility of establishing a *reasonable* line of demarcation between a situation in which intervention would be justified and a situation in which it would not, this does not mean that we cannot establish *some* such line. Let us say, for the sake of the argument, that a line can be drawn between an

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<sup>37</sup> This is Williams' (1985) interpretation of the logical slippery slope argument.

<sup>38</sup> One example of this from the field of medical ethics is the Norwegian law on abortion, in which a maximum length of pregnancy for abortion is specified. After that point has been passed, medical abortion is permitted only in extreme cases.

intervention situation and a non-intervention situation at 50,000 victims of human rights abuse. This line is, admittedly, arbitrary in the sense of being drawn between two situations that do not seem to be relevantly different. And the point is not that it is easy or possible to come up with some convincing arguments for the choice of *this* line. It is, all the same, a line – and the point about the slippery slope argument, in its logical form, is that it is impossible to draw such a line. This, it would seem, is not the case.<sup>39</sup>

Is the proposed solution to the problem convincing? I believe there is one major problem with it. If drawing of a sharp line between cases that are allowed and cases that are not is to prevent us from sliding down the slope, then that line must be based on facts that are easy to establish beyond doubt. In actual conflict situations, the range of human rights violations will be extremely difficult to confirm. What is a logical possibility in the case of, e.g., abortion, then seems to fail in the case of intervention to protect human rights.

It would seem, then, that attempts at specifying “intervention situations” have not come to grips with the problem of indeterminacy. This leaves extensive room for subjective judgement as to when the situation is grave enough to justify an intervention. Violations of human rights are a matter of degree rather than of kind. Once it is established that they may justify forcible interventions, it seems hard to establish logical barriers against a further relaxation of the principle of non-intervention.<sup>40</sup> The logical slippery slope argument, applied to the challenge of human rights, therefore certainly carries force.

### *5.1.2 The challenge from de facto statehood*

The second challenge to the principle of non-intervention is the challenge from *de facto* statehood. The very concept of *de jure* statehood was first developed as an analytical tool employed in an effort at explaining why states that lacked most, if not all, of the traditional features of sovereignty were still able to remain members of the inter-state society.

According to Jackson (1990), many ex-colonial states are more accurately described as

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<sup>39</sup> The question of whether the drawing of such a line will *in fact* prevent the Security Council from sliding down the slope is a separate one and will not be addressed here.

<sup>40</sup> The conditions for sliding down the slope of interventions include, however, more than just the existence of possible cases. In addition one has to identify specific actors with motives for fulfilling the slide. Furthermore, the procedure by which the decision to intervene is taken must be so as to make it fairly easy to turn motives into actual decisions. I will return to these questions.

possessing *de jure* than *de facto* statehood. They lack such features as a centralised government capable of exercising control over the state's territory and the population, and a permanent population that forms a stable community. These states have gained their sovereignty as a result of the process of de-colonisation, which granted colonies sovereign status without paying attention to the question of their long-term survivability. The other side of this coin is that such states have survived more by virtue of their externally granted right to political sovereignty and territorial integrity than because of their capacity to sustain themselves as members of the inter-state society.

To be sure, the empirical qualities of many old states are also shaky, and the recent dissolution of Yugoslavia and the USSR has paved the way for several new states that have no tradition of sovereignty. Many of these states are likely to remain ineffective for a long time. This means that it is more inaccurate than ever to put the distinction between “empirical” and “juridical” statehood on a par with the so-called North–South distinction. At the same time, it has become apparent that effectiveness is not easily stated in terms of either–or.

What, then, does the current loosening of the principle of non-intervention imply for the prospect of other so-called quasi-states? Resolution 794 is very weak on references to cross-border implications of the situation in Somalia at the time. It is rather the domestic situation that is deemed to constitute the “threat to the peace”. And a logical slippery slope argument against allowing interventions in a state-less society may thus be stated in the following way: Once the Security Council has determined that the situation in Somalia constituted a threat to the peace and thus justified the use of force, there are many other quasi-states that qualify for intervention as well. Justifying intervention on the basis of the absence of *de facto* statehood will create pressures for intervening in other states whose empirical qualities are shaky. The result is that the range of possible, justified interventions is further enlarged.

In the following I will examine whether the slippery slope argument produces a valid objection against this loosening of the principle of non-intervention. At first glance, it would seem that the challenge from *de facto* sovereignty raises the same kind of problems as the challenge from human rights. If effectiveness essentially remains a matter of more or less rather than either–or, and lack of effectiveness is deemed to constitute a threat to the peace, it will be very difficult to make a distinction between the

existence of an ordinary “quasi-state” and a situation that is of such a character as to justify a UN-authorized intervention. And that would mean that the logical slippery slope argument applies to the challenge from *de facto* statehood as well as to the challenge from human rights.

I believe, however, that it is possible to establish a barrier against such a relaxation of the principle of non-intervention. Gerald B. Helman and Steven Ratner (1992) distinguish between three groups of states whose survival is threatened. The first group is termed the “failed states”, whose “governmental structures have been overwhelmed by circumstances” (ibid.: 5). Somalia, Cambodia and Liberia are mentioned as examples of such failed states. The second group consists of states that have not yet collapsed, but that could collapse within some years. Georgia, Ethiopia and Zaire are mentioned as examples of such states. The third group consists of the states that gained sovereignty as a result of the dissolution of the former Soviet Union and Yugoslavia. The viability of these states is difficult to assess, according to Helman and Ratner.

I would suggest that only the first group of states – the actually failed states – are legitimate candidates for UN-authorized intervention. And even if there may be many states whose empirical qualities are shaky, cases of total breakdown in state authority are rare.<sup>41</sup> The logical slippery slope argument, applied to the challenge of *de facto* statehood, does not seem to produce a valid objection against extending the concept of “threats to the peace” to cover cases of breakdown in state authority, as it is logically possible to establish barriers against further loosening of the principle.

### *5.1.3 The challenge from democratic governance*

The perhaps most noticeable challenge to the principle of non-intervention is the third one, namely the challenge from democratic governance. There have been attempts at questioning the international standing of non-democratic states. Michael Reisman (1984) has suggested that Article 2(4) in the UN Charter does not prohibit the use of force to either preserve or promote democracy. The “Reagan Doctrine” justified armed support to insurgencies against governments that the Reagan Administration perceived as ruling without the consent of the governed. Both Reisman's position and the Reagan Doctrine propose subordinating the principles of non-use of force and non-intervention to what is

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<sup>41</sup> Helman and Ratner (1992) argue that we have only seen the beginning of “failed states”.

conceived as a more important objective –the promotion and preservation of democracy. However, the Reagan Doctrine did not receive support from other governments, and Reisman's view has been heavily criticised.<sup>42</sup>

As will be remembered from section 4.3, however, many authors argue that there is an emerging international right to democracy, but stress that violations of this right should be enforced internationally rather than unilaterally. According to such a view, the right to democracy is moving towards a rule of *jus cogens*, which means that states cannot contract themselves out of the obligation to obtain popular consent. The normative case for interventions in non-democratic regimes is then clear: Sovereignty is vested in the people. If the government in power does not represent the people, but suppresses the popular will, an intervention that could bring an end to this oppression is justified.<sup>43</sup>

One interpretation of what happened in the Haitian case is that the Security Council decided to act on the international right to democracy, and that states that are run undemocratically no longer enjoy protection under the principle of non-intervention. And if this is the case, all states that rule contrary to the will of the population may be legitimate candidates for interventions.

A slippery slope argument against intervention directed at non-democratic regimes could then be stated as follows: Once it is established that a regime which rules contrary to the will of the people may constitute a threat to the peace, thus warranting an intervention, there will be many states that also qualify for intervention. When intervention is justified on the basis of the existence of an illegitimate regime, this creates pressures for intervening in other states that are not run democratically. The relevant slippery slope argument then is that situation A (the situation in Haiti prior to the passing of Resolution 940) is indistinguishable from situation B (the situation in other non-democratic states). And if undemocratic states are no longer accorded protection under the principle of non-intervention, the result is that the scope of the principle is further narrowed.

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<sup>42</sup> See e.g. Schachter (1984).

<sup>43</sup> But see Walzer (1977) for the argument that undemocratic and illiberal regimes may be the expression of the shared beliefs among the population, and that this implies a presumption for non-intervention in the case of non-democratic regimes.

In what follows I will examine whether this version of the slippery slope argument produces a valid objection against relaxing the principle of non-intervention.

The soundness of the argument hinges on the premise that the situation in Haiti did not differ from that in other non-democratic states. I believe, however, that the situation was in fact relevantly different. In Haiti the democratically elected president, Jean-Bertrand Aristide, who had been elected in accordance with national laws, had been ousted from office. In this sense, what was being enforced in the Haitian case was a domestic democratic choice. And it is perfectly possible to term this situation a “threat to the peace” without implying anything about the international standing of states in which the population has not yet had the opportunity to express their political preferences in free elections. That is, it is possible to make a distinction between the situation in Haiti and the situation in other undemocratic states. Although Haiti in principle did not enjoy protection under the principle of non-intervention when Resolution 940 was passed, other non-democratic states did. The logical slippery slope argument, applied to the challenge of democratic government, does not seem to produce a valid objection against the loosening of the principle of non-intervention.

To summarise: The logical slippery slope argument seems valid in the case of the challenge from human rights. Once it is determined that massive violations of human rights constitute a “threat to the peace”, it is difficult to establish barriers against a further loosening of the principle of non-intervention. The situation looks different when the slippery slope argument is applied to the challenge from *de facto* statehood and democratic government, however. In the latter two cases, it seems perfectly possible to establish distinctions between the instant case and the danger case which could prevent a further loosening of the principle of non-intervention.<sup>44</sup> In these cases, then, the logical slippery slope argument does not seem to be a valid argument against taking the first step, that is, against letting the prerogatives of *de facto* statehood and democratic government take precedence over the principle of non-intervention.

Before turning to the empirical slippery slope argument, I want to address the danger that the three challenges I have dealt with so far are not the only putatively good reasons for UN authorised interventions. Focus is then shifted from the danger that it is

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<sup>44</sup> Whether these distinctions are effective in the sense that they will in fact prevent a further loosening of the principle of non-intervention is, of course, another question.

logically impossible or very difficult to prevent an enlargement of the basis for interventions *within* each of the three challenges to the danger that the three challenges I have dealt with so far are not the only putatively good reasons for UN authorised interventions. In other words, there is not just the danger that the term “threat to the peace” will be subject to *wider* interpretations than has so far been the case. There is also the danger that the term will be subjected to *other* interpretations than has so far been the case. Once the Security Council has accepted that *some* special concerns may justify UN authorised interventions, it may be hard to reject that *other* special concerns may also justify UN authorised interventions.

#### *5.1.4 The danger of expanding the list of special concerns that would justify interventions*

If the Security Council determines the situation a “threat to the peace”, it may, if deemed necessary, authorise the use of force. The term “threat to the peace” is extremely vague. So far, the Security Council has defined gross violations of human rights, lack of effective government and the existence of an “illegitimate *de facto* regime” as threats to the peace. It would seem, then, that the concept has been stretched to cover a wide range of situations, inter-state and intra-state alike. And once the concept of “threat to the peace” has been stretched in these three directions, it may well be stretched in even more directions. Various other situations could easily be included on the list of good reasons for deviating from the principle of non-intervention. This implies a second way in which it may be logically difficult to prevent a further loosening of the principle of non-intervention.

I suggest that severe environmental degradation, massive discrimination and violence against ethnic minorities, and the proliferation of nuclear weapons and other weapons of mass destruction can all be understood as among the “threats to the peace”. These are merely examples: the point is to show that once the concept of “threat to the peace” has been stretched to the extent that it already has, the concept can easily be made to encompass an even broader range of situations and events.

##### *(i) Environmental degradation*

Environmental degradation might be included on the list of “threats to the peace” and thus be yet another reason for one or more future UN authorised interventions. Thomas Homer-Dixon (1991) has offered an account of why it is that environmental degradation can be a

cause of acute conflicts, both between and within states.<sup>45</sup> Homer-Dixon's thesis, in its most general variant, is that the environmental effects of human activity may cause social effects that in turn may increase the probability of acute conflicts. Additional factors, such as political institutional set-up and distribution of coercive capabilities between and within countries, may increase or decrease the probability that a particular environmental change in fact causes serious conflict. He also acknowledges that political decisions and actions may change the processes that link the environmental changes, the social effects and the acute conflicts.

Homer-Dixon mentions the Great Anatolia Project on the Euphrates River as one example of an environmentally induced conflict. If Turkey's plans to build a system of dams and irrigation networks along the upper reaches of Euphrates were fulfilled, that would severely affect the annual flow of Euphrates within Syria. Syria already suffers from a serious shortage of fresh-water supplies, and the situation has given rise to mutual threats.

This example is by no means unique. Environmental degradation may easily be conceived of as a threat to the peace, and thus be added to the list of concerns that may outweigh the principle of non-intervention in particular situations.

#### *(ii) Protection of ethnic minorities*

Second, violations of minority rights could be included on the list of "threats to the peace". After the end of the Cold War, there has been an upsurge of ethnic conflicts in many parts of the world. According to Ted Robert Gurr, more than two hundred ethnic and religious minorities are "contesting the terms of their incorporation to 'the new world order'" (1993: ix). Some of these groups are engaged in efforts at establishing their own sovereign state; others strive for various forms of self-government within the framework of the sovereign state. Ethnicity has clearly become a major source of conflicts both within and between states.

John McGarry and Brendan O'Leary (1993) make a distinction between two macro-political forms of ethnic conflict regulation. The first they term methods for *eliminating* differences, and consists of the following strategies: genocide, forced mass-population

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<sup>45</sup> Homer-Dixon defines acute conflicts as conflicts that involve a substantial probability of violence (1991: 77).

transfers, partition and/or secession, and finally integration and/or assimilation. The second is what they call methods for *managing* differences, and consists of the following strategies: hegemonic control, arbitration, cantonization and /or federalization and finally consociationalism and/or power-sharing. Although minority rights are not included in their taxonomy, it seems reasonable to include them among the management methods.

On 18 December 1992 the General Assembly adopted a new Minority Rights Declaration (Resolution 42/135) devoted solely to the promotion and protection of minority rights. Underlying the declaration is the conviction that implementation of the declaration can play a significant role in preventing violent conflicts between groups. The declaration sets out numerous standards and rights that can be claimed by persons belonging to ethnic, religious or national minorities. No mention is made, however, of standard-enforcing mechanisms.

One way of circumventing the absence of mechanisms for enforcement is to define violation of minority rights as a “threat to the peace” and thus as a situation that may warrant the use of force. Given the immense destructive potential of ethnic conflicts, it does not seem unwarranted to include violation of minority rights on the list of “threats to the peace”; thus there are putatively good reasons for deviating from the principle of non-intervention. And if this is so, the principle of non-intervention may be further weakened and the scope of justified resort to force further enlarged.

*(iii) Inhibit proliferation of nuclear weapons and other weapons of mass destruction*

My third suggestion is that the threat of proliferation of nuclear weapons and other weapons of mass destruction might be included on the list of “threats to the peace” and thus be yet another reason for one or more future UN authorised interventions. Scholars disagree on how to interpret the relationship between conflicts and the existence of weapons, including weapons of mass destruction. Whereas some take the existence of weapons to be a consequence of conflict, others hold that the weapons themselves are genuine causes of insecurity and conflict. The latter view has prevailed in the UN, where arms control and disarmament have been seen as important devices for obtaining peace.

When, during the Gulf War, the allied forces attacked some of Iraq's nuclear facilities, this was met with silence or outright approval. The vast majority of governments seemed to tolerate the destruction of the Iraqi nuclear facilities. This is in sharp contrast to the wide condemnation that followed the Israeli limited attack on Iraq's Osiraq reactor in 1981. Why then the absence of similar reactions to the allied bombing 10 years later? This may indicate a change in attitude with regard to the use of force intended to prevent the proliferation of nuclear weapons.

Admittedly, the Iraqi case may be seen as one of the "easy cases" for the UN. Iraq's aggression against Kuwait had been condemned by the Security Council, and Iraq had been strongly committed to acquiring nuclear weapons, thus violating existing legal commitments. After the Gulf War, the destruction of all chemical and biological weapons and the elimination of the Iraqi nuclear program became part of the ceasefire solution between Iraq and the UN. Security Council Resolution 687 gave to the UN Special Commission and the IAEA (International Atomic Energy Agency) powers exceeding those conferred by the NPT (Non Proliferation Treaty) and the IAEA system. Security Council Resolution 707 of 15 August 1991, which was a response to the continued Iraqi attempt at questioning the authority of the UN Special Commission and the IAEA, further demands Iraq's surrender of the peaceful aspects of nuclear energy. France, the UK and the USA had made it clear that they were ready to use force if that proved necessary in order to destroy what was left of the Iraqi nuclear weapons programme (Müller et al. 1994).

The Iraqi case demonstrated willingness to use force for the purpose of hindering proliferation of weapons of mass destruction. The rationale for including the use of force as a non-proliferation measure is that the existence of such weapons may be seen as a threat to international peace and security. Even if Iraq were among the "easy cases" for the Security Council, the Council might well define a situation in which other states are about to acquire weapons of mass destruction as "threats to the peace" and authorise interventions for destroying production capabilities and goods that have already been produced or bought – even if these states have *not* committed aggression. And if so, the scope of the principle of non-intervention would be further reduced and the scope of justified resort to force further enlarged.

To summarise: Once the Security Council has begun to let the principle of non-intervention be outweighed by competing concerns, it is difficult to establish barriers against extending the concept of “threats to the peace” to an even wider range of situations. This means that there are numerous cases in which UN-authorized intervention might be applied.

## *5.2 The empirical slippery slope argument*

Having looked at logical versions of the slippery slope argument, I now turn to the empirical version of this argument, which may also be termed the “falling dominoes argument”.<sup>46</sup> Here the focus shifts away from the logical impossibility, or at least difficulty, of establishing barriers against what is seen as an undesirable outcome to the psychological and political processes that may ultimately lead to the danger case. Both versions of the slippery slope argument share the same concern –the fear that the range of possible UN-authorized interventions will be excessively broad. Where they differ is on the mechanisms that are believed to be operating. The empirical slippery slope argument says that once we have accepted the instant case, we will sooner or later end up accepting the danger case as well, due to psychological processes. The initial relaxation of the principle of non-intervention is politically dangerous, as it will diminish respect for state sovereignty and cause changes in the attitudes towards interventions. This may be used by parties that have an interest in a further relaxation of the principle of non-intervention, which may eventually lead to the danger case.

### *5.2.1 Changed attitudes?*

Have the members of the Security Council changed their attitudes towards interventions? This question is not one that can be answered with an unqualified yes or no. It seems likely that the phenomenon of interventions came to be regarded more positively as a result of the intervention in northern Iraq in April 1991. As former UN Secretary-General Javier Peres de Cuellar noted in the aftermath of this intervention: “We are clearly witnessing what is probably an irresistible shift in public attitudes toward the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents” (Quoted from Weiss and Campbell 1991: 455). And the mere fact that the Council has

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<sup>46</sup> I borrow this expression from Feinberg (1985).

authorised several interventions since 1991 bears testimony to the gradual acceptance of the view that interventions may legitimately be used to achieve political objectives.

It would be wrong, however, to jump to the conclusion that this means that the members of the Council are prone to move further down the slope of interventions. The Council has at times shown a striking reluctance to intervene. I will argue that two factors – perceptions of probability of success, and considerations of costs (in a broad sense) have come to serve as restraints, if not as actual stopping-points along the slope of UN authorised interventions. This in turn would indicate that the actors who have the authority to further widen the scope of UN-authorized interventions are not particularly inclined to do so. It would seem that the dominoes are simply not lined up in order, and so the fact that some have already toppled over does not automatically mean that the others will follow suit. In addition, the procedure by which decisions concerning Chapter 7 operations are taken makes it difficult to convert into actual decisions the motives of one or a few actors for intervening. This procedure then represents an additional restraint against a further relaxation of the principle of non-intervention.

### *5.2.2 Perceptions of probability of success*

The intervention in northern Iraq in April 1991 led some to declare that we had finally reached the historical turning point at which humanitarian concerns would trump the prerogatives of state sovereignty (Chopra and Weiss 1992). The situation in Iraq at the time of this intervention was, however, unique. Iraq had just been defeated in the Gulf War, and the allied forces met scant resistance during the operation.

Operation Restore Hope in Somalia proved to be a far more realistic test of the conditions for enforcement operations. The goal of the operation, as defined in Resolution 794, was to “establish a secure environment for humanitarian relief operations in Somalia as soon as possible” – which indicates that the operation was to have purely humanitarian objectives. This goal is not very specific, however; and the concrete steps that were taken to realise that objective – such as disarming some of the warring factions – were soon seen as political acts. The intervening forces found themselves charged with pursuing political as well as humanitarian objectives, and the relationship between the UNITAF forces and the Somali population became

increasingly tense. Eventually the forces came to be perceived as a party to the conflict and were treated accordingly.<sup>47</sup>

One lesson to be learned from Somalia is that enforcement operations involve rules of engagement that differ fundamentally from traditional peace-keeping operations. The single most important condition for a successful operation is probably that one has at one's disposal and is willing to use the means that are necessary in order to realise the objectives of the operation.

This raises the crucial question of the relationship between the means of intervention and the aims pursued. What aims can an intervention that is conceived of as a limited action possibly realise? Human suffering stems from a wide range of sources, and there is every reason to ask which of these sources can be removed by a UN-authorized intervention. The easiest case – that is, the case with the highest prospect of success – is probably a situation where the source of human suffering is a tyrannical regime, devoid of popular support. Once the regime is removed, the problem will be solved, at least on paper. The situation is quite different when the suffering has other sources: “[W]hat if (...) the inhumanity [is] locally and widely rooted, a matter of political culture, social structures, historical memories, ethnic fear, resentment, and hatred? Or what if the trouble follows from state failure, the collapse of any effective government...” (Walzer 1995: 36). I will not engage in a detailed evaluation of the suitability of the various measures that may be taken in such circumstances. Some situations clearly call for measures that are far more intrusive than interventions in the sense mentioned above. A failed state can hardly be saved by a limited operation: it is likely to require a long-term military presence and widespread state-building activities, such as institution building, as well as social reconstruction. The main point for the present purposes is that the actors' considerations of what can be achieved by more limited operations may serve as an important restraint against a further relaxation of the principle of non-intervention. Even if the attitudes towards interventions have changed, there has been a growing awareness of the limits to such operations as well.

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<sup>47</sup> UNOSOM II succeeded the UNITAF operation in May 1993.

### 5.2.3 Considerations of costs

The immense difficulties that the UN faced in Somalia no doubt made the members of the Security Council reluctant to engage in similar operations. This probably explains the lack of reaction to the tragedy that unfolded in Rwanda shortly afterwards. The humanitarian situation in Somalia did improve during Operation Provide Comfort, but the operation was costly indeed – in political, human and financial terms.

Of particular importance here is the growing unwillingness to put soldiers at risk. The US casualties in Somalia were, in fact, moderate, but the reactions show that human costs of this magnitude are hard to accept. Actors' considerations of what could be achieved by force, weighed against the likely costs of such operations, may become important restraints against a further relaxation of the principle of non-intervention.

### 5.2.4 Procedural Restraints

To what extent does the procedure by which decisions concerning use of force is taken represent a further restraint, if not a stopping-point, along the slope of UN-authorized interventions? Article 27(3) requires a positive vote by nine members of the Security Council, including all the permanent members, for a resolution concerning Chapter 7 to be adopted. It has been accepted, however, that an abstention by one or more of the permanent members does not act as a veto. This procedure is restrictive in the sense that a decision can be blocked if there is serious disagreement and conflict of interest between the permanent members of the Council. And even if there is no such disagreement among the permanent members, a minority consisting of 7 non-permanent members has the opportunity to block decisions concerning use of force. The voting procedures in the Security Council would thus seem to represent a fairly high barrier against excessive interventionism on the part of the UN.<sup>48</sup>

It could be argued, however, that once there has been an attitudinal change with regard to interventions, and UN-authorized interventions have become widely accepted, then there will be the danger that interventions *not* authorized by the UN Security Council will be legitimised as well. A hypothetical, but not implausible, situation may illustrate the point: Let us assume that an ethnic or religious minority is subject to atrocities – the

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<sup>48</sup> The composition of the Security Council and the decision-making procedures are, however, no guarantee against *arbitrariness*, quite the contrary.

situation is like that in northern Iraq prior to the intervention by the allied forces. There has, however, been a change in the Russian government, and the new government blocks a resolution in the Security Council concerning use of force for the purpose of terminating the violence. Let us assume that the French government decides to intervene anyway, without prior authorisation by the UN.

It is worth noticing that what is conceived as the “danger case” has changed in this last example. Whereas the focus thus far has been on the danger that the *range* of UN-authorized interventions will be excessively broad, the fear in the present argument is that relaxing the principle of non-intervention by the UN will ultimately lead to the acceptance of *unilateral*, unauthorized interventions against states that have not committed external aggression – exactly the kind of actions that are prohibited in Article 2(4) in the UN Charter. The concern, then, is that the initial loosening of the principle of non-intervention will eventually erode the ban on the offensive use of force.

Is it possible to establish a barrier against such a development, once the attitudes towards interventions have changed? It would seem that the strongest barrier against such a development is the insistence that an intervention, in order to be legitimate, must be authorised by the UN and thus be subject to the rather restrictive procedural constraints. This leaves us with a serious dilemma, however. One reason for scepticism regarding non-authorized interventions is that the acceptance of such interventions would remove the possibility of condemning unauthorized military interventions by other states at some later stage, if these states should deem the situation appropriate, while decisions in the Security Council are blocked. But if we hold that interventions are normatively defensible if and only if they are authorised by the UN, then we would have to accept non-action in the sense of non-intervention in situations where human suffering is tangible and widespread, while conflicts of interest block decisions in the Security Council.

## 6. Conclusion

The relationship between justifications and interests is complex. Interventions may be triggered by causes other than concern for human rights, effective statehood and democratic governance. These interest-based concerns will also affect the question of whether a particular slope is slippery or not. Here I have chosen to stick to the explicit

justifications for interventions. Precisely because these justifications are explicit and open, I believe they are the most important factors to be taken into consideration in determining if the UN is on a slippery slope of forcible interference.

The UN Security Council has quite clearly expanded the conditions required for the application of the principle of non-intervention. Practice suggests that a state may lose the claim to protection under the principle of non-intervention if it engages in systematic violations of human rights, if it is without an effective government or if the *de facto* government is unlawfully constituted. The question posed initially was whether the UN may get on a slippery slope of forcible interference by relaxing the principle of non-intervention. Our discussion has shown that this danger is not overwhelming. In two of the three cases dealt with, it is not logically difficult to establish barriers against a further widening of the scope of justified resort to force. And even if attitudes towards intervention have probably become more positive, perceptions of the probability for success and considerations about costs inhibit a limitless relaxation of the principle of non-intervention. And finally, the voting procedure in the Security Council represents a clear restraint against such a development. This in itself seems to be a strong reason for holding that an intervention, in order to be normatively defensible, must be authorised by the UN, although this leaves us with a serious dilemma in cases where resolutions in the Security Council are vetoed.

It would seem, then, that the slope of UN authorised interventions is not as slippery as it may seem. This reduces the risks of entering it in the first place. The lesson to be learned is thus that we need not fear a dramatic increase in inter-state use of force, as long as the interventions are authorised by the UN. On the other hand, the twin principles of state sovereignty and non-intervention will no longer prevent the UN from taking forcible action in certain extreme situations where human dignity is threatened on a massive scale. And I believe this is a change to be welcomed.

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# The morality of secession<sup>1</sup>

## 1. Introduction

Recent developments in international relations have placed the question of the moral significance of state borders on scholarly agendas. With the dissolution of the USSR, of Yugoslavia and of Czechoslovakia has come an important question: what groups can legitimately claim sovereign statehood? This calls for a systematic analysis of the legitimacy of secession. Can all existing states legitimately claim a right to territorial integrity? If not, under what conditions is secession justified?

Claims for secession arise in various historical and political contexts. How are we to distinguish between secession that is just and secession that is unjust? In this article I discuss the legitimacy of secession by systematically examining and comparing two different sets of general arguments for justifying secession: *community arguments* and *justice arguments*. Both sets hold that the state must satisfy some basic moral requirements, if it is legitimately to claim a right to territorial integrity. Both thus hold that the question of whether a state has a right to territorial integrity is not to be answered *a priori*.

The nature of the requirements for legitimate statehood differs, however. According to the *community arguments*, political boundaries should be nationally justified. Secession normally challenges the territorial integrity of existing states in the name of nationality. Thus the increase in the number of secessions mirrors Anthony Smith's observation that "the legitimating principle of politics and statemaking today is nationalism" (1986: 129). And the reason for exploring community arguments is that it is relevant to discuss whether such a factual development can be normatively justified. The primary requirement for legitimate statehood, according to the community arguments, is that the state must fulfil what may be termed the *normative nationalist principle*.

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<sup>1</sup> This is a slightly revised version of a paper that was presented at the *Third Pan-European International Relations Conference* in Vienna in September 1998. The author wants to thank Elisabeth Bakke, Lothar Brock, Raino Malnes, Knut Midgaard, Thomas Pogge, Stein Tønnesson and Øyvind Østerud for their comments on earlier drafts. The author would also like to thank participants in the ARENA group in normative political theory as well as participants in the colloquium of the Norwegian Research Council's Ethics Program for lively discussions and comments on earlier drafts.

Here I will make a distinction between the *ethnic community argument* and the *national community argument*. The former holds that the territorial boundaries of a sovereign state should encompass one and only one *ethnic group*. When actual boundaries encompass more than one ethnic group, the boundaries may be changed so as to accord with the ideal. According to the national community argument, however, the territorial boundaries of a sovereign state should encompass one and only one *nation*. When actual boundaries encompass more than one nation, the boundaries may be changed so as to accord with the ideal.

The *justice arguments*, by contrast to both of these sub-types, are either silent on the question of the ethnic or national composition of the population in one state, or subordinate it to the question of whether the state fulfils basic requirements of justice. According to this view, the proper role of political boundaries is not to encompass a national community, but rather to provide a geographical framework for a co-operative scheme of justice. The reason for exploring justice arguments is that these arguments rest on a different, and apparently competing, understanding of which interests count, from a normative point of view, in determining reasonable claims for secession. I will examine community arguments as well as justice arguments with a view to clarifying their normative rationale and deciding which of the reasons offered seem well-founded and which do not.

Secession and revolution may be considered alternative strategies for liberation from an unjust state. Political theory has long since recognised that the population has a legitimate right to revolt against a state that perpetrates injustices. The goals of secession and of revolution are fundamentally different, however. Whereas the goal of a revolution is normally to overthrow the existing government, transform society and set up a new state on the same territory as the old one, the goal of a secession is to withdraw a part of the state's territory and population from the jurisdiction of that state and either join another state or create an additional one. Secession challenges the principle of state sovereignty. Secession constitutes a permanent loss of territory and thus violates existing states' right to territorial integrity.

My discussion is founded on the premise that the existence of an international state system and thus the existence of territorial boundaries between political units is not *inherently unjust*. Particular boundaries may, however, prevent the realisation of basic

values. And when this is the case, there exists a strong *prima facie* case for overruling the prerogatives of territorial integrity for all existing states, and for accepting secession.

My concern is with the principles of justified secession rather than with the institutions that may be necessary to implement such principles. This does not mean that I do not realize that institutions are needed to implement principles or that I do not regard this question as important. However, it lies beyond the scope of the present article. Instead, I focus on what should be a fruitful basis for public discussion of how international law should deal with secession in a setting where I take for granted the existence of an international state system that has poorly developed mechanisms for dealing with human rights violations as well as scant acknowledgement of the cross-border distributive obligations of justice. Nor do I address questions pertaining to what would be fair terms of secession – such as how to divide the national debt, or how to issue credible guarantees for the protection of new minorities.

## 2. *Community arguments*

### 2.1 *The ethnic community argument*

The ethnic community argument holds that *all ethnic groups have a right to self-determination*. This normally means a right to independent statehood, but it can also in principle be a right to remain within a larger multi-ethnic state or to leave one state and join another. The main point is that the right resides in the ethnic group as such. Before spelling out this argument, let us take a brief look at the meaning of self-determination in UN terminology. In the UN, the “right to self-determination” has been interpreted so as to offer one particular answer to the question of who can legitimately claim separate statehood. The ethnic community argument, I take it, may reasonably be understood of as an effort at questioning the validity of the UN answer as well as an effort at formulating an alternative answer.

The UN Charter contains several provisions about the right to self-determination. Article 1(2) states that it is the purpose of the United Nations to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...”. Article 55 reiterates the commitment to “the principle of equal rights and self-determination of peoples”. The precise meaning of this term

remained contested for a long time within the UN, but “the right to self-determination” eventually came to be interpreted as a right for overseas colonies to sovereignty, within the territorial boundaries that were established by the colonial powers. For established states, the right to self-determination was interpreted as a right to territorial integrity and a right to protection under the principle of non-intervention.<sup>2</sup>

As pointed out by Lee Buchheit, it is far from obvious that this particular interpretation of the principle of self-determination can withstand critical examination:

One searches in vain (...) for any principled justification of why a colonial people wishing to cast off the domination of its governors has every moral and legal right to do so, but a manifestly distinguishable minority who happens to find itself, pursuant to a paragraph in some medieval territorial settlement or through the fiat of the cartographers, annexed to an independent State must forever remain without the scope of the principle of self-determination (1978: 17).

Thus it seems important to examine the charge of the ethnic community argument that the right to self-determination has been restricted in a way that is normatively unacceptable, and that all ethnic groups, or “manifestly distinguishable minorities”, have a right to their own state.

One particular interpretation of what is implied by the ideology of nationalism seems to capture the normative rationale behind the ethnic community argument. According to Ernest Gellner, “[N]ationalism is primarily a political principle, which holds that the political and the national unit should be congruent ... [it is] a theory of political legitimacy which requires that ethnic boundaries should not cut across political ones, and, in particular, that ethnic boundaries within a state – a contingency already formally excluded by the principle in its general formulation – should not separate the power-holders from the rest” (1983: 1). The normative character of the principle is

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<sup>2</sup> See e.g. Østerud (1984) for an account of the process that led to this particular delimitation of the principle within the UN, as well as further references on the topic.

quite apparent in this definition. Thus it is clear that Gellner's interpretation of the principle of nationality is meant to specify the primary criterion by which one should judge the legitimacy of existing political boundaries: The political boundaries of a sovereign state should encompass *one and only one* ethnic group. And conversely, each and every ethnic group should possess its own state. Since the principle of nationality is a normative principle against which one can measure the legitimacy of existing territorial boundaries, I will term this *the normative principle of nationality*. One reasonable implication of the ethnic community argument is thus as follows: In cases where the normative principle of nationality is violated, the existing state does not have a right to territorial integrity, and the boundaries of the state may consequently be changed so as to accord with the ideal.

The right to enjoy one's culture in company with others is one important part of the human rights canon. As stipulated by Article 27 of the International Covenant of Civil and Political Rights: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language" (quoted from Hannum 1990: 59).

What follows from this, for the question of the appropriate drawing of political boundaries? In order to evaluate whether the ethnic community argument produces a valid argument for secession, we need to probe into the question of the conditions for securing the right to enjoy one's culture in company with others. Since the topic of this article is the legitimacy of secession, the focus will be on the conditions under which the acquisition of sovereign statehood seems necessary for securing the right to enjoy one's culture in company with others.

It would appear that the right to enjoy one's culture in company with others can be safeguarded in multi-ethnic states as well as in ethnically more or less homogeneous states. To be sure, some existing states may pursue a policy that either neglects such a right or that deliberately attempts to destroy particular communal attachments. These are states that do not safeguard the right of all their citizens to enjoy their culture in

company with others – and in some cases this may justify secession.<sup>3</sup> But the reason why a secession may be just in some such circumstances will have nothing to do with the ethnic composition of the state – which is the explicit premise in the ethnic community argument. Recall that the ethnic community argument says that existing states *do not have* a right to territorial integrity if they violate the normative nationalist principle, that is, if the territorial boundaries of the state encompass more than one ethnic group. Surely, a more convincing argument would be that the existing state *forfeits* its right to territorial integrity if it fails to safeguard the crucial interests of all its citizens, including the right to enjoy one’s culture in community with others.

## 2.2 *The national community argument*

Some authors have sought to circumvent some of the apparent problems with the ethnic community argument by holding that the right to self-determination does not apply to all ethnic groups. It applies only to those ethnic groups who have developed a national consciousness. That is, the principle of self-determination applies only to nations, not to ethnic groups within the nation, this argument goes (Barry 1991, Miller 1995). Barry’s and Miller’s interpretations of the normative principle of nationality are, according to the same authors, at odds with Gellner’s interpretation of the principle. This variant of the community argument presupposes that it is possible to make a distinction between those groups which are ethnic groups and those groups which properly can call themselves nations – which is not always the case. It is, nevertheless, common to distinguish between “ethnic groups” on the one hand and “nations” on the other. The latter term signifies groups that aspire for a state of their own, or at least some degree of political autonomy, whereas the former term signifies groups that share some cultural characteristics, but that do not aspire to separate statehood. Here I will leave aside the problem of drawing sharp lines between ethnic groups on the one hand and nations on the other, and focus instead on the arguments for why political boundaries should coincide with national ones. We can distinguish between (i) arguments that hold that it is important for nations to have their own states and (ii) arguments that hold that it is important for the citizens of a state to have a

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<sup>3</sup> Several institutional devices that fall short of statehood may safeguard the right to enjoy one’s culture in community with other members of the group. The question of how the political system in a state ought to be designed in order to safeguard such a right is deeply contested, but will not be pursued here.

common national identity.<sup>4</sup> I will present these arguments and critically discuss whether or how they present a good case for secession in cases where political boundaries do not coincide with national settlement patterns.

First, however, there is an important question that needs to be clarified: the question of the redrawing of territorial boundaries.

I would argue that a case for secession arises only when the new state can assume borders that were previously internal administrative boundaries of a larger state. That is, I assume that the principle of *uti possidetis* applies. The principle of *uti possidetis* provides that “states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence” (Ratner 1996: 590). The reason why I believe it is preferable to adhere to the principle of *uti possidetis* for the present purpose rather than leaving open the question of where to draw the new and assumedly better line between states is that I believe this reduces the risk of armed conflict. There are weighty reasons for criticising the principle of *uti possidetis*.<sup>5</sup> Admittedly, the principle is not ideal – but any other clear and easily applicable alternative does not exist. By providing a clear answer to the question of where to draw the new borders in times of break-up of states, the principle of *uti possidetis* reduces the risk that this question will be settled on the battlefield. The desirability of avoiding armed conflict thus seems to me to justify the principle, despite its various weaknesses.<sup>6</sup>

### 2.2.1 *Why should nations have states of their own?*

The first group of arguments that is to be examined argue the case for national and political boundaries to coincide by stating that it is important for nations to have their own states. There are various views as to why this is so. I will start by presenting and discussing the argument that holds that a nation ought to have its own state since this is normally the best way of preserving the national culture. I then turn to the argument that nations ought to have their own states since this is the best institutional mechanism for enforcing the obligations we have to our fellow-nationals.

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<sup>4</sup> The distinction is borrowed from Miller (1995: 82).

<sup>5</sup> See e.g. Ratner (1996) for such a critique.

(i) *The “cultural protection” argument*

What then is “national culture”? We should note that the term consists of two separate and elusive components. Most authors seem to agree that the assumption that nations have distinct cultures need not presuppose cultural homogeneity on the part of the population. Normally a wide variety of lifestyles can flourish within one national culture. On the other hand, there must also be some elements of commonality, in order for a national culture to exist. Among the most important elements of a national culture are music, literature and poetry and, perhaps most importantly, the writing of a national history. And the first argument for letting national and political boundaries coincide is that a nation can best protect its national culture through the public institutions of a sovereign state. This argument is perhaps most clearly stated by Margalit and Raz (1990). I present their line of argument, and then go on to discuss whether their argument supports the case of secession when national settlement does not coincide with existing political boundaries.

Margalit and Raz’ concern is with the moral justification of the case for national self-determination: “[t]he right to determine whether a certain territory shall become, or remain, a separate state...” (1990: 440). They examine who has the right to self-determination and the conditions under which such a right is to be exercised. Identifying the groups that qualify for self-determination by characteristics “relevant to the justification of the right” (ibid.: 443), they conclude that it is what they term “encompassing groups” that qualify for self-determination.<sup>7</sup>

It is the nation and only the nation that enjoys the right to self-determination, for two reasons: because it has developed *a rich and pervasive culture*, and because membership in it is important to each person’s self-identity. Both of these are in turn important to the well-being of its members. On this account, there is a very close connection between valuing a national culture and expressing respect for the individual members of the nation. If a national culture is publicly ridiculed or

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<sup>6</sup> The principle of *uti possidetis* ought, however, not rule out the possibility of peaceful exchange of territories between parties that do not use or threaten to use armed force in order to change the location of borders.

<sup>7</sup> Margalit and Raz (1990) present the characteristics that define an encompassing group on pp. 443–447. These defining features include both “objective” and “subjective” factors. Examples of the former could be a pervasive culture and a common language; the latter means subjective identification

harassed, then its members are harmed. That is why the prosperity of national cultures is important for individual well-being, and that is why they are worth protecting. Thus one argument for why it is important for nations to have their own states is that it may be impossible, or at least extremely difficult, to preserve a national culture unless the nation enjoys separate statehood: “Sometimes the prosperity of the group and its self-respect are aided by, sometimes they may be impossible to secure without, the group’s enjoying political sovereignty over its own affairs...Hence the prominence of a history of persecution in most debates concerning self-determination” (ibid.: 450). Here persecution appears to be deemed the most important threat to the preservation of a national culture, so I will begin by considering whether the need for protection against persecution makes a good case for congruence between national and political boundaries. If it can be shown that separate sovereign statehood is both a necessary and a sufficient guarantee against persecution, this would strengthen the case for requiring that national and political boundaries coincide.

One philosopher who is sympathetic to the idea that nations ought to have their own state, Michael Walzer, has claimed that separate statehood is a *necessary* condition for the long-term survival of nations. In what he terms the prudential claim about the world, he states: “[W]e and our fellows, members of a people or historical nation, can only guarantee our physical survival, our long-term existence as individuals or as a coherent group, through the medium of sovereign power. We can be sure of no one’s protection but our own” (1986: 228–229).

On the face of it, it is false to claim that nations cannot survive without states and thus that there is no other way to overcome persecution than through possession of separate statehood. Nations with an exclusive religion have managed to survive, despite centuries of statelessness. The Jews would seem to be one example here; likewise the Armenians: “Yet, despite changes in location, economic activities, social organization and parts of their culture over the centuries, a sense of common Armenian identity has remained throughout their diaspora, and the forms of their antecedent culture, notably in the sphere of religion and language/script, have ensured a subjective attachment to their cultural identity and separation from their surroundings” (Smith 1991: 26). On the other hand, there is a kernel of truth in the

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with the group. Thus, for the present purposes, the term “encompassing group” can be used synonymously with the term “nation”.

statement that “We can be sure of no one’s protection but our own”, and both Jews and Armenians have certainly experienced the dangers of statelessness. Also the United Nations has tended to regard everything that goes on within the territorial boundaries of a sovereign state as the internal affairs of that state alone and has consequently taken no action against, for example, persecution of national minorities. In that sense, the Walzerian claim contains an ugly truth: Even when national minorities have faced genocide, the UN has not felt obliged to take action to stop the atrocities. This stands in sharp contrast to the way the world organisation has reacted to violations of the rights of sovereign states. The way the international society reacted to the Iraqi invasion and subsequent annexation of Kuwait illustrates the point: Nations devoid of statehood, such as the Kurds, have been extremely vulnerable to persecution, whereas the rights of sovereign states, such as Kuwait, have enjoyed full-scale protection.

This situation may be about to change. Since the end of the Cold War, the UN has undertaken several actions, both forcible and peaceful, to halt atrocities going on *within* states. Since the UN now sometimes takes or authorises action to protect nations that do not possess statehood, or to protect individuals belonging to such nations, the argument that sovereign statehood is a *necessary* condition for protection against persecution is no longer valid – and is thus no longer valid as a general argument for the need for nations to acquire their own state. However, it would be erroneous to conclude that these occasional UN initiatives constitute a safe international institutional mechanism to protect endangered national minorities, and it seems reasonable to conclude that there is a high probability that nations are more secure with states of their own.

Persecution is, however, not the only, and perhaps not even the most important, threat to the preservation of a national culture. “Suffering can be the result of neglect or ignorance of or indifference to the prosperity of a minority group by the majority” (Margalit and Raz 1990: 450). If the majority neglects or is indifferent to the well-being of members of the minority, this is clearly a situation that calls for reform. The question is whether changing the status of territorial boundaries is the best remedy. It is a far step from pointing to the fact that the culture of a national minority may sometimes be threatened by ignorance or indifference on the part of the majority, to the conclusion that nations generally need states to protect their culture and that this is

an argument for changing the status of territorial boundaries when national and political boundaries do not coincide. This latter conclusion seems to assume that only individuals who are members of one particular nation will in fact take measures to protect and preserve the culture of that nation – but that is an open question. The constitution of a multi-national state may be framed so as to make it extremely difficult to reach the kind of decisions that threaten the preservation of a national culture. Given what is at stake, it seems reasonable to insist that nations who do not currently possess statehood and who perceive that their national cultures are being threatened must make every effort at negotiating a political solution within the territorial boundaries of the existing states, before contemplating secession as one alternative solution.

Will existing states take the interests of their national minorities seriously if they do not have an incentive to do so? If national minorities were accorded the right to secede, this would substantially strengthen their bargaining position vis-à-vis the existing state. Paradoxically, according national minorities the right to secede *might* make it more likely that a satisfactory political solution *within* the territorial boundaries of existing states could be agreed upon. By providing national minorities with an exit-option, existing states cannot neglect the vital interests of national minorities who reside within the territorial boundaries of existing states. A right to secession would seem to substantially affect the way in which sovereignty can be exercised towards national minorities. Thus, even if the need to protect national cultures does not always support the case for secession, the need for preserving such cultures seems to support a right to secession, for bargaining purposes.

*(ii) The enforcement of obligation argument*

The second argument for why nations should have their own states may be termed “the enforcement of obligation argument”. According to this argument, people who are linked by bonds of nationality have special obligations of social justice towards each other – obligations that they do not have to individuals who do not belong to the nation. And the argument for why it is that nations ought to have their own states is that we can best fulfil our obligations towards fellow nationals if nations are granted the political powers of a sovereign state. This argument has been put forward by David Miller (1995). I begin by presenting his argument in some detail, and then

discuss whether it produces a good case for elevating the status of an existing boundary from internal to international through secession.

David Miller holds that nations are ethical communities in the sense that “[i]n acknowledging a national identity, I am also acknowledging that I owe special obligations to fellow members of my nation that I do not owe to other human beings” (1995: 49). Note that the argument is stated in terms of obligations to fellow *nationals* rather than fellow *citizens*. This point has no implications when the citizens of a state share a common national identity. When the territorial boundaries of a sovereign state encompass a citizenry that does not have a single national identity, or when the citizenry of a sovereign state comprises only a part of the nation, the argument apparently presents a case for changing the status of territorial borders to make national and territorial boundaries coincide.

Why should we have special obligations towards fellow nationals that we do not have towards other individuals who are not members of the same nation? What is it about bonds of nationality that create special obligations? National membership is often “a powerful source of personal identity”, Miller holds (*ibid.*: 68). This claim is best understood as being based on the psychological generalisation that most people see their national identity as a constituent part of their personal identity. What normative implications follow from this generalisation? Miller’s argument for why nationality is a source of special obligations is particularly interesting, since it seems to rest on an understanding of the relationship between psychology and morality that allows psychological statements to have normative implications.

Miller grounds his defence of the principle of nationality in general, and of the claim that nationality creates special obligations in particular, on a Humean philosophical system:

a philosophy which, rather than dismissing ordinary beliefs and sentiments out of hand unless they can be shown to have a rational foundation, leaves them in place until strong arguments are produced for rejecting them. The [...] beliefs cannot be deduced from some universally accepted premise; but that is no reason for rejecting them unless the arguments for doing so seem

better founded than the beliefs themselves. In moral and political philosophy, in particular, we build on existing sentiments and judgements, correcting them only when they are inconsistent or plainly flawed in some other way [...] It is from this sort of stance (which I shall not try to justify) that it makes sense to mount a philosophical defence of nationality” (1993: 4).<sup>8</sup>

On this account, the mere fact that one identifies with and experiences loyalty to a group is in itself a strong reason for giving special weight to the interests of other members of that group. So if most people have a firm sense of a national identity and believe that they have special obligations to their co-nationals, this is a weighty reason for according them normative significance: “What we can do is to start from the premise that people generally do exhibit such attachments and allegiances and then try to build a political philosophy which incorporates them” (ibid.). Thus, rather than critically examining whether or how national allegiances can be normatively defended, Miller constructs a political philosophy that has as a basic premise that such allegiances are important.

Miller is not the only author who envisions a close relationship between psychology and morality in asserting that we have special obligations to our fellow nationals. Michael Sandel’s critique of liberal political theory can be summed up by the claim that the moral force of some particular loyalties and convictions consists in the fact that “living by them is inseparable from understanding ourselves as the particular persons we are – as members of this family or community or nation or people...” (1982: 179). Sandel further holds that such allegiances go “beyond the obligations I voluntarily incur and the ‘natural duties’ I owe to human beings as such. They allow that to some I owe more than justice requires or even permits, not by reason of agreements I have made, but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am” (ibid.).

Miller’s way of conceiving of the relationship between psychology and morality may, of course, be based on the view that ‘ought’ implies ‘can’. The point would then be, as

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<sup>8</sup> Thanks to Raino Malnes, for drawing my attention to this methodological statement.

Buchanan (1989: 874) notes, that “one cannot be obligated to do (or not to do) that which one’s psychology bars one from doing (or not doing) and that some people’s perceived obligations are so bound up with their sense of self that they are psychologically incapable of regarding those obligations as invalid, or even of not attempting to fulfill them”. But even if we may be sympathetic to the view that ordinary beliefs are fruitful starting point for normative analysis, it seems fairly obvious that they will at times need to be supplemented by normative standards that may not be a part of these ordinary beliefs. As for Miller, it would seem that it is not any particular feature of the community itself that is the source of special obligations, but rather people’s perception that membership in this community defines who one is. In that case, it would seem that all sorts of attachments believed to be constitutive of personal identity – including membership in obviously immoral communities – would be sources of special obligations. Buchanan raises the question whether the fact that a person believes that his or her racist identity is constitutive for who he or she is implies anything about the validity of the obligations he or she feels as part of that particular community. Buchanan gives a negative answer to this question, and it seems hard to disagree with him. We need criteria for distinguishing between those communal attachments that may generate valid obligations and those that may not. An approach that fails to go beyond “ordinary beliefs and sentiments” cannot provide us with such criteria, and this would seem to be an important objection against such an approach.

But given that membership in a nation generates valid obligations of social justice, would this then mean that a formal scheme of political co-operation ought to be superimposed on the national community, so that obligations of nationality are backed by the formal rights and duties of citizenship? Can we best fulfil our special obligations to our fellow-nationals if nations are granted the coercive instruments of statehood? Or are there other ways in which these obligations can be fulfilled equally well, perhaps even better? The alternatives are that political sovereignty is non-national. One such alternative is that political authority is sub-national, that is, that the territorial boundaries of the state encompass only a sub-section of the nation. The other alternative is that political authority is super-national, that is, that the territorial boundaries of the state encompass more than one nation.<sup>9</sup> The former situation would

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<sup>9</sup> See Miller (1995: 84).

imply that we have special obligations of social justice to fellow-nationals who are citizens of other states. However, according to Miller, enforcing those obligations would involve serious implementation problems. As to the latter situation, where political authority is super-national rather than sub-national, it would imply that we have special obligations only to a sub-section of the total citizenry. Here, Miller holds, we will face serious problems of legitimating a policy of redistribution. Thus it would seem that the special obligations that we owe to fellow-nationals are most effectively enforced if nations are granted the powers of statehood. And this in turn supports the claim that there should be congruence between national and territorial boundaries.

### *2.2.2 Why is it important for citizens of a state to have a common national identity?*

The second group of arguments for why national and political boundaries ought to coincide reverses the line of reasoning. Instead of focusing on why it is important for nations to have states of their own, this second group of arguments builds upon the belief that congruence between national and territorial boundaries is desirable, because it is important for the citizens of a state to have a common national identity. This means that a common nationality is instrumental in furthering values that all citizens have an interest in. These arguments focus on nationality as a particularly important source of mutual trust and solidarity, and are stated in terms of the positive political consequences of the presence of such feelings.

The first argument to be presented and discussed come from John Stuart Mill: that a viable democracy presupposes a population with a common national identity. The second argument to be discussed holds that a policy of redistribution will get popular support only if the population has a common national identity.

#### *(i) Mill's democracy argument*

John Stuart Mill's defence of the principle that national and territorial boundaries ought to coincide is stated in terms of the prerequisites for a viable democracy: "[f]ree institutions are next to impossible in a country made up of different nationalities" (1861/1991: 392). What reasons does Mills adduce to support this position? It seems possible to discern two lines of thought, both of which concern the alleged empirical prerequisites for the smooth functioning of a democratic political system. The first

line of thought is concerned with the preconditions for the existence of a united public opinion: “Among a people without fellow-feeling, especially if they read and speak different languages, *the united public opinion, necessary to the working of representative government, cannot exist*” (ibid., italics added).<sup>10</sup> This statement seems to contain three suggestions: (1) that there exists a very close connection between a common language and the presence of fellow-feeling; (2) that the existence of fellow-feeling is a necessary condition for the existence of a united public opinion; and (3) that a united public opinion is a necessary condition for a democratic political system.

All three are problematic. One rather obvious objection against the first suggestion is one that Mill himself realised – the fact that nationality does not have a single source. Even though a common language may be an important source of a feeling of nationality in some cases, Mill mentions Switzerland as an example of a country with a “strong sentiment of nationality”, despite its linguistic and religious heterogeneity. Thus, fellow-feeling is not by definition linked to common language. However, it is not clear whether Mill conceives of this relationship as one existing by definition. And if the connection between common language and a feeling of nationality is historical rather than conceptual, then the fact that a feeling of nationality may exist also among people who do not speak the same language would not invalidate the suggestion that it is easier for such a feeling to develop among people who share a common language.

The second suggestion seems to leave one important question unanswered. It may well be that lack of fellow-feeling may impede the existence of a united public opinion. If the population consists of groups that do not have much contact but rather live quite isolated from each other, this may certainly prevent the development of a united public opinion and mutual trust. But Mill seems to accord *national* differences a privileged role in accounting for isolation between groups and lack of mutual trust, without presenting any reasons for doing so. National heterogeneity *may* be the source of a fragmented public opinion and lack of trust between groups, but in other cases

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<sup>10</sup>Subjective identification with the group has a prominent place in Mill’s definition of a nation: “A portion of mankind may be said to constitute a Nationality if they are united among themselves by common sympathies which do not exist between them and any others – which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively. This feeling of nationality may have been generated by various causes” (1861/1991: 391).

isolation and distrust are probably due to geographical, socio-economic or other differences. Whether there exist other sources of solidarity among large populations than common national identity is clearly an empirical question with no *a priori* answer. Nationality has indeed been accorded an extremely important role when it comes to fostering a sense of solidarity among collectivities of individuals who do not know each other. This is clearly captured in Benedict Anderson's (1983) conception of the nation as an *imagined political community*. This gives rise to another question: does nationality enjoy an *exclusive* role in accounting for a sense of solidarity and trust in the population? Or might these feelings be generated by other sources as well? Although this is an extremely important question, it will not be discussed here, since I do not believe it is necessary in order to address the topic in focus, the legitimacy of secession. I will return to this question later, but first I will discuss the third suggestion in Mill's line of argument.

Why is it that a united public opinion is “necessary to the working of representative government”? The mechanisms in this claim are well accounted for by Miller (1995), who embraces Mill's democracy argument. Miller is explicitly concerned with the conditions for sustaining a *deliberative democracy*. In order for such a democracy to work, two conditions have to be fulfilled, says Miller. First, the reasons one is ready to give in a political debate should be sincerely held rather than being adopted for the purpose of furthering sectional interests. Second, citizens should be willing to moderate their claims “in the hope that they can find common ground on which policy decisions can be based” (ibid.: 97). Miller's conclusion is clear: “To the extent that we aspire to form a democracy in which all citizens are at some level involved in discussion of public issues, we must look to the conditions under which citizens can respect one another's good faith in searching for grounds of agreement. Among large aggregates of people, *only a common nationality* can provide the sense of solidarity that makes this possible” (1995: 98, italics added).<sup>11</sup>

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<sup>11</sup> Brian Barry (1991) is also concerned with the relationship between communication, trust and democracy. Barry shares Miller's concern with the conditions for intercommunication and explicitly rejects a conception of politics and democracy as a means for the pursuit of individual interests. The difference does not just have theoretical significance. Barry criticizes the California Supreme Court for not requiring competence in English as a precondition for voter registration, and does not want to extend citizenship to persons without competence in English. We should notice, however, that the rationale for Barry's position is a deliberative ideal of democracy. Democracy, in his view, requires more than merely the ability for each voter to cast an informed vote.

The status of the last sentence is vague. It is stated as an empirical generalisation, but no evidence is offered to support it. Let us, for the sake of the argument, assume that nationality *is* the only source of a sense of solidarity and cohesion in the population – which is, according to the second suggestion, a necessary condition for a united public opinion. And this, in turn, according to the third suggestion, is a necessary condition for sustaining a deliberative democracy. Does this then imply that stateless nations should be given states of their own, thereby justifying secession by nations currently living within the territorial boundaries of a multi-national state? It seems to me that it is not necessary to reach such a conclusion, even if we take for granted the validity of the premise that nationality is a unique source of cohesion in a population. One alternative could be to rethink the basis of the national identity of the *existing* state, so as to be better able to accommodate diverse groups. This may mean changing some national symbols, rewriting the national history, etc. We cannot state, once and for all, *what exactly* it is that makes citizens willingly identify with one particular state: this question should be subject to debate and modification, where necessary.<sup>12</sup>

Mill's second line of thought in defence of his claim that democracy cannot be sustained in a multi-national state concerns the conditions for having an army that sympathises with the people. His claim is that a common national identity is a necessary condition, and that this is “the grand and only effectual security in the last resort against the despotism of the government” (1995: 393). Despotism can only be sustained with the help of the army, and the assumption is that the army cannot be used for internal repressive purposes if the army and the population have a common national identity. Again, Mill is concerned with the positive political consequences of a common national identity among citizens. His claim rests on the assumption that the army will see co-nationals as their friends. Whereas non-nationals are perceived as strangers by ordinary men and women, soldiers will experience non-nationals not merely as strangers, but as enemies: “The difference to [the soldier] is that between friends and foes” (ibid.). In order to ensure that the army will not be used for despotic purposes, enemies should be *outside* rather than *inside* the borders. Thus, the citizens of a sovereign state ought to have a common national identity.

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<sup>12</sup> See e.g. Charles Taylor (1994) for an interesting discussion of the basis of a Canadian national identity, and Michael Walzer (1992) on what it means to be “American”.

The soundness of this argument hinges on the validity of the empirical assumption that the army's perception of friend and foe is synonymous with the distinction between co-nationals and non-nationals. Recent political past, both in Southern Europe and Latin America, should make us sceptical to this assumption. Greece, Spain and Portugal, as well as many states in Latin America, all have recent histories of army-based dictatorships. These states were nation-states in the sense that the citizens had a common national identity.<sup>13</sup> And yet the army was clearly used for despotic purposes. It would seem, then, that the army in these countries perceived the friend-foe distinction in terms of political or ideological differences rather than in terms of national differences. Common nationality was no guarantee for "the sympathy of the army with the people".

Common nationality is clearly not a *sufficient*, and perhaps also not a *necessary*, condition for the army to sympathise with the people. But even so, a common national identity may increase the probability of the existence of such sympathy, and in that sense, may increase the probability of successfully establishing and sustaining a democratic political system. Would that not give us reason to support secessionist attempts by nations who are currently part of a multi-national state? Again, one obvious alternative to secession is to rethink the basis of national identity in the existing state. I shall return to the possibility that such efforts may prove unsuccessful, but first let us look at a second argument for why the citizens of a state ought to have a common national identity.

(ii) *The "legitimate redistribution" argument*

This argument concerns the preconditions under which citizens will support a policy of redistribution, and has been suggested by both David Miller and Brian Barry.<sup>14</sup> The argument runs as follows: Individuals who are fellow citizens ought to have a common national identity because this facilitates redistribution. If redistributive policies are to obtain popular support, the citizens must have a sense of solidarity. If

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<sup>13</sup> Spain is a partial exception.

<sup>14</sup> The argument goes back to the British historian John E.E. Dalberg-Acton, however – whose line of argument was exactly the opposite. Acton advocated the creation of multi-national states, because this would confine the state to protecting negative liberty and thus effectively hamper undesirable efforts at pursuing redistributive policies: "This diversity within the same State is a firm barrier against the intrusion of the government beyond the political sphere which is common to all into the social department..." (1862/1967: 150).

mutual trust is lacking, redistribution will be perceived as illegitimate and thus not gain popular support. Nationality is, according to Miller, the prime source of solidarity and mutual trust. Thus, a philosopher like John Rawls, who defends redistribution to the worst-off members of society, “tacitly presupposes that his principles are to operate in the context of a community whose members acknowledge ties of solidarity” (Miller 1995: 93).<sup>15</sup>

Miller’s proposition seems to suggest an interesting link between the *viability of a democratic welfare state* and the national composition of the citizenry. How are we, then, to account for the fact that the citizens of the United States, where the American national identity is strong, have been so reluctant to pursue redistributive policies on the federal level? In addition to the mere *existence* of a common national identity, Miller introduces a second variable when exploring the conditions under which redistributive policies can be sustained. This second variable is the *character* of the national identity in question. When the nation conceives of itself in individualistic terms, as does the American nation, it will be much more difficult to implement redistributive policies.<sup>16</sup> Two conditions will therefore have to be fulfilled if redistribution among citizens is to obtain popular support: (1) the citizens must have a common national identity; and (2) the nation must not conceive of itself in individualistic terms.

What are the implications of the “legitimate redistribution” argument for the question of the conditions for justified secession? This argument would seem to present a good reason for allowing secession when national and territorial boundaries do not coincide. If, however, secession is to be justified by redistributive concerns, there seem to be strong reasons for limiting the case for secession to nations that do not

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<sup>15</sup> See also Miller (1995:71–72), where he discusses and compares the rights and obligations of citizenship under two different conditions. In the first situation, citizens are bound to each other by the mere practice of citizenship itself and are motivated by the principle of fairness. In the second situation, the citizens are linked by bonds of nationality. According to Miller, it is difficult to understand why states should provide resources to, e.g., people with permanent handicaps if one follows the logic of reciprocity implicit in the first situation: “It is because we have *prior obligations of nationality* that includes obligations to provide for needs that arise in this way that the practice of citizenship properly includes redistributive elements of the kind that we commonly find in contemporary states” (ibid.: 72, italics added).

<sup>16</sup> One alternative explanation of the reluctance to pursue redistributive policies at the federal level is that even if the black population in the US has sought integration into the American nation, they have been denied access to the ‘melting-pot’. The reluctance to pursue redistributive policies at the federal

conceive of themselves in individualistic terms. If it is not merely the *existence* of common national identity, but also the specific *character* of this identity that accounts for the possibility of pursuing a democratic redistributive policy, this would also be an argument for fostering national identities along solidaristic lines in *existing* states.

To summarize: J.S. Mill's democracy argument and the "legitimate redistribution" argument should make us concerned with ensuring that states are bound together by *something* that creates mutual trust and cohesion. What does this imply for the question of the legitimacy of secession? Do these arguments support changing the status of territorial boundaries in cases where national and the territorial boundaries do not presently coincide?

This would be jumping to conclusions, for at least four reasons: First, the question of whether *nationality* is the only source of such mutual trust is an empirical question rather than a normative one. Mill's argument is, not surprisingly, consequentialist – stated in terms of the fortunate effects of common national identity among citizens. The same goes for the "legitimate redistribution" argument. There is nothing *inherently* valuable about nationality, according to these two arguments. If something else, for instance eye colour, would produce the same sentiments in the population, this would be a reason for letting the territorial boundaries of states be determined by the citizens' eye colour. Both of these arguments thus invite us to look for functional equivalents to nationality.

And second, even if we hold that nationality is the most important source of mutual trust between citizens, this does not necessarily imply that we ought to support the claims of all existing nations for statehood. If there are strong moral reasons for letting national and territorial boundaries coincide, there are in principle two ways in which this goal can be reached. The first way is to confer a right to secede on territorially concentrated national minorities. The second way is to let the territorial boundaries of the existing state remain intact, while trying to forge one nation of the population in this state. This latter strategy is often termed nation-building. Note that this need not imply cultural assimilation, but may rather aim at building over-arching

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level may thus be due to the unwillingness on the part of many Americans to redistribute to others who are not generally regarded as members of the American nation.

political loyalties.<sup>17</sup> This might very well require a rethinking of the basis for national identity in the existing state. However, we can never provide any final answer as to what it is that makes the citizens identify with one particular state.

Third, what if existing national identities are so strongly held and so mutually incompatible that efforts at building overarching loyalties to the existing state – that is, efforts at nation-building – fail? Is secession justified under such conditions? We have seen that there are strong democratic reasons for fostering a sense of cohesion and solidarity among the citizens of a state, and nationality is an extremely important source of such feelings. Does this then mean that nationalities are entitled to secede when efforts at nation-building in the larger state have proved unsuccessful and existing national identities are incompatible? We might be tempted to answer in the affirmative. After all, the cause of democracy and, at least to some extent, social justice, seems to be served by national homogeneity in the population. One major problem remains, however. It is only when a nation lives territorially concentrated, with few others residing on the same territory, that secession is possible without massive transfer of individuals who are *not* members of the nation. This seems to present us with a dilemma: If the right to secede is limited to nations who in fact live territorially concentrated with few others residing in that same area, we introduce a bias in favour of such nations. If, on the other hand, the right to secede is extended to nations who are not territorially concentrated, then massive transfer of non-nationals becomes necessary in order to avoid the problem of *new* national minorities – that is, in order for the secession not to create the same problems that it was intended to solve. There is no obvious way to solve this dilemma, but it seems to me that the need for not forcing people to leave their homes and neighbourhoods presents a case for limiting the right to secede to national minorities who live territorially concentrated in an area where few non-nationals reside, even if this introduces a bias in favour of such nations.<sup>18</sup>

Finally, there remains one crucial observation that should make us pause before concluding that territorially concentrated national minorities should be allowed to

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<sup>17</sup> This implies that the basis for national identity will have to be “thin” enough to be able to accommodate diverse groups, but still “thick” enough to be specific to that particular nation.

<sup>18</sup> Since this bias is justified by the undesirability of forcing people to leave their homes and neighbourhoods, the case for secession would have to be judged differently if the reason why few non-nationals currently reside in the area is that they have been subject to so-called ethnic cleansing.

secede in order to create congruence between national and territorial boundaries. This has been succinctly stated by Gellner: “[I]t is nationalism which engenders nations, and not the other way round” (1983: 55). Gellner’s point is that nationalism is not an ideology that helps pre-existing nations reach self-consciousness. Rather, nationalism transforms ethnic groups into nations through mobilisation of claims to independent statehood. This means that all ethnic groups can in principle be turned into nations – they are all potential nations. Thus, if the right to secede is accorded to nations, whether territorially concentrated or dispersed, this may introduce an unfortunate incentive: ethnic groups may choose to abandon the national identity of the existing state and embark instead on a nation-building project in a particular territory – in short, an incentive for the creation of ever-new nations that demand separate statehood. And, as Gellner remarks, “[o]n any reasonable calculation, the former number (of potential nations) is probably much, *much* larger than that of possible viable states. If this argument or calculation is correct, not all nationalisms can be satisfied, at any rate at the same time” (1983: 2).

But the incentive for an ethnic group to develop a national consciousness and demand separate statehood seems to exist only for groups that cannot combine their ethnic identity with the national identity of the existing state. This should mean, then, that this incentive can be countered by existing states, through working to foster national identities that are inclusive enough to accommodate different ethnic identities. In that case, the danger that all ethnic groups on the earth may develop a national consciousness and demand separate statehood would be exaggerated, as such an incentive would not exist for all ethnic groups.

### *3. Justice arguments*

The community arguments discussed in the previous section hold that the proper role of territorial boundaries is to encompass a national community, although different arguments give different reasons for why this is so. In this section I turn to a second type of arguments that may adduced to justify secession. For the sake of simplicity, I term these arguments *justice arguments*. Their common denominator is that the just location of territorial boundaries is seen as being one that helps realise, or at least not prevent the realisation of, basic values of justice. In this view, secession may be justified when it is a necessary political means for creating conditions that are

consistent with basic principles of justice. A distinction will be made between three meanings of justice: territorial justice; distributive justice; and justice as meaning adherence to basic human rights. Here I will seek to highlight the differences as well as similarities between community arguments and justice arguments.

### *3.1 Territorial justice*

This argument has been proposed by Lea Brilmayer. It focuses explicitly on the question of who has a valid claim to the *territory* in question. If the existing state possesses legitimate sovereignty over the territory, secession is seen as illegitimate. If, on the other hand, the secessionists have a valid claim to the territory in question, then secession may be justified. In other words, secession is justified only if it is a remedial strategy for recovering territory that was unjustly appropriated: “The plausibility of a separatist claim does not depend primarily on the extent to which the group in question constitutes a distinct people in accordance with the relevant international norms. The normative force behind secessionist arguments derives instead from a different source, namely the right to territory that many ethnic groups claim to possess” (Brilmayer 1991: 179).

How are we to establish whether the existing location of territorial boundaries is just or unjust? According to Brilmayer, at least two arguments can be used to demonstrate that the secessionists have a superior claim to the territory they seek to withdraw from the jurisdiction of the existing state: (1) that the territory in question was acquired through *conquest* by the existing state; (2) that the existing location of the territorial boundaries is a result of some wrongdoing committed by a *third party* who is no longer a party to the disagreement. The Baltic states provide an example of the former situation. Secessionists based their claim on the charge that the territories in question had originally become a part of the USSR through illegal annexation. The secessionists’ claim for separate statehood may thus be seen as an effort at reclaiming territory that had been unjustly taken from them. An example of the latter situation would be a group who wants to secede from a state whose territorial boundaries were fixed by a colonial power for the sole purpose of serving colonial interests. The territories of the dominant group and the secessionists were thus originally improperly joined, although the power that was responsible for setting up the territorial boundaries is no longer a party to the conflict. In both these arguments, the history

behind the geographical scope of the jurisdiction of the existing state is of paramount importance when assessing claims for secession. Only those states that have a legitimate claim to the territory they occupy can rightfully oppose secession. Other states forfeit their claim to territorial integrity due to the wrongfulness of the processes that once led to the fixing of boundaries.

According to this argument, secession can be justified only if the territory in question was at some point in history unjustly incorporated in the geographical scope of jurisdiction of the existing state. This I will term the *unjust incorporation* condition. According to Brilmayer, the unjust incorporation condition is a necessary, albeit not a sufficient, condition for justified secession.<sup>19</sup> One major problem with this proposition is that it is essentially backward-looking. If the history of origin of the territorial basis of an existing state is impeccable, then the unjust incorporation condition does not apply, and thus no valid claim for secession exists. If a group wants to secede because it, for some reason or another, finds the situation unbearable, it cannot legitimately do so unless it can establish that the territory it claims is currently part of another state only because of some wrongful historical process in the past. Brilmayer explicitly denies that, for instance, maltreatment alone can give rise to justified territorial claims. This seems to accord existing states with an irreproachable history of origin too strong protection against demands for secession by groups who may be subject to injustice today.

The force of Brilmayer's approach seems to lie in its explicit focus on territory and timely reminder that what is at issue is not solely the relationship between states and peoples, but rather between states, peoples and territory. Secession involves territorial claims, which is why the right to self-determination cannot be put on a par with, for instance, the right to free association or freedom of religion.

Interesting similarities as well as differences exist between the territorial injustice argument and the national community argument. One obvious contrast between the two is that the national community argument looks at the present distribution of national settlement patterns and their possible alignment with the territorial divisions or boundaries between existing states, whereas the territorial justice argument focuses

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<sup>19</sup> For a discussion of a set of additional factors that should be taken into account in determining whether a claim for secession is justified, see Brilmayer 1991, pp. 199–200.

on historical grievances. The most relevant question, according to the national community argument, is whether the secessionists really constitute a nation, since it is only nations that can have a legitimate claim for separate statehood. The most relevant question, according to the territorial justice argument, is whether the existing state exercises legitimate territorial sovereignty, or if the secessionists have a superior claim to the territory in question.<sup>20</sup>

Interesting similarities between the arguments also exist, however. Communal attachments are not irrelevant to Brilmayer's territorialist interpretation: "Ethnic identity (...) explains why historical grievances continue to matter" (ibid.: 191). If individuals had no reason for identifying with those who had been unjustly treated in the past, they would hardly become involved in secessionist movements. Ethnic identity provides individuals with such a reason, and thus constitutes a link between those who possessed the territory in the past and those who live in the present. Ethnic identity explains why territorial claims survive.<sup>21</sup>

One crucial difference between the national community argument and the territorial justice argument should be noted. The national community argument holds that secession would be justified if the nation that wants to secede lives territorially concentrated and the new state can assume borders that were previously internal administrative boundaries of the larger state, regardless of how that territory originally came to be a part of the larger state. The territorial justice argument, on the other hand, says that a nation's claim to set up a new state has no normative force unless it can establish that the territory in question was originally unjustly incorporated into the field of jurisdiction of the larger state, regardless of whether that territory is currently delimited by internal administrative boundaries or not.

### *3.2 Distributive justice*

The distributive justice argument focuses on the relationship between the scope of ethical principles and the drawing of territorial boundaries between sovereign states. The argument may be given a range of interpretations. I have chosen to concentrate on

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<sup>20</sup> See Brilmayer 1991, pp. 198–199.

<sup>21</sup> Note that Brilmayer's use of the term "ethnic identity" is slightly at odds with the way I used the term in the previous sections. If one is to follow my usage of the term, the fact that an ethnic group claims the right to set up an additional state on the territory in question implies that the ethnic group has developed a national consciousness.

the version that says that the territorial boundaries between sovereign states should not be drawn so as to arbitrarily limit the scope of distributive obligations of justice. Thus, a just location of territorial boundaries is one that brings these boundaries into alignment with the territorial scope of those conditions that make principles of justice apply, namely the circumstances of justice.

The notion of the circumstances of justice, which dates back to David Hume, has been given contemporary expression by John Rawls (1971: 126–130). According to Rawls, the circumstances of justice can be understood as “the normal conditions under which human co-operation is both possible and necessary” (ibid.: 126). There are both objective and subjective circumstances of justice. Prime among the former is that of moderate scarcity: “Natural and other resources are not so abundant that schemes of co-operation become superfluous, nor are conditions so harsh that fruitful ventures must inevitably break down” (ibid.: 127). Prime among the latter is that of individuals taking no interest in one another’s interests. Thus, the circumstances of justice obtain

whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity. Unless these circumstances existed, there would be no case for the virtue of justice, just as in the absence of threats of injury to life and limb there would be no occasion for physical courage (ibid.: 128).

Society is here depicted as a co-operative scheme, marked by conflicts of interests as well as by identity of interests. It is because society can be depicted as such a scheme that the principles of justice, specifying a fair distribution of the benefits and burdens produced by social co-operation, apply. Rawls’ principles of justice for institutions consists of two principles: “*First Principle*: Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. *Second Principle*: Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity” (Rawls 1971: 302).

According to this line of reasoning, the circumstances of distributive justice arise between members of co-operative schemes. One crucial question is thus how Rawls conceives of the territorial scope of such co-operative schemes. Rawls is concerned with but one instance of the application of the principles of justice: “I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a *closed system isolated from other societies*” (ibid.: 8, italics added). It would seem, then, that Rawls considers existing states the most important schemes of co-operation. His principles of justice are consequently meant to apply *within* states rather than *between* them. The territorial boundaries of existing states thus are taken to mark the boundaries of distributive obligations of justice.

This understanding obviously has drastic implications for the question of the scope of distributive obligations of justice, and has received extensive criticism.<sup>22</sup> Here we will take a closer look at one line of criticism, put forward by Beitz (1979). Beitz disagrees with Rawls’ factual assumption that the circumstances to which justice applies are confined within the territorial boundaries of sovereign states. Both Beitz and Rawls share the normative assumption that the circumstances of distributive justice arise between members of co-operative schemes.<sup>23</sup> Beitz’ interpretation of the circumstances of justice is, however, wider than Rawls’. According to Beitz, “the requirements of justice apply to institutions and practices (whether or not they are genuinely cooperative) in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place” (ibid.: 131). And if the requirements of justice apply under these conditions, it seems arbitrary to confine the application of these principles to domestic society.<sup>24</sup> The expansion of trans-border interaction, in particular as regards economy and technology, has rendered obsolete the assumption that states should be conceived of as “closed systems isolated from other societies”. Instead, the world should be depicted as one interdependent worldwide society.<sup>25</sup> Since states cannot be regarded as closed systems, but are parts of a worldwide society with tightly integrated economies, there

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<sup>22</sup> See e.g. Beitz (1979) and Pogge (1989).

<sup>23</sup> This assumption is disputed. See e.g. Barry (1982) and Goodin (1988) for criticism.

<sup>24</sup> Contractarians who give a narrow description of the circumstances of justice tend to be sceptical to the idea of international circumstances of justice. See e.g. Mapel (1992) for an overview of the contractarian tradition in international ethics.

is little reason to assume that there is a radical break between intra-state and inter-state spheres of social co-operation. And since inter-state economic co-operation produces “significant aggregate benefits and costs that would not exist if states were economically autarkic” (ibid.: 152), this means that the requirements of justice that specifies a fair distribution of those benefits and costs will apply. The assumption that distribution within domestic society is a matter of justice, whereas distribution between states is a matter of charity, is therefore ill-founded, because the distinction between obligations of justice and obligations of charity is based on assumptions of fact that cannot withstand scrutiny.<sup>26</sup>

Beitz is concerned with the apparent lack of congruence between the existing territorial boundaries of sovereign states and those conditions that make the principles of justice apply. The territorial boundaries of sovereign states thus cannot be regarded as boundaries of distributive obligations of justice: “[I]f evidence of global economic and political interdependence shows the existence of a global scheme of social co-operation, we should not view national boundaries as having fundamental moral significance. Since boundaries are not coextensive with the scope of social co-operation, they do not mark the limits of social obligations” (ibid.: 151). Beitz’ solution to this problem is to enlarge the scope of distributive obligations of justice. He consequently proposes extending the Rawlsian principles of justice to all situations in which the circumstances of justice apply, intra-state or inter-state alike: “If social co-operation is the foundation of distributive justice, then one might think that international economic interdependence lends support to a principle of *global distributive justice* similar to that which applies within domestic society” (ibid.: 144, italics added).

Beitz thus takes the location of the territorial boundaries for granted and extends the scope of distributive obligations of justice. However, the absence of reliable enforcement mechanisms that apply across borders makes it warranted to propose alternative ways of bridging the gap between existing territorial boundaries and those conditions that make the principles of justice apply. And there is a second way of

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<sup>25</sup> The *locus classicus* within political science for similar factual assumptions is Robert O. Keohane and Joseph S. Nye (1977).

<sup>26</sup> I will not discuss whether Beitz is right in asserting that the Rawlsian assumption that sovereign states should be conceived of as “closed systems isolated from other societies” is to be literally understood. Beitz’ line of argument is interesting on its own.

resolving the problem with the apparent gap between existing territorial boundaries and the circumstances of justice, as defined by Beitz. If the problem is that the circumstances of justice are not easily confined within existing territorial boundaries, an alternative solution is to redraw the boundaries themselves. Rather than changing the scope of distributive obligations of justice, while keeping the territorial borders between states intact, one could change the location of the boundaries themselves so as to circumscribe co-operative schemes.

According to this line of argument, an existing state forfeits its claim to territorial integrity when the conditions that make principles of justice apply are not currently confined within the existing territorial boundaries of that state. Changing the status of territorial boundaries is justified when it is a necessary political means for realising principles of justice. This implies that territorial boundaries ought to be extended if and only if co-operative schemes encompass individuals who live outside the boundaries of the existing state. Here it is important to note that the boundaries need not be extended by incorporating existing states (or nations) *in toto*. What counts, according to this line of reasoning, is that boundaries encompass people who are linked together. On this account, a group would be justified in seceding from an existing state and joining a larger political unit if measures of social co-operation indicate that the co-operative scheme encompasses the seceding group, but not the remaining parts of that state. And conversely, boundaries ought to be redrawn so as to circumvent only a sub-section of the existing territory if and only if co-operative schemes encompass no other people than those who reside in that sub-section. The redrawn territorial boundaries would still fix the limits of distributive obligations of justice. They would, however, not *arbitrarily* limit the scope of such obligations, because they would now circumscribe those who participate in the kind of activities by virtue of which the principles of justice apply.

Since one of the national community arguments – the “distributive obligations” argument – also links the question of the scope of distributive obligations and the question of the proper drawing of territorial boundaries, a comparison between the two arguments seems warranted. The basic difference between the “distributive obligations” argument and the “distributive justice” argument is that they give different answers to the question of whom we owe obligations of justice. That is, the two arguments give different answers to the question of what is the legitimate

redistributive community. Recall that, according to the “distributive obligations” argument, we owe special obligations of justice to those with whom we share a national identity. By contrast, the “distributive justice” argument holds that we owe special obligations of justice to those with whom we co-operate. Both arguments say that distributive obligations are not confined within the territorial boundaries of existing states. The way in which these obligations extend beyond borders differs between the two arguments, however. Whereas the *distributive obligations* argument says that special obligations are owed to co-nationals, be they co-citizens or citizens of other states, the *distributive justice* argument says that special obligations are owed those who participate in activities by virtue of which the principles of justice apply, irrespective of their national identity or citizenship status. According to the distributive obligations argument, the nation is the legitimate redistributive community, whereas the distributive justice argument says that the legitimate redistributive community consists of those who participate in a co-operative scheme. The circumstances of justice cut right across national settlement patterns and citizenship status.

What the two arguments have in common is the desire to let the territorial boundaries of sovereign states circumscribe those who owe each other special obligations. This implies that both arguments hold that common citizenship ought to be superimposed on those who have special obligations towards each other. The reason for this is that obligations of justice ought to be enforced, and the absence of reliable enforcement mechanisms that apply across borders strengthens the case for redrawing boundaries to align them with the residence patterns of those to whom we owe special obligations of justice.

The distributive justice argument offers an *a-national* principle for the fixing of territorial boundaries. As it stands, the principle is neither friendly to nor hostile to the principle that territorial boundaries ought to coincide with national settlement patterns. The question of the national composition of the citizenry is simply irrelevant to the argument. If borders ought to circumscribe co-operative schemes, the high level of trans-boundary interaction in today’s world strongly indicates that the redrawn boundaries will circumscribe more than one nation, so that the result will be multi-national states. Is it then likely that distributive policy à la Rawls will get democratic support in a multi-national state? Unless such policies can obtain popular support, it

seems extremely difficult to implement principles of justice in a multi-national democratic state. Recall that one of David Miller's arguments for why territorial boundaries ought to coincide with national settlement patterns is that popular support for redistributive policies requires a sense of solidarity in the population, and that nationality is at present a unique source of such solidarity.

This does not mean that nationality has *always* been a unique source of solidarity. Indeed, the very notion of the "nation" is a fairly recent one. Nor does it mean that nationality will always be a unique source of solidarity in the future. Solidarity may well have other sources in the near or not so near future. If the obstacle to implementing principles of justice in a state whose territorial boundaries encompass multi-national co-operative schemes is the absence of features that may generate solidarity, this obstacle is not immutable. Given that there seem to be no *available* alternatives to nationality at present, however, the problems of implementing principles of social justice under conditions of multi-nationality may count as an objection against the distributive justice argument.

The problems with the eventual presence or absence of psychological prerequisites for implementing principles of justice under conditions of multi-nationality concern only one problem with the distributive justice argument. A second problem with the argument is that it may, after all, not yield a unique answer to the question of where to locate boundaries. According to the logic of the distributive justice argument, a just location of territorial boundaries between sovereign states is one that aligns the boundaries with co-operative schemes. Thus, the territorial scope of co-operative schemes should determine where exactly to fix the boundaries. How do we, then, demonstrate the existence of a "co-operative scheme"? Beitz' argument for extending principles of justice to the international society is that "[i]nternational interdependence involves a complex and substantial pattern of social interaction, which produces benefits and burdens that would not exist if national economies were autarkic" (ibid.: 149). It would seem, then, that a scheme of co-operation exists to the degree that existing states or sub-sections of existing states are interdependent. In that case, the condition of interdependence is an expression of the sort of co-operation that makes principles of justice apply. In other words, the condition of interdependence is an expression of the existence of a co-operative scheme that ought to be delimited by a territorial boundary.

How then should territorial boundaries be justly located if they are to circumscribe “co-operative schemes”? An unambiguous answer to this problem presupposes that it is possible to give an equally unambiguous answer to the question of to whom the condition of interdependence applies. And it seems that one major problem with the proposition that territorial boundaries should encompass co-operative schemes is that different indicators of the condition of interdependence yield different answers to the question of where to locate the boundaries. It seems highly likely that any effort at bringing the circumstances of justice and the territorial boundaries of sovereign states into alignment is doomed to fail, due to lack of an unambiguous answer to the question of who are to be considered participants in a co-operative scheme. We all engage in various forms of co-operative endeavours and are participants in different co-operative schemes. Some of these schemes may be territorially co-extensive, some not, and it seems extremely difficult to tell which ought to be accorded a privileged position in determining the location of a territorial boundary.<sup>27</sup> In particular, there is little reason to believe that it would be possible to apply the principle of *uti possidetis*. Thus, the requirements of distributive justice, as presented here, do not appear very well suited as a guide for drawing and redrawing of boundaries, as they cannot serve as a precise guide on the question of how to locate boundaries in order to avoid the problem that they arbitrarily limit the scope of distributive justice.

This is not to say that the proper aim of normative political theory is always to give unambiguous answers. The proper role of normative political theory can sometimes be to indicate a *range* of acceptable – and a range of unacceptable – solutions. When the topic under discussion is the location of political boundaries, the proper role of normative political theory could thus be to point out not one unique solution, but rather a range of locations that would satisfy the normative criterion under consideration, for instance, the requirements of distributive justice. The requirements of distributive justice alone cannot determine where to locate boundaries, but they can specify a range of locations that would be acceptable. In order to determine where exactly to locate the boundaries, other supplementary criteria would be needed.

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<sup>27</sup> This could, of course, be taken as an argument for the establishment of a multi-layered scheme of political authority rather than for concentrating political power in a state, whatever the territorial scope of jurisdiction of that particular state. See Thomas Pogge (1992) for such a proposal.

### 3.3 Adherence with basic human rights

The third kind of justice argument focuses on the conditions for implementing basic human rights. Human rights are rights that are held by virtue of being a human, and they are held equally by all persons. Article 2 in the Universal Declaration of Human Rights is a firm expression of the universal character of human rights:

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

The idea of human rights thus transcends territorial boundaries. But even if human rights apply directly to individuals, they are primarily rights directed towards the state, and states are obliged to respect them. And, as has been remarked by Jack Donnelly (1985), ‘having’, ‘enjoying’ and ‘enforcing’ a human right do not always go together. Under some conditions, one ‘has’ and ‘has not’ a right at the same time – what Donnelly terms the ‘possession paradox’. The possession paradox is particularly characteristic of human rights. As is forcefully stated by Leo Kuper, states have all too often been engaged in severe human rights violation against people under its rule:

[T]he sovereign territorial state claims, as an integral part of its sovereignty, the right to commit genocide, or engage in genocidal massacres, against peoples under its rule (...). To be sure, no state *explicitly* claims the right to commit genocide – this would not be morally acceptable even in international circles – but the right is exercised under more acceptable rubrics, notably the duty to maintain law and order, or the seemingly sacred mission to preserve the territorial integrity of the state (Kuper 1981: 161).

The most obvious political solution to the problem of regimes that do not respect basic human rights is popular revolt. Normative political theory has long since recognised that the population has a right to revolt against a state that does not respect such rights. There seem, however, to be strong reasons why this particular strategy should not be considered the only legitimate one. First, the population at large may lack the resources necessary to topple such a state, which may leave an international intervention the only credible alternative. And second, the human rights violations may not affect the entire population. The victims of human rights violations are frequently not the entire population, but identifiable sub-sections of it – such as ethnic, religious or national minorities. As such minorities may well be unpopular among the majority population, human rights violations against them may proceed with the tacit or express consent of the majority. Under such conditions, it seems highly unlikely that the majority will take action to stop these violations of human rights. And if popular revolt against the state is unlikely, we ought to look for alternative ways of terminating human rights violations. One alternative is UN-authorized intervention. The UN has, on occasion, taken measures to terminate human rights violations. We are, however, still a long way from possessing an international enforcement mechanism for human rights violations. A second alternative to popular revolt is secession. The final sentence in the quotation from Kuper indicates that he, for one, believes that too high priority has been assigned to the importance of the territorial integrity of existing states in cases where territorial division may be one solution to human rights conflicts. This is a serious charge, so we need to discuss whether secession may be justified as a response to severe violations of human rights.

Allen Buchanan has suggested that a secession may be justified if it is an act of self-defence, which is to say that secession is justified as a response to deadly attacks by an aggressor (1991: 65). On this account, secession is justified if this is necessary in order to protect the members of the seceding group from extermination at the hands of the state. Robert Goodin's idea of 'assigned responsibility' seems well suited to illustrate the logic behind such a proposal. Even though human rights are universal in the sense that they apply equally to all individuals, they are primarily rights directed towards the state. Goodin suggests that general duties may be discharged more effectively if particular agents are assigned special responsibility for discharging those duties vis-à-vis special persons. Thus, according to Goodin, "[s]pecial responsibilities are, on my account, assigned merely as an administrative device for discharging our

general duties more effectively...” (1988: 685). And national boundaries perform the function of assigning special responsibility to particular states for discharging general obligations towards those individuals “who happen to be their citizens” (ibid.: 682). On this account, existing states are assigned responsibility for protecting for instance, the human rights of their citizens, as this is believed to be the most effective way of protecting such rights.

Although Goodin does not explicitly address the question of secession, the idea of ‘assigned responsibility’ seems useful when discussing the conditions for justified secession. On his account, territorial boundaries are “merely useful devices for ‘matching’ one person to one protector” (ibid.: 686). Goodin suggests that states should either be reconstituted or helped if they prove incapable of discharging their responsibilities. But what if the state is not incapable, but directly unwilling to discharge the responsibility for protecting the human rights of all its citizens? Existing territorial boundaries may prove inadequate administrative devices for matching one person to one protector. Sometimes existing boundaries match persons to agents that fail to act as protectors, but act as persecutors instead. Under such conditions, redrawing territorial boundaries may be necessary in order to make the boundaries perform the function they are intended to perform – to serve as administrative devices for “matching one person to one protector”. According to the logic in the assigned responsibility model, a state’s right to territorial integrity may be considered conditional upon its living up to its responsibility. Thus, a state may forfeit its claim to territorial integrity if it fails to protect the human rights of all its citizens.

Should the right to secede be limited to cases when what is at stake is lethal aggression on the part of the state? If, as proposed by Robert Goodin, territorial boundaries perform the function of assigning special responsibility to particular agents for protecting, for example, the human rights of particular individuals, it seems somehow arbitrary to limit the case for secession to situations where the state has failed to protect the right to life. It would seem that a wider range of human rights violations needs to be taken into consideration, thereby possibly widening the scope for justified secession. A fully developed argument to the effect that human rights violations may justify secession should specify both (i) the kinds of human rights violations that might give rise to valid claims for separate statehood, as well as (ii) the degree of human rights violation that would be necessary for a valid claim for

statehood to exist. For the present purposes, I will have to pursue a more modest goal. It is difficult to be precise on either question, but I will try to indicate an answer to both, starting with the first.

It seems to me that secession cannot be considered a meaningful remedial strategy for *all* kinds of human rights violations. Some kinds of human rights violations, such as violations of the right to adequate nutrition, may require changes in international rather than domestic political institutions. Since the topic here is secession, I will concentrate on the kinds of human rights violations for which the establishment of a new state may be an adequate remedial strategy. The case for secession as a remedial strategy for human rights violations could seem to arise only when the source of these violations of human rights are the domestic political authorities.<sup>28</sup> One such situation is the one that was referred to above – one in which the political authorities conduct lethal aggression against a sub-section of the citizenry. Such a situation seems to present a strong case for secession.<sup>29</sup> Secession may also be considered an adequate remedial strategy for violations of other important civil and political rights.

Since the territorial integrity of existing states is often challenged in the name of incompatible communal identities, we should ask whether violations of the right to participate in activities linked to ethnicity could give rise to valid claims for separate statehood. As noted in the discussion of the ethnic community argument, the right to enjoy one's culture in community with others is an important part of human rights. There is, however, no obvious connection between such a right and the need for separate statehood, as what is at stake may be safeguarded in a multi-ethnic state as well as in an ethnically more or less homogeneous state. What is beyond doubt is that states have a responsibility for not interfering in activities linked to "enjoying one's culture". Some existing states may, however, either neglect this right or make deliberate efforts at destroying particular communal attachments. When a state makes every effort at preventing the expression of ethnicity, it fails to protect the right to enjoy one's culture in community with others. Under such conditions, the state may forfeit its claim to territorial integrity, and secession may be justified.

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<sup>28</sup> Other kinds of human rights violations may have international rather than domestic sources. The topic of how one should conceive of human rights is hotly contested, but will not be pursued here.

<sup>29</sup> Cf. Buchanan (1991).

In addition to indicating what kinds of human rights violation that would, in principle, justify secession, an adequate argument should also indicate the degree of human rights violations that would, in principle, justify secession. It is extremely difficult to specify any exact threshold that would, when crossed, constitute a valid case for secession. This challenge is similar to the challenge of specifying exactly when the violations of human rights that go on within the boundaries of a sovereign states become so severe that the UN Security Council may term the situation a “threat to the peace” and authorise an intervention to stop the atrocities. I do not believe it is possible to specify such a limit, nor do I believe it is possible to specify exactly when the human rights situation is so severe as to justify secession. All that can be said is that the violations of the human rights will have to be systematic and gross. The case for secession then arises when the existing state conducts massive violations of human rights against a part of the citizenry that lives territorially concentrated in a part of the territory of the existing state which is currently an administrative sub-section, when the prospects of popular revolt are dim, and when the UN has failed to take adequate action to protect the victims of the human rights violations.

The argument from human rights highlights what seems to be the major weakness in Lea Brilmayer’s claim that only those groups that have a valid claim for the territory in question have a legitimate claim for separate statehood. According to Brilmayer, a group that wants to secede must demonstrate that it has a valid claim to the territory before secession is justified. It would seem that this requirement gives existing states too much leeway for human rights abuse, by ruling out secession as a remedial strategy when the victims of human rights cannot demonstrate that the territory they claim was originally illegally annexed to the state, or was incorporated into the state through some unjust act on the part of a third party.

The view that territorial boundaries between sovereign states first and foremost serve the function of assigning special responsibility for protecting the human rights of the population who resides within the borders to particular agents offers, just like the distributive justice argument, an a-national principle for the drawing and possible redrawing of territorial boundaries. Whereas the national community argument asks us to draw boundaries so as to make territorial boundaries coincide with national settlement patterns, the argument from human rights asks us to draw boundaries so as to see to it that all can live under the rule of a state that safeguards their human rights.

The argument from human rights is silent on the question of the national or ethnic composition of the citizenry. The question of the ethnic or national composition of the citizenry is irrelevant to this argument, just as it was to the distributive justice argument.

We should note that the argument from human rights seems to support secession on the part of ethnic groups that are denied the right to express their communal identity in the existing state. In this respect, the argument from human rights and the ethnic community argument may have similar implications. There is, however, a fundamental difference between the two. The former holds that the reason why such groups may at times have justified claims for a state of their own is that they have suffered serious injustice for which no other remedy is available. The ethnic community argument, on the other hand, holds that ethnic groups have a right to separate statehood by virtue of their inherited communal identities.

#### *4. Conclusion*

Claims for secession arise in various historical and political contexts. This article has presented and critically discussed arguments that may be put forward to justify such claims. It seems that both the cause of democracy and – with some qualifications – the cause of social justice are served by national homogeneity in the population. This in turn would appear to provide a strong argument for according the right to secede to territorially concentrated national minorities that live in an area where few non-nationals reside. Paradoxically, according such minorities the right to secede might make it more likely that a satisfactory political solution within the boundaries of the existing state could be agreed upon, as the right to secede would substantially strengthen the bargaining position of such minorities towards existing states.

Our concern with human rights should also make us pause before automatically according all existing states the right to territorial integrity. The obvious political solution to the problem of regimes that do not respect basic human rights is popular revolt. However, the conditions for a successful popular revolt will not always be present. Then secession will have to be contemplated as an alternative strategy for liberating individuals from regimes that do not respect human rights. A forceful case for secession seems to arise when (i) a state conducts massive human rights violation

against a part of the citizenry; (ii) that part of the citizenry lives territorially concentrated in an area administered as a province or another sub-section of the state; (iii) the prospects of a successful popular revolt are dim; and (iv) the international community – most notably the UN – has failed to take adequate action to protect the victims.

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# **How to Reconcile the Political One with the Cultural Many<sup>1</sup>**

## *1. Introduction*

According to Ted Robert Gurr (1993: ix), more than 200 ethnic and religious groups contest the terms of their incorporation into “the new world order”. Ethnic diversity may give rise to conflicts over issues such as language rights, autonomy, electoral systems, land rights and claims for separate statehood. Such conflicts may cause large-scale suffering on the part of individuals and groups. In addition, conflicts between ethnic- and religious groups often have wider regional implications and may consequently also be a source of cross-border conflicts.

Moreover, most of today’s states are ethno-culturally heterogeneous. To work out normatively defensible ways of coping with such diversity in a way that can preserve the internationally recognised boundaries of the state intact is thus a challenge for political practitioners and political theorists alike. This article will approach this challenge from the point of view of normative political theory. The aim is to discuss and try to answer the question of how the public authorities of a democratic state should respond to ethno-cultural differences in the population. A closely connected question is what would be an appropriate institutional expression of this response.

In order to suggest an answer to this question, I believe it is necessary to distinguish between two different types of cultural communities – ‘ethnic groups’ and ‘nations’. These terms will be defined in section two. The distinguishing feature between an ethnic group and a nation is that of state-aspiration: Members of a nation aspire to form a separate state (if the nation does not already possess statehood), or want to continue to have a state of their own (if the nation already possesses statehood). An adequate answer to the question of how the public authorities ought to respond to ethno-cultural differences in the population will hinge, at least to some extent, on whether or not markers of ethnicity have become the basis for incompatible national identities.

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<sup>1</sup> Thanks to Elisabeth Bakke, Andreas Føllesdal, Knut Midgaard, Thomas Pogge, Henrik Syse and Stein Tønnesson for critical comments and suggestions for improvement to earlier drafts. Remaining errors and short-comings rests with the author alone.

In section three I discuss strategies for implementing the principle of nationality under conditions of ethno-cultural pluralism. Anthony D. Smith has claimed that “[t]he legitimating principle for state-making today is nationalism” (1986: 129). Smith’s claim contains a descriptive account of the legitimating principles for contemporary state-making, but it can also be given a prescriptive interpretation. Thus interpreted, the claim says that there ought to be congruence between the territorial boundaries of states and national settlement patterns. I have argued elsewhere that powerful reasons exist for letting the territorial boundaries of states coincide with national settlement patterns (Semb 1998). In this article I will maintain that there is no necessary conflict between such a claim and the existence of ethno-cultural pluralism within the nation – and corresponding need for accommodation. The degree to which national identities conflict with other important sources of personal identity may vary, as the former may be expressed in values and symbols that may be more or less accessible to individuals with diverse ethnic and religious affiliation.

Sometimes, however, the conditions for letting the territorial boundaries of a state coincide with national settlement patterns are not present. In this case, we have little choice but to look for institutional solutions under which it will be possible for those individuals who have a common national identity to develop some degree of politically separate existence, without any division into separate nation-states. Thus, in section four, I discuss strategies for dealing with incompatible national identities among the citizenry of a state. I argue that the settlement pattern of the relevant groups and the meaning of the national membership affect the degree to which a proposed institutional solution is morally defensible. As far as possible, I shall try to be institutionally specific in sections three and four, although I do not believe it is possible to derive a set of unique institutional solutions from considerations of what is at stake.

## *2. Definitions*

Ted Robert Gurr (1993) distinguishes between what he terms “national peoples” and “minority peoples”. The former are “regionally concentrated groups that have lost their autonomy to expansionist states but still preserve some of their cultural and linguistic distinctiveness and want to protect or re-establish some degree of politically

separate existence”; they seek “separation or autonomy from the states that rule them” (ibid.: 15).

What Gurr terms “minority peoples”, on the other hand, have a “defined socio-economic or political status within a larger society – based on some combination of their ethnicity, immigrant origin, economic roles, and religion – and are concerned about protecting or improving that status” (Gurr 1993: 15). In this article, the term “nation” will be employed as a synonym for what Gurr terms a “national people”. If the territorial boundaries of a state encompass more than one such group, the state in question is not a nation-state, but a multi-national state. A multi-national state may contain two or more nations of more or less equal size, or one or more groups may constitute a clear minority. In the latter case, the relevant groups can be termed “national minorities”. I will use the term “ethnic group” as a synonym for what Gurr calls “minority people”. Ethnic groups, just like nations, are groups that are bound together by common cultural characteristics like language, religion or myth of common descent, as well as mutual recognition. The difference between an ethnic group and a nation is thus not that only the latter share, for instance, a common language or a common descent, real or imagined. What sets national identities apart from other kinds of collective identities is rather that a national identity involves “some sense of *political community*, however tenuous” (Smith 1991: 9, italics added). J. S. Mill’s definition of a nation (or Nationality, in Mill’s terms) captures this feature of nations:

A portion of mankind may be said to constitute a Nationality if they are united among themselves by common sympathies which do not exist between them and any others – which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be governed by themselves or a portion of themselves exclusively. This feeling of nationality may have been generated by various causes (1861/1991: 391).

On this account, the defining feature of a nation is that its members wish to continue to have a state of their own (if the nation possesses statehood) or desire to establish a separate state (if the nation does not possess statehood). I shall thus take state-aspiration as the criterion for distinguishing between ethnic groups on the one hand

and nations on the other. Nations aspire to form separate states or to develop some other forms of “politically separate existence”, to borrow Gurr’s term, whereas ethnic groups do not. Exactly what it is that makes members of a group develop a national consciousness and thus the desire to establish a separate state will vary. Sometimes a common language may generate “a feeling of nationality”, sometimes it is a common religion or common historical experiences that may give rise to this feeling. Another important source of a national identity is the experience of living together under common political institutions. The historical connection between the development of national identities and certain cultural characteristics may, to be sure, be strong. But since the “feeling of nationality” may, as Mill points out, be generated by “various causes”, such characteristics are better left out of the definition.

As is evident from Mill’s definition, a nation-state consists of a “portion of mankind” that wants to live under the same government. A multi-national state, by contrast, consists of a “portion of mankind” that does not want to live together under a common government. An adequate answer to the question of how the public authorities of a state ought to respond to ethno-cultural differences in the population should thus attach importance to whether or not markers of ethnicity have become the basis for incompatible national identities. This is also to say that the normative landscape changes if many members of ethnic groups find it difficult to combine their ethnic identity with the larger national identity, and gradually develop a separate national identity – a desire for their own sovereign state.

What Gurr terms “minority peoples” seems to correspond to what is termed “ethnic groups” by Will Kymlicka. According to Kymlicka, an ethnic group does not occupy a particular homeland. The distinctiveness of an ethnic group is likely to be “manifested primarily in their family lives and in voluntary associations, and is not inconsistent with their institutional integration. They still participate within the public institutions of the dominant culture(s) and speak the dominant language(s)” (1995: 14). The reason why an ethnic group participates within the public institutions of the dominant culture(s) is that ethnic groups do not aspire to form separate states, as they can combine their ethnic and national identities.

When Kymlicka spells out what groups could properly be termed “nations” and what groups are more appropriately termed “ethnic groups”, I believe his terminology can

be misleading. The mere fact that a territorial boundary of a state was drawn in such a way as to include more than one group with a distinct culture does not make that state multi-national, even if the groups in question were “historical communities, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture” – which, according to Kymlicka, are the defining characteristics of a nation (1995: 11). Some such groups could easily combine their cultural identity with a larger national identity. External markers of cultural distinctness, such as a separate language, different skin colour or religion may, to be sure, later become the basis of a separate national identity, so that the state in question becomes a multi-national state rather than a multi-ethnic or multi-cultural nation-state. However, the mere fact that some groups are “historical communities”, or that their cultural practices and/or language may differ from that of the majority population, is no good indication that they could properly be termed “nations”.

What is problematic with Kymlicka’s terminology, then, is not that he fails to distinguish between nations on the one hand and ethnic or cultural groups within the nation on the other. What is problematic is rather that what is a sound theoretical distinction is applied in a way that seems to presuppose that every culturally distinct group that has a long-standing territorial base is, by definition, a nation. I believe it is more fruitful to regard it an empirical question whether members of such groups have developed a separate national consciousness and thus aspire to establish a separate sovereign state or some other form of “politically separate existence”, or can combine their ethnic or cultural identity with the larger national identity and thus perceive themselves as members of ethnic groups within the nation.

The distinction between an ethnic group and a nation is important, but the fact that it is possible to make such a distinction does not mean that we can always draw a sharp line between them. Many nations have an ethnic origin, and ethnic groups may be transformed into nations. The degree to which an ethnic group has developed a national consciousness may sometimes be a question of considerable dispute within the group itself, and the answer may certainly change over time. It may also not be clear who properly belongs to the group and who does not. But in order to discuss the question posed initially, I believe it is necessary to make a distinction between the two. In the following I shall therefore do so, fully aware that the line between them may be difficult to draw in practice.

When the territorial boundaries between sovereign states correspond with national settlement patterns, it is the desires of individuals to be politically associated with some people rather than with some other that will determine the location of such boundaries. Brian Barry has argued that this way of justifying the location of territorial boundaries is unambiguously compatible with what he terms the “individualist principle” – namely the principle that “the only way of justifying any social practice is by reference to the interests of those people who are affected by it” (1991: 158–59). But sometimes the conditions for letting the territorial boundaries between sovereign states coincide with national settlement patterns are not fulfilled. And when this is the case, the desire of individuals to be politically associated with some people rather than with other cannot determine the location of state boundaries, but it should provide guidelines for how decision-making powers can be dispersed among the relevant groups.

An attempt at developing a systematic justification of responses to ethno-cultural differences in the population that is stated in terms of such desires differs in important ways from other ways of justifying such responses. One important difference is that a justification stated in terms of the conditions for securing this value makes no reference to historical grievances. This is not to say that history is irrelevant. Dominant historical myths and the reconstruction or construction of a particular group’s past are extremely important parts of the process of developing national identities. But the suggested justification makes no reference to historical injustices as a source of valid claims.

The absence of references to historical grievances has important implications for the status of the claims of indigenous peoples, national minorities and ethnic groups. What counts, according to this approach, is whether the relevant group has developed a national consciousness – not what role the group played in the state-making process. The role of an indigenous people and a national minority will differ with regard to the role these groups played in the state-making process, which seems to be the justification for the fact that international law is more accommodating towards the claims of indigenous peoples than to those of national minorities. Differences in the role played in the state-making process are, however, not immediately relevant to the justification proposed here. What matters is whether the groups in question have developed a national consciousness, not whether the members of the group are

descendants of those inhabiting a territory at the time when that territory became a part of the larger state.<sup>2</sup>

### *3. Efforts at building a common national identity among an ethno-cultural pluralist population*

Here I will present and critically discuss various propositions for how to institutionalise the relationship between what has been termed “the political one” and “the cultural many” (Walzer 1982: 12) – that is, between the state and an ethno-culturally heterogeneous population. All of the propositions try to come to grips with cultural pluralism by way of institutional design. I will seek to clarify differences in the normative rationale behind the different propositions, while also critically discussing and assessing the strengths and weaknesses of these propositions under various societal conditions. I will argue that different institutional responses may be normatively acceptable under different conditions. Since these societal conditions are likely to vary from one country to another, and from one period to the next, little in the current argument supports the view that the public authorities of a state should adopt uniform responses to ethno-cultural differences in the population. In this section, I discuss how it may be possible to build and sustain a common national identity among a population that is ethno-culturally plural. Then, in section four, I will discuss possible ways of responding to a citizenry that does not have a common national identity.

#### *3.1 A culturally neutral national identity?*

Since there are strong reasons why the territorial boundaries of sovereign states ought to correspond with national settlement patterns, one rather obvious answer to the question of how the public authorities ought to respond to ethno-cultural pluralism is that these authorities ought to facilitate the integration of all the citizens into one nation, including members of minority cultures. This can be done by fostering a new and presumably more inclusive national identity – one able to accommodate and include several cultures.

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<sup>2</sup> This does not mean that I believe that the fact that international law is more accommodating towards claims by indigenous groups than to claims by nations cannot be justified normatively. It just means that such a difference is hard to justify by way of the proposed justification.

The standard liberal answer to the question of how the public authorities of a state ought to respond to ethno-cultural differences in the population is that one's public role as citizen ought to be detached from other sources of personal identity. One assumption that has informed much liberal thinking on this topic is that this response should be an echo of the liberal answer to e.g. religious pluralism, so that the ideal of state neutrality towards different religions ought to be extended to the relationship between the state and ethnicity. This is not to deny that living by some loyalties and constitutive ties are "inseparable from understanding ourselves as the particular persons we are" (Sandel 1982: 179). John Rawls, for instance, argues that in our private affairs, we may regard it as unthinkable to view ourselves apart from, say, some long-lasting attachments, religious convictions or ethnic affiliations (1985: 241). Such attachments may indeed be a central part of our beliefs about what brings meaning to our lives, and may be an important source of our personal, or non-political, identity. But our role and standing as citizens, that is, our public identities, should be detached from, and thus independent of, such sources of personal identity, Rawls argues.

It is, then, not the case that liberal political theory has failed to take account of or has misunderstood the role that enduring attachments and loyalties play for one's personal identity, since most contemporary liberal political theorists are not concerned with the complex process of personal identity formation. However, liberals have most often argued that such attachments and loyalties should not affect one's citizenship status. And it is also the case that the national composition of a state's citizenry has rarely been addressed by liberal political theorists. Liberals have generally taken for granted that those who are co-citizens also share a common national identity. This is the core of the civic conception of nationhood, which defines the nation as "a community of people obeying the same laws and institutions within a given territory" (Smith 1991: 9).

One answer to how the public authorities ought to respond to ethno-cultural pluralism is thus the following: What the public authorities should aim for is integration. This is to say that the public authorities should aim at building a common national identity among all the citizens of the state. But since only very few existing states have a citizenry that can reasonably be described as ethno-culturally homogeneous, the

national identity should be constructed and expressed in such a way as to be neutral between different ethnic or religious identities.<sup>3</sup>

The ideal of neutrality is evident in Jürgen Habermas' proposition that the public authorities should foster a national identity that is purely civic – one devoid of, for example, ethnic or religious components. Habermas holds that the national culture should be emptied of ethnic content. This is to say that the content of the national culture should become neutral between different ethnic and religious groups, which will make the national identity compatible with a wide range of other important sources of personal identity:

The national legal order (...) must remain neutral with respect to these prepolitical forms of life and traditions. Remaining “neutral” means – and this is the critical edge of neutrality – *decoupling* the majority culture from this political culture with which it was originally fused, and in most instances still is (Habermas 1995: 851–852, italics in original).

Provided the process of de-coupling is successfully completed, the national identity will be purely civic and can be expressed in political terms. To be a member of this or that nation would, on this account, simply mean to be loyal to a set of political principles and corresponding institutions, without any references to an ethnic core – real or imagined, as is implied by Habermas' term *Verfassungspatriotismus* (Constitutional patriotism). *Verfassungspatriotismus* could thus serve as a possible foundation for a national identity capable of accommodating ethnic pluralism. According to such a notion of what is implied by the term constitutional patriotism, equal rights and duties, as well as loyalty to democratic principles, should be the basis for a common national identity among the citizenry. Because the national symbols and values are ethnically neutral, all ethnic groups will be obliged to accept the principles in the constitution. Such an obligation, however, need not have an impact on other aspects of the person's identity, and therefore need not extend to an obligation to assimilate into the majority culture. The notion of *Verfassungspatriotismus* is thus premised on the belief that allegiance to democratic institutions and principles ought

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<sup>3</sup> According to Walker Connor, only 12 out of a total of 132 states in 1971 were ethno-culturally homogeneous (1972).

to replace thicker conceptions of national identity, and that such allegiance ought to be detached from a person's ethno-cultural identity.

Habermas' proposition rests on the assumption that the relationship between institutions and identities is a dynamic one. If one believes that the content of the national identity is fixed and that nations have fixed boundaries, there seems to be little reason not to let political institutions mirror a pre-existing national identity. If, on the other hand, one believes that national identity to no little extent can be the product of the experience of living together under common institutions, as political institutions are capable of affecting the way persons look upon themselves, Habermas' proposition is an interesting one that warrants critical discussion.

One immediate objection is that while allegiance to a democratic constitution may be one important source of a common national identity among a citizenry, it is far from clear whether such allegiance can be sufficient as foundation of such an identity, without being supplemented by other factors. Some aspects of American national identity may shed some light on one possible short-coming of Habermas' proposition. American national identity is often depicted as being primarily political in character – a feature that makes it accessible to a wide variety of ethnic and religious groups:

But if the immigrants became Americans one by one as they arrived and settled, they did so only in a political sense: they became US citizens. In other respects, culturally, religiously, even for a time linguistically, they remained Germans and Swedes, Poles, Jews and Italians. (...) [b]ecause [the newer immigrants] were citizens of one state – so it was commonly supposed – they would become one people (Walzer 1982: 7–8).

In the American case, the national identity that makes for unity at the state level does not compete with pre-existing ethnic or religious identities, as it is expressed in symbols and values that are accessible to a wide range of ethnic groups. According to such a conception, nobody is required to give up her pre-existing ethnic identity in order to become a member of the American nation and acquire an American national identity, since the content of this identity can be combined with several ethnic and religious identities. According to Walzer, American national identity does not have an ethnic content, but is rather expressed in non-ethnic symbols and ceremonies:

“American symbols and ceremonies are culturally anonymous, invented rather than inherited, voluntaristic in style, narrowly political in content: the flag, the Pledge, the Fourth, the Constitution” (1990: 35).

The accuracy of such an account of what it means to be an American can, however, be disputed. “The idea, then, that to be an American is simply to subscribe to a set of underlying values - liberty, rights, equal opportunities – is a misconception”, claims David Miller (1995: 141). American national identity is, to be sure, expressed in terms of e.g. allegiance to the principles set forward in the American Constitution. But in addition, it includes “the more concrete ideas of common membership and shared history that are essential to nationality” (ibid.). And immigrants to the United States must not only pledge allegiance to the principles set forward in the Constitution, they must also learn the history of the United States as well as the English language in order to obtain citizenship. Loyalty to a set of political principles is far from being the sole source of American national identity. American national identity has a WASP core, which made integration into the American nation easiest for English-speaking, white Protestants, and also fairly easy for other white Protestants and for white Catholics. The black population in the USA, on the other hand, has by and large sought integration, but has faced immense problems in getting accepted as members of the American nation.

It has been suggested that civic national identities are devoid of cultural components, and that it is the very absence of such components that sets civic forms of national identities apart from ethnically based national identities:

One type, civic nationalism, maintains that the nation should be composed of all those – regardless of race, colour, creed, gender, language or ethnicity – who subscribe to the nation’s political creed. This nationalism is called civic because it envisages the nation as a community of equal, rights-bearing citizens, united in patriotic attachment to a shared set of political practices and values (Ignatieff 1994: 3–4).

This way of conceiving of a civic nation is somehow unfortunate, however. What sets civic national identities apart from national identities that are based on ethnicity is not

that the former does not have a cultural content whereas the latter does. Even civic nations include cultural elements, such as a shared language, or basic familiarity with history and society. Kymlicka goes a long way towards rejecting the idea that nations can be neutral, in the sense of non-cultural. I have no quarrels with this contention. The point about a civic nation is not that it is non-cultural, but rather that membership in such a nation is based on characteristics that it is possible to acquire. This makes membership in such a nation fundamentally open and voluntaristic. In order to become a member of such a nation, one may have to learn the national language, thereby perhaps becoming bi-lingual, as well as acquire knowledge about the national history. Such criteria for membership are not based on descent, but on willingness to become part of the nation. The degree to which nationhood is open and inclusive is likely to vary and to depend to no little extent on the meaning of the national membership in question.<sup>4</sup>

Nations can, furthermore, be neutral in the sense that the nation is depicted as a community that transcends rather than mirrors ethnicity. The choice of a national language or national symbols need not be that of the dominant ethnic group (or one of them) residing within the territorial boundaries of that state. Provided the nation is depicted as a community that transcends ethnicity, the choice of national language, national symbols etc. ought to be supra-ethnic compromises. Thomas Hylland Eriksen (1993) calls the choice of English as the national language of Mauritius as such a compromise, as English is the ancestral language or currently spoken language of no group there. National symbols that cannot be associated with one particular ethnic group, such as colonial symbols, also dominate in Mauritius. The idea behind such choices is that the state can and should prevent nation-building from becoming an ethnic enterprise, and instead try to foster national identities along non-ethnic lines. Habermas does not address important questions pertaining to possible cultural

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<sup>4</sup> The extreme anti-immigrant Norwegian political grouping *Hvit Valgallianse* has proposed that only persons with at least three grandparents of “ethnically Norwegian descent” should have a well-founded claim for membership in the Norwegian nation. This would mean that neither immigrants who have lived in Norway for, say, 20 years, who have mastered the Norwegian language and have acquired knowledge of Norwegian history, its political system and society and adhere to e.g. democratic principles and human rights, nor the children of such immigrants, would have a well-founded claim for membership in the Norwegian nation. If, on the other hand, Norwegian-ness is defined in terms of e.g. mastering the Norwegian language, basic familiarity with Norwegian history and society, as well as allegiance to democratic principles and human rights, then in principle anyone who resides within the territorial boundaries of the Norwegian state can become a member of the Norwegian nation.

preconditions of a common national identity, or what implications the notion of *Verfassungspatriotismus* has with respect to such matters as the choice of a national language, which days should become public holidays, or what national symbols to adopt. As such, the prescription stops where the hard questions begin. Contrary to what Kymlicka seems to suppose, however, this does not mean that it is not possible to give an account of what a non-ethnic nation would look like, as well as find examples of nations that can be described as non-ethnic communities.

### *3.2 Modifications of national cultures that have been shaped by dominant ethnic groups*

The process of creating a shared national identity for the citizens of a state could proceed in another way when the national identity of the existing state has been shaped by the dominant ethnic group. According to Anthony D. Smith, the first nations were formed on the basis of pre-modern ethnic cores (1991). But even nations that do not have an ethnic origin, have often made an effort at depicting themselves as communities with such an origin:

[W]here a nation-to-be could boast no ethnic antecedents of importance and where any ethnic ties were shadowy or fabricated, the need to forge out of whatever cultural components were available a coherent mythology and symbolism of a community of history and culture became everywhere paramount as a condition of national survival and unity (ibid.: 42).

Since it is the ethnic component in nations that is likely to cause tensions between nations and ethnic groups, there is little wonder why Habermas seeks a non-ethnic basis for national identities. But even when the national identity has an ethnic core (albeit often fabricated), one should be open to the possibility that the particular meaning of this national identity, as well as important national institutions, could be modified in ways that make it possible to add this national identity to pre-existing ethnic or religious identities. How exactly can a process of building or sustaining a common national identity among a citizenry that is ethno-culturally diverse proceed, when the national identity in question has been formed on the basis of a real or fabricated ethnic core? Even if there seems to be widespread agreement that ethnic and religious groups ought to be integrated into the nation, as well as agreement that

integration is a two-way process, the specific mechanisms and processes whereby the meaning of the national identity as well as important national institutions can legitimately be modified is contested.

The controversy revolves around the question whether the ethnic or religious identities of co-citizens should become the basis for unequal distribution of citizenship rights. The disagreement is one of means rather than ends, and is due to different opinions on how to realise the principle of nationality most effectively under conditions of ethno-cultural pluralism. Liberal political theorists have been largely negative to letting ethnic or religious identities become the basis for distribution of special rights. The perhaps best-known defender of group-specific rights, Will Kymlicka, has proposed that liberalism is not only in accordance with ethnically specific groups rights, which he terms ‘poly-ethnic rights’, but that liberalism indeed requires the institutionalisation of such rights. This strategy I will term the rights strategy. I will start by presenting and discussing the rights strategy, and then go on to present an alternative strategy for integrating members of minority cultures.

### *3.2.1 The rights strategy*

Ethnic groups normally seek integration into the larger society, Kymlicka holds, and they also can be expected to integrate into the national culture of the state. But members of ethnic groups also often seek some kind of public recognition of their distinct ethnic identity. Claims for public recognition may take the form of demands for public funding of specific cultural practices. But they can also take the form of demands for exemptions from particular laws or regulations. Since ethnic groups can be expected to integrate into the national culture, it is important that this culture and the dominant national institutions can be modified in ways that make it possible to integrate into the national culture without having to renounce all aspects of one’s cultural identity. And the justification of poly-ethnic rights is that such rights work to modify dominant institutions in ways that make it possible to combine a pre-existing cultural identity with the larger national identity: “[P]oly-ethnic rights are usually intended to promote integration into the larger society” (Kymlicka 1995: 31).

Kymlicka’s defence of what he terms “poly-ethnic rights” could reasonably be understood as one proposal for how the national culture could be made hospitable to cultural minorities. The idea behind this response to ethno-cultural pluralism is that

ethnic groups will find it easier to integrate into the nation if national institutions are modified by group-specific poly-ethnic rights. Kymlicka's claim is that poly-ethnic rights indeed promote rather than hinder integration into the nation, and that recognition of group differences is required if ethnic groups are to be integrated into the nation:

Like the working class (...), these groups are demanding inclusion into the dominant national culture. Group-differentiated rights are needed if they are to feel accepted by the community... The common rights of citizenship cannot accommodate the special needs of these groups. Instead, a fully integrative citizenship must take these differences into account (Kymlicka 1995: 180–181).

We can find several pertinent examples in Norway. For example, male Norwegian Sikhs are granted an exemption from certain armed forces regulations on head-gear that allows them to wear the Sikh turban while on draft service or while serving as officers in the Norwegian armed forces. Norwegian soldiers of other faiths are granted the same number of days off for religious holidays as Norwegian soldiers of Protestant faith, and alternative food is to be available when the main menu contains food that is connected with religious taboos.<sup>5</sup> The justification for these regulations is that they modify the conditions of the draft service in a way that demonstrates respect for minority cultures and religions.<sup>6</sup> The national identity as well as national institutions are thereby made hospitable to such minorities by institutionalising a set of special rights for ethnic minorities, and integration into the national culture is intended to be facilitated by such rights. Poly-ethnic rights are thus not to be

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<sup>5</sup> *Direktiv vedrørende utarbeidelse og iverksettelse av nye bestemmelser for etniske minoriteter i forsvaret*. Ministry of Defence, Oslo. The directive is currently being revised and is likely to be subject to change.

<sup>6</sup> “The Norwegian authorities have always pursued a policy aimed at integrating our new countrymen in such a way as to take full consideration of their cultural identity. This means compromise, negotiating and consensus. The Norwegian armed forces will of course continue this tradition and will offer to ethnic minorities a type of military service that shows respect for their culture and religion.” (*“Norske myndigheter har hele tiden ført en politikk for å integrerer våre nye landsmenn i samfunnet på en slik måte at deres kulturelle identitet blir vel ivaretatt. Dette tilsier kompromiss, forhandling og konsensus. Forsvaret vil naturligvis følge denne tradisjonen og tilby etniske minoriteter en tjeneste som viser respekt for deres kultur og religion”* (*Direktiv vedrørende utarbeidelse og iverksettelse av nye bestemmelser for etniske minoriteter i forsvaret*, section 3). Unofficial translation into English by Susan Høivik.

understood as rights which protect ethnic minorities from integration, but rather as rights that affect the terms of integration.

The claim that poly-ethnic rights may modify national institutions in such a way that integration is facilitated is interesting, but it also seems to raise some hard questions regarding the legitimate scope of such rights. For whereas the claim for exemption from the regulations on head-gear has caused little dissent, the claim for public funding of a Muslim school in Oslo gave rise to considerable dispute. In 1995 the claim was turned down by the Ministry of Church, Education and Research, but was finally accepted by the Ministry in December 1999. And any claim for the right to be divorced according to divorce laws that are biased against women will certainly never be accepted. I will return to the problem of the legitimate scope of poly-ethnic rights. First, however, let us look at an alternative way of making the meaning of national identity and existing national institutions more hospitable to cultural minorities. Such a comparison can help clarify both similarities and differences. I will term this alternative strategy the public debate strategy. Such a strategy has been given a systematic defence by David Miller, although Miller does not employ this term himself. Still I believe such a term captures the essence of what Miller takes the principle of nationality to imply vis-à-vis ethnic and religious minorities. Since Miller offers an argument for how national identities can be made hospitable to cultural minorities which is devoid of references to special rights for such minorities, I have chosen to concentrate on his work.

### *3.2.2 The public debate strategy*

The public debate may also be perceived as a strategy for realising the principle of nationality under conditions of ethno-cultural pluralism. But while the rights strategy rests on the assumption that group-specific rights are needed in order to modify the meaning of national membership, as well as important national institutions, the public debate strategy rests on the assumption that such rights are neither necessary nor desirable. They are not necessary, as the meaning of national membership and national institutions can and should be modified through open discussion of the meaning of the national identity and how national institutions ought to respond to ethno-cultural differences in the population, rather than through institutionalising of poly-ethnic rights. And they are not desirable, as such rights encourage members of ethnic groups to focus on what sets them apart from the majority culture rather than

on what unites them with it, thereby promoting sectarianism. Efforts at building a common national identity across ethnic lines among all the citizens of one state can thus be undermined.

The public debate strategy requires that members of the nation accept that the meaning of the national membership is subject to continuous re-definition and thus may change over time, as the population may become more heterogeneous. This requires a rethinking of the basis for the national identity; it may also require some modifications in the dominant institutions of the national culture, to make these more suited to accommodating e.g. ethnic or religious differences. However, it may also require that cultural minorities renounce aspects of their culture, as well as acquire competence in (one of) the national language(s). Ideally, the process of changing the meaning of the national identity in question should proceed by way of open discussion:

Ideally, the process of change should consist in a collective conversation in which many voices can join. No voice has a privileged status (...) The conversation will usually be about specific issues (...) But behind these lie the wider questions: What kind of people are we? What do we believe? How do we want to conduct ourselves in the future? (Miller 1995: 127).

Provided basic freedoms, such as freedom of speech and freedom of assembly are guaranteed, citizens with diverse ethnic affiliations and with different religious faiths could take part in the process of changing the meaning of the national identity. The public debate strategy should thus also be seen as a strategy for establishing conditions under which national and other group affiliations can co-exist by developing “forms of each that are consonant with one another” (ibid.: 153). But unlike the rights strategy, the public debate strategy seeks to do so by way of public discussion rather than by way of institutionalisation of rights. And even if ethnic and religious minorities are not accorded any special rights, this does not mean that they lack protection from possible excesses on the part of the majority. Basic human rights, such as the freedom of religion, the freedom of assembly and the right to enjoy one’s culture in company with others, severely restrict the scope of a majority’s legitimate encroachments on the life of ethnic minority members.

The public discussion strategy may seem more concerned with the procedure for making national and ethnic identities compatible than the substantive outcome of the procedure. Miller is, however, silent on how to determine the outcome of such an open, public debate. Furthermore, he presupposes that the outcome of such a discussion, in order to be legitimate, must be in accordance with the principle of equal treatment: “[R]espect for minority cultures requires nothing beyond equal treatment” (ibid.: 148). The notion of equality, moreover, should be interpreted “in a way that is sensitive to cultural factors” (ibid.). Miller does not offer an argument for why it is reasonable to expect that the outcome of a collective conversation on the meaning of national membership and national institutions will in fact be in accordance with the principle of equal treatment, thus interpreted. It does not seem implausible that the outcome of a collective conversation on the meaning of national membership could be that all members of the nation ought to be treated equally, and the principle of equal treatment be subject to no modification at all. Nor is it so implausible that the outcome could be that members of ethnic minorities are granted some special rights, or that the outcome of a public debate on the meaning of national membership will be profound disagreement. In the latter case, the public debate strategy fails to provide clear guidelines for how to make national and ethnic identities compatible. Thus, there seems to be a tension between the initial emphasis on the procedure whereby the meaning of national membership is to be modified and the proposition that the outcome, in order to be legitimate, must satisfy a substantive requirement.

Miller proposes that religious minorities have a justified claim that legislation on shopping and work hours be flexible enough to accommodate their Sabbaths and their festivals and suggests that “You don’t treat Christians and Jews equally by prohibiting everyone from trading on a Sunday” (ibid.: 148). But if this is so, then it must be because a certain flexibility in the legislation concerning shopping hours and work hours is in accordance with the principle of equal treatment, subject to an interpretation that is sensitive to cultural differences, rather than because there are any good a priori reasons for assuming that this would be the outcome of a collective conversation on e.g. shopping hours. I shall take this to indicate that Miller, for one, is not confident that the outcome of a public discussion of the meaning of national membership will be acceptable from the point of view of ethnic or religious minorities. Therefore, on an ad hoc basis, he introduces the modified principle of equal treatment as the normative standard against which existing legislation is to be

assessed. “The public discussion strategy” could thus be called “the strategy of equal treatment, subject to an interpretation that is sensitive to cultural differences” – or the “equal treatment strategy”, for short.

It is not evident what is implied by the claim that the notion of equality should be interpreted in a way that is sensitive to cultural factors. Miller rejects that the opportunities of minorities can legitimately be restricted “in ways that merely reflect the conventions or the convenience of the majority group” (ibid.: 148). However, such a statement is too general to be of much help in settling the crucial question of exactly what kinds of cultural differences the principle of equal treatment should be sensitive to, and what kinds of cultural differences the principle of equal treatment should rather be insensitive to. If it is the case that “You don’t treat Christians and Jews equally by prohibiting everyone from trading on Sunday”, raising the question of whether you treat Christians and Muslims equally by prohibiting polygamy or divorce laws that are biased against women is not necessarily a sign of xenophobia or prejudices. To raise such a question could equally plausibly be motivated by the fear that the public authorities of a state, once they allow national legislation to be so flexible as to accommodate some cultural, religious or other differences, will be on a slippery slope towards a situation where all kinds of cultural differences will be accommodated, also those that conflict with respect for democratic principles or equality between the sexes.

### *3.3 Legitimate limits?*

It would seem that both the rights strategy and the equal treatment strategy face some of the same challenges. Kymlicka defends poly-ethnic rights on the grounds that such rights are needed in order to secure equal access to the national culture, but he fails to give a precise account of the legitimate content and scope of such rights. Miller claims that no special rights for ethnic or religious groups can be justified. Still he requires that the national legislation be flexible enough to accommodate some cultural differences. Exactly what kind of cultural differences, then, should national legislation try to accommodate?

To take the rights strategy, what are the limits to special rights? It is probably impossible to give a complete answer to this question, and the precise limits also need not be the same everywhere. Within a liberal-democratic framework, respect for

democratic principles, the rule of law and human rights are obvious candidates for non-negotiable limits to the kind of cultural pluralism that ought to be accommodated within a sovereign state. The requirement to learn (one of) the national language(s) is a second candidate. As pointed out by Susan Moller Okin (1998), many claims for special legal treatment put forward by members of ethnic or religious minorities are gender-related. And as there are indeed possible tensions between poly-ethnic rights and feminism, conceived of as “the belief that women should not be disadvantaged by their sex, that they should be recognised as having human dignity equally with men, and that they should have the opportunity to live as fulfilling and as freely chosen lives as men can” (ibid.: 661), it seems warranted to include equality between the sexes as a third candidate for non-negotiable limits to the kind of cultural pluralism that would have a well-founded claim for being taken into account in legislative processes.

The point about proposing a list of limits to the kind of cultural pluralism that has a well-founded claim to be taken into consideration is not the fear that the vast majority of ethnic minorities support divorce laws that are biased against women, or are highly likely to claim the right to be divorced according to such laws, to take one example. But a list such as the one proposed above makes explicit the terms of integration into the nation, although there is the danger that limits may encourage demands that go right up to these limits. Interpretation of limits may, to be sure, be contested. Still, explicit limits can serve as barriers against the kind of gradual extension of poly-ethnic rights – up to the point where the tension between such rights and other values can hardly be overlooked – that some opponents of such rights fear. Explicit limits thus also rebut the charge of the slippery slope argument that, once the public authorities of a state institutionalise a set of special rights for members of ethnic minorities that may seem unproblematic from a normative point of view, it will be very difficult to prevent the institutionalisation of a wider range of special rights, some of which may clearly be at odds with norms such as equality between the sexes.

In addition to being explicit, I believe such limits should be made publicly known and publicly accepted, as in the USA. This last requirement could be met if one had to pledge allegiance to such limits in a ceremony during which one acquires citizenship in a liberal state. Provided the limits to cultural pluralism are made explicit and publicly known, granting members of ethnic minorities some limited exemptions from

generally applicable laws, such as the right of Sikhs to exemption from requirements concerning use of head-gear in Norway's armed forces, do not seem to pose problems from a normative point of view. I also fail to see why a limited set of special rights would undermine efforts at building a common national identity among citizens with diverse ethnic identities.

Such limits could also help us distinguish between justified and unjustified claims for more flexible, i.e. less culturally specific, legislation, modifications in national institutions etc. This could allow us to interpret the principle of equal treatment in a way sensitive to some, albeit far from all, cultural differences.

Having established some limits to either poly-ethnic rights or the kind of cultural differences that have a justified claim for being accommodated in legislative processes or national institutions, which of the two strategies for responding to ethno-cultural differences in the population is preferable, from a normative point of view? If national and other important sources of personal identity are to be made hospitable to each other, it would seem that we are faced with a choice between, on the one hand, maintaining national identities that may be fairly closely connected to group-specific values, while granting members of minority cultures some exemptions from generally applicable regulations, or, on the other hand, trying to develop national identities, national institutions and national symbols that are less closely connected to group-specific values, but that also grant no special rights for ethnic or religious minorities.

Both the rights strategy and the strategy of equal treatment may be capable of securing what is at stake. Since the justification for inclusive national identities is that such identities make it possible to combine a national identity with various other important sources of personal identity, we also need to ask whether these strategies seem capable of safeguarding ethnic, religious or other forms of cultural pluralism within the nation. It seems to me that both strategies pass this test as well. And since neither of the strategies appears to fall short of important normative standards, it seems hard to conceive of the choice between them as one between one clearly acceptable and one equally clearly unacceptable alternative. Still I would hold that the rights strategy is the preferable one. This strategy makes it possible for members of cultural minorities to integrate into the nation, while at the same time preserving the distinctness of the national culture. But since both strategies face some important

challenges with regard to limiting the kind of cultural pluralism that is to have a well-founded claim for being accommodated, the question of establishing legitimate limits would appear more important than the question of whether the public authorities of a state ought to choose the rights strategy or the equal treatment strategy.

#### *4. When markers of ethnicity have become the basis for incompatible national identities*

As Anthony D. Smith remarks, once a group has developed a national consciousness, that consciousness has proved extremely hard to change: “[W]henver and however a national identity is forged, once established, it becomes immensely difficult, if not impossible (short of total genocide), to eradicate” (1993: 131). This is to say that it will normally require repressive political means to ensure a large-scale change in collective identities on the part of groups that have developed a national consciousness.

In the introductory section I argued that an adequate answer to the question of how the public authorities of a state should respond to ethno-cultural differences in the population should attach importance to whether one or more groups have developed a separate national consciousness. This is to say that the normative landscape changes if efforts at nation-building have failed and ethno-cultural differences have become the basis for incompatible national identities among citizens of the same state. In such situations, the public authorities are faced with a multi-national citizenry rather than a multi-cultural or multi-ethnic citizenry. I have argued elsewhere that territorially concentrated national minorities that reside in areas where few non-nationals reside ought to be accorded a right to secede (Semb 1998). Such conditions are, however, often not fulfilled. In 1861 John Stuart Mill wrote:

There are parts even of Europe in which different nationalities are so locally intermingled that it is not practicable for them to be under separate governments. The population of Hungary is composed of Magyars, Slovacks, Croats, Serbs, Roumans, and in some districts Germans, so mixed up as to be incapable of local separation; and there is no course open to them but to make a virtue of necessity and reconcile themselves to living under equal rights and laws (Mill 1861/1991: 394).

Mill here directs our attention to the conditions under which no drawing or redrawing of territorial boundaries between sovereign states can create congruence between national settlement patterns and territorial boundaries. Under such conditions, we have little choice but to look for institutional solutions that seem capable of ensuring all citizens a chance to be politically associated with co-nationals, but still fall short of secession.

One common denominator of such solutions is that the fact of multi-nationality is somehow reflected in the political principles embodied in the constitution. These principles are majority-restraining, as they institutionalise limits to the content and scope of decisions that can legally be subject to usual majoritarian decision-making by the central government. And, as will become apparent, such solutions involve “constitutional engineering” – the belief that a careful design of a constitution can prevent the existence of different national identities among the citizenry from becoming a source of conflict between national groups. But what determines whether a proposed solution is a normatively acceptable way of making a virtue of necessity under conditions of multi-nationality? Two factors seem especially relevant. First, the settlement patterns of the relevant groups affect the degree to which different solutions may prove capable of securing what is at stake. When the relevant groups live concentrated in separate geographic areas, territorial solutions may prove capable of securing what is at stake. When the relevant groups live intermingled with each other, territorial solutions can hardly secure what is at stake, so other devices will have to be considered. And second, the meaning of national membership is likely to vary from case to case. Of particular relevance here is the degree to which the self-understanding of a national group is not only distinctness from other nations, but also antagonism towards these other groups.

I will first consider territorially based ways of responding to a multi-national citizenry, and then responses that do not require a territorial basis.

#### *4.1 Territorial solutions*

Some, but not all, national minorities have a territorial homeland. The degree to which the vast majority of members of the relevant nation live territorially concentrated vary, as does the degree to which members of other nations co-habit the same territory. This means that there is also considerable variation in the degree to which

territorial measures can serve as a vehicle for autonomy or self-determination for the relevant group without affecting the crucial interests of non-members.

A distinction can be made between two different territorial measures that may prove capable of securing what is at stake. These are federalisation and decentralisation. Both are strategies that aim at regulating the relationship between two or more groups with separate national identities by dispersing political power between different levels of government that are territorially defined. They differ, however, when it comes to the degree of constitutional protection of the division of powers.

In a federation, formal political decision-making competence is divided between the local units (whether they are termed states, provinces, or *Länder*) and the central government. The decision-making competence of the respective parties is laid down and specified in a codified and written constitution. This constitution cannot be changed without the consent of both levels of government, which means that it is not within the legal competence of the central government to redefine the boundaries of the component units or the decision-making powers of these units.<sup>7</sup>

In a unitary state, political power may also be dispersed to local units, but there the decision-making competence of local governments is delegated from the central government and can, in principle, be revoked at any time. In the following I will concentrate on federations, since local units enjoy constitutional protection of their decision-making competence in federal states.

Federal political systems distribute powers between different levels of government that are territorially defined. Thus, one important precondition for federalisation to be an effective strategy for accommodating incompatible national identities is that the boundaries between the federal units correspond to the national settlement patterns. This in turn requires geographic clustering of the groups in question, with each national group forming a clear majority within each of the component federal units.

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<sup>7</sup> Exactly what is to count as consent may, to be sure, vary.

In principle the component units in a federal political structure can be non-territorially defined. In section 4.2 I discuss one proposal for how decision-making powers can be dispersed to bodies exercising cultural jurisdiction over members of nations that live intermingled with members of other nations and that do not form a regional majority. Insofar as the powers of the respective bodies are constitutionally guaranteed, and changes in the decision-making competence require consent from both the central government and the body exercising cultural jurisdiction, I would term such a system a federation.

This is more or less the case with Belgium, but these circumstances rarely exist elsewhere. The Dayton Agreement, which specified the terms of the future Republic of Bosnia and Herzegovina, called for a federal state, composed of one Serbian part, Republica Srpska, and one Bosnian-Croatian part, the Federation of Bosnia and Herzegovina. The very possibility of separating these parts by way of the Inter-Entity Boundary Line was to a large extent due to massive transfer of non-nationals, as well as systematic killings of such persons. Prior to the war in Bosnia, the relevant groups (Bosnian Muslims, Serbs and Croats) had not been geographically clustered. The fact that earlier peace-plans for Bosnia were also founded on territorial solutions, may also have contributed to the destruction of the tradition of a dispersed and mixed national settlement pattern. It may thus also have contributed to the practice that was to become publicly known as “ethnic cleansing”, although the causal connection between war, ethnic cleansing and peace plans that were founded on territorial division is extremely difficult to establish. The partition of Bosnia and Herzegovina into two sub-units is, however, one major obstacle to repatriation of refugees, both those internally displaced and those currently residing in other countries, although refugees and persons displaced by the conflict have the right to vote in their original place of residence, also by absentee voting. The massive influx of non-members into the two constituent parts would rapidly disturb the demographic structure that forms the basis of the Dayton Agreement.

When the condition of geographic clustering has been fulfilled, federalism allows national minorities some degree of constitutionally guaranteed self-government in matters often considered vital to the preservation of the national culture, such as language and education. Since the decision-making powers of the federated units are constitutionally guaranteed and irrevocable, the majority nation cannot outvote the minority on such issues, and federation then serves as an instrument of autonomy. The degree to which federalism serves as an instrument of self-government for national minorities in a multi-national federation depends on how legislative, executive and judicial powers are distributed among the different levels of government. The degree to which federalism conflicts with other normative concerns, such as distributive justice, also depends on what powers are conferred on the local units – in particular whether fiscal capabilities lie with the local or the central unit. In cases where the local units have extensive fiscal capabilities and there are gross economic inequalities between the different local units, federalism may become not just an instrument of

autonomy for national minorities, but also an institutional barrier to what is often much-needed economic redistribution between different regions. Federalism is frequently combined with other majority-restraining measures, such as cantonisation and/or the consensus-based modes of decision-making inherent in consociated democracies.<sup>8</sup>

Since federal states confer decision-making competence on territorially defined political units, it can protect vital minority interests by leaving important issues outside the scope of ordinary majoritarian central decision-making procedures. Here we may usefully distinguish between symmetrical and asymmetrical federalism (Smith 1995). Under symmetrical federalism all the component units possess the same powers, whereas in an asymmetrical federation one or more of the component units will possess additional powers. Asymmetrical federalism is often instituted in an effort at containing a growing desire for secession on the part of the inhabitants of one or more provinces. Provided a federation is explicitly a “federation of peoples”, and the boundaries of the federated units correspond to the settlement pattern of the relevant groups, there will usually be no dispute over the symmetrical distribution of decision-making competence between the composite units. The former republic of Czechoslovakia seems to provide a good example of a federation that was explicitly a federation of peoples. In April 1990 a compromise was reached between the Czech and the Slovak components, and the state was renamed the Czech and Slovak Federative Republic. According to the terms of the constitution of this republic, the federation consisted of two equal sovereign republics, each of which possessed extensive decision-making competence within its own territory.<sup>9</sup>

The question of how exactly powers ought to be divided between the different levels of government in a federation is likely to be much more contested and much more difficult to solve when different provinces claim different powers. This is often the case when the component parts of the federation are partly nationality-based and partly based on non-national factors, such as administrative convenience. The disputes over the status of Quebec illustrate this situation well. The Quebecois want the Canadian federation to be based on a principle of asymmetrical federalism, which, if

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<sup>8</sup> I will return to the characteristics of a consociated democracy in section 4.2.

<sup>9</sup> The restructuring of the Czechoslovak state did, however, not prevent the final dissolution of the federation. After a peaceful process of dissolution which has been termed the “Velvet Divorce”, the Czech Republic and Slovakia became sovereign states on January 1, 1993.

implemented, would imply that the province of Quebec would have more decision-making powers than would the other provinces in the Canadian federation. The demand for additional powers reflects the fact that a growing number of Quebecois have come to develop a separate national identity. To possess additional powers would of course be important in its own respect, since it would allow more decisions to be taken by the Quebecois themselves. But to obtain status as a “distinct society” with additional powers would also amount to recognising the national distinctness of Quebec, which is also perceived as important by many Quebecois. One of the problems with making the Canadian federation an asymmetrical federation by granting Quebec additional powers is that the vast majority of English-speaking Canadians continue to look upon the inhabitants of Quebec as members of a bi-lingual Canadian nation. Consequently they want the component parts of the Canadian federation to continue to possess equal powers and thus preserve the symmetrical character.<sup>10</sup>

The debates on the future terms of the Canadian federation provide an interesting illustration of a more general theoretical point that has been voiced by Michael Walzer (1983). Walzer’s point further has some important implications for Habermas’ suggestion that allegiance to a democratic constitution ought to serve as a foundation for new and non-ethnic national identities. According to Walzer, one cannot appeal to shared ideas of justice to fix the territorial boundaries of a sovereign state, as this would be to put the cart before the horse. On Habermas’ account, the fact that there has been a convergence of the values held by the inhabitants of Quebec and those held by the English-speaking Canada would provide a good reason for them to retain a common national identity and desire to go on living within the same state. As pointed out by Charles Taylor (1993), the process of value convergence has gone hand in hand with a growing sense of belonging to a separate nation on the part of the Quebecois, with corresponding claims for a special status within the Canadian federation, or outright secession. The same goes for the relationship between Norway and Sweden, whose union was dissolved in 1905: “[T]here may be (and probably is) a remarkable convergence of values between the citizens of Norway and Sweden, but is this any reason for them to reunite? I do not think so” (Kymlicka 1995: 188). And since it is doubtful whether shared values provide a viable basis for common national identities,

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<sup>10</sup> Kymlicka (1998) provides a rather extensive critical discussion of the future terms of the Canadian

it seems equally doubtful whether constitutional patriotism would be a possible foundation of such an identity, or if it is more accurately depicted as one of the fortunate effects of a pre-existing national identity. If all Canadians could unite in allegiance to a democratic constitution, this would be because they held a common conception of the national composition of the Canadian citizenry. The contested status of Quebec reflects incompatible conceptions of the national composition of the Canadian citizenry. Thus it seems likely that the causal order between constitutional patriotism and national identity must be reversed.

The problems connected with conflicting claims for decision-making competence should make us look for alternatives to asymmetrical federations, when the terms of such a federation are deeply contested. One obvious alternative is secession. It is important to note that the conditions under which federation can serve as an instrument for self-government for national minorities are co-extensive with the conditions for justified secessions. Since what is at stake here is how individuals who have a common national identity can develop some kind of “politically separate existence”, opponents of secession will have to demonstrate that this value is better safeguarded in a federal state than in two separate states. I believe it is an open question whether this is the case, as the answer depends on factors such as the degree of ambiguity of the national identities. Rather than wholeheartedly embracing federation or secession, we should be open to the possibility that sometimes secession is the better solution, whereas sometimes a federal solution will prove more able to secure what is at stake.

#### *4.2 Non-territorial solutions*

Patterns of settlement and residence may be such as to make efforts at creating congruence between territorial units and nations a futile enterprise. Sometimes not even cantonisation is likely to lead to a situation where territorial boundaries are co-extensive with national settlement patterns, unless one is prepared to transfer parts of the population. When communities are not geographically clustered, but rather live intermingled with others, territorial solutions cannot serve as an instrument of self-government. Under such conditions, it seems that some form of power-sharing between the relevant groups may prove best suited to safeguarding what is at stake.

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federation.

Let us look at some institutional mechanisms for dispersing political power between different groups that cannot be geographically demarcated. We start with one proposal that has received surprisingly little attention in the literature –the so-called Renner/Bauer model.

*(i) The Renner/Bauer model*

The Austro-Marxists Otto Bauer and Carl Renner formulated a scheme that aimed at regulating the relationship between the various nationalities in the Austro-Hungarian Habsburg Monarchy before World War I, where groups lived so intermingled with each other that any attempt at territorial division between different “homelands” seemed doomed to failure.<sup>11</sup> The core of this model is the “personality principle”, under which national rights are accorded individual persons rather than territorial groupings.<sup>12</sup> The underlying idea here is that national rights can and should be exercised independently of place of residence. This requires that the constitutional order takes due account of groups that have developed a national consciousness but that live geographically dispersed, without forming a regional majority.<sup>13</sup> In order to achieve this, two systems of jurisdiction, one territorial and one cultural, should co-exist. Each citizen should have two votes, one that could be used in elections to a body exercising territorial jurisdiction, and one that could be used in elections to a body exercising cultural jurisdiction. National membership would thus be a matter of personal declaration. The bodies exercising cultural jurisdiction should be constitutionally recognised, guaranteed and accorded legal status. These representative bodies were to carry out a set of functions for their members that are

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<sup>11</sup> Otto Bauer and Karl Renner were prominent thinkers in the Austrian Social Democratic Party. They both wrote influential monographs on the nationality question in the Austro-Hungarian monarchy. The prime aim of Bauer and Renner was not to provide proposals for political reforms in the Dual Monarchy, but to provide a revised theoretical basis for the Austro-Marxist party’s nationality policy at the beginning of the 20<sup>th</sup> century. Their model was never implemented in the Dual Monarchy. But even if its historical influence may have been modest, this does not mean that it has been totally ignored: “It was discussed by the Russian Jewish *Bund* in Zurich in 1905 and by the Mensheviks under Trotsky’s chairmanship in Vienna in 1912. It influenced the Jewish proposals on the redrawing of Eastern European borders presented to the Versailles Conference. It was given legal expression in the short-lived independent Republic of the Ukraine in 1918 and in the law on language rights in interwar Estonia. In the 1930s the concept played a role in the debate on the future of Palestine within the Zionist movement” (Hanf 1991: 36).

<sup>12</sup> See e.g. Arne Kommisrud (1992) and Uri Ra’anani (ed.) (1991) for an elaboration of the Renner/Bauer model. The latter reference also contains efforts at applying the principles of this model to contemporary cases of conflicts between ethnic groups.

<sup>13</sup> According to Renner and Bauer, the personality principle corresponded to the conditions of the proletariat under capitalism. Under capitalism, the proletariat is no longer tied to place of residence, but is mobile.

believed to be crucial in sustaining the members' culture, widely conceived, such as their language and religion.<sup>14</sup> It should consequently be the prerogatives of these bodies to establish and maintain the educational and cultural institutions that were deemed important to reproducing and maintaining their culture. These bodies could thus be instruments for cultural autonomy for minority nations whose members were geographically dispersed throughout a territory. In their dealings with the central government and public institutions, persons belonging to minority nations should also not be disadvantaged by legal regulations or practices that were insensitive to their religious beliefs or cultural practices. The Renner/Bauer model consequently also includes measures aimed at preventing this from happening.

The Renner/Bauer model could be read as an attempt at giving national minorities autonomy by means of a political decision-making structure whose component units are not, or at least not exclusively, territorially defined. At least in principle, the Renner/Bauer model in effect abolishes the problem of minority status for members of minority nations. Since all individuals, regardless of place of residence, are accorded protection by their respective representative bodies, nobody is to be subject to majority rule in cultural matters. In non-cultural matters, on the other hand, all individual citizens are to be subject to a government with territorial jurisdiction over the entire territorial basis of the state. Provided the settlement pattern is such that one or more of the relevant groups form regional majorities, those bodies that exercise cultural jurisdiction for all members of one particular nation can also exercise territorial jurisdiction in that part of the country where the relevant nations form a majority. But the territorial jurisdiction of such a body would be checked by the cultural jurisdiction of other bodies.

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<sup>14</sup> The Norwegian Sami Parliament is elected on the basis of principles that resemble those proposed by Renner/Bauer. All persons registered in the Sami Electoral Roster have the right to vote in elections to the Sami Parliament, regardless of place of residence in Norway. The powers of the Sami Parliament are, however, extremely limited.

An example of non-territorial linguistic autonomy can be found in the Belgian constitutional amendments adopted in 1970. One of these amendments reads as follows: "There is a cultural council for the French cultural community made up of the members of the French linguistic group of both Houses [The Chamber of Representatives and the Senate] and a cultural council for the Dutch cultural community made up of the members of the Dutch linguistic group of both Houses" (Article 59B, section 1, quoted from Lijphart 1984: 28-29). According to Lijphart, these councils have legislative powers over cultural and educational matters over communities that are partly, but not exclusively, territorially defined. The Dutch cultural council has legislative powers over the Dutch-speaking Flanders, but also over the Dutch-speaking minority in Brussels, that is bi-lingual. The French cultural council has legislative powers over the French-speaking Wallonia, but also over the French-speaking majority in Brussels. There is also a cultural council for the German minority in Eastern Belgium.

There are, however, several problems with the model. One obvious problem is that the division between cultural- and non-cultural affairs is far from clear-cut. And since the Renner/Bauer model presupposes the co-existence of two systems of jurisdiction – one cultural and one territorial – the division of competence between them is crucial and most likely to be hotly contested, not least because the term “culture” is so elusive. Whereas there would probably be little disagreement over assigning the cultural representative bodies responsibility over educational affairs, it is far from obvious whether e.g. the management of natural resources is to be regarded a cultural or a non-cultural matter.<sup>15</sup> It is not difficult to imagine a situation in which one national group would regard the management of natural resources a cultural matter and claim jurisdiction accordingly, whereas other national groups would look upon such management as a prime example of a subject matter well-suited for territorial jurisdiction. The same could be said of, for instance, a penal code. So there is the danger that the lines of demarcation between the jurisdiction of the different bodies will be unclear, contested and subject to constant negotiation. And even if these problems could be solved so that it would be possible to reach agreement on the appropriate division of powers between cultural and territorial representative bodies, one other problem remains unresolved. A political system that aims at securing cultural autonomy for all citizens of a multi-national state is likely to result in extremely complex patterns of decision-making. With different bodies supposed to have jurisdiction over different subject matters, there is an overwhelming danger that such a system will not be transparent.

Moreover, if the dual jurisdiction system is to perform its allotted functions, this presupposes that individuals have unambiguous national identities. If they do, then it will probably pose no particular problem to opt for affiliation with any one of, say, three national representative bodies and to be subject to the jurisdiction of this body in cultural affairs. If, however, one’s national identity is more ambiguous, for instance because one’s parents or grandparents are members of different national groups, it will probably be far more difficult to opt for affiliation with one and only one

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<sup>15</sup> See NOU 1984: 18, *Om samenes rettsstilling* and NOU 1997: 4, *Om naturgrunnlaget for samisk kultur*, for interpretations of the term “culture” that include the material preconditions, i.e. the resource base for and aspects of more “ideal” sides of a culture, more precisely of Sami culture in Norway.

particular cultural representative body and feel confident that one's cultural interests will be adequately taken care of by this particular body.<sup>16</sup>

Despite these problems, are there lessons to be learned by the proposed institutional solutions contained in the Renner/Bauer model? Since some of the most serious conflicts between different national groups of recent years, at least in Europe, have occurred under the conditions addressed by Renner/Bauer, we should pause before concluding that no elements from this model could be applied to contemporary efforts at designing or redesigning constitutions in multi-national states. As we saw in section 4.1, the price of implementing a peace-plan based on territorial division of Bosnia and Herzegovina was high in terms of the number of persons who happened to find themselves or their homes in “wrong” parts of the new federal structure. Perhaps a system of dual jurisdiction that gave each nation cultural autonomy could have proved a constructive alternative to the constitutional principles embodied in the Dayton Agreement. It is, however, an open question whether a system of dual jurisdiction can work if the national groups in question have not only incompatible, but deeply antagonistic national identities. Under the latter conditions, territorial separateness may very well prove the only institutional solution capable of securing that most fundamental of all human rights –the right to life.<sup>17</sup>

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<sup>16</sup> Ambiguous national identities may be one reason why the vast majority of those who fulfil the linguistic criterion for entry into the Sami Electoral Roster have failed to register. See e.g. Hovland (1999) and Kramvig (1999) for discussions of tensions between publicly available categories for self-identification and how many individuals perceive themselves in the northernmost parts of Norway. Under the Renner/Bauer model, the Norwegian Sami Parliament would exercise cultural jurisdiction, however defined, over the Sami population, regardless of their place of residence. If a new county was established in which the Sami people constituted a majority – perhaps one based on the existing municipalities of Karasjok and Kautokeino, where registered Sami constitute a majority – the Sami Parliament could exercise territorial jurisdiction in such a county as well. A Norwegian representative assembly would exercise cultural jurisdiction over the Norwegian population and territorial jurisdiction in those counties where the Norwegian population constitute a majority. All citizens would have to choose whether they wanted to cast their vote for the one or the other of these assemblies. The powers of the Norwegian Parliament, the *Storting*, would be confined to non-cultural matters under such a scheme. As opposed to what would have been the case under this model, those who vote in elections to the Sami Parliament under the present political terms in Norway do not forfeit their right to vote in elections for representative bodies at either the municipal, county or national level.

<sup>17</sup> This conclusion is not without qualifications, though, as the massive presence of international peace-keeping forces may make it possible to sustain a multi-national settlement pattern, provided the terms of their presence allow them to take measures accordingly.

*(ii) Power-sharing systems*

Since the Renner/Bauer model aims at granting national minorities autonomy by way of non-territorial measures, we could call it a model for non-territorial federalism.<sup>18</sup> And non-territorial federalism is one of the eight defining characteristics of what Lijphart (1984) has termed a consensus model of democracy – a form of democracy that has been presented as being uniquely suited to the conditions in deeply divided societies. To what degree, then, does the institutional set-up of a consensus democracy seem able to safeguard what is at stake for all citizens under conditions of multi-nationality?

John Stuart Mill argued that there is a strong connection between the national composition of the citizenry of a state and the prospect of establishing and sustaining democratic political institutions: “Free institutions are next to impossible in a country made up of different nationalities” (Mill 1861/1991: 392). Mill’s claim is that a common national identity among the citizens increases the probability that democratic institutions will prove viable. It is worth noticing that Mill regarded the connection between the national composition of the citizenry and the existence of viable democracies a probabilistic rather than a deterministic connection. This is to say that the existence of one or more examples of workable multi-national democracies does not invalidate the general claim that it is far more difficult to establish “free institutions” under conditions of multi-nationality.

But that makes it of great interest to establish whether multi-national democracies share some features that can account for their success. The search for such features was the central concern of the Dutch political scientist Arend Lijphart in his study of Dutch, Belgian, Swiss and Austrian democracies. On the basis of the conclusions in case-studies of these and other democratic political systems, Lijphart has since worked out systematic principles for democratic constitution-making in “deeply divided societies” or “plural societies”. These are societies that are “sharply divided among religious, ideological, linguistic, cultural, ethnic, or racial lines into virtually separate sub-societies with their own political parties, interest groups, and media of communication” (Lijphart 1995: 276). Lijphart terms these sub-societies “segments”. Since one important characteristic of a segment is that its members experience little

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<sup>18</sup> I borrow the term “non-territorial federalism” from Lijphart (1984).

affinity with members of other segments, although they are citizens of the same state, I shall take Lijphart's model as highly relevant to the discussion of how to respond to conditions of multi-nationality.

The thought that underlies Lijphart's principles is that deeply divided societies lack a fundamental precondition for a majoritarian political system to work: rotating memberships, or cross-cutting cleavages. One important assumption behind majoritarian political systems is that the parties will alternate in power as voters change their political preferences, so that today's political minority may become tomorrow's majority, rather than being condemned to permanent political opposition. In deeply divided societies, voting patterns are closely tied to group membership, and the groups in question have proved remarkably stable. If majoritarianism is imposed under such conditions, there is a constant danger that political minorities will not be shifting, but rather permanent. This would leave minorities without influence on governmental affairs – and without any realistic prospect of gaining political power in the future. Under such conditions, there is a high probability that majoritarianism may degenerate into a tyranny of the majority over minorities. The minorities, in turn, are likely to perceive the regime as illegitimate and feel alienated from the political process. Rather than being accommodated and eventually resolved within the parliamentary political system, conflicts will tend to be channelled into other forms and often take a violent course. An adequate political system may prevent deep societal divisions from becoming a source of conflict between groups, whereas a system that does not reflect societal divisions and conflicts may itself become a source of conflict in such societies.

The consensus model of democracy contains several majority-restraining measures intended to counter the danger of permanent political minorities based on persistent group membership. According to Lijphart (1984), the following eight counter-majoritarian features constitute the characteristics of a consensus democracy:

- (i) Executive power-sharing: a grand coalition government is established by all important political parties that represent the main segments in the divided society. Executive power is thus shared.
- (ii) Formal and informal separation of powers;

- (iii) Balanced bi-cameralism and minority representation;
- (iv) Multiparty system;
- (v) Multidimensional party system;
- (vi) Proportional representation;
- (vii) Territorial and non-territorial federalism and decentralisation; and
- (viii) Written constitution under which the minorities have a right to veto decisions.

Of course, a power-sharing system need not embody all of these characteristics. Power-sharing between different groups, based on the principles that characterise a consociated democracy, can also in principle be implemented in federal states as well as in unitary ones.

Such measures are intended to ensure that those who are affected by a decision get a chance to participate in the decision-making process and influence the outcome – if not directly, at least through chosen representatives. One important aim of such measures is thus to ensure broad political participation by all groups in exercising political power. A power-sharing system is based on the recognition of national diversity within the state, and tries to organise that diversity politically. This is intended to facilitate co-existence of more than one nation within the state boundaries, and ensure that decisions are not taken through majority procedures, but rather through consensus and compromise. In order to ensure a consensus-based mode of decision-making, the model relies heavily on extensive co-operation between elites representing the major sub-societies. Consociational strategies have been pursued in, for instance, Switzerland, Belgium and the Netherlands, but also in Lebanon in the period 1943–75, and in Fiji on and off between 1970 and 1987 (McGarry and O’Leary 1995).

This particular strategy has been heavily criticised by Brian Barry (1991), among others. Barry questions the democratic qualities of the model, due to the model’s reliance on elite-co-operation rather than popular involvement in politics. He also points to the danger that a political system based on the recognition of national differences may in fact sharpen differences rather than ease them. Lijphart, on his

side, defends the model by arguing that deeply divided societies do not have a choice between the consensus mode of democracy and other (presumably more majoritarian) modes of democracy: the choice is one between consensus democracy and non-democratic modes of government. Despite its obvious weaknesses, a power-sharing model may thus still prove better than the available alternatives.

Since the model relies on extensive co-operation between elites, the prospect of success will depend largely on the degree to which these elites are willing to co-operate and to make political compromises with leaders representing other groups – either because they are committed to the principle of power-sharing, or because they fear that the costs of doing otherwise will exceed the benefits. In addition to being willing to co-operate, the leaders must be able to do so, without being accused of treachery. The political system imposed on Bosnia and Herzegovina under the Dayton Agreement bears some of the characteristics of a consociated democracy. Perhaps experiences from Bosnia and Herzegovina will some day enable us to know more about the conditions under which the institutional set-up in a power-sharing model can prove viable and able to secure vital individual interests. It is of considerable interest to identify the conditions under which a power-sharing system can work when the identities on the part of the relevant groups are not only incompatible, but deeply antagonistic. Since at least some of the costs of abandoning the principles of the power-sharing model as well as the benefits of adhering to it may be open to manipulation on the part of external actors, we also need to know about what role such actors can play in a process of establishing and sustaining an institutional set-up based on power-sharing between different groups.<sup>19</sup>

## *5. Conclusion*

The point of departure of this article has been a principled adherence to the view that territorial boundaries ought to correspond with national settlement patterns. I have discussed several strategies for building and sustaining a common national identity among fellow citizens. Some nations have been depicted as communities that transcend ethnicity. But even if the national culture has been shaped by the dominant

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<sup>19</sup> It would also be of interest to establish whether the process of developing incompatible national identities is irreversible – or, failing that, to know more about the conditions under which the long-term presence of peace-keeping forces and arbitration by international organisations can affect the

ethnic group, the character of this culture can be modified to make it more hospitable to ethnic and religious minorities. Sometimes, however, the conditions for making national settlement patterns coincide with state boundaries are simply not present. And when this is the case, then the desire of individuals to be politically associated with some people rather than with others cannot serve as guidelines for where to draw boundaries, but should rather indicate how to distribute decision-making competence between different groups. The settlement pattern of such groups, as well as their self-understanding, will affect the degree to which a proposed institutional arrangement will seem a normatively acceptable way of responding to a citizenry consisting of individuals with incompatible national identities.

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development of new national identities able to embrace former conflicting groups. This question, however, falls beyond the scope of the present article.

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# How Norms Affect Policy – The Case of Sami Policy in Norway<sup>1</sup>

## 1. Introduction

The purpose of this article is to examine the actual impact of international norms on policy-making – more specifically, the impact of international norms on contemporary Sami policy in Norway. How Norwegian public authorities *ought* to respond to ethno-cultural differences in the population, and what the appropriate institutional expression of this response would be, are normative questions. The answer will necessarily involve normative judgements. To be sure, normative judgements often rely on empirical knowledge about, for instance, how existing institutions distribute benefits and burdens – but the purpose of a normative political analysis is to answer whether existing institutions, political practices etc. are justifiable from a moral point of view. It is the role of normative political theory to assist us in answering such questions.

Norms can, however, also be studied empirically. The empirical study of norms can take a variety of forms. One possible object of study is the distribution of opinions about particular normative questions in the population. Another is whether and how particular norms affect e.g. the formation of policy. Is policy sometimes affected by norms? Whether or not the formation of policy is affected by norms is an empirical question. In order to answer it, we must first investigate actual cases so as to see what role, if any, norms played in the shaping of the policy in question. This article aims at just that.

International norms have affected the shaping of Sami policy in Norway. Such norms are also likely to affect future decisions concerning land- and water-rights in the county of Finnmark. How may international norms affect political decision-making concerning domestic affairs? In the second section I identify some mechanisms by which international norms can impact political decision-making. In the third section I

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<sup>1</sup> The author wants to thank members of the ARENA group in normative political theory, participants at the colloquium of the Norwegian Research Council's Ethics Programme, Else Grete Broderstad, Andreas Føllesdal, Audun Lona, Raino Malnes, Nils Oskal, Thomas Pogge, Eli Skogerbø, and Stein Tønnesson for valuable comments and suggestions for improvement on earlier drafts. Responsibility for remaining errors and shortcomings rests with the author alone. Quotations from Norwegian are presented in the text as (unofficial) translations done by Susan Høivik; the original texts can be found in the notes.

describe the development of Sami policy in Norway and the development of Sami self-understanding. In the fourth section I examine the relationship between international norms and the development of Sami policy. Norms, in particular international human rights law and measures aimed at regulating the relationship between states and groups with status as indigenous peoples, have considerably influenced Sami policy in Norway in the period since the “Alta affair” of the late 1970s. One crucial precondition for considering these measures relevant to the relationship between the Sami and the Norwegian state is that the Sami conceive of themselves – and are seen by others – as an ethnic minority with status as indigenous people. This is why I address the development of Sami self-understanding in section three. In the fifth section I return to the mechanisms that link the existence of international norms to norm-observant political decision-making and discuss how these mechanisms, or pathways, contribute to explaining how international norms have affected the shaping of contemporary Sami policy in Norway. The conclusion is presented in section six.

What is an “international norm”? Kjell Goldmann (1971) has argued that a normative idea is a norm when it is universal with respect to situation or outcome, and when non-observance may lead to sanctions. According to this understanding, a norm’s very existence is tied to the occurrence of sanctions in cases of non-observance. This definition does not seem well-suited for my purposes, however. Rather than regarding sanctions as an integral part of the definition of norms, I see it an open question whether non-observance of an international norm will lead to sanctions. The claim for universality is also made by Robert W. McElroy, who conceives of a norm as “a behavioral prescription that is universal in the claims it makes and that involves a consideration of the effects of the actor’s actions on others, not from the point of view of the actor’s own interest, but from the point of view of the others’ interest” (1992: 31). McElroy’s definition seems better suited for my present purposes. I suggest that the term “general” should replace the term “universal”, since many norms are not universal in the sense that they apply everywhere and in all cases, but are general in the sense that they apply to all cases of a particular kind. Moreover, McElroy’s definition makes no reference to the social impact of the norm, which would seem important to my subject-matter. This characteristic of a norm is at the forefront of Raino Malnes’ definition: “[A] normative principle is a *norm* within a given social system if and only if most members of the system seriously consider acting on the

principle in most situations where it applies” (Malnes 1991: 279, italics in original). In this article, an international norm will be understood as a prescription for action which most states seriously consider acting on in situations where it applies, which is general in the claims it makes, and which involves a consideration of the effects on the actor’s action on others, not from the point of view of the actor’s own interest, but from the point of view of the other’s interests.

A distinction can be made between codified and non-codified international norms. I will focus exclusively on the former – i.e. those norms that have become part of international law. Throughout this article, the terms “international law” and “international norms” will be used interchangeably. International law contains measures that aim at regulating the relationship between sovereign states. One example of such a measure is the prohibition against offensive use of force. However, international law also contains measures that aim at regulating the relationship between states, on the one hand, and the population residing within the territorial boundaries of states, on the other. International human rights law figures prominently among measures of this latter kind.

## *2. Pathways from international norms to policy-making on domestic affairs*<sup>2</sup>

We need to identify some mechanisms by which international norms influence political decision-making in order to establish that there is a causal link and not merely a correlation between international norms and norm-compliance.

One obvious way in which international norms can affect domestic policy-making is by way of incorporation into domestic law. A prominent example of international norms that have been incorporated into national legal systems is human rights norms, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, which several European states have incorporated into their national legal systems. The standards set forth in this Convention may therefore be subject to enforcement by agencies of government, on a par with other domestic laws.<sup>3</sup>

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<sup>2</sup> The term “pathway” is borrowed from McElroy (1992). Throughout the article, the terms “pathway” and “mechanism” will be used interchangeably.

<sup>3</sup> Norway has recently incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights as well as the

Other international norms are not, however, subject to enforcement, at least not through agencies of domestic governments. How is it, then, that norms which are not subject to legal enforcement may still be observed and thus have an actual impact on political decision-making? We may draw a broad distinction between moral and non-moral motives for compliance.<sup>4</sup> Norms may influence policy through the conscience of individual decision-makers. This mechanism has to do with moral motives for compliance. Or norms may influence policy through fear of adverse reactions of some sort. This mechanism has to do with non-moral motives for compliance. These two broad mechanisms may link existing international norms with norm-observant political decision-making.

These mechanisms can show how international norms may lead to norm-observant political decision-making. Nothing in these pathways suggests that international norms will always be effective in the sense that political decision-makers will always comply with the relevant norms. It would be of great interest to see what are the necessary and sufficient conditions under which international norms will be effective. It would also be of interest to explore the conditions under which either of the suggested mechanisms is likely to operate. These questions will not be pursued here, however. The point is merely to present some of the mechanisms that make it plausible that sometimes, under some conditions, policy and politics will be affected by norms.

### *2.1 Moral motivation*

The first pathway that links international norms to norm-observant political decision-making is the conscience of individual political decision-makers. This mechanism deals with moral motivation as a source of compliance with international norms and in particular focuses on the motivating power of the conscience of individuals. Robert McElroy (1992) singles out the conscience of individual decision-makers as one possible pathway from international norms to norm-observant behaviour. He suggests that insight from contemporary social psychology “affirms the power of conscience to motivate men and women to follow behavioral moral norms” (ibid.: 40).

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International Covenant on Economic and Social Rights into Norway’s domestic legislation. See Ot.prp. nr.3 (1998–99), *Lov om styrking av menneskerettigheter i norsk rett*.

How can the existence of an international norm produce the belief that one ought to follow the norm in question? We may distinguish between (i) a situation where the existence of a norm produces the belief that one ought to follow the norm because politicians believe that the international norm is a good indicator of morality, and (ii) a situation where the existence of an international norm produces the belief that one ought to follow the norm because politicians hold themselves to be morally obliged to abide by international norms. In both cases, politicians experience a sense of duty to comply with the norm, and have developed a positive attitude to the norm in question. In situation (i), politicians have a positive attitude to the content of the norm. In situation (ii), the positive attitude to the norm in question stems from a positive attitude to a meta-norm –the meta-norm that one is morally obliged to follow international norms. In this latter case, the positive attitude to the norm and the experience of the duty to comply with it is, at least in principle, detached from an evaluation of the content of the norm in question.

In both situations, the existence of an international norm will produce a propensity to act in accordance with the norm. In the first situation, an international norm that holds that schools and hospitals are not legitimate targets of bombing during warfare will produce the belief that one ought to comply with the norm because politicians take the fact that something has become a part of international law to be a good indicator of what morality requires. In the second situation, the same norm will produce the belief that one ought to comply with it because politicians consider themselves morally obliged to abide by international norms.

It might be objected that this conception of moral motivation begs the question of where the positive attitude to either the content of the specific international norm or the meta-norm that one is morally obliged to abide by such norms come from. This question is interesting and important in its own right, but falls beyond the scope of this article.

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<sup>4</sup> Some of the literature that is referred to in the following deals with pathways from international norms to norm-observant foreign policy behaviour. Several of the suggested mechanisms seem relevant for how international norms may come to affect domestic political decision-making as well, however.

## *2.2 Non-moral motivation: fear of negative or adverse reactions*

The second broad pathway that links international moral norms to norm-observant political decision-making arises from fear that violation of an international norm may cause negative or adverse reactions from others. Here I will distinguish between three different mechanisms that all deal with non-moral motives for compliance: (i) how domestic pressures can lead to norm-observant political decision-making; (ii) how the desire to sustain a good reputation in international affairs can lead to norm-observant political decision-making; (iii) how fear of various severe sanctions can lead to compliance with international norms.

### *2.2.1 Domestic pressure*

If politicians believe that there is widespread domestic support for an international norm, they may comply with that norm out of fear that doing otherwise will be detrimental to their chances of re-election. In order for this mechanism to operate, three preconditions have to be fulfilled. First, politicians must in fact believe that there is widespread domestic support for the international norm in question. If they believe that the electorate is either indifferent to or hostile to the international norm in question, the mechanism will not work. Second, politicians must believe that the question of norm-observance is considered of such importance to the electorate as to be included in their considerations of how to vote. If politicians believe that the voters support the international norm in question, but are more concerned with, e.g., the level of taxation or immigration control, politicians will not fear that violation of an international norm will preclude their re-election. And third, the various political parties must have differing opinions on the subject matter.

### *2.2.2 Fear of a bad international reputation*

The fear of a bad international reputation is another possible source of norm-observant political decision-making, as has been suggested both by Malnes (1991) and McElroy (1992). There are two plausible assumptions behind this pathway, each of which are necessary for the mechanism to work. First, politicians must fear that violation of international norms will have adverse effects on the international reputation of their state. And second, politicians must consider a good international reputation to be an asset for a state to have in international affairs. As regards the first of these assumptions, politicians will rarely admit openly that they act contrary to

international norms. One reason may be that international norms are strong “reputational indicators” (McElroy 1992) and that politicians fear that violation of international norms will negatively affect the image of their state. Malnes proposes that violation of international norms affects other governments’ perception of the state in question and their “beliefs about its general objectives and dispositions and their expectations as to how it will behave under various future circumstances” (Malnes 1991: 290). This may be especially true when the state in question has formally acceded to or approved the norm.

A state that violates international norms may thus acquire a reputation for unreliability. This is so because of the principle of extrapolation (McElroy 1992). In order to reduce uncertainty, states tend to predict the future behaviour of other states on the basis of their past behaviour. If a state violates widely accepted international norms, other states may come to believe that the state will violate international norms in the future as well. If a state violates widely accepted international norms, other states may come to believe that the state will violate *other* international norms as well, since non-compliance may create a perception of more general unreliability.

The second assumption behind this pathway is that politicians typically consider a good international reputation an asset for a state. A good international reputation may be considered an important precondition for being considered a credible partner in various co-operative endeavours. Hence perceptions of unreliability may cause exclusion from such co-operative endeavours. And since at least a certain degree of co-operation is inescapable in international relations today, a good international reputation will typically be considered an asset in international affairs.

### *2.2.3 Fear of severe international sanctions*

The third non-moral motive for compliance with international norms is fear of sanctions of various sorts. Some international norms have been incorporated into domestic legislation and are thus subject to enforcement through centralised agencies of government, on a par with other domestic laws. But even if international norms have not been incorporated into domestic law, they may be subject to enforcement. The way in which international norms are enforced will differ, however, from the way in which domestic laws are enforced. International norms may be enforced through self-help: “If a state violates international law, other states may be harmed and punish

the violator” (Malnes 1991: 288). International norms may also be enforced by third parties, who punish the violator of the norm in question. Such third parties may act because they want to deter the violator of the norm from future non-compliance, or out of sympathy for the victims of the violation (ibid.). The modes of punishment range from non-violent to violent.

The UN may also enforce violations of international norms when these violations lead to a situation that the Security Council considers a “threat to the peace”. Some international norms regulate the relationship between sovereign states, while others regulate the relationship between states and individuals and groups within the state. If the UN Security Council determines that a particular situation constitutes a “threat to the peace”, the UN may take measures to restore peace and security. These measures may be peaceful or may involve the use of force. UN may therefore react to violations of international norms that lead to situations that are considered a “threat to the peace”, regardless of whether those norms pertain to the relationship between sovereign states or the relationship between states and individuals or groups within sovereign states.

A political commentator has recently suggested that there exists at present a “welcome trend toward enforcing international law”, citing Germany’s and Denmark’s conviction of war criminals from the Bosnian war as a contemporary example of this trend (Pfaff 1998). Other examples are The Hague War Crimes Tribunal, Spain’s attempt at extraditing and trying former General and President Augusto Pinochet for crimes committed in Chile during Pinochet’s reign, and the asserted right to intervene for humanitarian purposes, that is, in order to alleviate mass suffering. Suffice it here to mention that even if the international society lacks enforcement mechanisms like those that exist at the domestic level, this does not mean that no mechanisms for enforcement exist.

These pathways suggest that international norms may sometimes influence decision-making. The suggested pathways are not mutually exclusive: I do not assume that decision-makers are typically moved by one of these motives alone, or that one of the pathways will necessarily be predominant. All the pathways suggest plausible links between international norms and the shaping of Sami policy in Norway. First, the pathway from moral motivation suggests that Norwegian politicians believed that

international norms pertaining to the relationship between states and ethnic groups as well as states and groups with status as indigenous peoples were good indicators of morality, or that they took themselves to have a moral obligation to follow international norms. Second, the pathway from domestic pressure suggests that Norwegian politicians believed that there was widespread domestic support for the international norms and that acting contrary to such norms would be detrimental to their re-election. The pathway from international reputational pressures suggests that Norway complied with the relevant international norms because politicians were eager to sustain Norway's reputation for taking human rights affairs seriously and for promoting the interests of groups with status as indigenous peoples worldwide. And finally, the pathway from fear of sanctions suggests that Norwegian public authorities feared informal or formal sanctions if they did not adhere to the relevant international norms.

### *3. Sami policy and changing Sami self-understanding*

In this section I will describe the development of Sami policy in Norway as well as the development of Sami self-understanding. One important precondition for considering particular international norms relevant to the relationship between the Norwegian state and the Sami minority has been a large-scale change in collective identities on the part of many Sami.

#### *3.1. The policy of assimilation*

We may distinguish made between two macro-political strategies for relating to ethnic differences in a population –elimination strategies and management strategies (McGarry and O'Leary 1995). For more than 70 years the Norwegian state pursued a policy of assimilation towards the Sami minority – a variant of elimination, according to McGarry and O'Leary. Assimilation may be defined as an effort to “create a common ethnic identity through the merging of differences” (ibid.: 17). The policy of assimilation, or *fornorskning* (Norwegianisation), developed gradually, becoming official Norwegian policy from about 1880. The policy of *fornorskning* was particularly evident in the schools sector, and several educational reforms were triggered by the desire to assimilate the Sami into Norwegian culture. A law passed in 1880, *Instrux for lærere i de lappiske og kvenske Overgangsdistrikter i Tromsø Stift*, states that the Sami and Finnish languages should not be used more than “the extent

to which conditions make it unavoidably necessary.”<sup>5</sup> According to a law passed in 1889, all instruction was to be conducted in the Norwegian language. Sami was gradually abolished as a medium of instruction. After the turn of the century, the Sami language was no longer used in the teachers training colleges either. In 1902 a law was passed (*Jordloven av 1902*) that was intended to prevent persons who were not assimilated into Norwegian culture from buying land: “Sales of land are to be solely to Norwegian citizens, and with the particular purpose of promoting the settlement of a population who can speak, read and write the Norwegian language and who use it in their daily communications.”<sup>6</sup> There was practically no political disagreement over the topic of assimilation, and not a single political party objected to it.<sup>7</sup>

Not surprisingly, the policy of assimilation led to a decline in the number of Sami in Norway. Until about 1860, the Sami constituted a majority of the population in Finnmark, the northernmost county in Norway. After 1860, the non-Sami population outnumbered the Sami in Finnmark. The non-Sami population in Finnmark consists of ethnic Norwegians, *norskinger*, and descendants of the Finnish-speaking minority in Norway, *kvener*. In contrast to many other groups with status as indigenous peoples, the Sami have traditionally lived and still live intermingled with *norskinger* and *kvener*. A considerable number of the inhabitants of Finnmark also have mixed origin, which makes the concept of three distinct ethnic groups problematic.

According to *Samekomitéen av 1956* (the Sami Committee of 1956), 20,786 persons qualified as Sami in Norway in 1890 (NOU 1985:14). The absolute numbers did not change much in the period 1890–1930, as 20,704 persons qualified as Sami in 1930 (*ibid.*). Of these, 18,842 were registered in the three northernmost counties, where the total population was 339,041 in 1930, according to census data. Since the total population in Norway increased in the period 1890–1930, this indicates that the relative size of the Sami population decreased. The effects of the policy of assimilation are even more evident in the 1950 census. Here, 8,778 Sami were registered in the three northernmost counties (the cities were excluded) out of a

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<sup>5</sup> “...[F]orholdene gjøre uomgjengelig fornødent” (NOU 1985:14: 50)

<sup>6</sup> “Afhændelse maa kun ske til norske Statsborgere og under særligt Hensyn til at fremme Bosættelsen af en for Districtet, dets Opdyrkning og øvrige Nyttiggjørelse skikket Befolkning, som kan tale, læse og skrive det norske Sprog og benytte dette til dagligt Brug” (quoted from NOU 1994:21: 82).

population of 403,674 (*Folketellingen i Norge 1. desember 1950*). Since the criteria for determining Sami-ness were not identical in the three censuses, and the 1950 census excluded cities, direct comparisons between the figures are impossible. There is, however, little doubt that the policy of assimilation led to a radical decline in the number of persons with Sami self-identification, although the exact magnitude of this decline is hard to verify.

The policy of assimilation remained more or less unaltered until the years immediately preceding the Second World War. After the war, the policy of assimilation gradually changed. Again, this is particularly evident in the schools sector, and the educational policy which was adopted after 1945 must be seen as a major departure from the assimilation policy pursued since the 1880s. Several measures that aimed at reintroducing and strengthening Sami language and culture in the schools were adopted, such as the publication of Sami-Norwegian ABCs (1951), a raise in the salaries of teachers who knew the Sami language (from 1948), and the authorisation of a unified Northern Sami mode of spelling for Norway and Sweden in 1950.

Among the Sami population, however, there were mixed reactions to reforms that aimed at strengthening the Sami language and culture. The reindeer nomads by and large adopted a positive attitude towards efforts at strengthening the Sami language, as their occupational interests were closely tied to Sami culture. The settled part of the Sami population was more sceptical. Many settled (i.e. non-nomadic) adult Sami felt that they were socially and economically handicapped due to inadequate mastery of the Norwegian language, and they did not want their children to suffer the same fate. To be sure, the perception among many Sami that Sami language and culture were inferior to Norwegian language and culture must also be seen as an effect of the policy of assimilation. Many Sami regarded a grounding in the Norwegian language as the most important goal of the educational system, and they feared that the introduction of Sami-speaking teachers and Sami schoolbooks would be at the expense of instruction in the Norwegian language.

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<sup>7</sup> See NOU 1985:14, pp. 52-54 for a discussion of the wide range of factors, such as economic interests, security considerations, Social Darwinism and nationalism, that may explain the introduction of the policy of assimilation.

### 3.2 Changes in Sami self-understanding

It is against this background that we should see the efforts on the part of the “Sami movement” in the 1950s at creating a new self-understanding among what was at that time a culturally and politically fragmented Sami population with scant community spirit. Ever since the beginning of the 20<sup>th</sup> century, some individual Sami had protested against the policy of *fornorskning*. After the Second World War, a small group of Sami began building an organised ethno-political movement, the Sami Movement. Whereas the unorganised individuals had protested against the policy of assimilation, the Sami Movement from the 1950s sought to create a constructive alternative basis for expressing Sami identity. Harald Eidheim has termed this the process of ethnic incorporation, which he defines as “the process by which ethnic membership is made relevant to the mobilisation of group spirit and joint political action vis-a-vis the majority population” (1971: 68).

The Sami Movement aimed at creating a Sami self-understanding as a separate and distinct people. Traditionally, no feeling of unity existed among the Sami, who used to be organised in small units (*siida*) with little co-operation between the units. The Sami also had no overarching political institutions and no common symbols (Magga 1995: 85). The political goal of the Sami Movement was to create a society which was based on the principle of “equality between contrasting groups” (Eidheim 1971: 74). The Sami Movement therefore pursued a deliberate strategy of developing a Sami ethnic identity that no longer carried the stigma of inferiority. All activities by the Sami movement were based on the premise that the Sami should be conceived of as a distinct people (*folk*). The Sami Movement also increasingly referred to the Sami language as the Sami mother tongue (*morsmål*).

The number of Sami remained low, however. The Central Bureau of Statistics conducted a census in 1970, one purpose of which was to register Sami. The registration of Sami was conducted in a sample of census districts in the three northernmost counties of Norway, and the results were analysed by Vilhelm Aubert (1978). The results of this census heavily depend on how Sami-ness is measured: in terms of the person’s own first language, the parents’ first language, the grandparents’ first language, or in terms of stated self-identification. For the total sample, the number of Sami was highest when measured in terms of the Sami tongue being the

first language of at least one of the grandparents, and lowest when measured by stated self-identification – 19,635 persons and 9,175 persons, respectively (Aubert 1978: 22). In Finnmark, the northernmost county, the number of persons with Sami as their first language was 8,582, whereas 55,749 persons in Finnmark did not have Sami as their first language (ibid.: 21). The number of persons with stated Sami self-identification in Finnmark was 7,563, as against 53 842 persons in Finnmark who did not have a Sami self-identification. In all three counties, the number of persons with Sami as their first language exceeded the number of persons with stated Sami self-identification. There was also a considerable number who answered that they did not know whether Sami was the first language of their parents and/or grandparents, or who refused to answer questions pertaining to Sami language or Sami identity.

The Sami Movement was active in establishing the so-called Fourth World Movement and in turning this movement into a formal organisation, the World Council of Indigenous Peoples (WCIP) in 1975. The fact that the Sami Movement was active in establishing the Fourth World Movement is an additional expression of the Sami Movement's efforts at fostering a Sami self-understanding as a separate people within the territorial boundaries of the Norwegian state. After the founding of the WCIP, a specific indigenous peoples' perspective on the future situation of the Sami developed: "[A] feeling of common destiny with the world's indigenous populations developed. This tendency accentuates what we could term the increased *aboriginalisation* of Sami ethno-policy and self-understanding throughout the 1970s and 1980s" (Eidheim 1992: 14, italics in original).

Since the Sami traditionally have been culturally and politically fragmented and with little feeling of commonality, the revival of the term "Sápmi" is of considerable significance when describing changes in Sami self-understanding. The term occurs in all Sami dialects and denotes what are conceived of as Sami lands and waters, as well as the Sami people and culture. The prominent Sami spokesman Ole Henrik Magga (1995) holds that the term "Sápmi" is the most overarching symbol on the part of the Sami, and is the main reason why the Sami wanted to be publicly termed Sami rather than "Lapp" or "Finn". A map of Sápmi was prepared by the Sami artist Hans Ragnar Mathisen in 1975.<sup>8</sup> A Sami flag was also designed, and the colours in the flag (medium blue, red, green and yellow) are the most common colours in the traditional

Sami national costumes (Eidheim 1992). The colours in the flag were also used in badges, rubber stamps etc. and where thus quickly spread throughout Sápmi: “The press and television took notice of this form of self-expression (...) and reflected them back to all homes in Sápmi in news coverage, commentaries, documentaries and feature programs, broadcast in the Sami language” (ibid.: 19).

It became increasingly evident that conflicts could arise between the rights and duties that pertained to the Sami *qua* Norwegian citizens and *qua* ethnic minority. Whereas the Norwegian state emphasised the rights and duties of the Sami *qua* Norwegian citizens, the Sami Movement emphasised the rights and duties that pertained to the Sami *qua* ethnic minority and *qua* their alleged status as indigenous people.

Throughout the 1970s it became evident that the legal status of the Sami was in need of clarification, not least because Sami politicians repeatedly pointed to what in their opinion was an ever-growing disparity between the Norwegian state’s international involvement in efforts at protecting the rights of ethnic minorities and indigenous peoples on the one hand and, on the other hand, the actual policy pursued towards the Sami in Norway.

### *3.3 The Alta affair and its implications for Sami self-understanding*

One particular political event, the Alta affair, greatly affected the relationship between the Norwegian state and the Sami minority. On 30 November 1978 the Norwegian Parliament, the *Storting*, approved a hydroelectric project that involved damming the Alta River, which flows through central parts of Finnmark county. A total of 85 representatives voted in favour, 41 against. The decision was controversial and led to a wave of protest from the local population, Sami and non-Sami alike, as well as from nature conservationists and others. The Sami argued that the damming would harm the resource base for reindeer nomadism – by many seen as an important symbol of Sami distinctness and connection to Sápmi. They argued that the damming would encroach on the Sami historical right to land and water, and that issues with a potentially devastating impact on Sami interests could neither morally nor legally be subject to the usual majoritarian decision-making in Norwegian institutions. The Sami Movement thereby questioned the *Storting*’s moral and legal competence to pass the

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<sup>8</sup> The map is displayed at the Folk Museum in Oslo.

decision.<sup>9</sup> An action of civil disobedience was initiated in July 1979. In early October 1979 a group of Sami set up a traditional Sami tent (*lavvo*) in front of the Storting and demanded that the damming be postponed until a court had decided whether the decision was legal. Some Sami initiated a hunger strike in front of the Storting. The hunger strike was brought to an end when the government agreed to take up negotiations over the damaging effects of the damming and to temporarily halt the construction work. The action of civil disobedience continued, in which the opponents of the damming chained themselves before the construction machines. These actions were brought to an end by a, by Norwegian standards, gigantic police operation in January 1981, and the decision to dam the river was effectuated, despite massive protests.

According to Eidheim (1992), the Alta affair marked a turning-point in relations between the Sami and the Norwegian state, and was an extremely important event in the development of Sami selfhood as a distinct people. Sami self-understanding remains hotly contested among the Sami, however.

The turbulence which the Alta affair aroused in Norwegian politics pointed up the acute need for clarifying the legal status of the Sami. A governmental advisory board, *Samerettsutvalget* (the Sami Rights Commission), was appointed by the government in October 1980.<sup>10</sup> The mandate given to this Commission says that the fact that international norms “to a considerable degree” had been invoked by the Sami demonstrated the need for clarifying the legal status of the Sami. In 1984, the Commission delivered its first report, a governmental green paper called *Om samenes rettstilling* (NOU 1984:18) (On the Legal Status of the Sami). The report concentrated on two issues: whether the Sami ought to have a separate representative body, and whether a special “Sami clause” should be included in the Norwegian constitution. The delicate issue of the right to land and water in Finnmark was not considered, but was addressed in the second green paper from the Commission. This was NOU 1997:4, *Naturgrunnlaget for samisk kultur* (The Resource Base for Sami Culture), which was completed and issued in 1997.<sup>11</sup>

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<sup>9</sup> The decision was later subject to judicial review by the Norwegian Supreme Court, *Høyesterett*.

<sup>10</sup> A Commission on Sami Cultural and Educational Matters was also appointed in October 1980.

<sup>11</sup> See also NOU 1994:21, *Bruk av land og vann i Finnmark i historisk perspektiv. Bakgrunnsmateriale for Samerettsutvalget*; and NOU 1997:5, *Urfolks landrettigheter etter folkerett og internasjonal rett – bakgrunnsmateriale for Samerettsutvalget*.

#### *4. International norms and Sami policy*

##### *4.1 Article 27 of the International Covenant on Civil and Political Rights*

The *Samerettsutvalg* took it for granted that Norwegian policy towards the Sami minority should be in accordance with international law:

In both the political and the legal discussions on the rights of the Sami, international law has played a central role. This report has, in line with the mandate of the Commission, conducted a comprehensive analysis of those provisions of international law of possible relevance for the Sami minority (see ch. 6). To the extent to which these international rules may be said to provide protection for the Sami people, this has formed the background for the standpoints taken by this Commission.<sup>12</sup>

Of particular interest is Article 27 in the International Covenant on Civil and Political Rights from 1966, since this article explicitly deals with the rights of members of minority cultures. Article 27 reads *in extenso*:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities should not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>13</sup>

The interpretation of Article 27 remained hotly contested for a long time, not least within the UN system. The article can be given a narrow interpretation and be understood as a mere clause of non-interference. Under this interpretation, governments are under the obligation not to interfere when members of minority cultures engage in activities that express ethnic or cultural identity. However, Article 27 can also be given a broader interpretation, to mean that governments are obliged to take positive measures aimed at preserving and fostering such identities.

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<sup>12</sup> “Både i den politiske og den rettslige diskusjon som har vært ført om samenes rettigheter, har den internasjonale retten, folkeretten, spilt stor rolle. Denne utredning har, i samsvar med utvalgets mandat, fått gjennomført i kapittel 6 en omfattende analyse av de folkerettslige regler som kan ha betydning for den samiske minoritet. I den utstrekning de internasjonale regler kan sies å gi den samiske folkegruppen et vern, har det dannet bakgrunn for utvalgets standpunkt” (NOU 1984:18: 570).

According to the *Samerettsutvalg*, there is no doubt about the status of the Sami as an ethnic minority: “In relation to this provision [*Article 27 - author’s note*] there can be no doubt that the Sami are an ‘ethnic minority’”<sup>14</sup> The Commission gave an expansive interpretation of the article in question. As they saw it, the Norwegian state is obliged to support and aid the preservation and development of Sami culture: “Thus our conclusion is that Art. 27 must be assumed to place upon the state the obligation to provide certain financial assistance to enable minority groups to cultivate their language, their culture, etc.”<sup>15</sup> This interpretation was approved by the Norwegian government.

What, then, is meant by “culture”? The *Samerettsutvalg*’s interpretation of this elusive term is interesting, because the relation between “ideal” and “material” aspects of Sami culture was at the forefront in the Alta affair, as well as in the Supreme Court’s judicial review of the decision to regulate the Alta River:

The linkage between means of livelihood and culture played a important role in the case of the Sami people as argued before the Supreme Court in connection with the Alta-Kautokeino river case. It was argued that the concept of ‘culture’ as set out in Article 27 “... could not... be understood in the narrowest sense, but also encompasses the material foundations for culture. This is a necessary precondition for the group to be able to maintain a way of life of which culture is an integral part” (Rt 1982, p. 292). The Sami emphasised how regulating the river courses would mean a highly deleterious interference for reindeer herding, and that such regulation would thus contravene the provisions of Art. 27. The State, for its part, questioned both the facts and such an interpretation of the term “culture”.<sup>16</sup>

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<sup>13</sup> Quoted from Hannum (1990: 53).

<sup>14</sup> “I forhold til denne betømmelsen er det ikke tvilsomt om samene utgjør ‘en etnisk minoritet’” (NOU 1984:18: 268).

<sup>15</sup> “Vår konklusjon blir ved denne avveining at art.27 antakelig må antas å pålegge statene en plikt til å yte visse økonomiske bidrag for at minoritetsgruppene faktisk kan dyrke sitt språk, sin kultur osv” (ibid.: 271). This interpretation is on a par with the so-called Capotorti study, which concludes that there is a positive obligation on the part of states to intervene on behalf of or provide support to minorities.

<sup>16</sup> Sammenhengen mellom næringsveier og kultur i ideell forstand spilte en viktig rolle for de samiske parters prosedyre for Høyesterettsplenum i saken om Alta-Kautokeino-vassdraget. Disse hevdet at kulturbegrepet i artikkel 27 ...ikke...kunne forstås snevert, men omfatter også kulturens materielle

The *Samerettsutvalg* proposed that the term “culture” should be given a wide interpretation. What is to be preserved is not just the “ideal” sides of Sami culture, such as language, literature, songs etc., but also the “material” preconditions for and aspects of it:

There is all reason to maintain that the concept of “culture” should be interpreted broadly enough to allow inclusion of also the material sides of the culture of an ethnic minority. Considerations of livelihood and other economic aspects should thus be included to the extent to which they are decisive in permitting a group to maintain and carry on its own culture.<sup>17</sup>

The government adopted this interpretation of the term “culture” in *Ot.prp. 33 (1986-87)*. The recently published green paper on *Naturgrunnlaget for Samisk kultur* also reflects the broad interpretation of the term “culture”. The preservation of important parts of Sami culture is closely tied to traditional utilisation of natural resources, which in turn raises the question of who can legitimately manage such resources in Finnmark county.

The majority of the *Samerettsutvalg* proposed that a separate clause dealing with the Sami ought to be included in the Norwegian Constitution. The *Samerettsutvalg* argued that the Constitution of Norway ought to be in accordance with international law, and that the requirements of Article 27 in the ICCPR should be reflected in it:

To the extent to which the Norwegian authorities are bound by international law, it must be seen as a matter of course that this be put into practice. The decisive point is not whether this follows solely because of international law or also because of the Constitution.

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grunnlag. Dette er nemlig en nødvendig forutsetning for at gruppen skal kunne opprettholde en livsform hvor kulturen utgjør en integrerende del” (Rt 1982 s.292). Det ble fra samisk hold sterkt fremhevet at reguleringen medførte et byrdefullt inngrep i reindriftnæringen, og at reguleringen derfor var i strid med art.27. Staten, som motpart, bestred både faktum og en slik fortolkning av uttrykket “kultur” (NOU 1984:18: 272).

<sup>17</sup> De beste grunner taler etter dette for at begrepet “kultur” oppfattes så vidt at også de materielle sider ved en etnisk minoritets kultur er omfattet av bestemmelsen. De næringsmessige og andre økonomiske forhold bør i så fall være omfattet i den grad dette er avgjørende for at gruppen skal kunne opprettholde og videreføre en egen kultur (ibid.: 283).

However, in this connection it is natural to give the Constitution an interpretation which is in line with the requirements of law.<sup>18</sup>

The constitutional amendment was adopted 27 May 1988. The new paragraph, § 110A in the Norwegian constitution reads *in extenso*: “It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”<sup>19</sup> Carsten Smith (1992), who chaired the *Samerettsutvalg* in the period 1980–85, conceives of §110A as a barrier against decisions aimed at assimilation of the Sami.

What are the specific policy-implications of §110A? An answer is suggested in the White Paper on Sami policy, *St meld nr 41 (1996–97), Om norsk samepolitikk*:

Central to the further development of Sami policy will be the preconditions for maintaining a sufficiently strong system of protection aimed at preserving and developing Sami culture in the future, and how such culture protection should be developed. This will involve specifying our obligations and rights towards the Sami people, and will constitute an overall system of protection for Sami culture in Norway.<sup>20</sup>

In other words, the specific implications of §110A will be determined by considerations of what specific measures are necessary for securing what is at stake. This is to say that §110A is to be interpreted so as to make it effective. Suffice here to note that a wide range of policy-areas have since been deemed relevant by the Norwegian government.<sup>21</sup>

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<sup>18</sup> I den grad norske myndigheter er forpliktet etter folkeretten, må det anses som en selvfølge at dette blir gjennomført i norsk myndighetsutøvelse. Det er for så vidt ikke avgjørende om det følger bare av folkeretten eller også av grunnloven. Men det er naturlig å gi grunnloven på dette punkt en forståelse som er i samsvar med lovens krav (NOU 1984:18: 437-38).

<sup>19</sup> Translation by Royal Norwegian Ministry of Foreign Affairs. The Norwegian text reads as follows: “Det påligger Statens Myndigheter at lægge forholdene til Rette for at den samiske folkegruppe kan sikre og utvikle sitt Sprog, sin Kultur og sit Samfundsliv” (quoted from NOU 1997:5: 16).

<sup>20</sup> Sentralt for den samepolitiske utviklingen videre vil være hva som må til for å opprettholde et tilstrekkelig sterkt samlet vern for å bevare og utvikle den samiske kulturen i tiden fremover, og hvordan et slikt kulturvern bør utvikles. Dette vil tilsvare en konkretisering av hva våre samepolitiske forpliktelser og rettigheter består i, og vil i sum utgjøre det samlede vernet for samekulturen i Norge (St meld 41 (1996-97), p. 7).

<sup>21</sup> See e.g. *St meld 41 (1996–97)* for an overview of such policy-areas.

The second question that was addressed in the first report by the *Samerettsutvalg* was whether the Sami ought to have a separate representative body. The Commission argued that the Sami ought to be given more influence over Sami matters, and recommended that a *Sameting* (Sami Parliament), should replace *Norsk Sameråd* (the Norwegian Sami Council). Whereas members of *Norsk Sameråd* were appointed by the government, the Commission recommended that members of *Sametinget* be chosen in direct elections. In May 1987 legislation to establish the Sami Parliament was adopted, and the first election to *Sametinget* was held in 1989.

In order to be entitled to vote in the elections and be eligible for election to *Sametinget*, individuals have to register in *Samemantallet* (the Sami Electoral Roster). The criteria for entry are as follows: first, self-identification as Sami; second, that the person in question, or at least one of that person's parents, grandparents or great-grandparents, has/have or had Sami as mother tongue. After 1997, it has also been possible for children of persons who are registered, or have previously been registered, to be entered in the Sami Electoral Roster.<sup>22</sup> By 1989, 5,497 persons had registered; by 1993, this had risen to 7,236, and prior to the election to the Sami Parliament in 1997, a total of 8,667 persons had registered.<sup>23</sup> In 1997, 64.3% of those registered as Sami lived in Finnmark. They constituted 9.9% of the total population registered in *mantallet til Stortingsvalget* (the Roster for General Elections) in Finnmark (Hætta 1998). In the municipalities of Kautokeino and Karasjok, which are core Sami areas, registered Sami constitute 63.3% and 55.2%, respectively, of the total. In 10 of the 19 municipalities of Finnmark, registered Sami constitute less than 5% of the total number of registered persons (*ibid.*). A vast majority of those who fulfil the linguistic condition for registering have failed to register. This was expected, but the number of registered Sami is also lower than many Sami organisations had hoped for.

For the purpose of elections to *Sametinget*, Norway is divided into 13 special constituencies, with three representatives each. *Sametinget* does not have independent

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<sup>22</sup> Until 1997, the linguistic requirement was that the person in question, or at least one of the parents or grandparents, has/have or had Sami as mother tongue. "Mother tongue" is defined as the language that the person in question did *in fact* speak at home while growing up. The linguistic criterion is thus reasonably interpreted as an operationalisation of a descent criterion.

<sup>23</sup> Figures according to Leif Dunfjell in the Ministry of Local Government and Regional Development.

authority – its powers are advisory only. The body also has a right to take initiatives, but the entire question of the powers of the *Sameting* is under on-going debate.

#### 4.2 ILO Convention 169 on Indigenous and Tribal Peoples

The second international legal instrument which has been invoked by the Sami and which is likely to exercise considerable influence on Sami policy in Norway is ILO Convention 169 *On Indigenous and Tribal Peoples* from 1989. When ILO Convention 107 *On Indigenous and Other Tribal and Semi-tribal Populations* was adopted in 1957, the Norwegian government voted in favour. This Convention was not ratified by Norway, however, since the government at that time held the view that the Sami did not qualify as an indigenous population.<sup>24</sup> The content of the Convention was thus deemed irrelevant to Norwegian affairs. As was noted above, it was not until the 1970s that representatives of the Sami claimed indigenous status for the Sami population. The process that preceded this claim has been termed the *aboriginalisation of Sami self-understanding* by Eidheim (1992). The claim for indigenous status triggered another Norwegian green paper, NOU 1980:53, *Vern av urbefolkninger*, which, among other things, addressed the topic of ratification of ILO Convention 107.

The Norwegian terms “urbefolkning” and “urfolk” are rough translations of the English terms “indigenous populations” and “indigenous peoples”.<sup>25</sup> The Norwegian term “urfolk” is interesting in more than one sense, and the mere term probably

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<sup>24</sup> Article 1 (1) of ILO Convention 107 reads *in extenso*: “This Convention applies to- (a) members of tribal- or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) members of tribal- or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of the nation to which they belong.” (quoted from NOU 1980:53: 70). Those who disputed the indigenous status of the Sami in particular argued that the vast majority of the Sami could not reasonably be described as tribal or semi-tribal. They also argued that the social and economic conditions of the Sami were not at a “less advanced stage” than the non-Sami part of the Norwegian population in the northernmost parts of Norway, and that the Sami enjoyed similar rights as the non-Sami Norwegian population.

<sup>25</sup> Whereas ILO Convention 107 employs the term “indigenous populations”, the ILO Convention 169 employs the term “indigenous peoples”. A similar terminological shift can be found in the green papers by *Samerettsutvalget*. In the first green paper, NOU 1984:18, the term “urbefolkning” is employed. In the second, this has been replaced with “urfolk”.

contributed to the heated debate about the indigenous status of the Sami.<sup>26</sup>

Etymologically, the Norwegian term “urfolk” resembles the English term “aboriginal peoples”. The latter term consists of the prefix “ab”, which means “from” and has its equivalent in the Germanic prefix *ur-*; and the Latin term “origo”, which means “the centre” or “the origin”. The term “aboriginal people” may thus be understood as a term to denote the peoples that reside in their country of origin, as opposed to immigrants. Semantically, the term “aboriginal” has been mainly used to characterise the indigenous populations in Australia and, more recently, Canada.

Semantically, “urfolk” is used in Norwegian in the same way as “indigenous people” in English. The term “indigenous” stems from the Latin term “indignia”, which consists of the prefix “in” or “inde” and the root form of the verb “geno”, “genui”, “genitus”. The prefix in this context means “within” and the verb means “bear/ be born”. The most precise Norwegian translation of the English term “indigenous” would be “innfødt”. When ILO Convention 107 was given an unauthorised translation to Norwegian in 1957, the term “indigenous populations” was translated with “innfødte befolkningsgrupper”. However, the term “innfødt” is far from neutral; among other things, it has been used to characterise colonised peoples in overseas colonies, and carries many of the same negative connotations in Norwegian as “natives” in English or “indigènes” in French. According to a standard Norwegian dictionary, the term “innfødt” is “used of lower/inferior peoples, especially non-European ones”<sup>27</sup>. After the process of decolonisation, it thus became politically impossible to use the term “innfødt” when talking about citizens of sovereign states. Presumably for the same reason, the term “urbefolkninger” was introduced as a new translation of “indigenous populations” in footnote 1, p.7 in NOU 1980:53, *Vern av urbefolkninger*.

This choice in turn creates another problem, however, since the term “urbefolkning” carries connotations about being somewhere “from the very beginning”, or at least to be the first group to arrive in a particular territory. As indicated above, the prefix “ur” is Nordic and German, and denotes what is original, oldest or has come first. This somewhat unfortunate Norwegian translation of the English term “indigenous” led to a heated debate about the alleged indigenous status of the Sami. It is probably

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<sup>26</sup> The following is based on NOU 1997:5, section 3.2.2.

<sup>27</sup> “...brukt om laverestående folk, særlig utenfor Europa” (*Norsk Rksmålsordbok*, 1957).

impossible to determine exactly when Sami settlement in what later became the states of Norway, Sweden, Finland and Russia started, as the oldest archaeological material found in the area in question cannot be classified in terms of ethnic categories. The oldest archaeological material which is distinctly Sami dates back to the first centuries AD and is from the Varanger area in Norway. The archaeologist Bjørnar Olsen (1994) has, however, argued that the millennium preceding the first century AD was crucial to the creation of many Sami cultural characteristics. The fact that it is impossible to find older relics which are ethnically differentiated has led some to conclude that the Sami are relatively recent immigrants to Nordic-speaking areas and, partly for that reason, that they cannot claim status as *urfolk*.

In 1989, ILO Convention 107 was replaced by ILO Convention 169, the *Convention on Indigenous and Tribal Peoples*.<sup>28</sup> Norway ratified the convention on 20 June 1990, indeed, as the very first country to do so. Whereas the 1957 Convention aimed at integrating indigenous populations, the one of 1989 contains measures to make it possible for groups with status as indigenous peoples to preserve their distinctness. The *Samerettsutvalg* never disputed the indigenous status of the Sami minority, although the green paper from 1984 to a very limited degree focused on the legal and political implications of the Sami's indigenous status. Such implications are, however, at the forefront of the second green paper from the *Samerettsutvalg*, NOU 1997:4, *Naturgrunnlaget for samisk kultur*. The Commission was not in doubt as to whether the provisions of ILO Convention 169 applied to the Sami: "There is no dissent that the Sami are covered by Article 1(2) of ILO Convention 169 and that they are an indigenous people in the sense used by the Convention".<sup>29</sup> The *Samerettsutvalg* thus regards the requirements of ILO Convention 169 as relevant to the relations between

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<sup>28</sup> Article 1 of the ILO Convention 169 reads *in extenso*: "1. This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations: (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. *Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply*" (italics added).

<sup>29</sup> "Det er ingen dissens om at samene dekkes av ILO-konvensjon 169 artikkel 1(2) og at de er et urfolk i konvensjonens forstand" (NOU 1997:4: 24).

the Sami minority and the Norwegian state, as well as to the relations between the Sami population and the non-Sami population.

ILO Convention 169 contains measures that aim to provide indigenous groups with the right to ownership and possession over areas where these groups are dominant. The Convention also contains measures aimed at safeguarding usufruct rights to areas which are also inhabited by other groups, but to which indigenous groups have had access for traditional utilisation of natural resources. The Convention furthermore contains measures to safeguard the right to participate in the use, management and conservation of the natural resources in “their lands”.<sup>30</sup>

In 1990, when the Norwegian government ratified the ILO Convention of 1989, it held that Norwegian domestic law and institutional arrangements were in accordance with the requirements in Article 14 (1). The legal arrangements which currently regulate the rights of ownership and possession to the territory in question are premised on the view that the Norwegian state owns all areas over which no private ownership has been established.<sup>31</sup> This view was disputed by *Sametinget*, which expressed doubt as to whether Norwegian domestic law fulfilled the requirements of Article 14 (1). *Sametinget's* view should be seen in connection with the long-standing view among some groups among the Sami that the Sami rather than the Norwegian state own the land – or at least part of it – in Finnmark county.

In 1985, the *Samerettsutvalg* appointed a group of legal experts, *rettsgruppen*, to clarify the legal status of the existing arrangements in Finnmark. Its majority concluded that the requirements of Articles 14 and 15 in ILO Convention 169 had only limited relevance for Norwegian affairs, as the Sami did not fulfil the conditions

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<sup>30</sup> The relevant articles in the ILO Convention are Articles 14 (1) and 15. The former reads *in extenso*: “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.” The latter article reads *in extenso*: “The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources”.

<sup>31</sup> For a detailed description of the relevant arrangements, see NOU 1993:34, *Rett til og forvaltning av land og vann i Finnmark*, especially chapter 2.

for claiming “ownership and possession” to land in Finnmark.<sup>32</sup> This triggered protest, not least from the Sami, who argued that the expert group had paid insufficient attention to Sami legal traditions and had given an inadequate interpretation of the Norwegian state’s obligations under international law. Partially as a response to this protest, the *Samerettsutvalg* appointed a group of experts on international law, *folkerettsgruppen*, who were to put more emphasis on Sami legal traditions and to specify the Norwegian state’s obligations under international law. The conclusions of *folkerettsgruppen* deviate from those presented by *rettsgruppen*. The former concluded that the Sami do fulfil the conditions for claiming “ownership and possession” to land in parts of Finnmark. The requirements in Article 14 (1) are thus deemed relevant to Norwegian affairs by *folkerettsgruppen*.<sup>33</sup>

The majority of the *Samerettsutvalg* recommends that the right to ownership to land in Finnmark for which no private ownership has been established be transferred from the Norwegian state to a new management arrangement, *Finnmark grunnforvaltning*, which is to be organised as an independent legal entity. The majority recommends that the board of *Finnmark grunnforvaltning* consist of eight members – four to be appointed by *Sametinget*, and four by *fylkestinget* (the County Council) in Finnmark. According to the majority proposal, the Chairman of the Board of *Finnmark grunnforvaltning* is to have a double vote in case of a tie, and leadership shall rotate between members appointed by the *fylkesting* and the *Sameting*. A minority consisting of five persons recommends that *Samisk grunnforvaltning* be established as a supplement to *Finnmark grunnforvaltning*. The municipalities in Finnmark shall, by way of majority decision-making, decide whether they wish to join *Samisk grunnforvaltning*. Provided one or more municipalities decide to join *Samisk grunnforvaltning*, it shall also be possible for local communities (*bygder*) outside these municipalities to join *Samisk grunnforvaltning*. The minority recommends that the board of *Samisk grunnforvaltning* consist of seven persons – five to be appointed by the *Sameting*, and two by Finnmark *fylkesting*. Accordingly, the Board and Annual Meeting of *Samisk grunnforvaltning* will be considerably more influenced by the

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<sup>32</sup> The report by the legal group is published as the first part of NOU 1993:34, *Rett til og forvaltning av land og vann i Finnmark*.

<sup>33</sup> The report by the international law group is published in NOU 1997:5, *Urfolks landrettigheter etter folkerett og internasjonal rett – bakgrunnsmateriale for Samerettsutvalget*.

Sami than will *Finnmark grunnforvaltning*, and is likely to be considered an attractive option only to municipalities and local communities with a Sami majority population.

The majority acknowledges that a Sami majority in the Board of *Finnmark grunnforvaltning* is in accordance with Article 14 (1) in ILO Convention 169 for those parts of Finnmark where Sami rights to “ownership and possession” are to be recognised, but holds that this is not the only way in which the requirements of the ILO Convention can be met. The majority argues that strong reasons exist for not dividing the powers to manage the lands and watercourses in Finnmark between two different management organs. Article 34 allows for flexible implementation of the provisions in the Convention in order to take due account of “the conditions characteristic of each country”, and the majority argues that the proposed *Finnmark grunnforvaltning* is indeed in accordance with the requirements of the ILO Convention in question.<sup>34</sup>

The *Samrettsutvalg* has tried to strike a balance between concern for Sami interests and concern for the non-Sami population in Finnmark:

From the preceding paragraphs it is clear that the recommendations of the *Samrettsutvalg* concerning future regulations on lands and water rights in Finnmark are based on considerations for the Sami. However, in the specific formulation of these *no distinction is made as concerns ethnic background*, in connection with the individuals and their right and access to make use of natural resources. Drawing such a distinction would be problematic, if not impossible in practice, not least because it is often difficult to distinguish between persons of Sami, *kven*-ish or Norwegian origin in the areas of Sami settlement and resource utilisation. Moreover, making such distinction would have unfortunate consequences, as persons belonging to the same local community would not have the same rights concerning the use of their immediate natural surroundings. This could create difficulties within the local communities; it would appear to be unfair for the non-Sami population

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<sup>34</sup> For a detailed argument to this effect, see NOU 1997:4, section 4.3.1.6.3.

and would seem unfortunate as seen from outside, as one could be accused of discriminating against the remainder of the local population.<sup>35</sup>

Various public administrative organs, institutions, organisations, political parties, municipalities etc. have been asked to voice their opinions about the proposals put forward in the report delivered by the *Samerettsutvalg*. These questions are considered extremely touchy, and it is too early to tell which of the proposals will be adopted by the Norwegian *Storting* – and hence what will be the future of the right to land and water in Finnmark. But whatever the more specific content of the future decisions, ILO Convention 169 is likely to leave its stamp on the legal changes to come.

### *5. Pathways from international norms to norm-observant political decision-making – the case of Sami policy in Norway*

In section 2, a distinction was made between two major mechanisms for how international norms may influence national decision-making. These mechanisms, or pathways from international norms to norm-observant behaviour, were termed moral motivation and non-moral motivation. In the following I will discuss how each of these contributes to explaining how international norms have influenced the shaping of Sami policy in Norway in the 1980s and 1990s. As noted in section 2, I do not assume that the paths are mutually exclusive. Politicians may well be moved by both moral and non-moral motives. At the end of the section, I will try to assess the relative importance of each of the pathways. Since the question of the right to land and water in Finnmark is yet to be settled, the focus will be on the changes in Sami policy that occurred during the 1980s. I will, however, also loosely indicate which mechanisms seem relevant to future decisions regarding the right to land and water in Finnmark.

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<sup>35</sup> “Av de foregående avsnitt fremgår det at samerettsutvalgets tilrådinger om fremtidige regler om rett til land og vann i Finnmark er begrunnet ut fra samiske hensyn. Det er imidlertid i den konkrete utformingen av rettsordningene *ikke trukket noe skille ut fra den enkeltes etniske bakgrunn*, når det gjelder enkeltpersoners rett og adgang til å utnytte naturgodene. Å trekke et slikt skille ville være problematisk, for ikke å si umulig å gjennomføre, bl.a. fordi det ofte vanskelig ville la seg gjøre å skille mellom personer av samisk, kvensk eller norsks herkomst i de samiske bosetningsområdene og den ressursutnyttelse de driver. Videre vil et slikt skille kunne ha uheldige konsekvenser, ved at personer bosatt i samme lokalsamfunn ville ha ulik rett og adgang til å bruke utmarksgodene i sitt nærområde. Slike skillelinjer mellom naboer ville kunne skape vansker innad i lokalsamfunnene, virke urettferdig for den ikke-samiske befolkning og virke uheldig utad, bl.a. ville man kunne bli møtt med anklager om diskriminering av den øvrige lokalbefolkning” (NOU 1997:4: 62, italics in original).

## 5.1 Moral motivation

This pathway rests on the assumption that the existence of an international norm produces the belief among decision-makers that they ought to follow the norm in question.<sup>36</sup> Two different processes can account for the existence of such a belief. First, decision-makers can take the fact that something has become a part of international law to be a good indicator of morality, and develop a positive attitude to and sense of duty to comply with the specific norm in question for that reason. And second, decision-makers can hold themselves to be morally obliged to adhere to the meta-norm that one ought to follow international norms, and develop a positive attitude to and a sense of duty to comply with the specific norm for that reason.

Does the pathway from these two forms of moral motivation suggest a plausible link between international norms and the shaping of Sami policy in Norway in the 1980s and 1990s?

When *Odelstinget*, the lower chamber of the *Storting*, debated the proposed Sami Law (*Sameloven*, Ot.prp.nr.33 1986–87), Inger Pedersen (Labour), head of Standing Committee of Justice (*Justiskomiteén*), stated that

For too long we, the majority, the mainstream society of Norway, have made decisions on behalf of the Sami people. Even granting that this has not been done with negative intent, the results have not always been something to be proud of. I hope and believe that the *Sameting* will become an important component in efforts to correct past mistakes and to ensure a specific identity for the Sami people in the future.<sup>37</sup>

The claim that the establishment of the *Sameting* is one aspect of the work to rectify old wrong-doing seems to indicate that Pedersen, for one, believed that the previous policy was wrong. Steinar Eriksen, from the Conservative Party, said that bad

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<sup>36</sup> The decisions in question are to be passed at the national level by the Norwegian Parliament, the *Storting*. The relevant political decision-makers are therefore members of the parliament and the government respectively. Unless otherwise indicated, I shall therefore mean members of the government and representatives at the *Storting* when using the term "political decision-makers".

<sup>37</sup> "Lenge nok har vi, majoriteten, det norske storsamfunnet, gjort alle vedtak på vegne av samefolket. La gå at det ikke er gjort i ond hensikt, men resultatene har ikke alltid vært verd å rope hurra for. Jeg håper og tror at Sametinget vil være et viktig ledd i arbeidet med å rette opp gamle feil og sikre samisk egenart i framtida" (*Stortingsforhandl.* 1986-87, 8: 484).

conscience can be read between the lines of the recommendation (*innstilling*) of the Standing Committee of Justice: “The bad conscience felt by mainstream society and the state authorities for the Sami policies of earlier times can easily be read between the lines of the Committee’s recommendation”<sup>38</sup> What he was referring to were probably statements such as this one:

The Committee wishes, however, to stress that Norway, especially in the interwar years, was clearly out of step with trends in the development of international law concerning the protection of minority cultures. As a result, the Sami language and culture are less widely disseminated and more vulnerable than would have been the case if our country had at that time followed the guidelines on minorities drawn up by the League of Nations.<sup>39</sup>

Also MP Harald Ellefsen (Conservative) said that bad conscience existed, both in Norway and internationally, for the way in which indigenous peoples had been treated:

Both abroad and here in Norway we have been through a process in which the rights of indigenous peoples have been brought more to the foreground. This is a part of the world’s bad conscience. In Norway we have at times been more preoccupied with the Indians of America than with the Sami of Norway. We must recognise that Norway, especially in the interwar years, was out of step with developments in international law concerning the protection of minority interests.<sup>40</sup>

Why should there exist bad conscience today for the Sami policy that was pursued earlier on? As will be remembered, international norms may produce the belief among

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<sup>38</sup> “Storsamfunnets og statsmyndighetenes dårlige samvittighet for tidligere tiders samepolitikk er lett å lese mellom linjene i justiskomiteens innstilling” (ibid.: 497).

<sup>39</sup> “Komiteen vil imidlertid understreke at Norge, særlig i mellomkrigstiden, var sterkt i utakt med internasjonal rettsutvikling til vern av minoritetskulturer. Denne fortid har medført at samisk språk og kultur er mindre utbredt og mer sårbar enn tilfellet hadde vært om vårt land den gang hadde fulgt de retningslinjer som ble trukket opp innenfor Folkeforbundet om minoriteter” (Innst.O nr.79 – 1986–87).

<sup>40</sup> “Både internasjonalt og her i Norge har vi vært gjennom en prosess hvor urbefolkningens rettigheter er kommet mer i forgrunnen. Det er en del av verdens dårlige samvittighet. I Norge har vi til tider vært mer interessert i og opptatt av indianerne i Amerika enn i samene i Norge. Vi må erkjenne at Norge, særlig i mellomkrigstiden, var i utakt med internasjonal rettsutvikling til vern av minoritetsinteresser” (*Stortingsforhandl.* 1986-87, 8: 481).

decision-makers that one ought to follow the norms in question, if decision-makers take international norms to be a good indicator of morality. The statements by Eriksen and Ellefsen are interesting. They indicate that these representatives believed that previous Sami policy could not be morally justified, as it failed to live up to international legal standards. These statements build on the assumption that Eriksen and Ellefsen took international law to be a good indicator of morality. The statements indicate that bad conscience existed, because policy that violated international law also violated the requirements of morality. Since the purpose of *Sameloven* is in accordance with international legal standards, this is an indication that policy based on this law meet the requirements of morality, as is implied by the statement of MP Kåre Kristiansen (Christian Democrats): “There now appears to be a willingness to do what one knows is right in this matter”<sup>41</sup>.

The statement of another MP, Einar Førde (Labour), is interesting, as it indicates that Norwegian politicians had indeed changed their opinions about the role of the Sami in the Norwegian society in the period between the Alta affair and the debate in the lower chamber (*Odelstinget*):

I (...) have the feeling we have come a long way since Alta. Everyone who experienced that conflict should be able to realise what a quiet revolution has taken place in Norwegian society in the meantime. (...) [S]even years ago, we would hardly have been able to predict the broad acceptance with which the *Odelsting* today is adopting this bill.<sup>42</sup>

What does the silent revolution that Førde refers to consist in, and what is the connection between this silent revolution and international norms? The continuation of Førde’s statement suggests one answer to this question:

This is a law that begins by speaking of the Sami people and their right to preserve and develop their language, their culture and their way of life. On the surface of it, these words may seem obvious – but they are not. Everyone who remembers the earlier debate will see how radical

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<sup>41</sup> “Det synes nå å være vilje til å gjøre det som man vet er rett i denne sak” (ibid.: 485)

<sup>42</sup> “Eg (...) har ei kjensle av at vi har gått en lang veg frå Alta. Alle som opplevde denne striden, har føresetnader for å sjå kva stille revolusjon som har skjedd i det norske samfunnet sidan. Eg vågar den

this is. The major thing about the bill that is to be passed today is that the basic viewpoints on Sami policy which this bill has taken over from the *Samerettsutvalg* now encounter no opposition. (...) [T]his indicates that these views have, in the course of only a few years, come to enjoy undoubted hegemony in Norwegian society.<sup>43</sup>

According to Førde, the silent revolution that occurred in the period between 1979, when the decision to dam the Alta River was passed, and 1987, when *Sameloven* was passed, was that the principled view of the *Samrettsutvalg* on Sami policy was gradually accepted by Norwegian politicians and by large parts of Norwegian society. The connection between this silent revolution and international norms is that the *Samerettsutvalg*'s principled view was heavily influenced by international law. And one reason why this principled view had been gradually accepted may have been that these norms produced the belief that one *ought* to follow the norms, as they are good indicators of morality.

International norms may, however, also produce the belief among decision-makers that they ought to follow the norms in question because they adhere to the meta-norm that one should follow international law. Einar Førde's statement is an indication that this kind of moral motivation may also have been present:

In my view, among the most important aspects of the work that has been done and that, as indicated by the main spokesperson of this bill, has now been achieved, is that we fulfil our interational obligations, and that with this bill we are pursuing a policy that is progressive as seen from abroad and that secures the rights of minorities. This is no small achievement.<sup>44</sup>

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karakteristikken, for om vi hadde sett oss sjølve sju år tilbake, ville vi knapt nok ha kunna spådd den breie oppslutninga som Odelstinget i dag vedtar denne lova med" (ibid.: 489).

<sup>43</sup> "Det er altså ei lov som børjar med å tale om den samiske folkegruppa og denne folkegruppas rett til å sikre og utvikle sitt språk, sin kultur og sitt samfunnsliv. Det er tilsynelatande honnørord som ein ved overflatisk betraktning kunne seie var sjølvsagte ord – men det er det ikkje. Alle som hugsar debatten den gongen, vil sjå kor radikalt dette er. Det store med den lova som i dag blir vedteke, er at det samepolitiske grunnsynet som lovproposisjonen har overteke frå Samerettsutvalet, nå ikkje møter nokon innvendingar. (...) [D]et tyder at dette synet i løpet av noen år har fått eit heilt tvillaust hegemoni i det norske samfunnet" (ibid.).

<sup>44</sup> "Eg ser som noe av det viktigaste med det arbeidet som er gjort, og som i dag får ei førebels sluttstein som saksordføraren sa, at vi møter våre internasjonale plikter, og at vi med denne

MP Jørgen Kosmo (Labour) also stressed the obligation to adhere to the meta-norm that one should follow international law:

It must be emphasised that the right of a people to practice their culture today must be seen as a fundamental human right. The international development of law must therefore be a central factor behind the formulation of Sami policy measures... The thorough work carried out by the *Samerettsutvalg* in clarifying the status of the Sami people and their relation to the international protection of human rights has taken as its point of departure Article 27 of the UN Covenant on Civil and Political Rights. The Committee has made special mention of this in its recommendation and has unanimously agreed with the opinion of the *Samerettsutvalg* and the Ministry.<sup>45</sup>

The fact that the existence of an international norm may produce the belief that one ought to follow the norm because the decision-makers take themselves to have a moral obligation to follow international law was also reflected in statement made by Labour MP Helen Bøsterud in the parliamentary debate:

This law will represent an important contribution towards the fulfilment of Norway's obligations to the Sami people. (...) The basis for the legal obligations incumbent on the Norwegian authorities is to be found first and foremost in Article 27 of the 1996 UN Human Rights Covenant on Civil and Political Rights.<sup>46</sup>

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lovproposisjonen fører ein – i internasjonal forstand – progressiv politikk når det gjeld å sikre verdet til minoritetar. Det er ikkje lite” (ibid.: 490).

<sup>45</sup> “Det må understrekes at en folkegruppes rett til kulturutøvelse i dag må anses som en av de fundamentale menneskerettigheter. Den internasjonale rettsutvikling må derfor utgjøre en sentral del av vurderingsgrunnlaget ved utformingen av de samepolitiske tiltak...Samerettsutvalgets grundige arbeid for å klarlegge sameenes status og det samiske folks forhold til det internasjonale menneskerettighetsvern har tatt sitt utgangspunkt i artikkel 27 i FNs konvensjon om sivile og politiske rettigheter. Komiteen har omtalt dette spesielt i innstillingen og har enstemmig sluttet seg til Samerettsutvalgets og departementets oppfatninger” (ibid.: 479).

<sup>46</sup> “Sameloven vil være et viktig bidrag i oppfyllelsen av Norges folkerettslige forpliktelser overfor sameene. (...) Grunnlaget for de folkerettslige forpliktelser som her påhviler norske myndigheter er først og fremst FNs menneskerettighetskonvensjon av 1966 om sivile og politiske rettigheter, artikkel 27” (ibid.: 496).

Apart from one representative, Carl I. Hagen of *Fremskrittspartiet* (the Progress Party), all who spoke during the debate stated that they were pleased with the law, and they also expressed their deep gratitude to the *Samerettsutvalg*.<sup>47</sup>

The parliamentary debate that preceded the adoption of the constitutional amendment was also rife with normative arguments. Inger Pedersen, head of the Standing Committee of Justice, explicitly addressed the relationship between Article 27 in the ICCPR and §110A in this debate:

The basis for the international legal obligations here incumbent on the Norwegian authorities is primarily the UN Human Rights Covenant of 1966 on Civil and Political Rights, Article 27. This regulation obliges the state to provide active support so as to make it possible – also in material terms – for the Sami people to practice their culture and their language. This bill is not a formal clause of incorporation in international law, but in content it corresponds to the international legal obligations already incumbent on the Norwegian state according to Article 27, and as this has been interpreted by the proposition to the Odelsting, Ot.prp. no. 33 of 1986–87, and by the recommendation from the Standing Committee of Justice.<sup>48</sup>

Pedersen’s statement emphasises that Norwegian politicians are morally obliged to follow international law. But also in this debate some representatives voiced the

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<sup>47</sup> Hagen opposed the idea of having direct elections to a Sami representative body based on a Sami Electoral Roster because the idea was controversial among the Sami. Two of the three major Sami organisations had opposed the proposal. *Samenes Landsforbund* strongly opposed the idea, as the organisation believed the Electoral Roster would create tension between registered and non-registered Sami and increase tensions between Sami, ethnic Norwegians and descendants of Finnish-speaking Norwegians, *kvener*. The organisation of the reindeer nomads, *Norske Reindriftsamers Landsforbund*, also opposed the law proposal, as they feared that they would not be adequately represented by the proposed electoral system for the Sami Parliament.

<sup>48</sup> “Grunnlaget for de folkerettslige forpliktelsene som her påhviler norske myndigheter, er først og fremst FNs menneskerettighetskonvensjon av 1966 om sivile og politiske rettigheter, artikkel 27. Ved denne bestemmelse er staten forpliktet til å gi aktiv støtte slik at samene vil ha forutsetninger - også materielt - for å dyrke sin kultur og sitt språk. Den foreslåtte sameparagrafen er i formen ingen inkorporasjonsbestemmelse i forhold til folkeretten, men dens innhold samsvarer med de folkerettslige forpliktelsene som den norske stat allerede er underlagt etter artikkel 27, og slik denne bestemmelsen er tolket i Ot.prp. nr.33 for 1986-87 og i innstillingen fra Justiskomiteén” (*Stortingsforhandl.* 1987-88, 7c: 3025).

opinion that the relevant international norm was indicative of what morality required. MP Harald U. Lied (Conservative) stated that:

One of the most important things that a people can do is to preserve its language and its culture. They are the major factors in an identify, something to stand on. I make no secret of what is my personal wish – that, as a result of this constitutional amendment, persons who are Sami will become proud of their special background. Regrettably, they have for years and years throughout earlier generations been subjected to treatment that has taken from them that sense of identity and that pride which every people should feel in connection with its own special situation. I hope that this can be a small contribution towards redressing the injustice done by Norwegian mainstream society against this people over the centuries.<sup>49</sup>

It is, of course, impossible to take all the statements uttered in the public debates in the Storting at face value. As has been remarked by Jon Elster, a deliberative setting may “shape outcomes independently of the motives of the participants” (1998: 104). Still it seems that the debate suggests that moral motivation played an important role in the shaping of Sami policy. To be sure, moral arguments often serve as window-dressing for more mundane motives. The relationship between justification and motive is complex. And it seems reasonable to expect a surplus of moral arguments in cases where the costs of arguing otherwise are considered high. In the case under consideration, however, it does not seem that the costs of arguing in legal, as opposed to moral, terms would be very high. The debates concerned the relationship between internationally codified legal norms and Norwegian policies. The fact that the debates were so full with normative arguments should thus be taken as an indication that the existence of international norms did in fact produce the belief among Norwegian MPs that they ought to follow the norms.

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<sup>49</sup> “Noe av det viktigste en folkegruppe kan gjøre, er å ta vare på sitt språk og sin kultur. Det er det viktigste for at man skal ha en identitet, noe å stå på. Jeg legger ikke skjul på at jeg personlig vil ønske at denne grunnlovsbestemmelsen skal føre til at de som er samer, også skal være stolte over at de har den spesielle opprinnelsen som dette innebærer. De har dessverre blitt utsatt for en behandling gjennom lang, lang tid i tidligere generasjoner som har fratatt dem den identitetsfølelse og den stolthet som ethvert folk bør føle for sin spesielle situasjon. Jeg håper at dette vil være et lite bidrag til å gjenopprette den urett som er gjort av det norske storsamfunn mot denne folkegruppe gjennom flere hundre år” (ibid.: 3029).

It would be of considerable interest to know whether and to what extent the existence of ILO Convention 169 has produced the belief among political decision-makers that they ought to follow that norm, as this would indicate the extent to which moral motivation is likely to operate when the question of future land- and water-rights in Finnmark is to be settled. The principle that underlies the composition of the proposed *Finnmark grunnforvaltning* as well as the proposed *Samisk grunnforvaltning* is a newcomer in the Norwegian public administrative system, and, thus far, Norwegian politicians have been remarkably silent on the issue. This is to say that we do not know very much about the extent to which Norwegian politicians take the substantive requirements of ILO Convention 169 as indicative of what morality requires. Insofar as Norwegian politicians consider themselves morally obliged to adhere to the meta-norm that one should follow international law, however, moral motivation may very well come to play an important role in future decisions concerning land- and water-rights in Finnmark.

## *5.2 Non-moral motivation*

The second path from international norms to norm-observant political decision-making goes through fear of negative reactions. To act contrary to an international norm could be detrimental to politicians' chances of re-election, or could have other unfortunate domestic consequences. Violations of an international norm could furthermore harm the state's international reputation, or induce other states to initiate sanctions.

### *5.2.1 Domestic pressure*

I will start by discussing to what extent norm-observant political decision-making may have been due to perception of pressure from would-be voters. Then I will address a second kind of domestic pressure – the perception of pressure not from would-be voters, but rather from what may have been perceived as extremist elements among the Sami.

#### *5.2.1.1 Politicians' desire for re-election*

If Norwegian politicians believed that there was widespread support for the norms in question and furthermore believed that many would-be voters considered the question of norm-adherence decisive or at least important for the question of how to vote, then

they may have adhered to international norms for fear that acting contrary to these norms could be detrimental to their chances of getting re-elected.<sup>50</sup>

Although the question of Sami rights and interests was only one aspect of the so-called Alta affair, this affair led to increased interest in the situation of the Sami and the relationship between the Sami minority and the Norwegian state on the part of non-Sami Norwegians. Some of the actions initiated by the Sami in connection with the Alta affair, like the hunger strike right in front of the *Storting* in October 1979 and in January 1981, as well as the so-called occupation of the office of Prime Minister Gro Harlem Brundtland by 13 Sami women in February 1981, attracted enormous publicity. The first hunger strike took place at a time when the question of Sami rights was at the forefront of the Alta affair. The magnitude of the reactions to the hunger strike triggered some surprise among politicians in Finnmark. On 16 October 1979 the mayor of Kautokeino, Klemet O. Hætta, said to the newspaper *Finnmark Dagblad*: “These Sami are not representative of the Sami of Finnmark. But I notice that they have almost the whole country on their side, and it is said that they have been getting support from all around the world.”<sup>51</sup>

The widespread publicity which these actions attracted, as well as the general publicity surrounding the Alta affair, may well have generated an impression among politicians that there was in fact widespread domestic support for norms that oblige Norwegian public authorities to aid the preservation and development of Sami culture. During the trial of four leaders of the protest actions (*Folkeaksjonen*) in Alta in March 1983, the leader of *Norske Samers Riksforbund*, Ole Henrik Magga, who was to be elected as the first President of the *Sameting*, stated: “The Alta actions have done more for the cause of the Sami than all the writings and resolutions in the world, even from the Sami organisations.”<sup>52</sup>

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<sup>50</sup> The political parties in Norway had different opinions on the question of the damming of the Alta River, which was the subject matter that was most immediately relevant to the question of adherence to international norms.

<sup>51</sup> “Disse samene er ikke representative for samene i Finnmark. Men jeg merker meg at de har fått nesten hele landet med seg, og det sies at de får støtte fra hele verden” (quoted in Heitmann 1984: 155).

<sup>52</sup> “Alta-aksjonene har gjort mer for samenes sak enn all verdens skriv og resolusjoner selv fra sameorganisasjonene” (quoted in Dalland 1994: 296).

One national survey exists which can tell us something about the *actual* degree of domestic support for a policy that aims at preserving and developing Sami culture. Unfortunately, the survey did not phrase the question in terms of adherence to human rights norms, which should make us pause before concluding that the way would-be voters felt about the matter had anything to do with human rights norms. The content of the relevant question does, however, go to the core of the norms in question, and the distribution of answers is therefore interesting – even if we cannot rule out the possibility that the connection between international norms and popular beliefs is spurious. A sample of voters (2,208 persons) was requested to answer a questionnaire prior to the general elections in 1981.<sup>53</sup> Among the questions was the following statement: “It is more important to defend the culture of the Sami and their rights to grazing areas than it is to get more electric power”.<sup>54</sup> 10 percent of the respondents answered that they agreed completely with the statement, while 13 percent answered that they agreed to some extent. Furthermore, 30 percent said that they disagreed to some extent, while 25 percent disagreed completely.<sup>55</sup> Almost one-fourth of the respondents thus believed that protecting Sami culture and access to reindeer grazing areas was more important than improving the supply of hydro-electric power, while more than half of the respondents accorded priority to improving the supply of hydro-electric power over the protection of Sami culture and Sami access to reindeer grazing areas.

Neither those who accorded priority to the protection of Sami culture nor those who reversed the order of priority seem, however, to have considered the question as being important enough to affect how they would vote. The question of protection of Sami culture was not included among those 17 political issues most frequently mentioned as decisive for the question of how to vote in the general election in 1981. Considering the turbulence that the Alta affair had aroused in Norwegian politics, this is quite remarkable. The voters’ interest for environmental protection and energy policy was also not particularly strong. Valen and Aardal, who conducted the survey in question, noted that

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<sup>53</sup> Valen, Henry and Bernt Aardal (1983).

<sup>54</sup> Question 44D: “Det er viktigere å forsvare samenes kultur og deres rett til beiteområder enn å få mer elektrisk kraft”. The statement was one of a total of four statements that concerned the damming of the watercourse of Alta-Kautokeino, and the respondents were asked to indicate the degree to which they agreed or disagreed with the statements.

<sup>55</sup> 15 percent answered that they both agreed and disagreed, while 7 percent answered “do not know”.

Table 2.12 indicates a remarkably weak degree of interest in questions of environmental protection, energy supplies and decentralisation. Here there is a clear decline compared with 1977. One should have expected the converse, since the controversial question of the Alta hydro-power project was on the agenda at least three years prior to the general elections of 1981.<sup>56</sup>

This remark indicates that this result was not expected, and Norwegian politicians may very well have misperceived the degree of domestic support for the norms in question.

When the damming of the Alta river was effectuated and the Alta affair no longer made the headlines, the question of Sami interests and rights rapidly vanished from the national political agenda and took on a much more local significance. The question of Sami interests and rights therefore came to concern only the relationship between voters and representatives in the northernmost part of Norway. And in the northernmost part of Norway, there was considerable opposition to the proposals put forward by the *Samerettsutvalg*, also within the ranks of the Sami. *Samenes Landsforbund*, a Sami organisation, wrote in a comment to the Sami Law: “It represents an unacceptable disregard for local democracy and local governance in Sami districts when the government proposes arrangements supported by only 2 of 12 central Sami municipalities and only 3 of 20 municipalities in Finnmark”<sup>57</sup> When the constitutional amendment was debated in the Storting, Steinar Eriksen (Conservative), from Finnmark, said:

A total of 11 of the 18 members of the *Samerettsutvalg* support a Sami amendment to the Constitution; 7 have recommended that there be no constitutional provision concerning the legal rights of the Sami people. I do not feel that it has become well enough known that of those seven, six come from Finnmark county, and that most of them, perhaps all, can

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<sup>56</sup> “Tabell 2.12 tyder på en påfallende svak interesse for spørsmål om miljøvern, energi og desentralisering. Her er det en klar nedgang sammenlignet med 1977. Man skulle ha ventet det motsatte tatt i betraktning at den omstridte Altautbyggingen stod på dagsorden i nesten tre år forut for stortingsvalget 1981” (1983: 44).

legally be accounted Sami. Three of the Commission's members from Finnmark have supported the bill. Two of these members were appointed by the Sami organisations that have promoted this issue. Also this fact says something about local opinion in this matter. I find it necessary to mention these underlying points of information because there can be no doubt that much of the matter of this proposed amendment will pertain to conditions in Finnmark county.<sup>58</sup>

Thus, pressure from the electorate in Finnmark can hardly account for norm-observant political decision-making.<sup>59</sup> It is doubtful whether representatives from other parts of Norway experienced pressure from their electorate. One representative, Jørgen Kosmo (Labour), even seems to have been open to the possibility that the majority of the voters did not support the Sami Law or the amendment to the Constitution. He defended the decisions on the grounds that credible legal guarantees for a minority cannot always be founded on majority opinions:

The Sami are a minority in the population. Their low numbers make them politically weak in relation to the majority population in the country and in the districts. For this reason, it is clear that satisfactory legal guarantees for a minority cannot automatically build on majority opinion in the usual sense of the word.<sup>60</sup>

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<sup>57</sup> “Det representerer en utilbørlig tilsidesetting av nærmedemokratiet og folkestyret i samiske distrikter når regjeringen foreslår ordninger som bare støttes av 2 av 12 sentrale samiske kommuner og bare 3 av 20 finnmarkskommuner.” *Bakgrunnsdokumenter for Justiskomiteens arbeid med Innst.O.79 (1986-87)*.

<sup>58</sup> “Av Samerettsutvalgets 18 medlemmer har 11 gått inn for en sameparagraf i grunnloven, og sju har tilrådd at det ikke gis noen grunnlovsbestemmelse om den samiske folkegruppens rettstilling. Jeg tror ikke det har kommet klart nok fram at seks av de sju som går mot, er medlemmer fra Finnmark, og at de fleste av disse, kanskje alle, kan regne seg som samer etter samelovens regler. Videre har tre av utvalgets medlemmer fra Finnmark støttet forslaget. To av disse var oppnevnt av de samiske organisasjonene som har vært pådrivere i saken. Også dette sier noe om de lokale meninger i saken. Jeg finner det nødvendig å nevne en del av disse underliggende forhold fordi det ikke er til å komme forbi at en stor del av begrunnelsene for og imot denne grunnlovsparagrafen særlig vil gjelde forhold i tilknytning til Finnmark (*Stortingsforhandlinger* 1987-88, 7c: 3028).

<sup>59</sup> None of the representatives from Finnmark voted against the proposed Sami Law. The law was passed against one vote, that of Carl I. Hagen. Steinar Eriksen voted against the constitutional amendment.

<sup>60</sup> “Samene er en befolkningsmessig minoritet. Deres fåtallighet gjør dem i politisk forstand svake i forhold til majoritetsbefolkningen i landet og i distriktene. Av denne grunn er det klart at tilfredstillende rettsgarantier for en minoritet ikke uten videre kan bygge på fletallsoppfatninger i vanlig norsk forstand” (*Stortingsforhandlinger* 1986-87, 8: 479). This argument was reiterated by Kosmo in the debate on the amendment to the Constitution.

Hence, domestic pressure does not seem to be a plausible explanation for norm-observant political decision-making.

Since the Storting at some time in the not-so-distant future is to settle the delicate question of land- and water-rights in Finnmark, it would be of interest to know more about how Norwegian politicians perceive of the degree of domestic support for the proposals put forward by the *Samerettsutvalg* on this matter. In Finnmark there is considerable local opposition. Judged by the temperature in the debate in Finnmark, local opposition to the establishment of *Finnmark grunnforvaltning* and *Samisk grunnforvaltning* is massive, and viewpoints are strongly held. This opposition is partly founded on a fear that future decisions by *Finnmark grunnforvaltning* will deviate from the principle of equal rights for all individuals, regardless of ethnic affiliation. This might limit the possibilities of non-Sami to enjoy such traditional activities as hunting, fishing, and berry-picking. Since the *Sameting* is to appoint four of the eight members of the Board of *Finnmark grunnforvaltning*, while the vast majority of the population in Finnmark does not have the right to vote in the elections to the *Sameting*, the opposition against *Finnmark grunnforvaltning* is also founded on adherence to the principled view that those who are affected by decisions made by an organ should have an opportunity to affect the composition of that organ. Only registered Sami in all parts of Norway have the right to vote in the *Sameting* elections, while all residents of Finnmark, whether Sami or not, have the right to vote in elections to the *fylkesting*. Accusations of ethnically-based discrimination therefore flourish. Little in the current situation in Finnmark suggests that a politician who is eager to be re-elected ought to support the proposals put forward by the *Samerettsutvalg*.

#### 5.2.1.2 *Fear of ethnic terrorism*

A second type of domestic pressure that might account for norm-observant political decision-making is the fear that an ethnically based terrorist organisation could develop and get a foothold among the Sami. On 20 March 1982 an effort was made to blow up a construction bridge crossing a river in Alta, Tverrelva. Two persons, Niilas Aslaksen Somby and Jon Reier Martinsen, were subsequently arrested.<sup>61</sup> When

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<sup>61</sup> The operation was unsuccessful due to a timer that did not work. Somby lost an arm and an eye in the operation.

questioned, Somby claimed that he never intended to cause damage to the bridge. The action was rather meant as a political demonstration against what he perceived as an encroachment on Sami rights. After about five months in prison, Somby was given leave due to alleged mental as well as physical health problems. He then fled to Canada with his family, where he lived with several Indian tribes in British Columbia for more than two years. In October 1984 he was arrested in Canada and in December he and his family were expelled. In a newspaper interview in November 1984, Somby said that the Sami Movement had supplied him with the financial means to escape to Canada (Guhnefeldt 1984).

The incident in Alta triggered the attention of the national Police Surveillance Department, *POT*. Actions like this are extremely rare in Norway. The political sympathies of those who were arrested also caused a certain uneasiness, as they were members or sympathisers of the small Marxist-Leninist political party AKP (m-l). Members of this political party as well as various offices that have been used by the party have been subject to surveillance by *POT* for many years. The phone of the party office in Oslo was subject to surveillance from July 1975 to December 1979 (Dokument nr.15 - 1995-96: 332). The surveillance was resumed in December 1982 and continued until August 1987 (ibid.). *POT* was obliged to obtain permission to carry out the surveillance from Oslo Lower Court (*Oslo Forhørsrett*). The reason why *POT* sought permission to carry out surveillance in the first of the periods referred to was the suspicion that AKP (m-l) violated §97a of the Penal Code. What is more interesting and relevant here is the reasons stated when *POT* sought permission to resume surveillance of AKP (m-l)'s party office in 1982. The submission to the court claimed that parts of AKP (m-l)'s declared principles and programme must be interpreted as preparation to and /or actual violation of Chapters 9 and 12 in the Penal Code. In addition it was stated:

AKP (m-l) have not been responsible for armed actions in our country. All the same, it is clear that it was two sympathisers/members who were behind the attempt to blow up a bridge over Tverrelva in Finnmark on 20 March this year. The party leadership of AKP (m-l) gave their full

support to the actions, and the party newspaper, *Klassekampen*, knew of the matter before it had been reported to the police.”<sup>62</sup>

The unsuccessful operation, regardless of the actual motives behind it, thus seems to have caused some anxiety in the Norwegian government that the resistance against the damming of the Alta River might lead to the establishment of an ethnically based terrorist organisation with the support of a Marxist-Leninist political party in Norway. On 30 January 1997, in an open hearing about *POT* held by the Parliamentary Committee for Scrutiny and Constitutional Affairs, Jostein Erstad, former head of *POT*, confirmed that the event in Alta had triggered *POT* activity. When asked whether the Sami population were more easily subject to surveillance than other parts of the population, Erstad replied: “Not in my time. Of course we had the Alta affair and everything that happened in that connection, the dynamiting of that bridge up there, as everyone will know. But that was a specific case, a specific set of circumstances. Otherwise there wasn’t anything special about the Sami.”<sup>63</sup>

What probably sharpened reactions by Norwegian politicians to the efforts at blowing up the bridge was the possible link between the Alta affair and the so-called Achilles affair. The latter case became public in 1983. In August 1979 detailed plans for sabotage against Norwegian power stations were found, together with photographs of several power stations and a personal letter, in a deposit box at the railway station in Oslo. The letter was from the “Center” in Frankfurt am Main, to a Norwegian contact with the initials V.G.; it was signed “W.S. in sector H.” The papers and the photographs were hidden inside a copy of the newspaper *Frankfurter Allgemeine Zeitung*. According to the records of the staff of the railway station, the documents had been placed in the deposit box on 27 February 1979 – the same day as three members of the Indian sect Ananda Marga hijacked an Aeroflot plane from Oslo to Stockholm. Some members of Ananda Marga have been involved in serious criminal

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<sup>62</sup> “Våpnede aksjoner har ikke vært gjennomført i vårt land av AKP (m-l). Likevel er det på det rene at det var to sympatisører/medlemmer som stod bak sprengningsforsøket av en bro over Tverrelva i Finnmark den 20. mars d.å. Partiledelsen i AKP (m-l) gav full støtte til handlingen, og partiets avis, *Klassekampen*, kjente saken før politiet fikk melding om den” (Dokument nr.15 - 1995-96: 333).

<sup>63</sup> “Ikke i min tid. Vi hadde selvfølgelig dette med Altasaken og det som foregikk omkring det, sprengingen av den broen som var der oppe, som man sikkert kjenner til. Men det var en konkret sak, et konkret forhold. Ellers var det ikke noe spesielt med samene.” *Referat fra åpne høringer vedrørende Rapport til Stortinget fra kommisjonen som ble nedsatt av Stortinget for å granske påstander om ulovlig overvåking av norske borgere (Lund-rapporten)* (Dokument nr.15 (1995-96)): 268. The minutes are printed *in extenso* in *Stortingsforhandlinger* 1996-97, 6a1b.

activities. One Swedish member was wanted for the murder of a defector from the sect. Three of the persons who received stolen goods in connection with a major robbery of the National Gallery in Oslo in October 1982 were members of the sect. Other members have been convicted for large-scale robberies in Sweden, Denmark and Iceland. According to the Norwegian newspaper *Aftenposten*, the sabotage plans found in the deposit box in Oslo perfectly matched page references in a “self-help” book which had circulated among West German terrorists (Jonassen 1987). According to the same article, German police suggested that there were close connections between Ananda Marga and *Rote Arme Fraktion* in West Germany, *Brigade Rosso* in Italy and also to Italian right-wing extremists in *Loge P2*.

The possible connection between the existence of sabotage plans against Norwegian power stations on the one hand and the Ananda Marga sect and international terrorist organisations on the other caused alarm in *POT*. According to the Norwegian newspaper *Dagbladet*, almost 50 officers were present in Alta months before the demonstrations that ended with police actions in January 1981 (Elvik et.al. 1983).<sup>64</sup> It is hard to know exactly how extensive the surveillance of activists in the Alta case was, but the possibility that there was a link between the “Achilles affair” and persons involved in the Alta affair doubtless caused alarm in *POT*, and possibly also among politicians. When the Achilles case became public in December 1983, *Dagbladet* printed an article with the title “Samer ble tilbudt terrorist-hjelp” (“Sami were offered terrorist assistance”) (Lund 1983). The article said that unknown Germans and Irishmen had contacted Sami activists during the hunger strikes in 1979 as well as in 1981 and offered certain services in return for co-operation. Odvar Nordli, Norwegian Prime Minister in the period 1976–81, wrote in his memoirs: “It was indicated that terrorist organisations outside Norway began to get interested in the Alta conflict”.<sup>65</sup> It is against this larger background that *POT*'s reactions to the attempt to blow up the bridge in Alta in March 1982 should be seen.

The fear that international terrorist organisations could get a foothold among young Sami and possibly establish an ethnically based terrorist organisation in Norway may

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<sup>64</sup> The Achilles affair has never been resolved, and it is uncertain if it in fact was members of the Ananda Marga sect that had placed the documents in the deposit box.

<sup>65</sup> “Det ble antydnet at terroristorganisasjoner utenfor landets grenser begynte å interessere seg for Alta-konflikten” (Nordli 1985: 170).

be another pathway from international norms to norm-observant political decision-making. Norwegian politicians may have wanted to grant some concessions to the Sami in order to prevent or at least to discourage them from allowing international terrorist organisations to gain a foothold among them. To abide by international norms may have been perceived as a necessary concession to make in order to achieve peaceful relations between the Sami, non-Sami and the Norwegian state. It would probably also be very difficult, if not impossible, for an ethnically based terrorist organisation to mobilise local sympathy if Norwegian Sami policy was firmly based on international norms. Here, the point is not whether there in fact was a connection between the Achilles affair and the Alta affair, or whether the fear of an ethnically based terrorist organisation turned out to be well-founded or not. What matters is to establish if such a fear existed and how important it was for the decision-makers.

It is extremely difficult to assess to what extent such fears developed in the aftermath of the Alta affair. Neither the type nor the quantity of the explosives used at Tverrelva indicated that the motive behind the operation was to cause much damage. When the Achilles case became public, Chief of Police (*politimester*) Einar Henriksen, who headed the police action against the civil disobedience action in Alta, said that the police had no indication that the Alta affair had international ramifications (Elvik et.al. 1983). Also nothing in the background material to the Parliamentary Standing Committee of Justice's work with the Sami Act suggests that such a fear existed in the period during which the Sami Act was being prepared.<sup>66</sup> Available sources do not thus indicate that norm-observant political decision-making was due to fear that an ethnically based terrorist organisation could be established in Norway. That, however, does not mean that we should exclude the possibility that such fears existed and thus could have played some role in the shaping of Sami policy.

### *5.2.2 International reputational pressures*

The third possible mechanism, international reputational pressures, rests on two assumptions: (i) that violation of an international norm will have adverse effects on a state's international reputation; and (ii) that states normally consider a good international reputation to be an asset in international affairs. As regards the first assumption, does it seem plausible to suggest that Norwegian politicians feared that

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<sup>66</sup> *Bakgrunnsdokumenter for Justiskomiteens arbeid med Innst.O.79 (1986-87).*

non-compliance with norms that pertain to ethnic minorities in general and groups with status as indigenous peoples in particular would have adverse effects on Norway's international reputation? McElroy terms international norms "reputational indicators" (1992: 46). And the claim that non-compliance with international norms pertaining to ethnic groups would affect Norway's international reputation was indeed present in the Parliamentary debate on the constitutional amendment. MP Harald U. Lied (Conservative) stated:

I am quite aware that the Sami as a group are a small minority in a small country. But if we look at this in an international framework, and if we wish Norway to be seen as a cultured nation and one governed by the rule of law, then we shall have to give to this minority the strength inherent in the fact that precisely their special position has led the majority of the Storting to wish to include this proposed amendment in the Constitution of Norway.<sup>67</sup>

The claim that non-compliance with norms pertaining to indigenous peoples would be detrimental to Norway's international reputation was also evident in the parliamentary debate that preceded Norway's ratification of ILO Convention 169. MP Karita Bekkemellem (Labour) stated:

In evaluating the question of ratification, it is of importance that Norway must be said to have been an active force in the work of getting the new convention adopted. This is in line with the positive attitude towards human rights in general and the rights of indigenous peoples in particular that Norway has shown in many other connections. In this way certain expectations have been created internationally, that Norway will be among those who ratify Convention no. 169, and Norway's credibility in this area will be weakened if we do not ratify – no matter

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<sup>67</sup> "Jeg er fullt klar over at samene som folkegruppe er en liten minoritet i et lite land. Men hvis man ser dette i internasjonal målestokk, og hvis vi ønsker at Norge skal bli betraktet som en kulturnasjon og en rettsstat, må vi gi denne minoriteten den styrke som vil ligge i nettopp at deres særstilling har ført til at Stortingets flertall ønsker å føre denne bestemmelsen, som jeg nylig siterte, inn i Grunnloven" (*Stortingsforhandlingene* 1987–88, 7c: 3029).

how good the internal legal situation for the Sami people might be in our country.<sup>68</sup>

It thus seems plausible to suggest that Norwegian politicians did fear that non-adherence to international norms would threaten Norway's credibility in questions concerning the protection of ethnic minorities and groups with status as indigenous peoples, and that it would even threaten Norway's reputation in wider human rights questions.

The second assumption, that Norway considers a good international reputation in human rights questions and questions concerning indigenous peoples to be an asset in international affairs, seems well founded. As regards human rights, Rolf Tamnes (1997), author of the final volume of the 6-volume history of Norwegian foreign policy, suggests that Norway has pursued an active human rights policy in international affairs ever since the 1960s, but that the emphasis on human rights was strengthened from the 1970s. The first White Paper on human rights was presented in 1977 (St meld 93 1976–77, *Om Norge og det internasjonale menneskerettighetsvern*). A new position as special adviser for human rights questions was established in the Ministry of Foreign Affairs in 1979, and in 1980 the Ministry set up a separate council for human rights questions. In 1983 the Christian Michelsen Institute in Bergen started a programme for human rights studies, and the Norwegian Institute of Human Rights was established in Oslo in 1987.<sup>69</sup> The role of human rights in Norway's foreign policy was at times controversial, as was evident in the discussions of whether to make transfer of development assistance conditional upon the recipient regimes' adherence to basic democratic principles as well as compliance with human rights, or in discussions of how to deal with a choice between two evils, as was the case when Pol Pot's genocidal regime was overthrown by an intervention. Norway also pursued more traditional interest-based policies towards, for example, China; the tension between ideals and more narrow interests was evident in several other

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<sup>68</sup> "Når ratifikasjonsspørsmålet skal vurderes, er det av betydning at Norge må sies å ha vært en aktiv pådriver i arbeidet med vedtakelsen av den nye konvensjonen. Dette er i tråd med den positive holdningen til menneskerettigheter generelt og urbefolkningsspørsmål spesielt som Norge har inntatt i en rekke andre sammenhenger. Det er på denne måten skapt en viss forventning internasjonalt om at Norge vil være blant dem som ratifiserer konvensjon nr.169, og Norges troverdighet på dette området vil bli svekket hvis vi ikke ratifiserer - uavhengig av hvor god den interne rettstilling for samene ellers måtte være her til lands" (*Stortingsforhandlinger* 1989-90, 7c: 3963).

situations and cases as well. Still, Tamnes argues, the moral commitment and what seemed to be a need for being a spearhead in human rights questions became increasingly evident in the period 1965–95 (Tamnes 1997, especially part 4).

Tamnes argues that Sweden, during the heyday of its former Prime Minister Olof Palme, wanted to appear as the world's moral super-power. However, Palme was assassinated in 1986; and Sweden definitely abdicated from the role as self-appointed moral spearhead when it joined the EU 1 January 1995. The position of the world's moral super-power thus fell vacant – and Norway aspired to fill this vacancy in the late 1980s and early 1990s. This pathway thus suggests that Norwegian politicians adhered to the relevant international norms for fear that doing otherwise might damage Norway's international reputation and be detrimental to Norway's desire to play a particularly active role internationally. The link between a good international reputation and the desire to play an active international role was evident in one of the statements in the parliamentary debate on the constitutional amendment. MP Gunnar Skaug (Labour) said: “A Sami clause in the Constitution can also give additional weight to Norway's involvement in the work to promote the interests of ethnic groups on the international level.”<sup>70</sup>

Norway's strong desire to maintain a good reputation on the international scene with regard to human rights and groups with indigenous status has thus made it possible for Sami politicians to wrest concessions from the Norwegian state. In a comment to the development of Sami policy in Norway, Leif Dunfjell, Head of Division in the Sami Section of the Ministry of Local Government and Regional Development, goes a long way towards suggesting that the Norwegian state's ambition to appear civilised and with deep respect for human rights and the international legal order accounts for the development in Sami policy:

The possibilities for the Sami to establish positive dialogue, followed up by a positive development with expectations of more comprehensive autonomous administrative arrangements, have come about first and foremost because Norway aims to stand forth as a civilised country that

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<sup>69</sup> The Norwegian Institute of Human Rights was a continuation of the Norwegian Human Rights Project, which was established in 1979.

<sup>70</sup> “En sameparagraf i Grunnloven vil også kunne gi ekstra tyngde til Norges engasjement i arbeidet for å fremme etniske gruppers interesser internasjonalt” (ibid.: 3023).

demonstrates great respect for human rights and the rule of international law. These attitudes and this level of ambitions means that the Norwegian authorities can be challenged in a dialogue that developed not only their own standards but also views on established international standards.<sup>71</sup>

The ambition to appear “civilised” made it possible for Sami politicians to successfully turn human rights standards against the Norwegian state. The Sami could thus use international norms in an effort at furthering their interests domestically, while being fairly confident that Norwegian public authorities would feel uncomfortable with public accusations of non-compliance with norms. Norway’s desire to play a particularly active role internationally made its international reputation important. Reputational pressures thus seem to suggest a plausible link between international norms and norm-observant political decision-making.

Norway has also maintained a high profile internationally on questions concerning groups with the status of indigenous people. Norway was actively involved in the work that preceded the adoption of ILO Convention 169. The Norwegian delegation consisted of representatives from the Ministry of Foreign Affairs as well as representatives from the Sami Parliament. Norway was among those states that proposed the UN General Assembly Resolution proclaiming the International Decade of the World’s Indigenous Peoples 1995–2005 (A/RES/48/163), and the Ministry of Foreign Affairs, together with the Sami Parliament and the Ministry of Local Government and Regional Development, has been involved in the work on formulating a UN Declaration on Indigenous Peoples. Norway has also supported efforts at establishing a permanent forum for indigenous peoples within the UN system. The multilateral co-operation in the Barents Region, which includes Norway, gives financial support to cross-border co-operation between groups of Sami as well as between Sami and the Nenets people. Groups with indigenous status are also granted financial support through Norwegian development aid.

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<sup>71</sup> ”Samenes muligheter til å etablere en positiv dialog fulgt opp av en positiv utvikling med forventninger om mere omfattende selvstyrte forvaltningsordninger, er muliggjort først og fremst fordi Norge har ambisjoner om å fremstå som et sivilisert land med utvist stor respekt for menneskerettighetene og den internasjonale rettsorden. Disse holdninger og dette ambisjonsnivået gjør at norske myndigheter kan utfordres i en dialog som utvikler såvel egne standarder som synet på de internasjonale etablerte standarder” (Dunfjell 1995: 107).

And since Norway's aspiration to be the world's moral spearhead has hardly become weaker since the 1980s, the pathway from international reputation is likely to operate in the future decisions regarding the right to land and water in Finnmark as well.

### *5.2.3 Fear of severe international sanctions*

In section two, I suggested that fear of international sanctions of various sorts could constitute yet another possible link between international norms and norm-observant political decision-making. This mechanism can hardly account for the development of Sami policy in Norway, however. As opposed to the situation when Norway violated the guidelines of the International Whaling Commission by resuming whaling in 1993, no states or international organisations have threatened Norway with sanctions due to the Sami policy pursued prior to the passing of the Sami Act in 1987 and the constitutional amendment in 1988. Fear of international sanctions thus does not seem to offer a plausible link between international norms and norm-observant political decision-making in the case under consideration here.

## *6. Conclusion*

This article has examined the actual impact of international norms on contemporary Sami policy in Norway. Two legal instruments have exercised – or will soon exercise – considerable influence: Article 27 of the International Covenant on Civil and Political Rights from 1966, and ILO Convention 169 from 1989. The content of the constitutional amendment that was adopted in 1988, §110A in the Norwegian Constitution, corresponds to the content of Article 27 of the ICCPR, and is to be interpreted so as to make it effective. This means that the Sami have acquired a constitutional protection against future decisions aimed at assimilation. Norway's ratification of ILO Convention 169 has implications for the question of who can legitimately claim the right to land and waters in Finnmark. The ILO Convention in question limits the range of future political outcomes. Both Article 27 of the ICCPR and ILO Convention 169 thus severely reduce the scope of majoritarian political decision-making in Norway with respect to the Sami minority.

Norm-observant political decision-making may be due to both moral- and non-moral motives. I have argued that moral motivation most likely played a significant role in the formation of Sami policy in the aftermath of the Alta affair, and that the belief that

international norms were indicative of what morality requires was instrumental in ensuring norm-observant political decision-making. I regard it an open question whether this kind of moral motivation is likely to operate in future decisions concerning the right to land and waters in Finnmark. Insofar as the decision-makers take themselves to have a moral obligation to follow international law, moral motivation is likely to be important, however. Non-moral motivation appears to have played a role in the formation of Sami policy in the late 1980s. It seems that the government was eager to maintain Norway's good international reputation for taking seriously human rights and groups with status as indigenous peoples worldwide, and that the government believed that public accusations of hypocrisy would threaten the credibility of the foreign policy courses followed by Norway. As the latter have hardly changed, I would suggest that international reputational pressures may link international norms with norm-observant political decision-making also in the future.

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