Positivism in International Law: State Sovereignty, Self-Determination, and Alternative Perspectives

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I. INTRODUCTION

Contemporary international law and its jurisprudence appear to be taking on a more self-reflective attitude in coming to terms with some of the core assumptions that have dominated international law since the age of European imperialism. One such assumption is that international law is concerned primarily with the actions of states and that those state acts have been and continue to be the basis for the content of international law. Part of the historical narrative of international law is that this positivistic approach departed from an earlier notion that international law emanated from natural law that found its source not necessarily from the purposeful action of states, but from obligations that existed beyond the states themselves.³ Accordingly, what can be found in Article 38 of the Statute of the International Court of Justice (“ICJ”) in what law the Court will apply to disputes between states, namely treaties and international custom, supports the sense that international law has had a strong positivist strand.⁴

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3 See Harold Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2607-14 (1997).

4 Even the reference to “general principles of law” in Article 38 which seems to support the notion of an obligation emanating beyond the state such as natural law is moderated by the phrase that direct follows it, “recognized by the civilized nations.” This appears to support the notion that international law is subject to change as general principles are subject to recognition by states. John W. Head,

State action in the form of treaty making and the state practice element of international custom confirm the sense that international law is made by the states themselves, a product of sovereign will. However, it is from that very point of positivism in international law that has been under attack not only from other legal philosophical schools in terms of methodological approaches in deducing the content of international law and explaining why states observe international rules, but it has also come under suspicion from others who question the very content of international law and its checkered history.

Third World Approaches to International Law ("TWAIL") have pointed to the period of colonial expansion when colonialism was viewed as a legitimate exercise of state power as to when the contemporary rules of international law took shape. Given the impact of this period on international law, TWAIL scholars look upon the colonial era with a great deal of skepticism on an international system that saw powerful states exploit weaker entities through colonialism utilizing existing concepts of international law to justify their activities. TWAIL views the colonial period as the critical moment in understanding the proliferation of international law as a transnational phenomenon because of the expansive nature of the colonial project.⁵ By focusing on European colonialism, TWAIL desires to permit the expansion of the forum in which the history of repression can be reflected and criticized upon international law.⁶

One of TWAIL's major contributions to the study of international law is that it has brought to light how the practice of powerful states shaped the content of contemporary international law. It posits that through an examination of European colonialism, international law today can be better understood if seen in light of the European states and their historical encounter with what was then the uncivilized world. This can be seen in how the present rules that govern the disposition of international disputes

Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of "International" Law, 42 KAN. L. REV. 605, 619 (1994).

- 5 See Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171, 176-77 (2005).
- 6 Jean Allain, *Orientalism and International Law: The Middle East as the Underclass of the International Legal Order*, 17 LEIDEN J. INT'L L. 391, 394 (2004); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 361-62 (1998).

that deal with fundamental concepts of state sovereignty such as territorial integrity along with the conspicuous failure during the colonial period to recognize self-determination as a legitimate legal principle. By relying on legal positivism as its philosophical base, international lawyers of that time helped to lay the groundwork for an approach to international law that reflected the European experience of statecraft and international relations.⁷ As one TWAIL scholar put it, the “sovereignty doctrine is understood as a stable and comprehensive set of ideas that was formulated in Europe and that extended inexorably and imperiously with empire into darkest Africa, the inscrutable Orient, and the far reaches of the Pacific, acquiring control over these territories and peoples and transforming them into European possessions.”⁸ As such, it is in that sense that there is a felt unfairness because of the absence of any meaningful contribution from other non-European states in the development of international law and skewed international law in the favor of hegemonic states.

The positivism that marked this earlier generation of international law that conveniently justified the colonial activities of European states, continued to make its marks on the very principle that was supposed to remedy the injustice caused by international law’s non-recognition of nations as states – self-determination. With the end of World War II and the advent of the United Nations (“UN”), the former colonial holdings of the imperial powers had their opportunity to participate in the international system as legally equal players. The principle of self-determination enshrined in the UN Charter,⁹ International Covenant on Civil and Political Rights,¹⁰ and International Covenant on Economic, Social, and Cultural Rights¹¹ gave

7 See Dakas C.J. Dakas, *Dokdo, Colonialism and International Law: Lessons from the Decision of the ICJ in the Land and Maritime Dispute between Cameroon and Nigeria*, in DOKDO: HISTORICAL APPRAISAL AND INTERNATIONAL JUSTICE (Seokwoo Lee & Hee Eun Lee eds., 2011)

8 Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 6 (1999).

9 U.N. Charter art. 1.

10 International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force on Mar. 23, 1976).

11 International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force on Jan. 3, 1976).

former colonies the right to statehood. However, there were clear restrictions in the application of the self-determination principle. States that were both colonizers and former colonies which had become newly independent sought to place definite limits on the application of self-determination so as to be not too destabilizing. The European colonial states naturally desired to see the principle only applicable to the areas outside of Europe it formerly governed, while the newly independent states in Africa desired to maintain the principle of *uti possidetis* and keep the pre-existing colonial borders with the hope of securing post-colonial stability.¹² Since states, especially those that were newly conceived, were concerned for survival, international rules that promoted their interests in establishing stability regarding their territorial boundaries made sense despite the emergence of the principle of self-determination which seemed to defy traditional norms. Thus, positivism in international law helped to create the conditions for an instrumentalism in its use so as to maintain the status quo ante. It has continued to do so because it has colored basic principles of international law such as state sovereignty.

II. STATE SOVEREIGNTY AND THE IMPACT OF COLONIALISM IN INTERNATIONAL LAW

State sovereignty is one of the most fundamental principles of international law. It is the basis upon which states claim the legal right to manage its own affairs to the exclusion of others. As expressed under classical international law, the sovereignty of the state allows it to enjoy exclusive jurisdiction over subjects and matters that exist within its territorial boundaries. The notion that the nation-state exercises authority over a territorial jurisdiction marked a significant shift in understanding the nature of authority and accountability that had previously been hierarchical with various political authorities subject to the Holy Roman Emperor or the Pope. The end of the Thirty Years War in Europe saw the centralization and recognition of power in the princes who were treated as sovereigns. These rulers and the state powers they began to represent became the principal actors in the international system. The new world order that was established at the con-

12 Diane Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1 (1998).

clusion of the Peace of Westphalia in 1648 was founded on the sovereignty of these states, which has endured as the bedrock of classical international law and formed the foundation for understanding international relations for the next four centuries.

The state continues to be considered the primary actor in international relations and from the perspective of international law, continues to possess the right to be free from the interference of outsiders and refuse any form of unwarranted intrusions within its territories.¹³ It has found articulation in international society through Article 2(7) of the UN Charter which states that “[n]othing contained 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...” The General Assembly, on multiple occasions during the Cold War, pronounced the importance of the non-intervention principle in relation to sovereign rights of member states.¹⁴ Adopted by an overwhelming majority in 1962, the Resolution on Permanent Sovereignty over Natural Resources declared that “[i]t is the duty of all States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the territorial integrity of any State and the exercise of its national jurisdiction.”¹⁵ In 1965, the General Assembly unanimously adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of State and the Protection of Their Independence and Sovereignty. It condemned the use of armed intervention and “all other forms of interference” against sovereign states as well as attempts at coercion through political, economic and any other means to gain advantages at the expense of the target state.¹⁶

From this basic notion of state sovereignty, the corollary of rules and principles such as sovereign equality, non-intervention, and self-determi-

13 See generally HERSCH LAUTERPACH, *INTERNATIONAL LAW AND HUMAN RIGHTS* 166-220 (1973).

14 Although General Assembly resolutions are not considered a primary source of international law, they are indicative of state practice.

15 The resolution was adopted by 108 votes in favor, 1 against and 16 abstentions.

16 See also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations stating that “[n]o State may use or encourage the use of economic,

nation were eventually derived and utilized in the conduct of international relations. While the essential conceptual framework for state sovereignty and the derivative legal principle of non-intervention has held together for centuries, the interpretation given to important definitional elements of these principles has not necessarily remained constant. Territorial sovereignty which European states enjoyed was not extended by the leading international law publicists during the period of European colonial expansion.¹⁷ A utilitarian, pragmatic, and positivist approach in understanding the principle of state sovereignty that offered a legal justification for the colonial enterprises of the various European empires created legal space for empires to grow territorially. These objective positive actions of treaty making with local “states” that ceded territory or the outright taking of territory deemed *terra nullius* by European states were taken to be legitimate.

The recent decisions of the ICJ in relation to territorial claims involving former colonial territories make this point clear. Territorial disputes between Qatar and Bahrain in 2001, between Nigeria and Cameroon in October 2002, and the Ligitan and Sipadan dispute of December 2002 share a similarity in that significant weight was given to the decisions of the colonial powers ruling at the time in the final judgment.¹⁸ In a pending case

political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.” G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 121 (1970).

- 17 Prominent international lawyers during the time such as John Westlake of Cambridge University did not consider any of the African tribes to possess the requisite measure of sovereignty to be accorded the legal personality of states, but rather deemed them to be “uncivilized tribes.” See DAKAS, *supra* note 7.
- 18 In the territorial dispute between Qatar and Bahrain in 2001, in recognizing Bahrain’s sovereignty over the Hawar Islands and Qatar’s sovereignty over the Janan Island, the ICJ took into consideration as sole evidence the 1939 decision of the British Government, which was the colonial power over the disputed area at the time. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), 2001 I.C.J. 40, paras. 113–48 (Mar. 16) [hereinafter *Qatar v. Bahrain*]. Even in cases relating to the territorial disputes of newly independent states, the decisions of the western colonial powers that colonized the disputed areas were held to have absolute evidentiary value. See also *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nig.: Eq.

before the ICJ, *Case of Territorial and Maritime Dispute between Nicaragua v. Colombia*,¹⁹ one of the determinative issues involves the validity of the Barcenas-Esguerra Treaty of 1928, a treaty that was claimed to have been illegally concluded under U.S. occupation recognizing the sovereignty of Colombia over the islands in dispute. In this case, the key to its resolution will be the assessment of Nicaragua's legal arguments in emphasizing the historical circumstances after 1909, namely the assertion of illegal conclusion of the Barcenas-Esguerra Treaty under U.S. occupation and the want of effectiveness of other treaties such as the Chamorro-Bryan Treaty of 1914 that were concluded under duress.²⁰ The ICJ has generally given preference to relying on the positive acts of dominant states, including treaty making and other state acts, in navigating through the historical evidence of territories in dispute. The Court's tendency to rely on positive state action has not come without criticism by a minority from the Court.

In a separate opinion in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judge Kooijmans took exception to this approach and stated, "[O]nly by taking into account the full spectrum of the Parties' history, can their present rights be properly evaluated. By not giving the full historical context its due, however, the Court has ... unnecessarily curtailed its scope for settling the dispute in a persuasive and legally convincing way."²¹ In his separate opinion in the *Land and Maritime Boundary between Cameroon and Nigeria* case, Judge Ranjeva expressed his concern saying, "The inequality and denial of rights inherent in colonial practice in relation to ... colonies is currently recognized as an

Guinea intervening), 2002 I.C.J. 303 (Oct. 10) [hereinafter *Cameroon v. Nigeria*]; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.)*, 2002 I.C.J. 625 (Dec. 17).

19 *Territorial and Maritime Dispute (Nicar. v. Colom.)*, <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=nicol&case=124&k=e2> (last visited May 20, 2010).

20 For an overview of the case, see Seokwoo Lee, *Analysis of the Recent Decisions of the ICJ Regarding Territorial Disputes and Other Pending Cases*, presented at the International Law Association - Korean Chapter, Academic Conference for Spring 2006 on International Legal Issues of Northeast Asia- Islands, Oceans and Territories, Apr. 29, 2006.

21 *Qatar v. Bahrain*, *supra* note 18, at para. 4 (separate opinion of Judge Kooijmans).

elementary truth; there is a resultant duty to memorialize these injustices and at the same time to acknowledge an historical fact.”²²

The “historical-critical method,”²³ first referenced by Judge Ranjeva in the *Case Concerning the Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, provided a new direction for the development of future decisions with regard to colonial issues. In his declaration appended to the Court’s judgment, Judge Ranjeva stated that in interpreting the facts of the case, the decision was reached without having taken into consideration the political and legal order prevalent at the time.²⁴ He observed that while the relations between the colonial powers were governed by international law, the relationship between the United Kingdom and Johor could not be seen as having been established as between sovereigns, equal subjects of international law. Thus, “the sovereignty granted to indigenous authorities did not have the same significance as that in relations between colonial Powers,” and their only role was “to submit to the will of the colonial Power...”²⁵ He questioned how Johor’s title over the islands in question could have been extinguished without its consent and emphasized that in the absence of proof, the conclusion of the transfer of title relied upon presumptive consent as evidenced by Johor’s silence in the face of decisions made by the British government regarding the islands. It was under these circumstances that the Sultan of Johor could not express any form of opposition to the decision of the British government. Judge Ranjeva reached the conclusion that it was difficult to infer an international transfer of title by acquiescence since Johor was merely exercising its colonial territorial

22 *Cameroon v. Nigeria*, *supra* note 18, at para. 3 (separate opinion of Judge Ranjeva).

23 Historical criticism is defined as the “literary criticism in the light of historical evidence or based on the context in which a work was written, including facts about the author’s life and the historical and social circumstances of the time. This is in contrast to other types of criticism, such as textual and formal, in which emphasis is placed on examining the text itself while outside influences on the text are disregarded. *Encyclopædia Britannica Online*, available at <http://www.britannica.com/EBchecked/topic/267358/historical-criticism> (last visited May 20, 2010).

24 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.)*, at para. 5 (declaration of Judge Ranjeva) 2008 I.C.J. 12 (May 23).

25 *Id.*

title according to the rules and practice of the colonial Powers and that the silence of Johor could not be interpreted against such circumstances.²⁶

Judge Ranjeva's approach to these issues is emblematic of a desire for alternative approaches in settling these issues rather than relying primarily on legal positivism. Given the impact of positivism on the shaping of international law, there is a need for viable alternative philosophical perspectives that can provide the basis for fairer international rules that depart from "a Eurocentric conception of international law based on notions of otherness."²⁷

The recent decisions of the ICJ in dealing with the disposition of territorial disputes originating from the period of European colonial expansion reveal the lingering impact of positivism in international law. These positivist presuppositions impacted the way states resolved important issues such as what political groups were entitled to be treated as states and ultimately who had state sovereignty, and related issues such as when intervention is possible or called for. Therefore, when it came to determine how to deal with indigenous peoples and their rulers, the European states, using existing principles of international law, had to find a way to deal with these native peoples. Ultimately, the classification between civilized and uncivilized mattered because it was the basis upon which whether the already recognized principles and rules of international law would apply to these indigenous societies such as whether to treat their political unity as states or given them lesser designations such as protectorate or colony. This distinction was critical in offering a legal justification for permitting colonial expansion.²⁸

III. THE SEARCH FOR AN ALTERNATIVE AND THE PROBLEM OF SELF-DETERMINATION

Positivism offers a compelling descriptive account of international law. International rules are made by the states themselves. Treaties and customary international law, as examples of willful consensual state action,

26 *Id.*

27 *Cameroon v. Nigeria*, *supra* note 14, at para. 5 (separate opinion of Judge Al-Khasawneh).

28 Anghie, *supra* note 6 at 66-74.

provide hard evidence for the existence of an international order. Despite its empirical claims, the criticism of positivism that emanates from natural law and elsewhere is that without any effective counterweight to check the desires of hegemonic states, international law is prone to be reflective of the current realities of international relations. A case in point is the period of European colonialism.

In what was a departure from positivism in international law, the development of new international legal principles during the first part of the last century such as self-determination and its application to formerly “uncivilized” groups along with new human rights norms posed a challenge to a purely positivistic conception of international law. It would have been hard to imagine any justification for the principle of self-determination during the period of European colonialism when the nations that were overrun were considered not to have the capacity for statehood. Indeed, the nature of self-determination itself having its roots in the concept of popular sovereignty and revolution²⁹ runs counter to the traditional positivist notion that international law stems primarily from the will of powerful states.

In search of an alternative perspective to ground an understanding of potentially new sources of international law, cosmopolitan, communitarian, and liberal perspectives provide potentially fertile ground for a discussion of the development of a fairer set of international rules. Utilizing the ideas of cosmopolitan theorists represented by Thomas Pogge and Charles Beitz and liberal approaches suggested by Allen Buchanan and communitarian perspectives proposed by David Miller and Michael Walzer, alternative frameworks can be erected to understand the issue of self-determination beyond a positivistic conception of international law.

IV. ALTERNATIVE APPROACHES

Despite the potential for violent conflict over a political separation, international law has recognized the legality of self-determination and secession in certain circumstances. The travails and victories of former colonies are a case in point. As the most dramatic and extreme form of self-determination, secession is a political act wherein a group separates itself from a state to

29 See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 11 (1995).

form an independent political entity of its own. Because this act of self-determination rarely happens peacefully with the state willingly letting some of its population and territory go, violence often goes hand in hand with secession. Not only would the state want to prevent valuable human and physical resources from leaving its control, but because the state often also consists of many different political groups, allowing secession might set a dangerous precedent for other like-minded peoples within its control.

Various political philosophers have chimed in over the debate of when self-determination is permissible and when secession is ever justified. Their ideas largely reflect perspectives that differ on the fundamental questions regarding who secession should favor (national groups, free associations, etc.) and what rights (individual v. corporate) should be valued more. Related distinctions can also be made on the basis of the nature of the right to secession, whether the theories describe justifications for separation as a remedial right or as a primary right. Depending upon what theory of secession is adopted for a particular scenario, divergent outcomes are likely to result with different reasons and justifications given. While not all the theories fall into neat, well-defined philosophical categories, the debate over secession can be viewed in the broader context of the debate between communitarian, liberal, and cosmopolitan perspectives. Generally, whereas communitarians underscore the importance of communities and identity groups, liberals tend to stress the interests of individuals and their rights. Cosmopolitanists likewise focus on individuals, but tend to value universality and stress an individual's right to choose where her community of obligations will be. Not surprisingly, these disparate foundations have led to diverse visions and justifications for secession.

By definition, all modern theories of secession offer justifications for when political separation from a pre-existing state is permitted. As the most extreme form of self-determination, all envision circumstances that would allow a group to remove itself from any entanglements with the state they presently reside to create a new political entity. Given their divergent philosophical underpinnings, the theories offer vastly different ideas on the identity of groups that can secede, the terms and rationale of their separation, and ultimately, the benefit independent statehood would have for a secessionist group. In part, these differences highlight

their diverse conceptions of the state and what utility statehood has for self-determining groups.

Yet despite their differences, all of these theories of self-determination begin with the assumption that the state is a relevant unit of analysis when beginning to evaluate secession claims even though they qualify different groups for the right to secede. Intuitively, a theory of secession rests on its conception of the state because secession is a political act of separation from a state. The theories must wrestle with the issue of where the original, pre-existent state lies in relation to those seeking their self-determination. Whereas some theories put more value on the state and place a higher bar for justifying secession, others would permit secession under less restrictive requirements because the pre-existing state should not be a significant obstacle to self-determination. Depending on, *inter alia*, what value each theorist gives to the state, their theories result in different outcomes for self-determining groups who have aspirations for statehood.

A. Cosmopolitan Approach

Cosmopolitan approaches share three basic characteristics: (1) there is a focus on individuals as the ultimate units of moral concern as opposed to family units, tribes, national groups, or states; (2) across the board, this special status of individuals universally attaches to all human beings; and (3) for everyone in the world, individuals are of primary importance and not just for members of their social groupings.³⁰ Despite this common ground, cosmopolitanism has three significant variations. Legal cosmopolitanists are devoted to the ideal of a world order where every individual has equal legal rights and duties reflected in the notion of global citizenship.³¹ Moral cosmopolitanism holds that all individuals are required to respect each other's status as ultimate units of moral concern.³² As a result, this approach to cosmopolitanism sets limits upon the conduct of people especially in the effort to establish international schemes. Lastly, institutional cosmopolitanism devises particular basic principles of justice that

30 Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, in *POLITICAL RESTRUCTURING IN EUROPE: ETHICAL PERSPECTIVES* 89 (CHRIS BROWN ED., 1994).

31 *Id.* at 90.

32 *Id.*

are applied to international schemes.³³ These schemes are entrusted with the responsibility to ensure the fulfillment of human rights.

1. THOMAS POGGE

It is on this institutional basis that Pogge attempts to work out a conception of self-determination based on upon the cosmopolitan ideal of democracy. Envisioning a “pluralist global institutional scheme,” Pogge does away with traditional notions of state sovereignty. In his view, the concentration of sovereign power in the state is no longer tenable, nor defensible under a cosmopolitan morality that focuses on the needs and interests of individuals. In his cosmopolitan model, sovereign power is dispersed vertically and can be achieved by centralizing and decentralizing political units above and below the state. According to him, this dispersal of power from the state would lead to the creation of new political units whose geographical shape is undetermined. In the absence of a central dominant state, individuals would rule themselves through these new political entities of various sizes. But because of the current condition of international relations, these new units have to eventually take shape both politically and geographically in the context of a state dominated system. As a result, principles of self-determination need to be expounded with respect to the creation of these new political units.

Pogge comes to the conclusion that there are two principles of self-determination. First, persons of any contiguous territory of reasonable shape are allowed to join an already existing adjoining political unit with the caveat that the decision to join was made by a majority of the people and that the people of the existing political unit accept them as members.³⁴ This is conditioned on the premise that political units who might be left out in the move can still remain viable or can be incorporated into another political unit. Second, if there are sufficient numbers of persons in any contiguous territory, they can themselves form a new political unit if the decision to create a new political unit was accepted by a majority of the people.³⁵ However, any desire to create something new out from within the old is subject to general principles of minority protection and must remain

33 *Id.* at 91.

34 *Id.* at 112.

35 *Id.*

consistent with the rights of individual choice.³⁶ Sub-groups can opt not to join the newly created political unit to become members of another political unit. Further, sub-groups are free to reject membership in the newly created political unit to establish their own independent political entity. Lastly, any political units leftover must be viable or their members must be willing to join another political unit.³⁷

2. CHARLES BEITZ

Beitz proposes a cosmopolitan perspective based on a normative framework where morality and international justice are the foundational concepts for international relations. Whereas the dogma of an amoral state in the state of nature preoccupies realism leading to a skeptical view of international morality, he provides a way to conceive of morality in international relations as a basis for making moral judgments on the affairs of state made impossible by realism. Although many who advocate positions from the natural law tradition assert that moral judgments can be made in a state of nature, principles of justice are valued less than considerations of international order. Beitz accepts the fundamental importance of the rights and interests of persons and offers a cosmopolitan approach towards thinking about international morality that is conscious of the moral relations members of a universal community have to each other. He asserts that there are no reasons why external agents cannot make moral judgments on the domestic affairs of the state.³⁸

Challenging the assumptions and empirical claims realism makes about the world, Beitz problematizes present justifications for self-determination. He observes that current principles of self-determination are informed by the experiences of former colonies and their struggle to gain independent statehood.³⁹ However, ambiguities arise when applying these principles to other situations where the impetus for a separate state is not in reaction to colonial oppression, but rather, the desire of ethnic minorities for independent statehood. First, it is unclear what the self refers to,

36 *Id.*

37 *Id.* at 112-13.

38 CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 182 (1979).

39 *Id.* at 94.

the government or to a certain group of people.⁴⁰ The ambiguity of self-determination also lies in identifying groups that have legitimate claims to self-determination. The principle was applied to former colonies that already had settled populations; however, it is unclear if it would apply to other groups.⁴¹ Finally, it is not clear what form of independence would satisfy self-determination.⁴² In response to these ambiguities, Beitz offers a moral basis upon which self-determination can be justified.

If borders are redrawn to accommodate people who seek self-determination, access to wealth and resources will be redistributed. There is a strong presumption in favor of not interfering with the status quo. Thus, a change based on principles of self-determination requires a good claim and justification of those seeking secession. Beitz argues that this self-determination claim must be validated by showing that the resulting new political entity is necessary to restore conditions with principles of justice appropriate for that community.⁴³ Thus, good claims for self-determination are correctly understood as the means by which social injustice can be remedied. In other words, the legitimacy of the state rests on adherence to the appropriate principles of justice. Thus, when self-determination is pursued by those within a colony, their efforts towards independence should be seen as their desire to see social injustices alleviated.⁴⁴ The implication is that a state that fails to uphold social justice runs the risk of spawning legitimate claims for self-determination and eventually, secession.

B. Liberal Approaches

Generally, liberalism as a political philosophy is historically linked to Western schools of thought that hold individual rights and liberty as fundamental principles. These principles are enshrined in the constitutions of liberal democracies and closely associated with the rationale justifying human rights, namely the understanding that all human beings are free and equal. As within any broad philosophical movement, there is great variation on the means to achieve the goals of liberalism and how to

40 *Id.* at 95.

41 *Id.*

42 *Id.*

43 *Id.* at 112.

44 *Id.* at 104.

conceptualize fundamental principles such as liberty, where individuals stand in relation to the state and its institutions. With respect to the right to self-determination and secession, liberal theories tend to adopt an approach that looks at the motivation behind the desire to separate as well as to the end effect of secession. The question that is asked is whether secession will promote social progress with guarantees of liberty. It is also concerned with the protection of minority rights which otherwise would not have been possible given the original political alignment.

Offering an examination of these different theories of secession, Allen Buchanan sets forth four criteria upon which to evaluate them. A superior theory of secession must be morally progressive, but also be minimally realistic. It also must be consistent with morally acceptable principles of international law in that it should not contradict these principles when interpreted in morally progressive manner. Moreover, the theory, if adopted, must not promote behavior that would subvert principles of international law or of morality, nor should it undermine strategies for conflict resolution or hinder efforts toward other desirable outcomes. Finally, while it need not be universal in acceptance, the theory should be morally accessible to wide global audience.⁴⁵ Buchanan is concerned with meeting theory with practice in such a way as to provide international institutions a way to respond to secession in a progressive, yet morally acceptable manner.

Theories of secession can be grouped into two general categories, remedial rights theories and primary right theories. Remedial rights theories hold that groups have a general right to secede if and only if certain rights they possess have been abused by the state they live in for which secession is the last remedy.⁴⁶ Unwilling to accept any other justification for secession, these types of theories do not allow for any other rights to secession other than those that justify secession on the basis of remedial rights. According to one version of a remedial right theory which Buchanan elaborates, it permits secession for a group only where: (1) the physical survival of the group's members is in jeopardy or there are violations of other basic human

45 Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31, 40-44 (1997).

46 *Id.* at 34-35.

rights or; (2) its previously sovereign territory was unjustly appropriated by the state.⁴⁷

Primary rights theories, however, do not limit the right to secession only to remedy an injustice. Depending on whether the group shares common non-political characteristics like ethnicity or religion (ascriptive group theories) or whether members choose to be with each other voluntarily through a democratic political process (associative group theories), the right to secession is given without regard to any action of the pre-existing state where the group resides.⁴⁸ In fact, as Buchanan notes, the right to secede is given to a group even though it lives in a state that is perfectly just.⁴⁹

For Buchanan, therein lies the inherent weakness in primary right theories and one of the reasons why remedial rights theories are more palatable. Primary right theories would permit secession without regard to the political, economic, and social realities on the ground and do not appear to appreciate the potential effect political separation has on exacerbating tensions in the new and former state.⁵⁰ In practice, ethnic minorities who seek to constitute their own state to become the majority often undertake secession. A new ethnic minority is created in the new state that can lead to the unsatisfying result of the new minority being persecuted by the newly created majority. Further, secession often leaves out members of the ethnic group creating a situation where the people left behind become even a small minority in the former state and become even more susceptible to discrimination which inspired secession to begin with.⁵¹ The potential for violence resulting from a secessionist act is high. Thus, remedial rights theories of secession do not leave it up to groups the right to choose secession, but would rather constrain the right to secede in cases where there are

47 *Id.* at 37.

48 *Id.* at 38.

49 *Id.* at 40.

50 *Id.* at 45.

51 *Id.*

clear injustices that cannot be remedied other than by created a separate state for those being persecuted.

C. Communitarian Approaches

In contrast to liberal and cosmopolitan approaches geared toward universalism and individualism, communitarianism rests its focus upon the value of communities. On the whole, communitarian theories encourage pluralism and stress the importance of local cultures. Consequently, communitarian theories readily acknowledge differences in worldviews affected by local conditions. Communitarians argue that there is no one standard of justice, but that the standards should be found in the particular cultures that exist in the world. By taking such an approach, the rights they advance do not support a singular, universal approach applicable to everyone, but are rights that serve to protect differences and local conditions. These conditions such as culture can affect the development of distinctive political institutions and can affect the prioritization of rights as well as the justification of those rights, the right to self-determination and secession included. Whereas some countries and cultures champion individual rights and institutions that are committed to liberal democratic values, communitarians are readily willing to accept these distinctions without making the value judgments liberals are bound.

1. DAVID MILLER

In his exposition on the idea of nationality, Miller proposes that a national people in a particular territory possess a “good claim to be politically self-determining.”⁵² He claims that these people should have their own state that would allow them to pursue matters that are of primary concern to them. In defense of this claim, he argues that the reasons why the boundaries set by nationality should correspond with the boundaries set by statehood are twofold with another more speculative reason following these justifications. His first reason looks to the state being made up of institutions that should be able to appreciate and meet the expectations of the national people’s conception of social justice.⁵³ The second reason to favor national self-determination is that the resulting national state would serve to pro-

52 DAVID MILLER, ON NATIONALITY 81 (1995).

53 *Id.* at 83.

tect the national culture.⁵⁴ He then goes on to posit that pursuing national self-determination reflects the desire for collective autonomy which he qualifies as being speculative, but should be a strongly considered reason nonetheless because people desire to affect the world with others who share the same nationality.⁵⁵ After justifying national self-determination, Miller examines how the national state should exercise its sovereign authority if national self-determination is a regulating value. He then puts forth the resulting obligations these states have towards other national states. Finally, he deals with the difficult situation where political and national boundaries do not correspond to each other and where secession may be rationalized.

Miller offers a compelling vision of self-determination suggesting that a national state is practically necessary in order to realize the full measure and values of a national people. In his ideal case, since the community is made up of one national people, their own national state will suffice to give them control over issues which they would not have had were they to reside in a state where they were the minority group.⁵⁶ For him, the national state is the political means to achieve a robust expression of nationalism through which reciprocity of obligations can flourish. Without the state, these obligations to one another are ambiguous, but with the backing of state power these mutual obligations become concretized in terms of citizenship.

Miller also asserts that self-determination also benefits the national culture through the protection of the state. Miller believes that a common national culture is valuable to members of a national community because it not only gives them sense of belonging and a historical identity, but also offers them a supportive environment where individual choices on how to live can be made and that a state made up of members of a nation can foster and nurture this environment.⁵⁷ National self-determination and the existence of a national state are a means to protect national culture.⁵⁸ Miller asserts that “if you care about preserving your national culture, the

54 *Id.* at 85.

55 *Id.* at 88.

56 *Id.*

57 *Id.* at 85-86.

58 *Id.* at 85.

surest way is to place the means of safeguarding it in the hands of those who share it—your fellow-nationals.”⁵⁹

Miller stresses that a national state will be more responsive to the needs of the nation which is itself a community of obligation. The members of this community acknowledge the duties owed to other members of the nation to meet fundamental needs and to guard their interests. In order for these duties to be assigned and enforced, the national state can establish and regulate institutions that can dispense rights and responsibilities to the people in a manner that is acceptable to them in accordance with their conception of social justice. In this manner, social justice can be realized as a regulating principle within a national community.⁶⁰

Miller’s more speculative justification for supporting efforts for a national state is based on the notion that national self-determination is an expression of collective autonomy. He argues that human beings have an interest in shaping the world with those who share similar values and concerns, usually with their own national people.⁶¹ Thus, a state can function most effectively where there is a single national community. The goals of the national community can be realized in a political environment where the members trust each other to uphold the obligations the state puts on them.⁶² In his ideal case, since the community is made up of one national people, their own national state will suffice to give them control over issues which they would not have had were they to reside in a state where they were the minority group.

2. MICHAEL WALZER

Discounting the idea of a universal tribe coming from the common humanity of people, Walzer identifies the crucial commonality among human beings, his concept of particularism in which people are all members of particular thick cultures that they call their own.⁶³ Walzer’s reasoning for pursuing self-determination hinges on the right of people to govern themselves in accordance with their own political ideas insofar this can

59 *Id.* at 88.

60 *Id.* at 83-84.

61 *Id.*

62 *Id.* at 91.

63 MICHAEL WALZER, *THICK AND THIN* 83 (1994).

be done without harming locals who might lose out if self-determination becomes a tangible reality. Using the captive example, he explains how his conception of self-determination is justified. The captive describes a national people that has recently been incorporated into a state through conquest. The captivity of this people is wrong judged on the minimalist principle that aggression is a criminal act in international relations.⁶⁴

Along the same lines, Walzer extends his reasoning for self-determination in situations where it is evident that a cohesive group within a state faces oppression from the ruling people. He observes that these groups, or national tribes as he calls them, come from a position of fear as they are confronted with the prospect of conquest and oppression.⁶⁵ As a result, conflicts flow out of this fear as minority groups respond with violence to majoritarian injustices. A solution for the potential for violent conflict is to permit the creation of protected areas of many different kinds where these national tribes can meet their own needs.⁶⁶ In some cases, secession will be the appropriate route. Rather than see traditional alignments upheld, Walzer would prefer separation if it is demanded by a political movement that represents the popular will of the people. He declares, "Let the people go who want to go."⁶⁷

Inherent in Walzer's justification for self-determination is the understanding that there is a right to resist the erosion of a national culture. Tribes, subjected to the forces of modernity and contemporary culture, respond by building walls to protect themselves from losing the thickness of the cultures. He recognizes the right to build these walls depending on the local context of where this will happen and the constitutional structures that will be used to support them.⁶⁸

V. CONCLUSION

Since states are the sole actors in the international system imbued with legal personality to act, one is able to derive the content of the interna-

64 *Id.* at 71.

65 *Id.* at 77.

66 *Id.* at 78.

67 *Id.*

68 *Id.* at 72.

tional legal order from state action vis-à-vis other states. This perspective is consistent with the positivist strain in the interpretation of the creation and development of international law. As indicated through Article 38 of the Statute of the International Court of Justice, international law consists of international conventions and international custom. According to the positivist account, the main sources of international law reflect the consensual nature of the rules. States, by their own will, enter into treaties and undertake state practice. Thus, states recognize the legitimacy and efficacy of the rules that they themselves created. "The doctrine of positivism . . . teaches that international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to which they have not consented."⁶⁹

A positivist reading of state sovereignty looks to the rational and necessary aims of such a principle which had its root in the Peace of Westphalia (1648) ending the brutal Thirty Years War in Europe. The bargain that was reached among the various powers that took part in the conflict resulted in the recognition that each sovereign was the master of its own physical territory, and as a consequence, others sovereigns were required to heed the borders of other sovereigns.⁷⁰ Cosmopolitan, liberal, and communitarian views, as discussed above, challenge the positivistic strand of international law by not simply looking at sovereign will as the source for the justification of legitimate international rules but are concerned about what would be acceptable and just.

Unlike positivism's focus on the state, cosmopolitan thinkers are more apt to look beyond the state and focus on the rights of individuals

69 J.L. BRIERLY, *THE LAW OF NATIONS* 1 (SIR HUMPHREY WALDOCK ED., 1962).

70 A question arises as to the perspective that could be drawn from advocates of positivism on the beneficial outcome that resulted from the recognition of state sovereignty after the Peace of Westphalia. Prior to the Peace, rulers exercised personal sovereignty, that is, authority over people groups in which "sovereigns" were referred to as ruler of the Franks or King of the Goths. The common interpretation given for the creation of state sovereignty was that it was necessary to deal with the fractious religious conflicts occurring on the European continent. Through the separation of church and state and establishing sovereign states, religious conflicts would be abated. One must question whether the European powers utilized religion as a pretext and rallying point to engage in conflicts to dominate the continent.

and the universality of individual moral obligations. Pogge and Beitz accept the cosmopolitan notion that individuals are the primary units of concern where there is interaction in a global environment on the basis of an international morality that is built on the needs of individuals. The modern state is devalued to the extent that individuals are preeminent in their theories of secession. Pogge goes so far as to conceive of an alternative framework where the result of valid claims for self-determination would lead to a vertical dispersal of power in other entities below and above the state. The result would be to lessen the importance of the state in order to achieve a pluralist international scheme that protects the interests of individuals. While not offering as extreme a cosmopolitan approach as Pogge, Beitz does recognize the fundamental value of individual rights and interests and accepts its universal scope. However, he tempers his theory of secession on the basis of the state's obligation to uphold the appropriate principles of justice. A state can remain legitimate and relevant as long as it upholds social justice.

Like their cosmopolitan counterparts, liberal political philosophers accept the premise that the individual is the focus of any discussion of rights. However, they limit their universal aspirations not to the obligations individuals have to each other, but to the universal nature of individual rights regardless of boundaries created by identities shaped by culture and religion. In some liberal circles, these liberal values find their expression in the state and their constitutions. However, if a state fails to protect human rights, and abuses come about as a result, liberals would give the groups who have suffered a good claim to self-determination and potentially secession if the situation warrants. Buchanan expresses such sentiments as he argues for the superiority of remedial rights theories of secession over theories that would justify secession absent any abuse of rights. The implication is that the state has an obligation to be the guarantor of individual freedoms and liberties. The state is accorded the responsibility to ensure minorities, groups that would qualify for self-determination under other theories of secession, have access to political power to have a system responsive to their needs. Secession would only be used as a last resort as a means to protect their human rights.

In stark contrast, communitarian approaches are inclined to see secession as a means for groups to exist in political communities whose institutions would be the most responsive to their unique needs by virtue of their

shared identity. Opposed to the universalism advocated by cosmopolitan philosophies, communitarians generally find value in the particular and celebrate the diversity found in different societies and cultures. Thus, some communitarians such as Miller and Walzer would allow national groups who have a desire for self-determination to secede subject to certain conditions. They advocate for a primary right theory of secession that enables national groups to pursue statehood justifiably to protect their interests and to promote their causes in the most receptive fashion. Although Walzer would prefer groups to secede with some showing that they suffered abuses and while Miller does not advocate an absolute right to secession for every national group, a presumption in favor of secession is given where conflict is likely because of identity politics. The state serves not only the negative role as a buffer against external threats to security and cultural erosion, but the positive function in the promotion of shared values. In the current context of international relations, the national state is the primary vehicle to attain such communitarian goals.

Cosmopolitan, liberal, and communitarian conceptions of self-determination and their theories of secession bear out their different conceptions of the state and its purposes. These perspectives differ sharply in that cosmopolitan and liberal theorists would tend to limit the practice of secession only to more extreme cases of group oriented human rights abuses and communitarians view secession as an opportunity to enhance communitarian values of particularism. However, what they hold in common is that they challenge the assumptions and presuppositions of positivism in international law. Such perspectives provide more than a descriptive account of international law. While they offer different methods for approaching international legal issues, they look beyond merely sovereign will by focusing on justifications for self-determination upon alternative positions of how best to secure justice and thus, to develop a fairer set of international rules.