Human Rights, Autonomy and National Sovereignty

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This paper[1] examines the legal and ethical problems involved in reconciling two separate rights, each of which plays a fundamental role in the current philosophical debate surrounding international relations and international law: the right to national sovereignty to which many states lay claim, on the one hand[2], and the right to self-determination[3], on the other.

Refusal to grant the right of self-determination frequently leads to the violation of the human rights of nationally, ethnically, racially or religiously defined population groups. In any justification of or claim to national sovereignty, and also in the claim of national minorities to autonomy, the concept of nationhood plays a decisive role. In part I of this paper, I will therefore be attempting to shed light on the history and the terminological content of the concept of nationhood, with a view to making use, in part II, of the knowledge thus gained in the search for a solution to the outlined legal and ethical problem. In this debate, I distinguish between the nation and the nation-state. It is possible to conceive nations which have no state, as well as states which serve no nation (such as the Vatican) or serve several nations at once (such as the former Soviet Union) as a political forum.

In resolving the question of whether nation-state sovereignty takes priority over regional autonomy or vice versa, we will also be addressing the question of the importance attributable to human rights, taken to mean individual rights, as against the collective rights of both nation-state sovereignty and regional autonomy (Conclusion, part III).

I. Europe on the Threshold of Post-Nationalism

There are many highly topical reasons why we should consider the advantages and the contradictions of the concept of the nation-state with a view to forming a judgement of the legitimacy of claims which states and peoples associate with the perception that they form a nation. Allow me to remind you of the claim repeatedly asserted by China to national sovereignty and to non-interference in its internal affairs whenever international criticism is leveled against its human rights violations. However, it is not only existing states that refer to their right of self-determination in order to demand the rights of nationhood. Ethnic minorities within existing states also frequently define themselves as nations and demand the right of national self-determination. One example of topical relevance is the Albanian majority in Kosovo. Although the question of the legitimacy of such claims on the part of the international community may be said to be a highly pressing issue, public discussion is clouded by great uncertainty as to what actually constitutes a nation, and the degree of importance which should be attached to the claims asserted by nations, perhaps justifiably, as against other legitimate demands such as the observance of human rights or questions of security.

International law provides no uniform or binding answers to all of these questions. Fundamentally, the principle of non-interference applies. However, the question of what constitutes interference and what does not is hotly debated. Does the condemnation of human rights violations alone constitute interference, or does this apply only once economic sanctions or even military intervention have been initiated? The convention on the prevention of and the punishment for genocide prohibits the "total or partial" destruction of national, ethnic, racial or religious groups (Art. II). However, the implementation of this standard is dependent on the cooperation of the state in which the genocide takes place (Art. VI). In the likely event that the affected state itself is the offending party, this would give the presumed culprit the right to decide whether proceedings are initiated against
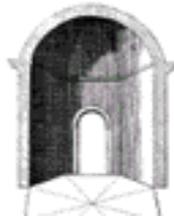
it or not. This means that the convention on the prevention of genocide would not be applied in the cases in which it is needed, and in the cases where it could be applied, it is presumably not needed.

Where positive law or the relevant legal practice remains unclear, or in the absence of the political will to achieve effective solutions, it is up to the critical public to lay down political terms of reference for those bodies responsible for the making and implementation of international law — the governments of the respective states. Political theory and legal philosophy can contribute towards structuring the discussion by clarifying fundamental concepts, exposing false alternatives and mediating between two seemingly opposed positions. It is as just such a contribution that I envisage my work in the field of political theory and legal philosophy. In concrete terms, in what follows it is my intention to work at clarifying the underlying concept which is central to the considerations outlined above — the concept of nationhood.

The concept of nationhood is taken as the foundation for the arguments in favour of defending the right of non-interference in existing states, and also for the arguments of the so-called national minorities who demand their own state and so stand in opposition to the sovereignty claims of existing central powers. In its democratic guise, the concept of nationhood also evokes the idea of the responsibility the government of a country holds towards its people, respect for its human rights, and in particular its right to political self-determination.

Before I turn to the question of how to legitimately define just what constitutes a nation, allow me to draw the attention of the reader to a circumstance which can be easily overlooked unless pointed out — the division of the world into individual sovereign nation-states, which we take for granted in the present day and age, is from a historical perspective a very recent phenomenon and accordingly not in any way a self-evident truth. Only a few centuries ago, Europe was divided not into national public territories but into privately owned principalities. Nations could disintegrate or new sovereign territories be incorporated as a result of inherited titles or strategic marriages. It is only in the modern age that the idea of a nation-state under a king who was responsible for its integrity slowly began to dominate.

The Peace of Westphalia in 1648 is often considered the point from which the nation-state was considered the primary political unit of reference rather than the royal houses and principalities. In Germany, this development was delayed somewhat by adherence to the concept of the Holy Roman Empire. As a result, there is a tendency still today in Germany to lean towards a romantic rather than a political concept of the nation-state. For the older nations of Europe, France and England for instance, it was rather the departure from the universal Christian concept of empire which placed the political character of the nation-state in the foreground. The concept of religion, represented by Pope and Emperor, played an ever more subordinate role in the legitimation of sovereignty in France and England. Instead, the church was subordinated to the nation. National churches emerged which were able to supply kings with their legitimation to rule independently of the Pope. The subordination of religion to politics became clearly evident during the Thirty Years' War, when France — although Catholic — entered into a coalition with Protestant powers in order to secure its autonomy from the dominant power of the Hapsburg dynasty.

The political character of the emerging nations, defined by the decision-making power of a state no longer subject to any higher authority, becomes evident in its relationship with the Christian empire and in terms of national foreign policy, but not yet internally within the nations. Sovereignty is held initially only by the nation-states and not by their populations. For them, the emerging nations had to make good the losses sustained along with the religious concept of empire. For their people, they were more than simply a Machiavellian instrument for guaranteeing legal peace over a limited territory. At the same time they were a meaningful authority and purpose to which individuals could subordinate themselves.

Attention is frequently drawn to characteristics such as language, culture, descent or historical determination said to be common to all elements of the population in order to substantiate the fusion of the concept of nation with supra-individual, meaningful concepts. In contrast to this, the concept of the voluntary joining together of a population to form a common state as expressed in the contractual concept of the enlightenment initially fades almost completely into the background. It is only with the idea of the voluntary joining together of the inhabitants of an area as the sole criterion for the identity of a nation that the concept of nationhood would be cleansed of all quasi-religious components and that the political concept, which was already expressed in the sovereignty of the nation-state, would be applied to the nation itself. Once this phase was reached, the population itself would become the actors on the political stage, and not the monarchs or the self-appointed advocates of the national interest. In the now democratic states, it would be the inhabitants whose decisions would be subject to no higher legal authority. The "L'État, c'est moi" of Louis XIV becomes "L'État, c'est nous" of the French Revolution. A population empowers itself and is bound to no higher authority with the exception of the law, which it legislates itself. From the enforced unity of the kingdoms grows what is ideally a freely elected community of citizens with equal rights. The Declaration of Human and Civil Rights of August 26, 1789 states that it is now the duty of the state to serve its citizens rather than the other way around.[4]

This brief journey into the history of what we now call the nation-state reveals that a difference can be drawn initially between two different concepts of nationhood. Firstly, the nation as a monarchy with the emphasis on the sovereignty of the monarch, and secondly the nation as a voluntary union of citizens with equal rights with the emphasis on the sovereignty and civil rights of the population. In the history of Germany, actually neither of the two terms played an instrumental role. Before the emergence of German nationalism during the Napoleonic wars of liberation, there existed neither a national monarchy nor a collective act of self-empowerment on the part of the population. Instead of this, a third concept came to dominate in Germany and later also other countries: The idea of the quasi-natural unity of a common culture and origin. This is the *romantic* concept of nationhood.

In contrast to the monarchistically or democratically defined nation, the romantic nation does not rest on an act of political will either on the part of the monarch or the population. Rather than being due to the declaration of a king or the election of a population, affiliation to the romantic nation simply happens to one. The romantic concept of nation is accordingly an almost botanical concept rather than a political one. It is based on idealizations which turn what is in truth a heterogeneous population not defined by any clear boundaries into a cohesive whole which is then required to maintain a position as a nation against other similar entities.

This is something I term the `monadic concept' of nationhood, and it is my contention that this concept can lead and indeed has led both in theory and practice to absurdities and indeed to out-and-out atrocities, and that as such it must be rejected both as unsatisfactory in theoretical terms and as irresponsible in practical ones. For the purpose of political analysis, I suggest using instead of this a concept of nationhood whose existence does not depend on quasi-religious or apparently natural supra-individual criteria but which is based on two characteristics — the aspect of self-determination and the aspect of security.

As the romantic concept of nationhood rests on quasi-naturalistic assumptions, this concept can be positively refuted by pointing out the factual situation. Nations are not what they are considered to be by the monadology of nations. The monadic view of nations is based on the typical ideal that nations — like Leibniz's monads — are simple political entities or units which cannot be further subdivided. Each has its own unmistakable identity, history and determination. The nation monads each form their own integral cosmos and are, in
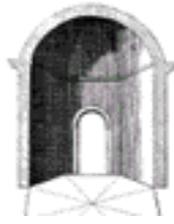
Leibniz's words `without windows'. Leibniz's monadology also encompasses the idea that a prestabilized form of harmony exists between monads. This would guarantee that nation-monads which were incapable of communicating could still exist side by side without mutually destroying each other or without fusing to form a larger entity which could threaten their individual identity.

It is evident that no prestabilized harmony exists between nations. Since the dissolution of Yugoslavia and other states or communities of states, in particular in the former Soviet Union, it has become clear that the monad concept of nationhood is misleading also in quite a different respect. Any attempt to define a nation by its linguistic, cultural or genetic characteristics is bound of necessity to exclude certain sections of the population in the region in question and so degrade them to second-class citizens with secondary rights. Ethnically, culturally or genetically homogeneous regions do not exist. Every cultural or linguistic community has its own local variants and dialects, and in turn borders onto regions in which related languages are frequently spoken. The transitions between cultures and their variants and between languages and their dialects are fluid, and any attempt to anchor the inhabitants of a region to a certain language and culture will discriminate against sections of the population or arbitrarily exclude them.

This is demonstrated by many instances in the former Yugoslavia or in the Caucasus region. In Georgia, we observe a true *reductio ad absurdum* of the monad concept of nationhood. Initially, Georgia split away from the Soviet Union with the justification of representing a nation of its own and thus enjoying unlimited sovereignty. Abchazija, Adzarija and South Ossetia are fighting for national autonomy with the same arguments. Within Abchazija, the Mingrelians are fighting for their right to remain. Czavachetia would have the same right to claim sovereignty as Abchazija, Adzarija and South Ossetia. However, Armenians also live in Czavachetia, who are fighting for autonomy for their province of Achalkalaki. Even the majority

population of Georgians is subdivided once again into Kartvelians, Mingrelians and Svans, who according to the logic of the monadology of nations could also all claim sovereignty.[5] If we follow this to its logical conclusion, in the end every village would be a state entitled to claim complete sovereignty.

The right of even the smallest communities to a certain degree of self-determination may be legitimate. However, the orientation of politics to this yardstick, to the complete neglect of the security aspect, leads almost inevitably to the use of force. The monadistic concept of nationhood is, therefore, not appropriate to today's conception of politics, which excludes the use of force as a political instrument. But the monadistic concept of nationhood is also not in keeping with modern precepts from a different point of view. In the social sciences, the monad concept is analogous to the so-called `container theory' of society.[6] According to this theory, the fields of society, of the economy and of politics coincide with the territorial borders of the nation. We speak of the national economy of English, French or German society, and in the process abstract from the diverse social interaction and the economic interdependence which exists between the nations. This does have certain uses, but is becoming increasingly questionable in view of the globalization of world markets and the parallel formation of a global civil society.[7]

In terms of political theory, too, the monadically conceived nation is still taken as the primary term of reference.[8] The nation forms the paradigmatic border between the inner sphere of law and politics in its normative sense in which peaceful conditions exist, and the potential conflict of the outer sphere in which politics is in a latent state of emergency and in which normative requirements are accordingly observed only with the proviso that its own security is not placed in jeopardy in the process.[9] The border between the peaceful, intrastate sphere and an external sphere ruled by conflict is also a grey area to the extent that nation-states join to form unions such as the EU, the OAS

or the CIS which as well as economic cooperation also cooperate in questions of external security and internal human rights policy. This means that the practice of politics is possible also between nations in the normative sense. Political theory only does partial justice to the fact that the political sphere extends beyond the boundaries of the nation-state.

In the globalization age, the monadic concept of nationhood as a paradigm of the social sciences and political philosophy no longer reflects the social, political and in particular economic realities. In view of the global interdependence of modern economies, there is an increasingly arbitrary tendency to separate off segments of the world economy and to subject these `national economies' to scrutiny. Transnationally operating corporations, some of the largest of which generate a turnover exceeding the gross national product of some individual states, are increasingly distancing themselves from the control of the nation-states.[10] This is leading to the sudden creation of new entities whose legitimation is not covered by existing political theory and which are in competition with the nation-states for formative power and competence in their previously sole domain, that of politics.

In the social sphere, too, the concept of nationhood as the primary and unique forum for social self-conception is becoming increasingly misleading. The tendency is for social self-conception processes to diverge increasingly from their previously parallel alignment with the borders of the nation-state. Non-governmental organizations whose legitimation, like that of the transnational corporations, is not covered by existing political theory, are the heralds of an emerging global civil society making social self-conception processes possible across and beyond national borders.

Existing political structures will be forced increasingly to address these realities by providing for political decision-making forums not only on the national but on the sub-national and supra-national level. Great Britain with its policy on Scotland and Northern Ireland, and Europe with the politically organizing EU appear to be pointing the

way on this front. In response to a commentary on the peace agreement in Northern Ireland, a British politician was recently heard to express words to the following effect:

> In Northern Ireland, we are dealing with two types of nationalism; the nationalism of the Protestants which is pro-British and the pan-Irish nationalism of the Catholics. The Northern Ireland peace agreement[11] does not concede to either of these two faces of nationalism. In territorial terms, Northern Ireland is to remain for the present a part of Great Britain — a concession which the Catholic Republican side wishes to see abolished. But it will be given its own parliament and government as well as the right to decide, with a simple majority of votes cast by the population of Northern Ireland, in favour of union with the Republic of Ireland — a concession which the Unionist side wishes to see abolished'. The politician closed with the remark that we were poised on the threshold of a post-nationalistic Europe.

What Europe is turning away from, according to this politician, is the customary conception that a certain geographical territory must of necessity coincide with the boundaries of a political and, where possible, also an economic and cultural sphere. Territorial union with Great Britain was, for pro-British nationalists, an argument for assuming that Northern Ireland must also form a direct union with Great Britain in the political domain. On the other side of the fence, geographical and cultural union with the Republic of Ireland is, for the pan-Irish nationalists, an argument why Northern Ireland must form a political union with the Republic of Ireland. Both forms of nationalism are based on the same precept which has been a characteristic factor in Europe since the Peace of Westphalia — the idea of the state as the union of a territorial,[12] legislative and political[13] territory and of the concept of the individual state as the fundamental parameter for political, economic and social consideration. It now appears as though the Northern Ireland agreement has broken this mould. In territorial terms, Northern Ireland will initially

continue to form a unit with Great Britain after execution of the Agreement, while in geographical, economic and also political terms, it will be closely tied by a joint ministerial council to the Republic of Ireland.

Fig. 1
(Key)
Oireachtas
Irish Parliament
Northern Ireland Assembly
North / South Ministerial Council
Westminster Parliament
Scottish Parliament
Wales Assembly
Scotland
Wales
Great Britain
Republic of Ireland
Northern Ireland
United Kingdom

What is remarkable about the Belfast Agreement is not only the complex structure of overlapping sovereignty (cf. Fig. 1), which would have been inconceivable according to the classic monadic concept of nationhood, but also the orientation to the enlightenment concept of free agreement of equal-ranking citizens and the avoidance of any romantic contemplation of language, culture or derivation. I quote here from the Belfast Agreement, dated April 10, 1998:

1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:

(i) recognize the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognize that it is for the people of the island of Ireland alone, by agreement between the two parts

respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and currently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland.

In view of this type of development, some tend to favour a complete departure from the concept of the nation-state. They call for a United States of Europe or even a World State.[14] Others will contend conversely that the nation-state has, throughout history, repeatedly become an instrument of emancipation and therefore for many of its members represents the first authority to which they owe loyalty. The nation-state was made an instrument of emancipation for the first time in the 17th Century, when the kings of France and England attempted to go against the universal dictates of Christian rule to create scope for political and religious plurality in Europe. It became an instrument of emancipation for the second time in the 18th century when France lent the concept of nationhood a democratic ingredient and so made room for the political self-determination of wide sectors of the population. Finally, it was used in the 20th Century as a means to achieve emancipation of the former colonies from their imperial masters.

The key emancipatory concept was always the concept of political self-determination, initially used by kings to overthrow the traces of a universal Christian empire, then by the people to depose absolutist monarchs, and finally by the colonies to free themselves of imperialistic hegemony. In each case, the concept of nation served to define a territory as a shield against external influences which were hostile to endeavours to attain autonomy. If we consider the emancipatory character of the nation-state in this instrumental sense, it becomes evident that the concept of nationhood and the idea of political self-determination are not, of necessity, interlinked. It is possible to envisage a situation in which the population's wish to attain political self-determination does not
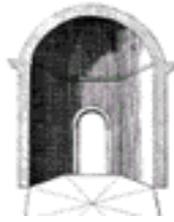
meet with opposition by any of the adjoining powers. At this moment, the tendency arises for the nation-state to lose significance as a guarantor of the security of a territory in which political self-determination is being sought.

This is a development of the type we are witnessing at present in Europe. Political self-determination does not need to be identical to the full decision-making authority held by a central power over every political question relating to a particular territory. Political self-determination is not necessarily linked to national sovereignty. Political structures are conceivable, and the British Isles are an example of this, in which national competence is transferred both upwards to a union of states and downwards to autonomous regions. Sovereignty, which according to our present understanding is the political will of a democratically organized society, is expressed on various political levels simultaneously, depending on needs. The sovereign will of the population, for example of Europe, is expressed on a regional level where regional concerns are at issue, on a national or state level where supraregional concerns are at issue and on a European level where European concerns are at stake.[15] In this way, the conventional nation-states are relieved of a two-fold burden. Their function as the guarantor of security in a territory where political self-determination should be possible is ceded to a supra-national organization, the EU, while they are able to increasingly cast off their function as the sole forum of democratic self-conception processes to autonomous regions.[16] The concept of the nation-state accordingly recedes into the background and two concerns which were originally synonymous with the concept of nationhood now become central, namely political self-determination and security.

II. *Security and Self-determination*
   Instead of Nationalism:
   Two Categories for the Assessment of
   Supposed Nationality Conflicts

I will now return to the actual theme of this paper: the question of the relationship in terms of international law between the right of the individual state to national sovereignty and the right of the individuals of a region to self-determination. The problem is always a topical one, at present due to the Kosovan conflict. Milosovic claims a right to national sovereignty for Yugoslavia and wishes this to include Kosovo, while the majority of the population of Kosovo is asserting its right to independence, or at the very least to autonomy.

I will now attempt to come to grips with the question of which of the rights customarily claimed during nationality conflicts is generally given priority, under which circumstances and with which justification. I will work not with a single — although enlightened — concept of nationhood which encompasses and indeed is made up exclusively of the aspects of security and of self-determination, but rather I will apply the categories of security and of self-determination to the problem in sequence and independently of each other.

As I was able to illustrate in part I, the two categories of security and self-determination are based on an enlightened concept of the nation-state and thus also on a well-understood claim to national autonomy or sovereignty, according to which the nation-state is not an aim unto itself but merely an instrument. If self-determination is possible in terms of security also, without total governmental independence, the endeavour to achieve total governmental sovereignty lacks foundation.

If we view the function of the sovereign state primarily as that of guaranteeing the security necessary for a political union in a world of individual states characterized by latent violence, the nation-state takes on the character of an instrument of self-defence in a situation of permanent threat. If this threat is removed, self-defence no longer has any justification. Under these conditions, no right to the permanent establishment of an instrument of self-defence can be said to exist. Therefore, under conditions of general security, there can be no right to an all-encompassing national sovereignty.

In part I, it became clear that any romantic con-

sideration of the concept of nationhood can also provide no legitimation for the call for complete governmental independence. The monadic concept of nationhood was refuted by *reductio ad absurdum*. All that remains to be discussed are calls for autonomy by nationality groups within existing individual states under the aspect of security on the one hand and self-determination on the other.

The self-determination aspect is a legal and ethical one. Security, on the other hand, does not constitute a legal or an ethical aspect. Security creates the underlying condition needed for the existence of a legal status, as it is only in a territory which is at peace that politics, as defined by a non-violent accomplishment of joint decisions, can be practised at all. It is only with politics in its nor-mative, non-Machiavellian sense that law and thus legal and ethical questions become relevant at all. If a national minority lays claim to a right of self-determination for itself, it is a logical consequence that initially the problems surrounding security must first be clarified in order to assess the degree of autonomy which can be reconciled with the justified security interests of the central power, the neighbouring states and also the newly created autonomous territory itself.

Complete rejection of autonomy can never be justified with arguments based on security consid-erations, and this applies equally to complete sover-eignty. Both extreme positions often come unstuck by virtue of the fact that the security aspect is confused with the legal, moral aspect of the right to self-determination, or else that one of the two aspects is left entirely out of consideration. States which refuse outright to grant any right of self-determination to a national minority often justify their actions by playing the security card and completely disregard the whole legal and moral issue. On the other side of the coin, national minorities often argue in favour of a perceived right to sovereignty without giving any consideration to the security interests of the central power, the neighbouring countries and often also themselves.

International law lays down no precedent or authority which could clarify, with legally binding effect, to whatw degree security restraints may impose restrictions on a call for autonomy, and how far the right of self-determination of national minorities may be permitted to go. Neither does it determine which groups of the population may claim to comprise a "people" as defined by the right of self-determination of peoples.[17] In the final reckoning, the community of states leaves it up to the population to demonstrate by force that it is a people and that it may lay claim to this right. The community of states generally legitimizes this *post festum*, as in the case of many former colonies, in Israel, by the PLO, in Croatia and many others. In this way, it creates precedents for what it should really be trying to avoid: that national majorities use violence as a means to gain their objective. In this way, the act of violence involved in the creation of a state ensures admission to the union of legitimate states as defined by international law. International law concentrates unilaterally on the security aspect, which is no wonder in view of the fact that this is a system of law laid down not by citizens but by states. The community of states remains silent on the legal and ethical question of whether the population's invocation of self-deter-mination is legitimate. However, the world of practical politics and thus each one of us is con-fronted with this question on a daily basis and we must arrive at a judgement for ourselves.

To form a fundamental judgement on the legal and ethical issue, it is essential to abstract oneself from all irrelevant aspects. These aspects include, seen purely from the legal and ethical standpoint, the security aspect as well. The question of when a population may legitimately lay claim to the right to settle its own affairs must be discussed in total abstraction from all questions of security. These apply only at a much later stage, when the question arises of how to implement what has been "seen to be right".

I am going to attempt to approach this legal and ethical question with the aid of argumentation based on contract theory of the kind customarily applied in the field of political philosophy.[18] I am basing this on a version of the theory of contract

law which has been much discussed in the field of political philosophy since the beginning of the seventies: the *theory of legitimacy* propounded by the Harvard philosopher John Rawls.[19] Rawls takes his criteria for legal and ethical assessment of the legitimacy and justice of an existing governmental and economic order not, as do certain other contract theoreticians, from a supposed natural state in which our forefathers are thought to have lived before they joined to form a political community. Instead, he bases his theory on the premise that we would call the underlying structure of a political community, however it came about, legitimate if we could hypothetically imagine that it could have come about through the union of free and equal citizens under fair conditions. Accordingly, Rawls's concept of legitimacy has the concise title "legitimacy as fairness".

Rawls calls this hypothetical natural state the "original position". The fairness of the original position is guaranteed by the fact that the citizens who, in our hypothetical scenario, are designing their future governmental order are dealing with each other behind a so-called "veil of ignorance" which conceals from them who they will be in the future political community and the social position which they currently hold. The negotiating citizens will consequently take care that their society is established so as to allow them to envisage a tolerable existence in any conceivable social position.

What I intend to do now is to take Rawls's hypothetical scenario and transform it in a way which permits us to solve the legal and ethical problem I posed at the outset — the question of when the sovereignty of existing nation-states takes priority over the demands for autonomy of national minorities, or conversely when demands for autonomy take precedence over the sovereignty of the central power. All previous contract theories, including Rawls's, are abstracted from the question of the location and territorial limits within which the hypothetical social union takes place. The boundaries of a nation-state, albeit geographically undefined, are usually tacitly assumed to create the

framework for the formation of this hypothetical society. Rawls is aware of the existence of this idealized concept, but accepts it as a necessary methodical limitation. This is legitimate if we restrict ourselves to consideration of the questions which interest Rawls. However, it is also possible to lift this restriction and consider which type of political structure the parties of an original position according to Rawls would create if they could not assume that anything resembling nation-states necessarily has to exist. This type of original position would then no longer be limited to justifying the creation and structure of a single, although not precisely determined state. In this case, the original position does not prejudice the creation of precisely one state, but it would also justify the creation of a group of political communities or a complex confederacy.

Rawls only skirts around the issues of global and international legitimacy[20] and his concept of the original position is not necessarily suitable for treatment of the associated problems.[21] The underlying idea of the original position can, however, be taken and adjusted to make it suitable for the task at hand. My suggestion is to alter the assignment which Rawls gives to the parties of the original position in such a way that these are no longer called upon to form precisely one state, but that they should order the political circumstances of a whole region, let us say Europe.[22] In my version of the original position, the negotiating parties only know that an arbitrary number of individuals are to join to form political communities in an arbitrary number of locations. They do not know what the size of these communities will be, nor in which of the communities they will themselves be living.

Finally, I would like to set up a number of theses, based on my suggested version of the original position, as to the criteria according to which the negotiating parties would presumably take decisions in the changed situation, and which answers would result to the initially posed question regarding the priority of claims to national sovereignty, regional autonomy and individual human rights. In the process, it will become clear
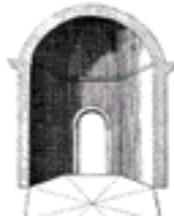
that it has now become possible to discuss the desire, mentioned in passing at the outset, to include new actors on the stage of international politics (transnational corporations and non-governmental organizations) into the field of political theory. There are six theses and a conclusion.

1st thesis: The parties know nothing of their language or culture. However, they know that they will be able to make the most effective use of their rights and liberties in the political community they aim to create if its institutions work using their language. They also know that a large number of different language communities exist in the region for which a political structure has to be created. The parties of the original position will accordingly tend towards the creation of a diverse political structure to correspond to the diversity of political communication media.[23] A homogeneous single state with only one official language and only one political culture for all the regions in question is accordingly not an acceptable option for the parties of the original position. The negotiating parties will, conversely, exercise a tendency to form as varied a political world as possible. This means that they will prefer a large number of small political communities as opposed to few larger states or even a single state.

2nd thesis: As the parties of the original position are not aware of which of the many political communities they will be located in after the veil of ignorance is lifted, they will have an interest in ensuring that all the political communities comply with a number of minimum standards. Consequently, I assume that the parties of the original position will draw up a type of human rights catalogue which will apply in all the political communities. The parties of the original position know that in order to guarantee the actual applicability of these human rights, an authority will be necessary which is in charge of their uniform interpretation and application. They would accordingly create such an authority, which effectively takes care of the necessary legal interpreta-

tion and implementation.

3rd thesis: The catalogue of human rights will include a right of liberty. This guarantees that each party to the original position will be able, after the veil is lifted, to find the political community which most appeals to him or her in terms of language or political culture.

4th thesis: The parties of the original position are aware that conflicts can arise between the individual political communities. For this reason, they will wish to avoid any type of military armament and also to set up an authority to monitor adherence to the general prohibition on armament. This authority could at the same time be given an arbitration function with the aid of which any conflicts could be resolved politically.

5th thesis: When the security of all the political communities has been taken care of in this way, as well as the security of the individuals, no matter in which of the communities they live, by guaranteeing human rights and liberties, it will then be possible to broach the question of the legitimacy of political structures lying between the level of the primary political communities and the level of the supracommunal authorities in charge of justice, arbitration and armament control — in other words the structures which correspond approximately to our present nation-states. The development of more comprehensive political structures would comply with the principle of the voluntary union of individual political communities. It may be assumed that the individual political communities would join to form pressure groups, regional and supra-regional political unions and in so doing only dispose of as many fields of competence to the higher levels as absolutely necessary. In this knowledge, the parties to the original position would determine a principle of subsidiarity for the formation of supra-regional institutions.

6th thesis: As regards the integration of transnational corporations as new international actors into

the field of political theory, the following assumption can be proposed: the current power of the transnational corporations over the existing nation-states is based in the main on the fact that the latter are not united, thus allowing the *global players* to play the individual states off against each other. This is a hazard which the negotiating partners would presumably confront in the original position which I have adapted by setting up a regional authority to permit a concerted policy on the part of all political communities in their dealings with the transnational corporations, thus ensuring that these would not be able to withdraw from their obligations to the communities by profiting from the social and educational institutions without creating a fair balance through tax payments.

III. *Conclusion*

The conceptual experiment shows that, from the legal and ethical viewpoint, the preservation of human rights has precedence over the right to political self-determination. The parties in the original position I have described would reject any form of political community which is not capable of guaranteeing their human rights and basic liberties.

To assess the legal and ethical question relating to the importance of regional demands for autonomy as against central claims to sovereignty, it follows that subject to general security from the military point of view and given the maintenance of human rights, in general local and regional autonomy takes precedence over national sovereignty. National sovereignty would consequently have to justify its existence by proving that it is conceivable for the nation in question to have been created from the voluntary union of local and regional autonomous communities.
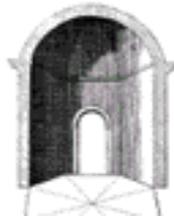
Literature

BECK, U. (1997) *Was ist Globalisierung?* Frankfurt am Main.

CHETERIAN, V. (1998) `Georgien und seine vielen Abchasien' in *Le Monde Diplomatique / Die Tageszeitung* (December), p. 8-9.

DUSCHE, M. (1998) Book Review of Kymlicka (1997) in *Ethical Perspectives* 5(1998)3, p. 227-229.

DUSCHE, M. (1999) *Der Philosoph als Mediator. Versuch einer Rekonstruktion von Rawls Gerechtigkeit als Fairneß im globalen Kontext* (forthcoming).

GERHARDT, V. (1998) `Zur historischen Bedeutung des Westfälischen Friedens — Zwölf Thesen' in Klaus BUßMANN & Heinz SCHILLING (ed.) *1648 Krieg und Frieden in Europa*, Textband I: *Politik, Religion, Recht und Gesellschaft*. Münster — Osnabrück, p. 485-489.

HORN, C. (1996) `Philosophische Argumente für einen Weldstaat' in *Allgemeine Zeitschrift für Philosophie* 21(1996)3, p. 229-251.

KYMLICKA, W. (1997) *States, Nations and Cultures* (Spinoza Lectures, October 1995, University of Amsterdam). Assen.

MARTIN, H.-P. & H. SCHUMANN (1996) *Die Globalisierungsfalle. Angriff auf Demokratie und Wohlstand*. Reinbek.

MÜNCH, l. v. (1982) (2nd edition) *Völkerrecht*, Berlin.

RAMONET, I. (1997) `Globalitäre Regime' in *Le Monde Diplomatique / Die Tageszeitung* (January), p. 1.

RAWLS, J. (1975) *Eine Theorie der Gerechtigkeit*, Frankfurt am Main.

RAWLS, J. (1993) `The Law of Peoples'. Stephen SHUTE & Susan HURLY (Ed.) *On Human Rights* (The Oxford Amnesty Lectures). New York, p. 41-82; Originally in *Critical Inquiry* 20(1993), p. 36-68.

RAWLS, J. (1995) `Fünfzig Jahre nach Hiroshima' in *Lettres Internationales* 30(1995), p. 104-105.

SMITH, A.D. (1979) *Nationalism in the Twentieth Century*. Oxford.

STEIGER, H. (1998) `Konkreter Friede und allgemeine Ordnung. — Zur rechtlichten Bedeutung der Verträge vom 24. Oktober 1648' in Klaus Bußmann & Heinz Schilling (Ed.), *1648 Krieg und Frieden in Europa, Textband I: Politik, Religion, Recht und Gesellschaft*. Münster — Osnabrück, p. 437-446.

Notes

1. This article is derived from a lecture given on January 27, 1999 at the German-American Institute in Heidelberg within the framework of a lecture series organized by the European Institute for International Affairs in cooperation with the Heinrich Böll Foundation. I would like to take this opportunity to express my heartfelt thanks to the organizers, in particular Ulrich Arnswald and Jens Kertscher.

2. Cf. United Nations Charter Section I, Art. 1 (2), Art. 2 (1, 4, 7).

3. Cf. United Nations Charter Section I, Art. 1 (2); General Declaration of Human Rights, Art. 21 (3); International Pact on Civil and Political Rights, Part I, Art. 1 (1) & Part VI, Art. 50.

4. Cf. Art II of the Declaration of Human and Civil Rights of August 26, 1789.

5. Cf. Cheterian (1998).

6. Cf. Beck (1997), p. 46, who in turn refers to Smith (1979), p. 191.

7. Cf. Martin & Schumann 1996; Beck 1997.

8. Rawls's legitimacy theory, for instance, is based on a methodological nationalism. cf. Rawls (1975), p. 24.

9. My differentiation between `minimally acceptable practice' (MAP) and no longer acceptable practice. Cf. Dusche (1999).

10. "The turnover of General Motors is higher than the GNP of Denmark, Ford's turnover is higher than the GNP of South Africa, and Toyota's turnover surpasses the GNP of Norway." Ramonet (1997), p. 1.

11. Cf. The Belfast Peace Agreement of April 10, 1998. Text on the Internet at www.irish-times.com/special/peace/agreement/agreement.html.

12. "Contractual capacity is now finally only bestowed on legally organized, independent forces or rulers with their own jurisdiction, not to subordinate bodies or private persons [members of royal families without right of jurisdiction over a territory]" Steiger (1998), p. 442.
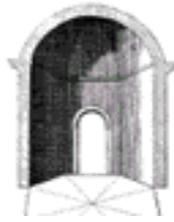
13. "In the negotiations [on the Peace of Westphalia], a new concept of statehood is expressed. The conditions for participation are no longer bound to territorial representation, but to the legal form of the political status" Gerhardt (1998) p. 487.

14. According to Horn (1996).

15. *Quod omnes tangit ab omnibus debet approbari.*

16. This also allows for a transnational concept of regions: overlapping areas such as Catalonia or the Basque country in Spain and France.

17. Cf. The International Pact on Civil and Political Rights, Part I, Art. 1 (1) & Part VI, Art 50.

18. Large elements of this argumentation are laid down in my discourse in Dusche 1999.

19. cf. Rawls (1975).

20. cf. Rawls (1975) p. 415f.

21. cf. Dusche (1999), Part V, Art. 16.

22. Subject to the existence of subjective conditions for the application of legitimacy. cf. Dusche (1999), Part IV, Art. 13.

23. Seen superficially, this would appear to be a leftover from the monadology of nations — however, this is incorrect, as here we are dealing not with sovereignty but with autonomy. The autonomous region is a voluntary union of citizens with equal rights based on adherence to human rights (thesis 2) and liberality between the communities (thesis 3) and not an enforced union like the monadic nation. Language, not as a characteristic of a monad, but as a medium of political self-conception in a political community, holds a special position among all the cultural characteristics, which for a long time was not sufficiently appreciated. An exception to this is provided by Kymlicka (1997).