FOR THEY HAVE SOWN NON-DOMINATION… TOWARDS A REPUBLICAN ACCOUNT OF SELF-DETERMINATION

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The general objective of this article is to reconstruct the principle of self-determination from a republican perspective. Based on a definition of freedom as non-domination, this republican conception offers a consistent reconstruction of the International Court of Justice (ICJ) approach, including the 2019 Chagos *Opinion. It also explains the different functions fulfilled by self-determination in international law: a structuring function and an aspirational one. These functions are linked to different bodies of international law relating to self-determination, mainly the law of states and human rights law. In addition to this descriptive dimension, I claim that the republican conception is able to lay down a promising path for rethinking the links with the international regimes of secession and minority protection. Overall, the article proposes a renewed interpretation of self-determination which is able to make sense of this key principle of international law beyond the* Chagos *Opinion and its focus on decolonization.*

Keywords: self-determination, UN Charter, political philosophy, international law theory, republicanism

I. INTRODUCTION

The self-determination of peoples is a topic frequently addressed in newspaper headlines. The armed struggles in Crimea, the looming crisis in Taiwan, the Kosovo conflict or the colonial heritage in Mauritius are examples which remind us that issues of self-determination have been, and still are, at the core of many major conflicts.[1] In the aftermath of the Advisory opinion on *Chagos* by the International Court of Justice (ICJ), interpreting self-determination continues to raise many legal and political

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1 For a historical overview, Jörg Fisch, *Das Selbstbestimmungsrecht Der Völker: Die Domestizierung Einer Illusion* (München: C.H. Beck, 2010).

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questions.[2] The stakes remain very high, as already made clear by the *Kosovo* Opinion.[3] Overall, as put by Fernando Tesòn, 'no other area of international law is more indeterminate, incoherent and unprincipled than the law of self-determination'.[4] In taking up the challenge posed by this diagnosis, the objective of this article is to propose a reconstruction of the principle of self-determination from a broader republican perspective. This reconstruction is intended to fulfil a double objective: to account for the current interpretation by the ICJ, and to highlight further potential developments of self-determination as an international legal norm.

The contributions of this article are three-fold, each of them corresponding to the following sections. First, it presents a methodological argument in the form of a reflective equilibrium, which brings together insights from international law and political theory. In this respect, the article represents a timely example of the advantages of more explicitly connecting these two disciplines, their conceptual tools and their epistemic communities.[5]

Second, against the background of this methodological proposition, this article gathers the relevant case law by the ICJ and the most influential interpretations given thereof by legal scholars. It then interprets this legal material from a republican perspective in which self-determination is understood as non-domination. This perspective is based upon the works by political philosopher Philip Pettit. I will show how his approach might be

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2 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, [2019] I.C.J. Reports. [hereafter: *Chagos* Opinion]. See Thomas Burri, 'Two Points for the International Court of Justice in Chagos: Take the Case, All of It – It Is a Human Rights Case', *Questions of International Law* 55 (2019), 93-105; Jan Klabbers, 'Shrinking Self-Determination: The Chagos Opinion of the International Court of Justice', *ESIL Reflections,* 8/2 (2019), 1-9.

3 *On the accordance with international law of the unilateral declaration of independence in respect of Kosovo*, *Advisory Opinion*, [2010] I.C.J. Reports, § 80. [hereafter: *Kosovo* opinion]. On the context of Crimea, Brad R. Roth, 'The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention', *German Law Journal,* 16/3 (2015), 384-415.

4 Fernando R. Tesoń (ed.), *The Theory of Self-Determination* (Cambridge: Cambridge University Press, 2016) 1.

5 For the broader theoretical framework at stake here, Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 1-33.

put into dialogue with the approach proposed by political philosopher Iris Marion Young in her work on a relational account of self-determination. I argue that a republican conception is able to address the various situations in which claims to self-determination arise and to establish a relational and political definition of which groups are to count as "peoples". More fundamentally, it also provides a normative framework for the simultaneously structuring and aspirational functions of self-determination in international law.

Third, this republican conception of self-determination is capable of providing guidance in interpreting related challenges in international law, most importantly on secession and minority protection. I will show below that different types of domination might in general justify different mechanisms to secure self-determination. The republican conception outlines how different incentives might transform conflict situations regarding claims to self-determination into institutionalized disagreements.

Overall, this article contributes to the rich literature on self-determination in international law by trying to meet the challenge formulated by Robert MacCorquodale almost twenty years ago: to develop a coherent legal framework for self-determination, firmly grounded within a clear conceptual and normative framework.[6] In comparison to exclusively philosophical accounts of self-determination, the article takes the law of self-determination seriously and engages with it.[7] In doing so, it does not ignore the normative ambition to prescribe how current legal interpretations should be changed in order to better fulfil the ideal of self-determination as non-domination.[8]

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6 Robert Mccorquodale, 'Self-Determination: A Human Rights Approach', *International and Comparative Law Quarterly,* 43/4 (1994) 857-85, 857.

7 For a purely philosophical account, e.g. Daniel Philpott, 'In Defense of Self-Determination', *Ethics,* 105 (1995), 352-85. Ohlin seems to clearly distinguish between positive law and its foundations in form of natural and moral rights. Jens David Ohlin, 'The Right to Exist and the Right to Resist', in Fernando R. Tesoń (ed.), *The Theory of Self-Determination* (Cambridge: Cambridge University Press, 2016) 70-93, 71-72.

8 For a similar ambition to link legal analysis and political theory on the issue of self-determination, James Summers, *Peoples and International Law* (The Hague:

II. METHODOLOGY

The methodological approach I would like to present takes the form of an instrument for integrating tools and concepts from both public international law and political theory in a reflective movement.[9] This instrument is broadly inspired by the 'reflective equilibrium' famously coined by political philosopher John Rawls.[10] This instrument aims at describing a process of normative exchanges. A new point of 'equilibrium' is reached when a first state of reflections has been challenged and improved by integrating legal and philosophical elements.[11]

This concept of reflective equilibrium is used in contrast to a top-down characterisation of the relationship between law and political theory.[12] This equilibrium better crystalizes the mutual and reflective process of normative interactions.[13] The reflexivity comes from the back-and-forth movement between an initial definition of specific values (such as freedom), the current interpretation of the relevant norms by the ICJ, the normative reconstruction of this interpretation (the republican reading of self-

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Martinus Nijhoff, 2013). See also Hurst Hannum, 'Rethinking Self-Determination', *Virginia journal of international law,* 34/1 (1993) 1-59.

9 I have used a first version of this tool in the context of justice issues in international trade law. Johan Rochel, 'Intellectual Property and Its Foundations: Using Art. 7 and 8 to Address the Legitimacy of the TRIPS', *The Journal of World Intellectual Property* 23/1 (2019)

10 For the original formulation, John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971) 18-22 and 46-53.

11 As put by Daniels, 'a reflective equilibrium is the end-point of a deliberative process in which we reflect on and revise our beliefs about an area of inquiry, moral or non-moral' See Norman Daniels, 'Reflective Equilibrium', *Stanford Encyclopedia of Philosophy* (2011).

12 For the use of bottom-up/top-down, see Kalypso Nicolaidis and Justine Lacroix, 'Order and Justice Beyond the Nation-State: Europe's Competing Paradigms', *Order and Justice in International Relations,* 1 (2003) 125-55, 128; Samantha Besson, 'The European Union and Human Rights: Towards a Post-National Human Rights Institution?', *Human Rights Law Review,* 6/2 (2006) 323-60, 328.

13 This on-going process could be said to share important commonalities with the reflective equilibrium. See Daniels (n 11). See also the original formulation in Rawls (n 10) 18-22 and 46-53.

determination) and back again to judicial practice to highlight potential developments in the way self-determination could be interpreted.

For the sake of clarity, three elements of this methodological approach must be explained: the object of the reflective equilibrium, the underlying conception of interpretation, and the place which the republican approach takes in the reflective process.

First, this instrument is especially interesting for the sake of interpreting a specific object, what we could call legal values and principles. What makes these norms specific is not so much their semantic denomination, but rather their nature and their function within a specific legal regime. As to their nature, these norms represent general and foundational legal norms.[14] As general legal norms, they are gradually opposed to more specific legal norms.[15] As explained by Joseph Raz in dealing with principles, these special norms need to be individuated through interpretation and reasoning.[16] In this respect, we will see below how the principle of self-determination is instantiated by the ICJ in specific circumstances. Furthermore, as foundational legal norms, they grasp and express the political and moral values upon which a specific regime is founded.[17] This view explains why legal values and principles represent challenging opportunities and, at the same time, good resources for an exercise of justification.[18] As we will see,

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[14] For this position, Roberto Guastini, 'Les Principes De Droit En Tant Que Source De Perplexité Théorique', in Sylvie Caudal-Sizaret (ed.), *Les Principes En Droit* (Paris: Economica, 2008) 113-26; Samantha Besson, 'General Principles in International Law - Whose Principles?', in Samantha Besson, Pascal Pichonnaz, and Marie-Louise Gächter-Alge (eds.), *Les Principes En Droit Européen - Principles in European Law* (Genève: Schulthess, 2011) 19-65.

[15] This is opposed to the influential Dworkinian position according to which the distinction is qualitative, not only gradual. In a jusnaturalist tradition, the importance of principles is addressed by Judge Cançado Trindade in his Separate opinion to *Chagos* (n 2) §288 ff.

[16] Joseph Raz, 'Legal Principles and the Limits of Law', *The Yale Law Journal,* 81/5 (1972) 823-54, 838.

[17] Besson (n 14) 26-28. This echoes the proposal formulated by Molinier to refer to the general principles as 'principes fondateurs.' Joël Molinier, *Les Principes Fondateurs De L'union Européenne* (Droit Et Justice; Paris: PUF, 2005).

[18] This point seems to be shared by Tomuschat when he writes that political sciences have contributed to the understanding of the legitimacy of self-

self-determination, as a foundational norm, represents such an opportunity for the UN regime and for public international law in general.

Second, the main strength of the proposed methodology is its ability to provide support to the interpretation of these specific legal norms. From a jurisprudential point of view, the idea is to transform what could be described as a fuzzy norm into a *locus* where political theory can contribute to clarity and consistency. As noted by Samantha Besson with respect to human rights law, the idea is to 'theorise the law in order to identify its immanent morality and hence the immanent critique within the law as a normative practice'.[19] Concepts and arguments developed by political theory are interesting resources to draw upon as part of this legal interpretation.

This approach is connected to a growing interest in the theoretical dimension of the process of interpretation in international law.[20] As noted by Peat and Windsor, it is essential to be as explicit as possible with regards to the presuppositions one holds when it comes to interpreting legal norms.[21] Without engaging in depth with this issue, it can be stated that the methodology defended here relies upon a constructive understanding of interpretation.[22] This point might be illustrated in drawing upon Marmor's example of the 'hypothetical speaker'.[23] It might be useful to refer to the construction of meaning through interpretation from the perspective of a

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determination and secession. Christian Tomuschat, 'Secession and Self-Determination', in Marcelo Gustavo Kohen (ed.), *Secession : International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 25.

19 Samantha Besson, 'The Law in Human Rights Theory', *Zeitschrift für Menschenrechte – Journal for Human Rights,* 7 (2013) 120-50, 126.

20 For instance, Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford: Oxford University Press, 2015).

21 Daniel Peat and Matthew Windsor, 'Playing the Game of Interpretation on Meaning and Metaphor in International Law', in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds.), *Interpretation in International Law* (Oxford: Oxford University Press, 2015) 3-33, 9.

22 The approach proposed here shares strong commonalities with James' constructivist political theory of global trade. Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford: Oxford University Press, 2013) 15 ff.

23 Andrei Marmor, *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press, 1995) 3-28.

hypothetical speaker whose identity should be specified (e.g. states, the international community or individuals in international law).

In accordance with the type of hypothetical speaker that one adopts to construct meaning, specific normative presuppositions are infused into the process of interpretation. It might, for instance, be argued that a specific interpretation of self-determination is proposed from the perspective of an impartial hypothetical speaker endorsing broadly liberal values, such as equality and freedom; meanwhile, a different speaker defending state sovereignty at any cost would come to a diverging interpretation. The idea of the 'speaker' is used as conceptual shorthand, to make the ultimate reliance of the interpreter and their interpretation – i.e. the construction of meaning – upon specific normative presuppositions tangible.[24] In that sense, the present contribution stems from the perspective of a republican speaker looking at the legal norm of self-determination. In making the perspective of this speaker explicit, I will draw upon resources coined by political theorists, which will be used in the context of the legal interpretation of self-determination.[25]

Assuming that interpretation is especially demanding for legal values and principles, different adjudicating bodies might be considered. For the sake of this paper, I will focus on the ICJ case law on self-determination, while taking into account interplays with political bodies such as the United Nations General Assembly (UN-GA). I specifically focus on the ICJ because it plays a key role with respect to the authority of public international law.[26] However, two caveats are important. First, this focus is by no means exclusive. A similar methodology might be applied to national case law referring to self-determination. Second, a focus on the ICJ does

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[24] For instance, see the distinction between originalists and evolutionarists in the context of the WTO, Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation', in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2012) 445-74, 452-54.

[25] On the use of such resources as part of a legal argument, Jeremy Waldron, 'Dignity, Rank, and Rights', *The Tanner Lecture on Human Values,* (2009) 209-53, 209-10.

[26] For the jurisprudential background of the claim, Joseph Raz, 'Why Interpret?', *Ratio Juris,* 9/4 (1996) 349-63, 357.

not imply a single, unitary approach to self-determination. Though I shall focus on the main interpretations adopted by the ICJ, this should not negate the richness and diversity of perspectives defended in converging or diverging opinions.[27]

Third, the place of the republican reading within the reflective equilibrium shall be articulated. Republicanism is but one possibility for giving meaning to the interpretation chosen by the ICJ. Freeman proposed a useful classification of six different ways to justify self-determination.[28] Assuming this classification, the republican approach defended here is a combination of the 'liberal' and 'democratic' positions. It does give fundamental importance to an individual claim to freedom defined as non-domination, and integrates it into a non-dominating institutional setting in which democratic credentials are essential.

But more importantly than claims regarding labels, the methodology I adopt here does not require a claim that republicanism is the "best" interpretative approach. Overall, I shift the focus from a putative "best" interpretation to a plausible and normatively fruitful interpretation. "Plausible" is linked to the capacity of the approach to descriptively apprehend the interpretation given by the ICJ. "Fruitful" should be read together with Buchanan's call for 'moral progressivity'. In his words, the successful implementation of a prescriptive theory shall be synonymous with a 'significant moral improvement over the status quo'.[29] The republican approach shall be assessed in light of its capacity to formulate and justify

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[27] The *Chagos* Opinion (n 2) is a good example of this danger to 'flatten' self-determination when only referring to the general decisions taken. If the general decision of this case is clear and supported by an almost unanimity, the diverging and concurring opinions address several important points, such as the importance given to GA-decisions (Judges Trindade and Robinson) or the idea that the Court has not gone far enough in declaring self-determination in decolonization context *jus cogens* (Judges Sebuntinde and Trindade).

[28] Michael Freeman, 'The Right to Self-Determination in International Politics: Six Theories in Search of a Policy', *Review of International Studies,* 25/3 (1999) 355-70.

[29] Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) 63.

proposals for a renewed interpretation of a specific legal norm.[30] Following Sangiovanni, these two elements should be assessed *a posteriori*, i.e. on the basis of the investigation as a whole.[31] I shall come back to these two requirements in the conclusion of this piece.

III. RECONSTRUCTING THE ICJ'S APPROACH TO SELF-DETERMINATION

Self-determination is one of the key principles of the UN Charter and the international legal order.[32] In its latest Opinion on *Chagos*, the ICJ confirmed that 'respect for the principle of equal rights and self-determination of peoples is one of the purposes of the United Nations'.[33]

According to the reflective equilibrium approach outlined above, I start by providing a working definition of what republicanism as a conception of freedom is about. This working definition shall be used as a resource to explain how the ICJ's interpretation of self-determination might be viewed as republican.

1. Working definition of non-domination

Within the scope of this piece, I will use the term 'domination' with reference to Pettit's seminal approach. An individual is dominated by another individual or entity when the latter has the capacity to interfere on an arbitrary basis with certain important choices that the individual is in a position to make. To "interfere with" means worsening the situation of an individual by affecting his or her ability to consider choices independently,

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30 For this general theoretical approach, see Ibid 22 ff; S. Besson, 'Institutionalizing Global Demoi-Cracy', in Lukas Meyer (ed.), *Justice, Legitimacy and Public International Law* (Cambridge: Cambridge University Press, 2009) 58-91, 59.

31 Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality', *Journal of Political Philosophy,* 16/2 (2008) 137–64, 149-52.

32 The principle of self-determination is found in art 1(2) of the UN Charter. The principle of equal rights and self-determination of peoples appears as one of the measures that could strengthen universal peace. Art. 55 of the Charter also mentions self-determination. A right of self-determination for peoples is also recognized in the common art 1 of the two International Covenants (1966). For a general overview, T. Burri and D. Thürer, 'Self-Determination', *Max Planck Encyclopedia of Public International Law* (2010).

33 *Chagos* Opinion (n 2) § 146.

for example by influencing the range of options available, the expected payoffs of these options and/or the actual outcomes of these options.[34] For the present argument, three features of the general republican concept of non-domination are important.

As a first feature, republicanism focuses on the threat to freedom that arbitrary interference represents.[35] Republican theorists have focused on the requirement to promote non-arbitrary interferences, that is, interferences that have to respect certain procedural requirements intended to "force" them to track the relevant interests of the interferee. By contrast, freedom can be defined as a function of the sheer number of interferences – according to the motto: "the less the better" – setting aside the modus of these interferences.[36] The potential sources of dangers for freedom are

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34 This is Pettit's classical characterization of a relationship of domination, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford Political Theory; Oxford: Clarendon Press, 1997) 52 ff. For a slightly different account, see Frank Lovett, *A General Theory of Domination and Justice* (New York: Oxford University Press, 2010). For an overview on republican theories in relation to legal problems, see Samantha Besson and José Luis Martí (eds.), *Legal Republicanism: National and International Perspectives* (Oxford: Oxford University Press, 2009) 347 p.

35 For the seminal formulation, see Pettit (n 34) 52 ff. The formulation proposed by Pettit has evolved. In 2008, he writes that 'Interference will be non-arbitrary [...] to the extent that, being checked, it is forced to track the avowed or avowal-ready interests of the interferee; and this, regardless of whether or not those interests are true or real or valid, by some independent moral criterion.' Philip Pettit, 'Republican Liberty: Three Axioms, Four Theorems', in C. Laborde and John Maynor (eds.), *Republicanism and Political Theory* (Oxford: Blackwell, 2008) 102-32, 117. For the latest book, see Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012) 26 ff.

36 Young opposes self-determination as non-domination to self-determination as 'non-interference'. For her, in the 'non-interference' model, the focus lies on avoiding any kind of interferences, not just arbitrary ones. Iris Marion Young, *Global Challenges: War, Self-Determination and Responsibility for Justice* (Cambridge: Polity Press, 2007) ch. 2. Similarly, Valentini uses the concept of 'freedom as option-availability' to grasp the core of the non-interference model. Laura Valentini, *Justice in a Globalized World: A Normative Framework* (Oxford: Oxford University Press, 2011) 157 ff.

manifold, ranging from the state, to private groups (e.g. companies) or other states and international organizations.[37]

A second feature of the republican reading concerns the robustness of the outlined concept of self-determination.[38] Most importantly, the mere capacity to interfere arbitrarily – i.e. to potentially dominate others – is normatively relevant. For domination to occur, there is no requirement for actual arbitrary interference. As in the well-known example of the benevolent dictator, the mere possibility of an arbitrary interference already represents domination.[39] Even in the total absence of interference, individuals may be considered to be dominated if they are at the mercy of decisions made by others.[40] Non-domination calls for individuals to be empowered to be free, freedom being understood as autonomy or, as Laura Valentini writes, as 'independence'.[41] This point explains why each citizen in a political community should be empowered to be free, but also why political communities need to be protected in their collective freedom. Following Cécile Laborde, the republican ideal calls for free citizens as members of a self-determined political community.[42]

A third feature concerns the particular suitability of this definition of non-domination in the context of permanent political, social, and economic

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37 Philip Pettit, 'A Republican Law of Peoples', *European Journal of Political Theory,* 9/1 (2010) 70-94.

38 For a similar focus, see Arthur Ripstein, 'Authority and Coercion', *Philosophy & Public Affairs,* 32/1 (2004), 2-35; Christian List, 'Republican Freedom and the Rule of Law', *Politics, Philosophy & Economics,* 5/2 (2006) 201-20;

39 Pettit (n 34) 73 ff, Richard Bellamy, 'Republicanism: Non Domination and the Free State', in G. Delanty and S. P. Turner (eds.), *Routledge Handbook of Contemporary Social and Political Theory* (Routledge, 2011) 130-39, 132.

40 Young (n 36) 64. Young uses the example of the Gaza Strip being put at the mercy of Israel and therefore being subjected to domination. The arbitrariness condition is fulfilled insofar as the Israeli state does not have to track the relevant interests of the Palestinians. It can be said to act in a discretionary manner.

41 Valentini (n 36) 162. As Halldenius put it, the specificity of this republican model lies in its 'modal' aspect, namely the 'claimable and secure enjoyment' of conditions of freedom. Lena Halldenius, 'Building Blocks of a Republican Cosmopolitanism', *European Journal of Political Theory,* 9/1 (2010) 12-3, 20.

42 C. Laborde, 'Republicanism and Global Justice: A Sketch', *European Journal of Political Theory,* 9/1 (2010) 48-69, 62.

interactions.[43] The importance of the secured enjoyment of freedom defined as non-domination is particularly attractive as a relational account, that is, an account that considers the multiple patterns of influences that exist among individuals and between political communities.[44] It can also acknowledge the particular risks attached to power imbalances among different actors and the sometimes diffuse risks these relations can represent in terms of (potential) arbitrary interferences. I shall come back to this point when attempting to define the type of groups considered as "peoples".

In light of this working definition, my main descriptive hypothesis is that the ICJ's approach on self-determination might be interpreted from a republican perspective. This concerns first the general approach chosen by the ICJ, second the relational account of a "people", and third the functions which self-determination fulfils in public international law.

2. Describing the ICJ's general approach to self-determination

The general approach taken by the ICJ on self-determination can be structured as a two-pillared approach. On the one hand, the Court has tried to interpret the principle of self-determination as containing the normative core of self-determination. On the other hand, drawing from this normative spring, it has identified several circumstances in which there is a substantial right to self-determination that takes the form of a customary rule. This reconstruction is inspired by the works by Antonio Cassese, Jan Klabbers and Matthew Saul.[45] This two-pillared approach is opposed to doctrinal contributions trying to isolate a single right to self-determination.[46] My

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43 This point was already taken by Young as key presupposition, Young (n 36) 65.

44 Ibid 39-58.

45 For a similar interpretation, Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Hersch Lauterpacht Memorial Lectures; Cambridge: Cambridge University Press, 1995); Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law', *Human Rights Quarterly,* 28/1 (2006) 186-206, 191; Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?', *Human Rights Law Review,* 11/4 (2011) 609-44.

46 For references and criticisms, see Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) 30.

contribution is to briefly recall the main features of this two-pillared approach and to interpret them from a republican perspective. On this basis, I will try to explain how we should make sense of the *Chagos* Opinion and its ambition to largely limit self-determination to the context of decolonization.[47]

In *Western Sahara*, the Court formulated the 'principle' of self-determination as the 'need to pay regard to the free and genuine expression of the will of the people concerned'.[48] According to Cassese, this principle can be interpreted as the normative 'essence' of self-determination.[49] This essence of self-determination must be understood as the requirement to adhere to a procedure, which sets out a standard for decisions affecting the destiny of a people.[50] This finding represents a common theme across the case law developed by the ICJ. In the *Chagos* Opinion, the Court writes that self-determination might be achieved through different options, but that it 'must be the expression of the free and genuine will of the people concerned'.[51] The Court recalls that, if Principle VI of General Assembly resolution 1541 lists three general options for realizing self-determination – emergence of a sovereign state, free association with a sovereign state, and integration into a sovereign state – Principle VII of the same resolution clearly emphasises the procedural quality required for the underlying decision.[52] This procedural quality is claimed to be the normative core of the principle of self-determination.

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47 For this reading, see Klabbers (n 2).

48 *Western Sahara, Advisory Opinion,* [1975] I.C.J. Reports, pp. 12 [hereafter: *Western Sahara* opinion], § 59. The definition is also the last sentence of the advisory opinion (§ 162). Cassese (n 45) 317-20.

49 Raič speaks of the 'raison d'être' of self-determination and defines it as 'the protection, preservation, strengthening and development of the cultural, ethnic and/or historical identity or individuality (the self) of a collectivity, that is, of a people [...]'. David Raič, *Statehood and the Law of Self-Determination* (The Hague: Kluwer Law International, 2002) 220 ff.

50 For a similar analysis, Klabbers (n 45), at 11. See also the concurring position by Burri and Thürer (n 32) § 26 ff.

51 *Chagos* Opinion (n2) § 157.

52 Ibid § 157; GA Resolution Defining the Three Options for Self-Determination, 1541 (XV), 1960, UN Doc A/RES/1541 (1961).

In addition to this principle of self-determination, the Court has recognised the specificity of certain circumstances and their implications for self-determination.[53] In specifying these implications, the Court has identified specific rights to self-determination in the form of customary rules. Since the recognition of its *erga omnes* character in *East Timor*[54], the Court has also specified the implications of a lack of respect for self-determination both for the state directly at stake, but also for all other states.[55]

The first customary rule recognises the right of colonised peoples to external self-determination, i.e. the possibility to freely choose one's international status, from independent statehood to an association with existing state or intrastate autonomy.[56] Authoritative statements on the question of self-determination for colonial people were rendered by the ICJ in two early advisory opinions (*Namibia* and *Western Sahara*[57]) and reinforced by several UN Declarations on the matter.[58]

The 2019 *Chagos* Opinion reasserts this ambition to bring colonialism to an end. The Opinion is limited to the questions raised by the UN-GA and clearly responds to these questions by reaffirming the 1960 Declaration of Independence to Colonial Countries and Peoples. On the one hand, this clear focus might be read as an attempt to limit self-determination to the colonial context.[59] On the other hand, the references to decolonization

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53 I focus on the notion of 'circumstances' in order to clarify that the development of the law of self-determination has always been very context-dependent. In a similar sense, Burri and Thürer speak of 'instances'.

54 *Case concerning East Timor, Portugal v. Australia,* [1995] *I. C. J. Reports, pp. 90*, § 29.

55 On the consequences, see e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, [2004] I. C. J. Reports 2004, pp. 136 [hereafter: *Wall* opinion], § 159.

56 GA Resolution Defining the Three Options for Self-Determination 1541 (XV), 1960, UN Doc A/RES/1541 (1961).

57 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, *Advisory Opinion*, [1971] I.C.J. Reports, pp. 16 [hereafter: *Namibia* opinion*], § 52-53. Western Sahara* opinion (n 48) § 162.

58 Most importantly, as clearly stated by the ICJ in its *Chagos* opinion, see the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Resolution 1514 (XV), 1960, UN Doc A/4684 (1961).

59 For this interpretation, see Klabbers (n 2).

might be interpreted as a sign of caution by the Court in light of potential misuses of self-determination, but not as an exclusive focus. In that sense, a short sentence in the Opinion might be interpreted as brief reference to the other circumstances of self-determination: 'The Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application.'[60] This interpretation is in line with the argument to come. The broad scope of application might refer to the further customary rules we will address below. Furthermore, the explicit reference to self-determination as a human right raises the question of the function of self-determination in international law.

The second customary rule addresses the people who live under foreign military occupation. In distinguishing this issue from the colonial question, emphasis is put on the possibility of exploitation, domination and subjugation outside of the colonial context. This provision is, however, limited to specific cases of exploitation and domination. It does not encompass economic exploitation or ideological domination, but rather covers 'those situations in which any one power *dominates* the people of *a foreign territory* by recourse to *force*'.[61] The wall constructed by Israel and addressed in the *Wall* Opinion by the ICJ might be considered an example of this form of domination by recourse to force. In its Advisory Opinion, the ICJ considered that the route of the wall chosen by Israel 'severely impedes the exercise by the Palestinian people of its right to self-determination'.[62] The Court went on to specify the legal consequences for Israel but also, because self-determination has an *erga omnes* character, for other states as well.[63]

Several commentators argue that a third customary rule highlighting a people's claim to internal self-determination should be recognised.[64] According to Cassese, this rule runs as follows: racial groups living within a sovereign state who are denied equal access to government have the right to internal self-determination, meaning that they should have equal access to

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60 *Chagos Opinion* (n 2) § 144. On this point, see Burri (n 2).

61 Original emphasis, Cassese (n 45) 99.

62 *Wall* Opinion (n 55) § 122.

63 Ibid 148 ff.

64 For complete references, Cassese (n 45) 108-26; Raič (n 49) 252.

representation within governmental institutions.[65] This customary rule takes root in the Declaration Concerning Friendly Relations and Co-Operation and in subsequent practice of states.[66] The 'saving clause' of paragraph 7 explicitly states that the government of a state should represent 'the whole people belonging to the territory without distinction of race, creed or colour'. Translated into a positive formulation, this provision stipulates that the government is representative if it grants equal access to its governmental institutions and if it does not exclude groups on the grounds of race, creed or colour.[67] This third rule should be interpreted in light of profoundly racist regimes, such as the Apartheid regime in South Africa.[68]

This third rule could be expanded by linking it to the protection of minorities, especially to recent developments regarding the rights of indigenous peoples. As explained by Anaya, indigenous people are ideal candidates for the right to internal self-determination in that they form a community that faces specific challenges within a broader legal and social context.[69] Although their right to self-determination might not amount to a right to secede, it could justify important intrastate mechanisms of

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65 Cassese (n 45) 108-26.

66 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN General Assembly 2625 (adopted 24th October 1970)

67 For references to the distinctions, Raič (n 49) 251-52.

68 Sterio proposes to consider the legal action of Georgia against Russia on the issues in South Ossetia and Abkhazia. Although the action was formally based upon the International Convention on Elimination of all Forms of Racial Discrimination (Georgia arguing that Russia has not respected its legal engagements under the Convention), the issue is relevant to self-determination in that it highlights the racial justification for a potential claim to internal self-determination. After having issued an order indicating provisional measures in 2008, the ICJ has considered in 2011 that it has no jurisdiction in this case. For this argument, Milena Sterio, *The Right to Self-Determination under International Law : "Selfistans", Secession, and the Rule of the Great Powers* (London: Routledge, 2013) 66-67.

69 See *infra*. For general overview, S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004).

autonomy or prerogatives of co-decision.[70] This interpretation can be supported by decisions made by the UN-GA, most importantly the 2007 Declaration on the Rights of Indigenous Peoples.[71] This Declaration may be seen as a landmark in the discussion on self-determination, not least because of the relevance of the UN-GA Declarations in the crystallisation of interpretation patterns and the emergence of new customary rules.[72]

3. Reconstructing the ICJ's approach

On the basis of this brief overview of the two-pillared approach, we can now turn to the hypothesis according to which the republican approach outlined above can be used to reconstruct the ICJ's general approach on self-determination. One of the important challenges is to explain the tightened approach which the Court seems to take in its *Chagos* Opinion.

To keep the same structure, let us first focus on the cases related to colonial power, in other words, the external dimension. They display the classical case of political domination. Under the assumption of the existence of a bounded community, it is relatively uncontroversial to argue that the inhabitants are dominated (in the sense described by Pettit) and have no say in the political arrangements imposed on them. Colonial powers have the capacity to interfere arbitrarily with the inhabitants of the colony. It is by no means required that the colonial power tracks the interests of the inhabitants in question and take them into account. In this first case, the procedural credentials of self-determination clearly come to light. The 'need to pay regard to the free and genuine expression of the will of the people concerned' identified by the ICJ might be interpreted as crucial procedural protection to secure non-domination. If this general protection is provided,

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70 For a similar point, Joshua Castellino, 'International Law and Self-Determination: Peoples, Minorities, and Indigenous Peoples', in Christian Walter, Antje Von Unger-Sternberg, and Kavus Abushov (eds.), *Self-Determination and Secession in International Law* (Oxford: Oxford University, 2014) 39 ff.

71 Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295, 2007, UN Doc. A/Res 61/295. It should be noted that four important states originally rejected the Declaration with respect to the issue of indigenous peoples (Australia, Canada, New Zealand and the United States).

72 For a general overview, B. Kingsbury, 'Indigenous Peoples', *Max Planck Encyclopedia of Public International Law* (2011).

we might assume that inhabitants of a given territory have the capacity to make their interests heard and to force public authorities to take them into account.

Interestingly, the *Chagos* Opinion addresses the validity of the 1965 Lancaster House Agreement in which Mauritius ceded the relevant territory to the United Kingdom. The ICJ makes it clear that the quality of consent of such an "agreement" must be scrutinized. It states that the "consent" given by the dominated to the dominating entity was not sufficient and concludes that the 'detachment was not based on the free and genuine expression of the will of the people concerned'.[73]

As a second scenario, representing the internal dimension, a sub-group within a broader community might be put under domination. Cases such as the Apartheid regime or the situation of indigenous people are examples in which an important part of the population is generally excluded from the decision-making process about common institutions or is excluded from specific questions. In the proposed republican framing, an important part of the population is here under domination. In a similar vein, the claim formulated by Kosovo – as an identified community within a broader political entity – can also be explained by this framing. Individuals from a specific territorial region, who share specific political challenges and in their majority have the political ambition to form their own state, were not respected as equal citizens and were persistently dominated.

It is important to underline that non-domination should be conceived against the background of the equal moral worth of every individual.[74] Self-determination as non-domination is not compatible with the existence of a benevolent master. Even if black people during the Apartheid were treated well (in a 'benevolent master' scenario), the domination would remain. The white minority would have the possibility to change its policy and to arbitrarily interfere with black people's interests, without being required to track relevant interests. The requirement to respect the core procedural

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73 *Chagos* Opinion (n 2) § 172.

74 Similarly, S. James Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', in Claire Chartres and Rodolfo Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhaguen: IWGIA, 2009)184-99, 188.

principle of self-determination should rather be understood as conditions for political coexistence as free and equal human beings, all living in conditions where domination is prevented from happening.

Drawing upon our previous discussion of the third customary rule, there seems to be different levels of domination at stake. Official and open racial domination (e.g. Apartheid) might be considered different to the more institutional domination exercised upon indigenous people or a minority like in the situation of Kosovo. In general, despite their differences, these cases all display – albeit to different degrees – patterns of domination, which are considered relevant for the international law on self-determination. I will show below that different types of domination might justify different mechanisms to secure self-determination.

Interestingly, the three customary rules provide different answers to the question of which kind of group counts as a "people".[75] If one focuses upon the different cases of decolonization, identification of the potential "peoples" would be relatively easy. But I have argued along the two-pillared approach that other circumstances remain relevant, thereby raising the question of whether this definition is accurate. Specifically, challenges to this definition might come from two distinct directions. On the one hand, the situation of indigenous peoples highlights the requirement to further refine the account of what the term "people" encompasses. At first glance, indigenous peoples do not appear to be fully congruent with situations of colonial domination. On the other hand, the situation of geographically more or less dispersed groups of individuals claiming self-determination also require a better definition of "people". In the next section, I shall take up this challenge in presenting a relational and political account of "people". As outlined above, it is a strength of republicanism to be able to take into account deeply entrenched economic, social, and political relations among individuals and communities. Indeed, these relations are often triggers for domination and need to be addressed as such.

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[75] For further references on this question, Saul (n 45) 620 ff ;Tomuschat (n 18) 23 ff; Tesoń (n 4) 3 ff.

4. A relational and political conception of the "people"

Addressing the question of the "people" from a republican perspective first requires the disentanglement of three distinct issues: what it means to be a group which is able to be a right-holder; what justifies the recognition of one of these groups as having a right to self-determination; and what a group with a right to self-determination might rightly claim under specific conditions. The first issue has been the object of numerous contributions on the matter of collective agency.[76] For the purpose of this article we can take an ecumenical view of these contributions. It seems sufficient to say that a group must reach a threshold of unity and identity and possess some sense of agency if it is to be potentially capable of bearing rights. There should be common ground on what is needed for a group to qualify as potential right-holders. The main issues for this contribution are the second and third questions raised, namely the justification of a specific group having a right to self-determination (among all the potential groups that qualify as right-holders), and the conditions by which this group can activate its right to self-determination (namely, to investigate under which conditions this group has this right and what this right amounts to).

In addressing the question of justification, I would like to propose a relational and political conception by drawing upon the insights developed by Young.[77] In brief, my hypothesis is that a "people" in the relevant sense for matters of self-determination is composed by individuals (a) facing common political challenges and conflicts and (b) considering themselves as members of an identifiable political group. The first criterion gives meaning to the relational account by highlighting that individuals form a group in the relevant sense if they share a common reality.[78] This common reality implies common challenges and conflicts. A similar idea is at the core of the

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[76] See e.g. the distinction proposed by Jones between the 'corporate' and the 'collective' identities of groups. Peter Jones, 'Group Rights', *Stanford Encyclopedia of Philosophy,* (2008). See also Anna Moltchanova, 'Collective Agents and Group Moral Rights', *Journal of Political Philosophy,* 17/1 (2009) 23-46.

[77] Young (n 36) 41-42.

[78] Ohlin seems to go further when he considers the criterion of 'some interrelations as a functioning society'. Ohlin (n7) 79-80.

'territorial' conception defended by Waldron.[79] This communality bears upon the relevance granted to the deep and permanent interactions between individuals and the requirement to establish common political institutions and legal mechanisms for addressing potential conflicts.

However, it could be difficult for Waldron to account for the case of a group claiming self-determination that is not territorially organized, for example a geographically dispersed minority within a state or across distinct states, such as the Kurds or the Roma. This tension could be solved by considering the geographical proximity advanced by Waldron as a specific, but not exclusive indication of the more general criterion of shared reality and challenges. Individuals living as neighbours have no choice but to face common political challenges and conflicts, but this does not prevent non-geographically concentrated groups from facing shared political challenges.

The second criterion focuses on the political identity of the group by asking whether individuals see themselves as part of a specific political group. Individuals identify with this political group by recognising that they, like the other members, face shared challenges and conflicts. I do not claim that this self-perception is purely voluntary. As rightly noted by Young in discussing the feature of 'throwness', we are 'thrown' into specific identities, sometimes against our will.[80] This self-perception as a member of a political group is often grounded in the common experience of situations of domination, for example by minorities such as the Roma who experience discrimination.

The political conception is clearly different from the 'identity' conception identified by Waldron.[81] In the identity conception, the value of self-determination relies upon an ethno-cultural homogeneous people claiming

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79 Jeremy Waldron, 'Two Conceptions of Self-Determination', in Samantha Besson and José Luis Martí (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 397-413, 411.

80 Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) 46.

81 Waldron (n 79) 401 ff. For this argument, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford Political Theory; Oxford: Clarendon Press, 1995); Avishai Margalit and Joseph Raz, 'National Self-Determination', *Journal of Philosophy,* 87/9 (1990) 439-61.

political control over its political institutions. For the political conception, common language or religion is an explanation for the common experiences of facing political challenges (such as discrimination on ground of religion) and an explanation for self-perception as members of this political group. However, these common languages or religions are not necessary conditions as such.[82]

Among all potential groups fulfilling the relational and political conception, groups in a situation of domination could activate their right to self-determination as a means of correcting an unacceptable situation. On the basis of my definition of domination, I am able to account for the various situations identified in the ICJ's approach: colonial domination, military occupation, systematic and persistent patterns of racial discrimination, but also its unsatisfactory dealing with the situation of indigenous people and other important minorities.

Situations of domination form the requirement for the right to self-determination to be activated by a specific people. This analysis might be refined using the distinction proposed in the republican tradition between the 'extent' and the 'intensity' of domination.[83] Domination is at its peak when a group of individuals is dominated in every important aspect of their life (extent), without any possibility of avoiding arbitrary interferences (intensity). As to the 'extent', the situation of indigenous peoples reflects specific areas of domination, which have been recognized by the

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[82] The political conception rather echoes the work by Moore in her political theory of territory. For Moore, three conditions are to be met in the definition of a people for matters of self-determination. A people should be in a position of being individuated (it should be recognizable as such), it should be able to exist in a certain period of time without losing its existence, and its members should be able to change over time while still remaining the same people. Margaret Moore, *A Political Theory of Territory* (Oxford Political Philosophy; Oxford: Oxford University Press, 2015) 54.

[83] Pettit (n 34) 58. The intensity of domination depends on 'how arbitrary the interference can be, how easy it is for the dominator to interfere, and how severe are the measures that can be taken.' This is what I grasped by the concept of 'modus of interaction'. By contrast, the extent of domination depends on 'which areas of a person's life are subject to arbitrary interference, and the range of their options'.

international community in the UN Declaration on the Rights of Indigenous Peoples. The 5th paragraph of the Preamble lists, inter alia, the colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests. The situation might be made worse by changing the 'intensity' of domination, for instance through the suppression of legal or administrative protection mechanisms which force the majority to track the interests of indigenous peoples. As explained above when referring to the ICJ's case law, there is no single form of self-determination, but a set of mechanisms meant to ensure non-domination.[84] There are several institutional options to make sure that people can freely determine their political status and freely pursue their economic, social and cultural development.

5. The Court's approach and functions of self-determination

The previous sections have interpreted the two-pillared approach and the definition of a "people" from a republican perspective. This section shifts the focus towards the function which self-determination fulfils in public international law.

Through the lens of the two-pillared strategy, the Court's decisions might be reconstructed to preserve the normative flexibility of the principle of self-determination. The Court first secured an important interpretative margin for itself in order to react to the evolution of self-determination. Second, the Court consequently tried to link the specification of what the principle would require to the identification of (emerging) customary rules. As a general matter, D'Argent notes that the Court is very cautious in referring to principles that it cannot directly link to customary law.[85]

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[84] Anaya (n 74) 189. This shall also allow respecting art 46 of the UN Declaration on the Rights of Indigenous Peoples.

[85] Pierre D'argent, 'Les Principes Généraux À La Cour Internationale De Justice', in Samantha Besson and P. Pichonnaz (eds.), *Les Principes En Droit Européen / Principles in European Law* (Schulthess, 2011) 107-20, 119. On the issue of self-determination, Burri and Thürer (n 32); James Crawford, 'The General Assembly, the International Court and Self Determination', in Vaughan Lowe (ed.), *Fifty*

This dual character of self-determination can be highlighted from the perspective of distinct bodies of international law and can be interpreted from a republican perspective.[86] On the one hand, self-determination as general principle of the international legal order is understood by the Court as a foundational structuring norm. Like other general norms, it represents a key element of the normative architecture of the international legal system.[87] The structuring function of self-determination is related to the classical body of the international law of states. It offers a normative rationale for the existence of states and their claims to sovereignty.[88] The procedural core of self-determination is interpreted as a set of mechanisms used by inhabitants to take back control over their political autonomy. In these cases, the function of self-determination is to re-align the legitimate bearers of popular sovereignty with the political institutions of their state. Self-determination represents the foundation of the republican 'free state'.

On the other hand, the Court has used self-determination as a norm with strong aspirational components. This was highlighted in the decolonisation cases,[89] but also in the effects that the norm exercises on the development of specific parts of international law (such as the law on indigenous people).[90] The more aspirational function can be framed by reference to the conceptual body of human rights law. Analytically, this function shifts the focus from the state-level to the claims held by a group of individuals to protect their capacity to decide autonomously upon specific issues (such as their economic, social and cultural developments).[91]

Years of the International Court of Justice - Essays in Honour of Sir Robert Jennings (Cambridge: Cambridge University Press, 1996) 586-605.

86 Anaya (n 74) 185 ff.

87 For this reflection around the function of self-determination, Waldron (n 79) 412.

88 Burri and Thürer (n 32) § 31 ff.

89 As elucidated by Burri, self-determination is 'a trigger that initiates and a catalyst that facilitates a process.' Thomas Burri, *Models of Autonomy: Case Studies of Minority Regimes in Hungary and French Polynesia* (Zürich: Schulthess, 2010) 14.

90 For the latter point, Burri and Thürer (n 32) § 30-33. See for instance the ICJ in the *Kosovo* Opinion (n 3) loudly thinking about conceiving the principle of self-determination as giving rise to a right to secede in a specific constellation (§ 82).

91 Reus-Smit has argued that the decolonisation context is the moment in which sovereignty and human rights appear as the two normative elements of a single,

Historically, this function can be found in the context of decolonisation. For instance, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples clearly links self-determination and the protection of human rights (Articles 1-2). When dealing with intrastate mechanisms of autonomy, the Court reinforced this conceptual linkage between self-determination and human rights. In this context, Burri and Thürer speak of a 'new constitutional dimension' of self-determination by focusing on intrastate mechanisms of political arbitration.[92] In the *Chagos* Opinion, the Court has recalled that the right to self-determination is a 'fundamental human right'.[93]

Two aspirational dimensions converge: the justification of self-determination as a human right and its justification of diverse institutional mechanisms securing self-determination, shifting away from a statehood-or-nothing argument. These two aspirational dimensions enable the possibility to justify claims to intrastate autonomy based upon the international law of self-determination understood as the joint exercise of human rights by a group of individuals. In the words of Allen Buchanan, claims to self-determination should be regarded as 'backups for failures to protect individual human rights [...], not as something to which groups have a right simply because they are nations or partake of a distinct culture or are distinct "peoples"'.[94] As interpreted by Anaya, they are 'rights that human beings hold and exercise collectively in relation to the bonds of community or solidarity that typify human existence'.[95]

When interpreting self-determination, the Court must reconcile these two poles. As expressed by Macklem, self-determination is always at the core of a movement that reinforces the normative foundations for the current state-based structure of international law and challenges these same

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contradictory, normative regime. Christian Reus-Smit, 'Human Rights and the Social Construction of Sovereignty', *Review of International Studies,* 27/4 (2001) 519-38.

92 Burri and Thürer (n 32) § 33 ff.

93 *Chagos* Opinion (n 2) § 144.

94 Buchanan (n 29) 405.

95 Anaya (n 74) 186.

foundations, most importantly in terms of human rights.[96] By finding a pragmatic way between these two normative poles, the Court underscores that self-determination has to be considered as an important value among other values which are anchored within international law.[97] For instance, the Court has always been very reluctant to change existing territorial demarcations, even though an important number of them were determined in the aftermath of grave injustices.[98] In the balance of sometimes conflicting principles, overall stability has systematically been deemed as crucial.[99]

The normative pressure exercised by self-determination recalls that, ideally, doctrines on sovereignty and human rights precepts, including those associated with self-determination, work in tandem to promote a stable and peaceful world. If not, self-determination as non-domination could be used as a normative device to arbitrate diverging claims. In that sense, one of the key contributions of the republican approach is to make clear that the two functions of self-determination (structuring and aspirational) should be interpreted as parts of a single conceptual framing, which sometimes justifies diverging claims, depending on the exact characterization of domination in a specific situation. We shall come back to this point in the next section.

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96 Patrick Macklem, 'Self-Determination in Three Movements', in Fernando R. Tesoń (ed.), *The Theory of Self-Determination* (Cambridge: Cambridge University Press, 2016) 94-119.

97 Waldron (n 79) 399.

98 Being arguably a proxy for the safeguard of stability and peace, the principle of territorial integrity and its colonial 'emanation,' the principle of *uti possidetis,* best display the tensions between self-determination and other fundamental objectives pursued by international law. See Giuseppe Nesi, 'Uti Possidetis Doctrine', *Max Planck Encyclopedia of Public International Law* (2011); Joshua Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial "National" Identity* (The Hague: M. Nijhoff, 2000).

99 For a similar thesis, Mccorquodale (n 6) 879 ff.

6. Criticisms: circularity and insufficiency of non-domination

In the first stage of the reflective equilibrium, the republican conception of self-determination has been shown to be useful for reconstructing the case law developed by the ICJ, addressing the definition of a "people" and accounting for the two functions of self-determination in international law (structuring and aspirational). Taken together, these three sections outline a general conception of self-determination as currently interpreted by the ICJ. They give substance to the descriptive hypothesis formulated above. They represent the first element of an answer to the challenge formulated by MacCorquodale: to develop a coherent legal framework for self-determination, firmly grounded within a clear conceptual and normative framework.

Before concluding this section and shifting to the perspectives offered by this republican conception, I shall consider two lines of criticism. The objective is not to discuss at length the various criticisms raised towards republicanism in general, but to focus on the relevant ones in the context of self-determination. The first is derived from Jacob Levy who claims that the republican argument on self-determination is circular.[100] He illustrates this danger by imagining a disputed case. In a dispute, who is to decide if the specific matter must be settled by either the people alone (falling within its prerogatives of self-government) or through negotiations? There are two difficulties here. First of all, the issue of which legitimate body is to decide upon this question is far from easy to settle. Second, even if parties can find such a legitimate body, the fact that this body has to decide whether the matter falls within the power of the people or whether it has to be discussed within the cooperative framework is in fact already relevant to the core of the dispute itself.

This important line of criticism is mainly directed towards the consideration of non-domination as a norm against which all questions could be addressed. This is not the case, as correctly highlighted by Levy when he focuses on non-domination as a jurisdictional rule. Non-domination should be considered as a political ideal, which we could refer to

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[100] Jacob T. Levy, 'Self-Determination, Non-Domination, and Federalism', *Hypatia,* 23/3 (2008) 60-78, 70 ff.

when assessing and justifying institutional mechanisms.[101] For the sake of the present argument, non-domination is one of the relevant ideals used to account for the ICJ's interpretation of self-determination. The ideal of non-domination should guide the creation of a non-dominating environment. In that sense, it inspires a specific interpretation. But it might also inspire an institutional mechanism, for instance the establishment of an independent body having the last word on potential disputes, in line with Levy's focus.

The second line of criticism can be found in Patchen Markell's account of the 'insufficiency of non-domination'.[102] According to him, non-domination alone is not sufficient to account for distinct kinds of threats and should be complemented by the notion of 'usurpation'. Contrary to Pettit, he argues that we shall not exclusively understand agency as control (and the corresponding focus on the requirement to prevent arbitrary interferences), but that we should broaden our understanding and also entail involvement (and the corresponding ambition to prevent usurpation).[103]

For my purposes, the interest of the criticism pushed by Markell is to highlight the possibility of situations in which non-arbitrary powers play an important role. These situations are normatively speaking not covered by a republican ideal exclusively focused on securing non-domination. The main reply to this criticism would be that, if such situations were to happen, my account of self-determination would allow for adding the idea of involvement and usurpation to the normative corpus of non-domination. There is *prima facie* no strict incompatibility between these values.[104]

This strategy of integration is especially clear when addressing the issue of democracy.[105] If, as claimed by Markell, Pettit's democracy is exclusively instrumental in securing conditions of non-domination – by a mix of election and contestation, forcing the state to take the relevant interests of its citizens into account – I could add an inherent value of democracy to my

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101 For this response, see Ibid 74-76.

102 Patchen Markell, 'The Insufficiency of Non-Domination', *Political Theory,* 36/1 (2008) 9-36.

103 Ibid 12.

104 This seems to be the line of reply favoured by Pettit, arguing that non-domination is 'not the only value in politics', but it 'serves a gateway role'. Pettit (n 35) 127.

105 Markell (n 103) 28 ff.

account. As formulated by the ICJ as a procedural core, self-determination would then be about the instrument of giving a people the means to decide for itself and together with the parties with which it interacts (thereby preventing domination), *and* about the inherent value of involvement by the individuals who compose a people. Although I shall not try to make the case for this more substantial value of self-determination as preventing usurpation by securing involvement, it is sufficient to note that this argument can be integrated into my conception of self-determination as non-domination. As claimed by Markell,[106] and echoing our former discussion of Levy's criticism, non-domination is not seen as an exclusive political ideal.

IV. REFORMING INTERNATIONAL LAW OF SELF-DETERMINATION

The start of this section marks a new stage for the reflective equilibrium. This section shifts the focus towards a more prescriptive stance on potential interpretation of self-determination. Two main claims derived from the republican conception are defended. First, this conception offers a sound justification for the 'isolate and proliferate' strategy for achieving self-determination conceived by Buchanan. It also represents a promising basis from which to conceptualize and rethink the links between self-determination and two related regimes: secession and minority protection.

1. Realizing self-determination: isolate and proliferate

Self-determination as non-domination offers a cogent justification for Buchanan's 'isolate and proliferate' strategy.[107] On the one side, we 'proliferate' institutional mechanisms to achieve non-domination. On the other, we 'isolate' cases where self-determination should not be attained through the typical mechanisms which secure non-domination but, exceptionally, through a secession. The republican contribution offers a general justification for this strategy, thereby building upon former reflections on the different functions and different bodies of law touched upon by self-determination.

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[106] Ibid 31.

[107] Buchanan (n 29) 401-03.

As to the 'proliferation' part, the challenge is to secure non-domination through mechanisms of intrastate autonomy. This point recalls that freedom as non-domination must be conceived within the limits of respect for and cooperation with other entities with whom it interacts and stands in relation.[108] In this 'proliferation' strategy, the republican approach calls for a shift from the members of a political entity who claim self-determination towards a normative environment in which all entities arbitrate their claims to self-determination. In Young's words, 'claims to self-determination are better understood as a quest for an institutional context of non-domination'.[109] Young opposes a model of non-domination and a model of non-interference. She defines non-interference in the following way:

> In this model, self-determination means that a people or government has the authority to exercise complete control over what goes on inside its jurisdiction, and no outside agent has the right to make claims upon or interfere with what the self-determining agent does.[110]

To conceive the multiplicity of those possible institutional arrangements, an 'unbundling' strategy is required.[111] Underlining this point, Young speaks of 'federalism' as 'the general name for governance arrangements between self-governing entities in which they participate together in such cooperative regulation'.[112] Overall, depending on the circumstances, self-determination as non-domination therefore leads to different federalist mechanisms guaranteeing people's autonomy.[113] Among many authors, Burri has analysed and presented a number of institutionalised mechanisms.[114]

The 'isolate' component of Buchanan's 'isolate and proliferate' strategy pertains to the issue of direct secession. Thanks to its relational account of a

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108 Young (n 36) 65.

109 Ibid 59.

110 Ibid 45.

111 Ibid 67.

112 Iris Marion Young, 'Self-Determination as Non-Domination', *Ethnicities,* 5/2 (2005), 139-59 at 149. Burri and Thürer propose to interpret the creation of the Swiss canton Jura in the late 20th century as example of the federalist potential of self-determination. Burri and Thürer (n 32) § 38.

113 Buchanan (n 29) 401-24. Similarly, Castellino identifies five model of political self-determination, Castellino (n 71) 40-41.

114 For a comprehensive discussion and practical examples, see Burri (n 90).

people and its claim to a non-dominating institutional environment, the republican conception offers a justification for what has been discussed in the literature under the heading of 'remedial secession'.[115] In brief, when all other options have failed and the members of a people are dominated in a particularly grave manner, international law should ensure a right to non-domination, which could take the form of secession.[116] The model of self-determination as non-domination considers secession as *ultima ratio* in two dimensions: the fulfilment of strict criteria that delimit a situation of emergency and the exhaustion of all other potential measures meant to secure non-domination.

On the first point, the right to secession depends upon a threshold of particularly grave patterns of domination. The criteria discussed in the literature can be integrated into the republican conception. For instance, Buchanan identifies three types of situations in which secession should be allowed: unjust taking of the territory of a legitimate state, large-scale and persistent human rights violations to members of the seceding group, and major and persisting violations of intrastate autonomy agreements by the state.[117] In a similar sense, Raič holds the view that this position corresponds to the actual legal stand on secession. He describes it as a 'qualified secession doctrine' where a right to secession depends on four (remedial) criteria. These criteria include: the existence of a minority, a territorial bond, serious and widespread violations of human rights, and the exhaustion of all effective judicial remedies and realistic political arrangements as

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[115] Burri and Thürer (n 32) § 41-45; Tomuschat (n 18) 38 ff. For a similar claim (albeit not defended upon non-domination), see Buchanan (n 29); Raič (n 49). For critical analysis, Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice', *St Antony's International Review,* 6/1 (2010) 37-56; Antonello Tancredi, 'A Normative 'Due Process' in the Creation of States through Secession', in Marcello G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 171-207. The jurisprudential position taken by the Canadian Supreme Court on Québec might be understood as supporting a 'remedial secession' doctrine. Supreme Court of Canada, *Reference re Secession of Quebec*, 2 S.C.R. 217 [1998].

[116] For the latest overview, Simone Van Den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?* (Cambridge Intersentia 2015).

[117] Buchanan (n 29) 401-03.

attempts to solve the problem.[118] Republicanism offers a general normative account of these criteria. They could all be expressed as threats to the essence of non-domination, namely the capacity of individuals to exist as political community and to decide without being put at the mercy of others.

On the second point, the requirement to exhaust other potential measures changes the political logic at work in matters of secession. Secession should not be considered as an objective on its own, but rather as the most extreme institutional form of non-domination. Secession would only be authorised as a matter of international law if other measures could be proven ineffective. This conception puts strong normalising incentives into force, only rebuttable in cases of extreme emergency.

Going further, republicanism also impacts the way in which a potential secession should be realized. The seceding entity, as soon as the most pressing danger has been prevented, should enter processes of negotiation at the international level with its former state. In order to prevent domination and settle common matters (such as shared natural resources), Cassese notes that the seceding nation should enter into a sort of 'international or regional association' with its former state.[119] The key point is not a formally independent state, but an effectively non-dominating environment for all stakeholders.

This republican conception also impacts the difficult concern of the territorial claim held by a people. If secession is only justified as an *ultima ratio* solution, taking control of territory is also justified only as a necessary part of a solution to face the graveness and urgency of the domination of peoples. For all other situations, the model of non-domination prescribes the achievement of common control over resources and territory along institutionalized mechanisms of political arbitration. As in the case of indigenous people, who define themselves through their relation with nature and the territory that surrounds them, this solution could grant the different entities what they care about the most, namely control over resources, without sparking political discussions over territory "taken away."

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[118] Raič (n 49) 447-48. See further Tomuschat (n 18) 37 ff.

[119] Cassese (n 45) 362.

Finally, this view on secession has an important consequence for the scope of validity of secession as a matter of international law on self-determination. Secession as a last remedy could exclusively be justified in illiberal states. Situations such as the one between Quebec and Canada or indigenous peoples within liberal states, should not lead to secession, with the exception of the two parties voluntarily accepting this solution.[120] In a liberal framework, intrastate solutions considered to guarantee non-domination should – or must – deliver that which is necessary to preserve the capacity of a people to decide for itself. The case is far less obvious in illiberal states, where mechanisms of non-domination will be much more difficult to implement and uphold and where, as a consequence, a remedial secession could be justifiable.

2. Linking minority protection and self-determination

In the continuation of this strategy of 'isolate and proliferate', the model of non-domination offers a promising basis upon which to conceptualize the links between minority protection and self-determination.[121] The model of non-domination has rendered this move not only possible, but also desirable in the sense that it would better take into account the group dimension of claims held by minorities.[122]

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[120] This has also been acknowledged by the Canadian Supreme Court. It leaves open the possibility of a remedial secession doctrine, but not for the case of Quebec. Supreme Court of Canada, *Reference re Secession of Quebec*, 2 S.C.R. 217 [1998].

[121] Besides requirements of non-discrimination, Art. 27 of the Covenant on Civil and Political Rights might be considered the main provision related to the protection of minorities. For general overview, Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009) 373-80. Further, see Anaya (n 70) 131-41. Other provisions of the Covenant on Civil and Political Rights are also very important to the safeguard of minorities and their prosperity as a group, for instance arts 22 (freedom of association), 25 (participation in the government) and 26 (equality before the law). On regional level, the European Framework Convention for the Protection of National Minorities is also a convention of central importance. See also UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Resolution 47/135, 1992, UN Doc. A/Res/47/135 (1992).

[122] For a similar claim, see Cassese (n 45) 349-50; Macklem (n 97) 109.

First, the republican conception softens difficulties between the regime of minority protection and self-determination. Because it insists on the requirement to clearly uncouple a right to self-determination from a right to secession, the republican conception addresses the political unwillingness to give too much latitude to the claims of minorities.[123] Secondly, the protection ensured to the minority group is dynamic and active in recognising the important capacity of group members to decide how they want to be organised. The protection focuses on the institutional mechanisms that should be put into place to empower members to enjoy autonomy.

As an example, the Declaration on the Rights of Indigenous Peoples offers an insight into how this non-domination for minorities can be secured through institutional mechanisms. According to Holder, the Declaration can be interpreted as securing indigenous people a right to 'develop and interpret a way of life that is distinctively one's own'.[124] This includes prerogatives for dealing with one's resources, an issue of extreme importance for indigenous people.[125] But this first level only addresses a single dimension of domination. A second level of institutional mechanisms is more clearly directed towards the prevention of domination and the promotion of cooperation. Following Holder, Articles 15, 33, or 34 of the

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123 For a similar conclusion, Will Kymlicka, 'Minority Rights in Political Philosophy and International Law', in Samantha Besson and José Luis Martí (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 377-96, 395-96.

124 Holder has usefully summarized the different articles in her text, although it shall be noted that she worked with the Draft Declaration (Draft Declaration on the Rights of Indigenous Peoples, 1994). See Cindy Holder, 'Self-Determination as a Basic Human Right: The Draft UN Declaration on the Rights of Indigenous Peoples', in Eisenberg Avigail and Spinner-Halev Jeff (eds.), *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2004) 294-316, 295-96.

125 See e.g. the case law by the Inter-American Court of Human Rights, 'for indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.' Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgement of 31 August 2001, Series C, No. 79, para 149

Declaration might be interpreted as securing what she calls the 'institutional underpinning of life'.[126] These articles are prerogatives enjoyed by peoples to set up their own institutions and rules of membership. Most importantly, the Declaration foresees – by means of guaranteeing that the voice of the people be heard – that common institutions with other entities have to be set up in order to meet the challenges of domination. In light of the republican account, the Declaration might be interpreted as laying down a republican framework to regulate the way a people enters into relationships with various other entities.

V. CONCLUSION: FOR THEY HAVE SOWN NON-DOMINATION...

Working with a back-and-forth movement between law and political theory, this article has laid down the path towards a republican conception with the objective of meeting the challenge formulated by MacCorquodale: to develop a coherent legal framework for self-determination, firmly grounded within a clear conceptual and normative framework. In the methodological section, I formulated two objectives for the republican conception: to be plausible and fruitful. The republican conception is claimed to be plausible with respect to the descriptive hypothesis – explaining the ICJ's case-law – while the prescriptive part – providing guidance in interpretation – is claimed to be fruitful in outlining further potential developments for self-determination.

The republican conception draws upon self-determination as being relational in nature, in other words respectful of the prerogatives claimed by others. In this context, I have proposed the conception of self-determination as a quest towards institutionalized conditions of non-domination. Self-determination as non-domination has integrative effects. We move from a logic of division and separation to a logic of cooperation and conflict resolution. By forcing all entities involved into institutionalized mechanisms of discussion and cooperation, the model enhances the chances of fostering an understanding of identity that is not ethnoculturally based. The point is not to criticize ethnocultural identity *per se*, but rather to contest its legitimacy when justifying a claim to self-determination as a

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[126] Holder (n 124) 296.

matter of international law. Non-domination paves the way for an evolution of the people's own understanding of its identity towards a more political understanding.[127]

On the public international law level, the conception of non-domination helps in making sense of the various facets which self-determination can have. On the one hand it accounts for its structuring function, linked to the law of states. Self-determination lays down a powerful rationale for the claim to autonomy held by individuals organised in the form of a state-entity. On the other hand, non-domination accounts for the aspirational dimension of self-determination, as framed through human rights law. Tensions between these two facets do not disappear. But the republican approach lays down a promising and consistent framework to address both. In that respect, it could facilitate the development of a modern international law of self-determination.

[127] For a similar thesis, see Iris Marion Young, 'A Multicultural Continuum: A Critique of Will Kymlicka's Ethnic-Nation Dichotomy', *Constellations* 4/1 (1997) 48-53, 196; Waldron (n 79) 412-13.