NATION REIFICATION OR "NATIONALIZING NATIONALISM" FROM THE PERSPECTIVE OF INTERNATIONAL LAW

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National reification takes place when the state defines itself as a tool to protect the interests of a particular ethnic group and tries to create a homogeneous society unified on the basis of linguistic, cultural, historical, ideological and religious principles. This inevitably leads to the monopolization of politics (common good) by the majority's culture, and at the same time, to the marginalization and exclusion of the minority's culture and its obliteration in the future. This marginalization does not imply a discrimination because the minority is not denied civil rights, but its political activity from now on implies an engagement with the majority's culture. This effect appears in waves. The first wave preceded World War II; the second wave started in the nineties and affected the new post-Soviet and Eastern European countries. National reification is closely related to the principle of democracy; since the minority retains this obviously ineffective right to participate, all other forms of protest become inaccessible to it. National reification is an objective and general tendency of the modern day. It fills the legitimacy deficit and not only "launches" a new state, but also generates internal threats that justify its existence. As a result, from the very first days, a new state is being created as a totalitarian and emergency one that can use extreme, but justified and legitimate measures. The principle of self-determination cannot be used against the process of national reification as it implies an obligation of conduct and has a narrow scope. Moreover, its beneficiaries, by not being states, are deprived of the procedural tools needed to protect their rights. It could be interpreted differently: we should recognize the right to secession for the nations faced with the choice of obeying or losing identity. This interpretation, however, is an unrealizable utopia. Human rights are completely helpless in the face of national

reification or, rather, are indifferent to it. The reason is a fundamental denial of the collective principle. Therefore, international law does not solve the problem of national reification. On the contrary, all the structures of the modern order (statehood, legitimacy, democracy, human rights, international law, etc.) generate this problem. The solution of the problem is vitally important and, at the same time, extremely difficult. It cannot be cosmetic, but should affect the very foundations of international law.

Keywords: international law; sovereignty; state; self-determination; democracy; liberalism; human rights; discrimination; national reification.

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Introduction

On 19 July 2018, the Israeli Knesset passed the Basic Law "Israel, the State of the Jewish Nation," which became known as the Nation-State Bill. According to this Basic Law, the state is defined by ethnic terms, on the basis of the identity of the Jewish majority. The Jewish majority is given control over state symbols and resources. Jewish symbols are the state symbols (Art. 2), the Hebrew calendar is the official one (Art. 8), and the Independence Day, and Holocaust memorial are official holidays (Art. 9). The state's resources must be harnessed to develop and strengthen Jewish communities and Jewish settlement (Art. 7). The Jewish people has the exclusive right to self-determination within "the Land of Israel" whose borders are not specified (Art. 1). This preference for the Jewish majority is accompanied by the absence of any reference to the Palestinian minority. Arabic is no longer an official language and its place in official institutions is to be established by law (Art. 4).

On the one hand, this legislative development embodies the traditional Zionist program's aim to establish a Jewish state. This objective was declared by the Zionist

groups in the Biltmore Hotel (New York) program in 1942. Subsequent events–the establishment of the State of Israel in 1948, Israeli-Arab wars, two suppressions of Intifada, and constitutional reforms in Israel–are, in fact, stages in its achievement. On the other hand, this legislative development reflects a more general trend of *national reification* that is typical of the contemporary history and, as a rule, accompanied by serious political and social upheavals.

Within this trend, the state defines itself as a tool to protect the interests of a particular ethnic group and tries to create a homogeneous society unified on the basis of linguistic, cultural, historical, ideological, and religious principles.[1] This inevitably leads to the monopolization of politics (common good) by the culture of the majority, and at the same time, to the marginalization and exclusion of the minority's culture and to its obliteration in the future. This marginalization does not imply a *discrimination* because the minority is not denied civil rights, but its political activity from now on implies an engagement with the culture of the majority (as a condition and as a result). This policy is close to genocide, not in the narrow sense of the Convention on the Prevention of Genocide (1948), but in the broad sense, according to R. Lemkin, who described this phenomenon in 1944 and defined its eight techniques: political, social, cultural, economic, biological, physical, religious, and moral.[2]

The nation that apparently benefits from national reification is also suffering from it because it implies confiscating what is specific to civil society for the needs of the state. Upon seizing the *national*, the state formalizes, freezes, and discredits it and deprives the majority of the ability to develop itself as happened with Germany after World War I. In this case, the nationalistic unification of the state led to the degeneration of the nation and not to its revival. In the era of globalization, national

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[1] "A nationalizing state … is one understood to be the state of and for a particular ethnocultural 'core nation' whose language, culture, demographic position, economic welfare, and political hegemony must be protected and promoted by the state. The key elements here are (1) the sense of 'ownership' of the state by a particular ethnocultural nation that is conceived as distinct from the citizenry or permanent resident population as a whole, and (2) the 'remedial' or 'compensatory' project of using state power to promote the core nation's specific (and heretofore inadequately served) interests." Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* 103–104 (Cambridge: Cambridge University Press, 1996).

[2] "Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all the members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups … Genocide has two phases: one, destruction of the national pattern of the oppressed group, the other, the imposition of the national pattern of the oppressor. This imposition in turn may be made upon the oppressed population which is allowed to remain or upon the territory alone, after removal of the population and the colonization by the oppressor's own nationals." Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 79 (Washington, D.C.: Carnegie Endowment for International Peace, 1944).

reification often paves the road for the complete destruction of the national culture.[3] For example, in Central and Eastern European countries, support for the majority language over that of the minority, leads to a limited use of both languages, as English increasingly becomes the mode of communication.

How does this trend affect a particular person? Historically, talking about the legal status of an individual is basically talking about dignity. The idea of dignity is subject to various speculations and often appears illegible; its core, however, is the capacity for individualization, i.e. the capacity to create a separate "I"–in the intellectual, social, economic, and other senses. The emphasis on this capacity dates back to the Renaissance period and was evidenced in the program work of G. Pico della Mirandola, "*Oratio de hominis dignitate*" (1496).[4] Individuality (singularity) is achieved by establishing relationships and communication with the outside world, including contact with separate groups (nations). If these relationships and communication are destroyed, the dignity is lost: it remains just a potential force or energy that lacks its practical dimension. Indeed, freedom of speech does not make sense in the absence of interlocutors, and freedom of conscience does not make sense in the absence of the church. In this sense, the victim of the reification is in a worse situation than someone who was simply deprived of *rights* but can act outside the legal space or hope that the rights will be restored one day. H. Arendt and her followers raise this aspect of dignity by focusing on citizenship and the "right to rights."[5]

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[3] "National independence cannot be achieved straightforwardly, by making active efforts for this. This is a gift and mercy (Geschenk und Gnade). A nation will become a nation not when it strives for national identity, but only when it devotes itself to the fulfillment of common tasks." *Радбрух Г.* Философия права [Gustav Radbruch, *Five Minutes of Legal Philosophy (1945)*] 71 (Moscow: Mezhdunarodnye otnosheniia, 2004). *See also* the propos of Hannah Arendt quoted by Bi Zaouli Sylvain Zamblé, "La race est, politiquement parlant, non pas le début de l'humanité mais sa fin, non pas l'origine des peuples mais leur déchéance, non pas la naissance naturelle de l'homme mais sa mort contre nature." Bi Zaouli Sylvain Zamblé, *Hannah Arendt et les droits de l'Homme en Afrique coloniale*, 8 Revue des droits de l'homme 1, 2 (2015).

[4] According to G. Pico della Mirandola, when God created Man, all images were already distributed. Then God gave Man an indefinite image:

"We have given you, O Adam, no visage proper to yourself, nor endowment properly your own, in order that whatever place, whatever form, whatever gifts you may, with premeditation, select, these same you may have and possess through your own judgement and decision. The nature of all other creatures is defined and restricted within laws which We have laid down; you, by contrast, impeded by no such restrictions, may, by your own free will, to whose custody We have assigned you, trace for yourself the lineaments of your own nature ... We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer. It will be in your power to descend to the lower, brutish forms of life; you will be able, through your own decision, to rise again to the superior orders whose life is divine."

Giovanni Pico della Mirandola, *On the Dignity of Man* 8–9 (C.G. Wallis et al. (trans.), Indianapolis: Hackett Publishing, 1998).

[5] "The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter

1. National Reification Mechanism

National reification differs from Irredentism, which implies a merger of political units into a single state in a desire to get rid of the foreign domination (the unification of Italy in 1870 and of Germany in 1971). It also differs from anti-colonialism, which implies the creation of new states in colonies. National reification appears as waves. The first wave preceded World War II: Germany used national reification to regain its position after its defeat in World War I, to restore its historical territory, and to build a new empire. The second wave started in the 1990s, it affected the new post-Soviet and Eastern European countries as well as Rwanda, Sudan and the Democratic Republic of Congo, and was accompanied by regional wars.[6] All the conflicts generated by the collapse of the Soviet Union and the Federal Republic of Yugoslavia, developed according to the same scenario. International law required the transformation of administrative boundaries into international boundaries (*uti possidetis juris*), and as a result, an important part of the population of new states became minorities. Immediately after coming to power, new governments started the policy of national reification which took the form of: introducing new symbols (Ukraine and Croatia), banning old symbols (Ukraine), renaming locations (Georgia and Ukraine), activating old laws (Georgia and Moldova), depriving minorities of titular nation status (Croatia), depriving minority languages the status of being an official language (Moldova, Croatia, and Ukraine), depriving some territorial entities of their autonomous status (Georgia), etc. As a response, minorities have formed semi-governmental bodies, organized referendums, and declared independence. Instead of encouraging the parties to find a settlement, the other countries supported either the government or the rebels. The result was ethnic cleansing, freezing the conflict, and sometimes the farce of international criminal justice.

National reification is closely related to the principle of democracy: the above-mentioned measures usually reflect national consensus, are approved by referendum or legitimate parliaments, are enshrined in constitutions and laws, etc. Thus, arithmetic calculation works as an *ultima ratio*, and the fact of participation in the decision-making process removes the problem of an unsatisfied substantive interest. Since the minority retains this obviously *ineffective* right to participate, all other forms of protest become inaccessible to it.[7]

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of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do." Hannah Arendt, *The Origins of Totalitarianism* 296 (New York: Meridian Books, 1958).

[6] The Yugoslav wars of 1991–2001, the Ossian-Georgian-Russian wars (1991–1992; 2004; 2008), the Abkhazian-Georgian wars (1992–1993), the Armenian-Azerbaijani wars in the High Karabakh region (1993–1994), and the wars between Ukraine and its eastern republics (2014).

[7] "Democracy rests on the equality of all, on the freedom of thought, of expression, of association, etc.; but since it is absolutized, majority rule ensures that the 'values' of democracy derive from the

In this sense, other political principles correspond to the interests of minorities to a greater degree. For example, the monarchical principle implies the personal responsibility of the king to all his subjects and each of them and, accordingly, protects the minorities' interests even in the face of a threat from the majority. Likewise, the ideologies alternative to liberalism show more tolerance for the minorities' interests: conservatism supports *every* collective principle, while Marxism subordinates it to the class interests.[8] Also it should be noted that some modern authors claim that democracy does not necessarily incorporate the majority principle, but rather has to do with values. For example, R. Dworkin believes that democracy means the guarantee that no choices are made to the detriment of human rights.[9]

2. National Reification as a Deviation from Liberalism

National reification is a product of economic modernity, industrial development, and the rise of a society characterized by movement, mass character, social communication, and migration. [10]The liberal discourse explains nationalism using the idea of totalitarianism, which removes responsibility from the liberalism itself, assigning it to individual politicians and at the same time stigmatizing alternatives (fascism, communism, Islamism, etc.). This idea implies, *firstly*, the ignoring of objective causes of conflict and charging a particular person, defined as a *hostis humani generis*;[11]

preponderance of certain voices. Consequently, the values thus defined have no chance of ever being accepted as universal, even though they have the claim of being imposed on all in the number of a fiction: the general will, regarded as having been expressed by the majority of votes. As a consequence, majority rule, in its sharp interpretation, is not only insufficient but dangerous, if it is not supported by moral reference and supplied with essential correctives, namely, truth and subsidiarity (or sociability). The formal rule of the majority legitimizes *a priori* the tyranny of the most numerous and their leaders. This same rule implies an indifference of principle before truth or good." Michel Schooyans, *The Hidden Face of the United Nations* 18 (St. Louis, MO: Central Bureau, CCVA, 2001).

8 "The proletarians, opposed as they are to nationalism of every kind, demand 'abstract' equality; they demand, as a matter of principle, that there should be no privileges, however sligh … While recognizing equality and equal rights to a national state, it [the proletariat] values above all and places foremost the alliance of the proletarians of all nations, and assesses any national demand, any national separation, *from the angle* of the workers' class struggle." Vladimir Lenin, *The Right of Nations to Self-Determination* (1914) (Jul. 2, 2020), available at https://www.marxists.org/archive/lenin/works/1914/self-det/.

9 "A definition of democracy that ties so firmly to majority rule defeats useful argument about what democracy is and how it might be improved." Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press, 2011). *See also* Jeremy Waldron, *A Majority in the Lifeboat*, 90(2) Boston University Law Review 1043 (2010).

10 "A fairly stable but intricate social structure is replaced by a mobile, anonymous mass society." Ernest Gellner, *Nationalism and Politics in Eastern Europe*, 189 New Left Review 127 (1991). *See also* Benedict Anderson, *The Last Empires: The New World Disorder*, 193 New Left Review 2 (1992); Karl W. Deutsch, *Nationalism and Social Communication: An Inquiry into the Foundations of Nationality* 162 (Cambridge, Mass.: The Technology Press of MIT, 1953).

11 I. Kant defined an unjust enemy as someone "whose publicly expressed will (whether by word or deed) reveals a maxim by which, if it were made a universal rule, any condition of peace among

secondly, the definition of totalitarianism as a deviation from the Western standards of democracy and a threat to public peace;[12] *thirdly*, total and discriminatory confrontation; *fourthly*, the duty of all states to participate in overcoming the threat and restoring democratic procedures; *fifthly*, the absence of the obligation to take preventive measures and to restore the economic and social sphere. In the legal sphere, this idea has engendered the criminal responsibility of individuals and the war against terrorism. Such an explanation, however, is vulnerable, since national reification often does not go beyond a specific country, is not accompanied by armed conflicts, and does not propose a departure from the standards of democracy. The result is a lack of political and legal means that may be used to resist the national reification.

Conservatism and Marxism provide better explanations, although they don't expressly affect international politics and international law. According to the conservative discourse, aggressive nationalism results from a political collapse, which is expressed in the destruction of society's internal hierarchy and in the formation of mass movements of isolated individuals striving for recognition. The main reason for this collapse is the deterioration of traditional values under the influence of liberal ideas.[13]

Marxists do not have a unified position. On the one hand, K. Marx saw the basic problem of the modern state in reducing political life to a simple tool for preserving human rights. Under these conditions, the emancipation of man is impossible; it will take place only when

> individual man re-absorbs in himself the abstract citizen, and as an individual human being has become a *species-being* in his everyday life.[14]

Accordingly, *every* state sublimates alienation from tribal life in nationalism. The Soviet Marxists, however, did not make this conclusion, as they distorted Marx's idea

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nations would be impossible and, instead, a state of nature would be perpetuated." Immanuel Kant, *The Metaphysics of Morals* 119 (M. Gregor (trans.), Cambridge: Cambridge University Press, 1996).

12 It is about the works of F.A. von Hayek (totalitarianism as state control of the economy and the planned organization of society); K. Popper (fascism as an activity of the "closed" society); E. Gentile (Fascism as a sacralization of politics); R. Griffin (fascism as a palingenetic ultranationalism); C.J. Friedrich and Z.K. Brzezinski (six features: one ideology, one-party system, terror, etc.), U. Eco (14 features: traditionalism, rejection of modernism, cult of action, etc.). *See* Friedrich A. Hayek, *The Road to Serfdom* (London: Routledge, 1944); Karl Popper, *The Open Society and its Enemies* (London: Routledge, 1945); Emilio Gentile, *Fascism, Totalitarianism and Political Religion: Definitions and Critical Reflections on Criticism of an Interpretation*, 5(3) Totalitarian Movements and Political Religions 326 (2004); Roger Griffin, *The Nature of Fascism* (London: Psychology Press, 1991); Carl J. Friedrich & Zbigniew K. Brzezinski, *Totalitarian Dictatorship and Autocracy* (New York: Praeger, 1965); Umberto Eco, *Ur-Fascism*, 42(11) New York Review of Books 12 (1995).

13 *See* Alain de Benoist, *Critique of Liberal Ideology*, 7(4) The Occidental Quarterly 9 (2007–2008). *See also* Arendt 1958; Günter Rohrmoser, *Der Ernstfall: Die Kriese unserer liberalen Republik* (Frankfurt am Main: Ullstein, 1994).

14 Karl Marx, *On the Jewish Question* (1843) (Jul. 2, 2020), available at https://www.marxists.org/archive/marx/works/1844/jewish-question.

of the withering away of the state.[15] Instead, they declared that fascism was "a special form of class domination of the bourgeoisie"[16] and did not return to this problem after the war. Thereby, the conservative discourse looks more holistic, although, in fact, it is not very different from the Marxist one.

These explanations need two important additions. *Firstly*, the core of liberalism is the idea of the social contract concluded to ensure the safety and security of its participants and to overcome the threat of private war emanating from feudal institutions. After the destruction of feudal institutions, the legitimacy of the state becomes "suspended in the air." The appeal to the national allows to partially remove this problem as it grants the state a new function of protecting and promoting national interests, which is carried out continuously, externally and internally. At the same time, it reanimates the threat of private war, giving it a new form of the threat emanating from aggressive minorities. In this sense, national reification represents a very effective way to build and unify the state, because it not only "launches" a new state, but also generates internal threats that justify its existence. As a result, from the very first days, a new state is being created as a totalitarian and emergency one that can use extreme, but justified and legitimate measures.

Secondly, starting from F. Suarez, the doctrine of international law resorted to an internal analogy, i.e. putting forward the idea of a global sovereign, that limits the voluntarism of states. Until the end of the twentieth century this idea was only a fiction that did not create a serious counterbalance to national sovereignty, but facilitated the solving of some difficult problems. At the end of the twentieth century this global sovereign becomes real and visible in institutional, functional, and financial plans while the internal sovereign progressively weakens. This is reflected in the granting of supra-national powers to international institutions, often in the fields traditionally related to national competence; formation of a general law that binds states regardless of their consent; and the emergence of a new transnational bureaucracy completely cut off from national roots. The result is a change in the positions of international and internal sovereignty. The first has become realistic while the second has become decorative and managed from abroad. Because of a perceptual inertia, the national sovereign is still seen to be as distinctive as before; though in fact, it is almost completely depressed. National reification partially

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[15] According to Joseph Stalin, since socialism successfully attacks the capitalist elements, the latter reinforce the resistance. Under these conditions, a strong state must mobilize the workers to fight against the class enemy and defend the gains of socialism from outside attacks. The working class must be hostile towards the bourgeois state, but not towards its own state. *See* The Right Deviation in the C.P.S.U.(B.), Speech Delivered at the Plenum of the Central Committee and Central Control Commission of the C.P.S.U.(B.) in April 1929. *Сталин И.В.* Вопросы ленинизма [Joseph Stalin, *Problems of Leninism*] 245 (St. Petersburg: State Publishing House of Political Literature, 1952).

[16] *See* XIII пленум Исполнительного комитета Коммунистического Интернационала. Стенографический отчет [XIII Plenum of the Executive Committee of the Communist International. Verbatim Report] 589 (Moscow, 1934).

solves this problem[17]. If the cosmopolitan elites show a commitment to national interests, it is to maintain control, the powers and remaining resources look almost as formidable as before; in reality, however, they too are almost completely depressed. National reification partially solves the problem: if cosmopolitan elites demonstrate a commitment to national interests, they retain a residual control and resource.

So, national reification is an objective and general tendency of the modern day, which constitutes another stage of the alienation from the "species-being." By destroying the feudal institutions, the state encouraged the development of ethnic ties, and often served as a platform for ethnogenesis. However, when it faced the threat of losing legitimacy, it was forced to break these ties, put itself in the place of the nation, and leave the citizen without protection in the face of new forms of totalitarianism. This situation inevitably affects international law, as its current institutions do not resist national reification, but on the contrary, create the most favorable conditions for it. Thus, resistance necessitates a violation of international law, including in the abominable form of terrorism.

3. National Reification and the Principle of Self-Determination

Historically, the principle of self-determination has ensured the reception of the state's form by non-European peoples and extended to them the rules of general international law. In the normative plan it grants stateless peoples the right to build their own state and once it's done, duplicates the principles of non-interference and non-use of force (it is assumed that within the state the people delegate the right to self-determination to the government). The principle is mentioned in Articles 1 and 55, as well as in Chapters XI and XII of the U.N. Charter (Non-Self-Governing Territories and Trusteeship System). As an anti-colonial norm, it was enshrined in the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 (UNGA Resolution 1514); as a general rule it was mentioned in Article 1(1) of the two Covenants of 1966. The Declaration of the Principles of International Law of 1970 fixes its detailed formula, including the "Protective Clause," that permits secession only in cases of discrimination.[18] Article 1(4) of Protocol I to the Geneva Conventions of 1949 equated the fight against colonial domination, foreign occupation, and racist regimes with international conflicts, thereby limiting the scope of the principle to three situations.

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[17] "National movements proclaim at the end of the twentieth century not a victory, but the end of the nation in the sense that it is a form of coexistence that assumes superiority over the religious, ethnic and racial division." Jean-Marie Guéhenno, *The End of the Nation-State* 7 (V. Elliott (trans.), Minneapolis: University of Minnesota Press, 1995).

[18] "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color."

The broad provisions contained in the Covenants and the Declaration should not mislead: the principle of self-determination *is not intended to adjust domestic policies*. *Firstly*, according to Article 1 of the Covenants, states shall "promote" and "respect" this right. This is an obligation of conduct, and not one of result: accordingly, the degree of its implementation largely depends on the state's discretion. *Secondly*, since "peoples" are not subjects of national law, within national order there is no one who could claim these rights while claims by other states are excluded by the principle of non-interference. *Thirdly*, whereas the "free" determination of the political status is presumed to be a *one-time* action, committed when the state is established, the "free" development and disposal of resources already imply the decisions of the government to which these rights were delegated. *Fourthly*, these provisions do not exclude national reification, which deletes the minority culture from public space, but rarely prevents its use in private life. The limited effect of the principle is recognized by most Western experts.[19]

Some authors try to emphasize the domestic dimension of the principle and reduce it to human rights (including the paradoxical right to determine one's ethnicity[20]) or to the right to participate in political decision-making–this approach deprives the principle of any substantial value. For example, R. McCorquodale states three reasons to consider the principle from the perspective of human rights theory. *Firstly*, the purpose of the principle (to protect communities and groups from oppression) is similar to the purpose of human rights. *Secondly*, self-determination is an essential condition for the protection of individual rights that cannot be effectively guaranteed without freedom from oppression. *Thirdly*, human rights law is able to protect the group rights in the economic, social, and cultural context.[21] J. Klabbers considers the right to self-determination as the right to participate:

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[19] J. Crawford draws the following conclusions: 1) International law recognizes the principle; 2) It is not a right applicable just to any group of people desiring political independence; it applies as a matter of right only after the unit of self-determination has been determined; 3) The units to which the principle applies are in general those territories established and recognized as separate political units; 4) Where a self-determination unit is not already a State, it has a right of self-determination: that is, a right to choose its own political organization; 5) Self-determination can result either in the independence of the self-determining unit as a separate State, or in its incorporation into or association with another State; 6) Matters of self-determination are not within the domestic jurisdiction of the metropolitan State; 7) Where a self-determination unit is a State, the principle of self-determination is represented by the rule against intervention in the internal affairs of that State. James Crawford, *The Criteria for Statehood in International Law*, 48(1) British Yearbook of International Law 93, 108–109, 160–161 (1976).

[20] The Arbitration Commission of the Peace Conference on Yugoslavia in its Opinion No. 2 determined self-determination as the right to "choose to belong to whatever ethnic, religious or language community he or she wishes." *Yugoslavia Through Documents: From its Creation to its Dissolution* 474–475 (S. Trifunovska (ed.), Dordrecht: Martinus Nijhoff, 1994).

[21] Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43(4) International and Comparative Law Quarterly 857 (1994).

> Self-determination is best understood as a procedural right: entities have a right to see their position taken into account whenever their future is being decided. That may not amount to a right to secede, nor even to a right to autonomy or self-government, but it does amount to a right to be taken seriously.

In his opinion, this approach has the following advantages: "it places less of a premium on the disputed but inherently limited notion of peoples"; "it would not engender any false hopes"; "it honours the importance of the political process."[22] Thus, the principle has a much narrower meaning than the meaning assumed by the formulation itself.[23]

An analysis of the jurisprudence of the International Court of Justice confirms these findings. The Court referred to the principle in the Legal Consequences for States of the Continued Presence of South Africa in Namibia (21 June 1971), Western Sahara (16 October 1975), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004), and Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (25 February 2019). All these cases affected the *external* aspect of self-determination, i.e. problems of achieving independence by peoples who were in colonial dependence or lived in the occupied territory and were recognized as subjects entitled to establish an independent state. The *internal* aspect was *never* analyzed by the Court, although it could have been, at least, twice: in cases concerning the application of the Convention on the Genocide (*Bosnia-Herzegovina v. Serbia* and *Croatia v. Serbia*), an analysis of violations of the Serbs' rights on the plaintiffs' territory would have been relevant and useful, however, the Court was emphatic in its neutral description of the internal situation.[24] Domestic jurisprudence follows roughly the same path: a typical example is the Canada Supreme Court judgment on the secession of Quebec

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[22] Jan Klabbers, *The Right to be Taken Seriously: Self-Determination in International Law*, 28(1) Human Rights Quarterly 186 (2006).

[23] "Self-determination was intended to brush aside the old, State-oriented approach prevailing in international dealings … Self-determination meant that peoples and nations were to have a say in international dealings: sovereign Powers could no longer freely dispose of them … Clearly this set of principles was directed toward undermining the very core of the traditional principles on which international society had rested since its inception: dynastic legitimation of power, despotism (albeit in increasingly attenuated forms), and agreements between rulers only … Self-determination also eroded one of the basic postulates of the old international community: territorial sovereignty … By promoting the formation of international entities based in the three wishes of the populations concerned, self-determination delivered a lethal blow to multi-national empires … As one would have expected, the dogma of State sovereignty has constituted a powerful bulwark against the full acceptance of the principle into the body of international legal rules. The acceptance of the principle into the realm of law has therefore been selective and limited in many respects." Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 315–317 (Cambridge; New York: Cambridge University Press, 1995).

[24] For example, in paragraph 62 of the judgment on Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (3 February 2015) the Court mentioned:

(20 August 1998), which recognizes Quebecers' participation in political life as sufficient evidence of self-determination.[25]

The narrow scope of the principle is also manifested in the fact that its beneficiaries, by not being states, are deprived of the procedural tools to protect their rights; their fate, therefore, depends on the goodwill of external actors. For example, Palestine's attempts to use international courts, at best, cause a limited diplomatic resonance. Unable to file lawsuits, Palestine can only initiate advisory proceedings. The Court's Opinion on the Wall (2004), however, was not implemented by Israel, subjecting it to a defiant criticism.[26] Palestine's attempts to use the ICC were also unsuccessful: Palestine recognized the ICC jurisdiction in 2009, but in 2012 the Prosecutor's Office declared that its recognition by 130 states was not enough to consider it as a state within the meaning of Article 12(3) of the Statute. As a result, Palestine became a party to the Statute only in 2015, after the Office took into account the GA Resolution 67/19 that granted Palestine the status of an observer state.[27] In 2015, the Office announced a preliminary examination of the situation, and in 2017, mentioned the difficulties related to the nature of the conflict and the status of the occupied territory.[28] In 2019, the Office announced that the situation

"On 25 July 1990, the Constitution of the Republic of Croatia was amended; in particular, a new flag and coat of arms were adopted which, according to Serbia, was perceived by the Serb minority as a sign of hostility towards them."

This statement gives the impression of an ungrounded suspiciousness on the part of the Serbs. However, this flag (red-white shahnovitsa) was used during WWII when Serbs were subjected to a brutal and organized genocide that took the lives of 200–800 thousand people. The Court described the adoption of the new Croatian Constitution in the same manner ("According to Serbia, the Croatian Serbs considered that the adoption of this new Constitution deprived them of certain basic rights and removed their status as a constituent nation of Croatia") and did not mention the fact, that the new constitution defined Croatia as the state of "Croats and national minorities," while in the previous constitution it was defined as the birthplace of "Croats, Serbs and national minorities."

[25] The Court stated (para. 136):

"The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive, and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a 'sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction.'"

Reference Re Secession of Quebec [1998] 2 S.C.R. 217.

[26] Statement by the Ministry of Foreign Affairs of Israel on 9 July 2004 (Jul. 2, 2020), available at www.mfa.gov.il; Israel High Court Ruling Docket H.C.J. 7957/04, International Legality of the Security Fence and Sections near Alfei Menashe, 15 September 2005 (Jul. 2, 2020), available at www.zionism-israel.com/hdoc/High_Court_Fence.htm.

[27] Report on Preliminary Examination Activities 2012, para. 202; Report on Preliminary Examination Activities 2013, para. 238 (Jul. 2, 2020), available at www.icc-cpi.int.

[28] Report on Preliminary Examination Activities 2017, para. 51.

> has raised a number of unique challenges, such as in relation to exercise of territorial jurisdiction by the Court, the resolution of which is a prerequisite before the Prosecutor can come to a determination under Article 53(1)(a).[29]

Similarly, the lawsuit filed by Palestine against the U.S. in 2018 regarding the transfer of the American embassy to Jerusalem is not expected to be examined on the merits. The U.S. announced that they are not in contractual relations with Palestine under the Convention on Diplomatic Relations 1961 because it does not hold state status. Probably, then, the Court will take a position similar to the one it took in the Legality of Use of Force (judgments of 15 December 2004) and consider that Palestine has no right to refer to Resolution 9 (1946) and Art. 35(2) of the Statute, since the "treaties in force" (Art. 35(2)) are the treaties in force at the time of the adoption of the new Statute (and not the treaties concluded later). As far as the General Assembly has recognized Palestine as a state, the Court is unlikely to fully support the U.S. argument; it can, however, borrow another argument from the judgments of 15 December 2014 and consider that Palestine has no *locus standi*, since it is in a *sui generis* situation: the General Assembly believes that it is a state, while the Security Council (and the defendant) does not.

The vagueness of the principle contributes to intellectual manipulations, which devalue it further. For example, the Israeli authors argue that Palestinians do not have the right to create their own state, because the Jewish ethnos arose earlier than the Palestinian one, the latter is a part of the Arab ethnos, thus, Palestinian nationalism is an imitation of the Jewish one. The Balfour Declaration is the main document governing the future of Palestine, because it was approved at the San-Remo Conference and incorporated into the British Mandate. It provides for the transfer of the whole of Palestine, which is defined as "a national home for the Jewish people," to the Jews. Resolution 181 violated the Declaration and awarded only a part of Palestine to the Jews. The Jewish people, however, accepted it. Palestinians, on the contrary, did not accept it and attacked the Jews. This attack and their permanent refusal to fulfill the reached agreements deprive them of any rights, since rights cannot arise from injustice (*ex injuria jus non oritur*). Israel is ready to discuss the issue of the Arab state if Arabs abandon the terror tactics and plans to destroy Israel. This, however, is unlikely, since Arabs deny any equality-based international law and recognize only a centralized caliphate. Palestinians have already exercised the right to self-determination, because they received Jordan, which is a part of the historic Palestine.[30]

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[29] Report on Preliminary Examination Activities 2019, para. 218.

[30] *See* Elon Jarden, *The Israeli-Palestinian Conflict in International Law* in *Israel and a Palestinian State: Zero Sum Game?* 132 (A. Stav (ed.), Tel Aviv: Zmora-Bitan Publishers, 2001); Robbie Sabel, *International Legal Issues of the Arab-Israeli Conflict: An Israeli Lawyer's Position*, 3(2) Journal of East Asia and International Law 407 (2010); Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58(3) Arizona Law Review 633 (2016).

The principle of self-determination could be interpreted differently. The interests of the nation are specific and historically conditioned; the preservation of the nation's personality is the most important one. This personality represents a combination of subjective and objective properties: national consciousness, character and temperament, lifestyle, language, history, culture, social norms, etc. These properties are interrelated: national character determines the language structure and vice-versa. Therefore, self-determination implies preserving this personality (and not only ensuring the participation in the political process). In this regard, the principle is violated when the nation's personality is in danger as a result of a destructive impact on its properties (and not only when the nation is excluded from the political process). The "failure to present" takes place in situations where the government refuses to protect the values and interests of nations, i.e. is unable to maintain a holistic, stable and harmonious community, an environment in which human rights and democracy have a real, and not just a formal meaning (and not only in situations of rights' restrictions). Such a refusal can manifest in radical changes in cultural policy, geopolitical orientation, economic structure, etc.

As a result, we should recognize the right to secession for the nations faced with the choice to obey or lose identity. For some nations (including the Palestinians living in Israel), however, this is not a solution, because, in addition to the "failure to present," the principle establishes other conditions: the existence of a "people," dense residence, recognition by the international community, and, finally, expression of the genuine nation's will in accordance with international standards and domestic legislation. Here, the modern order set up the second "barrier," often insurmountable, as demonstrated by the recent discussions about the annexation of Crimea by Russia.[31] Therefore, this interpretation is an unrealizable utopia: it can rely on some legal and philosophical doctrines (for example, on Hegel's idea of substantial will), but completely contradicts the fundamental principles of modern law as well as the interests of political elites.

4. National Reification and Human Rights

Human rights are completely helpless in the face of national reification or, rather, are indifferent to it. The reason for this is a fundamental denial of the collective principle. As noted above, human rights are based on the idea of dignity, which emphasizes a person's ability to independently choose their own destiny. This idea synthesized the Christian ideas of God's likeness of man and the omnipresence of God: by being godlike, man, like God, can be present in all things, although not in all at once. This relationship between man and God excludes all other relationships (including with a collective) as limiting godlikeness. Therefore, man–as presented

[31] *See* Vladislav Tolstykh, *Difficult Search for Truth*, 6(4) Russian Law Journal 154 (2018).

in Christianity–is *naked*, i.e. devoid of all social attributes.[32] This idea is also present in Scripture: Paul the Apostle in the Epistle to the Colossians calls for renewal "unto knowledge after the image of Him that created him: where there cannot be Greek and Jew" (3:10-11).

The historical aspect is also important. Feudalism was characterized by the multiplicity and intersection of jurisdictions: political power was exercised by several interdependent subjects: the pope, emperor, monarchs, feudal lords, guilds, municipalities, etc. In the seventeenth century, this structure became inadequate as an economic basis and was destroyed by the bourgeoisie, striving for protection from lords as well as the common market. Human rights served as one of the tools, together with the Reformation: by proclaiming the value of the individual they contributed to the disintegration of feudal corporations.[33] As a result, feudalism was replaced by a new structure, characterized by the supreme and exclusive power of the king (sovereignty) within large political and territorial entities (states). According to Th. Hobbes, the state is *a person*–an "artificial man," "mortal God," "Leviathan."[34] Thus, human rights have a *genetic* anti-collective focus: their use to protect the collective would be contrary to their historical purpose and the individualistic nature of the state.

A positivist analysis confirms this conclusion. The right to national heritage does not belong to the *first generation* of rights, since it does not depend on the individual himself, but requires external processes and efforts. Some elements of this heritage (for example, the right to language) can be protected by *ricochet*, i.e. together with protected rights (for example, the right to privacy); this protection, however, can be denied in the case of conflict with the interests of the state or other persons.

For example, in the inadmissibility decisions in the cases of *Mentzen alias Mencena v. Latvia* and *Kuharec alias Kuhareca v. Latvia* (7 December 2004), the European Court of Human Rights found that the addition of a variable feminine ending to a foreign surname and/or the transliteration of a foreign surname in accordance with Latvian phonetic rules did not breach Article 8 of the Convention. In both those decisions, the Court affirmed the following principles: (a) Although the spelling of names essentially concerns the area of the individual's private and family life, it cannot be dissociated from the linguistic policy conducted by the State. Linguistic freedom as such is not one of the rights governed by the Convention. However, there is no watertight division separating linguistic policy from a field covered by the Convention, and a measure taken as part of such policy may fall within certain

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[32] *See* Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (D. Heller-Roazen (trans.), Stanford: Stanford University Press, 1998).

[33] "The so-called rights of man, the *droits de l'homme* as distinct from the *droits du citoyen*, are nothing but the rights of a *member of civil society – i.e.*, the rights of egoistic man, of man separated from other men and from the community." Marx, *supra* note 14.

[34] *See* Thomas Hobbes, *Leviathan; Or, The Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil* (London: Andrew Crooke, 1651).

Convention provisions; (b) In adopting the national language, the State undertakes, in principle, to guarantee its citizens the right to use that language both to impart and to receive information, without hindrance not only in their private lives, but also in their dealings with public authorities. In other words, implicit in the notion of an official language is the existence of certain subjective rights for the speakers of that language. Consequently, in the majority of cases, it may be accepted that a measure intended to protect and promote a national language corresponds to the protection of the "rights and freedoms of others," within the meaning of Article 8 § 2; (c) The margin of appreciation which the State authorities enjoy in this sphere is particularly wide; (d) The fact that a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention.[35]

The Court, however, can uphold a complaint if the interests of the majority are not at stake. In *Güzel Erdagöz v. Turkey* (judgment of 21 October 2008), it found that the Turkification of the applicant's name (from "Gözel" to "Güzel") violates Article 8, because the domestic courts did not indicate any relevant legal provisions, nor a possible public or private interest competing with the applicant's interest, and Turkish law did not regulate the state powers in the field with a sufficient clarity. In *Khurshid Mustafa and Tarzibachi v. Sweden* (judgment of 16 December 2008), the Court found that the eviction of Swedish citizens of Iraqi origin from their house, on the facade of which they installed an antenna for receiving programs in Arabic and Farsi, violated Article 10 (the Court noted that the right to receive information in these languages is of particular importance to applicants). In *Mehmet Nuri Özen et al v. Turkey* (judgment of 11 January 2011), the Court found that a ban imposed on imprisoned Turkish citizens sending letters in Kurdish, issued on the grounds that the prison authorities were not able to read them, violated Article 8, because under Turkish law, such a ban can only be imposed in regard to letters infringing on security and order, containing false information, etc.

A similar logic is used by national courts. For example, in the decision of 15 June 1999, the Constitutional Council of France had to decide whether the European Charter for Regional or Minority Languages of 1992 conformed to the Constitution. The Charter enshrines the right to use a regional or minority language in private and public life (Preamble and Art. 7). The Council noted that the use of French is mandatory in the public sphere; therefore, the Charter encroaches on the constitutional principles of the indivisibility of the Republic, equality before the law, and the integrity of the French people.[36]

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[35] *See also* ECtHR, *Sabrina Birk-Levy v. France*, Appl. No. 39426/06, Decision, 21 September 2010; ECtHR, *Bulgacov v. Ukraine*, Appl. No. 59894/00, Judgment, 11 September 2011.

[36] European Charter for Regional or Minority Languages, Decision No. 99-412 DC of 15 June 1999 (Jul. 2, 2020), available at https://www.conseil-constitutionnel.fr/sites/default/files/2018-10/a99412dc.pdf.

The rights of the *second generation* set the guidelines for social policy. Some of them may involve the protection of national heritage, for example, the right to education or cultural life (Arts. 13 and 15 of the Covenant on Economic, Social, and Cultural Rights). A number of factors, however, exclude their binding effect. *Firstly*, according to Article 2(1) of the Covenant, each State-party is obliged to "take steps to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant." This obligation of behavior does not involve incorporation or judicial control[37] – as a result, we cannot talk about "rights."[38] *Secondly*, Article 2(2), prohibiting discrimination based on nationality, involves an equal access to certain goods, but not equal legal status of the goods (for example, the possibility of education in different languages). Thus, the state can always discriminate *against the goods* themselves, referring to "the purpose of promoting the general welfare in a democratic society" (Art. 4). *Thirdly*, Articles 13 and 15 do not mention that "the full realization" of these rights should take into account nationality–this silence *de facto* authorizes national reification.[39] *Fourthly*, the Covenant does not enshrine certain rights which, by their very nature, belong to the second generation (for example, the right to language).

The third generation of rights is designed to guarantee the well-being of groups and includes the rights of peoples to self-determination, development, peace, and a healthy environment, as well as the rights of minorities to perform the rites of their religion, use their own language, and develop their culture. At first glance, these rights should oppose national unification. However, just like the rights of the second generation, they fix abstract obligations of behavior and admit exceptions;[40]

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[37] "Article 2(1) itself is a somewhat confused and unsatisfactory provision. The combination of convoluted phraseology and numerous qualifying sub-clauses seems to defy any real sense of obligation. Indeed, it has been read by some as giving states an almost total freedom of choice and action as to how the rights should be implemented." Matthew Craven, *The Justiciability of Economic, Social and Cultural Rights* in *Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law* 1, 5 (R. Burchill at al. (eds.), Nottingham: University of Nottingham Human Rights Law Centre, 1999).

[38] H. Lapage calls the rights of the second and third generation "false": by setting out commendable purposes, they have nothing to do with law. They create chaos and distort the idea of law which is to ensure respect for the person and the correction of injustice, and not to generate an infinitely increasing mass of norms and decisions. Henri Lepage, *"Vrais" ou "faux" droits de l'Homme*, 3 Euro 92 Analyses 1 (1998).

[39] Article 13(1) uses a palliative wording, which leaves no doubt about the intentions of the States-parties:

"Education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship among all nations and all racial, ethnic or religious groups."

[40] "Some rights of peoples–in particular the right to a healthy environment and the right to peace–are of paramount importance for all peoples and, consequently, for mankind as a whole. Therefore, they must be given additional protection, over and beyond what classical international law is able to provide. In this perspective, to speak of "rights of people" would be a somewhat incorrect, albeit emphatic way, of recognizing in these rights the same legal status as the other rights. Rights of peoples would thus stand in line with the concept of the common heritage of mankind, which originated within the context of the law of the sea and is also slowly gaining recognition in other fields of international law ... Rights of peoples, understood in this sense as constituting the core of

moreover, many of them are enshrined in the instruments of soft law or in acts whose scope is limited by the territory of Europe.[41] The main problem, however, is that these rights are modelled on individual rights: for example, minorities have the right to use their heritage, *but only in private life*. Accordingly, the state is not obliged to guarantee that this heritage has a decent place in the public space (for example, to grant an official status to the minorities' languages). Simply put, minorities have the right *to non-interference on the part of the state*, which, in the context of national reification, does not protect their heritage from gradual extinction and becoming just a museum exhibit.

Conclusion

Thus, international law does not solve the problem of national reification. On the contrary, all the structures of the modern order (statehood, legitimacy, democracy, human rights, international law, etc.) generate this problem. Under these conditions, the oppressed minorities always face a difficult choice. The *first* option is to accept a sad fate and slowly fade away, in the cultural sense rather than in the physical sense. The *second* option is to leave the homeland and emigrate to kindred countries (if there are any). The *third* option is to break the social contract, take up arms and try to defend their values and their right to live on the land of their ancestors. The extreme manifestation of this option is terrorism.[42]

An apologist of international law could try to justify the national reification referring to the interests of internal and international stability. This argument, however, does not stand up to criticism: discriminating against some citizens and conning others does not guarantee a long-term legitimacy, but rather provokes internal and international conflicts, and makes the future of all humanity uncertain. The solution of the problem is vitally important and, at the same time, extremely

the international legal community, would give rise to a host of legal consequences not only at the international level, but also within the domestic legal order of states." Christian Tomuschat, *Rights of Peoples, Human Rights and Their Relationship Within the Context of Western Europe*, Peace, Human Rights, Rights of Peoples. Special Issue 61, 67–68 (1991).

41 The right to self-determination is enshrined in the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, Article 1 of the Covenants of 1966 and Declaration of Principles of International Law of 1970; other rights of peoples–in the Declaration on the Right of Peoples to Peace of 1984, Declaration on the Right to Development of 1986, Rio Declaration on Environment and Development of 1982, etc.; minority rights are enshrined in Article 27 of the Covenant on Civil and Political Rights, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, European Charter for Regional or Minority Languages of 1992, European Framework Convention for the Protection of National Minorities of 1995.

42 After the terrorist attack during the Olympic Games in Munich (1972), Sartre declared that terrorism is "a terrible weapon, but the oppressed poor have no other" ("Dans cette guerre, la seule arme dont dispose les Palestiniens est le terrorisme. C'est une arme terrible mais les opprimés pauvres n'en n'ont pas d'autre. … Le principe du terrorisme c'est qu'il faut tuer"). *See* Le Monde du 1er mars 1992, quoting La Cause du Peuple n°29.

difficult. Indeed, it cannot be cosmetic, but should affect the very foundations of international law, such as the principle of sovereignty or the idea of democracy. It remains to be seen whether humanity will be able to solve it or prefer to remain trapped by the disease of self-destruction.

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