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## Pushing the Limits of the Liberal Peace: Ethnic Conflict and the "Ideal Polity"

*Anne-Marie Slaughter*

Can international law help prevent ethnic conflict? Can international legal instruments or institutions help design or implement potential solutions to problems of ethnic conflict? Alternatively, does international law prohibit such solutions? The chapters in the first half of this volume offer a range of analytical lenses—historical, philosophical, doctrinal—with which to scrutinize the complex components of the phenomenon we identify broadly as ethnic conflict. Many of them locate affirmative responses to ethnic conflict in international law, but only by redefining our concept or understanding of ethnic conflict itself. The chapters in the second half of the volume offer more concrete institutional, doctrinal, or policy responses, efforts to survey existing international legal norms and arrangements that either are or could be addressed to problems of ethnic conflicts. They challenge scholars to count up successes, to analyze failures, and to analogize current conflicts to historical examples in both categories.

This chapter takes a slightly longer perspective. Instead of asking how international law responds to ethnic conflict, it examines the ways in which ethnic conflict is likely to shape international law. This approach treats ethnic conflict as an empirical fact, a historical phenomenon, a contemporary curse. On the assumption that international law is the skin of international society, a set of efforts to respond normatively and potentially coercively to a historically contingent set of problems, the fact of international conflict will be—is being—recorded in international legal norms. Indeed, Nathaniel Berman reminds us of the many ways in which existing norms were forged in previous eras in which ethnic conflict was the dominant or most dangerous form of conflict in the international system.

Part I of the book examines the impact of ethnic conflict on the liberal peace. It examines the impact of ethnic conflict on the liberal peace, the recognition of ethnic conflict in international law. On closer inspection, the liberal peace is better protected by adding to the liberal rights debate over ethnic conflict in many societies.

The second part of the book examines the often fluid rise of group political by efforts at expanding the rights and simultaneous again found with respect.

Part II takes a closer look at the rise of international criminal courts. These international courts are a vertical bridge between the international and the national.

Second, the book examines the "ideal polity," a concept that is supposed to be a Western European ideal to join to the liberal peace.

<sup>1</sup> Berman at cited.)

Part I of this chapter identifies two themes running through a number of the proposed responses—group rights and political settlement—and examines their larger implications for the international legal order. The impact of ethnic conflict on human rights law is easiest to discern. The apparent change is the addition of group rights to individual rights, with the concomitant focus on government treatment of minorities and the recognition of groups as well as individuals as subjects of international law. On closer inspection, however, it is not clear whether groups will be better protected, and hence the potential for inter-group violence reduced, by adding targeted group rights rather than relying on the traditional liberal rights of freedom of association and expression. Further, the entire debate over group rights in the context of international concerns over ethnic conflict could spur reflections about the definition of *groupness* in many societies without visible ethnic problems.

The second theme running through these chapters is the redrawing of the often fluid boundary between the legal and the political spheres. The rise of group rights may be understood as the further colonization of the political by the legal; on the other hand, the relative success of informal efforts at mediating simmering ethnic conflicts suggests the value of expanding the repertoire of political solutions rather than searching for new rights and remedies. Diplomats and lawyers may pursue these paths simultaneously, but as Berman's chapter suggests, legal efforts may once again founder on difficulties in reaching a consensus about generalization with respect to group identity.<sup>1</sup>

Part II takes a further step back and examines two additional dimensions of more fundamental change in the international legal order, dimensions that ethnic conflict may not cause so much as expose. First is the development of a permanent structural bridge between domestic and international institutions, exemplified in the links between the International Criminal Tribunal for the Former Yugoslavia (ICTFY) and domestic courts. These links portend a new and quite different architecture for the international legal system, disaggregating states into their component legislative, executive, judicial, and administrative institutions and forging vertical bridges to their supranational counterparts.

Second is the emergence of a stylized liberal state as a kind of "ideal polity," almost mystically endowed with an array of characteristics that are supposed to assure both domestic and international peace and prosperity. As a particular regional strategy, the political leverage exerted by Western European states on Central and Eastern European leaders seeking to join the Western club may be successful at resolving or forestalling

<sup>1</sup> Berman at 44. (Page citations in this chapter are to this volume unless otherwise indicated.)

conflicts currently on the political horizon. The larger assumption, however, that the existence of liberal institutions and legal guarantees will themselves provide a lasting framework for the political coexistence of ethnic groups is, to say the least, unproved. But to the extent that it foreshadows the imposition of a one-size-fits-all reconceptualization of the state as a basic unit of the international legal order, it heralds a post-Westphalian order.

## I. INDIVIDUALS VERSUS GROUPS, LAW VERSUS POLITICS

Individuals versus groups, law versus politics: these are old and inevitably false dichotomies. Nevertheless, a number of the chapters in this volume initially appear to turn on these distinctions. Whether group rights should exist independently of the rights guaranteed to individual members of the group, whether and how to use the flexibility of political settlement in place of the apparent certainty and clarity of legal entitlements—these are questions that structure both theoretical and practical approaches to ethnic conflict. The answers to these questions will leave a lasting impact on the international legal order.

### A. Which Groups Get What?

For one group of legal scholars, social theorists, and political philosophers, the emergence of ethnic conflict as the paradigm of war in the post-cold war era poses the theoretical challenge of identifying and accommodating group rights. For those who understand ethnic conflict as the recrudescence of longings for national self-determination long frozen during the cold war but irrepressibly bursting forth in its wake, group identity is a dimension of human flourishing that cannot be denied and probably should be protected. Some of these scholars affirmatively embrace group rights as a response to the anomie of atomistic liberalism; others reluctantly concede their necessity in the face of disturbing but seemingly irrefutable empirical evidence of nationalist striving around the world. But all agree with David Wippman's reluctant conclusion, in Chapter 8: "consociational practices [favoring collective over individual rights] . . . may . . . be the only means by which members of ethnic groups can maintain their identities and still participate meaningfully in the life of the larger society."<sup>2</sup>

Other scholars recoil at the oversimplification of a wide array of geographically and culturally diverse conflicts—each with its own peculiarly

<sup>2</sup> Wippman at 240.

combustible and social ship—under the label "ethnic dispositions" classified.<sup>3</sup> It will prove m

Lea Brilmayer of ethnic conflict however defined Brilmayer identifies practice in virtual not about aspects or religiously identifiable set of international enforcement to about the practice exist.

In a similar a special kind distinct from rights in terms argues further that instantiations cultures that choice. He also such, cannot justify de

Diane Orentlicher group rights government's of its Russian of its identity who have lived the only political individual agency trusts ethnic violence Orentlicher a solution—no individuals in instru

<sup>3</sup> Berman at 2

combustible mix of historical grievance, ideological conviction, economic and social stratification, political opportunity, and individual leadership—under the generic name “ethnic conflict.” To Berman, for instance, the label “ethnic conflict,” as opposed to “nationalism,” reflects the predispositions of the classifiers far more than any essential attributes of the classified.<sup>3</sup> In his view, the problem has been misdiagnosed. And the cure will prove much worse than the disease.

Lea Brilmayer and Fernando Tesón both seek to shift the understanding of ethnic conflict away from group conflict, or conflicts of ethnicity—however defined—to claims of injustice or violations of individual rights. Brilmayer identifies claims for corrective, retributive, or distributive justice in virtually all “nationalist” struggles. On her account, nationalism is not about aspirations for a nation based on some kind of cultural or ethnic or religious homogeneity, but rather about redressing a specific and identifiable set of historical wrongs. Once the issue is reframed this way, international law has an entire set of adjudicatory, prescriptive, and enforcement tools for resolving these problems. She is very pessimistic about the prospects for making these tools effective; nevertheless, they exist.

In a similar vein, Tesón strongly rejects the notion that ethnic conflict is a special kind of group conflict based on a concept of group rights as distinct from individual rights. He recategorizes these claims of group rights in terms of the rights of the individual members of the group. He argues further, privileging individual rights and the human rights law that instantiates those rights, that governments have no right to preserve cultures that are not themselves supported by affirmative individual choice. He also joins with Brilmayer in arguing that group identity, as such, cannot found a moral claim to a special entitlement any more than it can justify deprivation of a preexisting entitlement.

Diane Orentlicher, in Chapter 12, lends a more sympathetic ear to group rights claims, bringing alive the dilemmas arising from the Latvian government’s proposals effectively to deny citizenship to most members of its Russian minority. Must a nation-state submit to the forcible dilution of its identity by a previous conqueror? Yet can it dispossess individuals who have lived virtually their entire lives as Latvians of membership in the only polity they know? Her story not only poses the civil rights of the individual against the national identity rights of the group, but also contrasts ethnic with civic conceptions of group identity. In the end, however, Orentlicher also turns to individual rights as offering the most promising solution—not only to specific rights of nationality guaranteed to individuals in instruments such as the Universal Declaration of Human Rights

<sup>3</sup> Berman at 27.

but also to the more familiar civil and political rights protecting individuals against discrimination on the basis of ethnicity, race, or religion.

Here's the rub. It is precisely these canonical protections against discrimination on the basis of membership in a particular group that lie at the core of the cherished liberal ideal of individual equality before the law that are likely to be violated by consociational practices. As Wippman recognizes, "[c]onsociational solutions to ethnic conflict rest explicitly on the differential provision of tangible and intangible goods to individuals on the basis of their ethnicity."<sup>4</sup> And as Antonia and Abram Chayes recount, this perception has belatedly fueled opposition to a framework convention to be added to the European Convention on Human Rights that codifies principles designed to protect minority rights. This Convention "embodies a vision of the multicultural nation-state," in sharp contrast to the French "ideal of republicanism" which seeks to "decouple the state and ethnic identity," and permits no formal distinctions between citizens.<sup>5</sup> The opposition to this new vision is being led by Vaclav Havel, who ultimately refused to preside over the dissolution of Czechoslovakia.

What will be the outcome of this debate? In the short term, it will simply continue. In the medium term, international human rights law will almost certainly expand to include additional provisions for group rights. These provisions will be developed and adopted not only due to concern over the prevention of future ethnic conflicts, but also because they will attract support from proponents of a more general backlash against the universalism of current human rights provisions championing the individual over the family, the community, the tribe, and the nation. In the longer term, the present opponents of group rights may yet have their day; provisions for group rights should ultimately lead to a renewed focus on the definition of groupness. This second debate is most likely to take place in societies that are not necessarily riven by ethnic conflict but that nevertheless possess "discrete and insular minorities" whose abilities to make their voices meaningfully heard in the political process are limited.

Why should group rights fare any better in the 1990s than the minority rights provisions did in the treaties of the interwar period?<sup>6</sup> The answer, I think, lies in the interim development of human rights law as a distinct and important body of law. On the one hand, the existence of this body of law means that provisions governing governments' treatment of their own citizens are now codified and accepted in international law. On the other hand, the very growth of this body of law, founded on fundamental

<sup>4</sup> Wippman at 213.

<sup>5</sup> Chayes & Chayes at 187.

<sup>6</sup> For a comprehensive discussion of the origins and implementation of these treaties, see Nathaniel Berman, "But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law, 106 HARV. L. REV. 1792 (1993).

liberal premises the need to ensure the state, has led to East/West and

Some of these movements seeking to ing the critics with the tired garb of cultural relativism, postmodernism, and a noble critique of the conception of human rights that assumes a wary individual and the state based on social

Even assuming attaching to growth remains with importance of group identity will extend sharing bespeak static absolutism winning some argued, generate pluralistic democracy in power by nically riven societies the opportunity

<sup>7</sup> See MARY ANN GLAVIN, 76 (1991) ("Each day's tendency to speak of silence concerning the Banjul Charter and the VA. J. INT'L L. 339, 340 the trajectory of civil individual remedy meaning for individual ties.").

<sup>8</sup> See BRUCE RUSSELL, "norms of regulated peaceful transfer of national actors in world ATION IN THE LATE opposition political competition for power (1995).

liberal premises about the worth and dignity of the individual and hence the need to ensure certain inalienable rights of the individual against the state, has led to fissures within the human rights community along both East/West and North/South lines.

Some of these fissures are false, manufactured by repressive governments seeking to deflect international criticism of their actions by charging the critics with cultural imperialism. Others manifest themselves in the tired garb of hopelessly abstract debates between universalism and cultural relativism, the latter often spiced with the chic decentering of postmodernism. Still others, however, flow from a more telling and durable critique charging that the Western—particularly the United States—conception of human rights elevates rights above responsibilities and assumes a wary if not outright antagonistic relationship between individuals and the state, precluding more communal visions of self-governance based on social solidarity.<sup>7</sup>

Even assuming, however, the incorporation of some rights specifically attaching to groups in existing international legal instruments, the question remains whether general support for legal acknowledgment of the importance of group membership to the development of individual identity will extend to provisions governing political power sharing. Power sharing bespeaks an emphasis on process that contrasts sharply with the static absolutism of rights, the process of negotiation and compromise, of winning some and losing some. The lessons learned from this process, it is argued, generate norms that reduce the likelihood of violent conflict. In a pluralistic democracy, these norms emerge from the experience of alternation in power by two or three broadly representative parties.<sup>8</sup> In an ethnically riven society, in which clearly defined minorities will never have the opportunity to alternate in power as long as they vote on the basis of

<sup>7</sup> See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 76 (1991) ("Each day's newspapers, radio broadcasts, and television programs attest to our tendency to speak of whatever is most important to us in terms of rights. . . . Our habitual silence concerning responsibilities is more apt to remain unnoticed."); Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339, 344 (1995) ("In the West, the language of rights primarily developed along the trajectory of claims against the state; entitlements which imply the right to seek an individual remedy for a wrong. The African language of duty, however, offers a different meaning for individual/state-society relations: while people had rights, they also bore duties.").

<sup>8</sup> See BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* 33 (1993) (arguing that the "norms of regulated political competition, compromise solutions to political conflicts, and peaceful transfer of power are externalized by democracies in their dealings with other national actors in world politics"); SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATER TWENTIETH CENTURY* 6-7 (1991) (The "sustained failure of the major opposition political party to win office" indicates failure of democratic norms of unrestricted competition for power.); see also ALBERT O. HIRSCHMAN, *A PROPENSITY FOR SELF-SUBVERSION* (1995).



their minority status, the only option may be to replace the normal sequence of temporal power sharing with constitutional arrangements guaranteeing simultaneous power sharing.

This vision of power sharing, as Lani Guinier has eloquently articulated in the context of U.S. domestic politics, requires departing from the principle of one (hu)man, one vote.<sup>9</sup> But if members of some subdivision of a particular polity are entitled to more votes by virtue of the privileges accorded that subdivision in the constitutional or legislative power-sharing arrangements, the fundamental question inevitably reasserts itself: how to define the relevant group. Here, however, the question is re-framed: which group(s) of individuals are entitled to political power disproportionate to their number as a percentage of the polity as a whole? Guinier's answer is to create a political system that favors the expression of preferences by any and all groups, defined according to the commonality of their expressed political goals. This solution appears to take a step in the direction of the ideal compromise: a system that would allow all individuals to define themselves as members of whatever group they pleased, while preventing them from ever being labeled and differentially treated as members of a group as defined by others.

## B. The Limits of Law

Group rights, of some kind, may be international law's long-term response to ethnic conflict. Such a response fits the standard teleological account of twentieth-century international law that Berman seeks to challenge: the shift from individual to group rights reflects the continuing expansion of the legal into the political, the legal colonization of ever larger areas of political life. The imperialist metaphor is apt: law equates with civilization and politics with barbarism, law with domestic order and politics with international anarchy. This account is bolstered by the canonical narrative of human rights law after 1945, in which the march of progress rests on the slow but steady expansion of the international legal regulation of a government's treatment of its own citizens. The next step is from the regulation of a government's treatment of individuals to a government's treatment of groups.

Another set of responses to ethnic conflict, however, is more likely to acknowledge the limits of law. A number of the authors in this volume call for political rather than legal solutions, or at least seriously question the value of legal solutions. These choices of political over legal means are not the wholesale abdication of law in the face of the intractability of

<sup>9</sup> Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 131-32 (1994) (suggesting that collective group preferences "might be measured by using innovative electoral schemes like cumulative voting and proportional representation").

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<sup>10</sup> Berman at

<sup>11</sup> Chayes &

<sup>12</sup> *Id.* at 208-

<sup>13</sup> Orentlicher

<sup>14</sup> Wedgwood

politics; as Berman reminds us, law and politics mutually construct and shape each other.<sup>10</sup> The embrace of more political approaches is motivated instead by pragmatic recognition of the relative merits of formal rule-oriented solutions versus brokered compromises designed to address particular problems in particular contexts.

Chayes and Chayes tackle the question of conflict prevention—stopping the evil genie of ethnic hatred in the bottle. They survey the various measures that have been taken by a host of international and regional organizations in the name of conflict prevention, concluding that the informal mediation efforts made by individuals acting as neutral emissaries from regional organizations are far more effective than formal legal responses. Indeed, they find evidence in the efforts of the OSCE and its high commissioner for national minorities of the power of persuasion and of “managerial” modes of conflict prevention—the management of conflict rather than its forcible stifling.<sup>11</sup> What is needed now is “ad hoc interaction” among particular missions and NGOs to encourage “flexible, non-hierarchical processes.”<sup>12</sup> Orentlicher also praises the practical mediation efforts of international and regional organizations, and notes their innovative and flexible invocations of international law in responding to the problems posed by the Baltic citizenship policies.<sup>13</sup> These authors describe a new domain of mixed law and politics, a pragmatic domain focused above all on solving the problem at hand.

Ruth Wedgwood proposes another division between the legal and the political, calling for legal regulation of means to achieve an unforeseeable variety of political ends. She argues for extending the prohibition on the use of force in Article 2(4) of the U.N. Charter to internal conflict. As part of this extension, she would impose a duty of exhaustion of remedies on all parties to an internal conflict, requiring them to seek arbitration, mediation, or even adjudication of their dispute from bodies ranging from the Permanent Court of Arbitration in the Hague to the OSCE Office for Democratic Institutions and Human Rights to national courts sitting *ex aequo et bono*. The point of such dispute resolution alternatives would be explicitly *not* to develop a general set of principles about the political rights of minorities, much less a right to self-determination or secession, but rather “political hand tailoring, bespoke suits that fit a particular political history, state of conflict, surviving strands of fellow feeling, and possible common advantage.”<sup>14</sup> In sum, she advocates a legal emphasis on process combined with a political determination of substance.

<sup>10</sup> Berman at 27.

<sup>11</sup> Chayes & Chayes at 181–85.

<sup>12</sup> *Id.* at 208–9.

<sup>13</sup> Orentlicher at 298–99.

<sup>14</sup> Wedgwood at 251.

Overall, the 1990s will add another chapter to Berman's tale of the constantly shifting and contested boundary between legal and political responses to ethnic conflict. But the contributions to this volume suggest that learning has taken place: the authors here display little of the hubris of the interwar period. On the contrary, they are acutely aware of the limitations of their craft. David Wippman, for instance, advances consociationalism as a "least worst alternative."<sup>15</sup> Chayes and Chayes acknowledge that the efforts of regional organizations to address ethnic conflict in Eastern and Central Europe and the former Soviet Union have thus far been "disappointing and their potential elusive."<sup>16</sup> Such humility may be partly a result of critical reflections on the past. Above all, however, it bows before the enormity of present problems and reflects the chastened idealism that the simple experience of the twentieth century must compel.

## II. TOWARD A NEW INTERNATIONAL ARCHITECTURE

Even group rights cannot obviate the need for individual accountability. Lasting peace in countries and regions riven by ethnic conflict must be built on a measure of justice. Perhaps the most innovative response to ethnic conflict lies in the architecture of the ICTY. It holds potential for creating a set of personal and permanent links between domestic courts and supranational tribunals, harbingers of new modes of organizing and governing global society. At a deeper level, these links are predicated on assumptions about the existence and functioning of specific domestic institutions—courts unswayed by political pressures and devoted to the rule of law. These assumptions dovetail with yet more detailed assumptions about the optimal organization of a state that are becoming increasingly explicit in the European regional context. We are witnessing the emergence and perhaps the enshrining of an "ideal polity," cast in the image of Western liberal democracy. It may not be ideally suited to address the problems of ethnic conflict, but it is likely to take on a life of its own.

### A. Judicial Agents

Berman argues persuasively that previous international legal efforts to address nationalism or ethnic conflict have involved a "dual expansion," a simultaneous move below the surface of the state to regulate the "primitive" forces within and above it to a sophisticated supranational authority.

<sup>15</sup> Wippman at 241.

<sup>16</sup> Chayes & Chayes at 180.

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<sup>17</sup> U.N. Security Statute of the In the Security Cou S/25704 (1993), of the implement judicial systems, ity of concurrent refer it to the tril tribunal the pow independent ju tional regimes h double jeopardy statute, however judicial proceed the unprecedented Hochkammer, T national Law, 28

<sup>18</sup> Damrosch

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The dissolution of the line between the domestic and the international has thus again been inherent in the very idea that international law should regulate ethnic conflict. But what is striking and arguably novel about current efforts is that they are establishing links between domestic and international *institutions*, according each a distinct sphere of governance and linking them on the basis of common function. The ICTFY, for instance, establishes a direct link between national and supranational courts by placing primary responsibility for prosecuting individuals indicted for war crimes on national courts. If the ICTFY determines that a national court is not fulfilling its obligation, it is then entitled to ask to take over the case.<sup>17</sup>

Recognition of the duty of national courts to enforce international obligations is not new. Lori Fisher Damrosch points out, for instance, that the Genocide Convention envisions that national courts will handle all genocide prosecutions against individuals, while the International Court of Justice will hear genocide claims against states.<sup>18</sup> But these are twin and separate tracks based on the traditional assumption that national-level institutions govern individuals and international institutions govern states. The innovation of the new tribunal is that it establishes a dialogue between like institutions at the national and supranational level, institutions engaged in a common enterprise but with varying expertise.

The development of similar transjudicial communication has been most developed in the European Union, in which national courts are empowered by the Treaty of Rome to refer cases involving questions of European law up to the European Court of Justice (ECJ). The ECJ renders its opinion and effectively sends the case back to the referring national court for final decision.<sup>19</sup> The result is the creation and strengthening of

<sup>17</sup> U.N. Security Council Resolution 827 established the Yugoslav war crimes tribunal and contains the statute that sets forth the structure, procedures, and jurisdiction of the tribunal. Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., Annex at 36, U.N. Doc. S/25704 (1993), U.N. SCOR, 48th Sess., revised by U.N. Doc. S/25704/Corr. 1 (1993). Article 8 of the implementing statute gives the tribunal "concurrent" jurisdiction with the national judicial systems that have emerged from the collapse of the former Yugoslavia. The availability of concurrent jurisdiction means the national legal systems have the right to try a case or refer it to the tribunal as they see fit. However, Article 9 of the implementing statute gives the tribunal the power to declare a national judicial proceeding null and void and to institute an independent judicial proceeding on its own. This provision is based on a belief that international regimes have supremacy over national legal systems. It could subject war criminals to double jeopardy if they were tried and acquitted by national courts. The implementing statute, however, provides that the accused can be retried by the tribunal if the national judicial proceedings are deemed to be flawed. Under the terms of the statute, the tribunal has the unprecedented ability to render national judicial proceedings invalid. See Karl Arthur Hochkammer, *The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law*, 28 VAND. J. TRANSNAT'L L. 119 (1995).

<sup>18</sup> Damrosch at 272-73.

<sup>19</sup> For further discussion of this and other forms of transjudicial communication, see Anne-

an autonomous "community of law."<sup>20</sup> The prosecutor of the ICTY, Richard Goldstone, and the Tribunal itself have already demonstrated their autonomy from the political branches of the United Nations. As Ruth Wedgwood points out, the Security Council resolution that created the tribunal deliberately did not identify the conflict as international or internal but simply gave the tribunal jurisdiction over all violations of the law of armed conflict.<sup>21</sup> The appeals chamber of the tribunal has subsequently ruled that atrocities committed in civil wars are international crimes, thereby significantly expanding international jurisdiction over activities once thought to be a matter exclusively between a state and its citizens.<sup>22</sup> Matched with equally independent national prosecutors and courts, a legal process could be set in motion quite independently of the political process, leading to a measure of the international justice (as opposed to international law) that Brilmayer is so pessimistic about ever achieving. Her pessimism may prove well founded within the traditional international legal system. But harnessing like institutions at the national and supranational level may produce very different results.

An additional strength of this approach concerns the possibility that it will allow the Bosnians themselves to participate in bringing the criminals among them to justice. Should political conditions permit, the emphasis in the design of the tribunal on national prosecutions in the first instance allows a reconstituted Bosnian polity, or even reconstituted Serb, Croatian, and Muslim polities within the former Bosnia, to cleanse their own houses. It remains possible that as political winds shift and formerly silenced voices begin to be heard, many Bosnian Serbs will be prepared to turn against their former leaders, calling for their prosecution as war criminals.<sup>23</sup> The supranational institution provides both the legal impetus for such an initiative, by indicting the accused, and marshals the legitimacy of the international community behind national action.

These links between domestic and international institutions could foreshadow a new international architecture in which the primary actors are the disaggregated domestic institutions of individual states—courts, legislatures, executive branches, administrative agencies—interacting quasi-autonomously with one another and with their supra- and subnational

Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICHMOND L. REV. 99 (1995).

<sup>20</sup> Walter Mattli and I used this term in explaining the remarkable success of the European Court of Justice in constructing a European Community legal system with direct impact on nationals of the member states. See Anne-Marie Burley & Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993).

<sup>21</sup> Wedgwood at 246.

<sup>22</sup> *Dusko Tadic*, Case No. IT-94-1-AR72, October 2, 1995, reprinted in 35 I.L.M. 32 (1996).

<sup>23</sup> Chris Hedges, *Top Leader of the Bosnian Serbs Now under Attack from Within*, N.Y. TIMES, January 4, 1996, at A1.

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*Id.* at 16.

counterparts. What is equally noteworthy, however, is that the primary locus of action and accountability is national. The structure of the ICTFY assumes, indeed requires, that the vast majority of war criminals be brought to justice at the national level, with the supranational tribunal designed to spur, guide, supervise, and monitor national-level proceedings.

In one sense this is nothing new; international agreements have always been predicated on the assumption and obligation of domestic implementation. The difference here is that whereas states were the traditional subjects of international law and were thus bound to give effect to the obligations binding them or answer for their failings in this regard to other states before an international body, here international law purports to regulate individuals directly and to hold them directly accountable before an international tribunal. In this context, domestic courts function not as domestic actors invisible and unaccountable behind the opaque shield of the state, but rather as agents of a higher corporate body—a body comprised of all states acting collectively in their international law-making capacity. This posture can be understood as resting on certain assumptions about the way in which these courts will fulfill their tasks, assumptions that may in turn be transformed into obligations to meet certain standards.

The principal assumption embedded in a structure of supranational direction and national initiative and implementation is of a measure of judicial independence from the political branches of state governments: Not the independence of judicial review, but simply of presumed neutrality as between disputants and insulation from political pressures.<sup>24</sup> In other words, the independence inherent in a fidelity to the law as written or made through recognized judicial processes.<sup>25</sup> Only on such a foundation can a genuine community of law be constructed. This assumption

<sup>24</sup> The design of the tribunal does not assume that courts are completely independent of political branches; after all, member states of the United Nations must pass implementing legislation to permit domestic prosecutions for war crimes. Thus national courts must await political authorization. Once forthcoming, however, it must be general in terms, leaving lots of discretion to both prosecutors and courts. In many countries, once the legal processes are begun, political interference is difficult if not impossible.

<sup>25</sup> Cf. Thomas Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication*, in *RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: FESTSCHRIFT FÜR RUDOLF BERNHARDT* 702 (Ulrich Beyerlin et al. eds., 1995). Buergenthal concludes that three elements are needed to facilitate the process of the internationalization of domestic courts: "first, the existence of international tribunals with jurisdiction to deal with complaints by States and individuals alleging violations of international legal obligations; second, the recognition by domestic courts—this will not always come easy or without some political pressure—that we live in a world in which the routine interaction between national and international tribunals is in the national interest because it promotes the rule of law; and third, the existence of domestic legal institutions that permit and facilitate this interaction." *Id.* at 16.

was easy to make within the context of the European Community in 1957 and quite possible to make within the context of the members of the Council of Europe today. But the jurisdiction of the ICTFY is universal.

On the other hand, perhaps the structure of the Bosnia tribunal assumes a collaborative effort between national and supranational courts in an effort to build a global community of law. Where national courts can take the lead, they should. Where they are disabled, overborne, or nonexistent, the supranational tribunal will step in. This image leads to the further prospect of the potential socialization and strengthening of national judges in the independent enforcement of international law through regular contact with the supranational tribunal.<sup>26</sup> Of course, unlike in the European Community, the ICTFY and its Rwandan counterpart are starved for funds even to adjudicate the cases brought. In addition, national courts must depend for the cases brought before them not on individual litigants with commercial interests at stake but on national prosecutors subject to a welter of conflicting legal and political considerations.

On balance, the institutionalization of links between domestic and national judicial institutions is only beginning. And it may not, in the end, have a measurable impact on bringing the perpetrators of atrocities in this round of ethnic conflict to justice. It is, however, a significant advance over Nuremberg. It conjures a world in which courts play a dual role as servants of both the domestic and the international legal system.<sup>27</sup>

## B. The Limits of the Liberal Peace

The creation of international legal institutions premised on assumptions about the domestic structure of participating states has far-reaching implications. The innovation of human rights law was to hold states responsible for the treatment of their citizens and thus to accord individuals status as sometime subjects of international law. The incorporation of assumptions about the existence and nature of national courts in the creation of an international institution may signal an equally radical shift in the focus and concern of the international legal order: from how states treat their citizens to how states themselves are configured.<sup>28</sup> This shift is readily

<sup>26</sup> Eric Stein and Hjalte Rasmussen, among others, describe the way in which the European Court of Justice helped socialize national judges as agents of the European Community legal system, through means ranging from champagne receptions in Luxembourg to seminars in national judicial centers. Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986). See also G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MARKET L. REV. 595 (1989).

<sup>27</sup> Friedrich Kratochwil, *Contract and Regimes: Do Issue Specificity and Variations of Formality Matter?* in REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger ed., 1993).

<sup>28</sup> Thomas Franck's call for recognition of a right of democratic governance prefigures this shift, but he still frames his argument in terms of individual rights. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992). Recognition of the

observable in the Council of Europe is being used as a model for other members.

Whether these arguments for recognition of this chapter, even if met by dampen existing have reached the

Chayes and Chayes use to avert ethnic conflict in the context of membership in the Council of Europe (COE) in rights instruments. Chayes and Chayes separately kept a record of the former Soviet Union at its maximum leverage and assured human

Liberal democracy is a status. It can all symbolizing what Chayes observe explicitly that the joining the circle of OSCE have also as providing support for organizing semi-constitutions, and

Membership in the EU is the ultimate test upon liberalization efforts, including

right of each individual within the framework of the definition of statehood as principal actors in the

<sup>29</sup> Chayes & Chayes, *The Rationality Ideal and the Communist World* (1992).

<sup>30</sup> Chayes & Chayes

<sup>31</sup> *Id.* at 186 describing

<sup>32</sup> *Id.* at 197.

observable in the context of regional organizations such as the EU, the Council of Europe, and the OSCE, in which the template of an ideal polity is being used as leverage to try to quell ethnic conflict in would-be members.

Whether these criteria for membership will ripen into universal requirements for recognition for statehood is a large question beyond the scope of this chapter. Of more immediate relevance is whether these criteria, even if met by the states on which they are being imposed, will in fact dampen existing ethnic conflict and forestall future outbreaks. We may have reached the limits of the liberal peace.

Chayes and Chayes note that the tools that regional organizations can use to avert ethnic conflict include the intangible inducements of belonging to the community of democratic nations that is the imprimatur of membership in the Council of Europe.<sup>29</sup> Admission to the Council of Europe (COE) is conditioned on signature and ratification of COE human rights instruments and on demonstrable democratic practices. It has deliberately kept a number of states from Central and Eastern Europe and the former Soviet Union in a halfway house to full membership to maintain maximum leverage on them as they make the transition to full democracy and assured human rights protections.

Liberal democracy thus becomes the hallmark of a coveted, exclusive status. It can also become the caesura that marks a definitive transition, symbolizing what a country is not as much as what it is. Chayes and Chayes observe that one incentive for countries to join the COE is "to make explicit that the country has broken from past Soviet domination and is joining the circle of democracies."<sup>30</sup> In-country missions sponsored by the OSCE have also contributed to moderating ethnic conflict by such actions as providing support for delegations observing parliamentary elections, organizing seminars for officials to discuss the principles of a democratic constitution, and advising governments on human rights issues.<sup>31</sup>

Membership in the EU provides similar but even stronger incentives. The EU is the ultimate community of liberal states. Membership is "premised upon liberal democracy, respect for human rights, the rule of law and a market economy."<sup>32</sup> The EU also engages in more direct democratization efforts, including "support for democratic infrastructure and inter-

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right of each individual to representation in his or her polity can still be encompassed within the framework of human rights law. The potential shift that I describe would alter the definition of statehood itself and alter fundamental assumptions about the identity of the principal actors in the international system.

<sup>29</sup> Chayes & Chayes at 187, 189–191. See also Jean L. Manas, *The Council of Europe's Democracy Ideal and the Challenge of Ethno-National Strife*, in *PREVENTING CONFLICT IN THE POSTCOMMUNIST WORLD* (Chayes & Chayes eds., 1996).

<sup>30</sup> Chayes & Chayes at 189.

<sup>31</sup> *Id.* at 186 describing the activities of the in-country OSCE mission in Moldova).

<sup>32</sup> *Id.* at 197.



parliamentary cooperation, demarches in favor of democracy, assistance in creating a free media and election monitoring."<sup>33</sup> On the economic side, the European Bank for Reconstruction and Development was explicitly charged with "applying the principles of multiparty democracy, pluralism, and market economics."<sup>34</sup> The same template can be found in the Badinter Commission's criteria for recognition of new states out of the former Yugoslavia: respect for minority rights, the rule of law, democratic rules, and civil liberties.<sup>35</sup> Finally, moving beyond Europe, the World Bank and the International Monetary Fund have adopted the mantra of "good governance" as an "enabling condition" for development, code for democracy and respect for human rights.<sup>36</sup>

Why should the emergence of this particular ideal polity be surprising? Realists, after all, will argue that once again the most powerful states in the international system are setting out to remake the world in their own image. Critical theorists might well concur. After all, Berman's emphasis on the social construction of groups through projection of a set of cultural conceptions would lead him to find the social construction of an ideal polity unremarkable.

It is also possible to see the particular ideal polity being enshrined as the entirely predictable, and indeed foreshadowed, continuation of the trends that Thomas Franck identified as giving rise to a "right of democratic governance."<sup>37</sup> If such a right is established at the individual level, the emergence of a democratic polity as the basic unit of the international system is the natural corollary at the systemic level. And attributes other than democracy itself, such as guarantees of civil and political rights, are already provided for in international human rights instruments. These instruments must further assume some version of the rule of law where they do not explicitly provide for it.

Of greater moment here, however, is the specific context in which the outlines of this particular ideal polity have emerged and the purposes that its attributes are supposed to serve. Chayes and Chayes spell out the logic behind the practices of the various European and global institutions that they canvass: The "assumption [is] that Western-style democracies operating under the rule of law and protecting fundamental human rights do not experience much violent internal conflict."<sup>38</sup> Liberal democracy is thus being advanced less as an individual or even a national entitlement

<sup>33</sup> *Id.* at 198.

<sup>34</sup> Article I, Charter of the European Bank for Reconstruction and Development.

<sup>35</sup> Wedgwood points out that these criteria assimilate very closely to the minimum criteria for membership in the European Union, "as if recognition and membership were the same." Wedgwood at 253.

<sup>36</sup> Chayes & Chayes at 193.

<sup>37</sup> See Franck, *supra* note 28.

<sup>38</sup> Chayes & Chayes at 187.

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and more as a cure for ethnic conflict. As such, it is being offered as a solution for a problem it has never demonstrably been able to solve.

Many of the proponents of the democratic entitlement, or, more generally, those such as myself who have advocated drawing distinctions among states based on their domestic political regime, have drawn on scholarship demonstrating that democratic states are significantly less likely to go to war with other democratic states. In light of this phenomenon—frequently referred to as the “democratic peace”—inscribing the features of liberal democracy as an ideal polity embedded in and promoted by international law can be said to promote international peace.

No systematic evidence exists, however, to demonstrate that liberal democracy has an equally pacific effect on *internal* ethnic strife. In addition to prominent empirical examples—the festering problems of Northern Ireland, the Basque country, Catalonia, Corsica, Cyprus, and Quebec—the leading explanations of the causal links between democracy and peace do not readily translate into the context of domestic conflict among ethnic groups. The structural explanation assumes that parliaments vote on war, whereas ethnic conflict presumes divided parliaments or parliaments in which one of the potentially warring parties is a distinct minority. The normative explanation assumes the deep inculcation of norms of peaceful change and positive-sum bargaining that flow from long experience of alternating parties in power.<sup>39</sup> Yet to the extent that ethnic conflict results from the desire of persistent minorities to secure the rights and privileges accompanying majority political power, they are by definition unlikely ever to have had the experience of such alternation.

Indeed, David Wippman reminds us that Arend Lijphart’s theories of consociationalism were all premised on the assumption that pluralist democracy was unlikely to flourish in a deeply ethnically divided society. Consociationalism is a form of democracy, but it is deeply in tension with many of the most basic tenets of liberalism, as I have noted. The move to add specific protections for minority rights to various international legal instruments heretofore deemed to be sufficient to structure life in a liberal democracy equally reflects a recognition that ethnic conflict poses special problems. The vision and to a large extent the empirical experience of the ideal polity largely assumes that these problems have already been solved.

In sum, many of the responses to ethnic conflict on the part of regional and international institutions seem to herald a deeper shift in the international legal order. A new template of the attributes of statehood—the

<sup>39</sup> These two explanations have been advanced by Bruce Russett based on his own research into the empirical phenomenon of the democratic peace and a comprehensive review of the literature. See Russett, *supra* note 8.

prerequisite elements for participation in the international legal order—appears to be emerging. This template is offered as a prescription for peace in the face of the principal source of contemporary conflict, ethnic conflict. Unfortunately, however, while liberal democracy may be the best cure available for a host of ills, its efficacy in this case is unproved. Liberalism assumes a polity. It offers little guidance for creating one—or holding one together.

The nationalism of the nineteenth century has become the ethnic conflict of the twentieth century. We no longer think of ethnic groups as necessarily forming nations. We no longer think that nations are entitled to states or even that nation-states are uniquely appropriate units.

The twentieth-century response to bloodshed triggered by the perception and distortion of ethnic differences focuses more on the organization of existing states than on the creation of new ones. Individuals have the right to participate in their own governance, arguably bolstered by specific political guarantees so that their voices can be meaningfully heard. They are entitled to the legal protection of the rights they are given. These rights entail obligations on the part of specific state institutions—legislatures, courts, executives. Individual entitlement thus translates into state structure.

Ruth Wedgwood writes, "The state has lost its opacity."<sup>40</sup> States traditionally were conceived of as billiard balls and black boxes—organized in any fashion their rulers wished. Human rights law introduced standards for the way in which these rulers treated their subjects. The array of international legal responses to ethnic conflict reflects a further step toward the imposition of formal requirements concerning the way in which states are themselves constituted. In this world, titular rulers will be acknowledged as the reflection and instrument of a higher authority, as subject to the sovereignty of their subjects. Liberal democracy may not be a cure for ethnic conflict. But it may be the best that the international legal order has to offer.

<sup>40</sup> Wedgwood at 242.