

THE NEW STATE-CENTRISM IN INTERNATIONAL LAW*

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To the Georgetown International Legal Theory Workshop:

The attached two chapters are from my forthcoming book “Humanitarian Occupation.” In this brief note I’d like to describe the structure of the book and say how these chapters fit into its overall scheme. I’ll then briefly address an issue that has arisen since I finished these drafts. Please keep in mind these are drafts and probably require some editing!

The book’s title refers to a phenomenon also called International Administration, Internationalized Territory and quasi-Trusteeship. It involves international actors, principally the UN, assuming governing powers over some or all of a state’s territory. The four contemporary cases that form the central case studies in the book are Bosnia, Kosovo, East Timor and Eastern Slavonia. “Humanitarian occupation is intended to capture the two salient characteristics of these missions. They are *humanitarian* because in each case the stated purpose of the intervention is to establish social stability, respect for human rights and democratic institutions. They resemble classical belligerent *occupations* in that effective control over the territory is assumed by a de facto regime that, while not claiming full sovereignty, assumes virtually all functions of government.

The book is divided into three sections. The first reviews the history of internationalized territories, from ad hoc European arrangements in the mid-19th Century to mandate and trust territories to UN nation-building missions of the 1990s. I argue one can find a progression in the reasons for internationalization and the nature of international authority. The early missions reflected the geo-strategic concerns of the dominant European powers, and so made little provision for how the territories were to be governed. The later missions had less and less connection to interests of the major powers and focused increasingly on the structure of governing institutions.

The second section asks why the international community has taken the extraordinary step of divesting states of control over their own territories. The two chapters attached here come from this section. Not to give away the story, but I argue that humanitarian occupation missions seek to reify a model of the state that has become increasingly clear in international law since the end of the cold war. It is a conservative model in that it seeks to preserve existing borders and populations. Since the occupations have occurred in post-conflict states in which citizens have been demonstrably unable to coexist, a significant international presence is required to make such states viable. Long-term viability, without international administration, is only possible with political institutions that take account of the states’ diversity and give the previously warring factions a stake in its survival. Democracy promotion has therefore been at the center of each mission. Humanitarian occupation thus represents the ultimate commitment to preserving existing states and their populations.

The third section inquires into the legal justification for these extraordinary intrusions into the domestic realm. Two conventional justifications appear in most discussions: agreements negotiated with the target states and a Chapter VII resolution of the Security Council. I argue that significant problems hobble both these claims. Next I

ask whether the international law of occupation could support missions that, as noted, resemble in many ways the belligerent occupations described in the Hague Regulations on Land Warfare and the Fourth Geneva Convention. I identify problems here as well. Finally, I propose an alternative conception of Security Council action, one that rejects measuring its actions by norms designed to constrain unilateral state acts. Instead, I argue the Council should be seen as acting legislatively in these cases, changing the state-centric law. Such acts may be legitimized both by the collective interests perceived by states acting within international organizations (drawing on insights of institutionalist and constructivist scholars), and by indicia of support emanating from other international organizations and institutions.

So these two chapters focus on the model of statehood adopted by humanitarian occupation missions. The two discussions are complimentary: the first reviews the models of statehood rejected by international law and the second describes the positive model now ascendant. Importantly, both models suggest that contrary to much recent literature, international law is very much committed to the state as the principal source of political authority in the world. My discussion in the Colloquium will revolve around demonstrating this claim. For this reason I have entitled the talk “The New State-Centrism in International Law.”

Finally, I should briefly mention the recent developments on the final status of Kosovo. As you may know, Kosovo, part of Serbia, has been under UN administration since 1999. In early February, a UN special envoy recommended a form of autonomy for Kosovo and an end to UN administration. It is not clear at this point whether Kosovo will be independent. But if that occurs, my claim that the international community has made a firm commitment to existing borders might be seen as weakened.

I don't think this is the case, for several reasons. First, any move to autonomy would clearly be the international community's last choice. Every SC resolution from 1999 to 2007 has reaffirmed Serbia's territorial integrity, and the Balkans is the last region in which the UN or EU wants to set a precedent to the contrary. Second, the new plan would establish an international administrator for Kosovo, much like the High Representative created for Bosnia by the Dayton Accords. The new plan may thus be seen not as a rejection of international administration but the substitution of a new, albeit less heavy-handed form. Third, it is not at all clear that international law would support an independent Kosovo. If Serbia resists, as they have said they will, could the Security Council mandate Kosovar independence? A significant question would arise of whether its Chapter VII powers would extend to dismembering state territory. Finally, since the occupation mission was established by the Council it must be ended by the Council. There is a high likelihood that Russia would veto any resolution contemplating independence.

I look forward to your comments.

Greg Fox

Chapter 4

Rejected Models of Statehood

Why in the cases of Bosnia, Kosovo, East Timor and Eastern Slavonia, has the international community taken the extraordinary step of divesting national governments of authority over their own territories? This chapter and Chapter 5 seek to answer that question by situating humanitarian occupation missions in the context of legal principles addressed to the spasmodic civil wars that prompted the missions in the first place. I will suggest that those principles, when considered together, envision a highly particularized model of the state. This chapter describes models of statehood systematically rejected by international law; the next chapter will describe the new, affirmative model that has emerged from a variety of normative settings. The humanitarian occupation missions may be seen as operationalizing that emerging model. Humanitarian occupation is thus a small, but remarkably telling part of a much larger project in international law to reimagine the state, and in particular, its core attributes of population, governance and territory.

The historical review of international governance in Chapters 1 and 2 suggests that a link between those initiatives and norms of statehood is not entirely new. The link is weakest in the earliest cases, which arose from unresolved territorial disputes after the First World War and which may be explained in fairly straightforward geo-strategic terms. The mandate and trusteeship regimes share an element of that realpolitik explanation; they were, after all, the colonies of defeated states appropriated and distributed by the victorious powers. But these arrangements also introduced a concern for the welfare of colonial peoples, culminating in demands for their independence.

Other policy goals were thereby introduced, foreshadowing concerns that would later become explicit: unease with imperial governance and the associated structures of an unequal international order, nascent ideas of human rights against governing authorities and Wilsonian notions of self-determination among others. Further on, the UN nation-building missions of the 1990s, while not vesting governmental authority in international actors, deeply embedded outsiders in projects of national reform. Humanitarian occupation placed the international community in the position of architect of national political institutions. With outsiders – primarily the UN Security Council – asserting legal authority to become the ultimate law-giver in target territories, any meaningful distinction between the national and international was effectively eliminated. No domestic function, it seemed, was beyond regulation by international actors.

One might conclude from this historical progression that the humanitarian occupation is simply the culmination of a widely-noted trend toward ever-increasing international involvement in the relations between citizens and their governments. With human rights and principles of democratic governance now accepted as legitimate goals of international law, and with the United Nations unbound from its Cold War shackles, it was simply inevitable, one could argue, that in cases of extraordinary threats to individual welfare the international community would itself impose a set of governing institutions. Those institutions would comport with norms already prescribed by international law for the target state. The argument, in other words, is that humanitarian occupations are substantively unremarkable, or at least new just in degree but not in kind. It is only the remedy that breaks new ground.

In this chapter I will argue that while human rights and democratic majoritarianism are important normative catalysts for the missions, they cannot be the entire explanation. This is because democracy and human rights do not presuppose their application to any particular geographic units. The institutions of liberal governance have usually emerged from political transitions in existing states, but they might also apply to newly secessionist or partitioned states. The European Court of Human Rights has even applied its jurisprudence on democratic elections to the European Parliament.¹ Liberal governance, moreover, may operate both in existing heterogeneous states or in states made more homogenous through the removal or exchange of minority populations. Many international relations theorists, particularly those seeking to internationalize theories of social justice such as Rawls', have commented on the moral arbitrariness of existing boundaries and populations.² Others, writing in a more pragmatic vein, advocate redrawing specific borders in order to further liberal principles.³ If norms of democracy and human rights were the sole impetus for humanitarian occupations, in other words, changes in borders and demographic profiles would be available as means to facilitate those normative ends.

But they are not. Normative commitments to existing state borders and to maintaining demographic pluralism are equally evident features of contemporary international law. I will argue that the statehood espoused as a normative goal and secured by humanitarian occupations is one in which boundaries and populations are taken as a given, not to be altered through force or coercion. The conflicts within

¹ MATTHEWS V. THE UNITED KINGDOM, 1999 – I EUR. CT. H.R.

² THOMAS W. POGGE, *REALIZING RAWLS* (1989); FERNANDO TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (2D ED. 1997).

³ Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

existing states – that some may say have resulted from these very characteristics – are to be addressed through the creation of democratic institutions, minority protection regimes and the institutions of tolerant political culture. Humanitarian occupation missions are thus correctly viewed as extraordinary remedial measures designed to give effect to prevalent norms of governance. But the scope of those norms is much broader than generally supposed. The consequences of seeking to reify this vision of the state – a commitment to democracy in places where the inhabitants have not only rarely experienced democratic government, but have often been killing each other with exceptional brutality – are profound indeed.

This explanation for humanitarian occupation suggests a rather remarkable role for international law: as intellectual parent of major military interventions and a new class of internationalized territories. The boldness of this claim should immediately give international lawyers pause. Can it really be demonstrated that international norms are the principal catalyst for humanitarian occupations? Many other explanations for the missions are surely available. For example, the instrumental view that democratic politics is seen by the Security Council as the best means of ensuring peace in fragile post-conflict societies.⁴ Certainly legal analysis is not empirical social science; it does not purport to explain events by evaluating various potential causes and pronouncing one the true explanatory variable.

But the claim need not be stated in cause and effect terms. If an examination of relevant norms were to reveal a *preference* for conditions that made humanitarian occupation likely or even essential to achieve desired ends, that would be sufficient to

⁴ I examine this claim in Gregory H. Fox, *Democratization, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 69 (DAVID M. MALONE ED., 2004).

show a close affinity between the state as modeled by law and the state as shaped in practice by the occupation missions. Whether it is the rules themselves or the critical mass of international opinion supporting their emergence that led to the missions, the point is that legal prescriptions for the state now seem to accurately reflect the preferences of policy-makers. Law may not dictate policy; but if policy and law share an idealized conception of the state, it is appropriate to view the two as sharing an intellectual pedigree.

A. Introducing the Policy Options

The legal significance of humanitarian occupation emerges from the choices made by international actors. In each of the four cases the international community has been faced with a state rejecting the most basic tenet of the social contract: the security of its citizens. All four of the missions have proceeded from the assumption that such large-scale, violent assaults by governments against their own peoples are unacceptable. And three of the four (excluding East Timor, where a transition to independence was already underway) took the state boundaries within which the violence occurred as immutable.

But why should this be so? If these episodes signified the unraveling of the states involved as coherent political communities, or definitive proof that they were never coherent in the first place, why should international society seek to maintain their integrity? After all, “the modern state, since it emerged out of the ashes of the medieval order, has always been a work in progress.”⁵ Many European states coalesced only after centuries of violent challenges to political loyalties and authority structures. As

⁵ Jennifer Milliken & Keith Krause, *State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies*, 33 DEV. & CHANGE 753 (2002).

Mohammed Ayoob notes, "there was no dearth of 'Somalias' and 'Liberias' in seventeenth- and eighteenth-century Europe."⁶

The first response to the suggestion that "history" in these cases should be permitted to run its course is usually a compelling defense of individual rights: whatever the endgame of forces challenging the status quo in existing states, it is claimed, acquiescence to their objectives would come at a terrible human cost. In the 21st Century, are we prepared to tolerate ethnic cleansing, mass expulsion, secessionist wars, subordination of minority groups and worse on the theory that efforts to restrain these actions would interfere with the emergence of a more "authentic" political order? In an era suffused with individual rights, can international organizations accept such tactics as necessary by-products of nationalist or other claims of group entitlement? Or must they respond, as did the Security Council to the warring ethnic factions in Bosnia, that the individual retains its primacy over the group: "all parties are bound to comply with the obligations under international humanitarian law . . . and [] persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches."⁷

But the claims of group entitlement challenging these arguments are equally compelling. Asserting ideological, ethnic, religious or other collective identities, they seek to reverse historical injustices said to have been perpetrated by empires, colonizers, rival groups and regional hegemons. Violence in the course of vindicating these interests, it is asserted, is tragic but unavoidable. How else can history be "undone"? To

⁶ Mohammed Ayoob, *State Making, State Breaking and State Failure*, in *MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT* 37, 41 (CHESTER A. CROCKER ET AL. EDs., 1996).

⁷ S.C. Res. 764, para. 10 (July 13, 1992).

choose from a potentially endless series of examples, one can quote David Ben-Gurion in a 1941 memorandum discussing the necessity of transferring much of the Arab population of Palestine upon the creation of a Jewish state. “Complete transfer without compulsion – and ruthless compulsion at that – is hardly imaginable.”⁸

Which claim of right should international law prefer? Even if individual rights are to be preferred, is it self-evident that they are best served by preserving existing borders and populations? Will the rights of Kosovars, for example, be advanced by insisting that they remain citizens of a majority Serb state? Yet these seem to be precisely the assumptions of humanitarian occupation: that international law should be enlisted to oppose the forces of state implosion and uphold existing borders and demographic profiles.

The question of why the international community has embarked on humanitarian occupations is thus inexorably connected to its view of the state. But there is considerable disagreement as to how international law now regards the state.⁹ Adopting one perspective or another may lead to widely divergent conclusions about the goals and even necessity of the occupation missions. If, as many writers suggest, the state is being marginalized in a world increasingly populated by international organizations, non-governmental organizations, transnational religious communities and various sub-state groupings, many of which assume functions previously exercised only by states, the rationale for humanitarian occupation is unclear. Others, building on Robert Jackson’s

⁸ *Quoted in* BENNY MORRIS, *RIGHTEOUS VICTIMS* 169 (1999).

⁹ *See* INTERNATIONAL LAW AND THE RISE OF NATIONS (Robert J. Beck & Thomas Ambrosio eds., 2002); SOVEREIGNTY UNDER CHALLENGE (John D. Montgomery & Nathan Glazer eds., 2002); JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* (1998); STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS (Sohail Hashmi ed., 1997); Brad R. Roth, *Anti-Sovereignism, Liberal Messianism and Excesses in the Drive Against Impunity*, 12 FINNISH Y.B. INT’L L. 17 (2001).

work, find “the imposition of statehood as a global norm” ill-suited to much of the developing world, leading some regions to adopt the form but not the substance of the Westphalian order.¹⁰ Many, in Jackson’s words, are only “quasi-states.”¹¹ Why send missions to preserve an often dysfunctional form of political organization that can no longer claim a monopoly on the coercive use of force or the provision of security and subsistence guarantees to individuals?

Alternatively, the state might retain its favored status but international law could be agnostic on its specific form, in particular its borders, governing structures and population. On this view, humanitarian occupation also appears suspect. While the internal conflicts prompting the occupations may result in secessions, ethnic cleansing or second class status for national minority groups, states of some kind will emerge after the conflicts run their natural course. This highly pragmatic view would hold a state to be a state to be a state and leave matters there.

Finally, international law might take a highly particularistic view of the state. It might favor specific forms of government, certain rights for citizens, existing or newly crafted borders and/or oppose efforts to create demographic homogeneity. Unlike the first two approaches, this third approach would not allow internal conflicts to run their course. To the contrary, it would seek to reverse the anti-assimilationist goals of the combatants. In contrast to the first two models, this conception would hold humanitarian occupation to be essential. A state wracked by civil war, which by definition signals at least a partial failure of governing institutions, simply cannot survive on its own as a

¹⁰ Christoph Clapham, *The Global-Local Politics of State Decay*, in *WHEN STATES FAIL* 77, 80 (Robert I. Rotberg ed., 2004).

¹¹ ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* (1990).

coherent political community. Necessarily, such a state would be incapable of achieving the goals espoused by each of the humanitarian occupation missions — retaining existing borders and requiring the previously warring factions to cooperate in the tasks of governing. To expect self-generating, self-sustaining liberal democracy in such circumstances borders on fantasy. Only an outside force, willing to undertake the substantial tasks of reconciliation and social engineering, can hope to accomplish those goals.

In this chapter, I will argue that international law has chosen the third, particularistic view of the state. This is not to say the international community has sought liberal institutions for every state in civil disorder. Many civil wars have raged with virtually no external intervention. Others have seen interventions well below the scale of humanitarian occupation, some quite minimal. But neither has the international community articulated any alternative conception of the state in these cases. Since the early 1990s, the Security Council has taken positions on most large-scale civil conflicts and has routinely called on the parties to respect existing borders and pursue democratic solutions to their differences. Whatever its reason for not taking bolder action in these cases, the Council's statements make clear that it is not disagreement with the state model to be described below.

B. Legal Constraints on Exclusionary Nationalism

The particular model of the state I describe emerged only in the second half of the 20th Century. Traditional notions of domestic jurisdiction had ensured that international law was largely indifferent to matters of internal governance. “In consequence of its internal independence and territorial supremacy, a State can adopt any constitution it

likes, arrange its administration in any way it thinks fit, enact such laws as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on. According to this rule. . . all individuals and all property within the territory of a State are under its dominion.”¹² Even when such absolute territorialism began to lose its currency, questions of “governance” did not immediately emerge as a discrete normative category. International law first addressed questions of human rights, which prescribe certain government policies or actions against citizens. Norms concerning the selection and structures of a government itself are largely a product of the last decade.¹³

International law also had little to say about territorial change. The absence (prior to the UN Charter) of a legal prohibition on the unilateral use of force meant that collective decisions about the legitimacy of forcible territorial change – annexation, secession and the like – were simply not a feature of the legal landscape. Even if a consensus on particular territorial changes were reached, no institution existed prior to the UN Security Council to translate the consensus into collective action. Finally, even when governance and territory were occasionally the subject of legal prescriptions (as opposed to one-off political arrangements), they were rarely addressed together. The legal distinction between recognition of states and recognition of governments severely limited opportunities for outsiders to couple support for particular territorial states with prescriptions for governance *within* those states. Thus, states seeking to advance liberal governance might well be forced to choose between, on the one hand, continuing to recognize a non-liberal *heterogeneous* state that denied minority rights and, on the other,

¹² OPPENHEIM’S INTERNATIONAL LAW 255-56 (H. Lauterpacht ed., 1947).

¹³ See *generally* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000).

recognizing that minority's secessionist movement in the hope it would produce a more liberal *homogeneous* state. The requirement that a new state have a government in order to merit recognition, while certainly a traditional element of statehood, did not imply that states have any particular form of government.

This agnosticism toward issues of governance and territory is rapidly fading. The acts of exclusionary nationalism that prompted humanitarian occupation are now condemned by international law in all their particulars. The integration of human rights concerns into virtually every corner of inter-state relations has solidified minimum standards of conduct for governments' treatment of their citizens.¹⁴ Norms of physical integrity, equality and political pluralism have replaced indifference toward the more destructive aspects of ethno-nationalism. These norms have fundamentally revised international expectations about the relation between individuals and territory. As Jennifer Jackson Preece writes, whereas the ethno-nationalist view sought to "secure a better fit between boundaries and ethnic identities," the new civic notion of statehood seeks "to foster a shared political identity that could accommodate ethno cultural diversity within pre-existing territorial units."¹⁵ Under the ethno-nationalist view, the international community might address ethnic conflict by treating borders and national demographic profiles as malleable. Under the new civic nationalist view, borders and

¹⁴ As Judge Weeramantry observes, "In its ongoing development, the concept of human rights has long passed the stage when it was a narrow parochial concern between sovereign and subject. We have reached the stage, today, at which the human rights of anyone, anywhere, are the concern of everyone, everywhere. The world's most powerful States are bound to recognize them, equally with the weakest." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections), 1996 I.C.J. 595, 640, 647 (July 11) (separate opinion of Judge Weeramantry).

¹⁵ Jennifer Jackson Preece, *Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms*, 20 HUM. RTS. Q. 817, 842 (1998).

populations are taken as essentially immutable; it is a government's failure to accord equal rights to all its citizens that is subject to change.

A useful example is the General Assembly's 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, which is addressed directly to the dilemmas of heterogeneous states.¹⁶ The Declaration affirms the validity of pluralism and requires states to construct legal protections to ensure its survival: "the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law."¹⁷ But those rights are to be exercised *within existing states*, as none of the rights affirmed in the Declaration may permit "any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States."¹⁸ Commentary on the Declaration affirmed that "minority rights cannot serve as a basis for claims of secession or dismemberment of the state."¹⁹

Starting in the 1990s, when the international community began to respond regularly to destructive civil wars, its actions reflected this notion of civic pluralism. Each rejected aspect of the ethno-nationalist view once represented a potential, through often horrific, "solution" to internal conflict. But now one virtually discredits these options merely by listing them.

¹⁶ U.N. Doc. A/Res/47/135 (Dec. 18, 1992).

¹⁷ *Id.* preamble.

¹⁸ *Id.* at para. 8(4).

¹⁹ *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.1 (2000).

1. No Legal Support for Homogeneity Achieved Through Murder, Subordination or Forcible Conversion

Nationalist movements have sometimes attempted to “solve” their minority problems by direct and brutal means. The Nazi party, Rwandan Hutus, Khmer Rouge and others tried to eliminate disfavored groups in their midst through mass murder. Until the mid-20th Century, international law passed no judgment on such acts. In the midst of Ottoman Turkey’s genocide against its Armenian population, for example, the American Ambassador Henry Morgenthau noted with frustration, “I had no right to interfere. According to the cold-blooded legalities of the situation, the treatment of Turkish subjects by the Turkish government was purely a domestic affair; unless it directly affected American lives and American interests, it was outside the concern of the American Government.”²⁰ Today such acts are unequivocally condemned by a host of international norms, especially those concerning genocide and extra-judicial killing.²¹

Short of liquidating disfavored groups, other governments have reduced these segments of their populations to permanent subordinate status, the most prominent being the apartheid regimes in South Africa and Southern Rhodesia. International norms of equality now preclude these tactics as well.²² Still other regimes, faced with groups

²⁰ *Quoted in* SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 8 (2002).

²¹ *See* Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (Dec. 9, 1948); (no arbitrary deprivation of life); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 213 U.N.T.S. 221, art. 2 (right to life); American Convention on Human Rights, Jan. 7, 1970 OEA/Serv. K/XVI/1.1, Doc. 65, Rev.1, Cor. 1, art. 4 (right to life); African Charter on Human and Peoples’ Rights, June 27, 1981 O.A.U. Doc. CAB/LEG/67/3/Rev. 5, art. 4 (no arbitrary deprivation of right to life and integrity of the person).

²² The Rome Statute of the International Criminal Court designates apartheid as a crime against humanity. Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*, art. 7(1)(j). *See also*, International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (Nov. 20, 1973), ICCPR, *supra* note 21, art. 2(1); European Convention, *supra* note 21, art. 14; American Convention, *supra* note 21, art. 1, African Charter, *supra* note 21, art. 2; European Framework Convention for the Protection of National Minorities, Council of Europe, E.T.S. No. 157, Strasbourg I.II, 1995; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women Dec. 18,

defined by non-immutable characteristics such as religion or language, have sought to convert these groups forcibly to the dominant national practice. Norms protecting freedom of religion and the integrity of cultural practices forbid such coercion.²³ The international legal system is now sufficiently infused with a pluralist ethos that no argument of group entitlement or historical injustice can legitimize these practices.

2. No Legal Support for Secession or Partition

Groups facing persecution within states often choose, quite sensibly, to leave. In Kosovo, the option of secession would appear to have been a logical long-term solution to the crisis: the Kosovars would obtain the legal protections afforded by sovereign statehood and the dislocation involved would arguably be minimal, since the population was already over ninety percent Albanian.²⁴ Secession would also relieve the international community of ensuring Kosovo's viability as a functioning political community. The ferocity of ethnic violence in the territory, as well as the oft-repeated view that such conflicts are "ancient" or "endemic," led many commentators to deride pluralism as wholly alien to the region.²⁵ Some observers of the Balkans advocated an internationally-sanctioned secession or partition as the most pragmatic solution for states

1979, 1249 U.N.T.S. 13; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. Doc. A/Res/36/55 (Nov. 25, 1981).

²³ ICCPR, *supra* note 21, art. 18; European Convention, *supra* note 21, art. 9; American Convention, *supra* note 21, art. 12; African Charter, *supra* note 21, art. 8; Declaration on the Elimination of All Forms of Intolerance, *supra* note 22.

²⁴ Like any other state, an independent Kosovo would enjoy a right of territorial integrity, protecting it against external intervention. U.N. Charter, art. 2(4). It would also be entitled to exercise a right to self defense, to seek assistance from the Security Council, and, assuming jurisdictional requisites were met, to bring a claim to the International Court of Justice. *See* U.N. Charter, art. 51 (states possess inherent right to self defense); *id.* art. 35 (right of member and non-member states to bring issues of peace and security to attention of Security Council); Statute of the International Court of Justice, art. 34(1) ("Only states may be parties in cases before the Court.").

²⁵ *See, e.g.,* ROBERT D. KAPLAN, BALKAN GHOSTS 3-71 (1994) (discussing Yugoslavia's history of ethnic hatred).

they described, in effect, as dysfunctionally heterogeneous.²⁶ Others have made the same argument for Africa or for ethnically divided states more generally.²⁷ Chaim Kaufman argues that distinctive aspects of ethnic civil war – the inflexibility of group loyalties, the necessity of controlling territory in order to deny rival groups a “mobilization base” and the inability of existing state structures to satisfy the groups’ mutually inconsistent power demands – require the separation of rivals in order to alleviate the anarchy leading to conflict.²⁸ According to Kaufman:

Ethnic separation does not guarantee peace but it allows it. Once populations are separated, both cleansing and rescue imperatives disappear; war is no longer mandatory. At the same time, any attempt to seize more territory requires a major conventional military offensive. Thus the conflict changes from one of mutual pre-emptive ethnic cleansing to something approaching conventional interstate war in which normal deterrence dynamics apply.²⁹

In the view of its proponents, separation has an unassailable practicality: “State borders should not be seen as permanently fixed if their continuations will do nothing but foster more hatred, oppression and violence.”³⁰

Whatever the merits of these claims, the Security Council and other actors’ refusal to endorse independent statehood for Kosovo is consistent with contemporary international practice. A preference for existing borders is reflected in the critical legal instruments setting out a right to self-determination, the norm most frequently invoked by

²⁶ See Aleksa Djilas, *A House Divided*, NEW REPUBLIC 38 (Jan. 25, 1993); Thomas L. Friedman, *Is Kosovo Worth It?*, NY TIMES, March 2, 1999, at A19; Chaim Kaufman, *When All Else Fails: Evaluating Population Transfers and Partition as Solutions to Ethnic Conflict*, in CIVIL WARS, INSECURITY AND INTERVENTION, 221-60 (Barbara Walter & Jack Snyder eds., 1999).

²⁷ See PIERRE ENGLEBERT, STATE LEGITIMACY AND DEVELOPMENT IN AFRICA 181-89 (2000); Mutua, *supra* note 3.

²⁸ Chaim Kaufmann, *Possible and Impossible Solutions to Ethnic Civil Wars*, 20 INT’L SEC. 136 (Spring 1996).

²⁹ *Id.* at 150.

³⁰ DANIEL L. BYMAN, KEEPING THE PEACE: LASTING SOLUTIONS TO ETHNIC CONFLICTS 174 (2002).

secessionists.³¹ More importantly, virtually without dissent, states and international organizations in the post-colonial era have subordinated claims of self-determination to the principle of maintaining states' territorial integrity. Secessionist movements have repeatedly failed to gain the imprimatur of a legal entitlement to secede during the course of their struggles: groups with short (Biafra, South Yemen)³², medium (Chechnya, Abkhazia, Ngorno-Karabakh, Somaliland)³³ and long-standing claims (Cyprus, Eritrea, Quebec, the Basque region, Mayotte)³⁴ have all failed to garner support from the UN and regional organizations and have only received scant, half-hearted support from individual

³¹ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV) (1970) (describing "peoples" right to self-determination with caveat that "[n]othing 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 colour"); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV) (1970), para. 6 ("Declaration on Colonial Peoples") ("Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."). For a discussion of the Friendly Relations Declaration, making clear it does not create a generalized exception to its anti-secession principle for non-democratic governments, see Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus*, 16 MICH. J. INT'L L. 733, 740 (1995).

³² See THOMAS D. MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* 198 (1997) (Biafra); James Crawford, *State Practice and International Law in Relation to Succession*, 69 BRIT. Y.B. INT'L L. 85, 108 (1999) (South Yemen).

³³ See DAVID RAIČ, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 383 (2002) (Abkhazia); *id.* at 375 (Chechnya); Arnen Tamzarian, *Nagorno-Karabagh's Right to Political Independence Under International Law*, 24 SW. U. L. REV. 183, 203 (1994) (Nagorno-Karabakh); *Somalia: IRIN Special – A Question of Recognition* (Parts 1 and 2) (July 10, 2001), available at <http://www.reliefweb.int/IRIN/cea/countrystories/somalia/20010710.phtml> and <http://www.reliefweb.int/IRIN/cea/countrystories/somalia/20010710a.phtml> (quoting UN Special Representative for Somalia as saying that a May 31, 2001 independence referendum in Somaliland was "clearly not an internationally recognised referendum, and the outcome has no validity in the international community").

³⁴ David Wippman, *International Law and Ethnic Conflict in Cyprus*, 31 TEXAS INT'L L. J. 141, 147 (1996) (Cyprus); EYASSU GAYIM, *THE ERITREAN QUESTION* (1993) (Eritrea); *SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED* (Anne F. Bayefsky ed., 2000) (Quebec); C. Lloyd Brown-John, *Self-Determination, Autonomy and State Secession in Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 591 (1999) (Basques); MUSGRAVE, *supra* note 32, at 182-85 (Mayotte).

states.³⁵ Neither is support evident in interventions under United Nations auspices, which has never favored secessionist movements.³⁶ Indeed, the UN virtually drove itself to bankruptcy and constitutional collapse in attempting to prevent secession by the Katanga province of the newly independent Congo in 1960.³⁷

Montenegro's recent separation from Serbia in June 2006 requires special comment. One might well ask whether Montenegrin independence suggests a counter-trend toward greater acceptance of secessionist claims. The agreement providing for secession was negotiated with the assistance of the European Union. And there was no opposition to Montenegro's successful application for UN Membership.³⁸ But several factors suggest this case should not be viewed as a significant deviation from the international community's preference for territorial integrity.

First, the European Union, which took the diplomatic lead, expressed a clear preference for avoiding secession. As relations between Serbia and Montenegro deteriorated in the late 1990s, Montenegro proposed dissolution of the FRY in the

³⁵ Several recent settlements to internal conflicts have provided for the possibility of secession if a majority in the affected territory agrees in a referendum. *See* Machakos Protocol, July 20, 2002, *available at* http://www.usip.org/library/pa/sudan/sudan_machakos07202002_toc.html (potential secession of Southern Sudan); Agreement on Principles between Serbia and Montenegro within the State Union, March 14, 2002, *available at* http://www.usip.org/library/pa/serbia_montenegro/serbia_montenegro_03142002.html (potential secession of Montenegro); Bougainville Peace Agreement, Aug. 30, 2001, *available at* http://www.usip.org/library/pa/bougainville/bougain_20010830.html; (potential secession of Bougainville from Papua New Guinea). But these potentially consensual secessions would not be accomplished pursuant to a legal right asserted against the parent state, but by leave of that state. For a discussion of the distinction between consensual and non-consensual partitions, see text accompanying notes 65-76, *infra*.

³⁶ While the UN Charter affirms the self-determination of peoples in articles 2 and 55, the 1945 San Francisco Conference also made clear that self-determination "implied the right of self-government of peoples and not the right of secession." *Summary Report of 6th Meeting of Committee I/1*, 6 U.N.C.I.O. 296 (1945). None of the sixty-one peacekeeping operations mounted by the UN since 1948, nor any of the eleven "political and peace-building" operations have manifest support for secessionists. *See* Background Note: United Nations Peacekeeping Operations (Aug. 31, 2006), *available at* <http://www.un.org/Depts/dpko/dpko/bnote.pdf> (listing operations); Background Note: United Nations Political and Peace-Building Missions (Aug. 31, 2006), *available at* <http://www.un.org/Depts/dpko/dpko/ppbm.pdf> (same).

³⁷ THOMAS M. FRANCK & JOHN CARREY, *THE LEGAL ASPECTS OF THE UNITED NATIONS ACTION IN THE CONGO* (1963).

³⁸ *See* G.A. Res. 60/264 (July 12, 2006).

manner of Czechoslovakia's 1993 "velvet divorce." The EU (and the United States) rejected the proposal, emphatically so after the 1999 Kosovo intervention when independence for Montenegro might have encouraged pro-independence Kosovars, a result Western powers actively opposed.³⁹ In 2001, the EU's representative Javier Solana declared, "The European Union fully supports a democratic Montenegro within a democratic Yugoslavia. The EU opposes any unilateral steps which could run contrary to the stability of the region."⁴⁰ He later expressed "the European Union's strong preference for a genuine reform of the Federal Republic of Yugoslavia" and "warned against completely unfounded expectations that an independent Montenegro would be on a fast track to EU membership."⁴¹ The EU even dangled a more certain track to Union membership if the FRY pursued necessary reforms.⁴²

Second, the separation came not via armed struggle or leveraging for outside recognition, but through a negotiated settlement. The 2002 Belgrade Agreement transformed the FRY into the radically decentralized Serbia and Montenegro and provided that the union could be dissolved after three years.⁴³ The EU saw the Agreement as a last effort to hold the FRY together and leaned heavily on Montenegro to

³⁹ See Srdjan Darmanović, *Montenegro: Dilemmas of a Small Republic*, 14 J. DEMOC. 145, 151 (2003).

⁴⁰ Statement by Dr. Javier Solana, EU High Representative for the CFSP, After the Results on the Montenegro Elections (April 23, 2001), available at http://www.consilium.europa.eu/cms3_applications/applications/solana/details.asp?cmsid=335&BID=109&DocID=66158&insite=1.

⁴¹ Press Release, *Javier Solana, EU High Representative for the CFSP, Urges Podgorica and Belgrade to Resume Talks Promptly* (Nov. 27, 2001), available at http://www.consilium.europa.eu/cms3_applications/applications/solana/details.asp?cmsid=335&BID=109&DocID=68596&insite=1.

⁴² The assurances were given in the 2002 Belgrade Agreement. *Agreement on Principles between Serbia, supra* note 35. See Nathalie Tocci, *EU Intervention in Ethno-Political Conflicts: the Cases of Cyprus and Serbia-Montenegro*, 9 EUR. FOR. AFF. REV. 551, 562-63 (2004).

⁴³ *Agreement on Principles between Serbia and Montenegro, supra* note 42.

accede.⁴⁴ But in May 2006 Montenegro exercised its option and held a referendum in which voters overwhelmingly favored independence. The fact that Belgrade agreed to this chain of events substantially diminishes the claim that separation occurred pursuant to an international legal entitlement; as we will see shortly, such consensual separations are better seen as matters of private contract between the two entities. While formal consent to separation may mask coercive pressures on a parent state, that does not appear to have been the case for Montenegro. Serbian officials were in fact somewhat relieved by the clarity the Belgrade agreement brought to the troubled federation and, according to one report, were content to have the independence question decided by referendum.⁴⁵ Their accession to a referendum was almost certainly influenced by the possibility that pro-Serbian forces might prevail, since Montenegrin parties in 2002 were themselves split on the desirability of independence.⁴⁶ The Belgrade Agreement, in other words, was not a clear affirmation of secession by either party.

Third, given the turmoil of the fifteen years following the demise of the SFRY, Montenegrin independence is best understood as the final stage of that state's dissolution. Montenegro was a constituent republic of the SFRY and as such could have sought independence in the same manner as all the other republics (save Serbia) upon the collapse of the federal government in 1991. It chose federation with Serbia during the mid-1990s, but as early as 1997, dissatisfaction with President Milosevic's autocratic rule led Montenegrin leaders to embrace pro-independence policies.⁴⁷ That this final chapter

⁴⁴ Darmanović, *supra* note 39, at 151; *see also* International Crisis Group, *Still Buying Time: Montenegro, Serbia and the European Union* (ICG Balkans Report No. 129) (May 7, 2002) (“The agreement was the direct outcome of the European Union’s determination to block Montenegrin separatism and keep the two republics together.”)

⁴⁵ *See* International Crisis Group, *supra* note 44, at 2, 6.

⁴⁶ *Id.* at 12.

⁴⁷ CITE.

in Yugoslavian dissolution was delayed for several years and came about through a circuitous route does not place it outside the process of dissolution. Montenegro, on this view, stands on very different footing from secessionists seeking to leave long-established states.

James Crawford has undertaken perhaps the most comprehensive review of state responses to secessionist claims. He reports that since 1945, “no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State.” While some states may, episodically, find reasons to support secessionists, every state has an interest in the territorial integrity norm. Thus, “[w]here the government of the State in question has maintained its opposition to the secession, such attempts have gained virtually no international support or recognition, and this has been true even when other humanitarian aspects of the situations have triggered widespread concern and action.”⁴⁸

The break-ups of the Soviet Union and former Yugoslavia are often cited as contrary examples of legally sanctioned secession, since the successor states in both cases were widely recognized and admitted to the United Nations. But those recognitions came well after the successors’ independence was a legal *fait accompli*. In Yugoslavia, the first recognitions by Germany and Italy of Slovenia and Croatia on December 23, 1991 came shortly *after* the Badinter Commission had declared on December 7 that the Yugoslav federal state had effectively ceased to function and was “in the process of dissolution.”⁴⁹ In the case of the Soviet Union, the Baltic states, the first to leave, were recognized by the vast majority of states and international organizations only after President Yeltsin had

⁴⁸ Crawford, *supra* note 32, at 108.

⁴⁹ Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT’L L. 733, 744-45 (1995) (citations omitted).

issued a decree on August 24, 1991 recognizing Latvia and Estonia as independent (the Soviets had already recognized Lithuanian independence in 1990).⁵⁰ And the USSR's formal dissolution was described as fully consensual by all its successor states in the Alma Ata Declaration.⁵¹ Its dissolution also predated the successors' recognition and admission to the UN.⁵² As I have written elsewhere,

The strongest *opinio juris* that could have emerged from either break-up would have been statements of an entitlement to self-determination before the fact of independent statehood was clearly evident. Established conceptions of the self have followed this pattern. Resolution 1514 was such a general statement regarding colonial territories, as was the General Assembly's recognition of SWAPO, the ANC, and the PLO as 'legitimate' representatives of peoples well before independence (or majoritarian elections) were presented to the Assembly as a *fait accompli*. . . . Recognition after statehood has been achieved, or after the state resisting independence finally acquiesces, does not necessarily affirm a prior right to seek independence. It may simply constitute a recognition by states or international organizations that according to the prevailing declarative theory, a new state has come into existence and must be dealt with as such.⁵³

Stated bluntly, with largely academic exceptions at the margins, there is no legal right to secession.⁵⁴ While international law does not *prohibit* secession, it generally will not endow groups seeking to dismember existing states a legal entitlement to do so. Some sources maintain that an exception exists in situations of egregious human rights abuses or an inability of a "people" to participate in the government of their parent

⁵⁰ *Id.* at 744.

⁵¹ *Alma Ata Declaration*, U.N. Doc. A/47 /60 – S/23329 (Annex II) (1991). Actual declarations of independence substantially pre-dated *Alma Ata*, the last being Turkmenistan's on October 27, 1991. Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia and Czechoslovakia*, 23 DENV. J. INT'L L. & POL'Y 1, 3 & n.6 (1994-95).

⁵² The United States recognized the former Soviet republics in December 25, the European Community on December 31 and the UN admitted those seeking membership (with the exception of the Baltics, which had been admitted in September, 1991) in 1992. Williams, *supra* note 51, at 3; Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 E.J.J.L. 36, 44-47 (1993).

⁵³ Fox, *supra* note 49, at 743.

⁵⁴ Ved P. Nanda, *Self-Determination and Secession Under International Law*, 29 DENV. J. INT'L L. & POL. 305, 325 (2001) ("it is fair to conclude that the United Nations and its member states do not support claims for unilateral secession"); Alfred P. Rubin, *Secession and Self-Determination: A Legal, Moral and Political Analysis*, 36 STAN. J. INT'L L. 253 (2000).

state.⁵⁵ But this “exception” exists largely (if not wholly) in theory, since there are no cases in which individual states or international organizations have endowed groups facing repression or exclusion from national politics with a legal entitlement to secede.⁵⁶ Perhaps the exception lingers on in discussions of self-determination in order to save the principle from complete desuetude a post-colonial era.

Finally, if neither repression nor exclusion has ever been held to trigger an entitlement to secession, then a mere preference for separation certainly cannot. Crawford confirms that there has been “no recognition of a unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory.”⁵⁷ The lack of any response to the September 2006 referendum in Transnistria is illustrative.⁵⁸

Secessionist groups have received a chilly reception despite compelling histories of conquest and repression. Reversing these acts and restoring a territory’s “authentic” autonomy is presented as the essential remedy.⁵⁹ In order to accomplish this goal through application of an international norm, however, any rule would need to surmount three problems that, so far, appear beyond the capacities of existing international institutions.

⁵⁵ See Canadian Supreme Court, Reference re Secession of Quebec, *reprinted in* 37 INT’L LEG. MAT’L 1340 (1998); AFRICAN COMM’N ON HUMAN AND PEOPLES’ RIGHTS, EIGHTH ANNUAL ACTIVITY REPORT OF THE COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 31st Sess., Case 75/92, Katangese Peoples’ Congress v. Zaire, para. 6 (1995); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) (1970) (“Friendly Relations Declaration”).

⁵⁶ If the purported exception is “taken to mean that unilateral secession is permissible where the government is constituted on a discriminatory basis, it is doubtful whether the proviso reflects international practice.” Crawford, *supra* note 32, at 117.

⁵⁷ *Id.* at 116.

⁵⁸ Press Release, U.S. Dep’t of State (Sept. 18, 2006) (United States, EU and OSCE all reject the validity of the referendum).

⁵⁹ See generally Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177 (1991).

First, if some but not all secessionists are to be granted a legal entitlement, the rule would need criteria to distinguish, in a principled manner, between the legal situations of various peoples. If Chechnya, why not Kosovo, the Basque region, Quebec or Biafra? If the Southern Sudan, why not Ngorno-Karabakh or Abkazia? Attempts to sort the various claims have either put forth a broad range of mutually inconsistent factors or proposed criteria so limiting that virtually no existing claimants could take advantage of the rule.⁶⁰ Even if agreement were reached on criteria, no adjudicatory mechanism exists to engage in the actual sorting.

Second, and alternatively, if all secessionists are to be vested with a legal right to leave, how to avoid the slippery slope to an atomized international order? A world of proliferating micro-states would be highly undesirable for a variety of reasons, including the impossibility of reaching consensus on formal agreements and the likelihood that many of the new states would lack essential resources and the economies of scale necessary to economic prosperity.⁶¹

Finally, the transaction costs of moving from fewer heterogeneous states to many homogeneous states would be enormous. With no orderly means of sorting secessionist claims, and with virtually all being resisted by parent states, prolonged bloody conflict would become the price of realizing the right. Mark Zacher argues that one reason the territorial integrity norm has found such strong support among liberal states – those most likely to sympathize with secessionists’ efforts to cast off the authority of unwanted governments – is because they recognize that “the logical outcome of allowing self-

⁶⁰ See the discussion in DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 308-97 (2002).

⁶¹ THOMAS M. FRANCK, THE EMPOWERED SELF 25-29 (1999).

determination for every national group would be continual warfare.”⁶² Conflict represents a greater threat to liberal ideals than the continued denial of autonomy to national minorities. “Hence, democratic states’ fear of major war and their respect for self-determination by juridical states are inextricably interrelated in their support for the territorial integrity norm.”⁶³

To repeat, this “tremendous bias for the continuation of current borders, even in the face of constant unrest and repeated mass killing,”⁶⁴ does not mean international law affirmatively prohibits secession. It is neither prohibited nor required. But the effect of refusing to interpret the rights of self-determination, minority protection or cultural integrity to encompass changes in borders, even in cases of severe violation, adds up to an emphatic preference for existing states.

Forcible secession must be distinguished from negotiated partition, which, although seeking the same territorial objectives as secession, does not raise the specter of dismembering states pursuant to an international legal right. Secession involves territories asserting entitlements to withdraw from unwilling parent states. In a negotiated partition, the parent state gives its consent to withdrawal. Partition may thus be regarded as largely a matter of private contract between the two parties, and not an entitlement created or constrained by public international law. Presumably for this reason, no international objections were raised to the 1993 negotiated partitions of both the Czech Republic and Slovakia and Eritrea and Ethiopia.

⁶² Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT’L ORG. 215, 239 (2001).

⁶³ *Id.*

⁶⁴ BYMAN, *supra* note 30, at 174.

But despite the presence of formal consent, partition involves other difficulties that likely disqualify it as a legally sound option for addressing internal conflict. First, international law can provide no assurance that separation of a territory will lead to a separation of the competing populations, the presumed objective of partition. Recent international law has strongly opposed the idea that individuals may be arbitrarily denied their nationality as a result of border changes,⁶⁵ whether or not those changes are consensual.⁶⁶ Instead, individuals are given a “right of option” to choose nationality of the state in which they habitually reside.⁶⁷ In the case of Serb minorities in Bosnia and Croatia, for example, the Badinter Commission held that the right of self-determination would entitle them “to be recognized under agreements between the Republics as having the nationality of their choice.”⁶⁸ New states emerging from partition, therefore, cannot seek to make themselves ethnically homogenous by denying nationality to those of other

⁶⁵ In 1999, the International Law Commission adopted its Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (Draft Articles), a comprehensive restatement of customary international law on the subject. *See Report Of The International Law Commission On The Work Of Its Fifty-First Session*, U.N. Doc. A/54/10, paras. 34-48 (1999) (“Succession Draft Articles”). The rules vary depending on the type of succession involved, but in each case, “in the view of the Commission, the respect for the will of the individual is a consideration which, with the development of human rights law, has become paramount.” *Id.* art. 11, cmt. 6. *See also id.* art. 16 (“[p]ersons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.”).

⁶⁶ The Succession Draft Articles apply to instances of “state succession,” which is defined as “the replacement of one State by another in the responsibility for the international relations of territory.” Succession Draft Articles, *supra* note 65, art. 2(a). Thus, “replacement” may occur consensually or non-consensually, with the caveat that the articles will not apply to successions occurring through one state’s use of aggressive force against another. *Id.* art. 3 (“The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.”)

⁶⁷ Article 11 of the Succession Draft Articles provides in relevant part:

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

Succession Draft Articles, *supra*, note 65, art. 11. *See also id.* arts. 20-26 (specific rules for “Dissolution of a State” and “Separation of Part or Parts of the Territory”).

⁶⁸ Conference on Yugoslavia Arbitration Commission: Opinion No. 2 on Questions Arising from the Dissolution of Yugoslavia, 31 I.L.M. 1488, 1498 (1992).

ethnicities who are habitually resident in their territories. If individuals choose to become ethnic minorities in the new state, international law will support that choice. History suggests that many will in fact choose to remain put as minorities.⁶⁹ Eritrea's consensual separation from Ethiopia in 1993, for example, did not lead all Eritreans to leave Ethiopia. To the contrary, many of those who remained only left when they were forcibly expelled – based solely on their national origin – when the two countries went to war in 1998.⁷⁰ The minority problem, in other words, simply replicates itself in the newly partitioned states.

Second, formal consent to partition may mask coercive pressures from the party seeking separation. The human costs of secession flow not from the specific mechanism used to achieve separation, but from the violence and intimidation used to secede by any means possible. If a parent state, exhausted by struggle, ends a secessionist campaign by consenting to the departure of the rebellious territory, the war to achieve that goal will have been no less destructive. While the Czech and Eritrean separations were both formalized by consent, focusing on ultimate consent as the legally significant factor would prevent international law from taking account of the reality that the Czech partition was achieved through relatively short and amicable negotiations while the Ethiopian separation followed a thirty-year civil war.⁷¹ Such distinctions should matter. Would-be secessionists will hardly be less emboldened by the possibility that their separation might ultimately be memorialized in an agreement rather than proclaimed

⁶⁹ See BYMAN, *supra* note 30, at 155 (“Successor states are almost never perfectly homogeneous. They, too, will face the problems of communal mistrust and a lack of cooperation: only the names of the oppressor and the oppressed will change.”).

⁷⁰ See Human Rights Watch, *The Horn of Africa War: Mass Expulsions and the Nationality Issue* (2003) (75,000 Eritreans forcibly expelled).

⁷¹ See DAN CONNELL, *AGAINST ALL ODDS* (1993) (chronicling Eritrean struggle).

unilaterally. With such formalities operating as scant restraint, international law may be unable to draw meaningful distinctions between permissible and impermissible secessions.

Finally, data suggest that partition simply does not accomplish its primary goal of achieving peace between warring groups. This failure is significant because the case for legitimizing partition – and in particular, for overlooking its many attendant human costs – is based solely on its alleged effectiveness in bringing group-based conflict to an end. But partitions “are positively (though not significantly) associated with *recurrence* of ethnic warfare.”⁷² In reaching this conclusion, Nicholas Sambanis reviewed data from 125 civil wars since 1944, twenty-one of which produced partitions.⁷³ His examples of failure are compelling:

Croatia fought a second war with Serbia after it was partitioned in 1991. Ethiopia and Eritrea fought a bitter territorial war in 1999-2000 after being partitioned in 1991. The partition of Somaliland collapsed in a wave of new violence in 1992. India and Pakistan have fought three wars since their partition in 1947. Cyprus was at war again in 1974 after it was effectively partitioned into militarily defensible, self-administered enclaves between 1963 and 1967.⁷⁴

Preventing a recurrence of civil war is instead correlated with other factors, some of which may be influenced by international actors (negotiated settlements, strengthening democratic institutions and national militaries) and some not (GDP per capita and ethnic heterogeneity).⁷⁵ Conflict could easily recur, for example, in the case of an independent Kosovo, which would at least initially retain its Serb minority.⁷⁶

⁷² Nicholas Sambanis, *Partition as a Solution to Ethnic War: An Empirical Critique of the Theoretical Literature*, 52 *WORLD POL.* 437, 480 (2000) (emphasis added).

⁷³ *Id.* at 446.

⁷⁴ *Id.* at 464.

⁷⁵ *Id.* at 480-81.

⁷⁶ According to the International Crisis Group:

3. No Legal Support for Mass Population Movements

The Bosnian conflict of the early 1990s gave birth to the term “ethnic cleansing.”⁷⁷ The rapid entry of this phrase into popular, diplomatic and legal discourse might suggest the practice was new, if not in occurrence then in scope. But the forcible deportation of minority groups has been a tool of conflict resolution for millennia.⁷⁸ Examples continued well into the 20th Century. Notably, many were memorialized in treaties and so received the (at least) implicit imprimatur of international law. In 1919, Greece and Bulgaria ratified forcible relocations in a bilateral agreement that implemented a provision of the peace treaty between Bulgaria and the Allies.⁷⁹ In 1923 Greece and Turkey agreed to a mutual exchange of populations that resulted in approximately 2,500,000 persons being forcibly uprooted.⁸⁰ In 1937, faced with escalating violence between the Arab and Jewish populations of their Palestine mandate, a British Commission of Inquiry recommended a partition of the mandate territory and a treaty-based transfer of Arabs from the Jewish territory.⁸¹ “The existence of these

The partition of Kosovo has the potential to provoke instability in the province as well as in Albanian dominated areas in Serbia. Moreover, it would not solve the ethnic problem – the majority of Serbs in Kosovo live below the Ibar River in communities in the south. Thus partition would leave many Serbs even more vulnerable; living as a smaller minority within an Albanian dominated state that would have fewer incentives to protect their rights.

KOSOVO’S ETHNIC DILEMMA: THE NEED FOR A CIVIC CONTRACT 3 (May 28, 2003), available at http://www.crisisweb.org/projects/balkans/kosovo/reports/A400983_28052003.pdf.

⁷⁷ See generally John Quigley, *State Responsibility for Ethnic Cleansing*, 32 U.C. DAVIS L. REV. 341 (1999); Christopher M. Goebel, *Population Transfer, Humanitarian Law and the Use of Ground Force in U.N. Peacemaking: Bosnia and Herzegovina in the Wake of Iraq*, 25 N.Y.U. J. INT’L L. & POL. 627 (1993).

⁷⁸ See JEAN-MARIE HENCKAERTS, *MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE* (1995).

⁷⁹ Convention Respecting Reciprocal Emigration, Nov. 27, 1919, Gr.-Bulg., art. 1, 1 L.N.T.S. 68; Treaty of Peace Between the Allied and Associated Powers and Bulgaria, Nov. 27, 1919, art. 56(2), 226 Consol. T.S. 332.

⁸⁰ Convention Concerning the Exchange of Populations, January 30, 1923, Gr.-Turk., 32 L.N.T.S. 76. See generally Carol Weisbrod, *Minorities and Diversities: The “Remarkable Experiment” of the League of Nations*, 8 CONN. J. INT’L L. 359, 364-72 (1993); Stélio Séfériadès, *L’échange des Populations*, 24 RECUEIL DES COURS 311 (1928).

⁸¹ PALESTINE ROYAL COMMISSION REPORT 291-5 (1937).

minorities clearly constitutes the most serious hindrance to the smooth and successful operation of Partition.”⁸² While the Commission cited the Greco-Turkish agreement of 1923 as a model of the treaty that should be negotiated in Palestine, it warned that “it should be part of the agreement that in the last resort the [population] exchange would be compulsory.”⁸³ For a variety of reasons, the Commission’s recommendations were never adopted. In 1938, Yugoslavia and Turkey agreed to relocate as many as 400,000 Kosovar Albanians, but the outbreak of war prevented the agreement from coming into effect.⁸⁴

Finally, after the Second World War, the Allies agreed in the Potsdam Declaration to “recognize that the transfer to Germany of Germany populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken.”⁸⁵ While the Allies stipulated that the transfers “should be affected in an orderly and humane manner,”⁸⁶ this can charitably be described as an empty promise. It is estimated that approximately two million ethnic Germans died in the expulsions that followed.⁸⁷

The reasons given for these transfers were eminently practical, echoing the contemporary arguments favoring partition in Bosnia and elsewhere. At the Lausanne Conference, for example, Lord Curzon read a statement on behalf of the

⁸² *Id.* at 292.

⁸³ *Id.* at 293.

⁸⁴ NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* 285-86 (1998).

⁸⁵ *Report on the Tripartite Conference of Berlin*, in *FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE) 1945-1949*, art. XII (1960).

⁸⁶ *Id.*

⁸⁷ ALFRED DE ZAYAS, *NEMESIS AT POTSDAM* 103-30 (3d ed. 1988). The 1991 German-Polish border treaty recognized “the extreme suffering which resulted” from the expulsions and stated that the event “should not be forgotten and constitutes a challenge to the establishment of peaceful relations between these two peoples and their respective states.” *Agreement Between the Federal Republic of Germany and the Republic of Poland in Relation to Ratification of the Border Between Them*, Nov. 14, 1990, Ger.-Pol., 31 I.L.M. 1992, 1993 (1992).

four victorious powers declaring support for a population exchange between Greece and Turkey because

to unmix the populations of the Near East will tend to secure the true pacification of the Near East and because they believe an exchange of populations is the quickest and most efficacious way of dealing with the grave economic results which must result from the great movement of populations which has already occurred.”⁸⁸

Similarly, the British Palestine Commission argued that homogenizing the Jewish and Arab territories to be created by partition would allow the settlement to be “clean and final.”⁸⁹

In the human rights era, international law has long moved past these agreements’ view of individuals as passively subject to whatever arrangements parties to a peace agreement may find politically advantageous. Human rights have in fact become a central focus of peace agreements in the post-Cold War era.⁹⁰ And recent mass expulsions have met with widespread disapproval. Ethiopia’s expulsion of its Eritrean population, for example, was widely condemned.⁹¹ The now-defunct African Commission on Human Rights was particularly blunt in condemning expulsions, seemingly dispelling any notions of cultural particularism.⁹² The resounding

⁸⁸ *Quoted in* STEPHEN P. LADAS, *THE EXCHANGE OF MINORITIES: BULGARIA, GREECE AND TURKEY* 338 (1932).

⁸⁹ PALESTINE ROYAL COMMISSION, *supra* note 81, at 292.

⁹⁰ *See generally* CHRISTINE BELL, *PEACE AGREEMENTS AND HUMAN RIGHTS* (2000).

⁹¹ *See, e.g.*, Human Rights Watch, *supra* note 70; Statement of Susan Rice, Assistant Secretary of State for African Affairs, *The Ethiopian-Eritrean War: U.S. Policy Options*, Testimony to the U.S. House of Representatives International Relations Committee, May 25, 1999, at 3 (“[w]e have made clear that we consider the practice of deportation to be a fundamental violation of individual rights.”); United Nations, High Commissioner for Human Rights Expresses Deep Concern at Continuing Expulsion of Eritrean Nationals From Ethiopia, Press Release HR/98/88, July 1, 1998, *available at* <http://www.unhchr.ch/hurricane/hurricane.nsf/newsroom> (expressing deep concern at “the violation of human rights of Eritrean nations being expelled from Ethiopia, and particularly by the fact that their passports are being stamped ‘expelled never to return.’”).

⁹² *See, e.g.*, Commission Decision Regarding Communication 71/92, *Rencontre Africaine pour la Défense et Droites de l’Homme/Zambia*, at ¶20 (“the drafters of the [African] Charter [on Human Rights] believed that mass expulsion presented a special threat to human rights”).

denunciation of ethnic cleansing in Yugoslavia included statements that the forcible expulsion of minority groups violates fundamental human rights and may even constitute a war crime or a crime against humanity.⁹³ The Dayton Accords resolving the Bosnian war guaranteed those displaced by ethnic cleansing a right to return, reclaim their property, and to vote for candidates representing their home electoral district.⁹⁴ Remarkably, the bulk of the property claims were resolved by 2003.⁹⁵ The Security Council also guaranteed a right to return for refugees expelled from East Timor in the aftermath of the August 1999 independence referendum.⁹⁶ Thus, not only is forced expulsion an unacceptable means of separating ethnic antagonists, but the Bosnia and East Timor settlements suggest that international law will sometimes be employed to reverse its harshest consequences.⁹⁷

⁹³ See *The Prosecutor v. Milosevic*, *supra* note ____, at ¶35, available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm> (Yugoslav war crimes tribunal indicts defendants for the “unlawful deportation and forcible transfer of thousands of Kosovo Albanians from their homes in Kosovo”); *The Prosecutor Of The Tribunal Against Slobodan Iljkovic a/k/a Lugar, Blagoje Simic, Milan Simic, Miroslav Tadic a/k/a Miro Brko, Stevan Todorovic a/k/a Stiv a/k/a Stevo a/k/a Monstrum, Simo Zaric a/k/a Solaja*, Case IT-95-9 (July 21, 1995), at ¶20, available at <http://www.un.org/icty/indictment/english/sim-ii950721e.htm> (defendants indicted for “the planning of, and preparation for, the unlawful deportation and forcible transfer of hundreds of Bosnian Croat and Muslim residents, including women, children and the elderly, from their homes in the Bosanski Samac municipality to other countries or to other parts of the Republic of Bosnia and Herzegovina not controlled by Serb forces”).

⁹⁴ *General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes*, Annex 7, Dec. 14, 1995, 35 I.L.M. 75, 89 (1996). See Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT’L L. 1091 (1998).

⁹⁵ Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT’L L. & POL. 441, 443 (2005).

⁹⁶ In Resolution 1272, the Council affirmed “the need for all parties to ensure that the rights of refugees and displaced persons are protected, and that they are able to return voluntarily in safety and security to their homes.” S.C. Res. 1272, at 2 (Oct. 25, 1999).

⁹⁷ This has not occurred in all cases. One study finds that of seventeen settlements of civil wars between 1980 and 1997, refugee repatriation was only “central” to two: Bosnia and Rwanda. Howard Adelman, *Refugee Repatriation*, in *ENDING CIVIL WARS* 273 (Stephen J. Stedman, Donald Rothchild & Elizabeth M. Cousens eds., 2002). Adelman notes, however, that exclusion of an ethnic subgroup was only an objective of a warring party in four of these cases. *Id.* at 284-85. The refugees to be repatriated in the other cases, in other words, had not been subjected to mass and deliberate expulsions in the manner described in the text.

Because international condemnation of forced expulsion rests, fundamentally, on the right of individuals to choose their states of residence and nationality, a negotiated exchange of populations would likely be viewed as similarly unacceptable. A treaty between national elites may force migration upon unwilling citizens just as much as an eviction by foreign troops.⁹⁸ Negotiated expatriation shares the same element of hidden coercion as negotiated partition: it presents a formalized means of rewarding ethnic cleansing to those willing to use (or threatening to use) force. As Haenckerts notes, “[m]ost instances of population exchange operate . . . under the pretext of voluntary migration, but are in fact compulsory.”⁹⁹ This need to deny any principled distinction between forced and negotiated population transfers simply recognizes that in the inherently coercive environment of war – particularly when ethnic homogeneity is an unabashed war aim – formal ratification carries little independent information about the motives of ratifying governments or the consent of their dispossessed citizens.¹⁰⁰

C. Conclusion: What Remains? The Politics of Inclusion

Diverse populations within existing borders are thus taken as facts that international law is unwilling to change through grants of legal entitlement. No legal right to non-consensual change exists, and indeed, many acts are affirmatively prohibited. For the most part, it seems, heterogeneous states are here to stay.

⁹⁸ Patrick Thornberry describes the Greek-Turkish population exchange agreement as representing “the crudest expression of State power over individuals and groups.” PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 51 (1991) (noting also the transfers “involved appalling human misery”).

⁹⁹ HENCKAERTS, *supra* note 78, at 123.

¹⁰⁰ Thus, in a 1986 Declaration, the International Law Association stated: “Compulsory transfer or exchange of population on the basis of race, religion, nationality of a particular social group or political opinion is inherently objectionable, whether effected by treaties or by unilateral expulsion.” International Law Association, *Declaration of Principles of International Law on Mass Expulsions*, Principle 14, adopted at the 62nd ILA Conference, Seoul, Aug. 24-30, 1986.

This conclusion is easier to accept in its component parts than as a whole. The parts derive from deeply-held concerns for human rights and the prevention of conflict that is assumed to accompany large-scale border changes. The sum total, however, suggests highly conservative geopolitics. King Canute-like, it seems to command a halt to the violent forces of nation-building that typified much of the early modern era in Europe and elsewhere. It appears the international community has created a role for itself as guarantor of existing political arrangements, only some of which may be viable or viewed as just by the inhabitants.

Whether this state reconstruction project will succeed, and to what degree, cannot be known. But it is difficult to imagine international law reversing course and coming to accept any of the tactics reviewed above. To do so, ethnic, religious and other group-based claims to a collective territorial destiny would need to trump preferences of individual residents. And given the violence inherent in many of the tactics, such claims would also need to prevail over concern for the inhabitants' physical security. This seems almost unthinkable in an era of human rights. Individuals are now permanent subjects of international law. Governing elites simply cannot alter their borders or subordinate, transfer or expel citizens in order to further their visions of the collective good. The affected individuals now possess legal personalities separate from those of their states and must, at a minimum, grant their consent to such actions. As Michael Walzer observes, "We tend to deny, today, that individuals are automatically subsumed by the decisions of their governments or the fate of its armies."¹⁰¹ Occasionally, a change that is truly consensual in all respects will occur. But in the vast majority of cases where

¹⁰¹ MICHAEL WALZER, *JUST AND UNJUST WARS* 177-78 (2d ed. 1992).

it does not, the heterogeneous state will remain immune from legally-sanctioned disaggregation.

Chapter 5 Constructing the Liberal State

The previous chapter set out the first part of the claim that international law has developed a substantive conception of the state. It argued that in reacting against various extreme practices used to dismantle heterogeneous states, the international community has made a commitment, enshrined in law, to preserving existing borders and populations. That chapter described a largely *negative* phenomenon -- the type of state international law has come to view as unacceptable. This chapter describes the second part of the claim, which is largely *positive* -- a vision of the heterogeneous state in which antagonistic groups are expected to remain and co-exist. The model is both participatory and pluralist: it offers democratic politics as the means by which the groups may secure their political goals, but also sets limits on that politics when it threatens to infringe group and individual rights.

This model is of course familiar as that of classical liberalism. But the totality of its vision is not often acknowledged in the literature, which tends to view the liberal policies promoted by international institutions in isolation from each other, and not as a coherent vision of national politics. Nor have most authors acknowledged an important systemic consequence of the liberal model: in promoting a state designed to accommodate the concerns of conflicting groups, international law has reaffirmed the state's centrality to the international legal order. Despite sea changes, it is still the essential forum for the practice of politics -- political expression, political activism and the exercise of political authority. This view, of course, runs counter to much recent literature predicting the state's slow eclipse by forces of globalization and a host of new

transnational actors. But it is, I would argue, the model implicit in much state practice, including humanitarian occupation.

A. The Stubborn Persistence of a State-Centered Order

Before describing the liberal model itself, we must explore the matter of it being a *state-centered* model. States have earned something of a bad reputation in some international law and international relations circles. Human rights violations, military aggression, group-based discrimination and other objectionable policies have brought forth a frontal assault on normative conceptions of state sovereignty.¹ A separate and more descriptive claim focuses on a “power shift” away from states to alternative sources of international authority.² And so while it might seem obvious that an international legal system promoting a liberal conception of the state would, necessarily, express strong support for the state itself, this assumption is not shared by these writers. To the contrary, Miliken and Krause begin their exhaustive review of the political science literature on this question by describing the state as “under siege.”³

The state marginalization claim is complex and the literature varies widely in its focus and scope. While I cannot address all its permutations, the claim must be considered in broad terms before describing how international law has developed a particular view of the state. Otherwise, why bother considering the particular form of an entity that is approaching anachronism in all its forms? Of course, an effort to promote a liberal state is itself a strong counter to the marginalization view. But the claim is also vulnerable on its own terms.

¹ Cite ASIL Proc. Collection.

² See MARGARET P. KARNs & KAREN A. MINGST, INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE (2004); Jessica Matthews, *Power Shaft*, 76 FOR. AFF. 50 (1977).

³ Jennifer Milliken & Keith Krause, *State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies*, 33 DEV. & CHANGE 753. 753 (2002).

The Empirical Claim

As noted, reports of the state's demise contain two distinct variations: an empirical claim that the state is in fact being displaced as the central actor in the international community and a normative claim that tangible benefits are to be found in a non-state centric legal order. Let us first consider the empirical claim. There is certainly no doubt that a host of new actors has appeared on the scene and that traditional notions of sovereignty, bound to the exclusivity of territorial prerogatives, have long passed into history. But does this mean the state has lost its standing as the central consumer, producer and interpreter of international law? Such a dramatic conclusion seems unwarranted for several reasons. First, the sheer number of states has increased dramatically in the last century. A variety of alternative political arrangements might have been pursued to address the perceived short-comings of the Westphalian model. But the empires dismantled after WWI resulted in new states; the colonial territories of powers defeated in both World Wars were permitted to choose statehood (and virtually all did); the fragmentation of the Soviet Union and former Yugoslavia in the 1990s produced a host of successor states; and even micro-states, traditionally outsiders to global institutions, have been granted membership in the United Nations.⁴ The United Nations began with 51 member states in 1945 and today has 192. To be sure, sheer quantity says little about the new states' qualitative strength. But during the post-WWII period of rapid state expansion, the legal entitlements granted to new states were also progressively expanded and strengthened: universal membership in international organizations, a guarantee of sovereign equality, a principle of non-intervention,

⁴ See JORI DOURSMAN, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD (1996).

permanent sovereignty over natural resources and the availability of judicial and quasi-judicial fora in which smaller states might bring claims (and receive binding judgments) against more powerful states all enhanced the standing of the new players relative to their existing and more powerful brethren. These legal protections for the new states' political autonomy suggest that the version of statehood recognized in the post-WWII War era was enhanced, and not diminished, relative to earlier periods.

Second, the central protection contemporary international law offers the state – that of securing its territorial integrity – has not only been secured in principle by the UN Charter and its doctrinal progeny but, contrary to much conventional wisdom, largely respected in practice. Tanisha Fazal has shown that since 1945 there have been only two cases of violent “state death” – “the formal loss of control over foreign policy to another state” – and neither involved clear and permanent alteration of internationally recognized borders.⁵ Mark Zacher’s analysis of all inter-state territorial conflicts between 1648 and 2000 shows a progressive decline in the territorial redistributions brought about by aggressive war.⁶ “While approximately 80 percent of territorial wars led to re-distributions of territory for all periods prior to 1945, this figure dropped to 30 percent after 1945.”⁷ The data are equally striking when Zacher controls for the substantial fluctuation in the number of states during this period.⁸

Zacher’s data suggest that attempts at forceful alteration of borders have been least successful during the period in which the international legal commitment to

⁵ Tanisha M. Fazal, *State Death in the International System*, 58 Int’l Org. 311, 319 & 320 (2004). The two cases were the Republic of Vietnam, which many regarded as a civil war rather than an international conflict, and Kuwait, whose annexation by Iraq was reversed after six months. *Id.* at 320.

⁶ Mark W. Zacher, *The Territorial Integrity Norm: Interstate Boundaries and the Use of Force*, 55 INT’L ORG. 215 (2001).

⁷ *Id.* at 223.

⁸ “The figure for 1816–50 is 0.0032; for 1851–1900, 0.0035; for 1901–50, 0.0073; and 1951–98, 0.0015.40.” *Id.* at 225-8.

preserving state territory has been the strongest.⁹ And even the “successful” territorial alterations in the post-1945 UN era fail to impress. Zacher identifies 40 territorial conflicts from 1945 to 2000, of which only 12 resulted in a redistribution of territory.¹⁰ Most of the 12 cases “concerned developing states’ dissatisfaction with the boundaries they inherited from the colonial powers; but these quarrels are largely coming to an end.”¹¹ A variety of other factors, moreover, cast these incidents as marginal and not seriously challenging states’ general acceptance of the legitimacy of existing borders:

Two of the successful uses of force involved turbulent decolonization processes in 1947 and 1948 in the Indian subcontinent and former British Palestine, and the other ten occurred between 1961 and 1975. Of these ten wars, the UN passed resolutions calling for withdrawal in four of them (Israel-Arab states in 1967, India-Pakistan in 1971, Turkey-Cyprus in 1974, and Morocco-Spanish Sahara in 1975). Another three of the ten (India-Portugal in 1961, Indonesia-Netherlands in 1961–62, and North Vietnam-South Vietnam from 1962 to 1975) were viewed by many countries as stages of the decolonization process. The remaining two involved China’s occupation of remote areas—parts of northern India in 1962 and South Vietnam’s Paracel Islands in 1974.¹²

Third, the emergence of ever-longer civil wars as a more or less permanent feature of the UN era provides important evidence of support for the weakest and most dysfunctional of states. States mired in civil war would seem the most likely candidates to succumb to anti-statist trends and begin the transition to alternative forms of political organization. Even more, multilateral interventions in such “failing” states presented prime opportunities to begin such a transformative process. But they were opportunities not taken. Instead, the legitimacy of such states has been consistently supported and reinforced by international actors. This claim relies on data newly compiled by Ann

⁹ Obviously many other factors beyond the territorial integrity norm itself contributed to this trend. But the point is not one of causation but that post-war international law has not clearly weakened states’ territorial integrity.

¹⁰ No successful redistributions have occurred since 1976 when Morocco sent forces into the Western Sahara, a case whose “success” many would contest.

¹¹ *Id.* at 245.

¹² *Id.* at 234.

Hironaka, who seeks to explain the persistence of civil wars in post-colonial developing states.¹³ She begins with the observation that the length of civil wars has increased dramatically since 1945:

By the 1990s, roughly twenty civil wars were ongoing in the average year. This is approximately ten times the historical average, and reflects a massive new trend in conflict in the modern world. The fact that ongoing civil wars grow more than new wars has only one interpretation: civil wars last much longer than they used to. . . . The swelling of ongoing civil wars that occurs towards the end of the century represents a process of accrual. As civil wars get longer, they begin to overlap in time with each other such that there are more total wars in the world at any given moment. . . . The large number of ongoing civil wars in 1997, therefore, represents the continuation of civil wars begun several years, even decades previously.¹⁴

What might account for ever-longer civil wars becoming a fixture of the UN era? In Hironaka's view it is the persistence of weak states. Lacking much of the historical pedigree and developmental infrastructure of older Westphalian states, weak states exhibit a number of characteristics that make them particularly susceptible to prolonged conflict: a lack of autonomous bureaucratic structures, weakening their ability to make needed concessions or keep promises to rebel groups; a lack of military capacity to defeat rebellions, usually because governmental resources are scarce; and the fact that many are "so weak that they effectively cede peripheral geographic areas to rebels, who then gain a safe haven for local supporters and recruits, safe bases and lines of supply."¹⁵ Yet if weak states are so ineffectual they cannot pacify their own populations, why have they not, as in previous eras, simply imploded, fractured into sub-units or been absorbed by

¹³ ANN HIRONAKA, *NEVERENDING WARS* (2005).

¹⁴ *Id.* at 4-5. Hironaka refutes the common attribution of civil war in the 1990s "to an explosion of ethnic conflict enabled by the fall of communism." In fact, "[t]here was no 'explosion' of new civil wars after the end of the Cold War: most of the civil wars recorded in 1990 had begun in the 1970s and early 1980s, when the Cold War was in full swing. Indeed, the end of the Cold War actually led to a decrease in civil wars, as those civil wars associated with the Cold War ended within a few years of the fall of the Soviet Union." *Id.* at 5

¹⁵ *Id.* at 74.

their stronger neighbors? Hironaka argues that the post-WWII international order has sought to protect weak states from extinction – that is, protect their juridical existence -- *regardless of their marginal function in practice:*

After 1945, however, the rules and behavior changed. If one considers the international system as promoting a particular ecology of states, the population of states before 1945 was composed mostly of strong, battle-scarred states that had proven their capacity to withstand both interstate and civil war. Since 1945, most colonies have achieved independence and sovereign statehood not through victory in war, but through the encouragement and support of the international system. Furthermore, international norms and law increasingly discouraged territorial reshuffling through wars of annexation or secession. In the post-1945 era, shifting territorial boundaries became the exception rather than the rule. In a sense, the international system has locked the problems of states into specific territorial arrangements and pervasively created conditions that encourage lengthy civil wars in recently independent states.¹⁶

The UN era, then, has witnessed both a proliferation of states and a commitment, both legal and empirical, to their continued existence. But as Hironaka's study makes clear, the newer, conflict-ridden states being protected often bear only a fleeting resemblance to the Westphalian ideal. Groups other than governments wield significant power over regions or sectors of the society. Violence, corruption and inefficiency are endemic. And citizens invest little hope or effort in reforming their governments, since national institutions frequently lack the legitimacy born of long historical pedigree. As Rosa Brooks comments, "the state in the developing world has offered its citizens all the violence that accompanied European state formation, and few of the corresponding benefits."¹⁷ Jackson and Rosenberg describe this disjunction between form and function as the difference between the "empirical" and the "juridical" state.¹⁸ They argue that the

¹⁶ *Id.* at 7.

¹⁷ Rosa Ehrenreich Brooks, *Failed States, or the State as Failure*, 72 U. CHI. L. REV. 1159-1174 (2005).

¹⁸ Robert H. Jackson & Carl G. Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood*, 35 WORLD POL. 1, 2 (1982).

international community has accomplished little by securing the latter but not the former. Nonetheless, state-centrism persists.

The Normative Claim

If the conclusion from these data is that the international community has succeeded in promoting the juridical state but, in the process, sustained many entities with only weakly functional empirical capacities, have we not simply returned to doubts about the state's inherent worth? This is the second -- and normative -- part of the state marginalization claim: that states *ought* to recede in importance because they increasingly fail to promote their citizens' welfare. Why seek to preserve the state at all? Why not let forces of implosion and fragmentation run their course and embrace, in Opello and Rosow's words, a "deterritorialized politics."¹⁹ Why not conclude from Hironaka's data that the utility of the Westphalian state is limited to the historically and geographically contingent circumstances of its origin?

The responses to this normative claim are complex and multifaceted. In part this is because there is no unified vision of what a "post-statist" world would look like. What would replace the state? Would the new forms be universal or confined to regions where state failure has been most acute? It is also because the nature of a transition away from state-centrism is also unclear. Would it be organic or planned? Who would decide the form and function of the new entities? What if conflicts arose over the scope of their authority?

Answering these questions is beyond the scope of this inquiry into whether international law is now demonstrably committed to the state. But there are several

¹⁹ WALTER C. OPELLO, JR. & STEPHEN J. ROSOW, THE NATION-STATE AND GLOBAL ORDER 252-54 (1999); see also, Alfred van Staden & Hans Vollaard, *The Erosion of State Sovereignty: Towards a Post-territorial World?*, in STATE, SOVEREIGNTY AND INTERNATIONAL GOVERNANCE 165 (Gerard Kreijen ed., 2002).

response to the general question of whether promoting the state is desirable at all, each suggesting that given present circumstances, little would be little gained for individual welfare if the state were to lose its primacy.

First and most importantly, while one can imagine an endless array of alternatives to the liberal state model there are no viable candidates evident in contemporary international politics. No entities enjoy the same complement of rights as states and thus cannot act collectively to further the interests of large populations. One need only list a few areas of aggregate legal interest – defending territory, negotiating trade agreements that maximize the national comparative advantage, limiting immigration, etc. – to see why this is essential.²⁰ As discussed further below, critics of the state often downplay the necessity of leveraging collective interests in these and other circumstances in their (understandable) focus on protecting individuals against state predation or neglect. But individuals can suffer equally or to a greater extent without the support of a community that serves as their defender and proponent.

More importantly, no other entities can effectively serve the individuals arguably suffering from the deficiencies of existing states. Intergovernmental organizations (IGOs) and non-governmental organizations (NGOs), while increasingly present in all aspects of state reconstruction, are simply not equipped for the daily tasks of governing.

²⁰ Inter-governmental organizations (IGOs) may acquire certain state-like privileges to the extent these are essential to fulfilling their constitutional functions. *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 1949 I.C.J. 174, 178-9 (April 11) (“Reparation for Injuries Case”). But as the ICJ said of the UN, holding it to have these necessary rights “is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State.” *Id.* at 179. Non-governmental organizations (NGOs), which do not retain IGOs’ link to states through their creation by treaty and membership composed of states, have substantially fewer legal entitlements. See Menno T. Kamminga, *The Evolving Status of NGOs under International Law: a Threat to the Inter-State System?* in STATE, SOVEREIGNTY AND INTERNATIONAL GOVERNANCE, *supra* note __, at 387 (“[t]he formal status of NGOs under international law is still extremely weak . . . [and there is] little evidence that States will ever allow NGOs to become a serious threat to the inter-State system.”)

Can NGOs really begin collecting garbage, providing electricity and running courts? Can IGOs really mediate the myriad political, commercial and social conflicts addressed by national judiciaries, administrative bodies and political leaders respected in local communities? Beyond such obvious questions of capacity, NGOs and IGOs have primary constituencies far removed from the populations in the developing world they would arguably serve.²¹ “Democratic deficits” and, inevitably, legitimacy deficits, are sure to follow. It is difficult to imagine Africans, for example, acquiring any sort of loyalty to NGOs that are not only western-based and funded but which provide no formal mechanisms of feedback or accountability.²² To the extent hostility toward the state is fueled by a desire for more “democracy,” these alternatives appear even less satisfactory..

Finally, theories predicting IGO or NGO ascendancy relative to the state rest on a crucial fallacy. Existing IGOs and NGOs are taken as models for the future with the most highly functional entities serving as examples of the more diversified international community to come.²³ But marginalizing states would almost certainly undermine the very attributes that typify the most highly performing IGOs and NGOs. Highly functional IGOs are built on the strength of their highly functional member states.²⁴ These “strong states” supply the political capital, financial resources, opinion mobilization, military muscle and other tools necessary for IGOs to accomplish complex and costly reconstruction operations. It is no coincidence that the most effective contemporary IGO, the European Union, is built on the foundation of highly functional

²¹ Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the Unregulated Marketplace*, 18 CARDOZO L. REV. 957, 968-69 (1996).

²² *Id.* at 962-67.

²³ *See* Matthews, *supra* note ____, at 52-54, 58-60.

²⁴ CITE STUDIES ON COMPLIANCE THAT FOCUS ON COMPLIANCE WITH IGO DICTATES. ANDREW GUZMAN?

states capable of mobilizing vast resources to accomplish collective goals. Similarly, the UN has been at its most effective when operations are supported (politically and financially) by its most politically stable and resource-rich states. The WTO, also highly effective (as measured by rates of compliance), is also supported by the world's strongest states. By contrast, IGOs whose member states have much lower levels of resources, domestic legitimacy and functional effectiveness – the African Union and Arab League may be the clearest examples – perform quite poorly. Neither has been a significant presence, for example, in the state reconstruction missions reviewed in Chapter 2.

Similarly, NGOs that contribute in various ways to the growth of liberal politics are overwhelmingly concentrated in highly functional democratic states whose stability and resources make possible the political space and private philanthropy that allow civil society to thrive.²⁵ Praising NGOs as engines of democratic development treats the groups as context-neutral, pursuing the same objectives regardless of their political setting. But as Omar Encarnación has shown, civil society organizations sometimes pursue quite illiberal objectives when state institutions are weak.²⁶ “Civil society can only serve as an effective foundation for democracy where there are credible functioning state institutions and strong political parties with deep roots in society.”²⁷ Absent those critical social underpinnings, “civil society, especially an invigorated one, can become a source of instability, disorder, and even violence.”²⁸ The “civil society coup” against

²⁵ See Thomas J. Ward, *The Political Economy of NGOs*, in DEVELOPMENT, SOCIAL JUSTICE AND CIVIL SOCIETY 8-9 (THOMAS J. WARD, ED. 200_).

²⁶ Omar G. Encarnación, *THE MYTH OF CIVIL SOCIETY: SOCIAL CAPITAL AND DEMOCRATIC CONSOLIDATION IN SPAIN AND BRAZIL* (2003). CHECK THIS REFERENCE. NEED PAGE CITES.

²⁷ Omar G. Encarnación, *Venezuela's "Civil Society Coup,"* 19 WORLD POL. J. 38 (SUMMER 2002).

²⁸ *Id.*

Hugo Chavez in Venezuela in 2002 demonstrates this illiberal potential, as did the civil society organizations in Weimar Germany that made significant contributions to the Nazi's rise to power.²⁹ The groups themselves, in other words, are not intrinsically pro-democratic. "Civil society can both aid and harm democracy and the key variable determining these outcomes is the health of the political system."³⁰

One can well imagine a process of marginalization that creates quite unhealthy political systems and robs states of many of the attributes now contributing to IGO and NGO success. A drive toward ethnic, religious or other group solidarity may overwhelm existing tolerant pluralism and produce communities that are both homogenous and highly intolerant. Smaller territorial units mean fewer natural resources and economies of scale. The ceding of essential governance functions to non-state actors would also diminish states' political leverage. And the rise of entities competing for citizen loyalty could diminish the legitimacy, and thereby effectiveness, of state institutions. Extrapolations to such a world from the existing state system have little predictive value for the future governing capacities of IGOs and NGOs.

Second, given the lack of viable alternatives to the state, its historical successes should not be lost in a focus on its contemporary shortcomings. Strong states -- in the sense of being functional and legitimate -- have provided authority structures essential to securing individual rights. The connection between strong states and the practice of liberal politics is often obscured in discussions of human rights by an asserted dichotomy between individual interests and state power.³¹ Individual rights can only be secured, it is argued, when state power is restrained. But despite the obvious persistence of state-

²⁹ Sheri Berman, *Civil Society and the Collapse of the Weimar Republic*, 49 *WORLD POLITICS* __ (1997).

³⁰ ENCARNACIÓN, *supra* note __, at 46.

³¹ See HERSCH LAUTERPAHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 80 (1950).

sponsored brutality the claim is vastly overstated. State power is not monolithic. It is one thing for the state to impose its own conforming vision on a society or to engage in violence against its citizens. It is quite another for the state to establish and preserve the structures necessary for democratic politics to flourish. The European Court of Human Rights, in explaining how “there can be no democracy without pluralism,” has described the State as “the ultimate guarantor of the principle of pluralism.”³² This is obviously a distinction between the authoritarian and the liberal state. And just as obviously the human rights movement struggles mightily to change the former into the latter. But a liberal state is a state nonetheless with extensive institutional and normative constructs designed to restrain an anarchy that is antithetical to realizing individual liberty.

This is an old idea, embodied in the liberal social contract, but it is worth repeating. As Steven Holmes argues in a remarkable book, “almost all typically liberal institutions can be justified on the grounds that they *strengthen* the state’s capacity to govern and solve collective problems.”³³ In the classical Hobbesian view, when personal conduct is wholly unconstrained, a natural tendency to pursue self-interest will negate the practice of tolerance and justice.³⁴ Liberal theory counters with state institutions that identify and defend certain common civic interests in individual liberty, “interests disciplined by the restraints of social coexistence and justice.”³⁵ Holmes argues that this “positive constitutionalism,”³⁶ which enables the carefully calibrated politics from which tolerance and the rule of law emanate, exists only within the state:

³² Case of United Communist Party of Turkey and Others v. Turkey, Reports of Judgments and Decisions 1998-I, para. 44.

³³ STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 20 (1995) (emphasis added).

³⁴ *Id.* at 27.

³⁵ *Id.* at 66.

³⁶ *Id.* at 102.

Liberal democracy presupposes the existence of the state. The core norms of equality before the law and majority rule cannot be put into practice until territorial borders have been firmly established and the question of who is a member of the community has been clearly answered. In short, philosophers of liberalism must take elementary processes of state building for granted. This is obvious, in a way, for no nation can become liberal unless it is already a nation. The ideal of limited government will never have much popular appeal, moreover, unless political authority has already managed to secure a minimum of social order and protection from mutual violence. For this and other reasons, liberalism cannot be plausibly understood as an ideology deeply opposed to historical processes of centralization and state building.³⁷

For Holmes, the notion that rights can flourish in the absence of strong state institutions is obviously belied by contemporary experience:

In a sovereignless condition, rights can be imagined but not experienced. In a society with a weak state, such as Lebanon for the past decade, or with virtually no state, such as Somalia today, rights themselves are nonexistent or underenforced. Statelessness means rightlessness, as stories of migrating Kurds, Vietnamese and Caribbean boatpeople, and many others, have also made abundantly clear.³⁸

Third, as states in the developing world have themselves recognized, constructing an alternative international order would come at a terrible human cost. How would existing national territories, or authority thereover, be divided? Many overlapping claims are now made for the same territories. Many are driven by a desire to control valuable natural resources. Many involve problems of infinite regression, as minorities within minorities, energized by calls for group solidarity, seek to break away from the first breakaway territory.³⁹ These obstacles would arise whether a post-state order was premised on considerations of efficiency, justice, historical authenticity or some other organizing principle. Each is focused on supposed benefits once reordering is achieved, not how that reordering will be accomplished. Once current borders and spheres of

³⁷ *Id.* at 100.

³⁸ *Id.* at 19.

³⁹ *See, e.g.*, Gregory Marchildon & Edward Maxwell, *Quebec's Right Of Secession Under Canadian And International Law*, 32 VA. J. INT'L. L. 583, 616-617, nn.167-168 (1992).

authority lose their sanctity in the eyes of international law, however, a peaceful resolution of the many competing demands seems unlikely. Many take the view that in Africa “the Pandora’s box of territorial restructuring is better left unopened, lest Africa embark on a path of total anarchy, war and disintegration.”⁴⁰ It was for this reason that the 1963 Charter of the Organization of African Unity asserted a commitment to inherited colonial borders, despite acknowledgment of their illegitimacy among the new African states.⁴¹

Even if some claims were resolved short of violence, the sheer number of secessionist conflicts would itself render the problem unresolvable: Thomas Franck estimates that if every group which defines itself according to some coherent characteristic (ethnicity, language, history of persecution, etc.) were to gain independence, the world would be made up of roughly 2000 states.⁴² The conflicts generated by the inevitable resistance to these independence movements would soon overwhelm any collective mechanisms for keeping the peace, which, as noted, might well be in danger of foundering without the strong and resource rich member states that have so far proven essential to their functioning.

In sum, the international community’s continuing attachment to the state should not be seen as simple inertia. To the contrary, it is, for now, an essential means of preserving structures that protect personal liberty and security. Once again, the point of this discussion has not been to argue that the legal status of the state has remained unchanged in contemporary international law. That would deny reality. It is rather that

⁴⁰ PIERRE ENGLEBERT, STATE LEGITIMACY AND DEVELOPMENT IN AFRICA 181 (2000). Englebert himself disagrees with this view. *See Id.* at 182-4.

⁴¹ *See* Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM J. INT’L L. 590, 595-6 (1996).

⁴² THOMAS M. FRANCK, THE EMPOWERED SELF 23 (1999).

good and defensible reasons exist for why states remain at the center of the international legal order. The kind of state envisioned by contemporary norms is our next topic.

B. Norms of Governance

The Mainstreaming of Democracy Promotion

I would like to argue that international law has now adopted liberal democracy as the preferred model of national governance. This is admittedly a bold claim. It directly challenges the traditional view that any government in effective control of territory is entitled to recognition, regardless of how it attained power.⁴³ It shunts aside the core of traditional state autonomy principles, which were not only territorial but functional, viewing the conduct of national politics as the core of a state's protected identity. As Max Huber wrote in the Island of Palmas arbitration, sovereign independence involves the exclusive right to exercise "the functions of a State."⁴⁴ And to the extent the claim depends on human rights instruments, it departs from the view that those instruments, drafted largely during the Cold War, were intentionally neutral (or agnostic) on questions involving the legitimacy of political systems. None of the major global human rights instruments, for example, protects "democracy" as an independent right or even proclaims a commitment to political democracy.⁴⁵

There was a substantial debate on these questions in the early and mid-1990s, as commentators wrestled with how new and aggressive multilateral efforts to reform state government could be reconciled with an international legal system that had always

⁴³ See MALCOLM SHAW, *INTERNATIONAL LAW* 577 (5th ed. 2003).

⁴⁴ *Island of Palmas Case (Neth. v. U.S.)*, 2 R.I.A.A. 831, 838 (1928).

⁴⁵ Several instruments allow certain rights to be restricted when recessing in a "democratic society." See *Universal Declaration of Human rights*, GA Res. 217A(III), UN Doc. A/810, at 71 (1948), art. 29(a); *International Covenant on Economic, Social and Cultural rights*, 993 UNTS 3, arts. 4, 8(1)(c); *International Covenant in Civil and Political Rights*, 999 UNTS 171, arts. 14(1), 21, 22(a).

assumed a relatively clear demarcation between international and domestic spheres of concern.⁴⁶ In the critics' view, externally-imposed models of national governance were to be distrusted both on substantive grounds -- their conception of democracy was seen as unduly narrow and procedurally formalistic -- and because they were regarded as preempting organic national processes of political reform.⁴⁷ Many saw the "democratic entitlement" (in Thomas Franck's pioneering phrase) as simply the international lawyer's version of post-Soviet Western triumphalism or, in Susan Marks' words, "liberal millenarianism."⁴⁸ Legal institutions controlled by dominant Western powers had effectively been gripped by Francis Fukayama's "End of History" thesis and were attempting to codifying it as law.

These critiques were robust and, at the time, demanded serious consideration. But as normative statements they have simply been overtaken by events. As Chapter 2 demonstrates, the United Nations and many regional organizations have not only monitored elections for over a decade but are involved in virtually all aspects of reconstructing national institutions in post-conflict and post-authoritarian states. In each case those new institutions draw on liberal democratic models. Growing bureaucracies at the UN and regional organizations are now devoted to democracy promotion.⁴⁹ And in the realm of stated normative goals -- crucial for international law even in the face of contrary practice -- the Security Council, General Assembly, Human Rights Committee

⁴⁶ See the essays collected in *DEMOCRACY AND INTERNATIONAL LAW* (RICHARD BURCHILL, ED. 2006); *Democratic Governance and International Law* (Gregory H. Fox & Brad R. Roth eds. 2000)

⁴⁷ See SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IDEOLOGY* (2000); BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY AND INTERNATIONAL LAW* (1999).

⁴⁸ Marks, *supra* note ____, at ____.

⁴⁹ See ARTURO SANTA CRUZ, *INTERNATIONAL ELECTION MONITORING, SOVEREIGNTY AND THE WESTERN HEMISPHERE IDEA* (2005); *ELECTION OBSERVATION AND DEMOCRATIZATION IN AFRICA* (JON ABBINH & GERTI HESSELING, EDS. 2000); *POSTCONFLICT ELECTIONS, DEMOCRATIZATION, AND INTERNATIONAL ASSISTANCE* (KRISHA KUMAR, ED. 1998).

and Secretary-General all regularly pronounce on the desirability, indeed necessity, of democratic transitions.⁵⁰ Democracy is said to underlie a wide variety of other policy objectives of concern to United Nations.⁵¹ Similarly, the EU, the OAS, the African Union, the Commonwealth and other inter-governmental organizations proclaim democracy as a central goal for their member states.⁵² The Constitutive Act of the African Union (2000), for example, lists as one of its objectives to “Promote democratic principles and institutions, popular participation and good governance.”⁵³ ASEAN, which traditionally limited itself to economic and security matters and viewed concern with governance questions as contrary to rigid notions of sovereignty and non-interference, changed course in 2003 and took a tentative step by declaring its member states’ interest in “a just, democratic and harmonious environment.”⁵⁴

⁵⁰ See THE UN ROLE IN PROMOTING DEMOCRACY (EDWARD NEWMAN & ROLAND RICH, EDS. 2004). For a discussion of Security Council practice, see Gregory H. Fox, *Democratization, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 69 (DAVID M. MALONE, ED. 2004) (“Fox, Security Council and Democratization”). In a 2005 report, the Secretary-General declared “the United Nations does more than any other single organization to promote and strengthen democratic institutions and practices around the world.” *In Larger Freedom*, UN Doc. A/59/2005, ___ 151 (2005).

⁵¹ These include national reconciliation, internal security, building governmental infrastructures, regional stability and economic development. See Fox, *Democratization*, *supra* note ___, at 76-80.

⁵² In the 1993 Copenhagen Criteria, the EU agreed that Eastern and Central European countries seeking membership must have achieved “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” European Commission, EU Enlargement - A Historic Opportunity-From Cooperation to Accession, *available at* <http://europa.eu.int/comm/enlargement/intro/criteria.htm#Accession%20criteria>. The Inter-American Democratic Charter, adopted by the OAS in 2001, states that “The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it.” Inter-American Democratic Charter, AG/RES 1838 (XXXI-O/01) (2001), art. 1. In the 1991 Harare Declaration the Commonwealth proclaimed “democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government” as “fundamental political values of the Commonwealth.” Commonwealth Heads of Government, *Harare Declaration* (Oct. 20, 1991), *available at* <http://www.tcol.co.uk/harare.htm>.

⁵³ Constitutive Act of the African Union, July 11, 2002, Art. 3(g), *available at* <http://www.africa-union.org>.

⁵⁴ *Declaration of Asean Concord II* (Bali Concord II) (Oct. 7, 2003), *available at* <http://www.aseansec.org/15159.htm>. Inclusion of the word “democratic” in this passage was hotly debated by member states. Agence France-Presse, “Southeast Asian nations sign key pact with commitment to democracy,” (Oct. 7, 2003), *available at* http://quickstart.clari.net/qs_se/webnews/wed/ax/Qasean-pact.RUBh_DO7.html. An ASEAN spokesman remarked, “the introduction of the notion of democratic peace sets the standard of political norm in the region. It means that member states subscribe to the notion

More of this practice will be discussed below. Its legal significance, of course, should not be overstated. Democracy promotion regimes are weak or non-existent in some regions of the world and even where democratic norms have been institutionalized, responses to anti-democratic forces have sometimes been tepid and arguably selective. But as we have seen, while some academic commentators found normative stasis in this practice the international actors themselves perceive significant forward movement. The longevity of this practice, its integration into the regular business of international organizations, the lack of proffered alternatives, and explanations of prominent refusals to condemn anti-democratic practices (such as in Zimbabwe) that fail to challenge democratic goals themselves, all point toward a normative regime that has planted deep roots in inter-state relations.

Procedural versus Substantive Democracy

But what is the “democracy” being promoted? This definitional question not only raises notoriously contentious issues but ranges well beyond the discipline of international law. The nature of democracy is a well-rehearsed problem of political theory, where the debate has frequently revolved around whether “democracy” is understood in a procedural sense as relating only to the means for selecting leaders, or whether it suggests a broader range of substantive rights guaranteed in law.⁵⁵ Is democracy a blueprint of the good life itself or simply a framework for achieving the good life? This definitional debate has important consequences for the methodological concerns of international law. These involve the evidence employed to argue for or

that democratic processes promote regional security.” *Id.* The highly tentative nature of this step was underlined by ASEAN’s failure to issue any statement, let alone a condemnation, of the military coup in Thailand in September 2006. *See Thai Coup Won’t Affect Summit; ASEAN Pacts set for Signing Won’t be Altered, Diplomat Says*, Manila Bulletin, Sept. 28, 2006.

⁵⁵ *See generally*, IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* (2003).

against a democratic governance norm. Defining “democracy” procedurally would focus attention on a narrow range of practices related to holding competitive elections. A substantive definition would vastly expand the universe of relevant practice to, a broad range of social norms -- political, economic and relational – that make up a theorist’s conception of an equitable domestic order. Susan Marks, for example, criticized accounts of the democratic entitlement in which “democracy appears to be about means, and not also about ends.”⁵⁶ Since this chapter makes a claim for an emerging liberal democratic model of statehood, clarity on the definitional question is an essential first step.

Where to begin answering this question is far from obvious. “Democracy” norms are but a subset of a larger set of norms concerned with national governance. At the most general level, any international rule seeking to shape national policy might be described as a norm of “governance.” Many rules intend such an effect. But in the sense discussed here, international law addresses governance not when it has a secondary impact on domestic policies in the course of pursuing other objectives, but when it *deliberately seeks to shape the ongoing nature of the relationship between government and citizen*. Rules on the denial of justice to aliens or the use of one state’s territory to cause harm to another, for example, have direct and important consequences for domestic policy-making. But they are not norms of governance. Their intended effects on government-citizen relations are decidedly secondary to their intended effects on inter-state relations. By contrast, the Universal Declaration of Human Rights posits a theory of domestic governmental legitimacy as a direct and primary legal obligation: “the will of the people

⁵⁶ Susan Marks, *The “Emerging Norm”: Conceptualizing “Democratic Governance,”* 91 ASIL PROC. 372, 375 (1997).

shall be the basis of the authority of government.”⁵⁷ It then describes – as would its binding progeny drafted over the course of the next three decades -- how popular sovereignty is to be embedded in national political institutions: “this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁵⁸

But even within the universe of primary governance rules, one can argue that all of human rights law takes domestic politics as its subject and not just its object. Human rights standards are interposed between governments and those under their jurisdiction. When international law declares individuals entitled to a “right” it describes a preferred way for governments to relate to individuals. Some governmental policies, such as torture, are proscribed altogether. Others, such as the prohibition on “cruel, inhumane or degrading treatment,” are flexible and require different policy responses in different circumstances. Still others call for national institutions, such as courts, to follow a particular design. But in the words of the Universal Declaration, each right is to be respected “among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”⁵⁹ That is, the relationships subject to protection exist solely within national societies (issues of extra-territoriality aside). Those relationships lie at the heart of national politics

So the substance versus procedure question must be answered by reference to human rights norms as a whole, which collectively address the structure of national politics. In human rights instruments, articles on electoral processes appear separately from all other rights, thereby segregating difficult questions of governmental legitimacy

⁵⁷ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc A/810 at 71, art. 21(3) 1948).

⁵⁸ *Id.*

⁵⁹ *Id.*, preamble.

presented by a right to free electoral choice from more tailored questions about the legality of specific governmental policies.⁶⁰ Given that profound differences over the nature of legitimate government lay at the doctrinal heart of the East-West conflict, during the Cold War this division between participatory and human rights served a useful purpose. It allowed limited progress to be made on the latter without implicating divisive questions of governmental legitimacy. Thus, the slow ascension of human rights issues on to the international agenda in the 1970s and '80s was not matched by a similar attention to "democracy" issues.

The end of the Cold War changed all that, of course. But the old distinction between "democracy" and "human rights" continued to appear in the work of international organizations. Emblematic is the 1993 Vienna Declaration of the World Conference on Human Rights, which urges the international community to "support the strengthening and promoting of democracy, development *and* human rights."⁶¹

Democracy and human rights are also discussed as separate ideas in the Secretary-General's broad exposition of UN reform proposals, *In Larger Freedom*.⁶² The mandates of recent post-conflict reconstruction missions -- to Liberia, Burundi, Côte D'Ivoire and the Democratic Republic of Congo and elsewhere-- have addressed human rights and electoral issues separately.⁶³ In a resolution on the prevention of armed conflict, the Security Council spoke of the need to promote "good governance, democracy, gender

⁶⁰ Electoral (or "participatory") rights are addressed in article 21 of the Universal Declaration, article 25 of the Covenant on Civil and Political rights, article 3 of the First Protocol to the European Convention on Human Rights and article 23 of the American Convention on Human Rights.

⁶¹ *Vienna Declaration and Programme of Action*, UN Doc. A/Conf. 157/23, para. 8 (1993) (emphasis added).

⁶² *Report of the Secretary-General, In Larger Freedom*, UN Doc. A/59/2005, paras. 140-53 (2005).

⁶³ See SC Res. 1509 (Sept. 19, 2003) (Liberia); SC Res. 1545 (May 21, 2004) (Burundi); SC Res. 1565 (Oct. 1, 2004) (Congo); SC Res. 1609 (June 24, 2005) (Côte D'Ivoire).

equality, the rule of law and respect for and protection of human rights.”⁶⁴ The General Assembly scheduled an agenda item entitled “The Situation of Democracy and Human Rights in Haiti.”⁶⁵ Many more examples of such disjunctive usage could be given.⁶⁶

At the same time, the idea that democracy might be more or less limited to competitive elections, and thereby entirely separate from “human rights” questions, is one widely criticized within international organizations. Many within the United Nations regularly disavow Schumpeterian proceduralist conceptions of democracy. The Human Rights Commission, for example, identifies as “essential elements of democracy” the “respect for human rights and fundamental freedoms.”⁶⁷ Similarly, the High Commissioner for Human Rights, describes such “essential elements of democracy” as “separation of powers, empowerment and strengthening of parliaments, independence of the judiciary, fair and transparent elections, opposition to unconstitutional changes of Government, popular participation, decentralization of power, freedom of the press, freedom of the members of the Bar, and the subsidiary role of the armed forces, the police or the security forces in a democracy.”⁶⁸ And the newly-established United Nations Democracy Fund describes democracy as consisting of nine “distinctive, but wholly inter-related components,” one of which is human rights.⁶⁹

⁶⁴ SC Res. 1625 (Sept. 14, 2005) (annex).

⁶⁵ UN Doc. A/60/251, at 2 (2005).

⁶⁶ See Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and its Implications for International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 1, 7 N.24 (GREGORY H. FOX & BRAD R. ROTH, EDs. 2000).

⁶⁷ *Interdependence Between Democracy and Human Rights*, Commission on Human Rights Res. 2003/36.

⁶⁸ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *COMPILATION OF DOCUMENTS OR TEXTS ADOPTED AND USED BY VARIOUS INTERGOVERNMENTAL, INTERNATIONAL, REGIONAL AND SUBREGIONAL ORGANIZATIONS AIMED AT PROMOTING AND CONSOLIDATING DEMOCRACY*, available at http://www.ohchr.org/english/law/compilation_democracy/intro.htm.

⁶⁹ *SITUATING THE UN DEMOCRACY FUND IN THE GLOBAL ARENA*, available at http://www.un.org/democracyfund/Situating_Democracy.htm.

Are human rights and democracy then coextensive? The Secretary-General, who frequently proclaims a commitment to democratic government and so might be expected to clarify matters, seemed to have it both ways in a 2004 speech:

Democracy means more than the functioning of effective representative institutions. It means upholding fundamental principles – particularly the rule of law and respect for human rights. The rule of law – and its pre-eminent condition, equality before the law – is the platform upon which the edifice of democracy rests. Respect for human rights is vital for the democratic edifice to stand. In fact, a symbiotic relation exists between the two: human rights necessary for the functioning of democracy, and a functioning democracy is essential to ensure the full enjoyment of human rights.⁷⁰

Recall the *legal* significance of this clash between substantive and procedural approaches is that each suggests a very different type of evidence relevant to a normative commitment to the liberal state. Must international lawyers choose between the two? Certainly political theorists must do so, as must those wrestling with the policy question, often raised by critics of proceduralist democracy, of whether outsiders unduly raise expectations when they promise citizens “democracy” but deliver only elections. Despite the obviously unsettled nature of the question within international organizations, I believe the answer is no. “Democracy” must have a global definition only if it constitutes, or is on its way to constituting, a norm in itself. The term “democracy” is widely used by those commenting on political transitions, and even appears in some exhortative legal texts. But it is not the touchstone for compliance with international expectations about national governance. Rather, following the architecture of human rights treaties, the various component rights of a liberal order are described and protected discretely. As

⁷⁰ *Rule of Law and Human Rights are Vital for Democracy, Especially in Arab World, Secretary-General Says in Message to Regional Conference in Yemen*, UN PRESS RELEASE SG/SM/9110/L/3054 (DEC. 1, 2004).

noted, this is especially true for UN missions assisting political transitions, which have frequently established separate units for elections and human rights. The administrative reasons for this division are obvious. But administrative convenience appears to mirror a conceptual and normative division between these two aspects of governance. Whether one accepts this claim, it appears to have substantial support in practice and will therefore be adopted in the review of practice that follows here.

B. Elections

The first area of practice to be considered is elections. The United Nations began monitoring plebiscites and elections in newly-independent colonies in the late 1950s.⁷¹ Spurred by seminal General Assembly resolutions, the U.N. (and in particular the Trusteeship Council) observed thirty elections, referenda, and plebiscites in non-self-governing and trust territories between 1956 and 1990.⁷² Not all former colonies held votes on independence or had international monitors present at their first post-independence elections. But the ubiquity of supervision lent an important orderliness to many of these transitions, particularly those in territories with potentially explosive ethnic tensions such as British and French Togolands (later Togo, Ghana and Benin)⁷³ and Ruanda-Urundi (later Rwanda and Burundi).⁷⁴

The United Nations did not begin monitoring elections in independent states until after the process of decolonization was largely completed. Early in its history the U.N.

⁷¹ Portions of the following section are adapted from Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733 (1995).

⁷² YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY 98 (1994).

⁷³ See *Report of the United Nations Commission for the Supervision of the Elections in Togoland under French Administration*, U.N. GAOR, 13th Sess., Annex 1, Addendum to Agenda Item 40, at 1, U.N. Doc. A/3957 (1958); *The Future of Togoland Under British Administration: Report of the United Nations Plebiscite Commissioner*, U.N. TCOR, 18th Sess., 733rd mtg. at 279, U.N. Doc. T/1258 (1956).

⁷⁴ *Report of the United Nations Commissioner for Ruanda-Urundi*, U.N. GAOR, 16th Sess., Annex 2, Agenda Item 49, at 1, U.N. Doc. A/4994 (1961).

had attempted monitoring in Korea and Germany, with Cold War tensions leading to predictably unsatisfactory results.⁷⁵ The watershed came with the highly successful mission to Namibia (UNTAG), which capped over thirty years of international efforts to oust South Africa from the territory. The Namibian operation was ground-breaking in several respects. First, it was the Security Council that established the legal framework for Namibian independence by declaring it "imperative that free elections under the supervision and control of the United Nations be held for the whole of Namibia as one political entity."⁷⁶ Second, to many observers, South Africa's continued administrative control over the territory during the campaign and election, as well as outbreaks of fighting between South African and SWAPO forces, raised substantial doubts as to whether the final results would be accepted by both sides.⁷⁷ Yet voting occurred with virtually no violence and a peaceful transition of power took place several months later.⁷⁸ Third, the divisive ethnic politics practiced by South Africa during its years of occupation required, in the words of one UNTAG official, "that the holding of elections in Namibia which would be more than only superficially free and fair would require massive intervention by UNTAG to change the political climate in the country."⁷⁹ Substantial social engineering, in other words, as opposed to mere passive observation, was required to ensure a successful transition.

To overcome these and other obstacles UNTAG deployed over 8,000 persons in the territory - an enormous U.N. undertaking by the standards of 1989 - and insisted that

⁷⁵ BEIGBEDER, *supra* note __, at 120-26.

⁷⁶ SC Res. 385 (Jan. 30, 1976).

⁷⁷ See COMMISSION ON INDEPENDENCE FOR NAMIBIA, REPORT OF THE FIRST OBSERVER MISSION OF THE COMMISSION ON INDEPENDENCE FOR NAMIBIA (1989).

⁷⁸ BEIGBEDER, *supra* note __, at 161-63.

⁷⁹ CEDERIC THORNBERRY, THE SECRETARY-GENERAL AND NAMIBIA 7 (1991) (paper presented to Ralph Bunche Institute conference on "The Impact of the Changing International Climate on the Role of the United Nations' Secretary-General" held on Sept. 11-13, 1991).

it be involved in every step of implementing the new framework of electoral laws, which it had also painstakingly negotiated with the South African Administrator-General.⁸⁰ UNTAG also organized a massive public relations campaign to convince Namibians both that the elections would be conducted fairly and that the results would be respected.⁸¹ Shortly after successful elections were held, the new Namibian Constituent Assembly drafted a remarkably progressive constitution, which it adopted with much ceremony less than one week prior to formal independence.

The Namibian operation produced an enormous sense of optimism in the U.N. The next mission was the ONUVEN operation in Nicaragua, which the Secretary-General authorized even before the Namibian elections had taken place. The elections culminated a regional effort to resolve the contra war that had engulfed Nicaragua and its neighbors since the early 1980s. ONUVEN had none of the leverage with the Nicaraguan government that UNTAG was able to muster when negotiating with the South African electoral authorities. Yet, remarkably, it was able to persuade the Sandinista government both to alter laws and cease practices that it found inconsistent with the mission mandate.⁸² That mandate might have been interpreted to cast ONUVEN as mere passive observer, but Elliot Richardson, the Secretary-General's Special Representative, argued that ONUVEN's unique ability to legitimize the elections "demanded more than merely recording the process, more than monitoring, and could not stop short of actively seeking

⁸⁰ See Paul C. Szasz, *The Electoral Process*, in *THE NAMIBIAN PEACE PROCESS: IMPLICATIONS AND LESSONS FOR THE FUTURE* 143 (HERBERT WEILAND & MATTHEW BRAHAM EDS., 1994).

⁸¹ *Report of the Secretary-General: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, U.N. Doc. A/46/609, at 9 (1991)

⁸² *First Report of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua to the Secretary-General*, U.N. Doc. A/44/642, at 6 (1989).

to get corrected whatever substantial defects and been discovered."⁸³ That the incumbent government lost the election and proceeded to leave office (although not without substantial controversy) further reinforced the perceived value of a U.N. presence.

Still more ground was broken in the Haiti operation, authorized by the General Assembly only seven months after the elections in Nicaragua. Both the Namibian and Nicaraguan elections were part of solutions to conflicts long of concern to the international community; both, for example, had been the subject of opinions by the International Court of Justice.⁸⁴ In September 1990, the Secretary-General attempted to codify this practice by announcing that henceforth, large scale U.N. election monitoring would be restricted to situations with a "clear international dimension."⁸⁵ One month later, however, the General Assembly approved the mission to Haiti. The only "international dimension" to Haiti's ongoing political crisis was a steady outflow of refugees, a factor present in virtually all internal crises. After Haiti, the requirement of an international nexus has faded from official commentary on U.N. electoral activities.

Since these early operations, and as described in Chapter 2, the UN and regional organizations have consistently dispatched governance missions to post-conflict states. Discussion by both states and commentators now rarely focuses on the desirability of promoting democratic institutions in these societies. One recent study declares flatly, "national elections have become international affairs – and international election

⁸³ *Fifth Report of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua to the Secretary-General*, U.N. Doc. A/44/927, at 3 (1990).

⁸⁴ *International Status of South-West Africa*, 1950 I.C.J. 128 (July 11); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 6 (Jan. 26); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

⁸⁵ *Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/45/1, at 15 (1990).

monitoring has become an internationalized practice in world politics.”⁸⁶ Debate centers instead on logistical questions of how and when to intervene and which of the many possible tasks for international reconstruction – security, rule of law, political participation, infrastructure repair, etc. – ought to be attended first.⁸⁷

This emerging democracy-promotion regime has given rise to an elaborate institutional infrastructure, both at the U.N. and elsewhere, designed to promote and facilitate democratic transitions.⁸⁸ The breadth of these efforts suggests a nascent universalism. Eric Bjornlund reports that “between 1989 and 2002, international election observers were present for 86 percent of the national elections in ninety-five newly democratic or semi-authoritarian countries.”⁸⁹ Apart from the Middle East and North Africa, which have lagged substantially behind the democratic Third Wave,⁹⁰ monitoring levels have been remarkably consistent across regions. According to Bjornlund, 87% of national elections in Eastern and Central Europe were monitored by international observers during this period, 89% in Sub-Saharan Africa, 88% in Latin America and the Caribbean and 77% in the Asia/Pacific region.⁹¹ When in 2005 the Security Council referred without elaboration to “international democratic standards,” its apparent

⁸⁶ Arturo Santa-Cruz, *Constitutional Structures, Sovereignty, and the Emergence of Norms: The Case of International Election Monitoring*, 59 INT’L ORG. 663, 663 (2005).

⁸⁷ See, e.g. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (2006); JACK SNYDER & EDWARD MANSFIELD, *ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR* (2005); Thomas Carothers, *The End of the Transition Paradigm*, in *CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION* 167 (THOMAS CAROTHERS, ED. 2004); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule Of Law”*, 101 MICH. L. REV. 2275 (2003); JACK SNYDER, *FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT* (2000).

⁸⁸ See BIEGBEDER, *supra* note __; Roland Rich, *Bringing Democracy into International Law*, 12 J. DEMOC. 20 (2001); Christopher Joyner, *The United Nations and Democracy*, 5 GLOBAL GOV. 333 (1999).

⁸⁹ ERIC BJORNLUND, *BEYOND FREE AND FAIR: MONITORING ELECTIONS AND BUILDING DEMOCRACY* 43 (2004).

⁹⁰ The phrase is Samuel Huntington’s; see SAMUEL HUNTINGTON, *THE THIRD WAVE* (1991).

⁹¹ BJORNLUND, *supra* note __, at 44-5.

confidence that those standards were well-understood was grounded in a substantial body of international practice.⁹²

In five specific areas the mechanisms of international law have been engaged to encourage and reinforce the legitimacy of representative institutions.⁹³ First, when the United Nations and regional organizations monitor elections they necessarily pass judgment on candidates or parties claiming a legitimating mandate from the outcomes. In an internationally monitored election, it is not only the nation's voters that confer legitimacy on fairly elected leaders but international actors as well. In many crucial cases, the converse is more important: when voters *delegitimize* leaders by voting them out of power, only confirmation by outsider observers that the election was free and fair creates the political pressure necessary to compel those leaders to step down. The much vaunted Orange Revolution in the Ukraine, for example, started with the government's attempt to distort its electoral loss and the insistence by the Organization for Security and Cooperation in Europe and other international observers that the elections had been marred by significant fraud and other irregularities.⁹⁴

Second, decisions of human rights bodies have invigorated long-dormant provisions of human rights treaties guaranteeing a right to political participation through periodic and free elections.⁹⁵ By condemning military coups, bans on opposition parties,

⁹² UN Doc. S/PRST/2005/50 (Oct. 18, 2005).

⁹³ The following discussion largely parallels that in Gregory H. Fox & Brad R. Roth, *Democracy and International Law* 27 REV. INT'L STUD. 327, 327-38 (2001) ("Fox & Roth").

⁹⁴ See Statement by United States Deputy Permanent Representative Paul W. Jones to the OSCE Permanent Council (Nov. 25, 2004), available at http://www.usosce.gov/archive/2004/11/ukraine_elections_11_25_04.pdf.

⁹⁵ See *Socialist Party and Others v. Turkey*, Case No. 20/1997/804/1007 (Eur. Ct. H.R. 1998); Human Rights Committee, General Comment 25 (57), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996); Mexico Election Decisions, Cases No. 9768, 9780, 9828, Inter-American Commission on Human Rights 97, 108, OEA/Ser.L/V/11.77, doc. 7, rev. 1 (1990). See generally Gregory H. Fox, *The Right to Political*

irregularities in ballot tabulation and other distortions of electoral preferences, this jurisprudence has done much to narrow the international legal understanding of democratic processes. Even the comparatively weak organs of the Organization of African Unity joined this trend.⁹⁶ Third, bilateral and multilateral recognition of states and governments is increasingly predicated on professed adherence to democratic norms.⁹⁷ Several regional organizations now condition membership or continued membership in good standing on maintenance of democratic institutions.⁹⁸ Fourth, a variety of regimes unrelated to democratization have begun to predicate implementation on popular participation in regulatory processes.⁹⁹

Finally, the law of peace and security has invoked democratization as a tool in the peaceful resolution of disputes.¹⁰⁰ This instrumental use of democratization has taken several forms. Twice (in Haiti and Sierra Leone) the Security Council has deemed the overthrow of an elected government a “threat to the peace” and authorized the use of external force to oust the usurping regime.¹⁰¹ The Council has also institutionalized the planning, structuring and monitoring of elections as a permanent fixture in UN-brokered transitions from civil war to peace-time normalcy.¹⁰² The Secretary-General explains the U.N.’s perceived link between democratic practice and conflict-avoidance:

Participation in International Law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW *supra* note ____, at 55.

⁹⁶ See Nsongurua J. Udombanal, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT’L L. 1209, 1253-65 (2003).

⁹⁷ See Sean D. Murphy, *Democratic Legitimacy and Recognition of States and Governments*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note ____, at 123.

⁹⁸ This is true for the E.U., the O.A.S., MERCOSUR and the Commonwealth. See Fox and Roth, *supra* note ____, at 332 n. 31.

⁹⁹ The most prominent example is environmental protection. See Jonas Ebbesson, *Public Participation in International Environmental Law*, 8 Y.B. INT’L ENV. L. 51 (1997).

¹⁰⁰ See generally, Fox, Security Council and Democratization, *supra* note __.

¹⁰¹ See SC Res. 940 (July 31, 1994) (Haiti); UN Doc. S/PRST/1998/5 (1998) (Sierra Leone).

¹⁰² Fox, Security Council and Democratization, *supra* note __, at __.

At the center of virtually every civil war is the issue of the state and its power – who controls it, and how it is used. No armed conflict can be resolved without responding to these questions. Nowadays, the answers almost always have to be democratic ones, at least in form.¹⁰³

C. Human Rights

If electoral/democratic rights are the collective face of the liberal state model – expressing an entitlement of the citizenry as a whole to political participation – then “human rights” are its individual face. Human rights need not be individual of course, as minority protection regimes make clear. And political participation is phrased as an individual right in many treaties, so the distinction is not clear-cut. But human rights by-in-large involve entitlements to the bodily, intellectual and cultural integrity of individuals. Electoral rights, even if exercised individually, are meaningless without a process guaranteed to all. The distinction is clearest, of course, when human and democratic rights are in tension with each other, as the American debate over majoritarian versus counter-majoritarian rights makes clear.¹⁰⁴

Concern for human rights is now ubiquitous in inter-state relations. Once confined to weak and politically obscure treaty systems, the protection of individual rights has become the motivating force behind sophisticated regulatory systems, exposés of official brutality, civil adjudicatory mechanisms, prosecutions for international crimes, sanctions regimes and military interventions to mention a few of the ways compliance is now monitored and enforced internationally. The extent of state involvement obviously varies by region. Among the democratic states of Europe, a network of treaty obligations mandates respect for a catalogue of well-defined rights. Among non-democratic states (as in the Middle East), human rights are infrequently the subject of transnational

¹⁰³ Kofi A. Annan, *Democracy as a Global Issue*, 8 GLOBAL GOV. 135, 137 (2002).

¹⁰⁴ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1920).

discourse. In-between these two extremes appears an infinite variation of practice. But as the number of democratic states has grown, the end of the spectrum in which traditional realism dominates policy-making, framing state interests without any reference to individual welfare, has diminished considerably. The point is not to paint a utopian picture in which expressed fidelity to norms eclipses the decidedly more checkered record in practice. It is rather that the same human rights standards appear in virtually all collective pronouncements on governmental policy and institutions.

Thus, at the level of stated policy, “everybody seems to be in favour of human rights. That is true for governments that have made it a constituent element of their foreign policy. It is true for global and regional organizations that devote elegant words to it in international treaties and declarations.”¹⁰⁵ Indeed, if one premise of the liberal state thesis is that human rights law by its very nature expresses a preference for liberal governing institutions, the discussion might well end here. What other model of the state could possibly emerge from this increasingly dense web of transnational commitments – *institutions and enforcement actions?*

But the thesis need not rest on aggregating human rights norms to produce an overall model of governance. There are more direct ways in which international organizations and states, acting to secure adherence to human rights standards, have sought to create or reform national governing institutions. Two examples, not involving formal human rights mechanisms, are the human rights institutions created in post-conflict states and the lending policies of international financing institutions.

¹⁰⁵ PETER R. BAEHR & MONIQUE CASTERMANS-HOLLEMAN, *THE ROLE OF HUMAN RIGHTS IN FOREIGN POLICY* 129 (3RD ED. 2004).

First, as touched on in Chapter 2, international actors are increasingly involved in drafting and implementing peace agreements to end civil wars, and these agreements almost uniformly import human rights protections into the political architecture of the post-conflict state. Bell and Keenan report that since 1990 over 300 such agreements have been signed by parties in over 40 jurisdictions.¹⁰⁶ A variety of common “design features,” such as bills of rights, human rights commissions, judicial reform measures and revised criminal codes, address structural human rights issues.¹⁰⁷ Recent agreements with such features include those for Bougainville (Papua New Guinea)¹⁰⁸, Burundi¹⁰⁹ and the Sudan.¹¹⁰ There are many others.¹¹¹ That agreements ending conflict in deeply divided societies contain such extensive human rights protections suggests that “mediators and parties to the conflict find the connection between peace and justice persuasive.”¹¹²

One example is Haiti which, while experiencing less a full-blown civil war than low-grade anarchy, has exhibited many of the governing failures typical of post-conflict societies. The Security Council responded by authorizing a series of human rights reforms that closely resemble those in peace accords. The MINUSTAH mission was authorized under Chapter VII to assist in “monitoring, restructuring and reforming the Haitian National Police, consistent with democratic policing standards,” overseeing the

¹⁰⁶ Christine Bell & Johanna Keenan, *Human Rights Non-governmental Organizations and the Problem of Transition*, 26 HUMAN RIGHTS QUARTERLY 330, 331 (2004).

¹⁰⁷ *Id.*

¹⁰⁸ See Bougainville Peace Agreement (Aug. 30, 2001), available at http://www.usip.org/library/pa/bougainville/bougain_20010830.html.

¹⁰⁹ See Arusha Peace and Reconciliation Agreement for Burundi (Aug. 28, 2000), available at http://www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html.

¹¹⁰ See The Implementation Modalities of the Protocol on Power Sharing (May 26, 2004), available at http://www.usip.org/library/pa/sudan/cpa01092005/implementation_agreement.pdf.

¹¹¹ See William G. O’Neill, *Reform of Law Enforcement Agencies and the Judiciary* (Draft Paper for the International Council on Human Rights Policy Review Meeting, “The Role of Human Rights in Peace Agreements,” March 7-8, 2005), available at <http://www.ichrp.org/ac/excerpts/177.doc>.

¹¹² CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 6 (2000).

re-establishment of the corrections system and developing “a strategy for reform and institutional strengthening of the judiciary.”¹¹³ These law reform initiatives were designed to promote the “establishment of a State based on the rule of law.”¹¹⁴ In this, the Council echoed its resolution on Côte D’Ivoire two months earlier in which it authorized the UNOCI mission to assist in “in re-establishing the authority of the judiciary and the rule of law throughout Côte d’Ivoire.”¹¹⁵ Peace agreements have thus become an important human rights implementation mechanism: international standards are woven into the architecture of new institutions in states whose political relations have essentially failed. The hope – though not always the reality – is that a more stable and satisfying politics will emerge from these new processes.

Second, international financial institutions have begun to use their substantial leverage over structural reform in developing countries to promote institutional protections of human rights. Regional development banks have been the most explicit in incorporating human rights criteria into lending policies. The European Bank for Reconstruction and Development declares in its founding Agreement that the contracting parties are “committed to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics.”¹¹⁶ The Inter-American Development Bank pursues democratic development as part of a comprehensive strategy to “modernize the state.”¹¹⁷ This includes strengthening the judiciary, pursuing law reform and promoting “a culture of tolerance, freedom, participation, accountability and

¹¹³ SC Res. 1242 (April 30, 2004).

¹¹⁴ Id.

¹¹⁵ SC Res. 1528 (Feb. 27, 2004).

¹¹⁶ *Agreement Establishing the European Bank for Reconstruction and Development*, in BASIC DOCUMENTS OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT 5 (1991).

¹¹⁷ INTER-AMERICAN DEVELOPMENT BANK, MODERNIZATION OF THE STATE 12-15 (2003).

social solidarity.”¹¹⁸ As part of a strategy to promote good governance, the African Development Bank seeks to reform legal and judicial systems in order to promote “rule of law, human rights and private capital flows.”¹¹⁹ The Bank views protection of human rights as promoting social stability and cohesion, which, in turn, avoid disruptions in economic growth and the distribution of resources. “Thus, respect for human rights clearly has a bearing on the ability of borrowers to make productive investment of Bank Group resources and also fulfill their obligations.”¹²⁰ The Asian Development Bank, while engaging in robust “governance” initiatives, is the least aggressive of the regional banks in focusing on political reforms. Nonetheless, many of its governance initiatives have implicit human rights objectives, which might have been overtly classified as such but for regional political sensitivities: government accountability, especially through increased flow of information; legal standards that are regularly and equally enforced; and enhanced participation by civil society groups.¹²¹

The World Bank has been more reticent, traditionally adhering to a strict reading of its articles of incorporation that preclude involvement in political matters.¹²² But movement is evident. As with the regional banks, the World Bank launched a series of governance initiatives in the 1990s after concluding that problems of state administration were significantly inhibiting economic reform and development.¹²³ A watershed 1989 report, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, found that “underlying

¹¹⁸ Id. at 15. See also, Carlos Santiso, *Towards Democratic Governance: the Contribution of the Multilateral Development Banks of Latin America*, in DEMOCRACY ASSISTANCE: INTERNATIONAL CO-OPERATION FOR DEMOCRATIZATION 150, 162 (PETER BURNELL, ED. 2000).

¹¹⁹ AFRICAN DEVELOPMENT BANK & AFRICAN DEVELOPMENT FUND, BANK GROUP POLICY ON GOOD GOVERNANCE 4 (1999).

¹²⁰ Id. at 7.

¹²¹ ASIAN DEVELOPMENT BANK, ANNUAL REPORT 1998 16-18 (1999).

¹²² The limitations are contained in Articles III(5)(b) and IV(10).

¹²³ See Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 GEO. PUBLIC POL’Y REV. 1 (2001).

the litany of Africa's development is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs."¹²⁴ The Bank decried personalized rule in many African states in which "leadership assumes broad discretionary authority and loses its legitimacy."¹²⁵ In the worst situations "the state becomes coercive and arbitrary."¹²⁶ Resisting these trends, the Bank argued, "requires a systematic effort to build a pluralistic institutional structure, a determination to respect the rule of law, and a vigorous protection of the freedom of the press and human rights."¹²⁷

Despite having thereby set a reform agenda for itself, the Bank's narrow reading of its articles continued to restrain a rather obvious set of policy prescriptions. The Bank acknowledges a limited legal authority to pursue certain human rights reforms, primarily freedom of expression and assembly and popular participation, but only in relation to the specific project being funded.¹²⁸ Many of its projects focus both on how government authority is exercised (including rule of law and judicial reform initiatives) and the quality of life for the intended beneficiaries of Bank funds.¹²⁹ But the Bank still maintains that these efforts relate not to *legitimacy* questions of how governmental authority ought to be used but *effectiveness* questions of how government policies function in practice.¹³⁰

Conclusions

¹²⁴ WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH: A LONG-TERM PERSPECTIVE STUDY 60 (1989).

¹²⁵ *Id.* at 61.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Genoveva Hernandez Uriz, *To Lend or Not To Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197, 205-6 (2001).

¹²⁹ See Santiso, *supra* note __, at 2; John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L.J. 331, 355 (2000).

¹³⁰ Santiso, *supra* note __, at 5.

this chapter -- that international law is coalescing around a liberal model of the state. It is not vulnerable to the rather straightforward reply, that virtually all of the practice cited in support of this thesis involves intrusions by *international actors* into national politics. If external actors are now empowered to remake state governments in the myriad ways here detailed, are not they, rather than their target states, now the ultimate locus of international legal authority? Can an international system be described as state centric – and centered around a particular version of the state for that matter -- when the power to shape national institutions clearly resides beyond any one state's control?

This would be a powerful critique if the argument for a liberal state model had been one of legal competence. If the claim had been that states have retained a sovereign authority to reject changes to their governing institutions purportedly sanctioned by international law, then the many international efforts at democracy-promotion would serve as a powerful counter. But although the claim of retained sovereignty is important, and will be addressed in Chapter __, it is not made here. This chapter has *not* argued that states retain ultimate legal authority over their political processes and institutions. Rather, with substantial help from the international community, the liberal model envisions states retain primacy in the *practice* of politics. On this view, state institutions continue to make the social policies, from the mundane to the grandiose. States also bear primary responsibility for their citizens' physical safety, individual liberty and equal treatment. While regional and global institutions are increasingly present in this policy process it is a distinctly distant presence. For most people in the world, in other words, the most important politics remains state politics.

So the claim is one of institutional architecture. International law might have allowed conflict-ridden and failing states to face their problems unaided, following centuries of practice in which borders and populations were either allowed to drift amid prolonged conflict or were manipulated according to the preferences of powerful states. But for the reasons detailed in the previous chapter, those “organic” solutions are deeply offensive to contemporary human rights norms and a dedication to the territorial integrity of existing states. Resisting mass expulsions, secessions and the like obviously requires substantial international intervention, and along with it a claim to a vast new legal authority. But again, that is a different question. The United Nations and others do not seek to *replace* states. They seek not a permanent role in national governance but an opportunity to supervise compliance with norms that, in the aggregate, add up to the liberal model. There is thus inconsistency in saying both that international law claims the authority to reform national institutions along liberal lines *and* that it intends the resulting liberal state to be at the center of political life, the essential forum for policy choice and implementation.