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Normative progress and pathological practices:
The modern state and identity politics

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Abstract

Normative progress and pathological practices: The modern state and identity politics

HEATHER RAE¹

INTRODUCTION

In his book, *Sovereignty: Organized hypocrisy*, Stephen Krasner argues that ‘Westphalian’ sovereignty—the right to non-intervention—has always been something of a myth because powerful states have always intervened in other states when it has been in their (material) interests to do so. Krasner distinguishes between four kinds of sovereignty. These are Westphalian sovereignty (the assertion of autonomy and the capacity to exclude external actors), international legal sovereignty (which depends on international recognition and formal juridical independence), interdependence sovereignty (the capacity to regulate movements across borders), and domestic sovereignty (the way in which public authority is organised within the state). Krasner brackets off the last two aspects of sovereignty, and of particular interest here is his argument that there are many different ways of organising political authority within the state ‘without raising issues for either international legal or Westphalian sovereignty’.²

However, this is not necessarily so. While domestic sovereignty is certainly associated with the organisation of authority within the state, the manner in which authority is organised—and how it is legitimated—depends on how the identities and interests of state-builders are understood and, in turn the normative contexts within which this occurs. Thus I argue that the domestic and international legal sovereignty (and more broadly the social legitimacy of states) have become increasingly bound together as, over the last five centuries, international norms have

¹ Research Fellow, Department of International Relations, Research School of Pacific and Asian Studies, Australian National University. The material in this paper formed the basis of chapter 6 in *State identities and the homogenisation of peoples* (Cambridge: Cambridge University Press, 2002).

² Stephen Krasner, *Sovereignty: Organized hypocrisy* (Princeton: Princeton University Press, 1999), p. 11.

developed which affect the organisation of domestic power and authority. Claims to absolute sovereignty, in both the Westphalian and domestic senses, have long been contested by intersubjective notions of what constitutes legitimate state action, including what is a legitimate way to constitute the authority of the state. While Krasner identifies international legal sovereignty as the means through which states gain recognition there is an important social dimension to this process that is broader than international law and in which legal changes are situated.

Norms of legitimate state behaviour have developed, notwithstanding issues such as ‘the standard of civilisation’, as the international community has struggled to respond to practices that have come to be regarded as unacceptable. Practices such as mass forced displacement, ethnic cleansing and genocide are not accepted as the legitimate acts of sovereigns and those who commit such acts quickly achieve pariah status. While there has certainly not been any smooth evolution of such norms, in different periods norms of legitimate state behaviour have been articulated in *response* to the most extreme practices of state-builders. This demonstrates the deep and increasing interconnection between the internal and external aspects of sovereignty. It is the interaction between the domestic and the international—understood here as mutually constitutive—that gives rise to the articulation of international norms of legitimate state behaviour.

The social and legal redefinition of mass expulsions and slaughter as criminal acts, developed slowly, crystallising throughout the course of the twentieth century in response to massive abuses. Since the middle of that century an international legal framework has developed which prohibits such acts—although this in itself has not been enough to stop such abuses. Despite the lack of any systematic means of enforcement of such standards, recent developments such as the creation of two ad hoc tribunals, the development of the International Criminal Court (ICC) and the NATO intervention make it harder for would-be abusers, and their apologists, to assume that they will go unpunished or that claims to Westphalian ‘sovereignty’ will protect them. Over the course of the twentieth century and into the twenty-first, therefore, we have seen

normative developments which may contribute towards constraining those who wish to use violence against their own citizens. This is certainly patchy, but sovereign immunity from prosecution is no longer inviolable.³

I demonstrate this below by tracing the development of international norms and domestic state practices in the area of the forced displacement of peoples, ethnic cleansing and genocide. These developments can be traced according to nine criteria (see Table 1). At one extreme is the complete lack of any international norms regarding the internal constitution of the state and at the other a more developed, albeit still patchy, normative context. I begin with a discussion of state-building and

Table 1: Tracing International Normative Change

	Spain	France	Turkey	Yugoslavia
1. No norms of internal constitution	*			
2. Treaty specific norms		*		
3. General social norms			*	*
4. General legal norms				*
5. Judicial prosecution (domestic)			*	
6. Judicial prosecution (ad hoc international)				*
7. Judicial prosecution (general international)				Emergent
8. Enforcement (ad hoc)				*
9. Enforcement (systemic)				

³ See also Marc Weller, 'On the hazards of foreign travel for dictators and other international criminals', *International Affairs* 75(3) 1999, pp. 599–617.

the task of collective identity construction that accompanies this. I then give a brief account of two early modern attempts to construct 'homogeneous' communities within the boundaries of states and the international responses these engendered. From this normatively thin social environment I then turn to two twentieth century attempts to construct homogeneous populations within state boundaries: the early-twentieth century genocide of Armenians and the late-twentieth century ethnic cleansing in Bosnia-Herzegovina and Kosovo. The normative developments that occurred in the wake of these cases is then discussed in the context of changing ideas of minority and human rights. Both these cases raised problems, highlighting normative contest, and normative change, at the international level. In the early-twentieth century, despite an emerging international humanitarian impulse and a clear recognition that what had happened to the Armenians was morally indefensible, it proved impossible to reconcile these intuitions with the claims made in the name of both Westphalian and domestic sovereignty. At the turn of the twenty-first century such claims to absolute sovereignty are much harder to sustain as the norms of legitimate state behaviour are increasingly explicit and the criminalisation of certain practices proceeds apace.

STATE-BUILDING AND COLLECTIVE IDENTITIES

While there are many ways in which political authority may be organised, in the modern state this has been directed towards the creation of the state as a differentiated political unit, with a single, internal source of authority and a unitary, sovereign identity.⁴ In a system organised in this way the construction of a cohesive domestic identity is a task facing all state-builders. As Michael Walzer argues, the political unity of the state 'has no palpable shape or substance. The state is invisible; it must be personified before it can be seen, symbolized before it can be loved, imagined before it can be conceived'.⁵ As Walzer goes on to argue, '[I]f symbolization does not by itself create unity (that is the function of political practice as well as of symbolic activity), it does create units—units of discourse

⁴ John Gerard Ruggie, 'Territoriality and beyond: Problematizing modernity in international relations', *International Organization* 47(1) 1993, pp. 139–74, at p. 151.

⁵ Michael Walzer, 'On the role of symbolism in political thought', *Political Science Quarterly* 82(2) 1967, pp. 191–204, at p. 194.

which are fundamental to all thinking and doing, units of feeling around which emotions of loyalty and assurance can cluster'.⁶ The construction of a cohesive collective identity within the state is intimately bound up with the construction of the state as sovereign.

In his account of sovereignty Krasner treats rulers, understood as power maximising elites, as ontological givens. In so doing he does not consider the constitution of rulers' interests and strategies, and the relationship between such interests and strategies and the cultural context in which elites act.⁷ Even if rulers are the most significant agents in state-building they are shaped by, and in turn interact with, their social and cultural context. The way in which rulers have sought to legitimate themselves *as rulers*, drawing on the cultural resources available to them, is also part of the process by which the state itself is constituted and represented.⁸

In my discussion of collective identity construction I use Alexander Wendt's characterisation of the corporate (domestic) and social (international) aspects of state identity. In the process of collective identity construction, contemporary state-builders have several options at their disposal. They may opt to bolster the social (international) identity of the state, explicitly taking international standards as the benchmark for appropriate domestic behaviour, resulting in 'societal state identity construction'.⁹ They may seek to mediate the relationship between

⁶ Walzer, 'On the role of symbolism', p. 194.

⁷ Krasner, *Sovereignty*, pp. 49–50.

⁸ 'Culture' as used here refers to both those shared meanings and values that provide a framework for action *and* the practices through which, over time, agents remake their own social and cultural context. See Sharon Hays, 'Structure and agency and the sticky problem of culture', *Sociological Theory* 12(1) 1994, pp. 57–72.

⁹ Alexander Wendt, 'Collective identity formation and the international state', *American Political Science Review* 88(2) 1994, pp. 384–96, at p. 385. While states do not have some prior existence outside the international system, neither are they wholly constituted as agents by international norms. This is a mutually constitutive, 'intersubjective' process. This approach differs from Wendt's assertion that the state exists *a priori* outside of the system of states and that, as a consequence, the corporate identity of the state can be discounted. Wendt has reasserted this view more recently in Alexander Wendt, *Social theory of international politics* (Cambridge: Cambridge University Press, 1999), pp. 193–245. Although he extends the discussion of collective identity to include 'type' and 'role' identities this does not solve the problem of his bracketing off of corporate identity in my view.

competing dynamics of international societal norms and domestic cultural norms, finding common ground where possible and negotiating differences without resorting to conflict.¹⁰ State-builders may also focus exclusively on the corporate aspect of state identity and this usually involves the use of pathological means of creating supposedly more homogeneous communities within the state. To take this path in the contemporary system means rejecting international norms of legitimate statehood, but for non-democratic rulers these norms usually represent a threat to their domestic legitimacy in the first place.

Over time the social rules of legitimate statehood have become more clearly articulated and, except in the most extreme cases, international society plays an active role in state-building, as principles of legitimate state behaviour prescribe how corporate state-building *should* occur. However, these norms have developed in great part in response to the most extreme excesses of state-builders. Thus, this mutually constitutive relationship in which international social norms about legitimate state behaviour can be understood as both a *response to* corporate state-building and have become part of the international cultural framework which, in turn, puts *societal* pressure on state-builders.

Throughout the history of the modern state system elites have often (though by no means always) used ‘pathological’ means of corporate identity construction—turning on segments of their population and implementing policies such as forced assimilation, mass expulsion, genocide or what we now know as ‘ethnic cleansing’—as they attempt to create a unified, ‘sovereign’ identity within their state, one that they can claim to embody or represent, and that will thus legitimate their rule. Such unity can only ever be symbolic, though, even as the attempt is made to eradicate diversity. However, the attempt to create unity in such a way has concrete and often bloody political effects as various regimes have attempted to create homogeneous corporate identities, symbolising their domestic sovereignty, in the most literal way. The assertion that the boundary of the state constitutes the only legitimate moral boundary (and hence it is logical that those who are outside the moral community,

¹⁰ This is the case with many new states in eastern and central Europe that have recast themselves as democratic and accepted regional and international standards of human and minority rights.

however defined, are owed no moral duties and may be removed from the state) only makes sense, and is only morally acceptable, if the ‘state monopoly over the right to define identity’ is accepted.¹¹ The assertion by state elites that they have the right to define and police corporate identity (domestic sovereignty)—and the way in which this has been tied to notions of state autonomy (or ‘Westphalian’) sovereignty—has been characteristic of the system of states from its inception.

The context within which the Catholic Monarchs, Ferdinand and Isabella, expelled the Jews of Spain in 1492 in an attempt to homogenise the population within their proto-state was one in which no shared international norms, beyond the right to make war, existed. By the late-seventeenth century some protection was accorded to (some) minorities under the Peace of Westphalia and when Louis XIV caused an estimated 200,000 Protestants to flee France this caused alarm across much of Europe, though there was no thought of intervention on behalf of this minority.

By the end of the nineteenth century we see the development of general social norms proscribing mass slaughter across Europe reflected, for instance, in the public outcry against the ill-treatment of minorities in the Ottoman Empire. However, international public opinion and diplomatic pressure did not stop massacres of the Armenians in the Empire in the late-nineteenth century, or the genocide of the Armenian population implemented in 1915. In the aftermath of the first genocide of the twentieth century the international community struggled to articulate new international legal principles that would reflect the sense of moral outrage at what was clearly recognised at the time as a crime against humanity, as I explain in more detail below.

It is in the second half of the twentieth century that general legal norms regarding legitimate state behaviour have been most clearly articulated. In the wake of World War II horror at the Holocaust crystallised world opinion, the term genocide was coined, and the policies it represents were prohibited under the Genocide Convention. In the post-war era human

¹¹ Andrew Linklater, ‘The problem of community in international relations’, *Alternatives* 15(2) 1990, pp. 135–53, at p. 149.

rights standards were also articulated. In the last decade of the twentieth century such standards of legitimate state behaviour gained increasing moral and legal force, albeit still contested not least by authoritarian or murderous regimes. However, elite claims to complete sovereignty over 'internal affairs', so often made while abusing significant sections of their populations, have become less and less convincing.

Ad hoc international prosecutions of crimes committed in the name of the state also challenge the most conservative interpretation of sovereignty. More recently we have seen a further development towards general international judicial prosecution, which is still in its early stages with the development of a permanent International Criminal Court which will have a Prosecutor authorised to independently instigate investigations. Despite the opposition of some powerful states this represents an emergent normative standard which could not exist, even in its emergent form, if the norm of sovereignty was not undergoing revision. This is not to say that such standards stop all would-be ethnic cleansers and it is clear that under some circumstances only a clear and compelling threat of force may be enough to prevent or stop mass atrocities. The NATO campaign to stop such practices in Kosovo is thus far the only case of collective intervention to stop ethnic cleansing, and it has not to date been taken as a precedent for further military intervention. Certainly, the legitimacy of such operations is still strongly contested and whether more systematic forms of enforcement will develop remains to be seen as a conservative interpretation of sovereign rights remains compelling to many states. Nonetheless it is today increasingly difficult for state leaders to argue, in the name of sovereignty, that they are not accountable for their actions.

Two cases of pathological corporate identity construction: Early modern Spain and France

The 1492 expulsion of the Jews of Spain played an important role in the forging of a unified corporate political identity within a centralising proto-state. The monarchs, Ferdinand and Isabella who brought the realms of Argaon and Castile together with their marriage, asserted their right to be considered the sole legitimate sovereign(s) representing an ideal of an increasingly unified state. This was accompanied by the demand for a homogeneous corporate identity that was defined in terms of the cultural

framework of the society, which was religious. Forced conversion was presented as a 'choice' to Jews in late-fifteenth century Spain: convert or leave. While many did convert to Christianity many others fled the state. This expulsion, along with the reconquest of Islamic Spain completed in the same year, represented a final break with the medieval tradition of co-existence between the three great monotheistic religious and cultural groups, Islam, Judaism and Christianity.

The expulsion was a 'startlingly modern measure',¹² which, in its systematic nature, differed from previous, uncoordinated and sporadic measures taken against Jews in what was to become Spain. It was also unlike earlier expulsions of Jews from England and France, in that the population that was expelled from Spain was a well-integrated, socially diverse population whose forbears had lived in the kingdoms of Castile and Aragon for 1000 years. The Jews of Spain were as 'Spanish' as anyone else in Spain at that time. Yet the expulsion and forced conversions of 1492 allowed the monarchs to emphasise religious unity as the basis of the corporate identity of the incipient state.

In seventeenth century France, the existence of the distinct religious identity of French Protestants, the Huguenots, was perceived as a threat to the corporate identity and thus the integrity of the French state, at least according to the ideology of absolutism under Louis XIV. In 1685 Louis XIV revoked the Edict of Nantes which had accorded certain rights to Protestants. This act outlawed Protestantism in France and caused an estimated 200,000 souls to flee the country. This attempt to enforce Catholicism was a systematically implemented program with a clearly defined goal of achieving a religiously homogeneous population within the state. When, in the sixteenth century, the Huguenots—particularly Huguenot nobles opposed to the monarchy—*had* posed a threat to the stability of a severely factionalised state, the weak monarchy struggled to take effective action against them. However, by the time of Louis XIV, the Huguenots no longer posed any military or political threat to the French state. Yet the very existence of a group with a distinct religious identity

¹² Aristide Zolberg, 'The formation of new states as a refugee generating process', in Elizabeth Ferris, ed., *Refugees and world politics* (New York: Praeger, 1985), pp. 26–42, at p. 34.

was perceived as a threat to the integrity of the absolutist state and a challenge to the legitimacy of absolutist rule, and they were targeted for repression aimed at extinguishing this identity.

STATE-BUILDING AND PATHOLOGICAL HOMOGENISATION IN THE TWENTIETH CENTURY

Genocide and the creation of the Turkish state

By the late-nineteenth century the national principle had swept across Europe and the disintegration of the increasingly weak Ottoman Empire was underway. At its most extreme the national principle can be directed towards an absolute conception of sovereign identity which claims that the sovereign state must be exclusively of and for a particular nation, an interpretation most often underpinned by exclusivist ethnic or racial conceptions of the nation, rather than a civic-political one.¹³ It thus provides powerful criteria for identifying particular groups as insiders and outsiders and may lead to policies of pathological homogenisation. This was the case in the first genocide of the twentieth century, committed in 1915–1916, in what is now Turkey. This occurred when the Young Turk government, controlled by the Committee of Union and Progress (CUP), attempted to build a unitary sovereign state amidst the breakdown of the Ottoman Empire. Initially concerned with reforming the Empire in order to save it, the CUP, which seized power in 1908, ultimately sought to remake the remains of the crumbling Empire into a centralised, modern and national state, which could stand as an equal among European powers. The Young Turk regime systematically implemented a policy aimed at the extermination of the Armenian people in Anatolia. In a time of war and internal revolution, the Young Turks used the targeting of this minority population to buttress their own fragile legitimacy.¹⁴ It was

¹³ This is not to argue that civic-political ideas of the nation do not provide criteria by which insiders and outsiders are delineated. They do, but because membership is not ascriptive the boundary between insider and outsider is more porous and, combined with democratic institutions, the most extreme versions of pathological homogenisation are less likely to occur. However, targeting of ‘outgroups’ may be attractive to elites in civic-political nation-states, for example note the turn against refugees, widely cast as ‘criminals’ and ‘illegals’ in many Western states.

¹⁴ Robert Melson, *Revolution and genocide: On the origins of the Armenian genocide and the holocaust* (Chicago: The University of Chicago Press, 1992).

perhaps no accident that the estimated one million Armenians who were 'deported' to die in the desert, died within the bounds of the Ottoman Empire, but outside of the boundaries of the state of Turkey, which would soon be recognised as independent and sovereign in 1923.

The Young Turks were influenced by Turkish nationalism, which by the early-twentieth century had translated religious identity into national identity. A particularly exclusivist strain of this nationalism, influenced by the works of nineteenth century writer Ziya Gokâlp, asserted that Anatolia was the historical *vatan*, or fatherland, of the Turks. Influenced by this, and dealing harshly with opponents who held more liberal conceptions of Turkish national identity, the Young Turk regime set out to construct a rationalised, modern, national state. In such a state there was no place for the Armenians, even as second class subjects, and they were to be 'deported'.

Although they were modernisers, the Young Turks drew on a complex amalgam of traditional attitudes and a growing sense of national identity that refused to accept non-Muslims as equal subjects of the Empire. This process of state-building entailed rethinking the criterion of identity of membership of the state, and the idea of a homogeneous Turkish population gained increasing potency. As Gerard J. Libaridian observes:

The legitimisation of power on the basis of ethnic, cultural, and religious identity of the population acquired a dynamic significance for old Empires and new states. For the Young Turks, who engineered and supervised over the transitional stage, the creation of a new Turkish nation-state out of the old Ottoman Empire passed through the path of the homogenisation of the population.¹⁵

The religious worldview was still relevant to the world of the Young Turks, but by the first decades of the twentieth century it had been

¹⁵ Gerard J. Libaridian, 'The ideology of the Young Turks', in *The Permanent Peoples' Tribunal, A crime of silence: The Armenian genocide* (London: Zed Books, 1985), pp. 37–8. The genocide can be distinguished from a series of massacres that took place in the nineteenth century under the rule of Sultan Abdul Hamid. Acting from a religious worldview, the Sultan had been concerned to keep the Armenians 'in their place', that is as a millet or religious community that had certain rights but was of lower status than Muslims, and he was prepared to engage in massacres to do this, as he had been in Bulgaria and elsewhere.

transformed under the impact of nationalism, so that what were once religious communities were now understood as ‘nations’. There was no place for the Armenian nation in what was to be a Turkish national state and the regime embarked on a self-conscious program of Turkish identity building. Popular hostility towards the Armenians was aggravated by mass rallies and propaganda that stressed the threat posed by the Armenians to the *Turkish* state (and people) rather than the Empire.

Provincial and local administrations played an important role in the organisation of the genocide, as did local branches of the CUP and clubs such as ‘Turkish Hearth’. This meant that a network of command and implementation crisscrossed the country, coordinated by the use of telegraph. The local branches of the Turkish Hearth ‘became the catalyst of genocide, exerting pressure where necessary on reluctant officials, inflaming the hatreds of the populace with tales of Armenian treachery and atrocity, and in general activating the genocidal process’.¹⁶ This process of inflaming public opinion by playing on the fears of the majority—which also serves the purpose of making the victims seem responsible for their own fate—is very familiar at the beginning of the twenty-first century.

The collapse of Yugoslavia

Under conditions of systemic change or breakdown, nationalist criteria of identity may provide meaning and a sense of certainty, as the recent resurgence of aggressive nationalism illustrates. For contemporary elites intent on buttressing their own position, nationalist discourse provides new legitimating myths as old ones crumble. This is especially the case in a situation such as the former Yugoslavia, where we see manipulation, via the media, of the sense of threat posed by those designated as outsiders, and the assertion that only the designated ‘national’ communities have full rights within the state, and at the most extreme, that only the designated national community may live in each state.¹⁷ As the former Yugoslavia

¹⁶ Leo Kuper, *Genocide: Its political uses in the twentieth century* (New Haven: Yale University Press, 1981), pp. 118–19.

¹⁷ Mark Thompson, *Forging war: The media in Serbia, Croatia and Bosnia-Herzegovina* (London: Article 19, 1994); Robert Hayden, ‘Constitutional nationalism in the Formerly Yugoslav Republics’, *Slavic Review* 51(4) 1992, pp. 654–73.

collapsed, ethnic cleansing was used as an instrument of state policy directed at the goal of ethnically homogeneous populations within those parts of Bosnia controlled by Bosnian Serbs, aimed at carving Bosnia up in the name of a Greater Serbia. Such ethnic cleansing was an attempt to redefine state boundaries through pathological homogenisation. The outcome of this policy was mass murder and forced displacement on a massive scale, as peoples were forcibly ‘unmixed’, to use Rogers Brubaker’s term.¹⁸

Although atrocities were perpetrated by all sides in this complex series of conflicts, it is the policies of the Serbian government under the leadership of Slobodan Milosevic, and its Bosnian Serb clients under the leadership of Radovan Karadzic, that stand out as examples of systematically implemented policy to change the constituent population of those areas of Bosnia under their control. In Bosnia, media campaigns that stressed the lack of humanity of non-Serbs and the threat they posed to Serbs, preceded the physical expulsion, rape and murder. These drew in the case of the Muslims on the historic loss of Kosovo (the ‘Serb Jerusalem’) to the Ottoman Empire in the fourteenth century, and in the case of Croats on the World War II atrocities committed by the Ustasha regime. As in the Armenian genocide, the leaders could not have implemented their policy of ethnic cleansing if they had not been able to convince at least a sizeable proportion of the population that the victims were simultaneously less than human and posed a mortal threat to the existence of their own national community. In turn this community was defined through the existence of this threat and internal opponents of the regime cast as traitors. For the whole process of expelling non-Serbs and creating a ‘homogeneous’ state was also about constructing a unitary ‘Serb’ identity, convincing *them* that they are one people, simultaneously heroic and victimised by non-Serbs in Yugoslavia (and also by the international community), and thus united against overwhelming odds.

For the authoritarian leaders who pursued these policies the option of genuinely accepting the international social norms of legitimate statehood,

¹⁸ Rogers Brubaker, ‘Aftermaths of empire and the unmixing of peoples: Historical and comparative perspectives’, *Ethnic and Racial Studies* 18(2) 1995, pp. 189–218.

and all this means for the treatment of minorities, would undermine their own authority. Likewise a policy of trying to find common ground between domestic and international norms and negotiating any differences becomes impossible when elites are implicated in the manipulation of aspects of domestic cultures and norms, by exacerbating fears and casting minorities—and the international community—as a threat. This is highlighted by the way in which Slobodan Milosevic, turned his back on the international community, rather than gain some international legitimacy through easing restrictions on the Albanian community in Kosovo. Despite gaining some room to move due to his role in finally brokering peace in Bosnia, he ultimately sought to win an end-game with the international community through increasingly harsh treatment of Kosovar Albanians, culminating in the 1999 NATO intervention. I return to this case in a later section of the paper. For the moment though, I turn to tracing the development of international norms of legitimate statehood in the twentieth century.

INTERNATIONAL NORMS: THE SOCIAL IDENTITY OF THE STATE

The early development of international norms of legitimate state behaviour

When Ferdinand and Isabella were engaged in laying the foundations of the Spanish state, there were no international norms governing the internal practices of monarchs, either within Europe or in any wider system. Thus the Ottoman Sultan Bajezet, reportedly said on taking in Jews after 1492, ‘Call ye this Ferdinand “wise”—he who depopulates his own dominions in order to enrich mine?’.¹⁹ The Jews were welcomed as productive subjects, and the Sultan was clearly puzzled by the way the Spanish rulers understood their interests, but there was no normative content to this remark and no sense of obligation towards those displaced on the part of the Sultan.

These acts occurred in a period of normative flux within Western Christendom. The *Respublica Christiana*, though still providing the basis of a shared European identity in opposition to the Ottoman Empire, no

¹⁹ Cecil Roth, *History of the Jews* (New York: Schocken, 1961), p. 252 cited in Alan Dowty and Gil Loescher, ‘Refugee flows as grounds for international action’, *International Security* 21(1) 1996, pp. 43–71, at p. 58.

longer provided a universal ethical system as a basis for relations between emergent states. As the universal Christian community broke down, the heterogeneity that characterised medieval political organisation was displaced into the emergent international system, and the demand for homogeneity within the state became increasingly prevalent. Though the idea of a 'European conscience' retained some meaning, it was within the state that Christianity provided the framework of meaning that Ferdinand and Isabella drew on to consolidate their state-in-the-making. Thus we see both the reassertion of traditional elements and innovation as states arose out of the breakdown of Western Christendom. In this process rulers such as Ferdinand and Isabella transformed the church within their states into churches *of* the state. These rulers were able to make this transition without breaking with the Catholic church, but they transformed Catholic identity into the criterion for membership in the moral community bounded by the territorial boundaries of the state, making the presence of non-Christians problematic in a new way. In this newly emerging system there were no clearly articulated international norms other than the 'right to make war', however, and the method of internal constitution used by the monarchs—the harsh treatment of the Jews of Spain—was of little relevance in relations between states.

By the time Louis XIV revoked the Edict of Nantes in 1685 there had been a normative shift in the system, reflected in the development of treaty specific norms, seen in the protection accorded to minorities under the Peace of Westphalia (1648). The Westphalian settlement, itself a response to the devastation wreaked during the Thirty Years War, had gained widespread acceptance as laying the basis for international stability, the rights of religious minorities being the price that most rulers were prepared to pay for this. Louis XIV's expansionist ambitions and his treatment of the Huguenots presented a challenge to these norms. One aspect of the revocation was that it denied the right to emigrate with personal property, the *jus emigrandi* (though an exception was made for 'pastors who had two weeks' in which to leave), a right which had been granted to religious minorities in Germany under the Treaty of Osnabrück

and which had taken on the status of a Europe-wide norm.²⁰ Louis' expansionism brought a hostile response from other European powers and his attempts to create a homogeneous corporate identity within the French state brought external condemnation and the two factors combined to bring together an alliance against him.²¹ Although Louis's strategy worked within France, at least in the short term, it quickly came to be seen as a mistake. Many considered the revocation of the Edict of Nantes to be a huge political error, as well as a religious crime.²² Louis even got a lukewarm response from the Pope, whom he had hoped to win over with the revocation. In short, the revocation was seen as illegitimate and it had a 'marked effect upon an international opinion growing increasingly hostile to French pretensions and Bourbon methods'.²³

The responses that Louis XIV's actions engendered within a Europe increasingly hostile to such absolutist pretensions, indicate that the social norms of acceptable state behaviour were changing. Although the Peace of Westphalia codified a 'thin' normative order, all the same it reflects the beginnings of shared normative standards according to which the social identity of the state could be constructed. These norms—like all social norms—were by no means uncontested, as demonstrated by Louis XIV, but the effort to articulate minimum standards of coexistence distinguish this period from the lack of such standards in the late-fifteenth century when the system was first taking shape.

Over the next two centuries the concept of a European society of states developed further and natural law was replaced by the idea of a law of nations. By the mid-eighteenth century, positivist international law based on the growing body of treaties and customary law, was on the rise. States came to be seen as the sole subjects of international law in a view that was predominant until the early-twentieth century. As Hedley Bull notes, although individuals and non-state groups were considered to have moral

²⁰ Richard M. Golden, ed., *The Huguenot connection: The Edict of Nantes, its revocation and early French migration to South Carolina* (Dordrecht: Kluwer Academic Publishers, 1988), p. 17.

²¹ John B. Wolf, *Louis XIV* (New York: W.W. Norton and Co., 1968), p. 395.

²² Francois Bluche, *Louis XIV*, translated by Mark Greengrass (Oxford: Blackwell, 1990), p. 406.

²³ H.G. Judge, 'Louis XIV and the Church', in John C. Rule, ed., *Louis XIV and the craft of kingship* (Columbus: Ohio State University Press, 1969), pp. 240–64, at p. 243.

rights, these were distinct from legal ones.²⁴ Concurrent with this developing perception of the European society of states, and of the law of nations as the public law of Europe, was the growth of the idea of the 'standard of civilisation' to be applied to non-European societies. According to this standard, based on the perception of European superiority, entry into the European society of states required that non-European societies must be able to 'guarantee the life, liberty, and property of foreign nationals; to demonstrate a suitable governmental organisation; to adhere to the accepted diplomatic practices; and to abide by the principles of international law'.²⁵

Normative developments in the wake of the Armenian genocide

Despite the fact that it occurred during wartime there was widespread humanitarian concern for the plight of the Armenians which resulted in an international relief effort, that was particularly active in the United States, while a number of individual Germans (allies of Turkey) sought to publicise the genocide.²⁶ Aware of what was happening, in May 1915 the Entente powers called for Turkey to stop this assault on the Armenian population 'on the grounds of humanity and civilization'.²⁷ In response, one of the main architects of the genocide, Minister of the Interior Talat, declared that the Armenians posed a security threat, on the grounds that they supported Russia in the war and that they were on the verge of rebellion, and the 'deportations' continued unabated. During the war the leaders of the Young Turk government asserted that what they did with their subjects was an 'internal' matter. However, their claims that the

²⁴ Hedley Bull, 'The importance of Grotius in the study of international relations', in Hedley Bull, Benedict Kingsbury and Adam Roberts, eds, *Hugo Grotius and international relations* (Oxford: Clarendon Press, 1992), pp. 65–93, at p. 86.

²⁵ Gerrit Gong, 'China's entry into the international society', in Hedley Bull and Adam Watson, eds, *The evolution of international society* (Oxford: Clarendon Press, 1985), pp. 171–83, at p. 179.

²⁶ Arnold Toynbee, ed., *The treatment of Armenians in the Ottoman Empire: Documents presented to Viscount Grey of Fallodon, Secretary of State for Foreign Affairs with a preface by Viscount Bryce* (London: Hodder & Stoughton, 1916).

²⁷ Vahakn N. Dadrian, 'Genocide as a problem of national and international law: The World War I Armenian case and its contemporary ramifications', *Yale Journal of International Law* 14(2) 1989, pp. 221–334, at p. 262.

Armenians were traitors and that harsh treatment was therefore justified highlights that those responsible knew that their actual goal—to clear Turkey of Armenians in the most brutal way—could not be justified.

The international community clearly recognised that what had happened in the Ottoman Empire was not reducible to an internal security matter and called for punishment of those responsible and reparations to the Armenian community. The CUP was deposed at the end of 1918, and under pressure from the victorious powers and with the support of the reinstated Sultan, a domestic trial of those held responsible for the genocide was conducted in 1919.²⁸ However, there was great internal resistance to these trials and many perpetrators were able to flee the country, with the result that many of the individuals considered personally responsible for the genocide were sentenced to death in absentia. These trials were soon sidelined by the struggle that brought the nationalist regime of Mustapha Kemal to power as the Empire finally collapsed. Those who were found guilty in 1919, were, with few exceptions, sent briefly into exile only to return unabashed when the Kemalist regime came to power. Once in power this regime denied that the genocide had ever occurred.

The way the Armenian genocide was dealt with at the international legal level reflects the lag between emergent social norms and international law at the time. War crimes was the first item on the agenda of the Paris Peace Conference in 1919. The allies created a Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties.²⁹ The findings of this Commission reflect the clash between the principle of sovereignty (as non-intervention) and developing humanitarian norms. The systematic massacre of the Armenians was excluded from the category of war crimes, as it was regarded as an ‘internal

²⁸ Vahakn N. Dadrian, ‘The Turkish military tribunal’s prosecution of the authors of the Armenian genocide: Four major court-martial series’, *Holocaust and Genocide Studies* 11(1) 1997, pp. 28–59. At these trials the defendants based their defence on no proof of intent to commit genocide. As Dadrian notes, intent, though not to be found in any documents, can be found in the relationship between the proclaimed policy/law and the consequences. Dadrian, ‘Genocide as a problem’, p. 278.

²⁹ Vahakn N. Dadrian, *The history of the Armenian genocide: Ethnic conflict from the Balkans to Anatolia to the Caucasus*, 3rd edition, revised (Providence: Berghahn Books, 1997), p. xxvii; Dadrian, ‘Genocide as a problem’, p. 227.

matter'. Yet there was by no means consensus on this and one of the Commission members, Greek Foreign Minister Nicolas Politis, 'proposed the adoption of a new category of war crimes meant to cover the massacres against the Armenians'. Politis argued that although the crimes did not *technically* come under international law, they nonetheless were offences against 'the laws of humanity' to be found in the Fourth Hague Convention.³⁰ Politis was not alone in this, as Vahakn Dadrian notes:

Despite the objections of American representatives Lansing and Scott, who challenged the ex-post facto nature of such a law, the majority of the Commission 'hesitatingly' concurred with Politis. The Commission based its decision upon a Hague Convention principle which allowed for reliance upon the 'laws of humanity' and 'dictates of public conscience' whenever clearly defined standards and regulations to deal with grave offences were lacking.³¹

As a result, several articles in the Treaty of Sevres clearly stipulated the responsibility of the Turkish government for the genocide and the right of the allies to conduct trials of those accused of crimes.³² However, the Treaty of Sevres was repudiated by the Kemalist regime. Nonetheless, it is clear that there was an attempt to articulate more defined principles of legitimate state behaviour that would not sanction this enormous crime.

Yet, due to the prevailing interpretation of international law, there were no means of acting on this. Despite the 1915 allied declaration of intent to punish the perpetrators of genocide, after the war the lack of any true multilateral basis for cooperation, and the absence of any powerful state prepared to champion the Armenian cause against the assertive Kemalist regime, made this unlikely. In the end there were no sanctions against the Turkish state, which skillfully manipulated tensions between the allies to strengthen its own position.³³ Thus, when Interior Minister Talat asserted during the genocide that what was done with the Armenians was an 'internal matter', although he was out of step with rising humanitarian

³⁰ Dadrian, 'Genocide as a problem', p. 304.

³¹ Dadrian, 'Genocide as a problem', p. 304.

³² Dadrian, 'Genocide as a problem', p. 305.

³³ Dadrian, 'Genocide as a problem', p. 226.

sentiment and ideas of legitimate state behaviour, he was not out of step with the strict legalities of the situation as understood by many at the time. It was in this context that the US Ambassador to the Empire, Henry Morgenthau, would remember his attempts to persuade the regime to act differently: ‘Technically, of course, 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’.³⁴ In the post-war era the League of Nations continued to struggle with this contradiction.

Minorities and the League of Nations: Contradictions in the states system

Although it was unsuccessful, the League of Nations ‘represented one of the first attempts to lay down explicit and institutionalised restraints on the rights of sovereign governments over their own subjects’.³⁵ Within the League system, for the first time the institutionalised protection of minorities was regarded as an ongoing international responsibility.³⁶ This more systematic approach meant that minorities rights were ‘in an entirely different category from the rights granted by Turkey and Russia concerning their treatment of minorities ... which were *ex gratia* concessions, undefined by treaty’.³⁷

Yet there were no general principles that applied to all states. The victors of World War I did not see the need to sign a general treaty by which they too would have to abide. At the Paris Peace Conference in 1919 a proposal was put forward for general provisions in the covenant regarding protection of minorities, to be applicable to *all* states. This was quickly dropped, as few of the allies ‘ever seriously considered accepting

³⁴ Cited in Kuper, *Genocide*, p. 161. Dadrian notes that in a letter to President Woodrow Wilson, US Secretary of State Robert Lansing, a member of the commission that excluded genocide from the category of war crimes, justified US interventions on behalf of the Armenians during the war, not on the grounds that the deportations were illegal, but because of the ‘horrible brutality’ with which the deportations were carried out. Dadrian, *The history of the Armenian genocide*, p. xxvii.

³⁵ Evan Luard, ‘The origins of international concern over human rights’, in Evan Luard, ed., *The international protection of human rights* (New York: Praeger, 1967), pp. 7–21, at p. 15.

³⁶ Dorothy V. Jones, ‘The League of Nations experiment in international protection’, *Ethics and International Affairs* 8 1994, pp. 77–95, at p. 86.

³⁷ Luard, ‘The origins of international concern’, p. 15.

any such obligations for themselves'.³⁸ It was new states that were to come under the provisions of the minority treaties, to which they strenuously objected on the grounds that it was discriminatory. Hence there were many minorities not covered by treaty, including the Jews of Germany, and the treaties which did exist proved ineffective.

At one level the minorities treaties reflect an attempt to limit the worst methods of corporate state-building, which were by this time regarded as unacceptable at an international level. Unfortunately, this was underpinned—and ultimately undermined—by the overriding concern with the stabilisation of state borders, and the preservation of international order, in the wake of war and the emergence of new states. However, as the preceding case studies have demonstrated, in the modern era such practices have their roots in the construction of state boundaries as moral as well as territorial boundaries. The minorities treaties of the League, and their ineffectiveness, reflect the contradictions in the international system. While there was movement towards more clearly articulated social norms protecting the rights of minorities, at the same time new states continued to construct corporate identities through exclusionary policies, and the concern with maintaining the stability of borders limited the effectiveness of the treaties and dragged the League into complicity over the sorts of practices it had hoped to prevent.

This is illustrated in the role the League played in the 1923 compulsory exchange of populations between Greece and Turkey in 1923.³⁹ The term that was used at the time was that the League was assisting with 'repatriation'. This was a euphemism which did not mask the fact that Turkey expelled its Greek citizens, who risked massacre if they attempted to stay. The Greek government needed aid from the League to cope with over one million refugees. League officials had been uncomfortable with

³⁸ C.A. Macartney, 'League of Nations' protection of minority rights', in Luard, ed., *The international protection of human rights*, pp. 22–37, at p. 23.

³⁹ Jean-Marie Henckaerts, *Mass expulsion in modern international law and practice* (The Hague: Kluwer Law International, 1995), pp. 24–5. Provided for under Article 1 of the Convention of Lausanne Concerning the Exchange of Greek and Turkish Populations, which required that from 1 May 1923 Turkish nationals should reside in Turkey and Greek nationals should reside in Greece. There were some exceptions under Article 2.

an earlier transfer of populations between Greece and Bulgaria, but this compulsory exchange was seen by many as ‘outrageous’.⁴⁰

In this way the League became complicit in actions regarded as morally reprehensible by many of its personnel and by public opinion. But the alternative was to leave up to a million people to a fate similar to that of the Armenians, or, with no assistance to the Greek government, to place an unmanageable burden on that receiving state. Jean-Marie Henckaerts notes that ‘because of the highly unfavourable public response to the idea of a compulsory exchange’, both Greece and Turkey sought to deny responsibility for it.⁴¹ The British negotiator, Lord Curzon characterised the exchange as ‘a thoroughly bad and vicious solution’, but one made necessary by the actions Turkey had already taken against Greek nationals in its territory.⁴² For many, however, the forced exchange of populations seemed like a simple solution to the problem of minorities, which would ensure peace. This solution was particularly attractive to those states that came under the League minorities treaties and resented this fact. Few saw the dangers of the precedent that was being set.⁴³

Although the League was an attempt to systematise principles of conduct, this was not a generalised system that applied to all states equally. Thus, although it does represent a normative shift towards a more overt challenge to the claims of states to hold absolute sovereignty over their citizens—and commit crimes with impunity in the name of such sovereignty—at the same time it sought to stabilise the very system that underpinned such claims. Despite the emphasis on the protection of minorities, states were concerned with border protection and stabilisation⁴⁴—and if necessary, move populations in order to make borders clearer. As I have argued, international social norms develop, in large part, in response to corporate state-building. However, in the post-World War I era, while

⁴⁰ Raymond Pearson, *National minorities in eastern Europe 1848–1945* (London: Macmillan, 1983), p. 140.

⁴¹ Henckaerts, *Mass expulsion*, p. 125.

⁴² Henckaerts, *Mass expulsion*, p. 125.

⁴³ Alfred-Maurice de Zayas, ‘A historical survey of twentieth century expulsions’, in Anna C. Bramwell, ed., *Refugees in the age of total war* (London: Unwin Hyman, 1988), pp. 15–37, at p. 20.

⁴⁴ Jones, ‘The League of Nations’, p. 88.

trying to deal with the worst excesses of state-builders the international community also inadvertently gave further legitimation to the exclusive principles on which such strategies of pathological homogenisation were based. Although the League sought to ensure the protection of minorities, mass transfers occurred under its auspices, which set a precedent for further mistreatment of minorities. As Alfred-Maurice de Zayas so aptly puts it: 'Hitler himself became one of the leading advocates and practitioners of the principle of population transfers'.⁴⁵

From minority rights to individual rights in the United Nations system

In the years following World War II, minority rights were discredited in reaction to both the failure of the League Treaties system, seen in the shadow of the Holocaust, and hostility towards Hitler's use of ethnic German minority rights in Europe. There were no minorities rights in the Charter of the United Nations and the international community turned to individual human rights as articulated in the 1948 Universal Declaration of Human Rights and the 1966 Covenants,⁴⁶ working on the assumption that individual rights applied to each individual member of any minority group. Until the end of the Cold War the only UN convention to explicitly deal with minority rights was Article 27 of the International Covenant on Civil and Political Rights (ICCPR), which states that in 'those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.⁴⁷

Whether or not Article 27 places any positive obligation on states to take affirmative action on behalf of minorities is the subject of debate.⁴⁸ It

⁴⁵ de Zayas, 'A historical survey', p. 20.

⁴⁶ Jack Donnelly, 'State sovereignty and international intervention: The case of human rights', in Gene M. Lyons and Michael Mastanduno, eds, *Beyond Westphalia? State sovereignty and international intervention* (Baltimore: Johns Hopkins University Press, 1995), p. 117.

⁴⁷ In Ian Brownlie, ed., *Basic documents in international law*, 3rd edition (Oxford: Clarendon Press, 1989), p. 280.

⁴⁸ See Alain Fenet, 'The question of minorities in the order of law', in Gerard Chaliand, ed., *Minority peoples in the age of nation-states*, translated by Tony Berrett (London: Pluto Press, 1989), pp. 12–51; Nigel S. Rodley, 'Conceptual problems in the protection of minorities: International legal

also allows states to define what groups constitute a minority, with the predictable result that minorities can be conveniently defined as belonging to some other category.⁴⁹ Post-Cold War, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities ‘refers to such persons as having “the right to enjoy their own culture, to profess and practise their own religion, and to use their own language”’.⁵⁰ Although it requires more affirmative action on the part of states, this declaration is non-binding.

What other limits, if any, were placed on state-builders in the post-World War II era? Although the expulsion of nationals is not explicitly prohibited under international law, discriminatory or arbitrary treatment is prohibited. As Henckaerts notes, expulsions are inevitably accompanied by arbitrary or discriminatory treatment.⁵¹ Furthermore, what is termed a mass expulsion may also amount to genocide, as we have seen in the cases of the Armenian genocide and ethnic cleansing in Bosnia-Herzegovina. The prohibition on the expulsion of nationals is also established as a norm under Article 9 of the Universal Declaration of Human Rights (UDHR), which states that, ‘No one shall be subjected to arbitrary arrest, detention or *exile*’.

In cases of extreme nationalism expulsion is often justified on the grounds that those expelled are not nationals. Although policies of denationalisation are not specifically prohibited under international law, according to the UDHR no one should be arbitrarily deprived of nationality. Hence, it is difficult for states to claim that there is no link between a policy of denationalisation and any expulsions that follow. Given that mass expulsions are proscribed, denationalisation must be

developments’, *Human Rights Quarterly* 17(1) 1995, pp. 48–71; N. Lerner, ‘The evolution of minority rights in international law’, in Catherine Brölman, et al., *Peoples and minorities in international law* (Dordrecht: Martinus Nijhoff Publishers, 1993), pp. 77–101; M. Nowak, ‘The evolution of minority rights in international law, comments’, in Brölman, et al., *Peoples and minorities in international law*, pp. 103–118; Alfred-Maurice de Zayas, ‘The international judicial protection of peoples and minorities’, in Brölman, et al., *Peoples and minorities in international law*, pp. 253–87.

⁴⁹ Jennifer Jackson Preece, *National minorities and the European nation-states system* (Oxford: Clarendon Press, 1998), p. 113.

⁵⁰ Rodley, ‘Conceptual problems’, p. 51.

⁵¹ Henckaerts, *Mass expulsion*, p. 81.

considered arbitrary and may well lead to illegal and unacceptable policies.⁵² Furthermore, under ICCPR Article 12 (4) individuals have the right to enter the state of which they are a national. The forced removal of civilians during times of war is also prohibited under the Geneva Convention. 'Article 49 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War presents one of the clearest examples of positive international law forbidding removals during military occupations'.⁵³ Additional Protocols 1 and 2 also prohibit the forced removal of populations, as do the Nuremberg Principles, under which such practices constitute war crimes and crimes against humanity, as we have seen.⁵⁴

While it is possible to trace the sort of provisions outlined above, minority groups within states were still highly vulnerable as the norm of non-intervention undermined such protection if state-builders saw fit to construct corporate identity through pathological means. Once again, it seems that the concern with limiting the damage that states could do to their own populations, and indeed the need for domestic transformation in many states if such practices were to be avoided, were undermined by the overwhelming concern with the stability of borders during the period of decolonisation and the Cold War.⁵⁵

The right to national self-determination, first articulated after World War I according to ethnic and racial criteria, was reinterpreted in the light of World War II atrocities, the demands of colonised peoples for independence, and the desire to maintain the existing colonial boundaries between new states. Thus, from the 1950s a non-racial and non-ethnic concept of self-determination as a right of 'peoples' rather than 'nations' emerged, but despite this, the concept still often spelt trouble for minorities. Where self-determination has been interpreted in terms of the

⁵² Henckaerts, *Mass expulsion*, pp. 85–7.

⁵³ Christopher M. Goebel, 'Population transfer, humanitarian law, and the use of ground force in UN peacemaking: Bosnia and Herzegovina in the wake of Iraq', *New York University Journal of International Law and Politics* 25(3) 1993, pp. 627–98, at p. 632.

⁵⁴ Goebel, 'Population transfer', pp. 634–5.

⁵⁵ Jackson Preece, *National minorities*, pp. 106–14.

‘majoritarian principle’ rather than racial or ethnic categories per se, in practice majorities and minorities have often been cast in ethnic or racial terms rather than building a shared civic identity. Once again, this has left minority groups vulnerable to those in control of the resources of the state.⁵⁶ Thus the right to self-determination provided yet another means by which rulers asserted their right to be free from external intervention as they were engaged in pathological methods of state-building. How the ‘self’ in self-determination was to be constructed was, once independence had been gained, asserted to be an ‘internal’ matter.

Despite the post-war articulation of human rights norms and the proscription of genocide the UN Charter reaffirmed the prohibition of intervention in the domestic affairs of states on humanitarian grounds.⁵⁷ Those interventions that did occur during the Cold War period such as the Tanzanian intervention into Uganda that ousted Idi Amin or the Vietnamese invasion of Cambodia that brought the Khmer Rouge’s genocidal reign to an end were neither justified in humanitarian terms (though they did have humanitarian outcomes) or accepted as legitimate by the international community. It was the end of the Cold War, and the massive atrocities that were witnessed soon after, that pushed further normative developments.

‘Ethnic cleansing’ in Bosnia-Herzegovina and Kosovo in the late-twentieth century

As Marc Weller points out, the debates over how to deal with the Kosovo conflict, culminating in the 1999 NATO bombing campaign, represent a contest over ‘core values’ in the international system in which the principles of territorial unity, non-intervention and the non-use of force were all subject to intense debate.⁵⁸ This debate has been ongoing since the end of the Cold War but the Kosovo intervention took it to a new level of intensity. Advocates of intervention in Kosovo argued that such

⁵⁶ Martin Wight, *Systems of states* (Leicester: Leicester University Press, 1977), pp. 168–72.

⁵⁷ Louis Henkin, ‘Kosovo and the law of “humanitarian intervention”’, *American Journal of International Law* 93(4) 1999, pp. 824–8, at p. 824.

⁵⁸ Marc Weller, ‘The Rambouillet Conference on Kosovo’, *International Affairs* 75(2) 1999, pp. 211–51, at pp. 213–18.

interventions may be legitimate if they are necessary to prevent or stop massive human rights abuses.⁵⁹ The pathological methods of corporate identity construction employed by the Milosevic regime, with its attendant human rights abuses, combined with the concerns for regional stability these policies provoked, led leaders of a number of states to argue in favour of intervention.

This was the latest episode in a decade of such methods employed by Milosevic, and in the wake of Bosnia the international community knew who they were dealing with. In the first half of the 1990s the international community attempted to halt the ethnic cleansing in Bosnia-Herzegovina, albeit in a halting, ill-considered and uncoordinated manner.⁶⁰ The conflict was initially seen as an opportunity for Europe to 'spread its wings' on a collective security issue, but its inability to deal effectively with this conflict highlighted that although Europe has the highest level of institutional development of any region, reliance on European institutions to deal with Yugoslavia were overly optimistic.⁶¹ Yet it was clear, particularly once the 'ancient hatreds' explanation for the conflict had been challenged, that the methods of state-building being employed in the Balkans were widely regarded as abhorrent. While the failure to quickly broker lasting peace agreements can be attributed to international reluctance to use the credible threat of force when diplomacy failed, the intransigence of Serb leaders in the rump Yugoslavia and Bosnia (as well as Franjo Tudjman in Croatia and his clients in Bosnia), and their indifference to the accepted norms of legitimate statehood must also be taken into account.

⁵⁹ Nicholas Wheeler, *Saving strangers: Humanitarian intervention in international society* (Oxford: Oxford University Press, 2000).

⁶⁰ Tom J. Farer, 'A paradigm of legitimate intervention', in Lori Fisler Damrosch, ed., *Enforcing restraint: Collective intervention in internal conflicts* (New York: Council on Foreign Relations Press, 1993), pp. 316–47, at p. 324; and Ivo H. Daalder, *Getting to Dayton: The making of America's Bosnia policy* (Washington, DC: Brookings Institution Press, 2000).

⁶¹ Thomas G. Weiss, 'UN responses in the Former Yugoslavia: Moral and operational choices', *Ethics and International Affairs* 8 1994, pp. 1–22, at p. 11; and Philip H. Gordon, 'Europe's uncommon security policy', *International Security* 22(3) 1997/98, pp. 74–100.

It was difficult to avoid being drawn into the logic of the ethnic cleansers, and diplomatic activity resulted in a number of early proposals to divide Bosnia along ethnic lines.⁶² These were, understandably, rejected by the Bosnian leadership. In a manner reminiscent of the dilemmas faced after both world wars, such proposals bought into the logic of ethnic nationalism by accepting cantonisation as a solution, and by seeking to negotiate a settlement with, and thus legitimate the position of, those who were perpetrating war crimes and crimes against humanity based on this logic.

The UN decision to send a peacekeeping force into Bosnia placed the peacekeepers in the invidious position of being observers of various war crimes and crimes against humanity, and made military action more difficult as the peacekeepers themselves became targets. As Amir Pasic and Thomas Weiss point out, the attempt at humanitarian rescue was a poor substitute for 'robust diplomatic and military engagement' and in the end it 'prolonged the need for assistance', and damaged the UN.⁶³ Humanitarian assistance could not replace a coherent political and military policy for dealing with the former Yugoslavia and addressing the causes of the humanitarian crisis there. And a policy of neutrality towards all parties was misguided when it was clear that, although there were casualties on all sides, a particular ethnic group was bearing the brunt of the atrocities.⁶⁴

The capture of UN peacekeepers and the fall of Srebrenica in July 1995, in which the world (and UN peacekeepers) watched as an estimated 8000 Bosnian Muslim men and boys were herded off to be executed, spurred decisive international action.⁶⁵ At the same time Milosevic, acting on behalf of the Bosnian Serbs, was increasingly ready to negotiate in the face of Bosnian Serb losses to resurgent Croat forces which had resulted in a massive flow of Serb refugees into Serbia. Thus a combination of

⁶² David Owen, *Balkan odyssey* (New York: Harcourt Brace, 1995).

⁶³ Amir Pasic and Thomas G. Weiss, 'The politics of rescue: Yugoslavia's wars and the humanitarian impulse', *Ethics and International Affairs* 11 1997, pp. 105–31, at p. 108.

⁶⁴ Ed Vulliamy, 'Bosnia: The crime of appeasement', *International Affairs* 74(1) 1998, pp. 73–92.

⁶⁵ Jan Willem Honig and Norbert Both, *Srebrenica: Record of a war crime* (New York: Penguin, 1996).

diplomacy and force led to negotiations that resulted in the implementation of the Dayton Peace Accord, signed in Paris in December 1995.

However, the Dayton Accords allowed the consolidation of ethnically defined political communities ('entities') within Bosnia-Herzegovina.⁶⁶ Dayton finally brought an end to the slaughter but it reinforced contradictions between the social identity of the state—those international standards that are said to define legitimate statehood—and the basis on which the corporate identities within the two entities were to be constructed. From this it is apparent that although international action may be necessary to prevent or stop mass atrocities, if the preconditions that allow such atrocities to be 'thinkable' are to be swept away, domestic change is necessary. International standards have to be diffused into states, and in the longer term norms will only have constitutive, as well as constraining, effects when they are taken on by agents inside the state, who go about corporate identity construction accordingly. For example, despite the enormous resources that have been poured into Bosnia, since 1995 nationalists on all sides have displayed intense resistance to rebuilding a multiethnic state.⁶⁷ Ethnic cleansers and their supporters have consolidated their positions in the years since 1995 and have shown their resistance to rebuilding Bosnia-Herzegovina as a multinational state,⁶⁸ though more moderate forces now seem to be on the rise. The politics of ethnic division will only be left behind if moderates, with international support, are able to draw on alternative strands of domestic cultures, that do not see ethnic differences as primary and instead stress coexistence, thus finding other means of building corporate identities.

Another important aspect of the Dayton settlement did not deal with the problem of Kosovo, instead giving priority to bringing Belgrade on board

⁶⁶ Louis Sell, 'The Serb flight from Sarajevo: Dayton's first failure', *East European Politics and Societies* 14(1) 2000, pp. 179–202; International Crisis Group, 'Preventing minority return in Bosnia-Herzegovina: The anatomy of hate and fear', *ICG Balkans Report*, 73 (International Crisis Group, August 1999); and International Crisis Group, 'Is Dayton failing?: Bosnia four years after the peace agreement', *ICG Balkans Report*, 80 (Sarajevo: International Crisis Group, October 1999).

⁶⁷ International Crisis Group, 'Preventing minority return'.

⁶⁸ International Crisis Group, 'Preventing minority return'; and International Crisis Group, 'Is Dayton failing?'.

in the peace process.⁶⁹ Even in the aftermath of the 1999 NATO bombing campaign the international community is loathe to reconsider the ambiguous status of Kosovo, which may imply changing territorial boundaries. It was after Dayton that the Milosevic regime stepped up repression of the majority ethnic Albanian population in Kosovo. This, combined with the perception that they had been betrayed by the international community under the terms of Dayton, led to an increasingly radicalised Kosovar community, less convinced of the merits of non-violence.⁷⁰ By 1997 the Kosovo Liberation Army (KLA) had appeared and began mounting attacks on Serb targets. In response Serb forces began attacking not only the KLA but also ethnic Albanian citizens, destroying their homes and forcing hundreds of thousands to flee.

In February 1998 the US warned Milosevic against continuing his repressive policies in Kosovo and in March the UN Security Council imposed an arms embargo on Yugoslavia, calling for a political settlement that granted political autonomy to Kosovar Albanians.⁷¹ A short-lived dialogue between the Yugoslav government and the Albanian Kosovars ensued, but in May a new offensive began, causing massive numbers of civilians to flee. In September 1998 the UN Security Council once again called on the Milosevic regime to cease its repressive policies. Under Resolution 1199 the Council called for a ceasefire, an end to the repression of civilians, the withdrawal of the military and police personnel responsible for the violence and insisted that a monitoring mission be allowed into Kosovo. In October the Yugoslav government agreed, along with NATO and the Organization for Security and Cooperation in Europe (OSCE), to the creation of the Kosovo Verification Mission. On 5 October the UN Secretary General had issued a report condemning killings in Kosovo. In response to this Britain, the President of the Security Council at the time, proposed a draft resolution authorising the use of 'all necessary means' to stop the killings. This met with intense resistance

⁶⁹ Miranda Vickers, *Between Serb and Albanian: A history of Kosovo* (London: Hurst & Company, 1998), pp. 286–8.

⁷⁰ Vickers, *Between Serb and Albanian*, p. 287.

⁷¹ Ivo H. Daalder and Michael E. O'Hanlon, *Winning ugly: NATO's war to save Kosovo* (Washington, DC: Brookings Institution Press, 2000), p. 27.

from Russia and China, and led to NATO relying on the existing UN resolutions as grounds for intervention in Yugoslavia in March 1999, rather than going back to the Security Council.⁷²

Despite intense diplomatic efforts and numerous resolutions on the part of the Security Council there was clear evidence that agents of the state were employed in a systematic campaign of killing and expelling ethnic Albanian Kosovars. This led the Contact Group for the former Yugoslavia to set up talks at Rambouillet, backing the search for a diplomatic solution with the threat of force. However, in the end, the Rambouillet talks made little progress, in great part because representatives of the Federal Republic of Yugoslavia evinced little genuine interest in reaching a diplomatic solution.⁷³ Accepting international norms of legitimate state behaviour and changing domestic policies accordingly, was not an attractive option for a leader who had gained and maintained his authority through manipulation and violence.

This was yet another episode in a continuing normative clash between the Milosevic regime and those states (and other organisations) that asserted that what occurred within the borders of Serbia *was* of international concern. Milosevic never accepted the human rights standards that gained near universal assent after World War II and to which Yugoslavia was signatory. However, while there was clear consensus that what was being done to ethnic Albanians in Kosovo was unacceptable, debates over the appropriate way to handle this put the ‘core values’ of territorial unity, non-intervention and the non-use of force on the table for debate. As James Mayall observes, ‘[t]hroughout the early Cold War period, the Security Council exhibited a disturbing tendency to will the end but not the means. In Kosovo, NATO made it clear from the outset that it was prepared to commit whatever level of air power proved

⁷² Wheeler, *Saving strangers*, pp. 258–62; and Adam Roberts, ‘NATO’s “humanitarian war” over Kosovo’, *Survival* 41(3) 1999, pp. 102–23.

⁷³ Marc Weller, ‘The Rambouillet Conference on Kosovo’, *International Affairs* 75(2) 1999, pp. 211–51.

necessary to force President Milosevic to withdraw Yugoslav forces from the province'.⁷⁴

Thus the Kosovo campaign was not only based on the assertion that affairs within a state were of international concern but that this was grounds for military action to stop the state-sponsored violence towards ethnic Albanians. But the legitimacy of the operation was hotly contested, as evinced by the draft resolution presented to the UN Security Council on 26 March, two days into the NATO operation, by Russia (supported by two states who were not sitting on the Security Council at that time, Belarus and India), which charged that NATO's operation was in breach of the UN Charter and was therefore illegal. Although it gained support from China and Namibia, twelve other members of the Security Council, including six non-Western states, rejected the draft resolution. While some members of the Security Council remained silent, others such as Canada and Slovenia were forthright in their arguments that the intervention was in fact legitimate, and Malaysia, Bahrain and Argentina all made statements in support of the intervention.⁷⁵

There were miscalculations on both sides of this conflict as the NATO operation loomed. NATO miscalculated how quickly Milosevic would give way, based on a misreading of Dayton (that the threat of air strikes had brought Milosevic to the negotiating table on behalf of the Bosnian Serbs) and an assumption that Kosovo was the same as Bosnia. However, where Milosevic could let go of the idea of making Bosnia part of 'Greater Serbia' he could not easily let go of Kosovo. Not only was it within Serbia's borders, it was considered the heartland of Serb national identity and was the cornerstone of his use of Serb nationalism over the previous decade. Although Milosevic may have used this nationalism in the most instrumental manner, he was never a completely free agent, and by the late 1990s he had become enmeshed in the powerful symbolics that

⁷⁴ James Mayall, 'The concept of humanitarian intervention revisited', in Albrecht Schnabel and Ramesh Thakur, eds, *Kosovo and the challenge of humanitarian intervention: Selective indignation, collective action, and international citizenship* (Tokyo: United Nations University Press, 2000), pp. 319–33, at pp. 328–9.

⁷⁵ Wheeler, *Saving strangers*, pp. 265–81; and 'Editorial comments: NATO's Kosovo intervention', *American Journal of International Law* 93(4) 1999, pp. 824–62.

he used to gain power. If he walked away from the ‘Kosovo myth’, on what could he legitimate his authority? Though he had made the transition to nationalist demagogue in the late 1980s, he could hardly make a convincing transition to democratic leader in the late 1990s, with domestic opposition gaining momentum.

Milosevic miscalculated when he assumed that the NATO bombing would not last long. While at one level Milosevic was playing a game of bluff with the international community, his willingness to use mass violence as a weapon was not to be dismissed. On one occasion he is reported to have openly discussed killing all Albanians as a solution and on another he reportedly said to the German Foreign Minister, Joschka Fischer, ‘I can stand death—lots of it—but you can’t’.⁷⁶ Such statements explicitly signaled his rejection of certain norms of legitimate statehood and his understanding (*misunderstanding* as it turned out) that because others were working to a different set of norms he could manipulate this to his own advantage—playing to the theme of the historic victimisation of the Serb people by external powers once again—and NATO would back down. This normative clash had been going on since 1987 when Milosevic came to power. He never moved beyond a ‘strategically motivated rhetorical position’ towards other members of the international community.⁷⁷ Milosevic never entered into genuine dialogue but tried to play off, and to stave off, his interlocuters to his own advantage, while drawing on and manipulating domestic nationalist sentiment to construct a domestic normative environment in which non-Serbs posed a potential ‘threat’ and his critics were cast as enemies of the state. Meanwhile, his policies brought suffering and hardship to the very people in whose name he acted.

His actions ultimately pushed the international community, or at least significant sections of it, into taking military action to stop the systematic abuse of minority groups. What are the implications of this? Was it a

⁷⁶ Both cited in Daalder and O’Hanlon, *Winning ugly*, pp. 58, 94.

⁷⁷ Thomas Risse, “‘Let’s argue!’: Communicative action in world politics”, *International Organization* 54(1) 2000, pp. 1–39.

‘watershed’?⁷⁸ Lori Fisler Damrosch argues that ‘[t]he choice of NATO as the vehicle for intervention in Kosovo indicates that this was a European response to a European problem and would not necessarily prefigure comparable action anywhere outside Europe’.⁷⁹ While this is true up to a point, the fact that non-Western states were not prepared to support Russia’s draft resolution against the NATO operation highlights that this has broader implications. Nonetheless, the debate over the legitimacy of the intervention emphasises that the conclusions we can draw from this operation are mixed and, importantly, that the political will and military means for such operations are unlikely to be found outside of Europe at the moment.

All the same, the conflict in Kosovo may represent a turning point because not only did states intervene to stop violence within another state but the head of the offending state was held personally responsible for the crimes committed against Kosovars and was indicted by the Hague tribunal, where he is currently undergoing trial. Granted, the International Criminal Tribunal for the former Yugoslavia (ICTY) is an ad hoc tribunal, but the existence of this international court, along with the International Criminal Tribunal for Rwanda (ICTR) in Tanzania, set up to try those responsible for the Rwandan genocide of 1994, boosted support for the development of general international judicial prosecution, in the form of a permanent international criminal court. These developments highlight the fact that we are witnessing normative change that has global implications.

Sovereignty and international accountability

In 1992 the Security Council first warned that individuals would be held responsible for breaches of the Geneva Conventions in the war in Bosnia-Herzegovina.⁸⁰ On 6 October 1992, in an effort to deter further abuses, it opened investigations of violations of these conventions through the

⁷⁸ Wheeler, *Saving strangers*, p. 297.

⁷⁹ Lori Fisler Damrosch, ‘The inevitability of selective response? Principles to guide urgent international action’, in Schnabel and Thakur, eds, *Kosovo and the challenge of humanitarian intervention*, pp. 405–19, at p. 415.

⁸⁰ UN Security Council Resolution 764, July 1992, available at <<http://www.un.org/documents/sc/res/1992/s92r764e.pdf>>.

establishment of a Commission of Experts.⁸¹ Despite a serious lack of funding and lack of cooperation from within the UN bureaucracy, the Commission began collecting evidence for possible future prosecutions.⁸² Following this, in early 1993 the Security Council advised the Commission to finish its work and announced the creation of the International Tribunal to Prosecute Violations of International Humanitarian Law in the Former Yugoslavia after 1 January 1991.⁸³

The tribunal has the power to prosecute persons for serious violations of international humanitarian law, grave breaches of the Geneva Conventions, violations of the law or customs of war, genocide, and crimes against humanity. Radovan Karadzic has been indicted for war crimes and crimes against humanity for his role in the siege of Sarajevo and the use of UN peacekeeping troops as hostages. On 16 November 1995 he was charged with genocide for his role in the murder of thousands in Srebrenica in July 1995. General Ratko Mladic of the Yugoslav National Army (JNA) and commander of Serbian troops in Bosnia-Herzegovina, was also indicted by the tribunal on the same counts. As of July 2002 there are 77 outstanding public indictments (with 56 currently in custody and 21 outstanding arrest warrants) and an unknown number of undisclosed indictments for crimes committed in the former Yugoslavia. On 10 March 1998 the prosecutor's office of the tribunal released a statement to the effect that the jurisdiction of the tribunal covered the escalating violence, including violations of humanitarian law, in the province of Kosovo, in the Federal Republic of Yugoslavia. In May 1999, the Chief Prosecutor of the ICTY indicted Slobodan Milosevic, along with four others, on charges of crimes against humanity, and

⁸¹ UN Security Council Resolution 780, October 1992, available at <<http://www.un.org/documents/sc/res/1992/s92r780e.pdf>>.

⁸² James C. O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', *American Journal of International Law* 87(4) 1993, pp. 639–59, at p. 641; and M. Cherif Bassiouni, 'From Versailles to Rwanda in seventy-five years: The need to establish a permanent International Criminal Court', *Harvard Human Rights Journal* 10 1997, pp. 11–62, at pp. 39–42.

⁸³ Security Council Resolution 808, 22 February 1993, available at <<http://www.un.org/Docs/scres/1993/808e.pdf>>. By Resolution 827 of 25 May 1993 (<<http://www.un.org/Docs/scres/1993/827e.pdf>>), the Security Council unanimously adopted the statute of the tribunal.

violations of the laws or customs of war, in Kosovo so that for the first time, a serving head of state was indicted as an international criminal. Milosevic has since been indicted on further charges arising from crimes committed in Croatia and Bosnia-Herzegovina, the latter including genocide, and his trial at the Hague began in February 2002.

While the establishment of this tribunal was seen as a ‘fig leaf’ to cover international inaction by some, others have argued that it represents a normative shift. There are elements of truth in both these claims. While the conflict was raging in Bosnia, it did indeed seem that the establishment of the tribunal would give small comfort to those who were the victims of ethnic cleansing. From the account given by one participant in both the Commission of Experts and the ICTY it would certainly seem that the motives of members of the Security Council were certainly mixed. Yet this same account also demonstrates that the ‘international community’ is in practice much broader than a number of powerful states alone. A coalition of interested scholars, non-governmental organisations, and interested states have maintained, in the first place, the Commission of Experts so that its final report could be published by the UN, and more recently, they have worked to maintain support for the ICTY itself.⁸⁴ While it is still states that wield force, beyond this there is a broader coalition of concerned actors involved in the pursuit of international justice. At the same time a normative shift can be seen in that the ICTY cannot be attributed merely to victors’ justice, as could the post-World War II war crimes tribunals. Further, the statute for the ICTY establishes that crimes against humanity can occur in internal wars,⁸⁵ and rape was for the first time recognised as a crime against humanity.⁸⁶ More recently,

⁸⁴ Bassiouni, ‘From Versailles to Rwanda’, pp. 39–46.

⁸⁵ This was clearly articulated by the Appeals Chamber of the ICTY in 1995. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Appeal on Jurisdiction, 2 October 1995.

⁸⁶ Theodore Meron, ‘War crimes law comes of age’, *American Journal of International Law* 92(3) 1998, pp. 462–8. The tribunal for Rwanda goes even further in recognising that crimes against humanity can occur in peacetime.

three Bosnian Serbs were the first convicted and sentenced by the tribunal on charges of rape and enslavement as crimes against humanity.⁸⁷

Establishing the ICTY was no substitute for effective action to stop atrocities, but this does not detract from the possible longer-term deterrent effects of the tribunal, along with the ICTR. As Payam Akhavan argues the ICTY should also act as a deterrent and its effectiveness should not be judged only on whether or not particular individuals immediately desisted from perpetrating crimes but in how well it communicates that certain conduct is unacceptable:

It is this expression of disapproval by the world community that is at the core of the ICTY's mandate. The punishment of particular individuals ... becomes an instrument through which respect for the rule of law is instilled into the popular consciousness. Ultimately, the ICTY will be a success if it contributes to bringing about a culture of habitual lawfulness such that persecutions and atrocities do not present themselves as a real alternative to peaceful multiethnic coexistence.⁸⁸

While the tribunal is still plagued by a shortage of funds and the failure to apprehend the most highly ranked indictees, recent changes have seen greater cooperation with the tribunal by Croatia under a new government and the former President of the Serb Republic Biljana Plavsic (as well as Momcilo Krajisnik) going voluntarily to the Hague in January 2001 to face questioning over charges of genocide, breaches of the Geneva Convention, violation of the laws or customs of war and crimes against humanity. Despite internal struggles over how to proceed, the Federal Republic of Yugoslavia did cooperate with the ICTY, and handed Milosevic over. This contest between the nationalist Yugoslav President Vojislav Kostunica and Serbian Prime Minister Zoran Djindjic reflects debate over the form that the corporate and social identities of Yugoslavia, particularly Serbia, should take in the future. Despite this debate, in the wake of the devastation that has befallen Serbia and amid revelations in

⁸⁷ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic: Judgement*, 22 February 2001, Case No. IT-96-23-T & IT-96-23/1-T, available at <<http://www.un.org/icty/judgement.htm>>.

⁸⁸ Payam Akhavan, 'Justice in the Hague, peace in the former Yugoslavia? A commentary on the United Nations War Crimes Tribunal', *Human Rights Quarterly* 20(4) 1998, pp. 737–816, at p. 749.

the Serbian media of crimes committed against ethnic Albanians in Kosovo, rejecting existing norms of legitimate statehood is unlikely to be a realistic option.

Just as the rationale for the two ad hoc tribunals is of 'bringing about a culture of habitual lawfulness', this is also the goal of the International Criminal Court. Under its 1998 Rome Statute,⁸⁹ the Court will have jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression (Article 5). The definition of crimes against humanity is also wider, including 'forced pregnancy' (Article 7). However, the court's jurisdiction is not retrospective and it may exercise its jurisdiction only over crimes committed after entry into force of the statute for the state in which a crime was committed (Article 11).

The establishment of a permanent International Criminal Court clearly reasserts that genocide is a crime under international law and emphasises the obligation of all states to prevent, as well as punish, genocide. Under the Rome Statute, the Court will be truly independent, as the Prosecutor has the authority to initiate investigations, 'on the basis of information on crimes within the jurisdiction of the court' (Article 15). The court is also capable of prosecuting nationals of non-signatory states for crimes committed on the territory of signatory states (Article 12). Importantly, as well as drawing on appropriate treaties and rules of international law and national laws that are consistent with international law and the statute of the Court, the Court 'may also apply principles and rules of law as interpreted in its previous decisions' (Article 21). That is, it is within the Court's power to build on previous decisions and thus develop a body of legal precedent in international criminal law.

While some powerful states have been resistant to the court there is also significant support for it. By mid-2002 more than the required 60 states had ratified the statute and it entered into law on 1 July 2002. A range of Western and non-Western states ratified the statute, including Argentina, South Africa, Botswana, Ghana, Gabon, Canada, France,

⁸⁹ United Nations, *Rome Statute of the International Criminal Law Court*, adopted 17 July 1998, UN Doc. A/CONF.183/9, available at <<http://www.un.org/law/icc/statute/romefra.htm>>.

Germany, the Netherlands, Croatia and Yugoslavia, which signed on in December 2000 and ratified on 6 September 2001.⁹⁰

CONCLUSION: THE WINDING PATH OF NORMATIVE CHANGE

In this paper I have traced the difficult development of norms of legitimate statehood and how these have evolved in response to acts that have forced what we now call the international community to reconsider the limits of acceptable behaviour on the part of state-builders. I have thus sought to demonstrate the close connection between domestic sovereignty and the external aspects of sovereignty, particularly what Krasner terms Westphalian and international legal sovereignty. I have also demonstrated how when regimes opt to legitimate their rule through focusing on the corporate identity of the state this tends to lead to pathological methods. A regime that is open to legitimating its authority through international/social identity norms or at least attempts to reconcile the differences between these and exclusivist strands in domestic culture is much less likely to pursue such methods.

The normative developments outlined in this paper can be traced with reference to nine criteria (see Table 1). At one end of the continuum is the absence of any international norms regarding the internal constitution of the state. Such an environment existed when the Catholic Monarchs, Ferdinand and Isabella, attempted to build a homogeneous state in early modern Spain through expelling the Spanish Jews. At this time there were no reciprocally recognised standards in the embryonic international system, beyond the right to make war.

By the time Louis XIV revoked the Edict of Nantes in 1685 there had been a normative shift in the system, reflected in the development of treaty specific norms, seen in the protection accorded to minorities under the Peace of Westphalia. Louis' actions contravened this fragile normative consensus, causing alarm across much of Europe. While there was no thought of intervention, the Huguenots were able to find refuge outside of France.

⁹⁰ The full list can be found at <<http://www.un.org/law/icc/statute/rome1948.htm>>.

By the late-nineteenth century we see the development of general social norms proscribing mass slaughter, reflected in the public outcry against the ill-treatment of minorities in the Ottoman Empire. While this was often limited to co-religionists, this was not always the case. However, while the late-nineteenth century interventions in the Ottoman Empire on behalf of minorities raised the hopes of Armenians that they would be treated as equal subjects, in fact the Sultan responded to their demands for equality with a series of massacres. Though these massacres were considered outrageous in moral terms at the time, ultimately no protection was accorded to the Armenians in the Ottoman Empire.

Likewise, although the Entente powers attempted to persuade the CUP to stop its 'deportation' of the Armenians during World War I, this merely resulted in the CUP issuing a formal order of deportation and their program of extermination continued unabated. In the aftermath of the genocide, the international community struggled to articulate new international legal principles that would reflect the sense of moral outrage at what was clearly recognised at the time as a crime against humanity. This attempt to translate general social norms into legal principles can be found in the Treaty of Sevres, but, as we have seen, this treaty was never ratified. In the face of the Kemalist regime's refusal to acknowledge the responsibility of the Turkish state for the genocide, their assertions of sovereignty as complete control over all internal matters, and the scramble for position as the Empire crumbled, the international consensus that systematic murder of a million people should be punished at an international level disintegrated. This reflected both the tentative nature of the legal finding that crimes against humanity had been committed by a state against its own people, and the lack of a truly multilateral basis from which to approach this issue. Prior to these findings, there was an attempt at domestic judicial prosecution in 1919, imposed on Turkey by the victorious allies. However, this failed in the face of high levels of domestic resistance and the nationalist revolution that swept through Turkey.

It is in the second half of the twentieth century that general legal norms regarding legitimate state behaviour have been most clearly articulated, though these developments have not been straightforward, as I have demonstrated. Time and time again, when attempting to deal with the worst excesses of state-builders, the international community has acted on

principles that are still underpinned by an acceptance of the 'logic' of homogeneity within states. The contradiction still plays out in the international system between human rights norms and the most conservative interpretation of the rights of sovereignty and non-intervention. Nonetheless, human rights norms gained increasing moral and legal force in the last decade of the twentieth century, and when states claim sovereignty over internal affairs while abusing significant sections of their populations, this is less and less convincing.

Ad hoc international prosecutions of crimes committed in the name of the state challenge the most conservative interpretation of sovereignty. This is particularly the case with the contemporary tribunals dealing with Rwanda and the former Yugoslavia, which cannot so easily be dismissed as dispensing victors' justice, as was the case with the post-World War II tribunals in Nuremberg and Tokyo. Most recently we have seen a further development towards general international judicial prosecution, which is still in its early stages with the development of a permanent International Criminal Court which will have a Prosecutor authorised to independently instigate investigations. This is a new development, which despite the opposition of some states represents an emergent normative standard. This could not exist, even in its emergent form, if the norm of sovereignty was not undergoing revision.

However, ethnic cleansing in the former Yugoslavia occurred despite the development of clear norms proscribing such acts and the creation of the ad hoc tribunal for the former Yugoslavia. It is clear that under some circumstances only a clear and compelling threat of force may be enough to prevent or stop mass atrocities. The NATO campaign to stop ethnic cleansing in Kosovo is thus far the only case of collective intervention to stop ethnic cleansing, and it has not to date been taken as a precedent for further military intervention. Whether this remains a one-off intervention remains to be seen. Certainly, the legitimacy of such operations is still strongly contested as a conservative interpretation of sovereign rights remains compelling to many states, hence Russia and China's response to the NATO intervention in Kosovo.

Does this debate mean that it is too early to say there is a new sovereignty norm at work today? The intervention in Kosovo, the ad hoc tribunals and the ICC do not represent a fully articulated and robust

normative architecture. What they do represent, though, is a normative shift so that it is very difficult for state leaders to argue, in the name of sovereignty, that they are not accountable for their actions. The social recognition that mass expulsions and slaughter are criminal acts grew throughout the course of the twentieth century. Since the middle of that century an international legal framework has developed which makes this a fact in law. But these in themselves have not been enough to stop abuses. Although no systematic means of enforcement currently exist, recent developments make it harder for would be abusers, and their apologists, to assume that they will go unpunished or that 'sovereignty' will protect them.⁹¹

⁹¹ Weller, 'On the hazards of foreign travel'.

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