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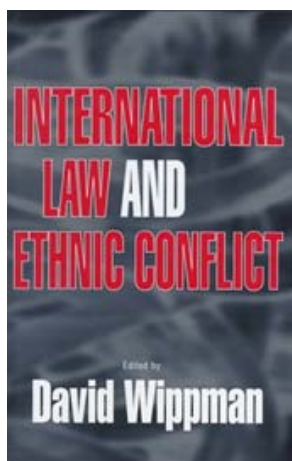
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Ethnic Groups and International Law: A Status Report on International Legal Personality at the Beginning of the New Century

By Steven M. Schneebaum

International Law and Ethnic Conflict edited by David Wippman. Ithaca, NY: Cornell University Press, 1998. 368pp.

Has the Treaty of Westphalia Finally Loosed Its Hold on Us?

Implicit in this collection of essays, edited by Professor David Wippman of Cornell University Law School, is the observation by the world community, with a mixture of nostalgia and relief, of the death of the Treaty of Westphalia. The venerable Treaty, which lived through more than three hundred years of modern history, exerted an enormous influence on international relations, diplomacy, and law. It is almost universally recognized as having served the world well in its youth and middle age, although it became something of a tiresome relic in its later years. Toward the end, it was on life support, entirely dependent on the ministrations of traditionalists who donned fading Prussian army uniforms to accommodate their dogmatic confidence in its continuing vitality. Yet, as it entered the fourth century of its existence, the Treaty was so far removed from international reality that the precise moment of its final passing went unmarked.

In announcing its demise, international legal scholars have paid homage to the regime that the Treaty represented: a classical architecture, characterized by intellectual and esthetic elegance, even if not always by the suppleness necessary to adjust to changing times. The Treaty's long life and many innovations, as well as the very fact of its venerability, are surely to be respected by history, alongside other traditions that have made the advances of our civilization possible. Yet its death should not now be the cause of mourning. Not to be disrespectful to the Canon, but the Treaty was permitted to live a bit longer than was optimal for its own good, as well as for that of a world that needed to adapt to an entirely new culture.

The Treaty had a good run. It was conceived as a means of constructing what turned out to be a sadly temporary peace after the Thirty Years War, and was born at the first truly multinational peace

conference in the West since Biblical times, at Osnabrück, beginning in 1645. Its gestation lasted three years, with the Treaty itself opened for signature on October 24, 1648.¹

Although it is most likely that those whose belabored negotiations led to the conclusion of the Treaty had their eyes fixed on more immediate goals of territorial consolidation and dynastic security, the significance of the Treaty in the longer term was contained in the language and implications of Article LXIV:

*And to prevent for the future any Differences arising in the Politick State, all and every one of the Electors, Princes and States of the Roman Empire, are so establish'd and confirm'd in their antient Rights, Prerogatives, Libertys, Privileges, free exercise of Territorial Right, as well Ecclesiastick, as Politick Lordships, Regales, by virtue of this present Transaction: that they never can or ought to be molested therein by any whomsoever upon any manner of pretence.*²

Their language may today strike our enlightened eyes and ears as archaic or redundant. Yet the drafters of the 1648 Treaty of Westphalia were clearly the intellectual forbears of the men and women who wrote these words in San Francisco, almost 300 years later: “All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”³

The mortal wound that ended in the demise of the Treaty was inflicted toward the end of World War II. That the Treaty could not long survive became apparent when the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, without dissent, on December 10, 1948. The Declaration noted in its preamble that the Members of the nascent Organization had “pledged themselves to achieve . . . the promotion of universal respect for and observance of human rights and fundamental freedoms.” It went on to articulate and to define the contents of the basic rights to which every member of our species is entitled. And it concluded with Article 30, according to which “Nothing in this Declaration may be interpreted as implying for any State . . . any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”

Obviously, the Universal Declaration as a General Assembly resolution is not, and was not intended to be, a legally binding instrument in the nature of a treaty. Yet its adoption was a momentous demonstration of the commitment of the post-Nuremberg world to a new way of thinking. The rights articulated in the Universal Declaration were not to be understood as having been benevolently granted by states, subject to rethinking or revocation later should there be a shift in the political winds. Most of the document’s sentences are declaratory, stated in the present tense, in the spirit of the first Article: “All human beings are born free and equal in dignity and rights. They

¹ Actually, there were three treaties comprised by the so-called Peace of Westphalia. The discussion here is of the multilateral convention that ultimately counted among its signatories the Holy Roman Emperor, the King of France, and numerous of their respective allies who were Electors, Princes, Governors, and other potentates representing most of the population of the western part of the European continent, excepting the British Isles.

² This version comes from the superb website of the Avalon Project at Yale Law School: <http://www.yale.edu/lawweb/avalon/westphal.htm>.

³ Charter of the United Nations, Article 2(4).

are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.”

States solemnly pledged to dedicate themselves to the protection of these rights through the rule of law, which, *inter alia*, imposes prohibitions on states themselves. As South Africa’s *apartheid* leaders were to learn in later decades, no nation was permitted unilaterally to exempt itself from the regime that the Declaration envisaged for the definition and protection of human rights.

The proposition that a state has no “right” to engage in acts aimed at destroying the “rights and freedoms” of individuals, including its own citizens, entails a hierarchy of values that can ultimately not be reconciled with the central creed of the 1648 Treaty, which is that each sovereign may exercise plenary authority in its own territory without molestation, at least from its temporal rivals. Nor was it the intent of the drafters of the 1948 resolution to impose some sort of religious or sectarian dogma on the world. On the contrary, one of the most important demonstrations of the Universal Declaration’s vaunted universality was its conscious omission of any (inevitably divisive) reference to the Deity. The new post-War regime, brought on by the movement that established the United Nations, grounded a set of rights more fundamental than those of state sovereignty, in an unspoken postulate of natural law, having to do with the sanctity and ultimate autonomy of every human person, of every nationality and every condition.

What the Universal Declaration did, in announcing that human rights are fundamental legal rights and that they inhere in people merely (merely!) by virtue of the fact of their humanity, was thus deeply subversive of the Westphalian system. And while it cannot be said that the Universal Declaration was the blow that was fatal to the Treaty (not least because the transmutation of human rights principles into human rights law was so painfully slow in the early years, and is even now vulnerable to forces that I discuss later in this essay), it became in the second half of the last century an increasingly difficult task to fend off international attention directed to states’ treatment of their own nationals on the grounds that this was no one else’s business. This is not to say, of course, that human rights abuses abated in those decades. But ritualistic invocation of the hoary Treaty of Westphalia (even in its contemporary embodiment in the U.N. Charter), by way of defense against charges of such abuses, came more and more to resemble the last refuge of scoundrels.

Since the time of the Declaration, the abandonment of the Westphalian concept that national sovereignty was the indivisible atomic unit of international law has become both widespread and irrevocable. Not only has it become nearly a commonplace that individuals are both the owners of internationally-guaranteed rights and the subjects of internationally-imposed obligations, but national borders have lost their opacity to the prying scrutiny of other states and of international organizations. International instruments treat as nearly axiomatic that individual rights have an international dimension, and they purport either to recognize or to create rights vested in other non-state entities, such as insurgencies, multinational bodies, and “peoples.” None of this is conceivable in a world governed by the Treaty of Westphalia: all of it presupposes the demise of that regime.

To say this is not to ignore, of course, the turbulence of the world’s progress in articulating a legal system for the protection of human rights and fundamental freedoms. Numerous obstacles have impeded this progress, not least of them the intransigence of the United States with respect to accepting the binding nature of norms, such as those of customary international law, born outside our national borders. But even the opposition of the world’s sole superpower cannot prevent the

emergence of customary law as, according to the teachings of the International Court of Justice, the confluence of consistent and widespread state practice with *opinio juris*.

One might have imagined that all of the essayists and scholars whose work is collected in David Wippman's excellent compilation under review would have started from these premises. Some, indeed, write as if they had seen in the newspapers the parody "obituary" with which this review begins. Others, however, seem to be of the view that fealty must still be shown to the ideals of the Treaty whose passing seems not to have perturbed either the world in which they live, or the international law regimes that they are teaching to the next generation of practitioners and professors.

The latter group poses for itself an unsolvable dilemma: they cannot explain why ethnic conflicts are of any interest or importance to international law, or how the international legal regime has come to address the rights and obligations of the parties to such conflicts. Professor Wippman himself recognizes the issue from the outset, and he does not exaggerate when he claims that a thorough examination of his topic of international law and ethnic conflict requires international lawyers "to rethink the most fundamental norms of our craft."

The point is that if, in obeisance to traditional precepts, one continues to consider international legal personality to be coterminous with statehood, then there is simply no room on the library shelf for a book entitled International Law and Ethnic Conflict. It would obviously be foolhardy to say that statehood at the beginning of our new century counts for naught, and no observer can embrace such a radical and demonstrably false position. Nevertheless, to the extent that the parties to ethnic conflict are not states, and yet are the repositories of international rights and duties, then something rather fundamental must have changed in our international law universe.

What Will Take the Place of States as the Atomic Units of the International Legal System?

If public international law is the regime governing relations between international legal persons, and if that category is effectively limited to states at least as traditionally defined, it follows that ethnic groups that happen not to have undergone reification as states can be neither subjects nor objects of international law. Elementary logic dictates, however, that if this proposition is true, so too is its contrapositive: if ethnic groups that are not states do have international legal rights, or are subject to international legal obligations, then statehood cannot be prerequisite to international legal personality.

Simply to deny *a priori* that it is sensible to speak of the legal rights of "peoples,"⁴ for example, is to ignore vast amounts of the work of the United Nations General Assembly over very many years. It is to pretend that the legacy of decolonization does not have a legal component. It is to relegate the world's nearly-universal condemnation of apartheid, ethnic cleansing, and genocide to the back rooms of politics and diplomacy, and to expel it from the halls of justice. Yet as long ago as 1960—well before, in the estimation of some, the rhetorical field was occupied by squatters who usurped

⁴ While we can all think of "ethnic groups" that are not "peoples," and there are "peoples" that are not "ethnic groups," there is little of interest to discover in exploring this semantic terrain. Of the ethnic conflicts discussed or cited as examples by most of the contributors to Professor Wippman's book, virtually all concern collections of individuals that qualify for both descriptions. I use the terms synonymously in the remainder of this essay.

the language of the law to promote an anti-Western ideology that had nothing to do with law—the General Assembly stated in a resolution adopted without opposition that “[a]ll peoples have the right to self-determination; by virtue of that right, they freely determine their political status, and freely pursue their economic, social, and cultural development.”⁵

United Nations instruments making reference to “peoples” nicely pose the definitional problem of the post-Westphalia world, however, and it is on these shoals that nearly every legal analysis (including some in the Wippman volume, as we shall see) founders. Whatever else may have been true of the Westphalian regime, it did have the advantage of relative clarity. Disputes over whether an entity was a state entitled to sovereignty, and therefore to the appurtenances of international legal personality, were rare.⁶

Would that there were equivalent certainty in an international legal system that confers rights and imposes obligations on “peoples,” whose defining characteristics are far more difficult to articulate than the definition of statehood. Stating with precision what one means when one refers to a “people” in this context is extraordinarily difficult, and commitment to any formula is as likely as not to be driven by one’s view of the proper outcome of some specific ethnic conflict.

No grammar of contemporary international law can be complete without at least some unpacking of the notion of “peoples,” since the fundamental, non-derogable rights of “peoples”—whatever they are—are explicitly vouchsafed by the international legal regime. Yet if, say, the right to independence in a nation-state of one’s own, or even the right to substantial, meaningful political autonomy within an existing member of the United Nations, inheres the moment that it is agreed that an ethnic group, or simply the inhabitants of an identifiable piece of real estate, is a “people,” then there will never be international consensus on the “peoplehood” of those who live in Palestine, Kurdistan, Chechnya, Corsica, or Puerto Rico.

Even though the recent expansion of the reach of international law beyond state actors may be seen in other uncharted zones as well, definitional problems in the context of “peoples” may be unique in their intractability. The international role of the European Union, or the obligations binding on the militia of the non-state *Republika Srpska*, are capable of more clinical resolution, in a manner less influenced by politics. Even the propositions that individuals have internationally-protected rights against their own countries of nationality, and that how states treat their citizens is a matter of legitimate international concern and even potential intervention, are easier pills to swallow in the post-Westphalian world than the general extension of rights and obligations under international law to ethnic groups and “peoples.”

Pointing to a means of solving this difficult puzzle is the central theme of the authors whose work Professor Wippman has collected. Some have made a valuable substantive contribution to the

⁵ Eighty-nine members of the United Nations voted for the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV), of which the language quoted here is paragraph 2. The United States, the U.K., France, South Africa, and five other countries abstained. Yet there were a comparable number of abstentions (eight out of 56) when the Universal Declaration was adopted, and the Declaration is still uncontroversially described as articulating an agreed consensus from which no derogation is permitted.

⁶ They were not, however, entirely unknown. The early U.N. membership of the Byelorussian and Ukrainian Soviet Socialist Republics—which were quite clearly not states—and the absence from the U.N. of the People’s Republic of China, which equally clearly was, showed that there was room for argument along the margins even after World War II.

dialogue; all have shown both how important and how hard it is to determine just what kind of regime will replace the legacy of “the most Serene and most Puissant Prince and Lord, Ferdinand the Second,” Holy Roman Emperor, whose diplomatic agents bequeathed the Treaty of Westphalia to us some 355 years ago.⁷ For if we do not know a “people” when we see one, and there are no rules to help us, then such “rights” as that to “the self-determination of peoples” cannot be legal rights (since we cannot ascertain who is entitled to hold them, much less to enforce them), and the vocabulary of international law must either undergo radical transformation or accept demotion to the level of exhortation and aspiration, rather than of legal entitlement and obligation. We cannot answer, at least in the language of the law, the basic question that Anne-Marie Slaughter bluntly poses: “which groups get what?” The significance of the need to solve this conundrum is manifest. Can we find an acceptable and generalizable answer, or must we retreat?

Liberal Democracy and International Morality, or, “I Can’t Define It, But I Know It When I See It.”

Several of the essays in International Law and Ethnic Conflict are not about ethnic conflict as a cross-border phenomenon at all: they are about international law and domestic conflict, of which intrastate strife cast along ethnic fault lines is a sadly recurring subspecies. They consider international devices (including such institutions as the United Nations High Commissioner for Refugees, as well as regional organizations) that may be brought to bear to modify the behavior of states and their agents which, in the heat of domestic nationalistic violence, violate the law of human rights, international humanitarian law, or the law mandating the protection of refugees.

Nothing in these pieces requires the invocation of rights possessed by ethnic groups (or “peoples”) themselves, as opposed to the individuals who make up those groups. It is not misleading to speak of international law as it would protect such individuals as a distinct portion of the law of human rights, applicable to be sure only in certain circumstances, but nonetheless normative and nonetheless enforceable through an increasing variety of means. International refugee law, as codified in various conventions and protocols and as implemented into municipal legal systems, likewise is highly individualized, in defining who may enjoy the rights it confers, who is obligated to honor those entitlements, and what remedial mechanisms may be deployed to ensure that the system works.⁸

A number of the other essays, however, both reflect and provoke very deep thinking about the essential role of the law and lawyers in the post-Westphalian era. Professor Tom Farer, in his concluding contribution, astutely observes how readily and un-self-consciously the academic contributors to this volume shift among legal, policy, and moral vocabularies in addressing the issues

⁷ Although it is proper to credit Ferdinand II with the outcome of the Westphalia peace conference, and especially with the preservation of the Habsburg dynasty in the face of military and diplomatic misfortune and religious rivalry, he actually had died in 1637, some 11 years before the execution of the eponymous Treaty. The laboring oar at Osnabrück was borne by his son and successor, Ferdinand III. See, generally, Chas. W. Ingrao, The Habsburg Monarchy, 1618-1815 (Cambridge, 1994), pp. 44-52.

⁸ That international refugee law has not been notably successful in reducing the misery of an especially vulnerable part of the population does not, of course, undermine my thesis. The fact that the law is not enforced consistently, efficiently, or effectively is generally not evidence that the law does not exist. Crime statistics in the developed world amply bear this out.

of international law and ethnic conflict. The problem, of course, lies in the territory of their agreement. It is dangerous in how alluring it is, and how obviously correct. Conflict is to be avoided where possible and managed where not; the world would be a better place were violence in pursuit of nationalistic goals abjured and condemned; and fairness and justice mandate that minorities that have been the objects of persecution be freed from such harassment, proceeding to participate in their own governance.

Unfortunately, these propositions offer no helpful advice to nationalists with long memories and irredentist claims. They are not relevant to tribal leaders who, whether cynically or not, wave the bloody shirt of uncorrected injustice in front of a population that has no stake in the avoidance of violence, and especially violence that will be directed at the perpetrators (or the descendants or the alleged beneficiaries of the perpetrators) of the supposed wrongs. Nor do they help to guide the international community in its response to ethnic conflict: not those who, for example, would oppose secession as a matter of principle, and not others perhaps more readily called to arms by tales of unpunished victimizers and unvindicated victims.

Anne-Marie Slaughter recognizes the problem, acknowledging that the roots of any new international law theory that addresses the issue of ethnic conflict in a productive way must by necessity be planted in a set of assumptions both hospitable to the resolution of competing claims and also consistent with the remaining corpus of international jurisprudence. She finds the answer in a familiar place. "Liberal democracy," she concludes, "may not be a cure for ethnic conflict. But it may be the best that the international legal order has to offer" (144). That is, one need not apologize for seeking to develop a law of ethnic conflict that contains among its principal objectives the reduction of bloodshed. Indeed, that is a positively good thing, just as it is a good thing to revile such practices as female genital mutilation, even in the face of remonstrations that to presume to urge Western value judgments on other cultures is a form of neo-colonialism or imperialism.

Professor Slaughter does not, however, tender much assistance in the quest for a metes-and-bounds delimitation of the legal rights of ethnic groups. She accurately sums up the claims set out in the excellent contributions by Professors Lea Brilmayer and Fernando Tesón, but they too ultimately rely on unstated and unexplored assumptions similar to hers. None of these essayists questions whether her or his locution for the basis of a fair system of respect for peoples is really as self-evident as all that.

Professor Brilmayer, for instance, effectively unpacks the notion of nationalism, exploring its communitarian aspects but suggesting that they are not its core: nationalism is typically and ultimately inseparable from territorial or retributivist claims. But, as she herself notes, every group clamoring for autonomy or independence can articulate some kind of argument that a historical wrong – ideally but not necessarily centering on the denial of title to real property – has gone unrighted.

As far as it goes, Professor Brilmayer's argument is highly persuasive. She considers and rejects the notion that ethnicity can be understood primarily in terms of community, and she places territorial aspirations at the heart rather than the periphery of the matter. Moreover, she shows that the territorial claims that she posits as so crucial are not "defeasible entitlements" subject to some kind of international justification: rather, they are claims of right (80-85.) These are very constructive contributions to the understanding of ethnic nationalist discourse.

Where Professor Brilmayer's analysis becomes less helpful, however, is in her conclusion that "international morality" mandates the identification of goals and then the pursuit of corrective justice by acceptable means (85). To fill in a meaning for "international morality,"—that is, to determine whether, in any case to be adjudicated, the elements of justice have been satisfied, and to decide which means are acceptable in the circumstances—we are left on our own. I strongly suspect that the masked zealot at the barricades and I are unlikely to agree on whether his ethnic group's claim to a particular piece of ground is consistent with "international morality" unless we have already agreed about the justice of the specific cause in whose name the rocket-propelled grenade is being fired or the suicide bombing launched. Yet I have no idea how to apply Professor Brilmayer's stricture to distinguish "between nationalist claims that are based on justice" (i.e., my group's claims) "and those that are based on prejudice, self-interest, or misunderstanding" (which is to say everyone else's, and especially those of the group(s) vying with my own).⁹

Maybe Professor Brilmayer's "international morality" coincides with Professor Slaughter's "liberal democracy." But, then again, maybe it does not. Or, worst of all, maybe it does so sometimes, but not others. We are given no algorithm by which to determine the contents of this "morality:" the bedrock on which her entire argument ultimately rests.

Professor Tesón presents a similarly well-reasoned and tightly written analysis, and he takes on and demolishes common misapprehensions as effectively as does Professor Brilmayer. In his case, one target that cannot withstand his assault is the notion that states owe some sort of obligation to protect and preserve ethnic minority cultures, even when the current title-holders to those cultures show scant interest in them (88-95). He demonstrates that there is no defensible right to "cultural survival," which concept cannot, therefore, lie at the heart of whatever claims ethnic groups might make to special status within domestic legal systems, and, presumably, in international law. But if "cultural survival" is not the basis of the rights of ethnic groups, then what is? Or are we asking the wrong question?

Does the International Legal Regime Define, and If So Does It Protect, "Group Rights"?

Is there such a thing as "group rights" at all? Professor Tesón suggests that to speak in this manner is to use a conventional shorthand, by which "group rights" are the aggregate of the individual rights of the members of the group (whether ethnic, elective, or otherwise). This theory makes eminently good sense if the topic is a right that by its nature can be held by an individual, such as the right to be free from torture. In such a case, it is sensible to speak of, say, the rights of "the Shan people" in Burma, or of "the Falun Gong" in China, just as it makes sense to speak of the right of "women" to be free from employment discrimination based on sex in the District of Columbia. By that we mean simply to identify people by their membership in a set or class, and to

⁹ Just as my characterization of the "zealot at the barricades" already presupposes a point of view about the content of that hypothetical person's position, so too does Professor Brilmayer make her prejudices clear when she contrasts justice—a good thing—with "prejudice, self-interest, or misunderstanding," all of which are presumptively bad. Perhaps she infallibly knows the differences when she sees them, but others (including this writer) have been known to become confused or to miss subtleties in such cases. Indeed, the commonplace that "one man's terrorist is another man's freedom fighter" reflects the notorious difficulty that international law has in assessing asserted justifications for otherwise violative behaviors.

refer to the union of the rights of each individual member not to be the victim of a certain kind of unlawful conduct based on a characteristic that all members (are perceived to) share.

There are, however, rights that inhere not in individuals but only in groups, such as the right of self-determination. Professor Tesón explains that, even here, our locution is a kind of conventional abbreviation, meaning nothing more than the sum of the political rights of each member of the collectivity to participate in government, or to vote in a free and fair election.

I am not sure that this is an empirically correct gloss on the way most speakers of English use terms like “self-determination.” I think that they have in mind something more than the sum of the separate rights to vote of each individual. Rather, there seems to be some implicit or explicit assertion with respect to rights of the “people” as an ethnic ensemble, whose participation in the electoral process must not be subjected to the simple rules of majority voting.¹⁰ Yet the difference between the aggregate claim, on the one hand, and the sum of the individual ones, on the other, defies quantification. The whole is, after all, no more than the sum of its parts.

Regardless, however, of how people do or do not employ terms of art in common or even professional speech, Professor Tesón is onto something. If our use of the terminology of group rights is elliptical, intending to refer to the simple sum of the individual rights of members of the group (or even some function of that combination), then we will have solved the vexing puzzle rhetorically posed earlier in this essay: whether we risk reducing international law talk to incoherence if we continue to attribute legal rights to subjects whose identity we cannot specify. The answer will be that “peoples” are not really subjects of international law, although the individual people who make up those “peoples” are. And when individuals who have an ethnic characteristic in common are systematically denied rights on that basis, then it makes sense to refer, even if imprecisely, to their collective individual rights as inhering in the collectivity as “a people.”

Of course, Westphalia is not raised from the dead by this conclusion, which contains as its starting-point a proposition inconsistent with the Treaty: that individuals have rights in international law, which can only mean rights against states and their agents. The very existence of such rights demonstrates that national borders are insufficient to block legitimate international attention to domestic activities of governments. So Professor Tesón’s (and my) view that there is no real need for the concept of “the rights of peoples,” at least in contemporary customary international law, is no less radically at odds with Westphalia, since it retains the centrality of individuals (not collectivities) as bearing rights and also obligations under the auspices of international law.

As Lori Fisler Damrosch demonstrates in her contribution to Professor Wippman’s volume, not even an analysis of that international delict whose very definition requires a concept of “peoplehood”—genocide—presupposes the need to define ethnic groups as atomic “subjects” of international law. At the end of the day, even genocide is the act of persons, whether or not acting as agents of states, and its victims are persons as well. It is for that reason that genocide is uniquely suited for handling through the traditional devices of municipal criminal law, and for this reason that

¹⁰ In her discussion of this point, Professor Slaughter refers to the ground-breaking work on voting rights, in a purely domestic context, by Professor Lani Guinier of the University of Pennsylvania. Surely the theory emerging from Professor Guinier’s writings suggests that group rights differ qualitatively, not just quantitatively, from individual rights.

the Genocide Convention requires (in Article 6) that all signatories provide in the first instance for the prosecution of individual human perpetrators in their municipal courts.

If domestic courts are not capable of handling the logistics of such complex, large-scale trials, or if there is serious reason to doubt the integrity or independence of the judiciary charged with the responsibility of conducting such proceedings, then it is sensible to develop other means of addressing what is still, in essence, criminality, if on a large scale that pays no heed to national sovereignty: either through the use of domestic tribunals in countries other than the *situs* of the wrong, applying traditional bases for extraterritorial jurisdiction (as in the case of Gen. Pinochet), or through international tribunals, ad hoc or permanent, tasked with providing a procedural and physical context, so that justice may be done. And the International Court of Justice is still capable of hearing and resolving interstate claims in such cases, so long as they can be brought within the Court's *ad hoc* or compulsory subject-matter jurisdiction, or that the parties voluntarily undertake to submit to it for decision.

Conclusion: “To Live Outside the Law, You Must Be Honest”¹¹

Perhaps, then, it is unnecessary to provide the criteria according to which ethnic groups may claim international legal personality. The death of the Westphalian regime may have many consequences, but it does not necessarily entail the endless proliferation of international legal persons. It is time to start stropping Occam's Razor. International law can address ethnic conflict without thereby committing to or encouraging, much less demanding, reification of the parties to that conflict.

The conclusions of this analysis, therefore, are two, and both are critical to an understanding of the international legal regime that will govern at least in the immediate future. Both are elegantly and provocatively framed by the essays in Professor Wippman's book.

First, the demise of the Westphalian regime, at least to the extent that it countenanced no international legal personality outside statehood, can in fact be confirmed. International law does have a substantial bearing on ethnic conflict in numerous ways—substantive, procedural, and institutional—and that very proposition demonstrates the point. The rights that lie at the core of human rights law, international humanitarian law, and refugee law, are legal rights, vouchsafed by legal instruments and remediable in legal fora, including courts both domestic and international. That individuals are therefore the repositories of legal rights and obligations is beyond question, and their international legal “personhood,” profoundly inconsistent with the premises of the Treaty of Westphalia, challenges the primacy of sovereignty and mandates a new conception of whose conduct it is that is governed by international law. This first conclusion, therefore, can be relied upon with confidence.

The reliability of the second proposition is, at this juncture, however, more troubling. Professors Brilmayer and Slaughter are right: there must be a shared conception of international morality, or of liberal democracy, that inspires our use of the new international legal vocabulary, if the legal system is to be prescriptive, and not merely descriptive of the world of the moment. This must be based on certain common substantive objectives, which occupy a more central place in the legal firmament:

¹¹ Bob Dylan, “Absolutely Sweet Marie” (1966).

abjuring violence except under strictly controlled conditions; respecting persons, in the Kantian terminology, as ends and not as means; honoring international compacts freely entered into (*pacta sunt servanda*); and adhering to the *acquis* of the United Nations, the International Court of Justice, and other organizations that are the formulators, the authoritative interpreters, and the guardians of conventional and customary international law.

But these propositions, in turn, depend on others, at a meta-level, about the role of the law in any society. All actors in a legal commonwealth must accept, at least in principle, the propositions that the law may require them to do that which they do not want to do, or may forbid them to do what they do want to do, and that they are obligated to go along or suffer punishment. The underlying premise of commitment to a legal regime *per se* must be that each member of the polity willingly undertakes, at least in principle, to forgo its immediate impulses for conduct mandated and regulated at societal level. In the literal sense, the survival of a legal system depends on this proposition (and it is close to the level of Kelsen's *grundnorm* for this reason): if any member of the legal community insists on her or his right to ignore the strictures of the law and at the same time to avoid the sanctions that the law provides, then there can be no certainty and no predictability for anyone, and the weak and dispossessed in particular can have no confidence that they will be able to claim their equitable entitlement, or, for that matter, any entitlement at all.

Professor Slaughter's liberal democracy accommodates these conceptions as part of its essence. So does Professor Brilmayer's notion of international morality. Yet today we are witnessing an international legal regime in which one participant claims simultaneously to be the avatar of liberal democracy and the protector (even the author!) of moral values, and also to be above the law, in that it adamantly refuses to adopt or to abandon conduct on the basis of the law's demands. The recent behavior of the United States—not in violating established international law (*lex lata*), and not even in arguing for its improvement, but simply in acting as if it did not exist—is deeply antithetical to the emergence of a new regime to supplant the Westphalian one. And to the extent that the enlargement of the concept of international legal personality to include individuals as well as states, and groups at least as aggregates of those individuals, depends upon a shared notion of international morality or of liberal democracy, that notion must be grounded in something more secure than the confidence that the United States is always right, that its instincts are always sound, or even that its security is always to be ensured at whatever cost to others or to the rule of law itself.

History will mark the early part of the 21st century as a period of transition in international law and relations. The emergence of entities like the European Union (hard to place in the traditional dichotomy of states and non-states), the sudden breakup of such national entities as Yugoslavia and the slow establishment of others like the Palestinian Authority, the threat of terrorism whether emanating from states or from groups of fanatics operating outside of state protection, and the eradication of national borders resulting from technological innovation: all demand that we find that common core of international relations sooner rather than later. And the nucleus around which we must coalesce, if there is to be any international legal system deserving of the name, must be found in a bedrock policy emphasizing the primacy of human rights as legal rights.

The principal threat to the emergence of an international legal regime to replace the Westphalian one that now belongs to the ages, including the protection of fundamental human rights as its core value, is not violence, or terrorism, or ethnic conflict. It is the arrogance that would deny the premises of the rule of law. To say this is not to draw a nihilistic, morally bankrupt parallel between

the perpetrators and the victims of murderous assaults on civilian targets. The reason that arrogance with respect to the rule of law poses a greater risk to world order than terrorism is that it would deprive us of the only means we have of attempting to deter international criminality on a systematic basis, and of bringing to justice those who commit such offenses.

The essays compiled by David Wippman in International Law and Ethnic Conflict remind us of the fragility of the premises of the new international legal regime that our generation and the one that follows are destined to create. It is within our power, as political beings and as participants in the genesis of that regime, to stamp out the arrogance that threatens its—and by extension, our—survival. If there is a moral imperative for international lawyers in our age, it lies here.

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