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### THE REGULATION OF POLITICAL PARTIES IN POST-CONFLICT SOCIETIES

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## The Regulation of Political Parties in Post-Conflict Societies

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### Abstract:

Democratic theorists have long struggled with a central paradox of democracy: how to reconcile the foundational democratic principles of free expression, tolerance and political participation with the existence of anti-democratic ideologies that seek to use those principles to gain power. This paper looks at the problem through an under-studied lens: the regulation of political parties in post-conflict societies that are building democracy out of the ashes of civil war and/or authoritarian rule. In these societies, ethnic, religious and ideological conflict make political party regulation a delicate balancing act between the norm of democracy-promotion and the necessity of protecting a fragile government from anti-democratic forces. This paper examines the international law and comparative law of regulating anti-democratic political parties and extends the analysis to post-conflict scenarios, which present new challenges and obstacles. The argument is that application of the norms which guide international organizations in regulating the post-conflict political party's rights of participation and expression requires a functional theory of the role political parties play in democracy; and that analysis of a party's right to autonomy must necessarily distinguish between the types and functions of parties. The paper applies the functional theory to the case study of the Electoral Appeals Sub-commission in Bosnia, which regulated that country's first post-conflict elections, and concludes by suggesting some principles for the administration of democracy in highly volatile environments.

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## **The Regulation of Political Parties in Post-Conflict Societies**

### **Part I: The problem of political party regulation in post-conflict societies**

Since the rise of totalitarian ideologies after World War I, democratic theorists have wrestled with a central paradox of democracy: how to reconcile the foundational principles of a democratic society—tolerance of a diversity of viewpoints, free expression, universal political participation—with the existence of anti-democratic ideologies that seek to use the electoral arena to capture the state apparatus in order to subvert those principles.

“Established” democracies deal with this problem in a multiplicity of ways. In the United States, a strong constitutional tradition of free speech—one which adheres to the liberal idea that the “only antidote to bad speech is more speech”—gives rise to an electoral arena that is relatively unregulated by the state. In European democracies, which have more history with extremist groups taking power through democratic means, a wider variety of prohibitions on political parties exists, ranging from party bans to restrictions on electoral speech. “Fractured” democracies, or democracies that exhibit strong ethnic or religious cleavages, employ even more stringent measures for navigating the tension between self-preservation and democratic values.

The use of these tools by democratic societies, and their assessment by domestic courts in those countries, has been well-documented and analyzed. This paper approaches the problem through a different lens—that of societies emerging from civil war and/or authoritarian rule, where political institutions and the rule of law are weak or non-existent. Where such transitions are occurring, political parties often develop out of armed groups such as former rebels or militias, or along racial, ethnic or religious lines, making political party regulation a delicate balancing act between the norm of democracy-promotion and the necessity of protecting a fragile government from anti-democratic forces. In post-conflict settings, “democracy” is a contestable concept. In societies which lack any form of civil society, political parties are the sole means by which citizens can engage with government—despite the fact that those parties may have ends which conflict with the very idea of participatory government.

While international law guarantees universal rights to form parties, compete within the democratic process, and express political views, the question of how these rights play out in unstable democratic situations—where they must be weighed against the need to protect an embryonic state—is yet to be comprehensively studied. More saliently, international law, with its focus on universal and aspirational norms oriented towards individual freedom, gives little guidance as to how political parties should be treated as democratic players in their own right. In

the run up to a post-conflict society's first elections, how should the rights of ethnic or nationalist political parties be qualified so as to protect the state from "coup by election"?

To exacerbate the problem, post-conflict societies are most often not in a position to maintain a semblance of social order, much less self-regulate a volatile political process. As a result, outside actors—international organizations, such as the UN; or occupying powers, such as the U.S. in Iraq—have stepped in as forces for democratization; acting simultaneously as lawmaker, law-enforcer, and law-adjudicator in the transitional period before elections take place. The most important task for external actors is to facilitate the move to democracy by organizing fractious groups into competitive political parties that may then take the reins of self-government. But international organizations—particularly the UN—have developed a misguided approach to regulating parties composed of the groups that participated in the conflict, overbalancing broad norms of free speech and universal participation against the threats posed by parties divided along sectarian lines.

In this paper, I argue that international organizations (IOs) building democracy in war-torn nations have adopted the external shell of norms relating to political parties, while ignoring the fundamental justifications for parties in a democratic society. By ignoring the rights restrictive approaches that even established democracies have taken in regulating the political process, IOs are complicit in the manipulation of the process by ethnic nationalist parties that aim to continue the conflict by other means. I argue against a solely human-rights-oriented approach, one that is universalist, aspirational and easily subverted by forces that are hardly committed to the values of democracy.

Instead, I draw upon theories of political parties and the comparative experience of established democracies to argue for a more functionalist, pragmatic approach to regulating political parties in post-conflict societies. I argue that because the question of political party regulation is closely tied to the question of the function of parties in a democracy, the associational and expressive rights of ethnic or nationalist parties must be reconceived in the light of a post-conflict scenario where their character is very different from those of established democracies. Ethnic or nationalist (or ethnic nationalist) political parties are not so much "mediating institutions" between the state and citizenry as they are groups organized to consolidate power along a single axis of identity. For this reason, a more nuanced view of their rights to expression and association is needed in the context of the transformative event of post-conflict elections.

The fraught relationship between ethnically-divided political parties and the post-conflict society they inhabit is exemplified in Bosnia. In the wake of the break-up of the former

Yugoslavia in the early 1990s, Bosnia was controlled by three major ethnic nationalist parties—Serbs, Bosnian Muslims (also called “Bosniaks”), and Croats. A bloody and violent civil war between the three groups characterized by ethnic cleansing was ultimately brought to an end by the signing of a peace agreement in Dayton that created a larger state of Bosnia formally organized through a consociational, confederal system that apportioned power between the three ethnic groups. The Dayton agreement directed the holding of national elections a scant nine months after its entry into force, resulting in a campaign dominated by the same three ethnic nationalist parties. The doubtful commitment of the parties to a multi-ethnic, unitary Bosnian state became the subject of political and legal controversy for the international organizations mandated to administer the election. The problem for regulators of the electoral process was the participation of the three ethnic nationalist parties was necessary in order to label the elections “democratically legitimate”; but that the parties themselves were implicitly and explicitly advocating for anti-democratic ends such as secession and the disintegration of the Bosnian state. Ultimately, these regulators failed to recognize that the centrality of political parties to the democratic order hinges not on their mere existence, but on their instrumental value as facilitators of a democratic process in which the members of a polity are fully represented. Where parties impede rather than assist this process, their rights to participate in the electoral arena must necessarily be qualified.

The argument proceeds as follows. In this Part, I describe the norms that guide political party regulation in modern nation-building efforts and argue that a rights-oriented framework of political party regulation has been adopted by international organizations and liberal reformers in post-conflict situations. Part II examines the historical and comparative context for democratic defense against extremist groups, and Part III lays out the international law framework. Both Parts conclude that comparative and international law recognize that circumscription of rights may be necessary for political parties to play their part in building democracy. Part IV builds on this insight to present a functional model of political parties, and to argue for a more pragmatic approach to party development and regulation in fragile societies. Part V concretizes the problems associated with analyzing the rights of the ethnic or nationalist political party using the case study of Bosnia’s Electoral Appeals Sub-commission (EASC), which adjudicated cases on the freedom of expression and association of political parties leading up to Bosnia’s first post-conflict elections. The EASC’s struggle with these issues offers several substantive and procedural lessons about regulating ethnic nationalist political parties in a highly volatile electoral environment. Part VI concludes by using the lessons of the Bosnian experience to suggest some principles for the administration of democracy in post-conflict settings.

*The evolution of international organizations as democracy-builders*

Party development has become the *sine qua non* of democratization efforts in transitioning societies. The late twentieth century brought with it the end of numerous tyrannical regimes and the promise of democracy and self-determination for societies that had had little to no historical experience with either. The question thus arose of how to build a democratic government out of the ashes of civil war, dictatorship or one-party rule. The prevailing view<sup>1</sup> became that party competition would lead to political stability in addition to democracy. As a result, most international organizations and NGOs made political party development a key element of their democracy-promotion agendas in Eastern Europe, Africa, Latin America and Asia.<sup>2</sup> For the international community, the benchmark for success in post-conflict societies quickly became the society's first elections, with political party development being the necessary first step in any democratization effort.<sup>3</sup>

The UN's role in democracy promotion began in 1989 through its provision of electoral assistance in post-conflict elections in Angola, Cambodia, El Salvador, Mozambique, and Nicaragua.<sup>4</sup> That role was mostly limited to the "neutral" oversight of implementation of peace agreements, technical and financial support for the holding of elections, and manpower to observe the electoral process and verify results.<sup>5</sup> The exception was in Namibia, where the UN took a more heavy-handed role in supplying a "Transitional Assistance Group" to actively supervise the independence process.<sup>6</sup> The 1990s, however, witnessed the collapse of the former Yugoslavia and exceedingly bloody conflicts in Bosnia and Kosovo that were halted only through military action by the international community, which proceeded to assume primary responsibility for the political reconstruction of both new territories by establishing UN missions

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1 The classic statement on the need for parties in democratizing societies comes from Samuel Huntington, in *Political Order in Changing Societies* 397-461 (1968).

2 Krishna Kumar & Jerome de Zeouw, "Supporting Political Party Development in War-Torn Societies," available at [www.psa.ac.uk/2007/pps/Kumar.pdf](http://www.psa.ac.uk/2007/pps/Kumar.pdf). A growing literature on the "democratic peace thesis," and the right to democratic governance under international law, provided normative support for elections to be held as quickly as possible; meanwhile, more pragmatic considerations (such as the domestic pressures to withdraw troops) spurred the international community also to support immediate "free and fair" elections. Simon Chesterman, "Elections and Exit Strategies," at 207 (manuscript on file with the author.) I shall develop this point in further length in Part IV, where I examine democratic transition under international law and the role of international organizations.

3 Kumar & de Zeow, *id.*

4 Robin Ludwig, "The UN's Electoral Assistance: Challenges, Accomplishments and Prospects," in *The UN Role in Promoting Democracy* 170 (Edward Newman and Roland Rich, eds.)(2004).

5 *Id.*, 173-76.

6 Yossi Shain & Lynn Berat, "International government model revisited", in *Between States: Interim Governments and Democratic Transition* 67 (1995).

that would govern until the first elections were held. This “transitional administration” model was subsequently adapted to East Timor, a territory that no experience with sovereignty or self-governance following years of repressive occupation by Indonesia.

The shift from “peace building” to “state rebuilding” to “state creation”<sup>7</sup> signified a corresponding transition for the UN as outside guarantor of the democratic process to authoritative regulator of that process. In Kosovo and East Timor, the UN exercised all of the plenary functions of government until power was ready to be transferred to the people.<sup>8</sup> As Chesterman points out, this role created a paradox for the UN: how to ready a population for democratic governance through a system of “benevolent autocracy.”<sup>9</sup> These “autocratic” functions included not only maintenance of law and order and provision of social services, but also the more subtle governmental tasks of deciding vital issues of constitutional design and electoral process—including proscribing political party participation and activity.

In all of the post-conflict societies where the UN has a peacekeeping presence (not just where it was the transitional administrator), it has been instrumental in negotiating with, assisting in the development of, or regulating the emerging political parties. Working with political parties makes up an entire industry in the democracy-building field. The major international organizations that have had a hand in nation-building over the last several decades—the various organizations within the umbrella of the United Nations, the Organization for Security and Cooperation in Europe—have all made political party development and assistance a central focus of their democratization agendas.<sup>10</sup> Large, multi-national non-governmental organizations (as well as domestic foreign aid organizations such as USAID) such as the National Democratic Institute, International IDEA, and the National Institute for Multi-party Democracy (NIMD) have similarly made political party development the guiding principle for rebuilding war-torn societies

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7 Ben Reilly, “Elections in Post-Conflict Societies,” in *The UN Role in Promoting Democracy: Between Ideals and Reality* 113, (Edward Newman and Roland Rich eds.) (2004).

8 Simon Chesterman, “Benevolent Autocracy”, in *The UN Role in Promoting Democracy: Between Ideals and Reality* 86 (Edward Newman and Roland Rich, eds.) (2004).

9 Simon Chesterman, *You the People, The United Nations, Transitional Administration, and State-Building* 124 (2004).

<sup>10</sup> See, e.g., OSCE Office for Democratic Institutions and Human Rights—Democratization, <http://www.osce.org/odihr/13430.html> (discussing political party development activities) (last visited November 22, 2008); United Nations Development Program, UNDP’s Engagement with Political Parties, <http://www.undp.org/governance/docs/policy-pub-engagementpolitical%20parties.pdf> (discussing UNDP’s activities and programs with respect to political party development in 43 countries); USAID Office of Democracy and Governance, USAID Political Party Development Assistance, [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacr216.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr216.pdf) (1999); United Nations Mission in Kosovo, “UNMIK at Two,” Political party and public interest development, <http://www.unmikonline.org/2ndyear/unmik2p7.html> (last visited November 22, 2008) (describing assistance to political parties and organizations of civil society).

as democracies; their efforts range from financial and technical assistance to parties to drafting political parties laws to mediating conflict between parties and party leaders.<sup>11</sup>

*The normative view of the role of political parties in a democracy*

The focus on creating viable political parties in post-conflict societies reflects the deeply entrenched normative view that parties are the building blocks of democracy, and thus the first step in any reconstruction endeavor. The role political parties play in organizing democracy is the subject of a seemingly inexhaustible literature, reflecting the scholarly consensus that modern democracy is “unthinkable save in terms of political parties.”<sup>12</sup> The broad functions of political parties can be defined as: facilitating political competition and supplying ideological alternatives; articulating and aggregating interests; coordinating the activities of government; and mediating between the state and the citizenry.

*Providing the means for political competition and supplying ideological alternatives.* Political parties facilitate political contestation in the most direct sense by mobilizing electoral activity. They select candidates through recruitment by party elites<sup>13</sup>; and provide the focal points for the organization and participation of voters.<sup>14</sup> They are the most efficient disseminators of information to the public.<sup>15</sup> Most importantly, political parties provide voters with a choice between alternatives. Under one model of the electoral arena as a political market, parties are suppliers and voters are consumers in a competition for ideological “goods.”<sup>16</sup> The alternatives supplied by political parties are structured along various issue dimensions and societal cleavages, giving voters clearer options from which to choose.<sup>17</sup> Through “structuring the vote” through appeals to voters to respond to particular party labels, political parties act as “brokers of ideas, constantly clarifying, systematizing, and expounding the party’s doctrine...

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<sup>11</sup> See, e.g., National Democratic Institute—Political Parties, [http://www.ndi.org/content/political\\_parties](http://www.ndi.org/content/political_parties) (last visited November 22, 2008); International IDEA—Political Parties, <http://www.idea.int/parties/index.cfm> (last visited November 22, 2008); National Institute for Multiparty Democracy, [http://www.nimd.org/page/about\\_nimd](http://www.nimd.org/page/about_nimd) (describing NIMD as “a democracy assistance organization of political parties in The Netherlands for political parties in young democracies”)(last visited November 22, 2008)

<sup>12</sup> E.E. Schattschneider, *Party Government* 1 (1942).

<sup>13</sup> Richard Gunther and Larry Diamond, “Types and Functions of Political Parties,” in *Political Parties and Democracy* 8 (Richard Gunther and Larry Diamond, eds.) (2001) [hereinafter “Gunther and Diamond”].

<sup>14</sup> Anthony King, “Political Parties in Western Societies: Some Sceptical Reflections,” 2 *Polity* 111-141 (1969).

<sup>15</sup> Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 *Int’l J. Const. L.* 84, 90 (2006).

<sup>16</sup> *Id.*

<sup>17</sup> Diamond and Gunther at 8, Mersel, *supra* note \_\_ at 90.

They maximize the voters' education in the competitive scheme... and sharpen his free choice."<sup>18</sup>

*Interest aggregation and interest articulation.* Parties are necessary for resolving problems of social choice and collective action, by articulating and aggregating the interests of society at large. As Gunther and Diamond put it, "Democratic systems vary in the extent to and means by which they meld the separate interests of groups into broader, more universalistic appeals."<sup>19</sup> In both presidential and parliamentary systems, political parties are vital for representing those interests and bringing them together in order to form the government in power.<sup>20</sup> The parties' role in articulating and aggregating disparate societal interests also serves a "social representation" purpose, as the parties must bid for the attention of interest groups and bring the policy preferences of those groups to the forefront of an electoral or policymaking process.<sup>21</sup>

*Coordination of governmental activity.* Once in power, political parties are necessary for "forming and sustaining governments" and organizing policymaking activity.<sup>22</sup> Parties influence policy whether they are the "party-in-government" or the "party-in-the-electorate."<sup>23</sup> The party-in-government exercises obvious influence over the policy agenda by initiating legislation that responds to the interest groups the party is supposed to represent. The party-in-the-electorate affects policy as well, through opposition to the goals of the party-in-government and through contributing to the content of the public debate.<sup>24</sup>

*Mediating between citizenry and government.* Perhaps the most important function played by political parties is that of linkage.<sup>25</sup> Parties facilitate responsive and accountable government because they mediate between citizens and governmental institutions. Political parties turn individual citizens into participants and stakeholders in the political process, thereby fostering social integration.<sup>26</sup> Parties must present a narrative or picture of the political community within

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18 Sigmund Neumann, *Modern Political Parties: Approaches to Comparative Politics* 396 (1956), cited in King, *supra* note \_\_ at 122.

19 Diamond and Gunther at 8.

20 *Id.*

21 *Id.*

22 *Id.*

23 See, e.g., V.O. Key, Jr., *Politics, Parties, and Pressure Groups* 163-65 (1964).

24 King, *supra* note \_\_ at 135-136.

25 Ben Reilly, *Introduction, Political Parties in Conflict-Prone Societies* 1 (2008).

26 Diamond and Gunther at 8.

which the individual citizen exists, and the citizen's engagement with the party becomes a proxy for his engagement with society at large.

While the above description of political parties reflects the scholarly and academic view on their role in facilitating democracy, democracy-building organizations have adopted essentially the same framework for political party development in post-conflict societies.

The National Democratic Institute, for example, describes the importance of political parties thusly: "Democratic political parties contest and seek to win elections in order to manage government institutions. They offer alternative public policy proposals which are shaped by citizens' preferences. Through their choices of candidates and policies, they provide citizens with options for governance. They can strengthen national political institutions when they present these choices at elections and seek to mobilize citizens behind their visions of the national interest. While there are parties without democracy, there can be no democracy without political parties."<sup>27</sup> Similarly, International IDEA introduces its party-building programme: "Representative democracy cannot function properly without different political parties. Political parties provide the vehicle for the electorate to express itself by accommodating diverse interest groups and offering voters different political options."<sup>28</sup>

As I shall argue in my case study of the EASC, these views are exemplar of the approach taken by international and non-governmental organizations towards political parties, and towards the role those parties play in political reconstruction. However, the reality of post-conflict political parties does not reflect the theory of their value in a democratic society.

### *The threats posed by post-conflict political parties*

The parties that emerge out of the social groups in transitioning society often look nothing like the paradigm of political parties more familiar to established democracies, and the environment in which they compete for power is nothing like the electoral marketplace in which such democratic parties compete. In post-conflict societies, the groups that are the natural precursors to political parties operate against a background of violence and severe distrust. Groups are often divided on the basis of intractable differences such as ethnic, religious, racial, linguistic or tribal cleavages; or must overcome a history of oppression of one by the other. These cleavages create a set of interrelated but distinct problems.

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<sup>27</sup> National Democratic Institute, Minimum Standards for the Democratic Functioning of Political Parties ii (2008).

<sup>28</sup> International Idea—Political Parties, <http://www.idea.int/parties/index.cfm> (last visited November 22, 2008).

The clearest problem forming political parties out of the ashes of conflict is that those parties will naturally group so as to reinforce existing fault lines; and that elections become a means of “score-settling” or redressing ancient grievances. In the wake of a civil war there are victims and perpetrators divided by group identity, and the same ethnic/religious/identity-based differences that were previously dealt with through armed conflict will become the organizing principles for electoral competition, with each group claiming the mantle of victimhood and seeking “justice” against the other. This becomes a dangerous proposition once power is consolidated by any party and the resources of the state can then be deployed against its enemies.

A haunting example is found in Rwanda, in the wake of the Hutu genocide of Tutsis. The Revolutionary People’s Front, which militarily defeated the genocidal Hutu regime in 1994, came to power nominally under the guise of a multi-party democracy that included the Hutu, and a stated commitment to reconciliation. Since then, however, the RPF has marginalized the Hutu opposition and consolidated its grip through the use of fraud and intimidation to secure electoral victories.<sup>29</sup>

The period leading up to an election where the parties are divided by group identity creates the additional problem of campaigning, and the igniting of simmering racial/ethnic/religious tension. The problem is not limited to the use of hate speech or speech that incites violence; the use of symbols or slogans that invoke the conflict, or rallying/organizing by individuals who were active in the conflict, are likely to polarize a fragile electorate and possibly lead to renewal of hostilities. As I shall show in the Bosnia case, the use of images of and quotes by one of hardline nationalists, a primary perpetrators of ethnic cleansing, to rally members of his party was a flash point for violence leading up to the country’s first elections. Such speech and imagery reinforced the threat posed by the reconstituted nationalist party to principles of Dayton and the concept of a unified Bosnian state.

Perhaps most importantly, post-conflict political parties are likely to display tenuous commitment to the idea of “renewability of consent”, or the idea of subjecting themselves to the *loss* of power as well as the gain of power through the electoral process.<sup>30</sup> “Parties at the negotiating table may accept elections for reasons other than the acceptance of democracy,” such as the opportunity elections provide to re-establish former ruling powers.<sup>31</sup> These parties are less likely to support the electoral process where that process will not provide them with victory,

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<sup>29</sup> See, e.g., Lars Waldorf, *Mass Justice for Mass Atrocity*, 79 *Temp. L. Rev.* 1, 35 (2006).

<sup>30</sup> See Issacharoff, *Fragile Democracies*, 120 *Harv. L. Rev.* 1407, 1465 (2007) (introducing idea of “renewability of consent”).

<sup>31</sup> Kumar and de Zeouw, *supra* note \_\_, at 8.

sometimes returning to war where they perceive that that elections are the endpoint in the contest for power.<sup>32</sup>

A classic example of the threat that a political party will regard an election as “one man, one vote, one time”<sup>33</sup> is Algeria. In 1991, during Algeria’s first multiparty election in thirty years, the Islamic Salvation Front (FIS) won 189 of the 231 parliamentary seats in the first round, virtually guaranteeing that it would obtain the parliamentary majority required to amend the Algerian Constitution.<sup>34</sup> The FIS’s platform was the remaking of Algeria into an Islamic state, and several FIS leaders were openly hostile to the possibility of future multiparty elections.<sup>35</sup> In response, the Algerian army instituted a coup, triggering a civil war that killed over 100,000 people.<sup>36</sup>

In Cambodia, the Cambodian People’s Party’s (CPP) surprising loss in the UN-supervised 1993 elections led it to manipulate both the UN and the victorious party to accept a post-election bargain in which CPP leader Hun Sen would be named "Second Prime Minister," and packing government with CPP loyalists. CPP influence led to the use of the state's coercive power against CPP opposition, allowing Hun Sen to overthrow the prime minister. Eventually, the CPP was able to “cement its grip on political power by winning the [CPP-manipulated] 1998 elections and then exercise that power with minimal interference” from other political parties.<sup>37</sup>

African countries transitioning to democratic self-governance face an especially acute variety of the problem of one-party entrenchment. The legacy of colonialism and authoritarian rule created a disturbing trend towards “majoritarian abuse or dominant party dictatorships that use multi-partyism as a convenient smokescreen behind which to disseminate their dictatorship.”<sup>38</sup> In Mozambique and Zimbabwe, elections swept into power two parties that have maintained their primacy by rigging elections and keeping the opposition weak and fragmented.<sup>39</sup> Despite the increased constitutionalization of human rights in emerging African

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32 The Angolan example is illustrative. Marina Ottaway, *Angola’s Failed Elections*, in POSTCONFLICT ELECTIONS, DEMOCRATIZATION & INTERNATIONAL ASSISTANCE, *supra* note \_\_, at 143.

33 Issacharoff, *Fragile Democracies* at 1465 n.251.

34 Fox & Nolte, *Intolerant Democracies*, *Democratic Governance and International Law*, at 394.

35 *Id.*

36 Issacharoff, *supra* note \_\_ at 1451 n. 197.

37 Frederick Z. Brown, *Cambodia’s Rocky Venture in Democracy*, in Kumar, *supra* note \_\_ at 99.

38 See Charles Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: The Case of Southern Africa*, 55 *Am. J. Comp. L.* 1, 5 (2007).

39 *Id.*

democracies, the subversion of political processes and one-party dominance remains the rule rather than the exception in many Southern African countries especially.<sup>40</sup>

The pattern continues with respect to several UN-brokered peace processes, in which the groups that sign onto the peace agreements accept elections only insofar as they provide a vehicle to consolidate power and eliminate opposition. Richard Holbrooke, the chief negotiator of Dayton, summarized the issue succinctly: “Suppose the elections were declared free and fair [and those elected] were racists, fascists, and separatists who are publicly opposed to [peace and reintegration]? That is the dilemma.”<sup>41</sup>

### *International organizations and party regulation*

Given the threats that post-conflict political parties pose to fragile democracies, the question of how to regulate their activities, especially during the heightened tensions created by a campaign for power, becomes vitally important. In places where international organizations like the UN and OSCE have taken over as de facto government until the reins of power could be passed to elected officials, how those organizations treat the conduct of parties becomes an especially complicated question. In the case study I present later in this paper, I show that IOs were insufficiently attentive to the destabilizing force of political parties organized around ethnicity and nationalism. But before embarking on the case study, it is important to address the historical and contemporary context for the problem of anti-democratic groups that use democratic institutions to gain power.

## **Part II: The problem of anti-democratic political parties in historical and comparative perspective**

The challenge of addressing anti-democratic political parties in modern post-conflict societies can best be understood by reference to the ways in which “established” democracies have dealt with this problem. The scope of humanitarian tragedy implicated by today’s failed states makes it easy to forget that all stable liberal democracies have histories of being forced to rebuild democratic institutions in the wake of civil war, ethnic or religious conflict, and extremists that refused to accept the legitimacy of the party in power. The exemplars of democracy—the United States, Western European countries, India, Israel—have all at some

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<sup>40</sup> *Id.*

<sup>41</sup> Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 *Foreign Affairs* \_\_, 22 (1997)(quoting Holbrooke).

stage of their histories been “post-conflict societies.” And yet many of the lessons learned from the historical and contemporary struggles of liberal democracy against extremism have been largely ignored in debates about democratic transition. The experience of “established” democracies demonstrates much more comfort with the idea of limiting the spheres of association and expression where such rights will be exploited by political parties that seek to unravel democracy from within.

*A. Historical examples of anti-democratic political parties*

The problem of anti-democratic political parties has powerful historical resonance. The specter of the Nazi party’s rise to power, a product of virulent populism at a time of deep discontent with the reigning democratic government, continues to haunt European politics. The Nazi party came to power in Weimar Germany using constitutional and democratic institutions, and the final step towards dictatorship occurred through a two-thirds majority vote by parliament to eliminate separation of powers.<sup>42</sup> The Nazis followed in the footsteps of the Fascists in Italy, who similarly came to power using legal, democratic processes. But Nazi Germany and Fascist Italy, while providing clearest and most consequential examples of the power of extremist political parties to subvert a democratic system, were not the only European countries to grapple with this problem in the interwar period. At the same time as the Nazis were consolidating their hold on the Reichstag, extremist groups were challenging fragile democratic rule, using the institutions of democracy, in at least three other European democracies—Belgium, Finland and Czechoslovakia.<sup>43</sup> These three societies are unique among the European interwar democracies in resisting the pressure to become dictatorships in order to contain threats from within.

In these three countries, as chronicled by political scientist Giovanni Capoccia, social and economic crisis laid the groundwork for totalitarian political parties to confront democratic elites and put forward alternative ideologies rooted in Fascist, Communist, nationalist or otherwise anti-democratic principles.

In Belgium, perceived structural flaws in Belgian government, and pervasive and endemic corruption in the political and financial systems, paved the way for the rise of the Rexist Party and the VNV party, which collectively laid out a platform denouncing Belgium’s “failed

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<sup>42</sup> Gregory H. Fox and Georg Nolte, *Intolerant Democracies*, Harvard J. Intl L., 1995, at 11.

<sup>43</sup> Giovanni Capoccia, *Defending Democracy: Reacting to Extremism in Interwar Europe* (2005). I rely on his historical accounts here to reinforce some of the “anti-democratic” methods utilized by those societies to fight back against extremist groups.

democracy.”<sup>44</sup> The Rexists railed against capitalism, and, more saliently, against political parties, which they maintained were at the root of Belgium’s political disorder; while the VNV party aimed to unite the ethnic enclaves of Belgium under authoritarian rule.<sup>45</sup> Finland faced extremist challenges from both the left and the right. The Finnish Communist Party evolved into a broad-based organization with significant parliamentary strength, and never disavowed its principle to disband liberal democracy.<sup>46</sup> The extreme right Lapua Movement, the platform of which was racist, ultra-nationalist and totalitarian, maintained a tight grip over the conservative National Coalition party and threatened to attack the state itself if the state continued to accommodate Social Democratic parties.<sup>47</sup> The Sudeten German extreme right weakened democracy in Czechoslovakia, where ethnic as well as ideological fragmentation, and the fact that ethnic minority parties had not been included in the constitution-drafting process, contributed to extreme polarization.<sup>48</sup> Extremist parties in Czechoslovakia were particularly pernicious because they adhered to anti-democratic goals even as they publicly espoused their commitment to liberal democracy and the integrity of the Czech Republic.<sup>49</sup>

A defining characteristic of the societies that were subject to extremist threats from within the democratic process, is the social and economic crisis that primed the populace to support a challenge to the dominant political order. Each of the parties appealed to popular unhappiness with the government, and to fear of rising instability due to the challenge posed by Hitler to European security. In the Czech Republic, for example, the Sudeten German extremists were actively collaborating with Hitler to destabilize and eventually take over the country.<sup>50</sup>

However, Belgium, Finland and Czechoslovakia—unlike many of the other European countries that experienced democratic breakdown by the time World War II began—were able to successfully resist takeover by the extremist political parties by adopting “militant” legal strategies, in addition to other more accommodative and incorporative political strategies.<sup>51</sup> All three countries adopted anti-extremist laws and administrative provisions that repressed citizens’ freedoms and rights and substantially expanded government powers. Democratic elites in all

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<sup>44</sup> *Id.* at 110.

<sup>45</sup> *Id.* at 40-41.

<sup>46</sup> *Id.* at 43-45.

<sup>47</sup> *Id.* at 163.

<sup>48</sup> *Id.* at 73, 77.

<sup>49</sup> *Id.* at 78.

<sup>50</sup> *Id.* at 79.

<sup>51</sup> *Id.* at 203-13.

three countries were also unafraid to selectively prosecute members of the extremist parties, and to apply pressure to the judicial branches to expedite trials against those defendants.

The Belgium executive, for example, prevented Rexists from marching on the capital and from using the broadcast time allotted to them on the national radio, and moved forward the parliamentary elections of 1936 specifically to avoid the consolidation of the Rexist party.

In Finland, the Lapua Movement went so far as to organize for military revolt against the government. The government, acting pursuant to legislation that criminalized threats to the democratic system, disbanded the Lapua movement by shutting down its newspaper and arresting its leaders.<sup>52</sup> It is significant that despite these highly repressive actions against a particular group, the democratic system in Finland was itself never suspended, and maintained space for other opposition movements so long as they were committed to democratic processes.<sup>53</sup>

Czechoslovakia took perhaps the most comprehensive and far-reaching range of anti-extremist measures, including: enacting political party bans and electoral barriers to parties that, by their activities, were hostile to the unity, security and integrity of the Czech democratic state; imposing restrictions on public officials; limiting freedom of movement; and establishing extensive anti-propaganda legislation. This last category included prohibitions on incitement to hatred against individuals and groups because of their support for a democratic republican form of state, political symbols that were hostile to the integrity of the state, and publications and films harmful to state interests.<sup>54</sup> The party bans in particular were severely restrictive, extending to freedoms of individuals who were in any way affiliated with groups that threatened in any way the democratic character of the Czech Republic. The emergency measures taken in Czechoslovakia indicate the extent of the territorial and democratic threat posed by extremist groups, especially given their ties to the German Nazi party.<sup>55</sup>

These examples are not necessarily meant to serve as models for defense against extremism; rather, they are meant to illustrate that successful democratic self-protection from extremist challenges has historically involved government action that would be widely considered to violate modern human rights norms and standards. Repressive strategies are, of course, not

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<sup>52</sup> *Id.* at 168-69.

<sup>53</sup> *Id.* at 174.

<sup>54</sup> *Id.* at 92.

<sup>55</sup> While the Czech Republic was eventually carved up by the European powers following the war, and is problematic as a case of “long-term” democratic survival, it is notable that, facing the extremist threat of Sudetan Germans who were working towards the annexation of Czechoslovakia by Germany, the fundamental democratic character of the Czech Republic never failed. See *Id.* at 106-107.

always successful; the failure of laws limiting political propaganda and freedom of assembly passed as a response to the rise of the Nazis is a good example. However, the point remains that the problems of deeply divided societies, and effective solutions to attempts by groups to leverage those divisions into a takeover of democracy, have a long historical record even in established democracies; and that these solutions have taken the form of government action that would probably make today's civil libertarians uncomfortable. And yet, these societies are historical examples of democratic *survival*—suggesting that in times of insecurity and instability, democratic norms such as freedom of association and expression may be malleable without undermining the fundamental character of democracy itself.

### *B. Contemporary examples of anti-democratic political parties*

The response of democracies to anti-democratic political parties is not a historical problem that ended with the fall of the totalitarian ideologies of Nazism, Fascism and Communism. Contemporary varieties of anti-democratic political parties are found in established democracies, such as those of Western Europe, India, and Israel; and in transitioning democracies such as those in Southern Africa. Whether “established” or “transitioning”, these democracies all have developed legal and constitutional responses to extremist political parties that arose out of a history of ethnic, religious or separatist conflict.

Significantly, all of these responses have occurred in the wake of the development of international human rights law, itself a response to the horrors of World War II and Europe's democratic breakdown. I discuss the international human rights framework for regulating political parties in Part III, *infra*; it is sufficient to note here that contemporary solutions to the problem of anti-democratic groups exist in the shadow of that history.

#### 1. Contemporary “established” democracies

The experience of several “modern, established” democracies demonstrates a range of restrictions on the behavior of political parties that pose a particular threat to the stability and the nature of the democratic order. As the following examples demonstrate, countries that exhibit deep and intractable differences, and especially those with histories of sectarian violence, have developed rights-restrictive approaches to political parties

India is the world's largest democracy, and its political system accommodates a remarkable level of division along ethnic, religious and class lines. Despite this, the period since Partition and the establishment of India's parliamentary democracy has borne witness to periodic explosions of communal violence between Hindus and Muslims. In 1992, the Hindu holy site of Ayodhya was scene to the massacre of thousands of Muslims, and in 2002 the burning of a train carrying mostly Hindu pilgrims led to the orchestration of a large-scale attack on Muslims in Gujarat.<sup>56</sup> The violence in both of those cases was incited by far-right Hindu nationalists, and tacitly supported by the political parties that count the Hindu nationalists among their constituencies.

The most extreme of these groups is Shiv Sena, a militant nativist organization cum political party that had as its face Bal Thackeray, who regarded as one of his political heroes Adolf Hitler.<sup>57</sup> Shiv Sena is closely aligned with the Bharatiya Janata Party (BJP), the majority Hindu nationalist party that was in power from 1998-2004. The strength and rhetoric of this far-right coalition consistently threatens to ignite the ever-simmering tensions between Hindus and Muslims in India, particularly at election time, when the risk of incitement runs high. India has responded to this threat with a code regulating electoral expression that prohibits appeals to "enmity or hatred" between groups based on religion, race, caste, and community.<sup>58</sup> This election code is consistent with Indian constitutional guarantees of free speech and free expression, in part through distinguishing the electoral period from the general space in which political expression and association take place.<sup>59</sup> As an alternative to party bans on Hindu nationalist groups, which would simply not be viable in India, the Indian government regulates potentially anti-democratic political party activity based on the content of that activity and the degree to which it could constitute incitement to violence.<sup>60</sup>

All-out bans on political parties, however, are not anathema to democracy, as two well-known European examples demonstrate. In Spain, the government outlawed the political party Batasuna, widely considered to be the political arm of the Basque separatist group ETA.<sup>61</sup> ETA is a terrorist organization whose actions were condemned by Batasuna, and whose cause

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<sup>56</sup> See Martha Nussbaum, *The Clash Within: Democracy, Religious Violence, and India's Future* 17-52 (2007).

<sup>57</sup> Issacharoff, *supra* note \_\_ at 1423 (citing Larissa MacFarquhar, *The Strongman: Where is Hindu-Nationalist Violence Leading?* *New Yorker*, May 26, 2003, at 50, 50).

<sup>58</sup> The Representation of the People Act, No. 43 of 1951; India AIR Manual (1989), v. 41 s. 125.

<sup>59</sup> See Issacharoff, *supra* note \_\_ at 1424-29.

<sup>60</sup> See *id.* at 1428 ("the Indian approach not only invites content and viewpoint regulation of speech, but embraces it.")

<sup>61</sup> See Thomas Ayers, Note, *Batasuna Banned: The Dissolution of Political Parties Under the European Convention on Human Rights*, 27 *B.C. Int'l & Comp. L. Rev.* 99 (2004).

Batusana advocated in Parliament.<sup>62</sup> In June 2002, Spain adopted a Political Parties law that prohibited political parties committing “grave and continuous” activity “makes democratic principles vulnerable.”<sup>63</sup> Following the passage of the law, the Spanish Parliament asked the Spanish Supreme Court to dissolve the party. The decision was upheld by Spain’s Constitutional Court, and subsequently by the European Court of Human Rights (ECHR).

In Turkey, the dissolution of political parties has occurred surprisingly often, on the basis of a constitution and Political Parties Law that prohibits parties that run on any platform that runs counter to “Turkish national identity” or Turkish territorial integrity.<sup>64</sup> While the European Court of Human Rights has rejected a number of party bans, such as those of the Turkish Communist Party and Kurdish separatist parties, a recent set of political party dissolution cases created an interesting departure from this line by the ECHR. In the *Refah Partisi* case, the question arose as to whether a mass-based Islamist party that evinced a commitment to sharia law could be dissolved by the Turkish government on the grounds that it was a threat to Turkey’s identity as a secular state.<sup>65</sup> Though the Turkish Constitutional Court’s decision to dissolve the party relied in part on the Refah Partisi Party’s implicit endorsements of violence and jihad, the ECHR decision dealt solely with the tension between the party’s platform and the values of liberal democracy.<sup>66</sup> The Court strongly affirmed that the principles of Refah Partisi’s platform—and those of sharia law generally—were fundamentally incompatible with the European Convention, and upheld the Turkish Court’s decision.<sup>67</sup> I examine the Turkish cases as addressed by the ECHR in more detail Section III, *infra*.

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<sup>62</sup> *Id.*

<sup>63</sup> Ley Orgánica de Partidos Políticos [Organic Law of Political Parties], (L.O.P.P. 2002, 12756), art. 9 (Spain), <http://www.elpais.es>. Prohibited activities include: promoting, justifying or excusing assaults against the life or the integrity of persons ... inciting, bringing about or legitimizing violence as a means for the achievement of political objectives ... politically complementing and helping the action of terrorist organizations for the achievement of their ends of subverting constitutional order or gravely altering public peace ... giving express or tacit political support, legitimizing terrorist actions or excusing and minimizing their significance. *Id.* art. 9(2)(a)-(c), (3)(a).

<sup>64</sup> Turk. Const. pmb., *translated* in 18 Constitutions of the Countries of the World: Turkey 1 (Gisbert H. Flanz ed., Omer Faruk Genckaya trans., 2003).

<sup>65</sup> Refah Partisi (Welfare Party) v. Turkey, 35 Eur. H.R. Rep. 56 (2002).

<sup>66</sup> *Id.* at 91.

<sup>67</sup> *Id.*

## 2. Contemporary “transitional” democracies

The closest analogous cases to the post-conflict societies with which this paper is concerned are other states that have recently emerged from authoritarian rule and civil war. In these conflict-prone transitioning democracies, where ethnic division supplies a constant threat of upheaval and political instability, regulation of the political parties’ participation in the electoral arena has been used as a strategy for preventing parties from coming to power that are likely to exacerbate rather than mitigate conflict.

Party bans are a tool most commonly seen in African countries with long histories of ethnic strife. Unlike in Western democracies, which tend to enact bans only with respect to parties that explicitly espouse antidemocratic or extremist ideologies, there is a strong tradition in Africa of banning any parties organized along the lines of brotherhood, clan, community, ethnicity, faith/religion; gender, language; professional group; region; race; sect; section; social condition / social or economic status; and tribe.<sup>68</sup>

There are several categories of party bans that target various aspects of party organization: 1) party program; 2) party symbols; 3) party organization; 4) and party membership.<sup>69</sup> For example, The Constitution of Tanzania, though it enshrines freedom of association and expression, prohibits the registration of any party and association, which, “according to its constituency or policy”, aims at “promoting or furthering the interests of any religious faith or group; any tribal group, place of origin, race or gender; only a particular area within any part of the United Republic”.<sup>70</sup> Similarly, the Ghanaian constitution requires that a political party’s “name, emblem, colour, motto or any other symbol ha[ve] no ethnic, regional, religious or other sectional connotations or gives the appearance that its activities are confined only to a part of Ghana”.<sup>71</sup> Constitutional and legislative proscriptions against ethnic parties have led to the denial of registration to 43 parties in Africa, with an additional eight ethnic parties banned from participation in politics.<sup>72</sup> The justifications for such extreme restrictions on the parties range from Islamist platforms to secessionist aspirations to merely being ethnic in nature. In most cases, prohibitions on party activity stem from a recent history of civil war, the memory

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68 Matthijs Bogaards, Comparative strategies of political party regulation, in *Political Parties in Conflict Prone Societies*, supra note \_\_, at \_\_.

69 Id. at \_\_.

70 Tanzanian Const., Article 22(2) (1995).

71 Ghanaian Const. Article 55, clause 7(c) (1996).

72 Bogaards at \_\_.

of which threatens constantly to reignite the spark of ethnic hatred. The Constitution of the Democratic Republic of the Congo, the site for one of the most violent and bloody conflict in recent human history, prohibits “The identification of a party or political group with a particular race, ethnic group, sex, religion, sect, language, or province”,<sup>73</sup> while in Rwanda, the Hutu-dominated *Mouvement Démocratique Républicain* (MDR) was banned for its “divisionist” ideology, stemming in part from the MDR’s complicity in the 1996 genocide and mass murder of Tutsis and moderate Hutus.<sup>74</sup>

One caveat to the use of party bans in many African countries is that these are countries that have for the most part only tenuous commitments to democracy, and have used the mechanism of the party ban as a way of repressing minority groups. The potential for abuse of the party ban—i.e., its use by a government to further entrench its own power—makes it a highly controversial tool from the perspective of democratization. Organizations such as Human Rights Watch criticize the use of party bans in societies with little experience with pluralism and political competition, arguing that prohibiting parties facilitates the return to one-party rule.<sup>75</sup> It is true that in many African countries whose experience with government can be traced from colonial to authoritarian, regulation by the party-in-government often serves ends that are anti-democratic rather than protective of democracy. The point remains, however, that in the constitutional moments of the democratization process in many African countries, those countries fashion political party regulations with the idea of that parties may abuse the process very much in mind. Moreover, courts in many African countries that evince seemingly weak commitments to democratic governance—such as Zimbabwe—have actually acted quite protectively towards the associational and expressive rights of parties where those parties are promoting interest aggregation, articulation and political competition.<sup>76</sup> Thus, ethnic party bans combined with judicial review of abusive treatment of opposition political parties may be an

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73 Const. of Dem. Rep. of Congo, Art. 22.

74 Bogaads at \_\_\_.

75 See, e.g., HUMAN RIGHTS WATCH, *MONOPOLIZING POWER: EGYPT’S POLITICAL PARTIES LAW*, 14-16 (2007). HUMAN RIGHTS WATCH, *HOSTILE TO DEMOCRACY: THE MOVEMENT SYSTEM AND POLITICAL REPRESSION IN UGANDA* (1999).

76 In the Zimbabwean case of *United Parties v. Minister of Justice, Legal and Parliamentary Affairs & Others*, 1998 (2) BCLR 224 (ZS), the party opposing the ruling majority party ZANU-PF brought a constitutional claim alleging that law funding political parties was unconstitutional because only ZANU-PF qualified under the requirements. The Supreme Court of Zimbabwe issued a ringing affirmation of the necessity of political parties to a democratic society, arguing that “political parties contending for ascendancy should not be subject to legislative measures that limit their capacity to engage in dialogue and communicate arguments and opinions to enable the populace to make informed judgments as to how they should be governed,” and striking down the law as unconstitutional. See Fombad, *supra* note \_\_\_ at 33.

effective means of balancing the powder keg of ethnic conflict with the necessity of associations that are autonomous from the state.

Identity-based party bans are seen also in the European democratic experience. Bulgaria, looking perhaps to the ethnic chaos wrought by the break-up of the former Yugoslavia, outlaws ethnic political parties and permits only “ethnically-neutral” political institutions (though this ban has remained largely unenforced with respect to the party that represents Bulgaria’s Turkish minority.)<sup>77</sup> Albania and Macedonia—both places with strong experience of ethnic conflict—<sup>78</sup> also exhibit varieties of ethnic party bans.

### **Part III: International law and anti-democratic political parties**

In this section, I examine the international legal framework for political party regulation. The increased involvement of IOs in democratization efforts has ostensibly showcased the influence of the international human rights regime developed after World War II—a regime that enshrined civil and political rights and codified an emerging norm of democracy.<sup>79</sup> In reality, however, even the aspirational, universalist dictates of international law recognize the threat posed by anti-democratic political parties in a way that real-world democratization efforts have not. Here, I lay out the applicable international legal norms to demonstrate the legality, and the considerable flexibility, accorded to restrictions on the rights of political parties.

#### *a. International treaties*

The two comprehensive human rights treaties that deal most closely with the rights related to the formation and activity of political parties (and the limits thereof) are the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Both were drafted immediately after World War II, and both were born in the shadow of Fascist parties rising to power through the democratic process.<sup>80</sup> Article 25 of the ICCPR and Article 21 of the Universal Declaration address the right of political participation, guaranteeing

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<sup>77</sup> Elena Baylis, *Beyond Rights: Legal Process and Ethnic Conflicts*, 25 *Mich. J. Int’l L.* 529, 533 n.3, n.6 (2004).

<sup>78</sup> Bogaards, *supra* note \_\_ at \_\_.

<sup>79</sup> See generally Thomas Franck, *The Emerging Right to Democratic Governance*, 86 *Am. J. Int’l L.* 46 (1992) (arguing that the democratic governance has reached the status of entitlement under international law.)

<sup>80</sup> Gregory H. Fox & George Nolte, *Intolerant Democracies*, 36 *Harv. L. Rev.* 1, 40 (1995).

the rights to take part in government, to vote and to be elected, and to have equal access to public service.<sup>81</sup> The rights to form political parties are dealt with in Article 20 of the Universal Declaration, which states that “Everyone has the right to freedom of peaceful assembly and association,” and that “No one may be compelled to belong to an association”<sup>82</sup>; and Article 22(2) of the Political Covenant, which reads:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.<sup>83</sup>

The language reveals that both rights are not unqualified. In other provisions of the ICCPR, the rights to public access to criminal trials, assembly, privacy, and freedom of religion and beliefs are limited by a clause that permits their restriction “when necessary in a democratic society.”<sup>84</sup> While the rights to vote and to participate in elections are not limited by the “democratic society” clause, they also may be restricted subject to a test of reasonableness.<sup>85</sup>

Article 5(1) of the ICCPR also contains language that is applicable to the problem of regulating groups that themselves pose a threat to democratic freedoms. The provision holds that

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.<sup>86</sup>

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<sup>81</sup> Universal Declaration on Human Rights, G.A. Res. 217A, Art. 21 [hereinafter UDHR] (“(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives; (2) Everyone has the right of equal access to public service in his country; (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”); International Covenant on Civil and Political Rights, Art. 25, opened for signature Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 [hereinafter ICCPR] (“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.”)

<sup>82</sup> UDHR, Art. 20.

<sup>83</sup> ICCPR, Art. 22(2).

<sup>84</sup> Fox & Nolte, *supra* note \_\_ at 38.

<sup>85</sup> *Id.* at 39.

<sup>86</sup> ICCPR Art. 5(1) (“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”)

Similar language appears in Article 30 of the Universal Declaration.<sup>87</sup>

The *travaux préparatoires* to the Universal Declaration and the ICCPR reflect a concern with preserving democracy from groups who use it to achieve anti-democratic ends, again with the memory of Nazism and Fascism in mind. A French delegate summarized the need for democracies to maintain mechanisms of self-preservation against these groups: “[t]he edifice of liberty which was erected in the Covenant must not be capable of being used against liberty itself”.<sup>88</sup>

The ability of groups (namely, political parties) to engage in free expression is also subject to limitations when it comes to advocacy of national, racial or religious hatred. Article 20 of the ICCPR places an affirmative obligation upon states to prohibit such advocacy and propaganda for war; while the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) requires states to “declare illegal and prohibit organizations” that promote or incite racial hatred.<sup>89</sup>

Regional human rights instruments confirm a circumscribed right to form political parties where those political parties pose a threat to the fundamental character of democracy. Article 11 of the European Convention on Human Rights provides for the right of peaceful assembly and freedom of association with others, but allows for restrictions that are “necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”<sup>90</sup> Article 17 of the Convention mirrors Article 5 of the ICCPR, stating that the rights contained within it may not be used to denigrate other rights.<sup>91</sup> The African Charter on

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<sup>87</sup> UDHR art. 30 (“Nothing in this Declaration may be interpreted as implying for any State, group or person 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.”)

<sup>88</sup> Fox & Nolte, *supra* note \_\_ at 41 (quoting French delegate, available at U.N. Doc. E/CN.4/SR.123 at 8). The French delegate argued that the article which became Article 30 in the Universal Declaration had a preventative character to it, as the drafters “consider[ed] that it was preferable to prevent the final act which, in general, was the outcome of a long activity. In the case of nazism and fascism, for example, the activity had been evident for many years. If the rights and the freedoms laid down in the declaration of human rights were really to be protected, provision should be made to prevent, at the very beginning, any activity aimed at their destruction.” *Id.*

<sup>89</sup> Fox & Nolte, *supra* note \_\_ at 41-42.

<sup>90</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms art. 11, para. 2, Nov. 4, 1950, 213 U.N.T.S. 221 (“No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”)

<sup>91</sup> *Id.*, art. 17 (“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth

Human and People's Rights provides every individual with a right of association, provided he abides by the law,<sup>92</sup> and freedom of association, "subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."<sup>93</sup> The African Charter also guarantees rights of political participation similar to the ICCPR and the Universal Declaration.<sup>94</sup> Article 15 of the American Convention on Human Rights provides the right of assembly, without arms, with the "democratic society" clause and the proviso that restrictions may be enacted in "the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others."<sup>95</sup> Article 16 guarantees the right to freedom of association, subject to the same set of qualifications.

Thus, the major human rights instruments all obliquely address the problem of the tools of democracy's self-preservation from anti-democratic forces, holding that all states may legitimately limit the rights to assembly, association and expression when necessary to protect the character of a democratic society or in the interest of some compelling governmental interest, with incitement to violence or hatred a per se governmental interest. The treaties themselves do not, however, define "democratic society" or provide the scope of governmental power in imposing restrictions. For that we must turn to how the treaties have been interpreted by the relevant international tribunals.

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herein or at their limitation to a greater extent than is provided for in the Convention.")

<sup>92</sup> Organization of African Unity, African (Banjul) Charter on Human and People's Rights, art. 10, June 27, 1981, 1520 U.N.T.S. 217 ("Every individual shall have the right to free association provided that he abides by the law. 2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.")

<sup>93</sup> *Id.*, art. 11 ("Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.")

<sup>94</sup> *Id.*, art. 10; art. 13 ("Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law; Every citizen shall have the right of equal access to the public service of his country; Every individual shall have the right of access to public property and services in strict equality of all persons before the law.")

<sup>95</sup> American Convention on Human Rights, art. 15, Nov. 22, 1969, 1144 U.N.T.S. 123 ("The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others."); art. 16 ("Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes; The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others; The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.")

*b. Statements of international judicial bodies*

*i. Human Rights Committee*

The Human Rights Committee is the UN body created by the First Optional Protocol to the ICCPR. Under the Protocol the Committee monitors state compliance with the ICCPR and may hear individual complaints. The Committee has issued several General Comments on the interpretation of the ICCPR, and decisions addressing the implementation of the provisions ICCPR that relate to freedom of association, assembly and expression and the right of political participation.

Importantly, the HRC has addressed the relationship of the rest of the ICCPR to Article 5, which holds that the ICCPR may not be read to permit groups to engage in the destruction of rights it protects. In one 1984 decision, the Committee held that the organization of a Fascist party in Italy was “removed from the protection of the Covenant by article 5 thereof.”<sup>96</sup> In a General Comment on Article 25, The Committee also states that Article 5 prevents the use of the right to political participation as a means of denigrating any other ICCPR-enumerated right.<sup>97</sup>

The scope of government action under the “abuse clause” of Article 5, however, is not unlimited. Crucial to the inquiry as to whether a government is justified under Article 5 in restricting the activity of a political group are the standards of *reasonableness* and *necessity*, both of which are contained in the analogous provisions across all of the aforementioned human rights treaties.<sup>98</sup>

Decisions of the Human Rights Committee suggest that there may be a spectrum along which various restrictions on political parties are assessed. The Committee has incorporated the concept of proportionality into the “necessity” standard, holding for example in a freedom of expression case that the restrictive law must be appropriated and adapted to achieving the stated end.<sup>99</sup> Certain requirements for voter registration or election to office (such as age or

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<sup>96</sup> Fox & Nolte, *supra* note \_\_ at 42.

<sup>97</sup> Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996) [hereinafter “General Comment 25”].

<sup>98</sup> Fox & Nolte note that in the ICCPR, the “necessity” standard is attached to “civil rights”, which are rights from state interference; while the “reasonableness” standard is attached to rights related to democratic governance, such as the conduct of elections and participation in public affairs. This distinction, they argue, signifies that that various types of restrictions may be reviewed according to different standards—for example, the exclusion of political parties from elections (which falls under the right to participate in democratic governance) may be treated differently than a total party ban (a restriction on the right to associate). Fox & Nolte, *supra* note \_\_ at 45-46.

<sup>99</sup> Sarah Joseph, Jenny Schultz, Melissa Castan, Elizabeth Evatt, eds., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 392 (2000)[hereinafter “ICCPR: Cases, Materials and

nationality) are reasonable;<sup>100</sup> while restrictions which tend towards the silencing of all political opposition and the creation of a one-party state are unreasonable.<sup>101</sup>

The operation of Article 5 also raises the specter of “national security” or the “public order” being used as a vehicle for restricting civil and political rights, on the theory that the activities of subversive political parties might threaten democratic values—“ [n]ational security’ is invoked as a limitation when the political independence or the territorial integrity of the State is at risk.”<sup>102</sup> Committee cases suggest that “detailed justifications” are required of States that restrict ICCPR rights for purposes of national security or public order; and that some immediacy of the threat must be shown.<sup>103</sup> Moreover, the treaties “warn governments not to limit rights more strictly than allowed by the agreements themselves.”<sup>104</sup>

Lastly, concerns with due process underpin some of the Committee’s decisions on state-imposed restrictions on the exercise of ICCPR rights. In Concluding Comments on Belarus and Lithuania, the HRC criticized burdensome “registration procedures” for non-governmental organizations and trade unions, and implied that procedural formalities for recognizing groups must not be so onerous as to substantively restrict the freedom of association.<sup>105</sup>

## ii. The European Court of Human Rights

European judicial institutions have developed fairly significant case law on the problem of anti-democratic political parties. The European Court of Human Rights is the chief mechanism that enforces the European Convention through individual complaint procedures. An individual may appeal from the highest court of his country to the ECHR for violations of the Convention.

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Commentary”].

<sup>100</sup> General Comment 25, para. 10.

<sup>101</sup> *Bwalya v. Zambia*, cited in Fox & Nolte, *supra* note \_\_ at 49. See also *Mukong v. Cameroon*, cited in ICCPR: Cases, Materials and Commentary 403, in which the Committee found that the state’s repression of an individual’s opposition to a one-party state was not justified by reference to the “public order” or stability; and *Pietraroria v. Uruguay*, cited in ICCPR: Cases, Materials and Commentary 502 (15-year deprivation of political rights including right to vote to members of opposition parties in violation of Article 25).

<sup>102</sup> ICCPR: Cases, Materials and Commentary 400 n.40.

<sup>103</sup> *Id.* at 400.

<sup>104</sup> John H. Knox, *Horizontal Human Rights Law*, 102 Am. J. Int’l L. 1, 11 (2008)(citing to ICCPR, *supra* note \_\_, Art. 5(1); European Convention, *supra* note \_\_, Art. 17; American Convention, *supra* note \_\_, Art. 29).

<sup>105</sup> *Id.* at 433.

In a series of cases, the ECHR has dealt with state-imposed restrictions on political participation that ranged from onerous requirements for candidates for political office to outright dissolution of political parties.<sup>106</sup>

The most famous set of cases that the ECHR has dealt with under Article 11 arise out of Turkey. In *United Communist Party of Turkey v. Turkey*, the ECHR rejected the Turkish government's argument that a ban of the Turkish Communist Party was justified because the Party's program of non-Turkish cultural and linguistic activities was designed to create minorities, "to the detriment of the Turkish nation." The ECHR also overturned repeated decisions by the Turkish Constitutional Court upholding the dissolution of Kurdish separatist parties. The ECHR's reasoning in those cases is instructive in understanding the scope of Article 11 of the European Convention. The Court held that a political party's mere advocacy of the right of self-determination did not merit a party ban; and appeared to create a sphere of protection for separatist platforms so long as they did not extend to incitement to violence or violence itself.

However, as discussed in Part II, *supra*, the ECHR took a different approach to the Islamic Rehaf Partisi party, holding that the principles of its platform—and those of sharia law generally—were fundamentally incompatible with Article 11 of the European Convention.<sup>107</sup>

In distinguishing between the Turkish cases, one obvious difference between the two types of cases may have been the potential for realization of the threat—as Professor Issacharoff points out, the Islamist party was a majority party with broad popular appeal, and the Communist and Kurdish parties were minority parties that stood no real chance of dominating the government.<sup>108</sup> No doubt the many statements made by party officials approached incitement to violence,<sup>109</sup> which were cited by the ECHR, also played a part in its decision. Both of these

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<sup>106</sup> In a case involving Latvia after Latvia had obtained independence from the Soviet Union, the ECHR struck down a Latvian law that required all candidates for office to demonstrate a minimum level of Latvian language proficiency. This regulation had the effect of excluding the Russian language minority population of Latvia, which consisted of almost 40% of the population. The Court held that the rule did not comply with the dictates of basic procedural fairness. See *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443. In another Latvian case implicating the Soviet legacy, the Court held that the Government's denial of an application to participate in a parliamentary election on the basis that the candidate had previous involvement with the dissolved Communist Party, was in violation of her Article 11 rights (which provides for the right of peaceful assembly and freedom of association) as the party no longer posed any threat to a "democratic society". The Court applied to the principle of proportionality, stating that the government's restriction was not tailored to meeting the invoked need for national security. See *Zdanoka v. Latvia*, App. No. 58278/00 (Eur. Ct. H.R. 2006)(unpublished), available at <http://www.worldii.org/eu/cases/ECHR/2006/231.html>.

<sup>107</sup> Issacharoff, *supra* note \_\_\_, at 1445.

<sup>108</sup> *Id.*

<sup>109</sup> See Adrien Katherine Wing & Ozan O. Varol, *Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example*, 42 *Tex. Int'l L.J.* 1, 8 (2006).

factors contributed to a sense of the immediacy of the threat of an anti-democratic party disabling democracy from within—despite the fact that there was no legal proof offered that such a threat was imminent.<sup>110</sup> Another subtle distinction between the Communist/Kurdish cases and the Islamist party cases may be in the nature of the substantive platforms of the parties. In the Communist and Kurdish cases, the values espoused—multiculturalism and Kurdish self-determination, respectively—are themselves considered democratic values; while sharia law was regarded by the Court as incompatible with democracy.

This sampling of ECHR cases illustrates an approach not dissimilar to that of the Human Rights Committee: a concern with due process, the application of “reasonableness” as to political rights and proportionality-driven “necessity” as to civil rights, and the assessment of the likelihood or immediacy of the threat to democracy (including whether that threat consists of potentially violent acts).

*c. Legal standards in post-conflict societies*

Human rights treaties are not the only source for legal norms relating to the restrictions that can be placed on political parties in democratic societies. More importantly, the applications of human rights treaties that have been discussed have been with respect to established democracies exhibiting checks and balances and functioning legal and political institutions. These are not characteristic of post-conflict societies, and the tension between allowing political parties to flourish and protecting a weak system from anti-democratic forces is a very different one in those places.

Peace agreements are the founding documents of post-conflict reconstruction. Defined loosely as “documented agreements between parties to a violent internal conflict to establish a cease-fire together with new political and legal structures,”<sup>111</sup> they enshrine the values that will guide an emerging democratic society going forward, and they proscribe the nature of the institutions that will govern that society. Peace agreements are the only expression of the consent of the parties involved in the conflict before elections take place or a constitution is drafted, and as such are the main reference points for democratic transition.

The right to democratic governance and international human rights commitments are among the first provisions established in peace agreements—a logical result, as it is important to

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<sup>110</sup> Issacharoff, *supra* note \_\_ at 1445.

<sup>111</sup> Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 Am. J. Int'l L. 373, 374 (2006).

immediately establish both in societies which are emerging from authoritarian rule or civil war. However, several peace agreements also reflect the concomitant need for security and stability and recognize that in unstable post-conflict societies, an emerging democratic process can be appropriated and misused by anti-democratic elements.

One of the UN's first pro-democratic interventions occurred in Namibia after that country's decolonization in the late 1980s. The UN Transitional Assistance Group (UNTAG) in Namibia played a supervisory and consultative role that was influential in Namibia's transition to democratic political system.<sup>112</sup> One of UNTAG's most important functions was to assist in the negotiation of the Namibian Constitution, which mirrors international human rights instruments in its invocation of "a democratic society", and, importantly, subjects political parties to "such qualifications prescribed by law as are necessary in a democratic society."<sup>113</sup>

The UN played a similarly influential part in brokering the Paris Peace Accords, which established the new political order in post-war Cambodia. The Accords lay out a comprehensive set of human rights guarantees, including the right to political participation, freedom of assembly, and freedom of speech.<sup>114</sup> The peace agreement also contains an "abuse clause" analogous to Article 5 of the ICCPR, stating that parties competing in the supervised elections must adopt platforms "consistent with the principles and objectives of the Agreement on a comprehensive political settlement,"<sup>115</sup> those principles being commitments to a democratic society.

That same year the UN was also involved in the drafting of a peace agreement in Mozambique, which had been racked by a decade of civil war. In Mozambique, the newly formed political parties were direct offshoots of the rebel and armed groups that had participated in the conflict. The General Peace Agreement for Mozambique is more explicit in its statement that the democratic process may not be subverted for anti-democratic ends, providing that freedoms of expression, association and political activity "shall not extend to the activities of unlawful private paramilitary groups or groups which promote violence in any form or terrorism, racism or separatism."<sup>116</sup> The GPA also provides that the UN would only participate in

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<sup>112</sup> See Henning Melber, "The UN and Namibia's Transition to Democracy," in *The UN Role in Promoting Democracy*, *supra* note \_\_ at \_\_.

<sup>113</sup> NAMIB. CONST. art. 17(1).

<sup>114</sup> Final Act of the Paris Conference on Cambodia, U.N. GAOR, 46th Sess., Annex, at 3, U.N. Doc. A/46/608/Annex (1991), reprinted in [31 I.L.M. 174, 198](#) (1992).

<sup>115</sup> *Id.*

<sup>116</sup> General Peace Agreement for Mozambique, U.N. Doc. S/24635/Annex, at 13 (1992).

monitoring elections where the political parties had platforms that were “non-regional, non-tribal, non-separatist, non-racial, non-ethnic and non-religious.”<sup>117</sup>

Peace agreements for more recent conflicts embody the concern with abuse of the democratic process, but also reflect the need to politically integrate deeply divided societies. For example, the Rambouillet Accords, which established peace in Kosovo, bar from standing for political office only persons who were concurrently on trial in the International Criminal Tribunal for the Former Yugoslavia, and persons refusing to renounce violence.<sup>118</sup>

Thus, major human rights instruments and the language of peacekeeping and peacebuilding all address the problem of the tools of democracy’s self-preservation from anti-democratic forces, holding that all states may legitimately limit the rights to assembly, association and expression when necessary to protect the character of a democratic society or in the interest of some compelling governmental interest, with incitement to violence or hatred a per se governmental interest. The treaties themselves do not, however, define “democratic society” or provide the scope of governmental power in imposing restrictions. The result is that the regulation of political parties must be a line drawing exercise between the rights of participation, association and speech on the one hand; and the vague values of “democratic society” on the other. While numerous international tribunals and courts have engaged in precisely this line-drawing exercise with respect to human rights claims, “rights-balancing” is much more difficult proposition in the context of regulating political parties who pose a very clear and present threat to the nascent democratic order. Thus, though international law has clearly provided the legal basis for circumscribing the rights of political parties where those parties run counter to democratic values, how precisely to regulate those parties *ex ante* provides a thorny line-drawing problem.

Finally, international law governs the activities of *states*. The cases this paper addresses are of international organizations acting as de facto states in regulating political parties in post-conflict societies. This is an important point. The historical and comparative context for political party regulation illustrates that states have been unafraid to restrict the activities of parties that threaten democratic stability. But international organizations, in addressing the problem of ethnic or nationalist political parties, have adopted the universal and aspirational aspects of human rights norms *without* concomitantly recognizing that even international law protects against abuse of the democratic system. It is understandable that in societies emerging out of violent civil war or repressive authoritarian rule, democratic values such as freedom of

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<sup>117</sup> *Id.* at 13.

<sup>118</sup> Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet, Feb. 23, 1999) art. I(9),.

speech and freedom of association have a deep emotional resonance. But international organizations, by adopting the rights-oriented norms of human rights law without the concomitant procedural democracy-oriented norms, have come to impose a version of democracy in post-conflict societies that is broader and more idealistic than the one contemplated even in established democracies or by international law. This version ignores the functional role political parties play in building democracies, and the way in which comparative constitutional law and international law enshrine that role, as I shall argue in the next section.

#### **Part IV: The Functional Model of Political Party Regulation**

In Part I, I described the idealized functions of political parties: interest aggregation and articulation, supply of political competition, coordination of governmental activity, and mediation between citizens and the state. In this section, I argue that how effectively political parties perform these functions is contingent on the type of party at issue. Political parties in different societies are very different animals, and the assumption that they will behave in the fashion required to organize a democratic society breaks down with respect to parties that arise not out of ideological or policy differences, but much more highly volatile factors such as group identity.

The degree to which political parties act to aggregate interests, for example, is dependent on the diversity of interests represented in the group; a party organized a very narrow ideology or identity will be weaker at fulfilling the functions of interest aggregation or social representation or integration (though it may be very good at mobilization). The functions described above are better understood through distinguishing between the different species of political party. Scholars of political parties have created numerous classifications of parties that map the party's internal characteristics onto their ability to promote political competition, aggregate interests, organize government and act as intermediary institutions. One useful typology developed by Diamond and Gunther distinguishes between five main types of parties. The parties they describe that I am most interested in here are the mass-based party,<sup>119</sup> the ethnicity-based party, and the electoralist party.

Electoralist parties hew most closely to the "ideal type" described above. They are "organizationally thin" except during election periods;<sup>120</sup> their overarching purpose is to

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119 Diamond and Gunther, *supra* note \_\_, at 9.

120 *Id.* at 26.

mobilize support to win elections and govern. Thus, electoralist parties tend to be non-ideological, as they seek to capture as many different types of interest groups as possible.<sup>121</sup> For this reason, their interest aggregation and social representation functions are much broader than the other types of parties identified by Diamond and Gunther, though the social integration fostered by such parties is low when citizen participation and engagement is weak.<sup>122</sup> But the focus on electoralist parties on winning elections means that they embody the promotion of political competition, and their end goal—forming the basis of government—reinforces their conformity with the ideal type.

Electoralist parties are, of course, only one species, and a rather rare one at that. Societies transitioning into democracy are much more likely to be characterized by clientelistic, mass-based or ethnicity-based parties. And those parties will behave very differently in terms of the functions described above.

Mass-based parties<sup>123</sup> arise out of a particular ideology or belief, are characterized by active membership, and are participants in several spheres of social life. Mass parties arose out of the mobilization of the worker class in Europe in the nineteenth and twentieth centuries, but more broadly describe parties organized unifying beliefs such as socialism, religion, or nationalism. Mass-based parties can further be classified along a continuum of *pluralism*, with some mass-based parties displaying more commitment to the democratic “rules of the game” and others pushing for the transformation of the system to one more in line with their ideology.<sup>124</sup> Thus, the functional analysis varies between, for example, nationalist parties (which are less committed to the rules of the game) and class-based parties (which may be more so).<sup>125</sup> Generally, however, mass-based parties aggregate only interests that are in line with its dominant ideology or belief system, and the issues around which it advocates and mobilizes are static from election to election. Mass-parties are effective at social representation because they can encapsulate a wide variety of social groups (as long as those groups display commitment to the party’s ideological goals), and can be effective at social integration depending on their level of pluralism.<sup>126</sup>

Ethnic parties exhibit party membership and voting patterns that are strictly defined in terms of ethnicity, and it appeals only to members within the particular ethnic group it

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121 *Id.* at 26.

122 *Id.*

123 *Id.* at 16.

124 *Id.* at 16-17.

125 *Id.*

126 *Id.* at 17-18.

represents. The programmatic agenda and goals of ethnic parties revolve solely around advancing the interests of that group.<sup>127</sup> The ethnic party thus plays a very narrow interest aggregation and social representation role, and correspondingly mobilizes a very narrow slice of the electorate. The ethnic party lies even farther outside the “ideal type” in terms of social integration—as Gunther and Diamond describe it, “The ethnic party’s particularistic, exclusivist, and often polarizing political appeals make its overall contribution to society divisive and even disintegrative.”<sup>128</sup>

Why does this distinguishing between these types of parties matter to the subject of how political parties should be regulated? In part, I argue that it is relevant because the hegemony of the idea that political parties are central to democracy is in part due to the assumption that *all* parties behave like electoralist parties. Those engaged in the democratization project in post-conflict societies have largely adopted the paradigm of the electoralist party in designing party systems and administering transitional elections. IOs have attempted to assist in party development and run the electoral sphere as though elections by themselves would lead existing political parties to behave according to the ideal type—facilitating political competition, offering real and distinct choices to voters, aggregating broad sets of interests, and fostering social representation and integration. But, parties that exhibit the features of ethnic and nationalist parties rather than electoralist parties are much less likely to fulfill those functions.

### *Political party and autonomy from the state*

If political parties are identified as intermediary institutions between the citizenry and the government, then it stands to reason that they must be accorded a sphere of autonomy from the state. Like other institutions of civil society—religious groups, trade unions, etc.—political parties are a buffer between individuals and the power of the state, acting to “counterbalance the state and, while not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, nevertheless prevent[ing] it from dominating and atomizing the rest of society.”<sup>129</sup> State interference in party activity creates the potential for the state to manipulate electoral outcomes, suppress dissenting viewpoints, and privilege certain interests over others. Thus, restrictions on parties by the state must necessarily be limited in order for

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127 Diamond and Gunther, at 23.

128 *Id.* at 24.

129 Ernest Gellner, *Conditions of Liberty* 5 (1994), cited in Samuel Issacharoff, 101 *Colum. L. Rev.* 274, 295 (2001) (arguing that political parties, as institutions of civil society, must be insulated from state power.)

parties to effectively perform the functions of competition, aggregation, representation and integration.

The contours of these restrictions, however, depend heavily on party performance of the desired functions. This relationship can be defined in two ways: one, the extent to which restrictions are prohibited depends on how well parties actually promote competition, aggregate interests, and represent/integrate society; two, the restrictions themselves can be targeted towards spurring parties to better fulfill their functions. In other words, a society may be more tolerant of state restrictions on party behavior where the parties fail to behave like “ideal type” parties; and the restrictions can be designed so as to provide incentives for that behavior.

Societies with electoralist parties tend to be less permissive of state regulation of political parties. This is typified in the United States, where First Amendment protections of the right of expression and the right to associate are construed to apply broadly to internal party activities. But electoralist parties also participate in political systems that are closer to “marketplace” models, where they are competing for, and directing their messages towards, the median voter. Fuller party autonomy in those settings is crucial for keeping democratic competition robust.<sup>130</sup> The same assumption does not hold for parties that are organized around ideology or identity (i.e. mass-based and ethnic-based ones). Because such parties are less motivated by the need to maximize votes and more motivated by the need to further their ideology- or identity-driven agendas, granting them fuller party autonomy may actually *impede* the democratic goals of competition, aggregation, representation and integration.

The autonomy calculus for political parties thus depends on the types of party at issue, and the ability of that party to carry out its democratic functions. However, the electoralist party paradigm has come to dominate the thinking of international organizations, and has led to a corresponding dominance of the idea that the primary norm for political parties is autonomy from the state, along with the concomitant rights of unqualified political participation and free speech.

### *Towards a functional analysis of political parties in post-conflict societies*

The threats posed by political parties to fragile democracies described in Part I—the potential for use of the electoral process to settle scores and resolve grievances; the possibility that once an ethnic party takes power, it will not cede power through electoral means; the use of

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<sup>130</sup> See Nathaniel Persily, *Toward a Functional Defense of Party Autonomy*, 76 NYU L. Rev. 750, 794 (2001).

the campaign period to ignite tribal resentments and grievances—become clear when viewed through the perspective of the functional model I lay out here. The factors that give rise to group identity often run counter to the democratic norms that underpin a system of political contestation; and these factors have little to do with the functions of “ideal-type” political parties.

### 1. *The salience of group identity*

Parties organized around group identity are unlikely to display the “cross-cutting cleavages” that are essential for political parties to perform their aggregation, representation and integration functions. Ethnic nationalist parties in particular display several characteristics that in a volatile electoral setting are likely to lead to less political stability rather than more.

In his classic study of ethnic groups and conflict, David Horowitz explains that the goals and strategies of ethnic political parties are narrowly limited to the interests of the ethnic groups they represent.<sup>131</sup> The existence of ethnic political parties depends solely on the allegiance of a particular ethnic group, and on the exclusion of other groups from membership. As Horowitz argues, “The very concept of party is challenged by a political party that is ascriptive and exclusive.”<sup>132</sup> Rather than representing the “conversion of segmental interests into public interests” and creating bonds between various social forces, ethnic political parties stand in opposition to groups deemed antithetical to their ethnically-defined interests.<sup>133</sup> Thus, ethnic parties do not play either the interest aggregation function, because the only interests they represent are those of the narrowly defined group; or the mediation function, because strong “intergroup cleavages” impede mechanisms for social conflict resolution.<sup>134</sup>

Ethnic political parties also fail to perform the crucial role of facilitating voter choice. The conventional view on parties—i.e., the view that assumes the “electoralist party” model—of parties as mechanisms for social choice is incompatible with parties that are defined by one, exclusive social group in which group membership is involuntary.<sup>135</sup> Voters cannot choose to belong to ethnic political parties unless they are of the same ethnicity, thus undermining the rationale for parties as goods in an electoral market.

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131 *See generally* Donald L. Horowitz, *Ethnic Groups in Conflict* (1985).

132 *Id.* at 296.

133 *Id.* at 296-297.

134 *Id.* at 297-298.

135 *Id.* at 298.

Ethnic parties that also display characteristics of mass-based parties are even more problematic from the perspective of democratization. For example, ethnic nationalist political parties combine narrow, ethnically-defined membership with separatist or irredentist demands. Secessionist conflicts are products of both ethnic and territorial strife, leading to parties that are not only inflexible and static (and unwilling to appeal to groups outside of the ethnic nationalist identity) but which also threaten the physical integrity of a newly formed state. As I shall examine in more detail in Part V, Bosnia's post-conflict political parties were both ethnic and nationalist in nature, creating a major problem for an international community that hoped that the country's first national elections after the war would result in a democratically elected and legitimate multi-party government that was representative of the interests of the polity. Instead, the political parties reinforced ethnic divisions and contributed to further tension by placing threatening nationalist rhetoric at the center of their campaigns.

As the Bosnia case study will demonstrate, post-conflict political parties create a major problem in terms of how the relationship between parties and the state should be conceived and regulated. The assumptions that traditionally militate in favor of fuller party autonomy do not apply because ethnic, nationalist or ethnic nationalist political parties are so far outside the electoralist paradigm that they fail to behave at all as the intermediary institutions that make democracy work. A better model for party autonomy will incorporate the very different purposes and functions of parties driven by identity or ideology, competing in an environment that looks less than market for voter choice and more like the continuation of ethnic conflict by other means.

## *2. Using the functional theory as a framework for analyzing party autonomy in the post-conflict context*

Conceiving of parties through the lens of functions problematizes a regulatory framework that is focused on rights and rights-balancing. The biggest failure of such a framework is that the orientation of these norms as rights set up in opposition to each other leads to confusing and inconsistent application as interpreters must balance individual freedoms against a vague definition of what is "necessary" in a "democratic" society (a definition that encompasses a whole range of possible policies.) A more "instrumentalist" approach to the individual rights of association and expression, in which those freedoms are conceived as necessary for furthering democratic governance rather than as "rights trumps", is a more useful way of understanding and applying human rights law to political parties.

The first question that must be asked in thinking about the boundaries of a party's rights to participation and expression is, what role is the party expected to play in a society? While this may appear a painfully obvious point, elections and party development often proceed in democratizing countries with the primary goal to transfer power to "legitimate", homegrown institutions as quickly as possible, without questioning whether those institutions are truly representative or capable of exercising political power. The focus in most cases is on electoral design—i.e., whether to adopt devices such as proportional representation or single-non-transferable voting—that will ideally lead parties towards more "electoralist" behavior, rather than on careful examination of the parties themselves. Once a particular electoral system has been chosen, more attention is paid to whether parties are complying with the rules of the game than to whether they are more broadly fulfilling the functions of an "ideal type" party—interest aggregation, representation, articulation and competition. I argue that a more dynamic, functional view of parties at this stage—one that recognizes, for instance, that an ethnic or nationalist party is going to behave as anti-competitively as possible regardless of the type of system within which they are acting. A more nuanced approach asks, what is the purpose of the party? Ethnic, nationalist, religious and other parties are not interest aggregators or "real" alternatives for voter choice; but they are mechanisms for the articulation and representation of specific interests. Recognizing that that is their primary function is the vital first step to developing a framework for regulation.

The second step is to think about party autonomy through the lens of the specific function the party fulfills. Because articulation and representation are the key purposes of identity-based parties, a rights analysis should ask how governmental action would burden those purposes and what countervailing social interests might support limitations on party's autonomy.<sup>136</sup> This function-oriented inquiry incorporates context-specific considerations that better take account of a society's historical and social conditions, and I argue is thus superior to more traditional means of weighing rights against the state's need to regulate. The functional analysis takes as its starting point the assumption that political parties as instrumental to furthering democratic values, and not in and of themselves the subjects of rights protection. The functional theory shines a light on how well parties are facilitating democratic governance through their unique relationship to the state—i.e. whether they are abusing their status as parties to exercise rights that impede competition.

This type of approach to political party regulation is found in several multi-party democracies, in various forms; functionality guides both the ex ante determination of which

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136 *Id.*

parties may participate in democratic competition,<sup>137</sup> and the policing of the limits of behavior and conduct of those parties.<sup>138</sup> The need for functionality in assessing the boundaries of parties is apparent in light of the threats, discussed earlier, posed by parties that develop along axes of ethnic identity: the possibility that they will use power to settle scores against rival groups; the danger of inflamed tensions during the election period; the incentive to maintain power through dismantling institutions of democratic competition.<sup>139</sup> A concern with these problems is present

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<sup>137</sup> Regulations that promote aggregation force parties to reach out to constituencies outside of their base. One strategy of aggregation is the use of electoral distribution requirements. One such type of measure is a requirement of national presence, which mandates that a party or candidate cannot win unless he/it draws a minimum number of votes from each region; another similar type of measure requires parties to field lists or candidates in all constituencies in order to take part in seat allocation. Party registration laws can also be designed so as to require parties to have organizational presences all over the country. Aggregation strategies create strong incentives for political parties to appeal to voters beyond their ethnic/religious/nationalist base. Such “spatial distribution rules” avoid the extreme measure of the party ban while spurring parties to aggregate and articulate broader sets of interests and promote more voter choice—in other words, to behave more like electoralist parties. Both the Tanzanian Constitution and its Political Parties Law condition party registration on demonstrating national presence. Twenty-two other African countries utilize electoral distribution requirements. Meanwhile, in Thailand, “new parties must establish a branch structure in each of four designated regions, and must show they have at least 5,000 members drawn from each region within six months of being registered.” While aggregation requirements can be used as a “soft ban” on political parties that rely mostly on localized support (as they likely are in Russia and Indonesia), they also represent an interesting mechanism for creating cross-cutting cleavages by integrating geographically-driven representation. Bogarads, *supra* note \_\_ at \_\_. Parties that must win elections in varying geographic regions are likely forced to account for a broader range of interest and incorporate more social groups than parties driven by identity. However, aggregation requirements may run into tension with the goal of promoting political competition if they are employed to suppress minority parties that cannot muster a national presence. Strategies of articulation are used to protect those minority parties. Articulation can occur through the creation of “communal rolls”, whereby a certain number of seats are set aside for a particular group who then vote for their own representatives in separate elections. Proportional representation is the best-known strategy for articulation; however, direct regulation of parties can also accomplish the same end by allowing more permissive standards for the entry of minority parties than for majority parties. In Slovenia and Romania, for example, fewer signatures are needed for minority parties to register. *Id.* at \_\_.

<sup>138</sup> The functional approach to party autonomy, and the relationship between party function and party regulation in the United States, has been fleshed out by Professor Issacharoff. As articulated by Issacharoff, the theory behind the functional approach to regulating American political parties relies heavily on the idea that parties are the conduits for political competition, and that politics is “a contested terrain in which political actors seek to devise a winning coalition strategy for electoral success.” In Issacharoff’s formulation, the role of the state is to prevent “anticompetitive” activity on the part of parties, in order to facilitate a more perfect political marketplace. Thus, state intervention is justified where they protect the ability of parties to fulfill their purpose of providing voters with clear and distinct alternatives. Professor Issacharoff focuses on the promotion of political competition as being the definitive function of political parties, with the representation of interest groups (in particular, the more partisan activists who are mobilized to act at election time) a vital element in creating real choices for voters. Professor Persily offers a similar defense of a functional approach to party regulation, emphasizing values of representation and competition to justify carving out a judicially-protected sphere for party autonomy. See Nathaniel Persily, *A Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. Rev. 750 (2001). See also Richard Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 Conn. L. Rev. 1525 (2003); Michael Kang, *The Hydraulics and Politics of Party Regulation*, 91 Iowa L. Rev. 131 (2005).

<sup>139</sup> See Part I, *infra*.

in both comparative constitutional law and international law, which preserve a space for even heavy-handed restrictions on the rights of groups subject to certain procedural and substantive limits of due process. I argue that the functional theory of parties animates the boundary between associational and expressive freedoms—the values of a democratic society—and the a democratic society’s means of self-preservation, by recognizing that parties are instrumental to, rather than the end-product of, democracy.

The implications of this theory are important from the perspective of the starting-point of democratization. If the presence of a multi-party system is treated as an indicator of democracy, rather than as a means of facilitating democracy, then a regulator’s focus will necessarily be on building political parties and moving as quickly to elections as possible, as well as providing those parties with fuller autonomy. If one begins with a functional theory that examines closely what kind of political parties are at issue, it does not follow that immediate elections and party autonomy are the first step.

I illustrate this argument in the next section, with a case study of political party regulation preceding Bosnia’s first post-conflict elections.

## **Part V: International organizations and political party regulation—A case study of Bosnia’s Electoral Appeals Subcommission**

Bosnia’s Electoral Appeals Subcommission, and its regulation of the political parties in Bosnia before the 1996 elections, provides important insights into the difficulties faced by international organization regulation of parties in deeply divided societies. The Bosnian parties were both ethnic and nationalist in character, and as such provide an opportunity to apply the functional theory in the context of adjudication by an international judicial body wrestling with the challenges of democratic transition. This section sets out the background to the Bosnia conflict and to the development of Bosnia’s ethnic nationalist parties, describes the Dayton framework and the organization of international bodies tasked with political reconstruction, and analyzes decisions of the EASC dealing with the expressive and associational rights of the political parties leading up to the country’s first post-conflict elections.

## 1. Background to the Bosnia Conflict

Post-conflict Bosnia is an example of a society emerging out of both authoritarian rule and virulent ethnic conflict; and as such encapsulates the bi-dimensional problems of democratization and transitional justice.

The genesis of the political parties problem in Bosnia lies in the political and ethnic history of the former Yugoslavia. Under the dictatorship of Josip Broz Tito, Yugoslavia was divided into six republics: Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro. Unlike the other five Republics, Bosnia had no majority ethnic group, consisting in 1991 of a population that was 43.5% Bosniac, 32.1% Serb, 17.4% Croat, 5.5% Yugoslav, and 2.4% other.<sup>140</sup> Under Tito, Bosnians, Serbs and Croats lived together in relative ethnic harmony, in part due to Tito's repression of nationalist or ethnic ideologies.<sup>141</sup>

The collapse of the Yugoslavian state began in 1986 with the rise to power in Serbia of Slobodan Milosevic, a Serb nationalist who fomented ethnic strife between Serbians, Croats and Muslims.<sup>142</sup> The conflict was hastened with the country's first multi-party elections in 1991. Strongly nationalistic parties dominated the election, with the Serbian Democratic Party (SDS), the Muslim Party of Democratic Action (SDA), and the Croat Democratic Union (HDZ) emerging as the three major players.<sup>143</sup> While the SDS and SDA initially cooperated as a coalition government, relations had disintegrated by 1992. That January, Bosnian Muslims (or "Bosniacs") and Croats held a referendum and voted by large majorities to declare the independence of Bosnia Herzegovina. The SDA, led by Serbian nationalist Radovan Karadzic and desiring to create "a Serb-dominated western extension of Serbia",<sup>144</sup> boycotted the referendum and declared their own Republic—the Republica Srpska.<sup>145</sup> Milosevic deployed the Yugoslav People's Army (JNA), now the de facto Serbian army, against Bosnia. With the support of Serbian nationalists inside Bosnia, the Serbian army embarked on a brutal campaign of ethnic cleansing—and its attendant murder, torture, and forced removal—to drive out Croats

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140 Angela M. Banks, *Moderating Politics in Post-Conflict States: An Examination of Bosnia-Herzegovina*, 10 *UCLA J. Int'l L. & Foreign Aff.* 1, 6 (2005).

141 *Id.*

142 State Department, Background Note on Bosnia-Herzegovina, available at <http://www.state.gov/r/pa/ei/bgn/2868.html> (last visited at November 22, 2008).

143 Banks, *supra* note \_\_, at 6.

144 *Id.*

145 *Id.*, at 7.

and Bosniacs from “Serbian” territory,<sup>146</sup> and establish “effective control” over the territory that would facilitate eventual secession and annexation by Serbia.<sup>147</sup> Though ethnic cleansing was not solely a Serbian tactic (Bosniacs and Croats employed it against Serbians and against each other after their own fragile alliance broke),<sup>148</sup> the JNA and Bosnian Serbs precipitated the largest mass murder in Europe since World War II, killing an estimated 6,000 Bosniac men and boys and displacing 26,000 Bosniac women and children in Srebrenica.<sup>149</sup> Outrage over the atrocity—which was labeled a genocide by the International Criminal Tribunal for the Former Yugoslavia in 2004—ultimately led to military intervention by the North Atlantic Treaty Organization (NATO) and the signing of the General Framework Agreement for Peace (the Dayton Agreement)<sup>150</sup> between the parties to the conflict.

## 2. *The Dayton Agreement*

The Dayton Agreement has been called “a paradox of both substance and implementation.”<sup>151</sup> The Agreement had to reconcile the reaffirmation of a state with the necessity of providing legal autonomy to separate political entities divided along the lines of ethnicity; the ideals of self-determination with the need for substantial intervention by the international community; and the rebuilding of a society in the shadow of genocide with the political reality of participation by the perpetrators of wartime atrocities. The Dayton negotiators struggled with these tensions on a number of levels, ultimately forging a compromise through the creation of a power-sharing arrangement between the three territorially-divided ethnic groups. This arrangement implemented a “consociational-confederal model” for Bosnia, wherein ethnic difference is formally recognized and managed through governance via a “grand coalition” of ethnic groups, and federal power territorially devolved to those groups.<sup>152</sup> Dayton, and the subsequent Bosnian constitution, enshrined this difference by recognizing three “constituent

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146 James Zahradka, “Reasonably Democratic, Balkans-Style: Observations on Municipal Elections in ‘Pax Americana’ Bosnia Herzegovina,” 4 U.C. Davis J. Int’l L. & Pol’y 201, 204 (1998).

147 John Malik, *The Dayton Agreement and Elections in Bosnia: Entrenching Ethnic Cleansing Through Democracy*, 36 Stan. J. Int’l L. 303, 307 (2000).

148 Banks, *supra* note \_\_ at 7 n.34.

149 Zahradka, *supra* note \_\_, at 204.

150 *Id.*

151 Fionnuala Ni Aolain, *the Fractured Soul of the Dayton Agreement: A Legal Analysis*, 19 Mich. J. Int’l L. 957, 958 (1998).

152 See Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 Texas L. Rev. 1861, 1888 (2004).

peoples” of Bosnia—Bosniacs, Croats, and Serbs—and three respective Entities belonging to each group. Dayton employed the key elements of the consociational model: It established a system of proportional representation and mutual veto powers between the three groups; created a weak central government consisting of a collective presidency (shared by one Serb, one Bosniac and one Croat) and bicameral legislature (composed of a House of Representatives to be elected through general elections and a House of Peoples elected by the individual Entity parliaments); and granted relative legal autonomy to the three Entities.<sup>153</sup> In practice, most of the political power was exercised by and within the Entities, and the central government remained mostly a figurehead.<sup>154</sup>

The Dayton compromise represented the entrenchment of ethnic difference in Bosnia—a concession to the political realities of post-conflict reconstruction in a highly mistrustful and polarized environment. Critics of Dayton argued that it formalized and reinforced ethnic lines without creating the opportunity for “cross-cutting cleavages,” or voting across ethnic/nationalist divisions.<sup>155</sup> One problem with the application of the consociational model in the case of Bosnia was that the many of the conditions under which consociation is more likely to be effective were not present in Bosnia.<sup>156</sup> Bosnia’s history of ethnic nationalism, combined with the substantial autonomy given to the ethnically divided territories, made the possibilities for cross-cutting cleavages much more remote.

Another component of Dayton that undermined the prospects for multi-ethnic party voting was its insistence (and, more saliently, the insistence of the United States and NATO) on elections being held as quickly as possible.<sup>157</sup> The Agreement mandated that elections were to be held no more than nine months after its entry into force, and tasked the Organization for Security and Cooperation in Europe (OSCE) with the administration of elections.<sup>158</sup> At the heart of the Agreement was the belief that immediate elections were the most effective way to begin

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153 See Joseph Marko, “United in Diversity”? *Problems of State and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina*, 30 *Vt. L. Rev.* 503 (2006).

154 *Id.*

155 *Id.*

156 As Arend Lijphart has argued, those factors include: a state without a majority ethnic group; an absence of major socioeconomic status between the ethnic groups; similarly-sized ethnic groups; limited number of ethnic groups; a relatively small total overall population; external threats that foster internal unity; a history of political compromise and accommodation; and political elites that command loyalties beyond ethnic fealty. Arend Lijphart, *The Power-Sharing Approach, in Conflict and Peacemaking in Multiethnic Societies* 497-98 (Joseph V. Montville ed., 1990) (cited in Banks, *supra* note \_\_\_ at 24).

157 Elizabeth Cousens, “Building Peace in Bosnia,” in *Peacebuilding as Politics: Cultivating Peace in Fragile Societies* 114-15 (Elizabeth Cousens & Chetan Kumar, eds.)(2001).

158 General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 *I.L.M.* 75 (1996) [hereinafter “Dayton Accords”].

democratization in earnest in Bosnia, by conferring legitimacy upon the power-sharing institutions and beginning the process of ethnic reconciliation.<sup>159</sup> However, the election provisions sparked criticism that early elections would simply reinstate the extreme nationalist leaders whose commitment to peace was suspect, and that the OSCE would not be ready to undertake election administration on so short a timeline in a war-torn environment—particularly with regards to preventing extremists from using violence and intimidation to manipulate voting.<sup>160</sup> On this view, Dayton was shortsighted in predicting the effects its constitutional system and electoral framework would have on further empowering the radical nationalist parties.

At the same time, the Agreement relied on the incorporation of international human rights standards into its democratization agenda to prevent the most extremist elements of those parties from regaining power. Article II, para. 2 of the Agreement states that “the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia Herzegovina. These shall have priority over all other law.”<sup>161</sup> The importation of the ECHR would become a central issue in the adjudication of claims surrounding freedom of expression and the rights of political parties during an election. Dayton also incorporates the International Covenant on Civil and Political Rights, and guarantees the right to vote, freedom of expression and the media, freedom of association, and freedom of movement.<sup>162</sup>

The Dayton Agreement additionally created a “bi-polar legal relationship” between the Bosnian system and the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>163</sup> In addition to the jurisdictional relationship between the Bosnian courts and the ICTY, Annex 4, art. IX(1) of Dayton proscribes any person serving a sentence imposed by, or indicted by, the ICTY from holding public office in Bosnia.<sup>164</sup> This provision would lead to electoral controversy over the invocation of Radovan Karadzic, who was under indictment by the ICTY, by the SDS during the 1996 elections.<sup>165</sup>

Dayton thus circumscribed its realist effort to accommodate virulent inter-ethnic tensions with aspirational international human rights standards that were supposed to suppress the most

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159 Cousens, *supra* note \_\_ at 131.

160 *Id.* at 132

161 Dayton Accords, art. II, para 2.

162 Dayton at \_\_ (cited in ICG Report)

163 Ni Aolain , *supra* note \_\_, at 994.

164 Dayton Accords, Annex 4, art. IX(1).

165 See Part \_\_ *infra*.

egregious nationalist tendencies of the parties. In order to strike this precarious balance, the Agreement allowed for the participation of the nationalist parties but delegated the restriction and sanctioning of those parties not to the Bosnians, but to the international community.

### 3. *The OSCE and the framework for free and fair elections*

The framework for holding the BiH's first elections reflects the muddled compromises between international intervention and Bosnian sovereignty. Annex 3 of the Dayton Agreement proscribes the rules and guiding principles for elections, stating as its purpose to "promote free, fair, and democratic elections, and to lay the foundation for representative government and ensure the progressive achievement of democratic goals throughout Bosnia and Herzegovina."<sup>166</sup> However, fundamental democratic decisions about political participation and expression fell to the OSCE and a multilayered administrative apparatus that gave ultimate decision-making authority to a representative of the international community—U.S. ambassador Robert Frowick.

The Dayton Agreement gives the OSCE the authority to establish a Provisional Election Commission (PEC) that would create regulations to govern electoral conduct.<sup>167</sup> The head of the OSCE Mission to Bosnia Herzegovina was designated the Chairman of the PEC, who was also given final authority over decisions when the PEC was not able to reach consensus.<sup>168</sup> The Chairman of the PEC in the run-up to the 1996 elections was Frowick, with the other members of the PEC consisting of an assignee of the High Commissioner, representatives of each ethnic group (a Bosnian Muslim, a Croat, and a Serb) and various international diplomats.<sup>169</sup>

The PEC's first task was to establish a set of rules and regulations on, *inter alia*, voter registration and eligibility; the registration of political parties and independent candidates; the voting process; an electoral code of conduct for political parties, candidates, and election workers; and the establishment of an Election Appeals Sub-Commission (EASC) and Media Experts Commission.<sup>170</sup> The EASC in particular was designed as a judicial institution to provide an avenue for complaints about violations of the electoral code and thus to enforce the substantive rules governing "free and fair" municipal elections. As such, the EASC and its

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166 Dayton Accords, Annex 3.

167 Dayton Accords, Annex 3, Article II.

168 See Daniel J. Blessington, *From Dayton to Sarajevo: Enforcing Election Law in Postwar Bosnia and Herzegovina*, 13 Am. U. Int'l L. Rev. 553, 605 (1998).

169 *Id.*

170 *Id.*

decisions provide a unique and important look into the how the political parties problem was dealt with on a legal level.

i. The EASC

The EASC mirrored the makeup of the PEC, being composed of Bosnian judges from each ethnic group as well as international lawyers.<sup>171</sup> The judges were appointed by Frowick.<sup>172</sup> The chairman of the EASC was Norwegian Judge Finn Lynghjem. The OSCE rules mandated that 4 lawyers make up the EASC—one an “international jurist” and one each representing the state of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska. Each of the Bosnian judges also represented the major ethnic groups. However, in practice the Bosnian judges had less influence over the outcomes of sub-commission decisions; as the Chairman of the EASC held the ultimate powers of judge and jury over the interpretations of PEC regulations and penalties, and over sanctions.<sup>173</sup>

In terms of its institutional authority and mandate, the EASC was a juridical body that had legal authority to issue decisions, but it also reported to Frowick, the head of the mission, a political figure with authority over the conduct of elections. Thus, it was not a purely judicial body in the sense that it was insulated from political pressures, but it also had enforcement authority that flowed from the institutions tasked with enforcing the Dayton Agreement. The EASC’s mandate was to “to ensure compliance with the electoral Rules and Regulations established by the Provisional Election Commission and adjudicate complaints with regard to the electoral process referred to it by the Provisional Election Commission, the Media Experts Commission, political parties, candidates, individuals and other entities.” To carry out its mandate, the EASC was given authority to: impose penalties and fines against any political party or candidate; prohibit a political party from running in the elections; decertify a party already listed on the ballot; and remove a candidate from a party list or an independent candidate from the ballot when it determines a violation. The applicable law interpreted and enforced by the EASC was the Dayton Accords, which set out a detailed framework for Bosnia’s first elections, but which also incorporated by reference principles of international law such as the UN charter.] It is important to note that the EASC did not have power over private individuals nor powers to

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171 *Id.* 574-575.

172 International Crisis Group, *Elections in Bosnia and Herzegovina* (1996)[hereinafter “ICG 1996 Report”].

173 David Chandler, *Bosnia: Faking Democracy after Dayton* 115 (2000).

criminally sanction—enforcement was limited to the removal of parties or candidates from the electoral process.

The EASC dealt with all election-related complaints, including issues touching on: technical questions relating to the Dayton Agreement, and electoral regulations; the linking of humanitarian assistance to voter registration; instances of violence and intimidation; misfeasance or malfeasance on the part of local officials and parties; and election-day problems.<sup>174</sup> However, it was the EASC's 1996 and 1997 decisions on freedom of expression and the right to participate in elections that most squarely confronted the issues of how ethnically-divided (and ethnically divisive) political parties are regulated in a country's first post-conflict elections.

#### 4. *Decisions of the EASC*

##### i. Political Parties and the 1996 elections

The 1996 elections were for the three-person Bosnian Presidency, represented by two members from the Federation BiH and one from the Republika Srpska, and the Bosnian House of Representatives, also divided in the 2:1 ratio between the Federation and the RS. Each Entity also held elections; the Federation for its House of Representatives and cantonal legislatures and the RS for President, Vice-President and National Assembly.<sup>175</sup>

One of the main challenges facing the OSCE in the run-up to the national and Entity elections was how to dilute the power of the three nationalist parties—the SDS, the Muslim SDA, and the Croat HDZ—so as to facilitate the participation and appeal of non-national, multi-ethnic parties.<sup>176</sup> In particular, the election was seen as an opportunity to cement the military defeat of radical Serb nationalists through the dual mechanisms of removing extremists from political participation and instituting voter registration for refugees in their 1991 pre-war home regions.<sup>177</sup> This was, in part, an “electoralist” strategy designed to break up the hegemony of the major nationalist parties. In addition, the OSCE and other international non-governmental organizations attempted to support smaller, moderate political parties without ethnic affiliations.

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174 *Id.*

175 Commission on Security and Cooperation in Europe, *The 1997 Municipal Elections in Bosnia-Herzegovina* 2 (1997) [hereinafter “CSCE Bosnia Report”].

176 Chandler, *supra* note \_\_ .

177 *Id.* at 119.

However, the SDA, the SDS and the HDZ—the ruling parties before the war—remained the dominant players.<sup>178</sup>

The nationalist parties displayed varying levels of commitment to Dayton and its preservation of a single Bosnian state. The SDA and HDZ fielded candidates in elections in both Entities as well as for the nation-wide election, while the SDS participated in the Bosnia-wide election but not in the Federation elections.<sup>179</sup> However, the HDZ also refused to disband its “self-proclaimed state of Herceg-Bosnia,” seemingly following the model of the Serb militants in hopes of achieving a Croat entity.<sup>180</sup>

Also problematic for the OSCE was the continued tacit political activity of the old leaders of the SDS in the elections. Radovan Karadzic, who had been indicted for war crimes by the ICTY, was explicitly banned from participating in the elections; and the SDS had removed Karadzic as the head of the party in order to avoid being banned from the elections themselves.<sup>181</sup> However, he had been replaced by his own deputies during the war, who were most likely complicit in the atrocities he was being tried for, and who invoked his image in campaign posters and at SDS rallies.<sup>182</sup> Karadzic was replaced by Biljana Plavsic, another Serb nationalist, whose statements on the party’s goal for a unified Serbian state also seemed to question the premises of the Dayton Agreement.

Lastly, the OSCE faced the problem of violence, intimidation and harassment of leaders of the newly formed opposition parties, as well as the prevention by nationalist militants of voters from exercising their freedom of association by limiting freedom of movement.<sup>183</sup>

All three of these issues—commitment to Dayton, the political participation of war criminals, and the restriction on freedom of association for opposition parties and voters—were the subjects of the most important decisions issued by the EASC in the run-up to the elections.

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178 CSCE Bosnia report at 3.

179 *Id.*

180 *Id.*

181 *Id.* at 6.

182 *Id.*

183 *Id.*

ii. Freedom of Expression and secessionist speech

The underlying issue of secessionism, and the parties' commitment to the Dayton peace process and to the idea of a united Bosnian state, arose early in the campaigning leading up to the September 1996 national elections. In July, the Republika Srpska filed a complaint with the EASC in order to prevent the Federation Entity from fielding candidates in the RS, arguing that the RS had sole authority to determine political party and candidate eligibility for seats to be filled from within the RS.<sup>184</sup> The RS's position was essentially that RS law pre-empted the Provisional Election Commission's Rules and Regulations, but also more broadly implied that it was arguing for the "total ethnic separation in the electoral context among Bosniacs, Croats and Serbs."<sup>185</sup> The EASC dismissed the complaint, holding that the PEC regulations "occupied the field" and outlawing prohibitions on political participation across Entity lines.<sup>186</sup>

A bigger crisis and more direct confrontation with the speech issue was precipitated as candidates began to ratchet up inflammatory rhetoric closer to the election. The EASC dismissed two complaints concerning offensive statements made about other candidates—in one, a rival was quoted in the local newspaper as calling the candidate "a bigger criminal than Karadzic"<sup>187</sup>—on the grounds that such speech was protected under Article 10 of the European Convention on Human Rights, as incorporated into Dayton. The EASC's decision adopted a distinction between "facts" and "value-judgments," and noted that "the requirement that an accused must prove the truth of an allegedly defamatory opinion infringes his or her right to impart ideas, within the meaning of Article 10, as well as the public's right to receive ideas."<sup>188</sup>

In Advisory Opinion 5, however, the EASC, alarmed by the "increasingly strident rhetoric" of the nationalist parties, held that freedom of expression was more qualified when balanced against the parties' obligations under Dayton to respect the territorial integrity of Bosnia-Herzegovina.<sup>189</sup> While the opinion was issued as a warning shot towards candidates in all political parties who had "made statements that call for independence and territorial separation of part of the country, or that refer to part of the country as a sovereign territory,"<sup>190</sup> it was clear

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184 Blessington, *supra* note \_\_ at 605.

185 Case 96-4b, cited in Blessington, *supra* note \_\_ at 606.

186 *Id.*

187 EASC case number 96\_28B\_27NA (on file with the author).

188 EASC case number 96\_28B-27NA (on file with the author), citing to European Court of Human Rights in *Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103, at para. 42.

189 Blessington, *supra* note \_\_ at 607.

190 EASC Advisory Opinion No. 5 (on file with the author)[hereinafter "Advisory Opinion No. 5"].

that the EASC was particularly targeting secessionist statements made by SDS candidates.<sup>191</sup> In the opinion, the EASC addresses three issues: the framework of territorial integrity and sovereignty set out in Dayton and the Constitution, the parties' legal obligations under Dayton, and the limitations upon freedom of expression as a bedrock value of democracy. The opinion relies purely on Dayton and on the European Convention as the applicable law, but attempts to articulate a theory of how the universalist and aspirational principles espoused in both those instruments are circumscribed by the realities of a fragile, post-conflict society.

The first part of the opinion reaffirms the parties' commitment to Dayton and to its creation of a single state of Bosnia, composed of constituent entities, and warns that the participation of political parties and candidates in the electoral process is contingent upon adherence to the principle that the entities have no separate legal status under international law.<sup>192</sup> The second part of the opinion analyzes Article 10 of the European Convention of Human Rights, holding that "while the right of freedom of expression is fundamental, it is not absolute."<sup>193</sup> Rather, it is limited by Article 10(2) of the ECHR, which permits restrictions upon the right so long as they are " 'prescribed by law and are necessary in a democratic society'" to protect various enumerated interests, including 'national security, territorial integrity or public safety, and the prevention of disorder or crime' ".<sup>194</sup> The EASC explicitly states that the balance must be struck in a context-specific way, and that the necessities of a post-conflict, ethnically divided society require a different calculus than that those of established democracies. Statements that are perceived to be secessionist thus pose more of a "*genuine and imminent threat* to national security, territorial integrity or public order [*italics added*]" in such a polarized environment, and in the context of a heated campaign, than they would in a stable democracy.<sup>195</sup>

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191 Blessington, *supra* note \_\_ at 610.

192 Advisory Opinion No. 5. ("It is thus not open to doubt that Bosnia and Herzegovina exists as a sovereign state within its recognized international boundaries, and that Republika Srpska and the Federation of Bosnia and Herzegovina are the constituent entities of that sovereign state, having no separate existence under international law.")

193 Advisory Opinion No. 5 ("Not all statements which call for a re-examination of territorial borders fall outside the protection of freedom of expression. Each statement must be examined within the context in which it is made to evaluate whether it poses a genuine and imminent threat to national security, territorial integrity or public order. A statement made in an academic journal or to an audience in a stable democracy, however offensive, may pose little likelihood of motivating unlawful action, whereas the same statement made in the context of the first election campaign following a war characterized by ethnic cleansing may well pose a genuine and imminent threat to territorial integrity as well as to public order.")

194 *Id.*, citing Eur. Conv. Hum. Rts. Art. 10(2).

195 *Id.*

The EASC also attempted to flesh out criteria for evaluating the degree of threat a secessionist statement may pose. Holding that the context of the statement determines the scrutiny given to it, the EASC stated that it would consider:

whether the language appeals to emotion or reflexive nationalism, rather than reason; whether the statement is made on television or radio, particularly if state-run, or to a large public audience, rather than in print; whether the person making the statements is armed or flanked by symbols or other paraphernalia suggesting the willingness to use violence;<sup>196</sup> or whether the speaker is a high-ranking official.

Advisory Opinion 5 reflects a careful approach by the EASC towards the growing threat posed by the SDS's secessionist sentiments and the possibility of incitement through the electoral process. The EASC reinforced the significance of the decision by taking the unusual step of calling a press conference in the capital of the RS and having the Chairman, alongside his Bosnia, Croatian and Serbian colleagues, read the decision aloud.<sup>197</sup> However, the decision did not have the hoped-for effect of dampening the inflammatory rhetoric of the extremist candidates—notably, the SDS-controlled Television Srpska failed to even carry the EASC's press conference.<sup>198</sup> The EASC was compelled to issue another decision, just four days before the election, in response to several complaints against SDS candidates. The EASC fined the SDS and ordered the cessation of any speech which “challenge[d] in any way the integrity of Bosnia and Herzegovina or which assert[ed] the independence of Republika Srpska.”<sup>199</sup> The violations continued unabated, especially by SDS leader Biljana Plavsic, whose secessionist statements were designed in part to invoke Karadzic. Just one day before the election, the EASC issued another opinion in which it stated that statements made at SDS rallies had crossed the line into impermissible speech which constituted “advocacy of lawless action which threatens the constitutional order.”<sup>200</sup>

However, the EASC faced a conundrum in how to sanction the SDS. Though it had the power to remove the SDS candidates from the ballot, the political consequences of doing so were dire. Such a move would not only reinforce perceptions that the international community was “anti-Serb,”<sup>201</sup> it would delegitimize the elections and likely spark a violent backlash in an environment where the security situation was already precarious. The EASC fashioned another

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196 *Id.*

197 Blessington, *supra* note \_\_ at 610.

198 *Id.*

199 *Id.* at 611.

200 *Id.*

201 *Id.*

creative solution, enjoining Pilsavic from making any further statements and requiring her to read a public statement of apology—written by the EASC—on Srpska Television on the eve of the election.<sup>202</sup> The statement reaffirmed the SDS’s commitment to Dayton and to a unified Bosnian state.<sup>203</sup> Reportedly, however, Pilsavic read the statement on television that night with observable contempt.<sup>204</sup> The next day, she was elected President of the RS with large majorities.

The EASC’s attempt to regulate secessionist speech by an ethnic nationalist party illustrates a delicate parsing of the meaning of “democracy” in a highly volatile electoral setting. The EASC clearly considered that such statements, even if not direct incitements to action or violence, demonstrated a viable threat to the tenuous Bosnian state established by Dayton. However, EASC focused on the content and context of the statements—i.e., their imminence—rather than their seeming centrality to the platform of the SDS, and ultimately ordered weak civil sanctions that had little to no effect on the SDS’s margin of victory. In part this was due to the political reality that an outright ban on either the candidates or the party would make a timely election—one of the primary goals of the international community in Bosnia—impossible, from both a legitimacy and security perspective.<sup>205</sup> And while the election of Pilsavic ultimately vindicated the SDS (and, arguably, its secessionist rhetoric), the EASC’s weak penalty also occurred in the shadow of the military presence of NATO. That presence may have undermined some of the force of the threat posed by the SDS to the Dayton framework.

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202 Blessington, *supra* note \_\_ at 613. See also Election Appeals Sub-Commission Report to Head of Mission 1996, 8-9.

203 The statement read: “The SDS sincerely apologizes for statements made during the election campaign, including my own statements, which appear to question the territorial integrity and sovereignty of Bosnia and Herzegovina. The SDS deeply regrets any statements which have suggested that Republika Srpska is an independent state. The SDS wishes to make clear to its supporters and the people of Republika Srpska that it is fully committed to implementing the Dayton Agreement. It is not the aim of the SDS, now or in the future, to unify all Serbs in the Balkans into one joint state. SDS candidates from Republika Srpska, if elected, are committed to joining and working with elected officials from the Federation of Bosnia and Herzegovina in the common institutions of Bosnia and Herzegovina. The future of Republika Srpska is within the state of Bosnia and Herzegovina. All SDS candidates, if elected, will work to preserve the unity of Bosnia and Herzegovina as an independent state and as a society dedicated to peace, justice, tolerance and reconciliation. The SDS will work for a Bosnia and Herzegovina in which Serbs, Croats and Muslims can live together in peace and dignity.” Blessington, *supra* note \_\_ at 613 n.397.

204 Blessington, *supra* note \_\_ at 613.

205 In the 1997 Municipal Elections, the EASC did strike several HDZ candidates from party lists due to the HDZ’s links with HTV-Mostar, which had broadcast “inflammatory language attacking the integration of Serbian and Bosniac people.” EASC Annual Report to Head of Mission, 1997, 14. The EASC drafted another public apology and ordered it broadcast by HTV-Mostar, preventing additional candidate strikes. In so doing, the EASC invoked Article 140 of the PEC Regulations, which holds political parties responsible for the actions of their supporters, and reminded political parties of their duty to prevent the dissemination of language promoting hatred and violence. *Id.*

From the functionalist perspective, it is significant that the EASC did not treat the expressive rights of the SDS as unqualified, and appeared to endorse the view that political parties could be strictly regulated in a manner not only consistent with, but necessary to, democratic values. The EASC made two important distinctions in its series of decisions: one, between speech targeting individual candidates—even though that speech arguably was inciteful of ethnic violence—and speech targeting the existence of Bosnia itself; and two, between speech that was essentially one candidate’s opinion (however defamatory) and speech that constituted a party platform. These distinctions show that the EASC regarded freedom of expression as a facilitator for democracy by empowering individuals to express political opinions, and not as a tool for an ostensibly protected group to use to undermine the democratic order.

### iii. The Karadzic problem

The election of Pilsavic underlined another problem faced by the OSCE and the EASC—the continuing influence of Radovan Karadzic upon the electoral activity of the SDS. Under Dayton, and the PEC’s Rules and Regulations, persons under indictment by the ICTY who had failed to appear before the tribunal were ineligible for public office, and political parties which maintained such persons in party positions or functions were similarly prohibited from electoral participation.<sup>206</sup> Though Karadzic, along with the Bosnian Serb commander Ratko Mladic, had been indicted by the ICTY for a long list of crimes against humanity,<sup>207</sup> it was widely acknowledged by the international community that he had not relinquished tacit and effective control of the SDS leadership.<sup>208</sup> The US Assistant Secretary of State declared that there was

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206 Dayton Accords, Provisional Election Commission Rules and Regulations Article 46(b): “[n]o person who is under indictment by the [International Criminal Tribunal for the Former Yugoslavia] and who has failed to comply with an order to appear before that Tribunal may stand as a candidate or hold any appointive, elective or other public office ... As long as any political party maintains such a person in a party position or function, that party shall be deemed ineligible to participate in the elections.”

207 “Karadzic is accused of being criminally responsible for, *inter alia*, the internment of thousands of Bosniac and Bosnian Croat civilians, including many children, in concentration camps. Internees were murdered, raped, tortured, beaten, and robbed. Thousands of Bosniac and Bosnian Croat civilians were deported. Civilian gatherings were shelled, including a soccer match in Sarajevo where 146 civilians were killed or wounded, and a student gathering in Tuzla where 195 civilians were killed or wounded. Extensive looting, appropriation, and destruction of Bosniac and Bosnian Croat property took place, and dozens of Catholic and Muslim sacred sites were destroyed. Snipers attacked Sarajevo citizens which resulted in hundreds of casualties, including the death of two-year-old Elma Jakupovic on July 20, 1993. And UN personnel were used as ‘human shields’ against NATO air-strikes in May 1995.” James Zahradka, “*Reasonably Democratic, Bakans Style*”: *Observations on Municipal Elections in “Pax Americana” Bonia and Herzegovina*, 4 U.C. Davis J. Int’l L. & Pol’y 201, 229 (1998).

208 *Id.*

“evidence [that Karadzic] could be participating in [SDS] decisions.”<sup>209</sup> This was bolstered by a statement issued by the SDS when Karadzic originally resigned from the party presidency: “President’s Karadzic’s view is that everyone must vote at the elections, and vote for the SDS, in order to prevent puppet and Bosniac parties from getting the one-third of the vote they need to drown the Republika Sprska in Bosnian and Herzegovina.”<sup>210</sup>

Though it was clear in the 1996 elections that Karadzic was quietly participating in SDS activity, it was not until the 1997 municipal elections and Pilsavic’s public break with Karadzic over economic issues—a break which led to a split within the SDS—that the EASC took the opportunity to sanction the party for violations of Dayton and Article 46.<sup>211</sup> In its opinion, the EASC put forth evidence of Karadzic’s involvement with the SDS, including “statements by international leaders, SDS campaign materials highlighting Karadzic, and statements by SDS leaders attesting to Karadzic’s continuing importance to the party.”<sup>212</sup> The EASC took strong issue with the continued role of Karadzic, holding that “allowing a person twice indicted on genocide charges to maintain a role in a leading party ‘shocks the conscience,’” and that the party would need to be severely sanctioned in order to maintain the integrity of the election.<sup>213</sup> However, despite the fact that the evidence supported a broad party ban of the SDS throughout Bosnia Herzegovina, the EASC chose only to bar the SDS from holding seats in the city of Pale, Karadzic’s headquarters, recognizing again that banning the party outright would likely lead to instability.<sup>214</sup>

The EASC’s decision did not stand. Despite the fact that the PEC’s rules and regulations hold that EASC decisions are final and not subject to appeal, Ambassador Frowick—the political head of the OSCE—overruled the EASC and reinstated the SDS in Pale. Citing the safety of election supervisors in Pale as well as the need to maintain the legitimacy of the election, Frowick stated that he was balancing “integrity and momentum.”<sup>215</sup> In reality, Frowick was

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209 ICG 1996 report at 22.

210 *Id.*

211 Zahradka, *supra* note \_\_ at 230.

212 EASC opinion, cited in Zahradka, *supra* note \_\_ at 230 n.126. One poster distributed by the featured a picture of Karadzic’s face and the SDS logo and sent “a very clear message: Vote for the SDS, vote for Radovan Karadzic.” See Senita Sehorcehajic, *Sandra Mitchell: Why Did I Resign: Between Politics and Law Frowick Chose Politics*, SVIJET, Sept. 28, 1997.

213 Tracy Wilkinson, U.S. Envoy Rejects Judicial Panel’s Order to Sanction Bosnian Serbs, L.A. Times, Sept. 17, 1997, 4.

214 See Zahradka, *supra* note \_\_ at 231.

215 See Wilkinson, *supra* note \_\_.

responding in part to threats by the SDS that they would boycott the election altogether.<sup>216</sup> The SDS went on to win overwhelming majorities in the municipal elections.<sup>217</sup>

Both Dayton's prohibition of participation by war criminals in party leadership, and the EASC's affirmation of this prohibition, represented limitations on associational rights of parties involved with perpetrators of war crimes rooted in a functionalist analysis of the ethnic nationalist political party. The exclusion of party leaders such as Karadzic—and the conditioning of party participation upon that exclusion—recognizes that participation by an indicted war criminal crosses the border from the party continuing to act as a party competing for legitimately exercised political power, to a party acting as a continuation of the group that sought power through ethnic cleansing and other crimes against humanity. The EASC's decision navigated the tension between the necessity of having to bring participants in an atrocity into a new political system, and the risk that those participants will use the rules of the game to turn the system against itself.

In this case, however, the correct result was thwarted by political actors. Frowick, driven by the international community's (or, more precisely, the United States's) agenda of maintaining the election schedule, overruled the EASC. The emphasis on elections at all costs led to the OSCE's susceptibility of being "blackmailed" by the SDS, who knew that any that the results of any election that proceeded without its involvement would never be accepted within the RS. Thus, the Karadzic incident illustrates an important institutional lesson: the importance of having a politically independent and insulated body in the post-conflict setting to administer democracy.

#### iv. Freedom of Association of minority parties

Another of the contentious issues that marred the 1996 national elections was the suppression of the freedom of association of opposition and minority parties by the major parties. During the September 1996 campaign, all three nationalist parties were responsible for violence and intimidation directed at opposition party leaders as well as the disruption of opposition party rallies—all designed to stifle political dissent.<sup>218</sup>

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216 See Zahradka, *supra* note \_\_ at 231.

217 *Id.*

218 John Malik, *The Dayton Agreement and Elections in Bosnia: Entrenching Ethnic Cleansing through Democracy*, 36 *Stan. J. Int'l L.* 303, 330 (2000).

Significantly, the violence and intimidation was directed particularly at multi-ethnic opposition parties. For example, in the Croat Entity, a multi-ethnic opposition coalition led by Jole Musa competed in a June 1996 poll for Mostar's municipal council. Nationalists promoting “Herzeg-Bosna” began to intimidate opposition leaders early on. Before the September elections, Musa was “forcibly evicted from the position he won in the June election and coalition candidates withdrew as a result of threats.”<sup>219</sup> The moderate HSS party refused to campaign in western Herzegovina following this precedent. Only the Croat Party of Right and the Croat Pure Party of Right ran against the ruling HDZ and they also complained about intimidation. More serious incidents of violence were also recorded; SDA supporters attacked Party of Bosnia-Herzegovina leader Haris Silajdzic, in June 1996, for example, causing serious injury. In the Republika Srpska, the SDS engaged in a vicious pattern of violence against both individual members and leaders of the smaller, moderate political parties.

The EASC’s mandate covered cases of violence and intimidation of opposition parties, but its enforcement capacity was limited. Despite a number of judgments in which it attempted to hold the parties accountable for the actions of their supporters,<sup>220</sup> minority parties were severely hampered in such an environment of fear and their reluctance to fully participate in part contributed to the overwhelming victories of the nationalist parties.

The EASC was hampered in its ability to fully remedy the problem of violations of the minority parties’ freedom of association for the following reasons: One, the EASC lacked the ability to criminally sanction offenders. Because the EASC was separate from the criminal justice system, and had questionable jurisdiction over the police (many of whom supported the campaign of violence), the EASC was unable to conduct investigations nor exercise criminal authority to enforce its decisions. Second, some of the more pernicious forms of intimidation/discrimination were employment-related, which meant EASC didn’t have jurisdiction over complaints. Third, the EASC had too few resources to fully enforce the decisions it did issue, and was limited in the number of complaints it could handle.<sup>221</sup>

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219 *Id.*

220 Advisory Opinion 3, 3 Bilten 67 (Election Appeals Sub-Comm'n, Provisional Electoral Comm'n, OSCE Mission in Bosn. & Herz. 1996); See Advisory Opinion 2, 2 Bilten 59 (Election Appeals Sub-Comm'n, Provisional Electoral Comm'n, OSCE Mission in Bosn. & Herz. 1996); See Case No. 96-1B, 1 Bilten 5 (Election Appeals Sub-Comm'n, Provisional Electoral Comm'n, OSCE Mission in Bosn. & Herz. 1996); See Advisory Opinion 3, at 68; See Case No. 96-20B, 3 Bilten 63 (Election Appeals Sub-Comm'n, Provisional Electoral Comm'n, OSCE Mission in Bosn. & Herz. 1996); Case Nos. 96-13D/96-15D, 3 Bilten 87 (Election Appeals Sub-Comm'n, Provisional Electoral Comm'n, OSCE Mission in Bosn. & Herz. 1996).

221 Malik, *supra* note \_\_ at 330.

What the cases on freedom of association demonstrate is the problems associated with the dominance of ethnic nationalist parties and the failure to fully develop and support the more moderate, multi-ethnic parties that arguably fulfill the functions of democracy in the way expected and hoped for by democratizers. In terms of the overall treatment of political parties, a functionalist approach would more fully protect the rights of association of parties that better facilitated political competition and aggregated interests across ethnic lines, and qualify the rights of ethnic nationalist majoritarian parties.

An additional procedural lesson is gleaned from the EASC's difficulties in regulating the electoral environment is the importance of providing regulators with a range of sanctioning measures, from civil to criminal. Much of the EASC's ineffectiveness was due to its inability to truly enforce its judgments. The EASC's independence from the political apparatus of the OSCE, which controlled the law enforcement and military units, was thus a double-edged sword. On one hand, the EASC was able to properly assess the threat posed by the nationalist parties and was not subject to the same kind of political blackmail that the OSCE political administrators had to deal with; on the other hand, the fact that the EASC's judgments ultimately had no teeth made them symbolic at best. The heavy losses suffered by opposition and minority parties bear out the view that the EASC's correct assessment of the situation did little good in policing the political process.

## **Part VI: Lessons learned—some principles for regulation of political parties in post-conflict societies**

The case study of the EASC illustrates the drawbacks of an international organization as regulator of the political process. By virtue of its lack of legitimacy, and its "limited" role in merely facilitating the transition to self-governance, international organizations must rely on broad, universalist notions of human rights in acting as a de facto government. But rights-balancing is an inappropriate exercise at the stage of democracy building where an anti-democratic group, playing on still-present resentments, divisions, and tensions, can easily topple the whole edifice.

Of course, an international organization such as the OSCE could not develop a comprehensive, functionally-oriented system for regulating political parties because that was the task of a legitimately-elected government (regardless of the possibility that that government might not choose to regulate itself out of power.) But the OSCE's failure to look more closely at the underlying principles of party regulation in both Western democracies and other post-conflict

societies is puzzling. A few principles emerge from those examples and from the failures (and limited successes) of the EASC in Bosnia.

### *Separation of Powers*

In both established and transitional democracies, the power to ban or restrict the rights of parties is placed in an independent body that does not have a stake in the outcome of an election, and that is disembodied from the power-holders. This institution may be the judiciary, or an independent commission, but its key feature is that it is outside of the political process whose boundaries it must police.

The EASC's political independence from the OSCE allowed it to make controversial moves such as finding that the SDS had violated the strictures of Dayton, and banning individual SDS candidates for invoking Karadzic and for using violence and intimidation against opposition candidates. The political arm of the OSCE won out, however, by overturning the EASC decisions where it conflicted with the mandate of completing elections as quickly as possible—regardless of the instability electoral environment. The SDS's ability to leverage its power as one of the major nationalist parties against the perceived-as-illegitimate (and eager-to-depart) international regulators severely impeded and benefits that may have flowed from the EASC decisions.

One lesson to be learned, then, is that the justifications for an independent arbiter of the political process are just as applicable in the context of international intervention. But where we have come to think of the international organization as a whole as an independent, impartial body suited to adjudicate these decisions, separation of powers concerns still apply to the different bodies within that organization. The decisions made by Frowick and the OSCE political leadership were motivated by self-interest; as has been well-documented, enormous pressure had been brought to bear by the United States to transfer the reins of power as quickly as possible to an elected government, even if that elected government were to reproduce the power dynamics of the conflict. The EASC, being made up of international judges as well as a mix of Bosnian Muslims and Serbs, could sanction the SDS without the fear of broader repercussions faced by political regulators.

As previously discussed, however, the independence of the EASC was of little use without the enforcement capability to back its decisions. The SDS's threats to Frowick, and Frowick's subsequent of the EASC's Karadzic decision, essentially allowed the SDS to capture the political process for its own ends, subverting the assumption that the OSCE would act as neutral and impartial.

That international regulators had their own political motivations separate from the issues of the efficacy or fairness of the electoral process reinforces the need for a wholly independent body to adjudicate these procedural questions without threat of being overturned. Just as constitutional courts prevent political actors from engaging in “self-dealing”, an independent apolitical institution is needed even to act as a check on the political impulses of even external, third-party actors like the UN or OSCE. This institution has to have the means to enforce its rulings; either through independent enforcement power or through the enforcement power guaranteed by the political arm of the organization.

It is telling that perhaps the most extraordinary unraveling of the formal legal ethnic divisions between Bosniak, Serb and Croat occurred as a result of a decision of the Constitutional Court of Bosnia, which in 2000 called into question the Dayton Agreement insofar as it created ethnically separate entities.<sup>222</sup> The Court, which like the EASC was composed of representatives of each ethnicity as well as international jurists selected through consultation between the President of Bosnia and the President of the European Court of Human Rights, issued a far-reaching opinion that declared that all citizens of the Bosnian state had full and equal rights regardless of which Entity of the State they belonged to. The decision had dramatic consequences, forcing the Entities to alter their constitutions and legislative arrangements in order to comply with the dictate of full rights granted to every citizen; these changes were agreed to and enshrined in an Agreement to implement the Constitutional Court’s decision, signed by representatives of all three Entities.<sup>223</sup>

The Constitutional Court’s success in overcoming the intractable political obstacle of group identity demonstrates the significance of an independent judicial body capable of enforcing controversial and sweeping dictates that are nonetheless crucial for managing delicate ethnic power-sharing arrangements. The same lesson applies to adjudicating electoral politics in an ethnically volatile environment. The Constitutional Court’s action was backed by a ruling by the Office of the High Representative that it would implement the decision itself unless the parties came to a joint agreement.<sup>224</sup> The EASC’s efforts to circumscribe the dangerous political

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<sup>222</sup> Constitutional Court of Bosnia and Herzegovina, Constituent Peoples Case, Case U05/98, Partial Decision (July 1, 2000); *see also* Constitutional Court of Bosnia and Herzegovina, Case U-44/01 (Sept. 22, 2004); Constitutional Court of Bosnia, Case U-2/04 (May 28, 2004); Constitutional Court of Bosnia and Herzegovina, Case U-8/04 (June 25, 2004). *See generally* Anna Morawiec Mansfield, *Ethnic But Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 103 Colum. L. Rev. 2083 (2003) (analyzing Constitutional Court’s decision to strike a balance between consociational democracy and individual rights).

<sup>223</sup> *See* Agreement on the Implementation of the Constituent Peoples Decision of the Constitutional Court of Bosnia and Herzegovina, Mar. 27, 2002, at <http://www.ohr.int/print/?content+id=7274>, cited in Mansfield, *supra* note \_\_\_ at 2072 n.96.

<sup>224</sup> Carrie Manning, *Armed Opposition Groups into Political Parties: Comparing Bosnia, Kosovo and Mozambique*, 39 *Studies in Comparative Political Development* 54, 62 (2004).

activities of the nationalist parties might have been similarly successful before Bosnia's first elections had the OHR and the OSCE similarly provided enforcement power to the EASC's decisions—even if they regarded those decisions as a mistake from a political perspective. The latter approach might have even reinforced the legitimacy and independence of the international reformers' intervention in the electoral process—a point I discuss in more depth below.

### *Other types of sanctions*

Additional substantive and procedural limitations that are present in both comparative and international law are necessary in order to prevent political party regulation from turning into yet another way for the group in power to prevent the entry of competitors for that power. As the Indian, Spanish and Turkish examples illustrate, prohibitions such as (1) electoral regulations that govern the content of political speech; (2) requirements that political parties accept some “fundamental tenet of the social order”; and (3) banning political parties from participation in elections (even if they are allowed to maintain their party organization),<sup>225</sup> can be enacted consistently with constitutional and international law guarantees of free speech and free association. As Professor Issacharoff argues, democracies are able to use these seemingly anti-democratic instruments in a manner consistent with democratic values through pairing them with institutional protections that guard against the potential for abuse. Procedural protections include the placement of the power to suppress party activity in bodies that do not have a direct stake in the political process (i.e. an independent judiciary or administrative tribunal); the types of sanctions employed (for example, civil versus criminal); and the idea that the governmental action to be taken must use the least restrictive means.<sup>226</sup> As a doctrinal matter, numerous courts have articulated standards to judge whether a party's speech and platform constitute a direct threat to democracy; these standards provide another bulwark against the manipulation of restrictions for political ends.<sup>227</sup>

Given the well-established presence of limitations (along with proper safeguards) on political party activity in comparative and international law, it is perhaps puzzling that international organizations took the approach they did to party regulation.

The inherent nature of democracy building by a supranational organization suggests one answer. The systems of political party regulation that have developed in established democracies did so through a messy historical process of trial and error—through experiences with confrontations with extremism, breakdown of democratic institutions and procedures, and

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<sup>225</sup> Issacharoff, *supra* note 1 at 1422.

<sup>226</sup> *Id.* at 1453-57.

<sup>227</sup> *Id.* at 1459-63.

occasional backslides into authoritarianism and dictatorship. International organizations, by contrast, are fundamentally undemocratic organizations—creating a paradox wherein an entity that exhibits no internal democracy must nonetheless impose and regulate external democracy. It is this paradox that arguably hampered the UN and the OSCE in its democracy-building enterprise. All of the UN’s and OSCE’s actions were obscured with the haze of illegitimacy—illegitimacy which flowed from the consequences of military intervention in the first place, coupled with controversial peacekeeping operations<sup>228</sup> and a widespread sense that it was the United States’ and EU’s agendas that were dictating the timeline for elections. This perceived illegitimacy may have hampered the IOs ability to act restrictively towards the SDS in particular, for fear of exacerbating the strong distrust and suspicion already directed at the international community.

This legitimacy problem may ultimately mean that even the substantive and procedural limitations described above are necessary but not sufficient to regulate political party activity in fractured societies, at least with respect to actors making essentially political decisions. More enduring approaches must occur over time, and under the auspices of institutions that are seen as legitimate by the population they are tasked with governing. But the fundamental point remains that despite international organizations public image as independent, neutral agents, profound mistrust in those organizations by local populations hampers their ability to be good faith arbiters of the democratic process. While the substantive and procedural protections found in the comparative and international law of democracy may help preserve the administration of democracy from the self-interested motivations of political actors, they do not substitute for the basic social trust that is the foundation for democratic institutions.

### *Functionalism*

The problems discussed above illustrate that the primary problem with the approach of international organizations to political party development and regulation in Bosnia was the refusal to see parties through the lens of their function under the circumstances of that particular post-conflict society. The process of democratization is dynamic and context-specific; and by assuming the paradigm of the electoralist party and by designing an electoral system catering to the idea of an electoralist party rather than ethnic nationalist ones, international organizations ignored how the existing groups set about to subvert the process for their own ends—in the case of the SDS, secessionist and ethnic separatist ends.

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<sup>228</sup> See, e.g., Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations* (2002).

A functionalist approach would have been less focused on elections as the endpoint for international intervention (and indeed, after the SDS was swept into power it became apparent that a quick exit for the international community was impossible) and more focused on establishing a system that was sustainable over the long-term, even if elections were delayed. Such a system might have looked to alternative institutions of power-sharing or to building parties in the long-term that were less polarized along the lines of victims and perpetrators of the conflict. The failure by the international community to build up the already-existing minority parties—parties organized around cross-cutting cleavages—and to protect those parties from violence no doubt contributed to the SDS’s overwhelming successes. And the continued presence of the OSCE in Bosnia was probably the sole bulwark against the backslide into violence that occurred once the nationalists took power.

The Bosnian example demonstrates the importance of functionalism both in designing ex ante a system of regulation, and in the balancing of interests implicated in the process of policing the boundaries of the political process. As the comparative context suggests, reformers in established democracies have used functionalism as a guide in both endeavors. And yet international organizations have struggled with using the lessons of functionalism in regulating post-conflict political parties.

One problem with the functionalist approach, and its use by IOs, is that it requires treating different types of political parties differently under the law. The troubling implication of the theory is that narrow, ethnic-based political parties have fewer “rights” than broad-based, electoralist parties. The echo of discrimination, especially in the context of heightened ethnic tensions, is no doubt a barrier to IOs adopting this approach. A bedrock principle of democratization is equal treatment under the law, as enshrined in the charters, guiding principles and mission statements of every NGO and IO involved in the democratization process. But the functional theory suggests that the associational and expressive rights of parties that exhibit the kinds of cross-cutting cleavages that are necessary for long-run stability should be given more weight than those of groups whose platforms run counter to that goal.

International human rights law is often viewed solely through the lens of individual rights and freedom from the potentially oppressive power of the state. But human rights law is also neither inflexible nor inattentive to the practical and functional considerations posed by political parties that develop out of groups that were formerly at war with each other. In established democracies, the constitutional law of the administration of politics is responsive to the functional purpose of political parties, and is willing to tolerate limitations upon freedom of

expression and association where such it is adjudged that such limitations are *more* facilitative of democracy than the alternative. International human rights law performs the same role as constitutional law in this sense—providing a mechanism for protecting the institutions that make democracy work. But the articles of faith of human rights law—equal treatment, nondiscrimination, etc.—must be informed by a more pragmatic vision of the role political parties perform in making democracy work.

As the case study of the EASC illustrates, a rush to competitive elections between groups that fundamentally mistrust each other, and who maintain aims that are anti-democratic in nature, creates special obstacles for the process of democratization. The fact that such groups fulfill particular key functions of political parties, such as interest representation, makes the problem even thornier. But to recognize that elections, and the electoral sphere, may necessitate special restrictions on speech and association is not to deny that such groups are still representative of their members and legitimate from the perspective of rebuilding a shattered country. Suppression or repression of the ethnic character of politics in a place like Bosnia is not a realistic mechanism for democracy-building, because ethnicity plays such a central role in social and political identification of the members of society. This truth is likely at the heart of the OSCE's approach in Bosnia—because so few other groups could lay claim to being legitimate representatives of the majority of Bosnians, the international community had little choice but to deal with parties that were essentially reconstituted out of the formerly warring ethnic factions. This legitimacy on the part of the ethnic groups in turn provided them an enormous amount of leverage with respect to international regulators that themselves were viewed with a high degree of suspicion.

Even so, the distinction between the *process of competitive elections* and the recognition of fundamental group identity suggests that the administration of democracy can be treated differently—and perhaps more rights-restrictively—than the treatment of the groups or individuals themselves. As comparative examples illustrate, contemporary established and transitional democracies have navigated the tension between self-determination and democracy-preservation through a wide variety of legal approaches—from content prohibitions on speech to party bans—that remain untried by international organizations in the position of regulator. Those examples show that rights can be restricted, albeit in narrowly tailored ways, without altering the fundamental character of democracy or denying the claims to legitimacy of groups and individuals.

## *Conclusion*

The most important conclusion to be taken from the international intervention in Bosnia, and from democratization efforts generally, is that such a process has no endpoint, and must be responsive to the unpredictable forces that generated conflict in the first place. Political parties cannot be regarded as “democratic goods” in and of themselves, and a process of democratic reform cannot rely on them to “generate democracy” where the requisite civic culture does not exist. Recognizing that political parties will not play their assigned role in an environment of severe mistrust may mean more heavy-handed regulation by the state than perhaps those used to the Western free speech tradition are comfortable with. Such regulation must conform to certain procedural requirements—it is independent from the political actors it restricts, it should be proportional to the threat posed by the party—and can encapsulate a broad range of sanctions; but it must be tailored to characteristics of the parties it deals with.

Another conclusion that should not come as any surprise to students of modern nation-building efforts, is that democratization is a highly contextual and contingent process—one that is sensitive to the particular historical, social and economic factors that are ingrained in the collective psyche of any emerging society. Even in the most well-established and stable democracies, where the risk of coup is minimal, the process of electoral competition and the ultimate transfer of power that must occur create heightened tensions. One need only look to the most recent presidential election in the United States, where the historic nature of the candidacy of the first black nominee for president led to isolated charges of racial incitement.<sup>229</sup> In societies where wounds run deeper, the risks of administering a zero-sum election are apparent.

As ethnic, religious and nationalist conflict have shown no sign of receding—predictions of the “end of history” notwithstanding—it has become increasingly important to revisit the basic assumptions of democracy in order to bring democracy to places that have a different understanding of it than the West. The wholesale importation of institutions such as political parties into a newly forming society makes little sense outside the context in which those parties act. And, ironically, they are being exported from democracies that have become entirely comfortable with limiting speech, participation and association, by undemocratic institutions that espouse universal human rights.

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<sup>229</sup> See e.g., *In Fla., Palin Goes for the Rough Stuff as Audience Boos Obama*, Wash. Post, Oct. 6, 2008, available at [voices.washingtonpost.com/the-trail/2008/10/06/in\\_fla\\_palin\\_goes\\_for\\_the\\_roug.html](http://voices.washingtonpost.com/the-trail/2008/10/06/in_fla_palin_goes_for_the_roug.html).

In this paper, I have argued for a less substantive-rights-oriented and more proceduralist reform approach to political party building in post-conflict societies. The hope is that future exercises in democracy building pay better attention to the complexities of democracy's past.