

Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms

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[The establishment of a legal precedent for ethnic cleansing] is a thoroughly bad and vicious solution [to the problem of national minorities] for which the world will pay a heavy penalty for a hundred years to come.

Lord Curzon
British Foreign Minister, 1923¹

It could not have been predicted when the first Sub-Commission [on the Prevention of Discrimination and Protection of Minorities] resolution on population transfer [or ethnic cleansing] was adopted in 1990 that this form of human rights abuse would become so central to conflicts and pressing political issues of which the international community is now seized.

A.S. Al-Khasawneh and R. Hatano
UN Special Rapporteurs, 1993²

I. INTRODUCTION

In the early 1990s a new term entered the language of politics: ethnic cleansing. By 1997 that term was commonplace. It appeared regularly not only in media reports but also in the pronouncements of those international

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1. ALFRED DE ZAYAS, *NEMESIS AT POTSDAM: THE ANGLO-AMERICANS AND THE EXPULSION OF THE GERMANS* 11–12 (1979) (quoting Lord Curzon, the British Foreign Minister from 1919 to 1924, a participant at the Lausanne Conference).
2. *The Realization of Economic, Social and Cultural Rights: The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, U.N. ESCOR, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 45th Sess., Provisional Agenda Item 8, at 85, U.N. Doc. E/CN.4/Sub.2/1993/17 (1993) [hereinafter *The Human Rights Dimensions of Population Transfer*].

and nongovernmental organizations (NGOs) concerned with various ethnic conflicts around the globe—be they in the Balkans (Bosnia and Croatia), the Caucasus (Armenia and Azerbaijan), Africa (Somalia and Rwanda) or Asia (Cambodia). Seemingly, ethnic cleansing was a phenomenon of the post-Cold War era: that, at least, was the impression that one received from most writing on the subject—which as of 1997 remained primarily journalistic.

This impression, however, was misleading. In fact, forcibly moving populations defined by ethnicity (race, language, religion, culture, etc.) to secure a particular piece of territory—thereby *cleansing* that territory of a particular group—has been an instrument of nation-state creation for as long as homogeneous nation-states have been the ideal form of political organization.³ Since Woodrow Wilson first hailed national self-determination as the organizing principle of the 1919 territorial settlement,⁴ ethnic cleansing has affected millions of people around the world.⁵ The following are but a few European examples: in the interwar period, 1.5 million Greeks were cleansed from Turkey,⁶ 400,000 Turks cleansed from Greece,⁷ between 92,000 and 102,000 Bulgarians cleansed from Greece,⁸ 35,000 Greeks cleansed from Bulgaria,⁹ 67,000 Turks cleansed from Bulgaria¹⁰; during World War II and its aftermath, 110,000 Romanians cleansed from Bulgaria,¹¹ 62,000 Bulgarians cleansed from Romania,¹² 1.2 million Poles

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3. While *cujus regio ejus religio* remained the legitimizing principle in international relations (that is, prior to 1919), there were of course numerous incidents of religious cleansing designed to create homogeneous religious populations within states. See Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, 72-1 FOREIGN AFF. 110 (1993); see also Jennifer Jackson Preece, *Minority Rights in Europe: From Westphalia to Helsinki*, 23 REV. INT'L STUD. 75 (1997).
 4. Treaty Between the Allied and Associated Powers and Germany, 28 June 1919, U.S.-The British Empire-Fr.-Italy-Japan-Belg.-Bol.-Braz.-P.R.C.-Cuba-Ecuador-Greece-Guat.-Haiti-The Hedjaz-Hond.-Liber.-Nicar.-Pan.-Peru-Pol.-Port.-Rom.-The Serb-Croat-Slovene State-Siam-Czecho-Slovakia-Uru.-Germany, 2 BEVANS 43, reprinted in 1 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE TREATIES OF PEACE 1919-1923, at 3 (1924) (known as the Treaty of Versailles).
 5. On 11 February 1918 Woodrow Wilson described national self-determination as "an imperative principle of action." See ALFRED COBBAN, THE NATION STATE AND NATIONAL SELF-DETERMINATION 53, 57-84 (1970). This thinking was later borne out both in Wilson's Fourteen Points of February 1918 and later in Article X of the League of Nations Covenant. See Wilson's Fourteen Point Speech of 8 Jan. 1918, 1 FOREIGN RELATIONS OF THE UNITED STATES 12ff (Supp. I 1918); LEAGUE OF NATIONS COVENANT art. 10.
 6. See Alfred de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207, 222-23 n.2 (1975).
 7. See *id.*
 8. See *id.*
 9. See *The Human Rights Dimensions of Population Transfer*, supra note 2, at 28 ¶ 120; see also JOSEPH ROTHSCHILD, EAST CENTRAL EUROPE BETWEEN THE TWO WORLD WARS 328 (1990).
 10. See *The Human Rights Dimensions of Population Transfer*, supra note 2, at 29 ¶ 126.
 11. See EUGENE M. KULISCHER, EUROPE ON THE MOVE: WAR AND POPULATION CHANGES 1917-1947, at 304 (1948).
 12. See *id.*

cleansed from areas incorporated by the German Reich,¹³ 700,000 Germans cleansed from Latvia, Lithuania, Estonia, Romania, Yugoslavia, and Italy and relocated into the Nazi Incorporated Territories of Western Poland,¹⁴ 6 million Jews cleansed from Nazi-occupied Europe and eventually exterminated,¹⁵ 600,000 Soviet citizens belonging to politically suspect ethnic groups (e.g., Chechens, Tatars, Pontic Greeks) cleansed from their historic homelands on Stalin's orders and relocated beyond the Urals,¹⁶ 14 million Germans cleansed from Poland, Czechoslovakia, Hungary, Yugoslavia, and Romania,¹⁷ 140,000 Italians cleansed from Yugoslavia,¹⁸ 31,000 Hungarians cleansed from Czechoslovakia,¹⁹ 33,000 Slovaks cleansed from Hungary;²⁰ since 1948, 45,000 Turkish Cypriots cleansed from Greek Cyprus,²¹ 160,000 Greek Cypriots cleansed from Turkish Cyprus,²² more than 300,000 ethnic Turks cleansed from Bulgaria,²³ 2.5 million people displaced as a result of the conflict in former Yugoslavia, many of whom were the victims of ethnic cleansing.²⁴ It should be emphasized that this list is not exhaustive.

Indeed, in the twentieth century so widespread was the practice of ethnic cleansing or forced population transfer (which is the older expression used to describe those practices associated with ethnic cleansing) and so far-reaching were its consequences that UN Special Rapporteurs A.S. Al-Khasawneh and R. Hatano in their 1993 report *The Human Rights Dimensions of Population Transfer* offered the following observation: "As much as population transfer has prevailed as an instrument of State-craft in every age in recorded history, ours could be distinguished as the century of the displaced person."²⁵

Clearly, ethnic cleansing or forced population transfer is a subject that merits careful academic scrutiny. By the late 1990s there were still too few analyses of the practice and its status in international society. This article aims to fill in at least some of those gaps that remain in our understanding of ethnic cleansing as an instrument of nation-state creation. In so doing, it will address the following questions: (1) What was meant by the term ethnic

13. See Bell-Fialkoff, *supra* note 3, at 114.

14. See *id.*

15. See *id.*

16. See *id.* at 115.

17. See *id.*

18. See KULISCHER, *supra* note 11, at 303.

19. See Bell-Fialkoff, *supra* note 3, at 115.

20. See *id.*

21. See ANTHONY PARSONS, FROM COLD WAR TO HOT PEACE: UN INTERVENTIONS 1947-1995, at 178 (1995).

22. See *id.* at 178-79.

23. See HUGH POULTON, THE BALKANS: MINORITIES AND STATES IN CONFLICT 159-60 (1991).

24. See Bell-Fialkoff, *supra* note 3, at 118.

25. *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 5.

cleansing? (2) How was ethnic cleansing practiced in Europe during the twentieth century? (3) What was the normative status of this practice in international society at this time? (4) And, finally, what was the relationship between changing practices and evolving norms on this issue?

It will be argued that the practice of ethnic cleansing is fundamentally linked to the political ideal of the homogeneous nation-state and the ethnic nationalism that underscores it. This is an ideal that rejects pluralism in domestic politics in favor of uniformity and affirms the virtue of the territorially bounded political community predicated upon a shared ethnic identity. In circumstances of demographic ethnocultural complexity—and these circumstances are the rule rather than the exception—such a community can of course only be brought about by securing a better fit between political boundaries and ethnicity. States can physically eliminate national minorities either by removing peoples to fit existing nation-state boundaries or by adjusting international boundaries to fit existing demographics. The latter possibility—adjusting boundaries—is usually justified on the basis of the ethnic composition of adjacent territories, which of course also can be manipulated by moving peoples. In this way, the practice of ethnic cleansing becomes an instrument of nation-state creation.

II. WHAT IS ETHNIC CLEANSING?

The term ethnic cleansing has its origins in the 1990s Yugoslav conflict and is in fact a literal translation of the Serbo-Croatian/Croato-Serbian "*etničko čišćenje*."²⁶ It is impossible to determine who was the first to employ the expression—although the suggestion has been made that *etničko čišćenje* was in fact part of the Yugoslav National Army's (JNA) military vocabulary and was used by the JNA to denote their policy of removing Croats and Moslems from territory conquered and claimed by rump Yugoslavia (Serbia-Montenegro).²⁷ There can be no doubt, however, that the expression was first publicized in the West by journalists reporting Yugoslav developments and that by the late 1990s it had entered the official language of international institutions and NGOs.²⁸

So what, then, were journalists, world leaders, and NGO representatives talking about when they used this term? Both the 1990s expression ethnic cleansing and its more general synonym, forced population transfer, refer to those practices designed to remove specific groups from a given area—be it

26. See Drazen Petrovic, *Ethnic Cleansing: An Attempt at Methodology*, 5 EUR. J. INT'L L. 342, 342–43 n.3 (1994).

27. See *id.* at 343.

28. See *id.* at 342.

within a state or across international frontiers.²⁹ Ethnic cleansing, however, is a distinctive kind of population transfer—one that is exclusively based upon ethnic criteria. For example, UN Special Rapporteur Tadeusz Mazowiecki defined ethnic cleansing as “the elimination by the ethnic group exerting control over a given territory of members of other ethnic groups.”³⁰ Moreover, “‘ethnic cleansing’ may be equated with a systematic purge of the civilian population based on ethnic criteria, with a view to forcing it to abandon the territories where it lives.”³¹

Consequently, while ethnic cleansing affects people, what is really at stake is territory. The primary consideration behind moving people is to secure territory that is defined in ethnic terms. In other words, the quest for territory inhabited only by one’s own people is arguably the *modus operandi* of the ethnic cleansing process; the goal is the ethnically homogeneous or pure (cleansed of minority ethnic groups) nation-state. Ethnic cleansing is in this way an instrument of nation-state creation. Indeed, such population movements are often carried out to bolster claims for international boundary changes or to consolidate control over disputed frontier areas. The cleansing of Croats from Serbian-occupied Krajina, the cleansing of Azerbaijanis from Nagorno-Karabakh, and the cleansing of Russians from Chechnya are just a few post-Cold War examples of ethnic cleansing’s role in the quest for national self-determination.

Ethnic cleansing may be a dramatic expulsion conducted suddenly and en masse or it may occur more gradually over a longer period of time. Such

29. Whereas ethnic cleansing is exclusively concerned with conflict between rival ethnic groups, forced population transfer does not immediately imply an ethnic dimension. Population transfer is thus defined in UN documents more generally as

the movement of people as a consequence of political and/or economic processes in which the State Government or State-authorized agencies participate. . . . [It is] conducted with the effect or purpose of altering the demographic composition of a territory in accordance with policy objectives or prevailing ideology . . . [that] asserts the dominance of a certain group over another.

The Human Rights Dimensions of Population Transfer, supra note 2, at 6. For example, the exodus of political dissidents from Hungary in 1956 and Czechoslovakia in 1968—precipitated by the return to hardline communist rule—may be described as population transfer but would not fit the more specific criteria of ethnic cleansing, as the peoples involved were distinguished by their political beliefs rather than their ethnic identities.

30. *Human Rights Questions: Human Rights Situations and Reports of the Special Rapporteurs and Representatives: Situation of Human Rights in the Territory of the Former Yugoslavia: Note by the Secretary-General*, adopted 17 Nov. 1992, U.N. GAOR, 47th Sess., at 6 ¶ 9, U.N. Doc. A/47/666-S/24809 (1992).

31. *Situation of Human Rights in the Territory of the Former Yugoslavia, Sixth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Paragraph 32 of Commission Resolution 1993/7 of 23 February 1993*, U.N. ESCOR, Comm’n on Hum. Rts., 50th Sess., Agenda Item 12, at 44, U.N. Doc. E/CN.4/1994/110 (1994).

forced movements usually take place when territories are being fought over and thus when boundary revision is a real and immediately obtainable possibility—i.e., during armed conflict (whether civil or international), in the context of belligerent occupation, or following the cessation of hostilities. In these circumstances, the potential political gains of ethnic cleansing—territorial readjustments and the creation of ethnically homogeneous nation-states—are most apparent. That being said, ethnic cleansing can and indeed has occurred during peace time as well, as was the case as regards the exodus of Moslems from Bulgaria in the 1980s.³² Further, ethnic cleansing may involve only the domestic acts of a particular state or occupying power (as in Bosnia and Croatia)—in which case it usually occurs during hostilities and is a pretext or justification for territorial claims. Alternatively, it may be stipulated in the bilateral or multilateral agreements of a number of interested parties (as in the interwar exchange of populations between Greece and Turkey)—in which case it usually occurs after the cessation of hostilities and is a means of safeguarding an existing territorial division.

As a practice, ethnic cleansing can consist of a number of different actions committed by one ethnic group against another with a view to compelling flight. People may simply be rounded up, detained, and deported; or, their movement may be the result of other, more indirect measures including some or all of the following: the removal of elected authorities; the prohibition of ethnic associations and minority language use; forced homogenization or assimilation; work restrictions; restricted access to education, housing, medicine, food, or humanitarian aid; forced labor; confiscation of property; political violence in the form of pogroms and purges; or terror campaigns inflicting beatings, rape, castration, and even death.³³ Regardless of the measures used, the end result is the same: a given area is eventually cleansed of a particular group of people defined in ethnic terms and the dominant ethnic group comes closer to achieving a homogeneous nation-state—that is ethnic cleansing.

III. CHANGING PRACTICES IN TWENTIETH CENTURY EUROPE

A. Interwar

Ethnic cleansing became a significant element of European international relations following the end of World War I. The peace settlement of 1919

32. See *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 9–10.

33. See *id.* at 9–20.

aimed to restructure international society according to the requirements of national self-determination defined in ethnocultural terms. At this time, distinct linguistic and cultural characteristics were accepted widely as proof of nationhood. If the peoples inhabiting a particular area had a unique language and culture—and thus a common ethnic identity—they could legitimately claim a right to national self-determination. Thus, from 1919 to 1920 new nation-states were created in Central and Eastern Europe. Out of the defeated Austro-Hungarian Empire, Ottoman Empire, and Prussian Kingdom emerged a dozen new or enlarged states, all of whom claimed legitimacy on grounds of nationality: Poland, Czechoslovakia, Austria, Hungary, Yugoslavia, Romania, and Albania. Added to these were Finland and the Baltic states that emerged out of the disintegrating Russian Empire: Estonia, Latvia, and Lithuania.

A fundamental weakness in this new European order of 1919, however, was the indeterminate nature of ethnic identity and the limited assistance it actually was able to give in delineating frontiers. In other words, the 1919 boundaries unavoidably created both new nation-states and with them new national minorities that could potentially threaten the territorial division of the postwar settlement through separatism or irredentism. Ethnic cleansing—then population transfer—was viewed as a legitimate means of overcoming these national discrepancies (i.e., of improving the fit between national boundaries and the ethnic composition of the population within them). National minorities who remained outside the boundaries of their ethnic group's nation-state could simply be relocated. It was hoped that this would ease tensions both within and between states by reducing the incidence of disruptive minority claims for national self-determination. At the same time, the transfer of national minorities to their ethnic group's nation-state was considered the fulfillment of that minority's right to national self-determination—once moved, they would become a part of that body politic that reflected their ethnocultural distinctiveness.³⁴

34. Those national minorities that remained in the various successor states were assigned rights to civil and political equality with the majority as well as a measure of cultural autonomy. These rights were placed under the guarantee of the League of Nations. It was hoped that the League of Nations System of Minority Guarantees would reduce minority/majority tensions within the successor states, thereby diminishing the possibility of separatism and irredentism. In the end, the guarantee did not operate in the way that had been envisioned and this hope was not fulfilled. The great powers were loath to become involved in minority disputes when their national interests were not at stake. This resistance allowed kin-states (i.e., those states whose ethnic kin formed minorities) such as revisionist Germany and Hungary to take the lead in implementing the guarantees. As one might expect, kin-state involvement evoked suspicion and indeed hostility in those states that possessed minorities and feared that such involvement was a pretext for intervention and possibly even irredentism. Consequently, treaty-bound states increasingly sought to evade their minority responsibilities. The League System

It is in this context that the exchange of populations between Greece and Turkey and Greece and Bulgaria took place. These population transfers were authorized and (in theory) regulated by the Treaty of Lausanne of 1923³⁵ (for transfers between Greece and Turkey) and the Convention on Reciprocal Voluntary Emigration³⁶ signed at the same time as the Neuilly Treaty of 1919³⁷ (for transfers between Greece and Bulgaria). The Treaty of Lausanne is the better known of the two—presumably because the numbers involved were so much greater (1.5 million Greeks and 400,000 Turks as opposed to between 92,000–102,000 Bulgarians and 35,000 Greeks).³⁸ The Greco-Bulgarian arrangement was in principle voluntary though the persons concerned nevertheless did come under pressure to relocate. In contrast, the Treaty of Lausanne was explicitly compulsory. Greeks and Turks were either forced to leave Turkey or Greece or—having fled during the war of 1922—were prohibited from returning. Nevertheless, the Lausanne Treaty was intended to ensure that these forced movements were both “orderly and humane.” The League of Nations was assigned supervisory responsibility and transferees were guaranteed compensation for properties left behind. The transfers themselves were accomplished quite quickly, but the monetary compensation later proved unworkable.³⁹ While a few leading statesmen—including Lord Curzon, then British Foreign Secretary, who was quoted at the beginning of this article—deplored the transfers because of the very many social and economic problems they involved, “a majority gradually exhibited a peculiar euphoria over the simplicity of the solution”

eventually came to an end in 1934 when Poland unilaterally renounced her treaty obligations. For a discussion of the League of Nations System of Minority Guarantees see INIS CLAUDE, *NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM* (1955). See also Preece, *supra* note 3, at 81–84; CARLILE MACARTNEY, *NATIONAL STATES AND NATIONAL MINORITIES* (1934); LUCY PHILIP MAIR, *THE PROTECTION OF MINORITIES: THE WORKING SCOPE OF THE MINORITIES TREATIES UNDER THE LEAGUE OF NATIONS* (1928); JACOB ROBINSON, *WERE THE MINORITIES TREATIES A FAILURE?* (1943); JULIUS STONE, *INTERNATIONAL GUARANTEES OF MINORITY RIGHTS* (1932).

35. Treaty of Peace with Turkey, 23 July 1923, *The British Empire-Fr.-Italy-Japan-Greece-Rom.-The Serb-Croat-Slovene State-Turkey*, 28 L.N.T.S. 12, *reprinted in* 2 *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE TREATIES OF PEACE 1919–1923*, at 959 (1924) (known as the Treaty of Lausanne, which replaced the Treaty of Sevres of 10 Aug. 1920).
36. Convention Between Bulgaria and Greece Respecting Reciprocal Emigration of Minorities, 27 Nov. 1919, *Greece-Bulg.*, 226 C.T.S. 435.
37. Treaty of Peace Between the Allied and Associated Powers and Bulgaria, *opened for signature* 27 Nov. 1919 (*entered into force* 9 Aug. 1920), U.S.-The British Empire-Fr.-Italy-Japan-Belg.-P.R.C.-Cuba-Greece-The Hedjaz-Pol.-Port.-Rom.-The Serb-Croat-Slovene State-Siam-Czech.-Bulg., 226 C.T.S. 332, *reprinted in* 2 *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE TREATIES OF PEACE 1919–1923*, at 653 (1924) (known as the Treaty of Neuilly).
38. See de Zayas, *supra* note 6, at 222–23.
39. See 8 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 438–44 (P. Bernhardt ed., 1985) [hereinafter *ENCYCLOPEDIA*].

of ethnically mixed populations that population transfer was thought to embody.⁴⁰ Indeed, the Treaty of Lausanne became an oft-cited precedent for “orderly and humane” transfers of population throughout the 1920s, 1930s, and 1940s.⁴¹ Thus, for example, the bilateral transfer agreement concluded between Romania/Turkey in 1936—as a result of which 67,000 Turks were relocated to Turkey—was justified at least in part by reference to the so-called success of Lausanne.⁴²

B. World War II and Its Aftermath

By the early 1940s, Germany had emerged as the principal protagonist of transfer agreements in Europe.⁴³ The movement of populations was a fundamental component of Nazi policy immediately prior to and during the Second World War. Needless to say, Jews were moved to concentration camps from across Nazi-occupied Europe as a first step towards the “Final Solution.” However, cleansing Europe of its historic Jewish population was not Hitler’s sole concern as regards ethnic cleansing. Hitler was also deeply committed to the idea of bringing ethnic German minorities in East Central Europe—where they had lived for centuries—back to the Reich as part of his plan for the fulfillment of German national self-determination.

Consequently, in accordance with Hitler’s policy of *Umsiedlung* (re-settlement), German minorities were relocated to areas claimed by the expanding German Fatherland. Thus, for example, under bilateral agreements with the Baltic states, Italy, Romania, Yugoslavia, and Bulgaria, German *Volksdeutsche* were “repatriated” to the Reich. The vast majority of these ethnic Germans were resettled in the Incorporated Territories of Western Poland, Upper Silesia, and East Prussia. To make way for these returning Germans, the Slav populations of these territories were forcibly—and indeed often ruthlessly—expelled.⁴⁴ Elsewhere in the Reich, non-German populations were also ethnically cleansed from border regions to bolster German claims to these areas. Thus, for example, more than 100,000 French were expelled from Alsace-Lorraine into Vichy, France.⁴⁵

Similarly, the Nazi/Soviet alliance—which outlined a territorial division between Germany and the USSR—also became a pretext for population transfer agreements intended to permanently secure the stipulated boundary

40. DE ZAYAS, *supra* note 1, at 11.

41. De Zayas, *supra* note 6, at 222–23.

42. See *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 28–30.

43. See *id.* at 29.

44. See *id.* at 30–31.

45. See ENCYCLOPEDIA, *supra* note 39, at 439.

revisions. The three German/Soviet agreements of 1939 to 1941 all provided for the forced transfer of populations.⁴⁶ As a result of these agreements, 100,000 Germans were moved from Soviet-occupied Poland to the Incorporated Territories, and in exchange, between 30,000 and 40,000 Ukrainians and Byelorussians were moved from German- to Soviet-occupied areas. This ethnic cleansing of course was made in the attempt to create a tidier German/Slav division in the region.⁴⁷ Likewise, following the Soviet annexation of Bessarabia and Northern Bukovina (from Romania) in 1941, more than 137,000 Germans from these areas were relocated to the Reich.⁴⁸

Other treaties and agreements involving the forced movement of non-German minorities were also concluded during the war to strengthen those boundary revisions Hitler awarded to his allies (such territorial adjustments were a common fee paid for association with Nazi objectives). Hungary, for example, sought to recover territories and kin-minorities lost as a result of the 1919 settlement. As part of Hungary's alliance with Nazi Germany in 1940, the Hungarian state was ceded territory in (neighboring) Slovakia and Romania that she had lost as a result of the Trianon Treaty of 1920⁴⁹—despite the fact that Hungarians made up a substantial proportion of the population in these regions. In order to make these newly claimed areas majority Hungarian—and thus to protect them from rival claims to self-determination by other ethnic groups—Hungarian minorities from Yugoslavia and elsewhere in Romania were forcibly relocated to them.⁵⁰

Enthusiasm for ethnic cleansing as a solution to outstanding minority problems was not confined to the Axis powers. As World War II progressed,

46. *The Human Rights Dimensions of Population Transfer* identifies these three German/Soviet agreements *supra* note 2, at 31 ¶ 134, 92 n.89. See Russo-German Agreement of 16 Nov. 1939 on the Evacuation of Ukrainians and Belorussians from Polish Territory, Foreign Policy Documents (1939), Russian Foreign Ministry (Moskva, Mezhdunarodnie Otnoshenia 1992) (known as the Treaty of Moscow); Note Exchanged with Rumanian Government Regarding the Transfer of Bessarabia and Bukovina, 3 SOVIET DOCUMENTS ON FOREIGN POLICY 458 (1953), reprinted in 8 DOKUMENTE DER DEUTSCHEN POLITIK 624–39 pt.2, translated in 2 DOCUMENTS ON INTERNATIONAL AFFAIRS: 1939–46, at 59 (Margaret Carlyle ed., 1954) (known as the Accord of Moscow); Soviet-German Frontier Treaty, *id.* 479, reprinted in 21 *The Exchange of Minorities and Transfers of Population in Europe Since 1919: II*, in 21 BULL. INT'L NEWS 657, 663 n.17 (1944) (known as the Convention of Moscow) [hereinafter Convention of Moscow].

47. See *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 31.

48. See Convention of Moscow, *supra* note 46.

49. Treaty of Peace Between the Allied and Associated Powers and Hungary, 4 June 1920, U.S.-The British Empire-Fr.-Italy-Japan-Belg.-P.R.C.-Cuba-Greece-Nicar.-Pan.-Pol.-Port.-Rom.-The Serb-Croat-Slovene State-Siam-Czech.-Hung., 113 BRIT. & FOREIGN ST. PAPERS 486, reprinted in 1 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE TREATIES OF PEACE 1919–1923, at 461 (1924) (known as the Treaty of Trianon).

50. See *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 31–32.

both the British and US governments also came to believe that population transfers would play a key role in the postwar settlement.

With the fresh memory of the failure of the League's minority system in their minds [see footnote 34], the planners of post-war Europe proposed to solve the problem of minorities not by redrawing frontiers nor by attempting another guarantee of minority rights [both of which had been tried in 1919 with unsatisfactory results], but rather by eradicating the minorities themselves. Of course, any such programme would necessarily raise additional problems from the humanitarian point of view, but it was thought that temporary discomfort and dislocation were not too high a price to pay for future peace and stability.⁵¹

The first serious proposals for postwar transfers were brought forward by the Czechoslovakian and Polish governments in exile and concerned the German minorities there. During the interwar period, both Czechoslovakia and Poland possessed substantial minority populations—particularly ethnic Germans—and accordingly both had been subject to the League of Nations System of Minority Guarantees as regards the treatment of these groups.⁵²

51. DE ZAYAS, *supra* note 1, at 7.

52. The League minority system comprised a series of treaties wherein the states concerned agreed to uphold certain stipulations regarding their treatment of minorities and recognized the League of Nations as guarantor of that agreement. Generally these treaties were multilateral rather than bilateral. Austria (St. Germain-en-Laye, 10 September 1919), Hungary (Trianon, 4 June 1920), Bulgaria (Neuilly-sur-Seine, 27 November 1919), and Turkey (Lausanne, 24 July 1923)—as defeated states—were bound by national minority clauses in the various peace treaties that formally ended the First World War. Similarly, the participation of new or enlarged states such as Poland (Versailles, 28 June 1919), Czechoslovakia (St. Germain-en-Laye, 10 September 1919), Romania (Paris, 9 December 1919), the Kingdom of Serbs, Croats and Slovenes (St. Germain-en-Laye, 10 September 1919) and Greece (Sevres, 10 August 1920) was also a stipulation of the peace treaties. Albania (2 October 1921), Lithuania (12 May 1922), Estonia (17 September 1923), and—outside of Europe—Iraq were persuaded to conclude similar national minority treaties as part of their admission to the League of Nations. Finland (27 June 1921) also made national minority commitments in regard to the Aaland Islands. In a more limited way, Germany, too, was a party to the international system of national minority protection by virtue of the 1922 Geneva Convention wherein Poland and Germany established a national minority regime for Upper Silesia and themselves assigned an important supervisory role to the League of Nations. The Upper Silesia agreement was the only bilateral treaty in the League minority system. The League minority system effectively came to an end on 13 September 1934 when Poland renounced its minority obligations. Following this unilateral action, the system became increasingly ineffectual until it finally was destroyed by the impact of the Second World War. It was judged to be extinct in a study by the UN secretariat in 1950, which based its findings on the effect of the Second World War, the dissolution of the League of Nations, the implicit abrogation of the minorities treaties by the coming into effect of the UN Charter, and by the stipulations concerning human rights and fundamental freedoms in the peace treaties of 1947. For a further discussion of the League of Nations minority system see JENNIFER JACKSON PREECE, *The League of Nations System of Minority Guarantees*, NATIONAL MINORITIES AND THE

The general consensus amongst Czechoslovakian and Polish government officials was that the large and internationally protected German minority groups had not only been pretexts for Nazi aggression but also accomplices in that aggression. It subsequently became an established fact that German minority groups in Czechoslovakia, Poland, and elsewhere in occupied Europe did indeed participate in fifth column activities both before and during the war.⁵³ Thus, Czechoslovak and Polish officials were eager to ensure that this potentially subversive element was removed from their states after the war by a policy of forced transfer. They were, however, quick to assure the British and American governments that such transfers would satisfy the criteria of "orderly and humane" as established under the Treaty of Lausanne. As Czechoslovakian President in exile Eduard Benes assured British Foreign Secretary Anthony Eden in 1941,

I accept the principle of the transfer of populations. . . . If the problem is carefully considered and wide measures are adopted in good time, the transfer can be made amicably under decent human conditions, under international control and with international support. [Benes] . . . did not recommend any method which involves brutality or violence.⁵⁴

With these reassurances, the British and US governments endorsed the principle of transfer as a necessary means of ensuring future peace and security in postwar Europe. Thus, for example, President Roosevelt is reported to have said that the Allies "should make some arrangements to move the Prussians out of East Prussia the same way the Greeks were moved out of Turkey after the last war . . . while this is a harsh procedure, it is the only way to maintain peace. . . ." ⁵⁵ In a similar vein, Churchill argued that

expulsion is the method which, so far as we have been able to see, will be the most satisfactory and lasting. There will be no mixture of populations to cause endless trouble. . . . A clean sweep will be made. I am not alarmed by these large transferences, which are more possible in modern conditions than they ever were before.⁵⁶

The authorization to forcibly transfer populations in post-World War II Europe finally was given in the Potsdam Protocol of 1945 wherein the Allies authorized the transfer of ethnic Germans from East of the Oder-Neisse line,

EUROPEAN NATION-STATES SYSTEM ch.5 at 67-95 (1998) (on file with author). See also *Protection of Linguistic, Racial and Religious Minorities by the League of Nations*, League of Nations Doc. C.L.110 1927 I.B.2 (1927); CLAUDE, *supra* note 34; Preece, *supra* note 3, at 81-84; MACARTNEY, *supra* note 34; ROBINSON, *supra* note 34; STONE, *supra* note 34.

53. DE ZAYAS, *supra* note 1, at 4.

54. *Id.* at 7.

55. *Id.* at 8.

56. *Id.* at 1.

from prewar Poland, Czechoslovakia, and Hungary.⁵⁷ The Potsdam Protocol thus declared that “[t]he Three [US, British, and Soviet] Governments . . . recognize that the transfer to Germany of German populations . . . will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner.”⁵⁸ There is evidence to suggest that the British and Americans originally had expected a transfer of between 3 and 6 million Germans.⁵⁹ Moreover, following the precedent set in the Treaty of Lausanne, it was envisaged that these transfers would be supervised by an international commission that would ensure that “orderly and humane” conditions prevailed and that would compensate transferees for lost properties, etc.

These plans, however, were overcome and ultimately frustrated by events. Poland, Czechoslovakia, and Hungary began transferring Germans before an international commission could be formed—in the end, it never was. Moreover, though not specifically authorized to do so, Yugoslavia and Romania also expelled their German minorities, citing the Potsdam provisions as justification for their actions. As a result, more than 14 million Germans were expelled under conditions of starvation and terror. So far from “orderly and humane” were the actual conditions in which the flight occurred that more than 2 million people died or were killed in the process.⁶⁰ As the *New York Times* reported from Germany in February 1946,

[I]t was also agreed at Potsdam that the forced migration should be carried out “in a humane and orderly manner.” Actually, as every one knows who has seen the awful sights at the reception centers in Berlin and Munich, the exodus takes place under nightmarish conditions, without any international supervision or any pretense of humane treatment. We share responsibility for horrors only comparable to Nazi cruelties. . . .⁶¹

Yet, despite evidence of brutality in the practice of ethnic cleansing, the policy continued. Bilateral transfer agreements to remove unwanted national minorities from post-World War II Europe were also concluded in 1946 between Czechoslovakia and Hungary, Hungary and Yugoslavia, Yugoslavia and Italy, the Soviet Union and Poland, and the Soviet Union and Czechoslovakia.⁶²

57. Protocol of the Potsdam Conference, 17 July–2 Aug. 1945, art. XIII, 145 BRIT. & FOREIGN ST. PAPERS 852, reprinted in 39 AM. J. INT’L L. SUPP. 245 (1945).

58. ENCYCLOPEDIA, *supra* note 39, at 441–42.

59. See DE ZAYAS, *supra* note 1, at 89.

60. See ENCYCLOPEDIA, *supra* note 39, at 442.

61. N.Y. TIMES, Feb. 1946, quoted in DE ZAYAS, *supra* note 1, at 123.

62. See *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 31.

C. Since 1948

After the immediate post–World War II period, the incidence of ethnic cleansing in Europe declined considerably. This may be explained in part by the fact that the most troublesome minorities of the interwar period—the German minorities in East Central Europe—were virtually all forcibly relocated to Germany between 1945 and 1947. Moreover, as the Soviet Union tightened its grip on Central and Eastern Europe and the division between East and West became increasingly impenetrable the opportunities for transfer became correspondingly more limited. Nevertheless, the use of ethnic cleansing as an instrument of nation-state creation was not entirely eradicated from Europe either.

For example, during the Cypriot Crisis of 1974—when Turkey invaded the island—approximately 45,000 Turkish Cypriots fled Greek-controlled areas fearing that they would be subject to attack or reprisal by the rival ethnic community.⁶³ At the same time—and again fearing for their lives—about 160,000 Greek Cypriots fled in the opposite direction (i.e., away from Turkish-controlled areas).⁶⁴ Twenty years later, the territorial division created by this process remained in place. Consequently, as of 1997, ethnically cleansed individuals and their descendents were still displaced from their historic villages and without compensation for properties left behind.

Ethnic cleansing was also carried out in Bulgaria from 1984 to 1989.⁶⁵ Beginning in 1984, the Communist government led by Todor Zhivkov began implementing a policy of forced assimilation of the ethnic Turkish minority designed to strengthen its political control over the Bulgarian state and its people. Ethnic Turks were required to change their names to Bulgarian equivalents—often by military officials and at the point of a gun. Those who refused to assimilate lost their jobs and were denied access to education. At the same time, Mosques were closed and Moslem practices as regards burial and circumcision were prohibited—those who disobeyed were imprisoned. In 1989, a Turkish dissident movement was formed to resist these assimilationist measures. The Bulgarian government responded with violence and mass expulsions of the activists. In this repressive environment, more than 300,000 ethnic Turks fled to neighboring Turkey.⁶⁶

63. See PARSONS, *supra* note 21, at 178.

64. See *id.* at 178–79.

65. See POULTON, *supra* note 23, chs. 9–11, at 105–161 (for an excellent analysis of Zhivkov's assimilationist policies).

66. By January 1990, more than 130,000 of these had voluntarily returned to Bulgaria. This return may be explained both by the improved political circumstances in Bulgaria following the overthrow of the Zhivkov regime and the unfavorable economic situation in Turkey. See *id.* at 159–71.

Needless to say, however, the most well-known and notorious example of ethnic cleansing in Europe since 1948 was that carried out in Bosnia and Croatia in the early 1990s as part of the process of carving homogeneous nation-states out of the former multinational Yugoslavia. In 1991—even before Croatia and Slovenia had declared independence—about 20,000 Serbs fled Croatia for Serbia. Although the violent measures that later came to be used by both the JNA and irregular civilian forces had not yet begun, it is important to remember that proposed Croatian constitutional measures were being criticized at this time by the European Union, Council of Europe, and other international organizations for providing inadequate minority rights protection. Indeed, it was on the basis of Croatia's minority rights shortcomings that the Badinter Commission—convened to establish common European Union criteria for the recognition of Yugoslav successor states—recommended against immediate recognition of Croatian independence.⁶⁷ Thus, it was clear that the Serbian minority would not be welcomed in an independent Croatia. Consequently, many Serbs believed their position post-independence would be untenable and so were encouraged to leave sooner rather than later.

Once independence was declared and the war to determine control of former Yugoslav territory had begun, ethnic cleansing became rampant and increasingly violent. By the beginning of 1992, there were 158,000 refugees in Serbia alone.⁶⁸ One month after Bosnia's declaration of independence, some 420,000 people had fled or been forced from their homes.⁶⁹ By the end of that summer, one third of the Serbian minority in Croatia had been cleansed and ten percent of Croatia's population were Croat refugees ethnically cleansed from Croatian territories seized by Serbian forces.⁷⁰ According to the UN High Commissioner for Refugees, the total number of displaced persons in former Yugoslavia had reached 2.5 million by July of 1992.⁷¹ The organized rape and internment that accompanied this vast displacement—and that were indeed measures of ethnic cleansing—are of course infamous. Despite international condemnation of these actions, the process of ethnic cleansing continued and did not come to a halt until the territorial objectives of the various successor nation-states were more or less realized. In the hope of maintaining this tenuous stability, the Dayton Peace Agreement (1995) reluctantly confirmed the territorial divisions achieved

67. See Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178–85 (1992).

68. See Bell-Fialkoff, *supra* note 3, at 118.

69. See *id.*

70. See *id.*

71. See *id.*

through ethnic cleansing and granted self-government to the Bosnian Serbs in their self-declared *Republika Srpska*.⁷²

IV. EVOLVING NORMS IN INTERNATIONAL LAW

Given the extensive use of ethnic cleansing to secure a better fit between national boundaries and ethnic demographics, it was only to be expected that international law would seek to regulate the practice and prohibit its most inhumane consequences. The discussion that follows will attempt to clarify the present status of ethnic cleansing in international society: Is ethnic cleansing legitimate if it is sanctioned in the domestic law of the sovereign state concerned and is carried out solely within the borders of that state? Is ethnic cleansing legitimate if it is carried out across the borders of two or more states but is based on international agreements between such states? Can ethnic cleansing be justified in some circumstances, e.g., war?

Broadly speaking, international law relevant to ethnic cleansing may be found in four areas—humanitarian law, crimes against humanity, human rights texts, and emerging law and standards. As a result of these various provisions, arguably the only population transfers sanctioned under international law in the 1990s were voluntary movements conducted in an orderly and humane fashion and with the guaranteed right of return.⁷³ Admittedly, international society would have difficulty corroborating whether or not such criteria had been fulfilled—particularly as regards voluntariness. Nevertheless, the intent of these international law provisions was certainly to limit the incidence of ethnic cleansing and other types of forced population transfer.

A. Humanitarian Law

Humanitarian law refers to that body of international law that is concerned with protecting individuals in times of war. Broadly speaking, the Hague Convention (1907)⁷⁴ outlines the rights and responsibilities of combatants

72. See Payam Akhavan, *The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259 (1996); see also General Framework Agreement for Peace in Bosnia and Herzegovina, annexes 6 & 7, U.N. GAOR & U.N. SCOR, 50th Sess., Attachment, Agenda Item 28, at 2, U.N. Doc. S/1995/999 (1995), reprinted in 35 I.L.M. 75 (1996).

73. See *The Human Rights Dimensions of Population Transfer*, supra note 2, at 82.

74. Hague Convention, Convention Respecting the Pacific Settlement of International Disputes, Final Act of the Second International Peace Conference at the Hague (15 June–18 Oct. 1907), opened for signature 18 Oct. 1907, (entered into force 26 Jan. 1910), 205 C.T.S. 216, reprinted in INTERNATIONAL PEACE CONFERENCE 1899, HAGUE CONVENTIONS

while the Civilians Convention (1949)⁷⁵ concerns the protection of noncombatants.⁷⁶ Thus, in general, humanitarian law is applicable only to international armed conflict—although some clauses also specify minimum standards in cases of internal conflict.⁷⁷ Thus, humanitarian law is relevant to ethnic cleansing when such practices are carried out during warfare.⁷⁸

The Hague Convention (1907) makes no explicit mention of population transfer (of which ethnic cleansing is a particular kind). This omission should not, however, be interpreted to mean that ethnic cleansing was considered permissible by the drafters. On the contrary, Jean Pictet argued that this omission “was probably because the practice of deporting persons was regarded at the beginning of this century as having fallen into abeyance.”⁷⁹ Alfred de Zayas has further contended that “the practice of expelling hundreds of thousands or even millions of civilians from their homes and deporting them . . . did not seem to belong to the Twentieth Century.”⁸⁰ It may, however, be more accurate to say that ethnic cleansing did not belong to the pre-1919 era. The absence of ethnic cleansing from the international agenda of 1907 is only to be expected given that the right of nations to national self-determination was not recognized until 1919. The Hague Convention therefore predates the political ideal of the homogeneous nation-state and its concomitant instrument of nation-state creation: ethnic cleansing.

Yet, although explicit prohibitions of ethnic cleansing did not exist nor were likely to be stipulated in 1907, deportations in general were already prohibited under the Lieber Code (1863)⁸¹—which influenced the Hague Conventions and the development of its provisions into customary international law.⁸² Article 23 of the Lieber Code held that “private citizens are no

AND DECLARATIONS OF 1899 AND 1907: ACCOMPANIED BY TABLES OF SIGNATURES, RATIFICATIONS AND ADHESIONS OF THE VARIOUS POWERS AND TEXTS OF RESERVATIONS 256 (James Brown Scott ed., 2d ed. 1915).

75. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), *adopted* 12 Aug. 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956) [hereinafter Geneva IV].
76. See JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* (1985) (for a general discussion of humanitarian law).
77. See Christa Meindersma, *Legal Issues Surrounding Population Transfers in Conflict Situations*, 41 NETH. INT'L L. REV. 31–50 (1994).
78. See *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 34.
79. OSCAR M. UHLER ET AL., *COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 279 (Jean Pictet ed., 1958).
80. De Zayas, *supra* note 6, at 211.
81. Lieber Code of 1863, Instructions for the Government of Armies of the U.S. in the Field, prepared by Francis Lieber, Adjutant General's Office, War Department, General Orders No. 100, Series of 1863, Series 2 Official Records, V, 671–82 (1863), *reprinted in* 2 FRANCIS LIEBER, *MISCELLANEOUS WRITINGS OF FRANCIS LIEBER* 247–74 (1881).
82. See *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 35.

longer murdered, enslaved, or carried off to distant parts. . . ."⁸³ Thus, for example, the Nuremberg Tribunal ruled that "(mass) deportations were contrary to the international conventions . . . (and) the laws and customs of war."⁸⁴ Several of the accused at Nuremberg were found guilty of having committed the crime of mass deportation.⁸⁵

The prohibition of mass deportations in warfare was further strengthened and clarified in Article 49 of the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949)⁸⁶ and its Additional Protocols I and II (1977).⁸⁷ Article 49 of the Geneva Convention—which concerns the protection of civilians in enemy territory—states that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . are prohibited, regardless of their motive."⁸⁸ Exceptions are permissible only if "security of the population or imperative military reasons so demand" and even then, persons must be returned home as soon as hostilities in the area have ended.⁸⁹ From this Article, Theodor Meron concludes that "although it was less clear that individual deportation was already prohibited in 1949, I believe that this prohibition has by now come to reflect customary law."⁹⁰ Thus, inasmuch as ethnic cleansing constitutes a specific form of mass deportation—one that targets minority ethnic groups—it is not a legitimate instrument of warfare.

B. Crimes Against Humanity

Mass deportations are also prohibited by the notion of "crimes against humanity," which differs from war crimes in that crimes against humanity may be committed in peace as well as in war and against a state's own

83. *Id.* at 35 (quoting Lieber Code of 1863 art. 23).

84. De Zayas, *supra* note 6, at 215.

85. It is interesting to note that the many similarities between the Allied transfer of ethnic Germans as authorized in the Potsdam Protocol and the crime of mass deportation with which Nazi officials were charged was not lost on the defense counsel at Nuremberg. "Alfred Seidl, Defense Counsel for Hans Frank, . . . 'tried to establish, by way of *tu quoque* defense that Allied practices were equally criminal.'" *Id.* at 236–39, 237.

86. Geneva IV, *supra* note 75.

87. Protocol I Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* 8 June 1977, art. 76, U.N. Doc. A/32/144, Annex I, 1125 U.N.T.S. 512 (*entered into force* 7 Dec. 1978), *reprinted in* 16 I.L.M. 1391 (1977); Protocol II Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* 8 June 1977, art. 4, U.N. Doc. A/32/144, Annex II, 1125 U.N.T.S. 513 (*entered into force* 7 Dec. 1978), *reprinted in* 16 I.L.M. 1442 (1977).

88. Geneva IV, *supra* note 75, art. 49.

89. *Id.* at 36.

90. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 48–49 (1991).

citizens (as for instance when the majority ethnic group in a state targets its minority citizens).⁹¹ Moreover, the fact that a particular action was sanctioned in domestic law prevailing at the time it was committed or was authorized in military orders is not a defense where crimes against humanity are concerned. This concept, then, extends protection against ethnic cleansing to domestic, peacetime circumstances, such as those pertaining in Germany during the 1930s or in Bulgaria during the 1980s, and removes the legitimacy of domestic laws sanctioning it. Article 6 of the London Charter of the International Military Tribunal (IMT Charter)⁹²—adopted to assist in the prosecution of Nazi war criminals—defined “crimes against humanity” as “murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the war.”⁹³ The IMT Charter was acceded to by nineteen states in addition to the original signatories—Great Britain, the United States, France, and the Soviet Union.⁹⁴ Moreover, both the UN General Assembly and the Convention on the Nonapplicability of Statutory Limitation to War Crimes and Crimes Against Humanity (1968)⁹⁵ ultimately affirmed the principles of international law recognized in the IMT Charter and the judgment of the Nuremberg Tribunal—thus further confirming “crimes against humanity” and the inclusion of mass deportation under this rubric as customary law.⁹⁶ Thus, for example, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (1993) lists “unlawful deportation or transfer” as part of the Tribunal’s competence.⁹⁷

C. Human Rights Law

There are a number of international human rights texts that also provide indirect protection against ethnic cleansing. It has been suggested, for

91. See *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 34.

92. International Military Tribunal, Trial of the Major War Criminals Before the International Military Tribunal (IMT), Article 6 of the Charter of the International Military Tribunal, Nuremberg, 1945–1946, 1 London, H.M. Stationary Office, 1947–1949, at 11.

93. *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 33.

94. See *id.* at 34.

95. Convention on the Nonapplicability of Statutory Limitation to War Crimes and Crimes Against Humanity of 1968 (*entered into force* 11 Nov. 1970), 754 U.N.T.S. 73, *reprinted in* 8 I.L.M. 68 (1969).

96. See *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 34, 39.

97. Meindersma, *supra* note 77, at 76–77. See also *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, Pursuant to Commission Resolution 1992/S-1/1 of 14 August 1992*, U.N. ESCOR, Comm’n on Hum. Rts., 49th Sess., Agenda Item 27, Annex II, ¶ 9, U.N. Doc. E/CN.4/1993/50 (1993).

example, that such indirect protection may arise from provisions concerning *inter alia* the right to self-determination, protection against genocide and discrimination, freedom of movement, freedom of religious worship, freedom of assembly, freedom of expression, cultural identity, adequate housing, right to education, and protection against forced labor.⁹⁸ All of these various provisions pertain to acts that fall into the category of practices associated with ethnic cleansing.⁹⁹ Such provisions may be found in a number of international texts including the following: the UN Charter (1945),¹⁰⁰ the Universal Declaration of Human Rights (1948),¹⁰¹ the Convention on the Prevention and Punishment of the Crime of Genocide (1948),¹⁰² the International Covenant on the Elimination of All Forms of Racial Discrimination (1966),¹⁰³ the International Covenant on Civil and Political Rights (1966),¹⁰⁴ the International Covenant on Economic, Social and Cultural Rights (1966),¹⁰⁵ and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992).¹⁰⁶ However, the explicit prohibition of ethnic cleansing or forced population transfer has occurred far less frequently.

An express prohibition against mass expulsions was included in the Fourth Protocol to the European Convention for the Protection of Human Rights (ECHR) (1950).¹⁰⁷ Article 3 of the Protocol states: "No one shall be

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98. This interpretation of general human rights provisions applicable to circumstances of ethnic cleansing may be found in the following: *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 40–60; *ENCYCLOPEDIA*, *supra* note 39, at 440–41; Meindersma, *supra* note 77, at 60.
 99. See *supra* text and accompanying footnotes.
 100. U.N. CHARTER, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 Oct. 1945).
 101. Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948), reprinted in 43 AM. J. INT'L L. SUPP. 127 (1949).
 102. Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec. 1948, 78 U.N.T.S. 277 (entered into force 12 Jan. 1951) (entered into force for U.S. 23 Feb. 1989).
 103. International Convention for the Elimination of All Forms of Racial Discrimination, adopted 21 Dec. 1965, 660 U.N.T.S. 195 (entered into force 4 Jan. 1969), reprinted in 5 I.L.M. 352 (1966).
 104. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976).
 105. *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., Agenda Item 13, U.N. Doc. E/CN.4/1996/96 (1996).
 106. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted 18 Dec. 1992, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Annex, U.N. Doc. A/Res/47/135/Annex (1992), reprinted in 32 I.L.M. 911 (1993).
 107. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force 3 Sept. 1953).

expelled by means either of an individual or of a collective measure from the territory of a state in which he is a national."¹⁰⁸ Article 4 goes on to prohibit "collective expulsion of aliens."¹⁰⁹ The fulfillment of these rights is limited by Article 15, which allows for derogation in "time of war or other public emergency threatening the life of the nation."¹¹⁰ It remains to be seen, therefore, how effective a protection these provisions would provide against ethnic cleansing in wartime or civil unrest (which are precisely the situations in which ethnic cleansing is most likely to occur).¹¹¹ Until the 1990s, this was the only human rights text specifically to prohibit forced expulsion.

However, the UNESCO Declaration on Race and Racial Prejudice (1978)¹¹² affords evidence of a movement towards the prohibition of forced assimilation and forced population transfer in international thinking on minorities and related matters. Its preamble notes that racism is manifested through unjust practices amongst which are the forced assimilation of members of disadvantaged groups (which, as in the Bulgarian example discussed above, is often a precursor to ethnic cleansing). Yet until the 1990s, no precedent existed for the explicit prohibition of forms of assimilation intended to alter an individual's language, culture, and ultimately his or her ethnic or national identity or of policies involving the transfer of an individual from one locale to another on the basis of ethnic or national identity.

The Organization for Security and Cooperation in Europe (OSCE)'s Copenhagen Document (1990) went beyond the international status quo in this regard when it stated in section IV (32) that "persons belonging to national minorities have the right to freely express, preserve and develop their ethnic, cultural, linguistic or religious identity . . . free of any attempts at assimilation against their will."¹¹³ Similarly, the Council of Europe's Convention for the Protection of National Minorities (1995) specified that states shall refrain from both "practices aimed at assimilation of persons belonging to national minorities against their will" and from "measures which alter the proportions of the population in areas inhabited by persons

108. *Id.* art. 3.

109. *Id.* art. 4.

110. *Id.* art. 15.

111. De Zayas, *supra* note 6, at 245–46.

112. Declaration on Race and Racial Prejudice, *adopted* 1978, UNESCO, Resolution 3/1.1/2, *adopted* by the General Conference at its 20th Sess. (1978), *reprinted in* ALBERT BLAUSTEIN ET AL., HUMAN RIGHTS SOURCEBOOK 340 (1987).

113. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, U.S. Commission on Security and Cooperation in Europe, § IV ¶ 32, at 17 (June 1990), *reprinted in* 29 I.L.M. 1305, 1318 (1990).

belonging to national minorities."¹¹⁴ Thus, as a result of these two texts, by the mid-1990s, direct prohibitions of ethnic cleansing had become a part of international human rights law, at least insofar as it applied to Europe.

D. Emerging Law and Standards

As is apparent from the foregoing discussion, many aspects of ethnic cleansing were by the mid-1990s already regulated under humanitarian law, crimes against humanity, and international human rights agreements. However, the process of institutionalizing specific prohibitions against ethnic cleansing was far from over. As UN Special Rapporteurs A.S. Al-Khasawneh and R. Hatano acknowledged in their 1993 report, "[F]urther protections and guidelines for regulating the practice will rely upon emerging standards and legal principles, among other future developments."¹¹⁵

In the 1990s there were a number of international agreements in draft form that would have further strengthened protection against ethnic cleansing. These draft agreements included the International Law Commission (ILC)'s Draft Code of Crimes Against the Peace and Security of Man-kind,¹¹⁶ the ILC's Draft Articles on State Responsibility,¹¹⁷ and the Council of Europe's Draft National Minority Rights Protocol to the ECHR.¹¹⁸ Several provisions of the Draft Code of Crimes refer to "deportation or forcible transfer of population"¹¹⁹ and cite these practices as examples of "systematic or mass violations of human rights."¹²⁰ As regards the Draft Articles on State Responsibility, of particular importance to situations of ethnic cleansing is Article 19, which cites among essential state obligations "safeguarding the

114. The Framework Convention for the Protection of National Minorities, *opened for signature* 1 Feb. 1995, Council of Europe Parliamentary Assembly, Europ. T.S. No. 157, at arts. 5, 16, *reprinted in* 16 HUM. RTS. L.J. 98, 99 (1995).

115. *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 69.

116. Draft Code of Crimes Against the Peace and Security of Mankind, *Report of the International Law Commission on the Work of its 48th Session, 6 May–26 July 1996*, U.N. GAOR, 51st Sess., Supp. No. 10, at 14 ¶ 50, U.N. Doc. A/51/10 (1996) [hereinafter Draft Code].

117. Draft Articles on State Responsibility, *Report of the International Law Commission on the Work of its 48th Session, 6 May–26 July 1996*, U.N. GAOR, 51st Sess., Supp. No. 10, at 125, U.N. Doc. A/51/10 (1996) [hereinafter Draft Articles].

118. *Report on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights, Documents: Working Papers*, 7 EUR. PARL. ASS. 44th Ordinary Sess. (4th part), Doc. No. 6742 (1993) [hereinafter Draft Minority Rights Protocol].

119. Draft Code, *supra* note 116. See also *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 69 ¶ 319.

120. Draft Code, *supra* note 116.

right of self-determination of peoples,"¹²¹ the legal consequence of which is for states "not to recognize . . . the situation created by such crime; not to render aid or assistance to the State which has committed [such a] crime [by aiding in] maintaining the situation so created [by such crime]."¹²² This provision is pertinent to ethnic cleansing in that it "may imply that states are required actively to ensure the undoing of situations created by such [forced] transfers and at a minimum must not . . . recognize or support financially the illegal state of affairs."¹²³ Similarly, The Draft National Minority Rights Protocol to the ECHR would require positive state actions to prevent situations of ethnic cleansing from arising. Article 11 of this Draft Protocol would recognize the right of persons belonging to national minorities to "have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation."¹²⁴

In addition to these draft texts, a number of other developments within the international legal sphere also provide an indication of the direction that international thinking on ethnic cleansing was taking by the end of the twentieth century. In 1986, the International Law Association adopted the Declaration of the Principles of International Law on Mass Expulsions.¹²⁵ This declaration defined "expulsion" as "an act or a failure to act . . . with the intended effect of forcing the departure of persons against their will . . . for reasons of race, nationality, membership of a particular social group or political opinion."¹²⁶ Moreover, the declaration stated that "[c]ompulsory transfer or exchange of population . . . [was] inherently objectionable, whether affected by treaties or by unilateral expulsion."¹²⁷

Further proposals for the increased international codification of prohibitions against population transfer were made in the 1990s. In 1993, for example, the International Institute for Humanitarian Law called upon the United Nations and regional bodies to urgently consider the adoption of international legal mechanisms to prohibit population transfers.¹²⁸ A similar opinion was voiced by the President of the International Red Cross in

121. Draft Articles, *supra* note 117, art. 19, at 131 ¶ 3(b). See also *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 71 ¶ 325.

122. Draft Articles, *supra* note 117, pt. 2, art. 53, at 146. See also *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 71 ¶ 326.

123. *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 71 ¶ 327.

124. Draft Minority Rights Protocol, *supra* note 118, at 5 art. 11.

125. Declaration of the Principles of International Law on Mass Expulsions, *cited in The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 78 ¶ 354.

126. *Id.*

127. *Id.* at 78 ¶ 356 (principle 14 of the twenty principles of international law that the Declaration enumerates).

128. See Meindersma, *supra* note 77, at 79.

relation to the conflict in former Yugoslavia and the evidence of ethnic cleansing in Bosnia and Croatia.¹²⁹ And finally, the UN Special Rapporteurs on Population Transfer, A.S. Al-Khasawneh and R. Hatano, called for “a specific legal instrument [to] clarify that population transfer is, *prima facie*, unlawful.”¹³⁰ Moreover, they argued that such a legal remedy should “confer beyond reasonable doubt the criminal responsibility [of those engaging in ethnic cleansing], allow for remedies, and provide for early warning and other preventative machinery.”¹³¹

V. CONCLUSION

This article has sought to demonstrate that ethnic cleansing is a historic instrument of nation-state creation. Although the resurgence of acts designed to cleanse specific territories of particular—usually minority—ethnic groups may have surprised the UN Rapporteurs charged with examining the human rights dimension of population transfers in 1993, the continued significance of ethnic cleansing as a problem for international relations clearly was foreseen by Lord Curzon seventy years earlier—and, sadly, the subsequent events of the twentieth century confirmed his worst fears. For so long as state sovereignty continues to be justified on the basis of national self-determination and homogeneous nation-states remain the ideal form of political organization, the temptation to ethnically cleanse anomalous minority groups from the body politic will persist: that was the case in 1993 just as it was in 1923 and it remains so today.

However, it would be wrong to conclude from this observation that nothing has changed with regard to ethnic cleansing’s status in international society in the seventy-year interval between Lord Curzon’s remarks concerning the exchange of populations between Greece and Turkey and the UN report by Special Rapporteurs Al-Khasawneh and Hatano. In the interwar and early post-World War II periods, international society was prepared to accept ethnic cleansing in the interests of international peace and security. By the mid-1990s, it was increasingly unwilling to do so; for example, recognition of the territorial division created by ethnic cleansing in former Yugoslavia was not only grudging but also motivated by the desire to prevent further actions of this kind.

The effects of ethnic cleansing—with their demonstrated potential to create mass refugee flows both within and across international frontiers—

129. See *id.* at 79–80.

130. *The Human Rights Dimensions of Population Transfer*, *supra* note 2, at 82.

131. *Id.*

were themselves recognized as potential sources of international instability and even conflict.¹³² Evidence of the many economic, social, and humanitarian problems created by mass population movements in the period following 1948 led to the increasing prohibition of those actions associated with the practice of ethnic cleansing. Such international codification was, of course, the subject of renewed interest and activity in the 1990s. The strong condemnation of ethnic cleansing in former Yugoslavia as well as in Rwanda and Cambodia, for example, was indicative of a growing recognition of the many problems—international as well as domestic—created by ethnic cleansing and a corresponding readiness to address the issue of legal clarification.

As a result, by the mid-1990s there was evidence of a new willingness within international organizations to develop a specific legal instrument aimed at ethnic cleansing that would remedy any defects or ambiguities that remained as regards the status of this practice in international society at the end of the twentieth century. As Al-Khasawneh and Hatano concluded in their 1993 report, the “[p]olitical will to ban the practice [of ethnic cleansing was] growing and [by the mid-1990s] may [have become] sufficient to move at all levels towards a relevant international legal code.”¹³³ This certainly appeared to be the case in 1997. By this time, the United Nations was examining the viability of an international convention on the prohibition of ethnic cleansing and other international organizations—in particular the Council of Europe and the OSCE—were also paying greater attention to the problems raised by ethnic cleansing, especially with regard to the early warning and prevention of minority/majority conflicts and mass refugee flows.

Underlying this normative shift in international attitudes towards ethnic cleansing there may be a return to an earlier, pre-1919 conception of civic nationalism (i.e., a nationalism predicated upon political rather than ethnic identity), and a corresponding desire to affirm the multicultural or multinational state—as opposed to the ethnically homogeneous nation-state—as the ideal form of political organization.¹³⁴ Thus, for example, behind the international condemnation of ethnic cleansing in Bosnia there was arguably a recognition of the multicultural or multinational Bosnian state as the

132. See *id.* at 5.

133. *Id.* at 82 ¶ 374.

134. The distinction between ethnic and civic nationalism can be traced back to the works of Hans Kohn. See, e.g., HANS KOHN, *THE IDEA OF NATIONALISM* (1944); HANS KOHN, *NATIONALISM: ITS MEANING AND HISTORY* (1955). Following the end of the Cold War, this distinction was popularized by Michael Ignatieff in his BBC television series *Blood and Belonging* and its accompanying publication. See MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (1993).

legitimate political community—which was violated and destroyed by the illegitimate, forced transfer of national minority groups.

The imperatives of civic nationalism would seem to require instruments of nation-state creation fundamentally different from those of ethnic nationalism. Instead of seeking to secure a better fit between boundaries and ethnic identities, civic nationalism should in theory seek to foster a shared political identity that could accommodate ethnocultural diversity within pre-existing territorial units. In this way, civic nationalism would be better suited to the international circumstances pertaining at the end of the twentieth century. In a world of demographic complexity and fixed international frontiers, civic nationalism would seem to be the best way both to encourage respect for minority rights within states and, by so doing, to prevent destabilizing mass movements of peoples between states.

For the time being, these observations can be nothing more than speculative. It remains to be seen what, if any, effect proposed codifications will have on the incidence of ethnic cleansing in the twenty-first century—and that will be the true litmus test of normative change on this issue.