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1. There is no intrinsic distinction between real and regulatory offenses.
2. The principle that there should be no state punishment without proof beyond a reasonable doubt by the state of an act and fault should apply equally to corporations and individuals.
3. Automatic rules, such as vicarious and absolute liability or direct attribution, and legal fictions, such as aggregated knowledge, should therefore be abandoned.
4. The basis for punishing corporations should be changed to corporate culture respecting proof of both act and fault, with the level of fault determined by the offense definition.
5. There is no persuasive case for having special rules of accessory liability for corporate directors and executives.

The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia*

Alfred de Zayas**

*There is no greater sorrow on Earth than the loss
of one's native land.*
—Euripides, *Medea*, v. 650–651

INTRODUCTION

It may be considered an anomaly that although the right to live in one's homeland¹ is undoubtedly a fundamental right, and although the

Editor's note: This article was completed in September 1995 but has been updated through December 10, 1995, to take brief note of some new indictments by the International Criminal Tribunal for the Former Yugoslavia and the conclusion of a peace agreement between the parties to the conflict in the region of the former Yugoslavia.

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¹ The term *Recht auf die Heimat* ("right to the homeland") was coined by German legal scholars and publicists in the 1950s and 1960s. For a recent discussion, see *Das Recht auf die Heimat: Ein Menschenrecht* (Hartmut Koschyk ed., 1992). The standard work is Otto Kimminich, *Das Recht auf die Heimat* (1978); see also F.H.E.W.

United Nations and other intergovernmental forums have engaged in extensive standard setting in the area of human rights, this right has not yet been expressly recognized in either an international convention or an addendum to the universal human rights covenants,² in the form of a new article or optional protocol. Notwithstanding this positivist lacuna, the right to one's homeland is a necessary prerequisite to the enjoyment of most other human rights. Indeed, the denial of the right to live in one's homeland necessarily entails the violation of such rights as the right to self-determination, which many consider to be jus cogens, or a peremptory norm of international law.³ Without the right to one's homeland, persons could be forcibly expelled from their native lands and thus deprived not only of self-determination but also of the exercise of most civil, political, economic, social, and cultural rights that are widely recognized in international law.

This article proposes to demonstrate the existence of the right to one's homeland in international law by tracing the protection of its elements in existing norms. As discussed below, this right can be derived, *inter alia*, from provisions of the International Covenant on Civil and Political Rights,⁴ the International Covenant on Economic,

¹ Tomuschat, *Das Recht auf die Heimat, neue rechtliche Aspekte*, in *Das menschenrechtliche zwischen Freiheit und Verantwortung* 183 (Jürgen Jekwitz ed., 1989); Felix Ermacora, *Die sudeten-deutschen Fragen* (1992); *Das Recht auf die Heimat* (Kurt O. Rahl ed., 1959).

² The so-called international bill of rights includes Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration]; International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter International Covenant on Economic Rights]; International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter International Covenant]. One could argue that this right is implicit in *id.* art. 12(4), which protects the right to "enter" one's own country.

³ Support for this view can be found in Ian Brownlie, *Principles of Public International Law* 515 (3d ed. 1979); Hector Gros-Espil, *Self-determination and Jus Cogens*, in *U.N. Law/Fundamental Rights* 167 (Antonio Cassese ed., 1979). This view also has its critics. For a good discussion of the debate and references, see Ralph Steinhardt, Book Review, 88 Am. J. Int'l L. 831 (1994) (reviewing several recent works on self-determination).

Social, and Cultural Rights,⁵ the International Convention on the Elimination of All Forms of Racial Discrimination,⁶ the Convention on the Prevention and Punishment of the Crime of Genocide,⁷ and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities.⁸ It can also be established *constitio*; that is, the prohibition of compulsory population transfers is the negative expression of the right to one's homeland. Such a prohibition is contained in the Fourth Geneva Convention of 1949⁹ and in Additional Protocol II of 1977.¹⁰ Moreover, the deportation of the native population and the implantation of settlers in occupied areas was prosecuted under the Nuremberg Charter as a war crime and a crime against humanity.¹¹ On the basis of these sources of law, it can be

⁵ International Covenant on Economic Rights, *supra* note 2.

⁶ Adopted Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Convention on Racial Discrimination].

⁷ Adopted Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

⁸ G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1992) [hereinafter Declaration on Minorities].

⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted Aug. 12, 1949, art. 49, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV].

¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, art. 17, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol II].

¹¹ The International Military Tribunal at Nuremberg was established pursuant to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter London Agreement]. The Charter of the International Military Tribunal at Nuremberg is set out in *id.* at 284 [hereinafter Nuremberg Charter]. War crimes were prosecuted under Nuremberg Charter, *supra*, art. 6(b); crimes against humanity, under *id.* art. 6(c). For the judgment of the International Military Tribunal, see *22 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 October 1945-1 October 1946*, at 411 (1948) [hereinafter *Trial of the Major War Criminals*]. See *infra* text accompanying notes 79-85.

asserted that, although the right to one's homeland has yet to be specifically formulated and embodied in an international convention or protocol, its violation in the form of "ethnic cleansing"¹² or mass expulsion constitutes a serious offense against international humanitarian law¹³ that is subject to prosecution by the International Criminal Tribunal for the Former Yugoslavia under various provisions of its Statute.

In the following sections, a distinction is made between hard and soft law. Hard law encompasses rules of customary international law that are universally binding, conventions (*lex lata*, or law that has been laid down) insofar as they bind the parties (although some treaty law may also be considered customary and hence universally binding), and international case law at least as to the parties to a contentious dispute before the International Court of Justice. Soft law, or developing law (*lex ferenda*), includes declarations, certain resolutions, recommendations, and reports of UN organs and other international organizations and has persuasive but not binding force.

Within this framework, I examine the continued occurrence of ethnic cleansing and mass expulsions. I begin with a historical survey of forcible population transfers in European history. In the following sections, I review the applicable hard law and soft law, focusing on international norms and case law, as well as on ongoing efforts by the International Law Commission, the UN Subcommittee on Prevention of Discrimination and Protection of Minorities, the UN Commission on Human Rights, and the UN High Commissioner for Human Rights to promote and protect the right to one's homeland. The next section examines the current policy and practice of ethnic cleansing in the former Yugoslavia and shows that it entails war crimes as well as crimes

¹² It appears that the term was coined in the early 1980s by the Serbian ultranationalist leader Vojislav Seselj. But it was only after the outbreak of hostilities in 1991 that the term attained its sad notoriety. The best analysis of the term and its history may be found in Drazen Petrovic, *Ethnic Cleansing—An Attempt at Methodology*, 5 Eur. J. Int'l L. 342 (1994).

¹³ See generally M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (1992); see also Christa Meindersma, *Legal Issues Surrounding Population Transfers in Conflict Situations*, 41 Neb. Int'l L. Rev. 31 (1994).

against humanity, and that some manifestations of ethnic cleansing constitute genocide within the meaning of the Genocide Convention. In this context, I review the mandate of the International Criminal Tribunal for the Former Yugoslavia and its proceedings to date.¹⁴ Although ethnic cleansing is not an offense expressly included in the Tribunal's Statute,¹⁵ I suggest that the actions used to accomplish ethnic cleansing clearly fall within the Tribunal's competence. The concluding section puts forward the idea that in this era of human rights codification, forcible population transfers and specifically ethnic cleansing are an anachronism. I explore possible remedies, in particular, the return of refugees and expelled persons to their homelands, and call for the formal articulation of this right in an international convention.

POPULATION TRANSFERS

Population transfers were common in ancient times, but the practice had fallen into disuse in Europe over the centuries. When frontiers changed by military force, the native populations were for the most part allowed to remain where they lived as long as they recognized the new sovereign. In the late nineteenth century, however, runaway nationalism and the racist concept of the single-ethnic state resulted in the terrorization and forced flight of minority ethnic groups. During and after the Balkan wars of the early twentieth century, large-scale expulsions and population transfers took place. In the period between the first and the second world war, the government of the new Yugoslav state, in an attempt to assert cultural hegemony, closed state schools for Kosovo's Albanians and forcibly expelled about 45,000 Albanians from Kosovo prov-

¹⁴ For background, see the essays collected in *A Critical Study of the International Tribunal for the Former Yugoslavia*, 5 Crim. L.F. 223 (1994).

¹⁵ The Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter ICTY Statute] is set out as an annex to *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 & Add.1 (1993), reprinted in 32 I.L.M. 1163, 1192, and 5 Crim. L.F. 597, 636 (1994) [hereinafter *Secretary-General's Report*].

ince—confiscating their land and turning it over to some 60,000 Serbian "colonists."¹⁶ Ethnic cleansing in Bosnia and Herzegovina following the breakup of the former Yugoslavia in 1991 is a contemporary example of how international law and morality have been subordinated to jingoistic and racist fantasies.¹⁷

Prior to the second world war, international human rights standards had not quite coalesced and the concept of population transfers was not defined in legal terms. As a matter of fact, the possibility of transferring populations, rather than shifting frontiers, was viewed by numerous respected politicians as an arguable solution to ethnic tensions. Such a solution appeared particularly attractive when a redrawing of frontiers along ethnic lines was not practicable and would not succeed in separating intermingled hostile populations. Thus, pursuant to the 1923 Treaty of Lausanne,¹⁸ some two million Greeks and Turks were "exchanged" on a compulsory basis,¹⁹ with the blessing of the League of Nations.²⁰ This novel idea was not, however, without its critics.

¹⁶ Sabrina Petra Ramet, *War in the Balkans*, Foreign Aff., Fall 1992, at 79, 81.

¹⁷ See the reports on *The Situation of Human Rights in the Territory of the Former Yugoslavia*, prepared by Tadeusz Mazowiecki, Special Rapporteur, U.N. Comm'n. Hum. Rts. U.N. Doc. E/CN.4/1992/S-1/9 (1992); U.N. Doc. E/CN.4/1992/S-1/10 (1992); U.N. Doc. A/47/666 (U.N. Doc. S/24809) (1992); U.N. Doc. E/CN.4/1992/S-2/6 (1992); U.N. Doc. E/CN.4/1993/50 (1993); U.N. Doc. E/CN.4/1994/3 (1993) (first periodic report); U.N. Doc. E/CN.4/1994/4 (1993) (second periodic report); U.N. Doc. E/CN.4/1994/6 (1993) (third periodic report); U.N. Doc. E/CN.4/1994/8 (1993) (fourth periodic report); U.N. Doc. E/CN.4/1994/47 (1993) (fifth periodic report); U.N. Doc. E/CN.4/1994/110 (1994) (sixth periodic report); U.N. Doc. E/CN.4/1995/4 (1994) (seventh periodic report); U.N. Doc. E/CN.4/1995/10 (1994) (eighth periodic report); U.N. Doc. A/49/641 (U.N. Doc. S/1994/1252) (1994) (ninth periodic report); U.N. Doc. E/CN.4/1995/54 (1994) (special report on media); U.N. Doc. E/CN.4/1995/57 (1995) (tenth periodic report). On July 27, 1995, Mazowiecki resigned his post in protest against United Nations and world inaction in the face of Bosnian Serb attacks on the United Nations protected areas (UNPAs) of Srebrenica and Zepa. *U.N. Envoys in Bosnia Quit as "Hypocrisy"*, Int'l Herald Trib., July 28, 1995, at 1.

¹⁸ Treaty of Peace (Lausanne), July 24, 1923, 28 L.N.T.S. 11.

¹⁹ Convention and Protocol on the Exchange of Greek and Turkish Populations, Jan. 30, 1923, Greece-Turk., 32 L.N.T.S. 75.

²⁰ Treaty of Peace, *supra* note 18, art. 142, incorporated by reference the bilateral

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Prominent among them was Lord Curzon, British Foreign Minister from 1919 to 1924 and participant in the Lausanne conference, who at that time warned that "the world will pay a heavy penalty for a hundred years to come" for such a "thoroughly bad and vicious solution."²¹ Later commentators agreed that the population exchange was not a model of either humanity or wisdom, and its repercussions, economic and political, were considerable. Sir John Hope-Simpson, who also had been intimately involved with the Lausanne treaty process, observed in 1946 that the exchange of Greeks and Turks had meant an appalling amount of misery and hardship to everyone concerned.²²

Yet, in the 1920s the Lausanne precedent was perceived by many as a bold new scheme in international affairs, an experiment entered into with great expectations.²³ It should be noted that under the terms of the agreement the population exchange was to be gradual and orderly, provision having been made for a mixed commission of members representing Greece, Turkey, and the Council of the League of Nations to supervise the exchange of persons and the liquidation of property claims. Whereas the population exchange was carried out smoothly, the settlement of property matters proved unworkable, so that finally all accounts were liquidated by a lump sum agreement.²⁴

Several population transfers pursuant to bilateral treaties with a

²¹ February 11, 1918, before the joint Houses of Congress. President Woodrow Wilson had insisted that "peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere charnels and pawns in a game, even the great game, now forever discarded, of the balance of power." 1 *Foreign Relations of the United States* 112 (Supp. I 1918).

²² Quoted in 130 Parl. Deb., H.L. (5th ser.) 1120 (1944) (speech of Lord Noel-Buxton); see also Georgios S. Streif, *Der Lausaner Vertrag* 24 (1929).

²³ 139 Parl. Deb., H.L. (5th ser.) 68 (1946).

²⁴ Indeed, even in the 1940s Winston Churchill spoke approvingly of this arrangement. 406 Parl. Deb., H.C. (5th ser.) 1484 (1944).

²⁵ See generally Stephen P. Ladas, *The Exchange of Minorities: Bulgaria, Greece, and Turkey* (1932); Kalliope A. Koufa & Constantinos Svolopoulos, *The Compulsory Exchange of Populations between Greece and Turkey: The Settlement of Minority Questions at the Conference of Lausanne, 1923, and Its Impact on Greek-Turkish Relations, in Ethnic Groups in International Relations* 275 (Paul Smith et al. eds., 1991).

clause of option of nationality were conducted in 1939-1941 after the outbreak of World War II. Following a speech to the Reichstag on October 6, 1939, announcing "a new order of ethnographical conditions . . . a resettlement of nationalities in such a manner that the process ultimately results in the obtaining of better dividing lines," Hitler summoned hundreds of thousands of ethnic Germans living in neighboring states to return to Germany. On October 15, 1939, the Reich concluded an agreement with Estonia involving the transfer of 12,900 "splinters of the German nationality,"²⁵ followed on October 21 by an agreement with Italy involving 185,365 South Tyrolians; on October 30, by an agreement with Latvia involving 48,600 Baltic Germans; on November 3, by an agreement with the Soviet Union involving 128,000 Germans from Volhynia and East Galicia; and by other agreements. Since the repatriations were to be voluntary, many Germans at first opted to stay in their host countries. Only after the Soviet Union invaded and annexed the Baltic states did the majority of the remaining 70,000 ethnic Germans decide that they would prefer, after all, to resettle in Germany. A new transfer treaty with an option clause was negotiated on January 10, 1941, this time between the Reich and the Soviet Union.²⁶

Fundamentally different from these transfers based on option of nationality agreements were the forced resettlements that Hitler imposed on millions of non-Germans during the war. Among the victims were over 100,000 French who were expelled from Alsace-Lorraine into Vichy France, and over one million Poles who were deported from the western parts of occupied Poland (Warthegau) into the so-called Government-General of Poland. Similar treatment awaited many Yugoslavs and Ukrainians. Only military defeat prevented Hitler from implementing his Lebensraum and resettlement plans.

The crucial difference between the option agreements and the expulsions was the element of compulsion. But, as noted above, international law had not yet formally taken up the question of population

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transfers. Most notably, the Hague Conventions did not specifically cover the issue, "probably because the practice of deporting persons was regarded at the beginning of this century as having fallen into abeyance."²⁷ However, the lack of an express prohibition on compulsory deportations does not mean that this practice was compatible with international law. Indeed, the Allies soon condemned the forcible expulsion of civilians as war crimes and as crimes against humanity,²⁸ arguing that any population transfer out of occupied territory necessarily entailed violations of articles 42-56 of the regulations annexed to the Fourth Hague Convention of 1907,²⁹ which delimit the powers of a belligerent occupant.

Nonetheless, in the last few months of the second world war and in the years immediately following, the Allies carried out compulsory population transfers on an unprecedented scale. Some fifteen million ethnic Germans were expelled from areas where their ancestors had lived for seven hundred years, including Czechoslovakia, Hungary, Romania, and Yugoslavia, as well as from the eastern provinces of Germany,³⁰ which were placed under the so-called Polish Provisional Government of National Unity.³¹ While these transfers into the Soviet, British, U.S., and French zones of occupation were supposed to be conducted in an "orderly and humane" manner,³² the expelling states observed neither the timetables nor the conditions established by the Allied Control Council

²⁷ 4 *The Geneva Conventions of 12 August 1949: Commentary* 279 (Jean S. Pictet gen. ed., 1958) [hereinafter Pictet, *Commentary*].

²⁸ Nuremberg Charter, *supra* note 11, art. 6(b)-(c); 22 *Trial of the Major War Criminals*, *supra* note 11, at 380-81.

²⁹ Hague Convention (IV) Respecting the Laws and Customs of War on Land, and Annex to the Convention (Regulations Respecting the Laws and Customs of War on Land), Oct. 18, 1907, 205 Consol. T.S. 227, reprinted in *Documents on the Laws of War* 44 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

³⁰ de Zayas, *Nemesis at Potsdam*, *supra* note 26, chs. 1, 5-6.

³¹ Protocol of Proceedings of the Berlin (Potsdam) Conference, Aug. 2, 1945, art. IX, 3 Bevans 1207 (in the final version of the protocol, this provision is redesignated art. VIII).

³² *Id.* art. XIII (in the final version of the protocol, this provision is redesignated art. XVII).

²⁴ See *infra* text accompanying note 194.

²⁶ These events are reviewed in Alfred de Zayas, *Nemesis at Potsdam* (4th ed. 1990); Alfred de Zayas, *A Terrible Revenge* (1994); Eugene M. Kulischer, *Europe on the Move* 382-86 (1948).

for Germany. An estimated two to three million Germans died as a result.³³

COLLECTIVE EXPULSIONS: HARD LAW (DE LEGE IATA)

Standard Setting after World War II: International Norms

While the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, does not by its terms prohibit population transfers and the implantation of settlers in occupied territory, this practice may well constitute genocide not only under the terms of the convention but also as a matter of customary international law.³⁴

Article 2 defines genocide as encompassing any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

³³ Statistisches Bundesamt, F.R.G., *Die deutschen Vertreibungsverluste* 38, 46-47 (1958); de Zayas, *Nemesis at Potsdam*, *supra* note 26, at xxv, 1-4 Alfred Bohmann, *Menschen und Grenzen* (1969-1975).

³⁴ Genocide Convention, *supra* note 7, construed in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28) (holding that the principles underlying the convention are declaratory of customary law); Secretary-General's Report, *supra* note 15, ¶¶ 35, 45; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 20 (1989) (arguing that

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It is not difficult to prove that population transfers have frequently led to enormous loss of life, in direct violation of article 2(a) or 2(c). As noted earlier, the expulsion and enforced flight of some fifteen million ethnic Germans at the end of the second world war caused the deaths of over two million of them,³⁵ and there is ample evidence that numerous leaders of the Soviet Union, Poland, and Czechoslovakia intended that loss of life.³⁶ The traumatic experience of losing their homes and every link to the land where they were born and where their parents and grandparents were buried certainly also caused serious bodily and mental harm to the surviving members of the group, in violation of article 2(b). It is hardly tenable that those who order or carry out such expulsions do not intend their foreseeable consequences.

On December 10, 1948 (one day after the Genocide Convention), the UN General Assembly adopted the Universal Declaration of Human Rights.³⁷ In its preamble, the declaration "proclaims" a comprehensive set of rights as a "common standard of achievement for all peoples and all nations" and seeks "to promote respect for these rights and freedoms" and "to secure their universal and effective recognition and observance." Most relevant here are the prohibition on discrimination in the enjoyment of the enumerated rights (article 2); the right to life, liberty, and security of person (article 3); the prohibition on slavery and servitude (article 4); the prohibition on torture and cruel, inhuman, or degrading treatment or punishment (article 5); the guarantee of

³⁵ See *supra* notes 30-33 and accompanying text; Alfred de Zayas, *International Law and Mass Population Transfers*, 16 Harv. Int'l L.J. 207, 228 n.79 (1975); 1 Gerhard Reichling, *Die deutschen Vertriebenen in Zahlen* (1986).

³⁶ See generally James Bacque, *Verschuiene Schuld* (1995); Ermacora, *supra* note 1. According to former U.S. statesman George Kennan:

The disaster that befell this area with the entry of the Soviet forces has no parallel in modern European experience. There were considerable sections of it where . . . scarcely a man, woman or child of the indigenous population was left alive after the initial passage of the Soviet forces; and one cannot believe that they all succeeded in fleeing to the West.

³⁷ George F. Kennan, *Memoirs* 265 (1967).

³⁸ Universal Declaration, *supra* note 2.

equality and equal protection (articles 1, 7, 8, and 10); the prohibition on arbitrary arrest, detention, or exile (article 9); the prohibition on arbitrary interference with privacy, family, home, and correspondence (article 12); the right to freedom of movement and residence within national borders and the right to return to one's country (article 13); the right to a nationality (article 15); and the right to freedom of thought, conscience, and religion (article 16).

Although population transfers would violate these and other articles, positivists would remind us that the declaration is not legally binding, but only a catalogue of principles to be progressively implemented. However, most experts now agree that the Universal Declaration is an authoritative interpretation of the human rights provisions of the UN Charter and at least in some provisions codifies customary law; frequent invocation by the General Assembly down through the years lends further support to the declaration's status as a binding instrument.³⁸

The first attempt after World War II expressly to criminalize population transfers was taken in the context of the protection of civilian populations in armed conflict. Indeed, many population transfers have occurred in one way or another before, during, or as a result of war. Article 49 of the Fourth Geneva Convention of 1949 stipulates:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material

reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.³⁹

In order to put some teeth into the convention, the drafters stipulated in article 146 that the high contracting parties must enact legislation providing effective penal sanctions for persons committing, or ordering to be committed, the grave breaches listed in article 147 of the convention. The category of "grave breaches" includes the unlawful deportation or transfer of persons. There is now little doubt that these protections are available as a matter of customary international law.⁴⁰

The prohibitions spelled out in the Fourth Geneva Convention apply, in principle, only in situations of international warfare. In situations of armed conflict not of an international character, article 3 of the convention stipulates that the high contracting parties must respect, and suppress the violation of, certain minimum rules; notably, to treat humanely all persons taking no active part in the hostilities, to spare them violence to life and person, to refrain from hostage taking, and to refrain from committing outrages upon personal dignity. Deportation arguably falls within article 3.

³⁸ Geneva Convention IV, *supra* note 9, art. 49. For a positivist, this provision is the best statement of hard law prohibiting population transfers and resettlement of occupied areas by nonnative people. The Red Cross has frequently reaffirmed this rule, most recently at its twenty-sixth international conference in Geneva in late 1995. *Völkerrecht bekräftigt*, Frankfurter Allgemeine Zeitung, Dec. 8, 1995, at 6.

³⁹ *Secretary-General's Report, supra* note 15, ¶ 35; Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, Foreign Aff. Summer 1993, at 122, 129; Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 Am. U. J. Int'l L. & Pol'y 449, 512 n.43 (1994) (asserting that most provisions of the Geneva Conventions are now viewed as customary law). Note that unlawful deportation or transfer of population also constitutes a grave breach under Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, art. 85(4)(a), 1125 U.N.T.S. 3 (entered into force Dec. 7 1978).

³⁸ For a sense of the debate, see the discussion and sources cited in Frederic L. Kirgis, Jr., *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 Am. J. Int'l L. 146 (1987); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int'l L. 1 (1986); Jonathan L. Charney, *Universal International Law*, 87 Am. J. Int'l L. 520 (1992).

It took nearly three more decades to codify the prohibition of forced removal of civilians in internal armed conflicts. Under Additional Protocol II (1977) to the 1949 Geneva Conventions:

The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.⁴¹

There is considerable support for the view that individual criminal responsibility attaches under customary international law to violations of Protocol II, at least arguably including forcible population transfers, in an internal armed conflict.⁴²

The Right to One's Homeland as a Human Right

The Fourth Geneva Convention and Additional Protocol II help us understand the prohibition of population transfers in situations of armed conflict, whether international or internal. In peacetime we also recognize the right of everyone to live in his or her homeland, free of fear of being subjected to compulsory transfer. Indeed, the prohibition of collective expulsion and the implantation of settlers must be understood as the negative expression of one of the most fundamental rights of the human being: the right to one's homeland.

⁴¹ Additional Protocol II, *supra* note 10, art. 17(1). On the history of this article, see Howard S. Levie, *The Law of Non-International Armed Conflicts: Protocol II to the 1949 Geneva Conventions* 529-43 (1987).

⁴² See Prosecutor v. Tadic, Case No. IT-94-1-AR72, ¶¶ 98, 102, 110-112, 117, 127-129, 134 (ICTY App. Oct. 2, 1995) [hereinafter *ICTY Tadic App.* Dec.]; Prosecutor v. Nikolic, Case No. IT-94-2-R61, ¶ 31 (Review of the Indictment pursuant to Rule 61) (ICTY Oct. 20, 1995); Prosecutor v. Tadic, Case No. IT-94-I-T, ¶¶ 65-74 (ICTY Aug. 10, 1995); Claude Pilloud et al., International Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 1340-42 (Yves Sandoz et al. eds., 1987); Meron, *supra* note 34, at 73.

Subsequent to the adoption of the Universal Declaration of Human Rights, the United Nations has proceeded to adopt over fifty important conventions and declarations in the field of human rights. The most important are indubitably the two human rights covenants of 1966, which are discussed in the following sections. It will be shown that the right to one's homeland in both peacetime and wartime can be derived from these instruments.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Measured against the International Covenant on Civil and Political Rights,⁴³ compulsory population transfers would violate almost every provision. The following summary highlights the most important.

Article 1(I): "All peoples have the right of self-determination." The exercise of this fundamental right, which today is considered by many to be *ius cogens*,⁴⁴ would necessarily be frustrated where a population was uprooted from its homeland.⁴⁵

Article 2(I): "Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other

⁴³ International Covenant, *supra* note 2. It should be noted that the Republic of Bosnia and Herzegovina (Sept. 1, 1993), Croatia (Oct. 12, 1992), and (the former) Yugoslavia (Aug. 8, 1967) are parties to the covenant. *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1994*, at 117-18, U.N. Doc. ST/LEG/SER/E/13, U.N. Sales No. E.95.V.5 (1995) [hereinafter *1994 Multilateral Treaties*]. With 129 parties, *id.* at 117, this treaty can be considered to have attained the status of customary international law. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L. 46, 58 (1992).

⁴⁴ See *supra* note 3 and accompanying text.

⁴⁵ Alfred de Zayas, *Population, Expulsion and Transfer*, in 8 *Encyclopedia of Public International Law* 438, 440 (Rudolf Bernhardt ed., 1985); Daniel Thurer, *Self-determination*, in 8 *Encyclopedia of Public International Law*, *supra*, at 470; Antonio Henkin ed., 1981); *Models of Autonomous Normal* . . .

opinion, national or social origin, property, birth or other status." Any state that collectively expels its residents denies them the enjoyment of their covenant rights. Moreover, singling out any segment of the population for purposes of expulsion would itself constitute prohibited discrimination.

Article 4(1), (2): Even when "public emergency . . . threatens the life of the nation," no derogation is allowed from articles 6, 7, 8, 11, 15, 16, and 18. Deportation would violate most of these provisions.⁴⁶

Article 6(1): "Every human being has the inherent right to life." It is hardly conceivable that a compulsory population transfer would not violate this right. The policy of ethnic cleansing has resulted in an estimated 200,000 people killed or disappeared in Bosnia since the war began.⁴⁷

Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Victims of expulsions or ethnic cleansing are invariably subjected to cruel, inhuman, or degrading treatment. Frequently, they are also subjected to torture, rape, and other physical abuse. This has been amply documented in the former Yugoslavia.⁴⁸

⁴⁶ International Covenant, *supra* note 2, arts. 6-8, 18, are discussed below. The other nonderogable rights are as follows. *Id.* art. 11 provides, "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation." *Id.* art. 15 mandates adherence to the *nullum crimen* principle but also stresses that a crime may be prosecuted if it is created under the "general principles of law recognized by the community of nations." According to *id.* art. 16, "Everyone shall have the right to recognition everywhere as a person before the law."

⁴⁷ Diane Bartz, *Ethnic Cleansing Goal Being Achieved*, Agence France Presse, Sept. 27, 1995, available in LEXIS, World Library, Allwms File; *Bosnia Enters Fourth Year of War with Remembrances and Battles*, N.Y. Times, Apr. 6, 1995, at A8, available in LEXIS, World Library, Allwms File [hereinafter *Fourth Year of War*]. An estimated additional 400,000 people have been injured. *Bosnian Health Conditions Improved But Still Poor*, WHO, Agence France Presse, Apr. 13, 1995, available in LEXIS, World Library, Allwms File (citing World Health Organization report) [hereinafter *WHO Report*].

⁴⁸ See generally Letter from the Secretary-General to the President of the Security Council, May 24, 1994, U.N. Doc. S/1994/674 (1994), transmitting *Final Report of the*

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Article 8(3)(a): "No one shall be required to perform forced or compulsory labour." Prior to expulsion, persons frequently are subjected to detention and/or required to perform forced labor. This was the case with nearly one million ethnic Germans from Hungary, Romania, Slovakia, and Yugoslavia, as well as from East Prussia, Pomerania, and Silesia, who in the aftermath of the second world war were first deported to the Soviet Union as "reparations in kind"⁴⁹ and then "repatriated"—not to their respective home countries but to other localities in the newly created German Democratic Republic and Federal Republic of Germany. Forced labor has been reported in Bosnia, most recently, northern Bosnia, where there is evidence not only of slave labor⁵⁰ but also of mass killings of men who were being used as forced laborers.⁵¹

Article 9(1): "Everyone has the right to liberty and security of person." Any expulsion necessarily violates the right to security of person, and

Commission of Experts Established pursuant to Security Council Resolution 780 (1992) [hereinafter *Final Report*]; CSCE Rapporteurs (Coral-Thune), *Moscow Human Dimension Mechanism to Bosnia, Herzegovina, and Croatia, Proposal for an International War Crimes Tribunal for the Former Yugoslavia* (1993); Dept. of State, U.S., *Supplemental United States Submission of Information to the United Nations Security Council in Accordance with Paragraph 5 of Resolution 771 (1992) and Paragraph 1 of Resolution 780 (1992)*, U.N. Doc. S/24705 (1992); Amnesty International, *Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces* (1993); Helsinki Watch, *War Crimes in Bosnia-Herzegovina* (1992).

⁴⁹ This was the official term used by Prime Minister Winston Churchill, President Franklin D. Roosevelt, and Premier Josef Stalin in their agreement on reparations at Yalta. Protocol of the Gimca (Yalta) Conference on the Question of the German Reparation in Kind, Feb. 11, 1945, art. 1(c), 3 Bevans 1020 ("Reparation in kind is to be exacted from Germany in three following forms: . . . (c) Use of German labour."); de Zayas, *A Terrible Revenge*, *supra* note 26, at 116-24.

⁵⁰ Davor Huić, *Serb Expulsions of Muslims Go into High Gear*, Reuters, Sept. 3, 1994, available in LEXIS, World Library, Allwms File.

⁵¹ *Report of the Secretary-General pursuant to Security Council Resolution 1019 (1995) on Violations of International Humanitarian Law in the Areas of Srebrenica, Zepa, Banja Luka, and Sanski Most ¶¶ 70-72*, U.N. Doc. S/1995/988 (1995) [hereinafter *Srebrenica Report*]; Chris Hedges, *2 Officials Report New Mass Killings by Bosnian Serbs*, N.Y. Times, Oct. 20, 1995, at A1, available in LEXIS, World Library, Allwms File; Mike O'Connor, *Bosnian Village Fears 500 Captives Were Killed by Serbs*, N.Y. Times, Oct. 16, 1995, at A3, available in LEXIS, World Library, Allwms File.

experience shows that persons subjected to expulsion measures are frequently deprived of their liberty by being detained in internment camps prior to expulsion and confined in reception centers upon arrival in the new location.⁵² The war in Bosnia has in a very real sense been waged through and in concentration camps: the great majority of persons indicted by the International Criminal Tribunal for the Former Yugoslavia have been charged with crimes committed in connection with the collective detention of civilians, including murder, rape, and torture.⁵³

Article 12(1), (4): "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." An expulsion is intended permanently to frustrate this right.⁵⁴ More important, "No one shall be arbitrarily

⁵² 1 International Comm. of the Red Cross, *Report on Activities during the Second World War, September 1, 1939-June 30, 1947*, at 675 (1948); Senate, U.S., *Education and Concentration Camps in Silesia*, 92 Cong. Rec. A4778 (1946); H.G. Adler, *Theresienstadt, 1941-1945*, at 214 (1955); de Zayas, *A Terrible Revenge*, *supra* note 26, at 93-108; John Sack, *An Eye for an Eye* (1993); 4 Theodor Schneider, *Documents of the Expulsion of the Germans from Eastern-Central Europe 76* (1960); Alfred de Zayas, *The Legality of Mass Population Transfers: The German Experience, 1945-48* (pts. 1 & 2), 12 E. Eur. Q. 1, 143 (1978).

⁵³ Prosecutor v. Nikolic, Case No. IT-94-2-I (ICTY Nov. 4, 1994), *reprinted in* 34 I.L.M. 996 (Sutisa camp); Prosecutor v. Tadic, Case No. IT-94-I-T (ICTY Feb. 13, 1995), *reprinted in* 34 I.L.M. 1011 (Omarska camp) (additional charges filed Sept. 26, 1995), concerning Omarska, Keraterm, and Trnopolje camps); Prosecutor v. Meakic, Case No. IT-95-4-I (ICTY Feb. 13, 1995), *reprinted in* 34 I.L.M. 1011 (Omarska camp); Prosecutor v. Karadzic, Case No. IT-95-5-I (ICTY July 25, 1995) (counts 3-4 relate to "unlawful confinement of civilians" in various camps established and operated by personnel "under the control of" the accused); Prosecutor v. Shtirica, ICTY Press Release, No. CC/PIO/013-E (July 25, 1995) (Keraterm camp); Prosecutor v. Jelacic, ICTY Press Release, No. CC/PIO/013-E (July 25, 1995) (Udka camp). Details are also available in *Final Report*, *supra* note 48, ¶¶ 56, 168-173, 216-231; David Binder, *No U.S. Action Seen on Prison Camps*, N.Y. Times, Aug. 4, 1992, at A6, *available in* LEXIS, World Library, NYT File (Omarska and Brcko camps); Elaine Sciolino, *U.S. Names Figures It Wants Charged with War Crimes*, N.Y. Times, Dec. 17, 1992, at A1, *available in* LEXIS, World Library, NYT File (Omarska and Celibici camps).

⁵⁴ See Avni Shawhat Al-Khasawneh, Special Rapporteur, U.N. Subcommittee on Discrimination of Discrimination and Protection of Minorities [hereinafter U.N. Subcomm'n

deprived of the right to enter his own country." The adverb "arbitrarily" means without proper legal proceedings in each individual case. Victims of population transfer are denied the right to legal process at the time of expulsion. By the nature of the expulsion policy, the right to return is also denied routinely and without individual justification. The number of Bosnian refugees has been estimated from over two million, or roughly half the prewar population of 4.3 million,⁵⁵ to 3.7 million.⁵⁶

Article 13: "An alien lawfully in the territory of a State Party . . . may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed . . ." A collective expulsion would necessarily be incompatible with this provision.

Article 14(1): "All persons shall be equal before the courts and tribunals. In the determination . . . of his rights . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial

Discrim. & Minor.), *The Human Rights Dimensions of Population Transfer, Including the Implementation of Settlers: Progress Report* ¶ 17, U.N. Doc. E/CN.4/Sub.2/1994/18 (1994) (noting that any "form of forced population transfer from a chosen place of residence, whether by displacement, settlement, internal banishment, or evacuation, directly affects the enjoyment or exercise of the right to free movement and choice of residence within States and constitutes a restriction upon this right"); see also *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories* 139-43, 154-64, U.N. Doc. A/47/509 (1992) [hereinafter *Israeli Human Rights Practices*]; de Zayas, *Nemesis at Potsdam*, *supra* note 26, ch. 6; Alfred de Zayas, *The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context*, 6 Palestine Y.B. Int'l L. 17, 34 (1990).

⁵⁵ *Fourth Year of War*, *supra* note 47; Bartz, *supra* note 47. Over a million refugees are living abroad. *Fourth Year of War*, *supra*.

⁵⁶ *WHO Report*, *supra* note 47. Alan Cowell, *For Bosnia's Refugees, Return May Be Illusion*, N.Y. Times, Dec. 8, 1995, at A18, *available in* LEXIS, World Library. Allows million displaced within Bosnia; 700,000 persons, mainly Bosnian, living abroad; and 820,000 persons forced from their communities who are now living in other republics in the region, mainly Serbia and Croatia.

tribunal established by law." Article 2(3) requires each state party to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" and to "ensure that any person claiming such a remedy shall have his right thereto determined by . . . competent authority . . . and to develop the possibilities of judicial remedy." Thus, all persons threatened by expulsion are entitled to due process of law on the same basis as persons who are not so threatened.

Article 17: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Expulsion entails an arbitrary or unlawful interference with privacy, family, and home and is frequently accompanied by unlawful attacks on the honor and reputation of the persons being expelled.

Article 18(1): "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom . . . to manifest his religion or belief in worship, observance, practice and teaching." Expulsions are frequently motivated by religious hatred. Surely the freedom to practice one's religion by worshipping at a sacred shrine in one's homeland and the freedom to visit and honor the burial sites of ancestors would be denied by forcible expulsion.

Article 19(2): "Everyone shall have the right to freedom of expression . . ."

Expulsions may be directed against persons because of their exercise of this right. Indeed, demonstrators and critics are frequently the first to suffer expulsion, for example, in the Palestinian context.⁵⁷

⁵⁷ In S.C. Res. 607, U.N. SCOR, 43d Year, 1988 S.C. Res. & Dec. at 1, U.N. Doc. S/INF/44 (1988); S.C. Res. 608, U.N. SCOR, 43d Year, 1988 S.C. Res. & Dec. at 2, U.N. Doc. S/INF/44 (1988); S.C. Res. 636, U.N. SCOR, 44th Year, 1989 S.C. Res. & Dec. at 14, U.N. Doc. S/INF/45 (1989); S.C. Res. 641, U.N. SCOR, 44th Year, 1989 S.C. Res. & Dec. at 14, U.N. Doc. S/INF/45 (1989); S.C. Res. 681, U.N. SCOR, 45th Year, 1990 S.C. Res. & Dec. at 8, U.N. Doc. S/INF/46 (1990); S.C. Res. 694, U.N. SCOR, 46th Year, 1991 S.C. Res. & Dec. at 2, U.N. Doc. S/INF/47 (1991); S.C. Res. 726, U.N. SCOR, 47th Year, 1992 S.C. Res. & Dec. at 5, U.N. Doc. S/INF/48

Article 20(2): "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." States parties are obligated to prohibit precisely the sort of rabble-rousing that often results in expulsions. It is widely recognized that Slobodan Milosevic consolidated his political power in the former Yugoslavia by fomenting nationalist fervor among ethnic Serbs,⁵⁸ and this incitement is generally considered a principal (if not the principal) factor in the breakup of the republic and the ensuing fighting.⁵⁹

Article 23(1): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Expulsion measures frequently separate men from their wives and children, and sometimes they never see each other again.⁶⁰ Both at Srebrenica⁶¹ and

(1992); S.C. Res. 799, U.N. SCOR, 47th Year, 1992 S.C. Res. & Dec. at 6, U.N. Doc. S/INF/48 (1992); the Security Council expressed its condemnation of the deportation of Palestinian civilians from the occupied territories. See generally de Zayas, *supra* note 54.

⁵⁸ Henry Kamm, *Serb-Croat Rivalry Is Again Shaking Yugoslavia*, N.Y. Times, Jan. 30, 1986, at A2, available in LEXIS, World Library, Allwys File; David Binder, *Serbian Official Declares Part of Croatia Separate*, N.Y. Times, Mar. 18, 1991, at A3, available in LEXIS, World Library, Allwys File; Robert Wright, *How Kosovo Set the Serbian Agenda*, The Scotsman, Aug. 18, 1995, at 13, available in LEXIS, World Library, Allwys File.

⁵⁹ *Serbia vs. the New World Order*, N.Y. Times, Aug. 14, 1991, at A18, available in LEXIS, World Library, Allwys File; Roger Cohen, *The World: From "Greater Serbia" to Lesser Serbs—A War Turns*, N.Y. Times, Aug. 20, 1995, § 4, at 1, available in LEXIS, World Library, Allwys File; Raymond Bonner, *In Reversal, Serbs of Bosnia Accept Peace Agreements*, N.Y. Times, Nov. 24, 1995, at A1, available in LEXIS, World Library, Allwys File.

⁶⁰ The American poet Henry Wadsworth Longfellow (1807-1882) immortalized in his epic poem *Evangeline* the 1755 expulsion of 15,000 Acadian farmers of French descent, whom the British governor of Nova Scotia (Canada) considered to be of doubtful loyalty to the British crown. These peaceful farmers, who had settled in Acadia a century before, were laden onto ships, husbands separated from their wives and children, and deported to other French and British colonies. Many never saw each other again.

⁶¹ Survivors "told of how men and boys were torn from their families during the UN-escorted evacuation [of Srebrenica]. One woman . . . said Bosnian Serb soldiers tore

in northern Bosnia, 62 thousands of Muslim men and boys have "disappeared" after being forcibly taken away from their families. On November 16, 1995, indictments were filed by the prosecutor of the International Criminal Tribunal against Radovan Karadzic and Ratko Mladic for genocide following the Bosnian Serb takeover of Srebrenica.⁶³ A report issued by the UN Secretary-General on November 27 gives an estimate of 3,500-5,500 men and boys missing from this area, most of whom are presumed murdered, and documents a similar pattern of separations and disappearances under Bosnian Serb forces in northern Bosnia in recent months.⁶⁴

Article 24(1), (3): "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." An expulsion is a traumatic experience, which subjects children to considerable privation and suffering and denies them the special protection that

her son from her arms and 'just slit his throat. They killed him.'" Elizabeth Neuffer, *Groups Says U.N. Failed to Protect Bosnia Haven*, Boston Globe, Oct. 10, 1995, at 9, available in LEXIS, World Library, Allwys File (citing Human Rights Watch/Helsinki Watch report of 8,500 men and boys missing from Srebrenica after being separated from their families); Stephen Engelberg et al., *Srebrenica: The Days of Slaughter*, N.Y. Times, Oct. 29, 1995, at 1, available in LEXIS, World Library, Allwys File (reconstructing massacre from survivors' accounts); Eric Schmitt, *Spy Photos Indicate Mass Grave at Serb-Held Town*, U.S. Says, N.Y. Times, Aug. 10, 1995, at A1, available in LEXIS, World Library, Allwys File.

⁶² Hedges, *supra* note 51; O'Connor, *supra* note 51.

⁶³ Prosecutor v. Karadzic, Case No. IT-95-18-I (ICTY Nov. 16, 1995).

⁶⁴ *Srebrenica Report*, *supra* note 51, ¶¶ 8-31, 55-62; *Bosnia-Herzegovina: Serbs Killed Muslims at Srebrenica U.N. Says*, Inter Press Serv., Nov. 29, 1995, available in LEXIS, World Library, Allwys File. On November 9, 1995, the Security Council strongly condemned reports of "grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder, unlawful detention and forced labour, rape, and deportation of civilians," and requested the Secretary-General to report thereon. S.C. Res. 1019, U.N. SCOR, 50th Year, 3591st mtg. at 1, U.N. Doc. S/RES/1019 (1995). See *Srebrenica Report*, *supra*.

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is their right. Moreover, "Every child has the right to acquire a nationality." An expulsion may also be accompanied by denationalization and may thus render the child stateless.

Article 25: "Every citizen shall have the right and the opportunity . . . [t]o take part in the conduct of public affairs, . . . [t]o vote and to be elected at genuine periodic elections . . . [and] [t]o have access, on general terms of equality, to public service in his country." Expelled persons; if formerly citizens of the state concerned, are through their removal deprived of all these rights.

Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." It is hardly possible to conceive an instance of compulsory population transfer, which singles out one group and spares others, that would not be based on prohibited discrimination and denial of equal protection.

Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Thus, international law recognizes the right of minority groups to maintain their identity.⁶⁵

⁶⁵ Declaration on Minorities, *supra* note 8, goes further than International Covenant, *supra* note 2, art. 27. In its preamble, the declaration recognizes that the promotion and protection of the rights of minorities contributes to the political and social stability of states in which such persons live and to the strengthening of friendship and cooperation among peoples and states. The declaration calls upon states to encourage conditions for the promotion of the national or ethnic, cultural, religious, and linguistic identity of minorities and to take all necessary measures to ensure that minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law. In 1995, the UN Economic and Social Council (ECOSOC) established a Commission on Human Rights.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

In addition to the infringement of civil and political rights, the socioeconomic and cultural dislocations and losses associated with collective expulsions would amount to a violation of most provisions of the International Covenant on Economic, Social, and Cultural Rights.⁶⁶

At issue in particular are the right of self-determination (article 1(1)); a people's right to dispose freely of its natural wealth and resources (article 1(2)); the right to work, "which includes the right of everyone to the opportunity to earn his living by work which he freely chooses" (article 6(1)); the right to social security (article 9), for which expellees have frequently contributed for many years prior to their expulsion; the right to protection of the family, new mothers, children, and young persons (article 10); the right to an adequate standard of living (article 11(1)); the right to the "enjoyment of the highest attainable standard of physical and mental health" (article 12(1)); the right to education (article 13(1)); and the right to take part in cultural life (article 15(1)(a)). Indeed, the long-term cultural and psychological damage inflicted on expelled populations, their children, and grandchildren cannot be overstated.⁶⁷

which reports to the Subcommittee on Prevention of Discrimination and Protection of Minorities. E.S.C. Res. 1995/31 & E.S.C. Res. 1995/32, U.N. ESCOR 1995, U.N. Doc. E/1995/INF/4/Add.2 (1995). The working group held its first session in August 1995. *Report of the Commission on Human Rights on Its Fifty-first Session*, U.N. ESCOR 1995, Supp. No. 4, at 19, U.N. Doc. E/1995/23 (1995) [hereinafter 1995 *Comm'n Report*].

⁶⁶ International Covenant on Economic Rights, *supra* note 2; see Danilo Türk, Special Rapporteur, U.N. Subcomm'n Discrim. & Minor., *The Realization of Economic, Social, and Cultural Rights: Progress Report*, U.N. Doc. E/CN.4/Sub.2/1990/19 (1990); Danilo Türk, Special Rapporteur, U.N. Subcomm'n Discrim. & Minor., *The Realization of Economic, Social, and Cultural Rights: Final Report*, U.N. Doc. E/CN.4/Sub.2/1992/16 (1992). With 131 parties, 1994 *Multilateral Treaties*, *supra* note 43, at 107, this treaty can be considered to have attained the status of customary international law. See Frank C. Newman, *Introduction*, Symposium, *Comparative Constitutionalism*, 40 Emory L.J. 731, 738 (1991).

⁶⁷ E.g., *Israeli Human Rights Practices*, *supra* note 54, at 165-71. Part of the long-term psychological impact of the Holocaust on survivors and their families relates to the fact that after the war survivors in most cases could not return to the communities from

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Bearing in mind that population transfers are frequently aimed at eliminating ethnic, religious, or linguistic groups, it is evident that they violate most provisions of the Convention on Racial Discrimination.⁶⁸ This convention broadly prohibits "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms"⁶⁹ and imposes affirmative obligations on states parties to combat prohibited discrimination.⁷⁰

The Committee on the Elimination of Racial Discrimination (CERD) was established to monitor compliance by states parties with the convention. The committee, which reports to the UN General Assembly, is composed of eighteen independent experts who meet twice a year in Geneva. In its "concluding observations" on the report of the Republic of Bosnia and Herzegovina,⁷¹ CERD condemned

the massive, gross and systematic human rights violations occurring in the territory of Bosnia and Herzegovina, most of which are committed in connection with the systematic policy of "ethnic cleansing" and genocidal acts in the areas under control of the self-proclaimed Bosnian Serb authorities. All these practices still occurring constitute a grave violation of all basic

⁶⁸ *in Families of Survivors of the Nazi Holocaust* (1981); Abraham J. Peck, *The Children of Holocaust Survivors* (1983).

⁶⁹ Convention on Racial Discrimination, *supra* note 6. With 142 parties, 1994 *Multilateral Treaties*, *supra* note 43, at 91, this treaty can be considered to have attained the status of customary international law. See Franck, *supra* note 43, at 78.

⁷⁰ Convention on Racial Discrimination, *supra* note 6, art. 1(1).

⁷¹ *Id.* arts. 2, 4-7.

⁷² Report Submitted by Bosnia and Herzegovina pursuant to a Special Decision Taken by the Committee [on the Elimination of Racial Discrimination], U.N. Doc. CERD/C/247/Add.1 (1993).

principles underlying the International Convention on the Elimination of All Forms of Racial Discrimination. The Committee urges the immediate reversal of ethnic cleansing, which must begin with the voluntary return of displaced people.⁷²

In its Decision 2 (47) on the situation in Bosnia and Herzegovina, adopted on August 17, 1995, the committee reemphasized "that any attempt to change or to uphold a changed demographic composition of an area, against the will of the original inhabitants, by whichever means is a violation of international law" and by way of concrete reparation demanded "that persons be given the opportunity to safely return to the places they inhabited before the beginning of the conflict and their safety be guaranteed as well as their effective participation in the conduct of public life."⁷³ These pronouncements represent the concrete application of the convention's norms and constitute hard law as to states parties to the convention.

Regional Norms

On the regional level, collective expulsions violate several provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷⁴ Article 1 binds the states parties to "secure to everyone within their jurisdiction the rights and freedoms" defined and guaranteed in the convention, which largely tracks the Universal Declaration of Human Rights. Protocol 4 to the convention specifically provides:

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

⁷² *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 50th Sess., Supp. No. 18, ¶ 219, U.N. Doc. A/50/18 (1995) (emphasis added).

⁷³ *Id.* ¶ 26.

⁷⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Eur. T.S. 5 (entered into force Sept. 3, 1953). As of December 1995, 31 of the Council of Europe's 38 members were states parties.

2. No one shall be deprived of the right to enter the territory of the State of which he is a national.⁷⁵

The protocol also expressly prohibits the "[c]ollective expulsion of aliens."⁷⁶

Expulsions would similarly violate many of the civil and political rights protected by the American Convention on Human Rights.⁷⁷ Most important in terms of the right to one's homeland are article 22(5), which provides that "[n]o one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it," and article 22(9), which prohibits "the collective expulsion of aliens." Likewise, the Banjul (African) Charter on Human and Peoples' Rights expressly prohibits the "mass expulsion of non-nationals," which is defined as deportation "aimed at national, racial, ethnic or religious groups."⁷⁸

International Jurisprudence: The Nuremberg Trials

The catalogue of crimes committed by the National Socialist government of Germany was so large and the crimes so shocking that an international court was convened in Nuremberg in 1945 to bring those responsible to justice. The charges relevant here involved forced expulsions of civilian populations, mass deportations for the purpose of gaining Lebensraum, and forced labor. Article 6(b) of the Nuremberg Charter defined "war crimes" to include "murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory."⁷⁹

⁷⁵ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, art. 3, Eur. T.S. 46 (entered into force May 2, 1968).

⁷⁶ *Id.* art. 4.

⁷⁷ American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

⁷⁸ Banjul (African) Charter on Human and Peoples' Rights, adopted June 27, 1981, art. 12(5), O.A.U. Doc. CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 59 (entered into force Oct. 21, 1986).

⁷⁹ Nuremberg Charter, *supra* note 11, art. 6(b) (emphasis added).

Count 3, section B, of the Nuremberg indictment alleged the "[d]eportation for slave labor and for other purposes of civilian populations of and in occupied territories."⁸⁰ Count 3, section J, of the indictment read:

In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavored to assimilate those territories politically, culturally, socially, and economically into the German Reich. The defendants endeavored to obliterate the former national character of these territories. In pursuance of these plans and endeavors, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists.⁸¹

Article 6(c) of the Charter defined "crimes against humanity" to include "murder, extermination, enslavement, *deportation*, and other inhumane acts committed against any civilian population, before or during the war."⁸² Such crimes, including the crime of mass deportation, were the subject of count 4, section A, of the indictment.⁸³

During the trials, the practice of "germanizing" occupied or "annexed" territories was repeatedly condemned, as were the deportations of civilian populations from one occupied region to another (the Government-General of Poland) or to unoccupied regions (Vichy France).⁸⁴

⁸⁰ 1 *Trial of the Major War Criminals* (1947), *supra* note 11, at 51.

⁸¹ *Id.* at 63.

⁸² Nuremberg Charter, *supra* note 11, art. 6(c) (emphasis added). For an interesting overview of the history of the term "crimes against humanity," see Egon Schwelb, *Crimes against Humanity*, 23 Brit. Y.B. Int'l L. 178 (1946).

⁸³ 1 *Trial of the Major War Criminals*, *supra* note 11, at 66.

⁸⁴ *E.g.*, Pierre Mounier, assistant prosecutor for France, called the mass deportations "contrary to the international conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6(b) of the [Nuremberg] Charter." 2 *Trial of the Major War Criminals* (1947), *supra* note 11, at 49.

The tribunal's conclusion was unequivocal: population transfer and colonization of occupied territory constituted both war crimes and crimes against humanity.⁸⁵

After such condemnation, and the unanimous approval by the United Nations of the Nuremberg principles in General Assembly Resolution 95 (I) of 1946,⁸⁶ it could safely be assumed that compulsory population transfers and the implantation of settlers in territories long settled by other peoples would no longer occur. Unfortunately, there remained a very big gap between standard setting and implementation. Indeed, while the Nuremberg trials were still in progress, the deportation of ethnic Germans described earlier was proceeding,⁸⁷ based on decrees by, or at least with the tacit approval of, the very powers whose prosecutors and judges were condemning the mass deportations perpetrated by the Nazis. Were population transfers legal, after all, if carried out by victorious powers but illegal if carried out by the

⁸⁵ It became clear that impediments placed in the way of war refugees who wanted to return to their homelands upon cessation of hostilities were, in human rights terms, an equally criminal act. On December 14, 1945, Captain Samuel Harris, assistant prosecutor for the United States, introduced evidence on this matter and read the following excerpt from a report on expulsions from Alsace into the court record: "The first expulsion action was carried out in Alsace in the period from July to December 1940; . . . 105,000 persons were either expelled or prevented from returning." 3 *Trial of the Major War Criminals* (1947), *supra*, at 596.

⁸⁶ In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans.

⁸⁷ In the West the population of Alsace were the victims of a German "expulsion action." Between July and December 1940, 105,000 Alsatians were either deported from their homes or prevented from returning to them.

⁸⁸ 22 *Trial of the Major War Criminals*, *supra* note 11, at 480-81.

⁸⁹ Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (I), U.N. Doc. A/64/Add.1, at 188 (1946). The Charter principles are widely viewed as part of customary international law. *E.g.*, *Secretary-General's Report*, *supra* note 15, ¶¶ 35, 42-44, 47 & n.9.

⁹⁰ See *supra* notes 30-33, 35 and accompanying text.

vanquished, or was the expulsion of Germans to be understood as an exception to a universal prohibition?

COLLECTIVE EXPULSIONS: SOFT LAW (DE LEGE FERENDA)

United Nations Subcommission on Prevention of Discrimination and Protection of Minorities

By Resolution 1994/24 of August 26, 1994, the UN Subcommission on Prevention of Discrimination and Protection of Minorities, a functional ECOSOC commission established in 1947 under article 68 of the UN Charter to support the UN Commission on Human Rights in standard setting and monitoring, essentially recognized the right to one's homeland when it affirmed two crucial elements of this right: the right to remain and the right to return. In its operative paragraphs, the resolution

1. [a]ffirms the right of persons to remain in peace in their own homes, on their own lands and in their own countries;
2. [a]lso affirms the right of refugees and displaced persons to return in safety and dignity, to their country of origin and/or within it, to their place of origin or choice;
3. [u]rges Governments and other actors involved to do everything possible in order to cease at once all practices of forced displacement, population transfer and ethnic cleansing in violation of international legal standards.⁸⁸

This resolution was reaffirmed by the subcommission at its forty-seventh session in August 1995 in Resolution 1995/13, which asserts "that practices of forcible exile, mass expulsions and deportations, population transfer, 'ethnic cleansing' and other forms of forcible

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displacement of populations within a country or across borders deprive the affected populations of their right to freedom of movement," in violation of article 12 of the International Covenant on Civil and Political Rights and article 13 of the Universal Declaration of Human Rights.⁸⁹ The 1995 resolution⁹⁰ also "recall[s]" the Vienna Declaration and Programme of Action, adopted in 1993 by the UN World Conference on Human Rights, which reaffirmed the right of everyone, without distinction of any kind, to return to his or her own country,⁹¹ and "not[es] with great interest" Resolution 1995/88 of the UN Commission on Human Rights on "human rights and mass exoduses," in which the commission "strongly deplored ethnic and other forms of intolerance . . . and urged States to take all necessary steps to ensure respect for human rights, especially the rights of persons belonging to minorities."⁹² Even before the adoption of these important resolutions, the subcommission had appointed two special rapporteurs to study the human rights dimensions of population transfers, including the implantation of settlers and settlements. By Resolution 1992/28, adopted without a vote on August 27, 1992, the subcommission

1. [r]ecognizes that practices of population transfer constitute a violation of fundamental human rights;
2. [e]ntrusts Mr. Awn Shawhat Al-Khasawneh and Mr. Ribot Harano, as Special Rapporteurs, with preparing a preliminary study on the human rights dimensions of population transfer, including the implantation of settlers and settlements.⁹³

⁸⁸ U.N. Subcomm'n Discrim. & Minor. Res. 1995/13, U.N. Doc. E/CN.4/Sub.2/1995/L.11/Add.3, at 20 (1995).

⁸⁹ *Id.*

⁹¹ Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/24 (pt. I), at 20 (1993), reprinted in 32 I.L.M. 1661. The right to return is set out in Vienna Declaration, *supra*, ¶ 23.

⁹² U.N. Comm'n Hum. Rts. Res. 1995/88, 1995 Comm'n Report, *supra* note 65, at 259.

⁹³ U.N. Subcomm'n Discrim. & Minor. Res. 1992/28, U.N. Doc. E/CN.4/1993/2, at 70 (1992).

The Commission on Human Rights subsequently endorsed the subcommission's decision to request this study.⁹⁴

In their first report, Al-Khasawneh and Harano concluded that population transfer is *prima facie* unlawful and violates a number of rights affirmed in human rights and humanitarian law for both transferred and receiving populations. The special rapporteurs also asserted that such practices undermine the very foundations of an international order based on self-determination and constitute a threat to world peace.⁹⁵ A later report focused on rules of customary international law that are recognized as binding upon all states, including "the prohibition of genocide, torture and cruel, inhuman and degrading treatment, slavery, racial discrimination, or a pattern of discrimination," which

also form peremptory norms of *jus cogens* whose character is such that they cannot be derogated or set aside, even by agreement or treaty. . . . Population transfer is clearly unlawful and prohibited where its purpose or effect constitutes or amounts to genocide, torture and its related elements, slavery, racial and systematic discrimination, and interference with the legitimate exercise of the right to self-determination, or where it is manifestly disproportionate to the exception of military necessity in humanitarian law. . . . [T]he proscription of racial discrimination prohibits population transfers aimed at specific groups such as minorities and indigenous peoples, especially where the purpose or effect is one of demographic manipulation by dispersing such groups from their homelands within the State. . . . Population transfer is unlawful if its purpose is punitive so as to subject a group to torture or cruel, inhuman and degrading treatment.⁹⁶

⁹⁴ U.N. Comm'n Hum. Res. Dec. 1993/104, *Report of the Commission on Human Rights on Its Forty-ninth Session*, U.N. ESCOR 1993, Supp. No. 3, at 282, U.N. Doc. E/1993/23 (1993) (48 in favor, United States against, no abstentions).

⁹⁵ Awn Shawhat Al-Khasawneh & Ribot Harano, Special Rapporteurs, U.N. Subcomm'n Discrim. & Minor., *The Human Rights Dimensions of Population Transfers, Including the "Implantation" of Settlers: Preliminary Report*, U.N. Doc. E/CN.4/Sub.2/1993/17 & Corr.1 (1993).

⁹⁶ Al-Khasawneh, *supra* note 54, ¶¶ 18-21.

The report concluded that

international law prohibits the transfer of persons, including the implantation of settlers, as a general principle. The governing principle is that the transfer of populations must be done with the consent of the population involved. Because the transfer of populations is subject to consent, this principle reinforces the prohibition against such transfer.⁹⁷

Special Rapporteur Al-Khasawneh also made an interesting recommendation that "the Sub-Commission begin work towards a draft declaration on the subject of forcible population transfers and the implantation of settlers and settlements."⁹⁸ Ultimately, such a declaration would be adopted by the General Assembly as a step toward the adoption of a new protocol to the International Covenant on Civil and Political Rights.

International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind

Progress in the struggle to ban population transfers is unquestionably being made. The number of legal experts coming to the conclusion that such practices constitute crimes against humanity and even genocide is steadily increasing. One important example is the International Law Commission's (ILC) Draft Code of Crimes against the Peace and Security of Mankind.⁹⁹ The ILC, an expert body set up by the General Assembly in the late 1940s,¹⁰⁰ was requested to prepare such a code¹⁰¹ and examine the related question of creating an international criminal

⁹⁷ *Id.* ¶ 131.

⁹⁸ *Id.* ¶ 142. Special Rapporteur Harano stepped down in 1993 and Al-Khasawneh was appointed sole rapporteur.

⁹⁹ Draft Code of Crimes against the Peace and Security of Mankind, *Report of the International Law Commission on Its Forty-third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 198, U.N. Doc. A/46/10 (1991) [hereinafter *Draft Code of Crimes*].

¹⁰⁰ G.A. Res. 174 (II), U.N. Doc. A/519, at 105 (1947).

¹⁰¹ G.A. Res. 177 (II), U.N. Doc. A/519, at 111 (1947).

tribunal.¹⁰² The ILC approved the current text of the Draft Code of Crimes at its forty-third session in 1991.¹⁰³ The commission is now reviewing comments from governments on this text. Article 21 of the Draft Code lists "deportation or forcible transfer of population" as a "systematic or mass violation of human rights" (a term that replaces "crime against humanity") for which perpetrators bear individual criminal liability. The ILC commentary on this article observes

that a crime of this nature could be committed not only in time of armed conflict but also in time of peace [Deportation] implies expulsion from the national territory, whereas the forcible transfer of population could occur wholly within the frontiers of one and the same State. . . . Transfers of population under the draft article meant transfers intended, for instance, to alter a territory's demographic composition for political, racial, religious or other reasons, or transfers made in an attempt to uproot a people from their ancestral lands. One member of the Commission was of the view that this crime could also come under the heading of genocide.¹⁰⁴

Under article 22(2)(a), "deportation or transfer of the civilian population and collective punishment," and under article 22(2)(b), "establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory," are listed as "exceptionally serious war crimes." The ILC commentary explains that

[e]stablishing settlers in an occupied territory constitutes a particularly serious misuse of power, especially since such an act could involve the disguised intent to annex the occupied territory. Changes to the demographic composition of an occupied territory seemed to the Commission to be such a serious act that it could echo the seriousness of genocide.¹⁰⁵

¹⁰² G.A. Res. 260B (III), U.N. Doc. A/810, at 177 (1948).

¹⁰³ See *supra* note 99.

¹⁰⁴ Draft Code of Crimes, *supra* note 99, at 268.

¹⁰⁵ *Id.* at 271.

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Although the Draft Code of Crimes has not yet been adopted, it is a source of guidance to international jurists and in particular the judges of the International Criminal Tribunal for the Former Yugoslavia as they are called on to judge crimes connected with ethnic cleansing.

United Nations High Commissioner for Human Rights

At its forty-eighth session in 1993, the UN General Assembly created the post of High Commissioner for Human Rights.¹⁰⁶ In February 1994, the General Assembly unanimously confirmed the nomination by Secretary-General Boutros Boutros-Ghali of Ambassador José Ayala Lasso, former Ecuadorian Permanent Representative to the United Nations, as High Commissioner.¹⁰⁷ On April 5, 1994, High Commissioner Ayala Lasso took up his functions as overall supervisor of the UN Centre for Human Rights in Geneva and principal officer-in-charge of all UN human rights activities.¹⁰⁸

Since that time, the High Commissioner has been confronted with many challenges, including forced displacements in the former Yugoslavia, Rwanda, and elsewhere. Speaking in Frankfurt in May 1995, at a commemorative ceremony held on behalf of the Germans expelled at the close of World War II, High Commissioner Ayala Lasso called the right not to be expelled from one's homeland a fundamental right and suggested that "if in the years following the second world war states had reflected more on the implications of the enforced flight and expulsion of the Germans, today's demographic catastrophes, particularly those

¹⁰⁶ G.A. Res. 48/141, U.N. GAOR, 48th Sess., Supp. No. 49, at 261, U.N. Doc. A/48/49 (1993).

¹⁰⁷ G.A. Res. 48/321, U.N. GAOR, 48th Sess., Supp. No. 49A, at 57, U.N. Doc. A/48/49/Add.1 (1994); Alfred de Zayas, *The United Nations High Commissioner for Human Rights: Position, Functions, and Experience in The Institution of a Commissioner for Human Rights and Minorities* 17 (Eckart Klein ed., 1995).

¹⁰⁸ See *Report of the United Nations High Commissioner for Human Rights*, U.N. GAOR, 49th Sess., Supp. No. 36, at 1, U.N. Doc. A/49/36 (1994); see also *Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. E/CN.4/1995/198 (1995).

referred to as 'ethnic cleansing,' would, perhaps, not have occurred to the same extent."¹⁰⁹

Emerging Jurisprudence

There have not yet been any domestic prosecutions of forcible population transfers. Although states parties to the Fourth Geneva Convention are obligated to prosecute their own soldiers and commanders who are responsible for grave breaches,¹¹⁰ a category into which ethnic cleansing as a form of population transfer can easily be placed, no Croatian or Serbian or Bosnian soldier or commander has thus far been tried by the judicial authorities of his own country. However, as discussed in the following section, this offense can now be investigated and punished by the ad hoc tribunal established in 1993 by the UN Security Council to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.¹¹¹ It is to be hoped that the International Criminal Tribunal for the Former Yugoslavia will prosecute and punish not merely subordinate soldiers who have committed random offenses but, more important, those politicians responsible for the policy and systematic practice of ethnic cleansing and the terrorization of hundreds of thousands of civilians who have been forced to abandon their homelands and seek refuge elsewhere.¹¹²

The same Tribunal in the Hague has now been given jurisdiction over genocide, crimes against humanity, and violations of common article

¹⁰⁹ Reprinted in *Dokumentation der Gedenkstunde in der Paulskirche zu Frankfurt am 28 Mai 1995: 50 Jahre Flucht, Deportation, Vertreibung 4* (Dieter Blumenwitz ed., 1995); quoted in *LoB für Charta der Vertriebenen*, Frankfurter Allgemeine Zeitung, May 27, 1995, at 5.

¹¹⁰ Geneva Convention IV, *supra* note 9, art. 147 (prohibiting unlawful deportation or transfer of persons). There also is universal jurisdiction over grave breaches of the Geneva Conventions. 4 Pictet, *Commentary*, *supra* note 27, at 587; Pilloud et al., *supra* note 42, at 975.

¹¹¹ S.C. Res. 827, U.N. SCOR, 48th Year, 1993 Res. & Dec. at 29, U.N. Doc. S/INF/49 (1993); ICTY Statute, *supra* note 15, art. 1.

¹¹² See *infra* section entitled "Proceedings to Date."

3 of the 1949 Geneva Conventions and of Additional Protocol II committed during the recent bloodbath in Rwanda.¹¹³ Although the term "ethnic cleansing" has not been employed in this context, it is clear that the Hutu government's incitement of racial hatred, deliberate terror, and systematic killing against the Tutsi opposition and civilian population could well be termed ethnic cleansing and fall under the jurisdiction of this judicial body.

Another source of international case law is likely to be the judgment of the International Court of Justice in the case brought by the Republic of Bosnia and Herzegovina against Yugoslavia, alleging violations by the latter of the Genocide Convention. Two interim orders have been entered directing the government of Yugoslavia to undertake to prevent the commission of the crime of genocide and both parties to refrain from any action that might aggravate their dispute over the prevention and punishment of this crime.¹¹⁴

ETHNIC CLEANSING

Ethnic cleansing has been universally condemned in the various organs of the United Nations. Essentially, ethnic cleansing is an old crime by

¹¹³ S.C. Res. 955, U.N. SCOR, 49th Year, 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994), reprinted in 5 *Crim. L.F.* 698 (1994); Rene Degen-Segui, Special Rapporteur, U.N. Comm'n Hum. Rts., *The Situation of Human Rights in Rwanda*, U.N. Doc. E/CN.4/1995/71 (1995). Pursuant to S.C. Res. 935, U.N. SCOR, 49th Year, 3400h mtg. at 1, U.N. Doc. S/RES/935 (1994), reprinted in 5 *Crim. L.F.* 695 (1994), a Commission of Experts was established in order to determine the extent of serious violations of humanitarian law in Rwanda. The commission has now completed its work. Letter from the Secretary-General to the President of the Security Council, Oct. 1, 1994, U.N. Doc. S/1994/1125 (1994), transmitting *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935* (1994); Letter from the Secretary-General to the President of the Security Council, Dec. 9, 1994, U.N. Doc. S/1994/1405 (1994), transmitting *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 935* (1994).

¹¹⁴ I.C.J. Statute art. 41 provides for interim measures of protection. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herz. v. Yugo.), 1993 I.C.J. 3 (Interim Order of Apr. 8), reprinted in 32 *ILM* 888; 1993 I.C.I. 325 (Interim Order of Sept. 12).

a new name.

According to the first interim report¹¹⁵ by the Commission of Experts¹¹⁶ established pursuant to Security Council Resolution 780 to investigate serious violations of international humanitarian law committed in the territory of the former Yugoslavia:

The expression "ethnic cleansing" is relatively new. Considered in the context of the conflicts in the former Yugoslavia, "ethnic cleansing" means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area. "Ethnic cleansing" is contrary to international law.

Based on the many reports describing the policy and practices conducted in the former Yugoslavia, "ethnic cleansing" has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. *Those practices constitute crimes against humanity and can be assimilated to specific*

¹¹⁵ Letter from the Secretary-General to the President of the Security Council, Feb. 9, 1993, U.N. Doc. S/25274 (1993), transmitting *Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780* (1992) [hereinafter *First Interim Report*].

¹¹⁶ S.C. Res. 780, U.N. SCOR, 47th Year, 1992 S.C. Res. & Dec. at 36, U.N. Doc. S/INF/48 (1992). Initially under the chairmanship of Professor Frits Kalshoven of Leiden University, the commission was chaired from the fall of 1993 to its termination in the spring of 1994 by Professor Cherif Bassiouni. Bassiouni organized a large team of volunteers at DePaul University College of Law to analyze data collected by, and submitted to, the commission. When the commission's term ended, the database was turned over to the office of the prosecutor of the International Tribunal. See generally M. Cherif Bassiouni, *The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 Crim. L.F. 279 (1994); M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 Fordham Int'l L.J. 1191 (1995); Alfred de Zayas, *The Kalshoven Commission*, 6 Leiden I. Int'l L. 131 (1993).

*war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.*¹¹⁷

In its final report to the Security Council, the Commission of Experts concluded that ethnic cleansing is a deliberate policy to instill terror so as to induce persons to flee.¹¹⁸ Thus, the term embraces the denial of the right to one's homeland through compulsory population transfer. The coercive means used to remove the civilian population, of Bosnia and Herzegovina in particular, have included

mass murder, torture, rape and other forms of sexual assault; severe physical injury to civilians; mistreatment of civilian prisoners and prisoners of war; use of civilians as human shields; destruction of personal, public and cultural property; looting, theft and robbery of personal property; forced expropriation of real property; forcible displacement of civilian population; and attacks on hospitals, medical personnel and locations marked with the Red Cross/Red Crescent emblem.¹¹⁹

In the view of the Commission of Experts, then, ethnic cleansing in the former Yugoslavia can be prosecuted as a crime against humanity, a war crime, and/or genocide. Many agree that ethnic cleansing constitutes genocide within the meaning of the Genocide Convention.¹²⁰ This is the argument of the Bosnian government before the International Court of Justice, but the case is not expected to be heard on the merits until late in 1996, nor have the Court's provisional orders had any deterrent effect.¹²¹

¹¹⁷ *First Interim Report*, *supra* note 115, ¶¶ 55-56 (emphasis added).

¹¹⁸ *Final Report*, *supra* note 48, ¶ 135. See generally U.N. Dep't of Pub. Information, *The United Nations and the Situation in the Former Yugoslavia* (1995).

¹¹⁹ *Final Report*, *supra* note 48, ¶ 134.

¹²⁰ Genocide Convention, *supra* note 7.

¹²¹ See *supra* note 114 and accompanying text. The most recent proceedings involve a jurisdictional challenge by Yugoslavia. *Belgrade Disputes Authority of the International Court of Justice*, Agence France Presse, July 22, 1995, available in LEXIS.

United Nations Commission on Human Rights

The UN Commission on Human Rights has devoted considerable resources to the problem of ethnic cleansing and in 1992 held two special sessions on the crisis in the former Yugoslavia. At this time, the commission appointed the former Prime Minister of Poland, Tadeusz Mazowiecki, Special Rapporteur for the Former Yugoslavia.¹²² The evidence he has assembled should prove useful in the prosecution of crimes that have been planned and carried out to achieve ethnic cleansing in the region.

In his report of November 17, 1992, Special Rapporteur Mazowiecki explained: "The term 'ethnic cleansing' refers to the elimination by the ethnic group exerting control over a given territory of members of other ethnic groups."¹²³ In his second periodic report, Mazowiecki stated "that the principal objective of the military conflict in Bosnia and Herzegovina is the establishment of ethnically homogenous regions. Ethnic cleansing does not appear to be a consequence of the war but rather its goal."¹²⁴ In his third periodic report, he called the continuation of ethnic cleansing "a deliberate effort to create a fait accompli in flagrant disregard of international commitments entered into by those who carry out and benefit from ethnic cleansing."¹²⁵

World Library, Allwys File. The response from the Bosnian government was submitted in mid-November 1995.

¹²² *The Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Comm'n Hum. Rts. Res. 1992/S-1/1, U.N. ESCOR 1992, Comm'n Hum. Rts. 1st Spec. Sess., Supp. No. 2A, at 2, U.N. Doc. E/1992/22/Add.1/Rev.1 (1992). The 16 reports Mazowiecki prepared are cited *supra* note 17. On his resignation, see *supra* note 17.

¹²³ Tadeusz Mazowiecki, Special Rapporteur, U.N. Comm'n Hum. Rts., *The Situation of Human Rights in the Territory of the Former Yugoslavia* ¶ 9, U.N. Doc. A/47/666 (1992).

¹²⁴ Tadeusz Mazowiecki, Special Rapporteur, U.N. Comm'n Hum. Rts., *The Situation of Human Rights in the Territory of the Former Yugoslavia* ¶ 6, U.N. Doc. E/CN.4/1994/4 (1993).

¹²⁵ Tadeusz Mazowiecki, Special Rapporteur, U.N. Comm'n Hum. Rts., *The Situation of Human Rights in the Territory of the Former Yugoslavia* ¶ 135, U.N. Doc. E/CN.4/1994/6 (1993).

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In his sixth periodic report, submitted early in 1994,¹²⁶ the special rapporteur described various manifestations of ethnic cleansing and population transfers, in particular, the terrorization of Bosnian Muslims and Bosnian Croats in Serb-held territory. He reiterated

his outright condemnation of such practices which violate fundamental human rights including the right to life, integrity of the person, property, privacy and family life, freedom of thought, conscience, religion and of movement, to earn one's livelihood, to nationality, and rights as a member of an ethnic or cultural group.¹²⁷

Mazowiecki deplored the escalation of ethnic cleansing observed in Banja Luka, where Muslim and Croat tenants have been summarily evicted from their apartments in overwhelming numbers. According to his report, almost all non-Serbs have now lost their jobs in Banja Luka. The Serb authorities in Banja Luka have even removed the physical traces of the Muslim community through the demolition of all of the municipality's 202 mosques.¹²⁸ In the same report, Mazowiecki focused attention on the terrorization of Bosnian Muslims and Bosnian Serbs in Bosnian Croat-held territory, in particular Mostar. "A result of the 'ethnic cleansing' of Serbs is that their population in Mostar has been reduced from a pre-war figure of 30,000 to just 400."¹²⁹ He also deplored the killing in Mostar on October 18, 1993, of a well-known Muslim doctor and members of her family, apparently by Bosnian Croat

¹²⁶ Tadeusz Mazowiecki, Special Rapporteur, U.N. Comm'n Hum. Rts., *The Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Doc. E/CN.4/1994/110 (1994).

¹²⁷ *Id.* ¶ 7.

¹²⁸ *Id.* ¶¶ 8-13. Even after the warring parties concluded their peace agreement in late November 1995, expulsions of non-Serbs have continued, leaving some 12,000 of an original half a million Muslims and Croats in the Banja Luka area. Kir R. Roane, *More Muslims Evicted from Homes despite Pact*, N.Y. Times, Dec. 8, 1995, at A18, available in LEXIS, World Library, Allwys File.

¹²⁹ Mazowiecki, *supra* note 126, ¶¶ 15-19.

defense forces.¹³⁰

According to the special rapporteur, displacement of populations has been effected by three means: involuntary population exchanges between municipalities under the control of opposing belligerents; private arrangements for emigration to the territory of another belligerent; and, least commonly, forced and immediate expulsions of communities from their area of residence. The various forms of displacement are often accompanied by offenses against persons and property. Thus, for instance, displaced persons leaving Serb-held territory are routinely subjected to strip searches at the frontier and to confiscation of their valuables,¹³¹ and many refugees have suffered rape and other very serious violations in the context of expulsions.¹³²

International Criminal Tribunal for the Former Yugoslavia

Unlike the International Military Tribunal at Nuremberg, which was established by treaty,¹³³ the International Criminal Tribunal for the Former Yugoslavia was created by decision of the Security Council¹³⁴ upon the recommendation of the Secretary-General of the United

¹³⁰ *Id.* ¶ 17.

¹³¹ *Id.* ¶¶ 40-48; see also *Final Report*, *supra* note 48, ¶ 137 ("Another recurring practice is to force civilian inhabitants to sign over their property as a condition of their departure or removal to other areas."); *Srebrenica Report*, *supra* note 51, ¶¶ 44, 47, 50-51, 53-54 (reporting on extortion and theft crimes against persons expelled from northern Bosnia in the late summer and the fall of 1995).

¹³² E.g., *Srebrenica Report*, *supra* note 51, ¶¶ 48-49, 53-54; *Final Report*, *supra* note 48, ¶¶ 173, 179. See generally sources cited *supra* note 48.

¹³³ London Agreement, *supra* note 11.

¹³⁴ S.C. Res. 827, *supra* note 111. See generally Christopher Greenwood, *The*

International Tribunal for Former Yugoslavia, 69 *Int'l Aff.* 641 (1993); James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 *Am. J. Int'l L.* 639 (1993); Karin Oellers-Frahm, *Das Statut des Internationalen Strafgerichtshofs zur Verfolgung von Kriegsverbrechen in ehemaligen Jugoslawien*, 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 416

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Nations.¹³⁵ The Tribunal is composed of eleven judges.¹³⁶ By Resolution 936 of July 8, 1994, the Security Council appointed Judge Richard J. Goldstone of the appellate division of the South African Supreme Court as chief prosecutor.¹³⁷

From an international law perspective, the most visible and innovative aspect of the Secretary-General's report on the creation of the Tribunal was to establish it under chapter VII of the UN Charter,¹³⁸ which gives the Security Council broad responsibility for maintaining and restoring international peace and security.¹³⁹ The Tribunal's character as an enforcement measure under chapter VII, following a determination by the Security Council that the armed conflict in the territory of the former Yugoslavia constituted a threat to the peace,¹⁴⁰ limits the Tribunal's territorial jurisdiction to the boundaries of the former Socialist Federal Republic of Yugoslavia.¹⁴¹ Temporal jurisdiction begins on January 1, 1991,¹⁴² a "neutral date which is not tied to any specific event"¹⁴³ but is the beginning of the year in which armed conflict

¹³⁵ *Secretary-General's Report*, *supra* note 15.

¹³⁶ G.A. Dec. 47/328, U.N. GAOR, 47th Sess., Supp. No. 49 (vol. II), at 45, U.N. Doc. A/47/49 (1993).

¹³⁷ S.C. Res. 936, U.N. SCOR, 49th Year, 3401st mtg. at 1, U.N. Doc. S/RES/936 (1994).

¹³⁸ *Secretary-General's Report*, *supra* note 15, ¶¶ 22-30; Daphna Shraga & Ralph Zaclin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 *Eur. J. Int'l L.* 360, 361-62 (1994); Roman Kolodkin, *An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia*, 5 *Crim. L.F.* 381, 385-95 (1994).

¹³⁹ ICTY *Tactic App.* Dec., *supra* note 42, ¶¶ 28-29.

¹⁴⁰ S.C. Res. 808, U.N. SCOR, 48th Year, 1993 Res. & Dec. at 28, U.N. Doc. S/INF/49 (1993); S.C. Res. 827, *supra* note 111; see also *Secretary-General's Report*, *supra* note 15, ¶ 10.

¹⁴¹ ICTY Statute, *supra* note 15, art. 8; *Secretary-General's Report*, *supra* note 15, ¶¶ 60-61.

¹⁴² ICTY Statute, *supra* note 15, art. 8.

¹⁴³ *Secretary-General's Report*, *supra* note 15, ¶ 62.

broke out in the region, as one republic after another declared its independence.¹⁴⁴ Temporal jurisdiction is intended to end with respect to crimes under the Tribunal's jurisdiction committed after a "date to be determined by the Security Council upon the restoration of peace."¹⁴⁵

The establishment of the Tribunal under chapter VII has an important practical effect. An arrest warrant issued by the Tribunal¹⁴⁶ would be considered in most national legislation a request for extradition, which, as such, may be refused on the ground of the nationality of the accused or other prohibition under domestic law. This, indeed, has been the position of the Federal Republic of Yugoslavia, which asserted until recently that it would not surrender its own citizens because the constitution forbids extradition of nationals.¹⁴⁷ Notwithstanding "any legal impediment" to the surrender of persons indicted by the Tribunal "which may exist under the national law or extradition treaties of the State concerned," such requests are binding under chapter VII of the UN Charter and have priority over national legislation.¹⁴⁸ Moreover, the

¹⁴⁴ For background, see *The Search for Peace in the Balkans: A Primer*, N.Y. Times, Nov. 1, 1995, at A11; Tony Barber, *Tito's Wayward Children Get Ready to Divide the Spoils*, The Independent (London), Dec. 16, 1990, at 10, available in LEXIS, World Library, Allwms File; Carol J. Williams, *Slovenia Begins Secession, Voids Yugoslav Laws*, L.A. Times, Feb. 21, 1991, at A1, available in LEXIS, World Library, Allwms File; Chuck Sudetic, *Another Yugoslav State Brakes Ties*, N.Y. Times, Feb. 22, 1991, at A3, available in LEXIS, World Library, Allwms File; Dusan Cotic, *Introduction to a Critical Study of the International Tribunal for the Former Yugoslavia*, 5 Crim. L.F. 223, 227-29 (1994).

¹⁴⁵ S.C. Res. 827, *supra* note 111, ¶ 2.

¹⁴⁶ ICTY R. Proc. & Evid. 55, 61, U.N. Doc. IT/Rev.3 (1995), reprinted in 5 Crim. L.F. 651 (1994).

¹⁴⁷ U.N. Doc. CERD/C/SR.1004, ¶ 57 (1993) (Declaration of Miodrag Mitic, Representative of the Federal Republic of Yugoslavia, Aug. 14, 1993); *Belgrade Says It Will Not Extradite War Crimes Suspects*, Agence France Presse, Nov. 20, 1995, available in LEXIS, World Library, Allwms File. *But see* Robin Knight, *Can There Be Justice as Well as Peace in Bosnia?*, U.S. News & World Rep., Dec. 4, 1995, at 30, available in LEXIS, World Library, Allwms File (reporting that Milosevic agreed at the Dayton peace talks to cooperate fully with the Tribunal).

¹⁴⁸ ICTY R. Proc. & Evid. 58, *supra* note 146; see ICTY Statute, *supra* note 15, art. 29; *Secretary-General's Report*, *supra* note 15, ¶ 23; see also ICTY Statute, *supra*, art. 9(7). For a discussion, see Kenneth S. Gallant, *Securing the Presence of Defendants before*

peace agreement recently initialed by the heads of government of Yugoslavia, Croatia, and Bosnia-Herzegovina in Dayton, Ohio, specifically requires cooperation with the Tribunal.¹⁴⁹

With regard to personal jurisdiction and general principles of criminal liability, the Statute of the Tribunal rejects the notion of guilt by association implicit in the crime of membership in a hierarchical structure such as the armed forces of Yugoslavia or Croatia. Individual criminal responsibility is attributed, under article 7(1) of the Statute, to any person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" falling within the jurisdiction of the Tribunal, whether as a principal or as an accomplice. Following the Nuremberg and Tokyo principles, the Statute provides that superior orders do not constitute a defense;¹⁵⁰ conversely, a superior officer who knew or had reason to know that persons in positions subordinate to him were about to commit any of the crimes within the Tribunal's jurisdiction, or had already committed such crimes, and who failed to take the necessary and reasonable steps to prevent or to punish their commission, is held individually responsible.¹⁵¹

¹⁴⁹ *The International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 Crim. L.F. 557 (1994).

¹⁵⁰ General Framework Agreement for Peace, Nov. 21, 1995, art. 9 (mandating cooperation with all entities authorized by the Security Council "pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law"); *id.* annex 6, art. 13 (mandating cooperation with "organizations concerned with human rights," including the International Criminal Tribunal; see also *id.* annex 7, art. 6 (precluding amnesty for returning refugees and displaced persons charged with any "serious violation of international humanitarian law" as defined in the Tribunal's Statute).

¹⁵¹ ICTY Statute, *supra* note 15, art. 7(4), tracks Nuremberg Charter, *supra* note 11, art. 8, allowing for a plea of obedience to superior orders as mitigating punishment only. The International Military Tribunal for the Far East was established in Tokyo pursuant to Special Proclamation by the Supreme Commander for the Allied Powers, Establishment of an International Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20. It operated pursuant to Charter of the International Military Tribunal for the Far East, Jan. 19, 1946 (*as amended* Apr. 26, 1946), 4 Bevans 21 [hereinafter Tokyo Charter]. Tokyo Charter, *supra*, art. 6, is to the same effect as Nuremberg Charter, *supra*, art. 8.

¹⁵² ICTY Statute, *supra*, art. 15.

Head of state immunity is not available.¹⁵²

The Tribunal's subject matter jurisdiction, set out in articles 2-5 of the Statute, encompasses grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.¹⁵³ In conformity with the principle of *nullum crimen sine lege*, these are all offenses prohibited by "rules of international humanitarian law which are beyond any doubt part of customary law" and binding on everyone.¹⁵⁴ Although ethnic cleansing as such is not

¹⁵² *Id.* art. 7(2) (following Nuremberg Charter, *supra* note 11, art. 7; Tokyo Charter, *supra* note 150, art. 6).

¹⁵³ Until recently, some experts argued that Nuremberg Charter, *supra* note 11, art. 6(c), was the only authoritative definition of crimes against humanity. See generally Bassouni, *supra* note 13, ICTY Statute, *supra* note 15, art. 5, lists the following crimes against humanity: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, and religious grounds, and other inhumane acts "when committed in armed conflict, whether international or internal in character, and directed against any civilian population." This goes beyond the Nuremberg definition in two important respects. First, rape was not enumerated as a crime against humanity under Nuremberg Charter, *supra* art. 6(c). Second, crimes against humanity had to be committed "in execution of or in connection with" crimes against peace or war crimes. *Id.* But see Allied Control Council Law No. 10, Dec. 20, 1945, art. II(1)(c), in Control Council for Germany, Official Gazette, Jan. 31, 1946, at 50, reprinted in *Documents on Prisoners of War 304* (Naval War College International Law Studies Vol. 60, Howard S. Levine ed., 1979) ("Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.")

Recently commenting on the scope of ICTY Statute, *supra* art. 5, the International Criminal Tribunal stated that under customary international law it is "by now a settled rule" that "crimes against humanity do not require a connection to international armed conflict" and "may not require a connection . . . [to] any conflict at all." The opinion goes to state that there is "no question" that the definition in the Statute comports with the principle of *nullum crimen sine lege*. ICTY *Tadić* App. Dec., *supra* note 42, ¶ 141; see also *id.* ¶ 140 (citing Genocide Convention, *supra* note 7, art. 1; International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, arts. 1-2, 1015 U.N.T.S. 243 (entered into force July 18, 1976), "both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict").

specifically criminalized in the Statute, the acts by which it has been effected can be subsumed under the above provisions. As documented by the Commission of Experts, these have included murder, torture, rape and sexual assaults, deportation of the civilian population, and many other breaches of international humanitarian law that fall under the Tribunal's jurisdiction.¹⁵⁵ The Security Council clearly interprets the Tribunal's mandate to encompass the prosecution of ethnic cleansing. In Resolution 941, the Council

[s]trongly condemns all violations of international humanitarian law, including in particular the unacceptable practice of "ethnic cleansing" perpetrated in [areas in Bosnia] under the control of Bosnian Serb forces, and reaffirms that those who have committed or have ordered the commission of such acts will be held individually responsible in respect of such acts.¹⁵⁶

A judgment by the International Tribunal specifically condemning ethnic cleansing as a crime against humanity, or under any of the other substantive provisions of the Statute, would be both just and desirable for the further development of international law and would go far toward demonstrating the right to one's homeland.

PROCEEDINGS TO DATE

As of mid-November 1995, the office of the prosecutor had issued indictments and warrants for the arrest of 52 individuals on charges of having committed serious violations of international humanitarian law in the former Yugoslavia. The accused in the first indictment is a Bosnian Serb charged with grave breaches of the Geneva Conventions, crimes against humanity, and violations of the laws or customs of war in connection with murders, torture, inhumane acts, cruel or inhuman treatment, and other offenses committed by himself and subordinates

¹⁵⁵ See *supra* notes 53, 117, 119 and accompanying text. See *infra* section entitled "Proceedings to Date."

¹⁵⁶ S.C. Res. 941, U.N. SCOR, 49th Year, 3428th mtg. at 1, ¶ 2, U.N. Doc. S/RES/941 (1994).

against Muslims held at the Susica death camp in Bosnia in 1992.¹⁵⁷ The accused has not been surrendered to the Tribunal, which on October 20, 1995, issued an international warrant for his arrest under proceedings completed pursuant to Rule 61 of the Tribunal's Rules of Procedure and Evidence.¹⁵⁸ This rule permits the trial chamber to receive evidence against a defendant in case of "failure to execute a warrant" and to issue an international arrest warrant if satisfied that "there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment."¹⁵⁹

The accused in the second¹⁶⁰ and third indictments¹⁶¹ are Serb or Bosnian Serb camp commanders, guards, and visitors associated with the Omarska death camp in Bosnia. The victims were Muslims and Croats who were held under armed guard in brutal conditions. Detainees were murdered, raped, sexually assaulted, severely beaten, and otherwise gravely mistreated. One of the accused, Dusan Tadic, is charged not only with abuses inside the camp but also with terrorizing and killing Muslim civilians outside the camp, in pursuance of the policy of ethnic cleansing, with an aim to forcing non-Serbs to flee their homes and communities. The indictments allege the following crimes against some or all of the accused: genocide, crimes against humanity, violations of the laws or customs of war, grave breaches of the Geneva Conventions of 1949, and command responsibility for the foregoing crimes. Additional charges were brought against Tadic in September 1995 involving crimes against humanity and grave breaches of the Geneva

¹⁵⁷ Prosecutor v. Nikolic, Case No. IT-94-2-I (ICTY Nov. 4, 1994), *reprinted in* 34 I.L.M. 996.

¹⁵⁸ Prosecutor v. Nikolic, Case No. IT-94-2-R61 (Review of the Indictment pursuant to Rule 61) (ICTY Oct. 20, 1995); Robert Marquand, *A Dogged U.N. Judge Prepares "the Real Trial of the Century"*, Christian Sci. Monitor, Oct. 23, 1995, at 7, available in LEXIS, World Library, Allaws File.

¹⁵⁹ ICTY R. Proc. & Evid. 61, *supra* note 146.

¹⁶⁰ Prosecutor v. Meakic, Case No. IT-95-4-I (ICTY Feb. 13, 1995), *reprinted in* 34 I.L.M. 1011.

¹⁶¹ Prosecutor v. Tadic, Case No. IT-94-I-T (ICTY Feb. 13, 1995), *reprinted in* 34 I.L.M. 1011.

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Conventions, based on allegations of murder, torture, and rape at three internment camps and "deportation" of Muslim and Croat residents of the Prijedor area.¹⁶²

On August 10, 1995, the Trial Chamber seized of the Tadic case ruled against a defense motion challenging the jurisdiction of the Tribunal.¹⁶³ This ruling was affirmed on somewhat different grounds on October 2, 1995,¹⁶⁴ and would appear to foreclose future challenges to the Tribunal's competence.

For purposes of this article, the most important indictment is that jointly brought against Radovan Karadzic, (then) president of the Bosnian Serb administration in Pale, and the Bosnian Serb military commander, Ratko Mladic, issued on July 25, 1995.¹⁶⁵ Counts 1-2 charge genocide and crimes against humanity. Paragraph 19 of the indictment alleges the "unlawful deportation and transfer of civilians" as one of the predicate offenses supporting the charge of crimes against humanity. Paragraph 25 specifically alleges:

Thousands of Bosnian Muslims and Bosnian Croats from the areas of Vlasenica, Prijedor, Bosanski Samac, Brcko and Foca, among others, were systematically arrested and interned in detention facilities established and maintained by the Bosnian Serb military, police and their agents and thereafter unlawfully deported or transferred to locations inside and outside of the Republic of Bosnia and Herzegovina. In addition, Bosnian Muslim and Bosnian Croat civilians, including women, children and elderly persons, were taken directly from their homes and eventually used in prisoner exchanges by Bosnian Serb military and police and their agents under the control and direction of Radovan Karadzic and Ratko Mladic. These deportations and others were not conducted as evacuations for safety, military

¹⁶² ICTY Press Release, Case No. IT-94-I-T (Dusko Tadic) Update 6: Indictment Amended, Accused Faces Additional Charges, No. CC/P/O/19-E (Sept. 26, 1995).

¹⁶³ Prosecutor v. Tadic, Case No. IT-94-I-T (ICTY Aug. 10, 1995).

¹⁶⁴ ICTY Tadic App. Dec., *supra* note 42.

¹⁶⁵ Prosecutor v. Karadzic, Case No. IT-94-I-T (ICTY Aug. 10, 1995).

necessity or for any other lawful purpose and have, in conjunction with other actions directed against Bosnian Muslim and Bosnian Croat civilians, resulted in a significant reduction or elimination of Bosnian Muslims and Bosnian Croats in certain occupied regions.

As noted earlier, Karadzic and Mladic have also been indicted for genocide in connection with the Bosnian Serb attack on Srebrenica in the summer of 1995.¹⁶⁶ Although it is unclear whether Karadzic or Mladic will appear before the Tribunal, it is of considerable historical, legal, and psychological importance that the Tribunal has branded their actions criminal, in particular, the policy of forced population transfers and ethnic cleansing.

In August 1995, the first Croat, Ivica Rajic, a military commander with the Croat Defense Council, was indicted on charges of grave breaches of the Geneva Conventions and war crimes in connection with an attack on the Muslim village of Supni Do in central Bosnia in October 1993.¹⁶⁷ At least sixteen Muslim civilians were brutally killed and the remaining 230 Muslim villagers were forced to flee. At the time of the indictment, Rajic was being held by Croatian authorities at a prison in Mostar on unrelated murder charges.¹⁶⁸ Although his surrender to the Tribunal was expected, and indeed specifically contemplated by the Bosnian peace agreement concluded in late November 1995, Rajic has now been released following his acquittal by a Bosnian Croat court, in clear breach of both the peace accord and assurances from the Bosnian Croat authorities.¹⁶⁹

¹⁶⁶ Prosecutor v. Karadzic, Case No. IT-95-18-1 (ICTY Nov. 16, 1995).

¹⁶⁷ Prosecutor v. Rajic, Case No. IT-95-12-1 (ICTY Aug. 29, 1995).

¹⁶⁸ Ian Geoghegan, *U.N. Tribunal Charges First Croat with War Crimes*, Reuters, Sept. 6, 1995, available in LEXIS, World Library, Allwvs File.

¹⁶⁹ General Framework Agreement, *supra* note 149, annex 1A, art. 9(1)(g) (notwithstanding the provisions on prisoner exchanges, "each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations

Six Bosnian Croats were indicted recently. On November 10, 1995, the Tribunal charged Dario Kordic, a leader of the Croatian community in Bosnia, and five other prominent Bosnian Croats with crimes against humanity based on the ethnic cleansing of some seven hundred Muslims in Bosnia's Lasva Valley in 1992-1993.¹⁷⁰ Further indictments, possibly including the Croatian defense minister, are anticipated in connection with these events.¹⁷¹

At about the same time, the Tribunal indicted three senior officers in the army of the former Yugoslavia (JNA) for the massacre of some 260 men who had been forcibly removed from a hospital in Vukovar, Croatia, in late 1991.¹⁷² These indictments may lead to charges against Slobodan Milosevic as the office of the prosecutor considers whether "direct orders did come down the line for what happened" or "if these officers were acting independently, then those further up had a responsibility to stop or punish the illegal activity."¹⁷³

Meanwhile, Yugoslav authorities have accused the Croatian government of carrying out a policy of ethnic cleansing not only against the ethnic Serb population of Croatia but also against the Bosnian

for a period of time sufficient to permit appropriate consultation with Tribunal authorities."); *Bosnian Croat Sought by Tribunal Is Freed Despite Pledge*, N.Y. Times, Dec. 8, 1995, at A18, available in LEXIS, World Library, Allwvs File. See sources cited *supra* note 149.

¹⁷⁰ Prosecutor v. Kordic, Case No. IT-95-14-1 (ICTY Nov. 10, 1995). There are mixed signals as to whether Croatia will cooperate with the Tribunal in the surrender of accused persons. Mark Fuller, *Yugoslavia: Croatia, Bosnia Set to Surrender War Crimes Suspects*, Inter Press Serv., Oct. 11, 1994, available in LEXIS, World Library, Allwvs File (citing Croatia's prospective willingness to cooperate). But see Julian Berger, *Croatia Angers U.N. with Promotion of Indicted Soldier*, The Guardian (Manchester), Nov. 16, 1995, at 14, available in LEXIS, World Library, Allwvs File.

¹⁷¹ Roy Guman, *War Crimes: Bosnian Croats Indicted in 700 Deaths*, Newsday, Nov. 14, 1995, at A18, available in LEXIS, World Library, Allwvs File.

¹⁷² Prosecutor v. Miskic, Case No. IT-95-13-1 (ICTY Nov. 7, 1995).

¹⁷³ Roger Cohen, *Tribunal Indicts 3 Serbia Officers*, N.Y. Times, Nov. 10, 1995, at A1, available in LEXIS, World Library, Allwvs File (quoting Deputy Prosecutor Graham Blewitt); see also William Drodzick, *U.N. Tribunal Indicts Officers in '91 Massacre: Charges Are First Placed against Belgrade Officials*, Wash. Post, Nov. 10, 1995, at A31, available in LEXIS, World Library, Allwvs File.

Muslims. These accusations must, of course, be investigated. In particular, on August 4, 1995, the Croatian government launched a broad military offensive in the Croatian Krajina, which for centuries has been populated primarily by ethnic Serbs. Reportedly some 150,000 Serbs fled the area in panic.¹⁷⁴ On the basis of testimonial and other evidence of violations of international humanitarian law in the Krajina, the Security Council, on August 10, 1995, adopted Resolution 1009, which demands that

the Government of the Republic of Croatia, in conformity with internationally recognized standards and in compliance with the agreement of 6 August 1995 between the Republic of Croatia and the United Nations Peace Forces (a) respect fully the rights of the local Serb population including their rights to remain, leave or return in safety, (b) allow access to this population by international humanitarian organizations, and (c) create conditions conducive to the return of those persons who have left their homes.¹⁷⁵

The resolution reiterates that "all those who commit violations of international humanitarian law will be held individually responsible in respect of such acts."¹⁷⁶ Security Council Resolution 1009 is an important assertion of the right to one's homeland and the concomitant right to return.

¹⁷⁴ John Pomfret, *NATO Members Agree on Proposal for Bosnia Forces*, U.N. and E.U. *Say Cross Carried Out Atrocities*, Int'l Herald Trib., Sept. 30, 1995, available in LEXIS, World Library; Allwys File; Laura Silber, U.N. *Claims Croatian Atrocities*, Fin. Times (London), Oct. 3, 1995, available in LEXIS, World Library; Allwys File; Chris Simon, *Thousands of Serbs Flee Croatia*, UPI, Aug. 6, 1995, available in LEXIS, World Library; Allwys File.

¹⁷⁵ S.C. Res. 1009, U.N. SCOR, 50th Year, 3563d mtg. at 1, ¶ 2, U.N. Doc. S/RES/1009 (1995); Drozdak *supra* note 173 (citing Elisabeth Rehn, chief UN human rights investigator of the Krajina operation in August 1995, on mounting evidence that Croatian forces killed both fleeing civilians and those who refused to leave).

¹⁷⁶ S.C. Res. 1009, *supra* note 175, ¶ 4.

REMEDIES AND CODIFICATION

The compulsory transfer of populations has been shown to violate important rules and principles of international law, whether committed in time of war or in time of peace. It is not enough, however, to recognize that forcible population transfers, and ethnic cleansing in particular, constitute a historical aberration, an anachronism in light of the human rights covenants and the Genocide Convention, a crime against humanity and a war crime within the meaning of the Nuremberg judgment. As discussed earlier, ethnic cleansing can already be prosecuted in the context of the conflicts in the former Yugoslavia and Rwanda: what is needed now is a permanent international criminal court to vindicate this right wherever it is infringed.¹⁷⁷ Moreover, the question of remedies for victims must also be addressed,¹⁷⁸ specifically, implementation of the right to return. Admittedly, any scheme of *restitutio in integrum* poses grave practical and political difficulties,¹⁷⁹ but with good faith and sufficient determination on all sides, the rights of competing claimants to territory should be reconcilable.

In December 1948, the UN General Assembly resolved that Palestinian refugees wishing to return to their homes [in Israel] and live in peace with their neighbours should be permitted to do so at the earliest practicable date, and . . . compensation should be paid for the

¹⁷⁷ This goal may finally be within reach. The General Assembly is expected to adopt a resolution in mid-December 1995 calling for the creation of a preparatory committee to draft a convention for an international criminal court "as a next step" to a conference of plenipotentiaries. This committee is to report back to the General Assembly in the fall of 1996. *Establishment of an International Criminal Court*, GA Draft Res., U.N. GAOR 6th Comm., Agenda Item 142, U.N. Doc. A/C.6/50/L.14 (1995).

¹⁷⁸ See Theo van Boven, Special Rapporteur, U.N. Subcomm'n in Discrim. & Minor., *Study Concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Second Progress Report*, U.N. Doc. E/CN.4/Sub.2/1992/8 (1992).

¹⁷⁹ See Cowell, *supra* note 56 (discussing the concerns of Bosnian refugees presently living in Germany).

property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.¹⁸⁰

This resolution has been repeatedly reaffirmed by the General Assembly with regard to the Palestinians¹⁸¹ and other refugee groups. Similar language can be found, for example, in the relevant resolutions on Cyprus in the General Assembly,¹⁸² as well as in the UN Commission on Human Rights.¹⁸³

The right to return was also endorsed in the UN peacekeeping plan for the Republic of Croatia,¹⁸⁴ in the Secretary-General's report to the Security Council of December 1, 1994, on safe areas in Bosnia,¹⁸⁵

¹⁸⁰ G.A. Res. 194 (III), U.N. Doc. A/810, at 24, ¶ 11 (1948). William Fredick, *The Right of Return*, 2 Int'l J. Refugee L. 442, 444 (1990), notes that "exile is a fundamental deprivation of homeland . . . that goes to the heart of those immutable characteristics that comprise our personal and collective identities."

¹⁸¹ E.g., *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*, G.A. Res. 40/161, U.N. GAOR, 40th Sess., Supp. 53, at 112, U.N. Doc. A/40/53 (1985); G.A. Res. 41/101, U.N. GAOR, 41st Sess., Supp. 53, at 164, U.N. Doc. A/41/53 (1986). It should be noted that Israel (Dec. 19, 1966) is a party to International Covenant, *supra* note 2. 1994 *Multilateral Treaties*, *supra* note 43, at 117.

¹⁸² E.g., G.A. Res. 3395 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 5, U.N. Doc. A/10034 (1975); G.A. Res. 34/30, 34th Sess., Supp. No. 46, at 17, U.N. Doc. A/34/46 (1979); G.A. Res. 37/253, U.N. GAOR, 37th Sess., Supp. No. 51, at 48, U.N. Doc. A/37/51 (1983).

¹⁸³ E.g., U.N. Comm'n Hum. Res. Res. 4 (XXXII), *Report of the Commission on Human Rights on Its Thirty-second Session*, U.N. ESCOR, 60th Sess., Supp. No. 3, at 59, U.N. Doc. E/5768 (1976).

¹⁸⁴ *Concept for a United Nations Peace-keeping Operation in Yugoslavia* is set out as annex III to *Report of the Secretary-General pursuant to Security Council Resolution 721 (1991)*, U.N. Doc. S/23280 (1991), reprinted in 31 I.L.M. 1442. See *id.* ¶ 20. The Security Council "approved" the peace plan in S.C. Res. 724, U.N. SCOR, 46th Year, 1991 Res. & Dec. at 45, U.N. Doc. S/INF/47 (1991).

¹⁸⁵ *Report of the Secretary-General pursuant to Security Council Resolution 959 (1994)*, ¶¶ 45, 53, U.N. Doc. S/1994/1389 (1994).

and in numerous Security Council resolutions on the former Yugoslavia, including Resolution 947, which "[a]ffirms the right of all displaced persons to return voluntarily to their homes of origin in safety and dignity with the assistance of the international community,"¹⁸⁶ and Resolution 1009, concerning the Krajina.¹⁸⁷ A subsequent resolution reiterates the Council's demand that the government of Croatia "take urgent measures to put an end to violations of international humanitarian law" and "respect fully the rights of the local Serb population including *their right to remain or return in safety*" and calls upon the government "to lift any time-limits placed on the return of refugees to Croatia to reclaim their property."¹⁸⁸ As noted earlier, the right to return has been recognized as well by the Committee on the Elimination of Racial Discrimination¹⁸⁹ and by the Subcommission on Prevention of Discrimination and Protection of Minorities.¹⁹⁰

Most recently, the Bosnian peace accord¹⁹¹ incorporates an agreement on refugees and displaced persons (annex 7) that protects the "right [of persons] freely to return to their homes of origin" and sets up a framework of obligations on the parties to facilitate the exercise of this right, including the creation of "an independent Commission for Displaced Persons and Refugees." As stated in article 1(1), "The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties

¹⁸⁶ S.C. Res. 947, U.N. SCOR, 49th Year, 3434th mtg. at 1, ¶ 7, U.N. Doc. S/RES/947 (1994).

¹⁸⁷ S.C. Res. 1009, *supra* note 175; see also S.C. Res. 941, *supra* note 156, ¶ 3 (reaffirming that "all displaced persons should be enabled to return in peace to their former homes"); S.C. Res. 959, U.N. SCOR, 3462d mtg. at 1, U.N. Doc. S/RES/959 (1994); S.C. Res. 981, U.N. SCOR, 50th Year, 3512th mtg. at 1, U.N. Doc. S/RES/981 (1995).

¹⁸⁸ S.C. Res. 1019, *supra* note 64, ¶¶ 6-7 (emphasis added).

¹⁸⁹ See *supra* note 72 and accompanying text.

¹⁹⁰ See *supra* notes 88-90 and accompanying text; Al-Khasawneh, *supra* note 54, ¶ 102.

¹⁹¹ General Framework Agreement, *supra* note 149, art. VII (obligating the parties to comply with annexes 6 on human rights and 7 on refugees and displaced persons).

confirm that they will accept the return of such persons who have left their territory." Under article 2(1), "The Parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion." A separate agreement on human rights (annex 6) specifically protects the right to liberty of movement and residence and requires the parties to guarantee "to all persons within their jurisdiction" the protections encompassed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the Genocide Convention, the Geneva Conventions and Additional Protocols I and II, the International Covenant on Civil and Political Rights and its protocols, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and other instruments that directly or indirectly support a right to return. In sum, there is ample recognition in international law that return is the appropriate remedy.

The right to return has been recognized at the regional level as well. Over a decade ago, the Inter-American Commission on Human Rights informed Nicaragua that the refusal to allow the return of Miskito Indians to their ancestral lands upon expiry of the state of emergency would amount to an impermissible restriction of movement and choice of residence,¹⁹² in violation of the American Convention on Human Rights.¹⁹³ In the European context, President Lennart Meri of Estonia noted in an official statement issued on October 3, 1995, the significant economic and cultural contribution of ethnic Germans to the Baltic states for the seven centuries of their residence in Estonia, Latvia, and Lithuania and invited persons who had been ousted pursuant to the Hitler-Stalin pact of 1939, and their descendants, to resettle in Estonia and take Estonian citizenship. President Meri referred to the right to one's

homeland as a "fundamental norm of the European order" and stated that Baltic Germans would be able to exercise this right in Estonia.¹⁹⁴

The experience of ethnic cleansing in the former Yugoslavia has been a major setback to the effort of the international community to protect the right to one's homeland. It is hoped that the Dayton peace accord will be effective in vindicating the right of refugees and displaced persons to return to their communities.¹⁹⁵ On a larger scale, unambiguous affirmation in a multilateral treaty of the right to one's homeland as a fundamental human right appears necessary. The world community must repudiate the use everywhere of forced population transfers as a solution to minority conflicts or as a means of peacemaking. One possibility is a new protocol to the International Covenant on Civil and Political Rights. Another alternative would be a prohibition on collective expulsions, which could take the form of a multilateral convention. Neither approach is likely to put an end to the practice of expulsion as an instrument of national policy, just as the criminalization and prosecution under the Nuremberg Charter of waging an aggressive war has not ended war. Nevertheless, bringing to the attention of the world public the illegality of mass expulsion may lessen its incidence. The developments in the Subcommission on Prevention of Discrimination and Protection of Minorities give reason for some optimism that such a document will be drafted, and the declaration proposed by Special

¹⁹² *Deutschland—eine Republik der Ruhe*, Der Tagespiegel (Berlin), Oct. 5, 1995, at 7.

¹⁹³ There are already some discouraging indications. Roane, *supra* note 128, reports on ongoing expulsions of non-Serbs after the Dayton accord was concluded. Moreover, experts do not expect many refugees to return. Tim Hundley, *Fate of Refugees in Bosnia True Test of Dayton Accord*, Chi. Times, Dec. 10, 1995, at 11, available in LEXIS, World Library, Allnews File (citing an outside figure of 10 percent); Kurt Schork, *Bosnian Refugees Get Right of Return—in Theory*, Reuters, Dec. 4, 1995, available in LEXIS, World Library, Allnews File. The press has also reported considerable opposition on the ground. *No Yielding Sarajevo, General Vows: Military Commander Mladic Says Serbs Will Never Submit to Bosnian Control*, L.A. Times, Dec. 3, 1995, at A9, available in LEXIS, World Library, Allnews File; Scott Peterson, *Disgruntled Serbs around Sarajevo Threaten Peace as NATO Arrives*, Christian Sci. Monitor, Dec. 6, 1995, at 7, available in LEXIS, World Library, Allnews File; Zoran Radosavljevic, *Bosnian Federation's Great President Quits*, Reuters, Dec. 2, 1995, available in LEXIS, World Library, Allnews File.

¹⁹⁴ Case 7964, Inter-Am. C.H.R., *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc. 26, at 118 (1984); see Alfred de Zayas, *The International Judicial Protection of Peoples and Minorities in Peoples and Minorities in International Law 255* (Catherine Bröhlmann et al. eds., 1993).

Rapporteur Al-Khasawneh¹⁹⁶ could constitute an initial draft. It is also to be hoped that the International Criminal Tribunal for the Former Yugoslavia will obtain personal jurisdiction over and convict those responsible for the crime of ethnic cleansing, not only those persons who have carried out aspects of the policy but, more important, its intellectual authors.

Reflections on Homicide

Peter MacKinnon*

Reviewing:

Isabel Grant, Dorothy Chunn, and Christine Boyle, *The Law of Homicide*. Scarborough, Ontario: Carswell, 1994, 380 pp. (looseleaf).

This volume on the Canadian law of homicide is intended primarily for practitioners.¹ It provides a comprehensive review and analysis of legal doctrine and illuminates many of the problems found in this area. Though the book's focus is doctrinal, its breadth is impressive as the authors (two of whom are academic lawyers and the third, a criminologist) include the perspectives of many disciplines. The result is a book that should appeal to lawyers and judges, as well as a wide academic audience.

The authors first address the social reality of homicide. From the outset they acknowledge a core definitional problem relating to the domain of their subject: the answers to the questions "what is homicide?" and "which homicides are culpable?" cannot be taken as given (chapter 1). Different criminological and cultural perspectives influence

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¹ Isabel Grant et al., *The Law of Homicide* (1994). The reader should note that pagination in this treatise includes both the chapter and the page number. See *infra* note 2 for an example.