

# **The Crime of Population Transfer in International Law: Prohibition, Prosecution and Impunity**

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H a b i t a t I n t e r n a t i o n a l C o a l i t i o n

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Population transfer is a grave crime in modern international law. However, the cruel practice is as old as the earliest civilizations. The Egyptian pharaohs and the South American Incas variously expelled indigenous populations and implanted reliable settlers in territories they sought to conquer. The prohibited practice can encompass both aspects and directions of population movement resulting in bundle of human rights offenses, including gross violations such as forced eviction.<sup>1</sup> Population transfer is known by various synonyms, including “forced removal,”<sup>2</sup> “deportation,”<sup>3</sup> “expulsion,”<sup>4</sup> “ethnic cleansing,”<sup>5</sup> “removal,” “relocation”<sup>6</sup> and (forced of involuntary) “resettlement.”<sup>7</sup> Notoriously thorough at the practice were the neo-Assyrians, whose West Asia-Mediterranean empire applied 19 euphemisms<sup>8</sup> to name the policy that caused legendary human suffering and imperial hegemony.

Such felonious practices are supposed to be vestiges of an ignoble past. With the development of international law in the 20<sup>th</sup> Century, population transfer is now codified and punishable as both a war crime and a crime against humanity. However, firm and enforceable prohibitions have been long in coming and inconsistently upheld.

## Toward Prohibition

Vanquishing the oppressive Neo-Assyrian regime at the 546 B.C. Battle of Sardis, Persian Emperor Cyrus the Great reversed the practice and left a legal legacy to build on. The Cyrus Cylinder, 539 B.C., which we consider to be the first human rights charter, articulated in law the unacceptability of the acquisition of territory by the practice of population transfer. This famous text also enshrines the first known codification of the right of return.

Among the checkered patterns of practice and prohibition are the much later Anglo-American traditions, which had so much influence on the normative establishment of the relevant legal and administrative norms. The English Crown eventually perfected popular transfer in both ideological theory and practice with legal and religious rationale devised to dispossess the Irish people of their lands 100 years before the British colonization of North America on the ideological premise that people who move about on the land have no right to tenure.<sup>9</sup>

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Population transfer soon rose to the level of sacrament with the colonial-minded Protestants and fundamentalists clearing the American Colonies of their natural habitat and populations in a pious re-enactment of scripture. Protestant English settlers in North America justified their reenactment of the genocidal—if ahistorical—scenes in the Bible's *Genesis* as playing the role of the “new Hebrews” or “New Israelites,” while they referred to the indigenous peoples collectively as the “new Canaanites.”<sup>10</sup>

In parallel, if not also in stark contradiction, the United States of America (USA), later established on the same depopulated land, has contributed greatly to the development of norms that have criminalized the practice of population transfer. Other American States also pioneered the legal prohibition of population transfer as a function of illicitly acquiring territory. However, as a whole, foreign policies and the violation of extraterritorial obligations of States' have failed to uphold this universal prohibition or otherwise correct the illegal situation in current cases of protracted crises, including Palestine, Cyprus, Tibet and Western Sahara.

#### *Evolution of the Legal Norms: States' Rights*

The emerging legal norms pertaining to population transfer have addressed two dimensions of the practice and its consequences. First, the legal prohibitions against population transfer addressed the implications for States of population transfer as a practice aimed at the acquisition of territory, violating the sovereignty of the State. Secondly, the norms eventually addressed the consequences for persons, including the violation of a bundle of individual and collective human rights. Among the human rights consequences of population transfer, particularly large-scale population transfer, is the violation of the collective human right to self-determination, as well as an impediment to the function of the State as the embodiment of that right. The merger of these two dimensions—i.e., States' rights and human rights—through the continuation of grave breaches and violations is reflected in the explicit criminalization of population transfer through the 20<sup>th</sup> Century.

The principle of *uti possidetis iuris* in international law (Latin for “as you possess it under law”) has grounded the prohibitions against population transfer as a violation of States' rights. Originating in Roman Law, the legal concept was used by England's 17<sup>th</sup> Century King James I to affirm that, while he recognized the existence of Spanish authority in those regions of the Western Hemisphere where Spain exercised effective control, James refused to recognize Spanish claims to exclusive possession of all territory west of longitude 46° 37' W under the Treaty of Tordesillas (1494). More recently, States referred to *uti possidetis* in the context of South American independence movements as early as 1810 and, in Central America, since 1821.<sup>11</sup>

In its modern application, *uti possidetis* establishes that newly formed sovereign States are to maintain the same borders as their dependent area before achieving independence. This, by extension, includes the obligation of nonrecognition of illicit acquisition or occupation of territory by military force and other means; i.e., population transfer, etc.

The Congress of Panama produced the Treaty of Union, League, and Perpetual Confederation, signed on 15 July 1826 by all the participating Latin American nations.<sup>12</sup> The main objective of the pact, according to Article 2, was the collective defense of the sovereignty and independence of those nations against all attempts at foreign domination. In order to strengthen their relations, the signatories to the 1826 treaty had agreed to hold a general assembly of plenipotentiaries (Article 11) every two years in peacetime, and annually in times of war. A significant outcome of this process was the Treaty of Confederation (Congress of Lima)<sup>13</sup> in 1847, which enshrined the interstate principle such that:

When any foreign nation occupies, or tries to occupy any portion of land that is within the limits of any of the Confederated Republics, or uses force to steal [usurp] such territory and dominion of the Republic, whatever the claimed pretext, the Confederate Republics guarantee, mutually and in the most explicit and solemn terms, to uphold the mastery and dominion of all the territory that is included within the [Confederated Republics'] respective limits, and do not acknowledge and will not recognize the right of any foreign nation, or any Indian tribe, to dispute the [Confederated Republics'] domain and dominion (Art. 2, ¶ 1).<sup>14</sup>

Although Mexico and the USA were not parties to the Confederation, this development coincided with the implantation of U.S.-sponsored settlers in Mexican territory, notably Texas. This form of population transfer formed part of the ambition of the USA during the presidency of James K. Polk (D) to establish a contiguous slave economy stretching from the Atlantic to the Pacific. The acquisition of territory by population transfer and the 1845 U.S. annexation of Texas, which Mexico considered part of its territory, led to the Mexican-American War, or the United States War against Mexico (1846–48). The military campaign culminated in U.S. occupation of New Mexico and California, invasion of parts of Northeastern Mexico, Northwest Mexico and Mexico City. The Treaty of Guadalupe Hidalgo, in 1848, ended the war with Mexico ceding 55% of its territory to the USA.

Eight years later (1856), eight Latin American nations met in Washington to adopt a mutual security and reciprocity pact, the Treaty of Alliance and Reciprocal Assistance (Continental Treaty), resolving that “each of the republics guarantees, each to the other, its independence and sovereignty and the integrity of its territories.” The following November, another group of States convened at Washington, this time on the initiative of Costa Rica and Guatemala, who then concluded a new Treaty of Alliance and Confederation with El Salvador, Nueva Granada (Colombia), Mexico, Peru and Venezuela.

In 1864, the Treaty of Union and Defensive Alliance was signed at the 2<sup>nd</sup> Congress of Lima, providing a collective antecedent to the guarantee of territorial integrity that later formed a principal of international law in the Charter of the League of Nations and the UN Charter.<sup>15</sup> The Treaty concluded that:

The High Contracting Parties (...) guarantee each other's independence, sovereignty and the integrity of their respective territories, binding themselves to the terms of this Agreement, to defend against any attack that has the purpose of depriving any Party of any of the rights herein expressed, and against aggression coming from a foreign power,

and from any party to this covenant, and any foreign forces that do not respect a recognized government (Article 1).

By this time, the USA was making its own contribution to the explicit prohibition of population transfer. At the outbreak of the American Civil War in 1862, U.S. President Abraham Lincoln was pressed to specify the meaning and parameters of recently declared Martial Law, and issued General Order No. 100 (Lieber Code).<sup>16</sup> It specifically recognized population transfer practices as unconscionable, asserting that “Private citizens are no longer murdered, enslaved, or carried off to distant parts...”

Following the Brazilian, Argentinian and Uruguyan war against Paraguay, in 1870, Argentina adopted the doctrine that “victory confers no rights” (“La Victoria no da derechos”), which principle later found its way into Article 3(g) of the 1948 Charter of the Organization of American States.<sup>17</sup>

The First International Conference, held in Washington DC (2 October 1889–19 April 1890), was dedicated to laying the foundations for economic cooperation among the American States and to establishing a plan of arbitration for the peaceful settlement of disputes. All of the existing American republics, except for the Dominican Republic, were represented.

Arising from the First American Conference in 1890 was the reference to “American Public Law” and a resolution, “Law of Conquest” (Derecho de Conquista), on 18 April. That legal instrument “affirmed that the principle of conquest remains eliminated from American Public Law” (Article 1). It established that no territory is without an owner (*dueño*) [in South America] and any possession contrary to the legal principle is considered a *usurpación*.<sup>18</sup> Although the Treaty lacked the ratifications needed to enter into force, it nonetheless served as a legal milestone that presaged the adoption of similar procedures that would be incorporated in subsequent American and international law.

The prohibition of population transfer so far remained linked to States’ deep concern over the illicit acquisition of territory.<sup>19</sup> Thus, the states already had rejected the practice of population transfer as a function of such territorial expansion and established the international diplomatic and legal tradition of nonrecognition of territorial acquisition by force.<sup>20</sup>

The Montevideo Convention on the Rights and Duties of States, concluded at the 7th International American Conference (1933), recognized in Article 11 the inviolability of the territory of the states and affirmed that “the territory of a State is inviolable and may not be the object of military occupation *nor of other measures of force* imposed by another state directly or indirectly, or for any motive whatever, even temporarily” [emphasis added].<sup>21</sup>

The OAS Member States meeting at Washington in October 1933 to end the Chaco Boreal War between Bolivia and Paraguay, reaffirmed the inadmissibility of the acquisition of territory by force, which language is included almost verbatim in the GA

resolutions 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples, of 14 December 1960, known as the Magna Carta for the right to decolonization as a principle of international law, 2526 (XXV), known as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (24 October 1970), and 3314 (XXIX) Definition of Aggression (14 December 1974). This principle is also enshrined in the Organization of African Unity resolution AGH/Res. 16(1) of Cairo, 21 July 1964, on decolonization.

*International Law: Filling a Normative Void*

The Hague Regulations (1907) concurred, but were effectively silent on the presumably unthinkable practice of population transfer as a means of acquiring territory. The resurgent practice of population transfer after 1907, however, required the prohibition of such specific practices in the legal developments that were to follow.

In the early 20<sup>th</sup> Century, population transfer has occurred as a function of multilateral and bilateral treaties, often called "option agreements" or "population exchange treaties," dating back to 1913.<sup>22</sup> The interwar exchange agreements did not call for wholesale transfers of population, but theoretically offered individuals the option of voluntary emigration to the State corresponding to their ethnicity, while also alleviating individuals' resulting financial burden. This option was first adopted and exercised in the Balkans, but then only as a supplement—not an alternative—to protection.

At the Paris Peace Conference, the New States' Committee was receptive to the Greek proposal for a minorities-exchange convention among Greece, Bulgaria and Serbia. Serbia rejected the idea. However, Bulgaria and Greece agreed at Neuilly-sur-Seine<sup>23</sup> on the "reciprocal voluntary emigration of the racial, religious and linguistic minorities in Greece and Bulgaria." This was viewed as a solution, in part, to the demographic confusion resulting from the territorial transfers and forcible population movements of the first and second Balkan wars. It applied to the estimated 37,000 Greeks in Bulgaria and some 150,000 Bulgarians in (Greek) Macedonia and Thrace. Under the Treaty of Neuilly-sur-Seine, emigrants could take movable property duty free across the border, and obtain reimbursement upon liquidation of immovable property left behind.

Whereas a series of post-war treaties sought to diminish the military and political strength of the defeated Central Powers, the Treaty of Neuilly provided for unilateral action against a vanquished enemy. Upon liquidation, enemy property would be credited to reparations of the State of which the owner was a national.<sup>24</sup>

Several authors noted at the time that the motives of the Treaty were actually ethnocentric, rather than humanitarian. For example, Greece exploited the opportunity to remove the Bulgarian minority from its territory and Bulgaria sought safeguards against unilateral actions of a neighboring State.<sup>25</sup> Despite the horrendous human and economic losses arising from the post-WW I transfer agreements,<sup>26</sup> they only emboldened other intentional perpetrators.<sup>27</sup>

### *Corrective Measures*

European sabre rattling in the interwar years compelled statesmen to devise strategies to evade costly conflagration. French foreign minister Aristide Briand initially proposed a bilateral treaty between France and the United States in 1927 renouncing war as a means to settling disputes. In the rosy afterglow of Charles Lindbergh's solo flight to Paris a month before, U.S. political support for the pact was bipartisan.<sup>28</sup>

However, on implementation, the Kellogg–Briand Pact (Pact of Paris) did not live up to its aim. It remained ineffective even after its entry into force in 1929, as the USA continued its Banana Wars in Central America. In the ensuing years, Japan invaded Manchuria, Italy invaded and annexed Abyssinia/Ethiopia, and both Germany and the Soviet Union both invaded Poland.

Nonetheless, the pact is an important multilateral treaty binding the nations that signed it, and a legal basis for eventually criminalizing territorial acquisitions by force and/or population transfer.<sup>29</sup> Despite State behavior then, international lawyers refer to 1932 as date in which the parallel development of law established population transfers as prohibited.<sup>30</sup>

Building on the established norm of the unacceptability of the acquisition of territory by force, U.S. Secretary of State Henry L. Stimson issued a 7 January 1932 statement against the Japanese occupation of Manchuria.<sup>31</sup> Echoing the long-standing position of the other American States, the USA “did not intend to recognize any situation, treaty or agreement [that] may be brought about by means contrary to the covenants and obligations of the Pact of Paris...”<sup>32</sup> The League of Nations Assembly affirmed this principle in a resolution on 11 March 1932, unanimously adopting this 42-year-old inter-American policy of nonrecognition of the acquisition of territory by force. (China and Japan abstained.<sup>33</sup>) Other pacts in the same period enshrined principles logically consistent with the “established” prohibition against the acquisition of territory by force, which typically involve the push and pull factors of population transfer.<sup>34</sup>

### *Resurgence and Criminalization*

By the end of the 1930s, a moral, legal and international-relations line had been drawn, establishing the unacceptability of the acquisition of territory by force and its concomitant practice of population transfer. However, colonizers continued to resent and defy the norms.<sup>35</sup>

All of this *jus cogens* legal development did not deter the prohibited practice from being repeated. Population transfers continued defiantly through the subsequent decade in such diverse cases as the “option clauses” and “Transfer Agreements” concluded with the Third Reich,<sup>36</sup> the partition of India, the Allies’ forced transfer of Germans after WW II<sup>37</sup> and, of course, Israel’s ethnic cleansing of Palestine (*al-Nakba*)<sup>38</sup> and the nearly simultaneous Chinese annexations of Tibet<sup>39</sup> and East Turkestan (*Xinjiang*).<sup>40</sup>

In light of the developments in Europe, the law prohibiting population transfer became more explicit during and immediately after WW II. The earliest explicit mention of

population transfer in an international legal document was the recognition of "forced resettlements" as a war crime in the Allied Declaration on German War Crimes, adopted by representatives of the nine occupied countries, exiled in London, in 1942. It stated, inter alia:

"With respect to the fact that Germany, from the beginning of the present conflict, has erected regimes of terror in the occupied territories...characterized in particular by...mass expulsions..."<sup>41</sup>

On 17 October 1942, the Polish Cabinet in Exile issued a decree on the punishment of German war crimes committed in Poland. That instrument provided that life imprisonment or the death penalty would be imposed "if such actions caused death, special suffering, deportation or transfer of population."<sup>42</sup>

In response to the abundant and flagrant violations of the laws and customs of war during World War II, the Allies set up the International Military Tribunal (IMT) to try the principle war criminals of the Axis Powers. The IMT Charter introduced into international law the notions of crimes against the peace, war crimes and crimes against humanity. It 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..."<sup>43</sup>

Article 6 (c) of the Charter defined "crimes against humanity" as:

Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war...in execution of or in connection with any crime within the jurisdiction of the Tribunal..."<sup>44</sup>

The notion of "crimes against humanity" differs from war crimes in that crimes against humanity can be committed before, after, as well as during, a war and against any population, including the perpetrator's own population.

In addition to the four Powers that approved the IMT Charter, 19 other States acceded to it. The United Nations General Assembly also affirmed the principles of international law recognized by the IMT Charter and reflected in the judgment of the IMT.<sup>45</sup>

The IMT judgments at Nuremberg variously dealt with displacement of civilians from the occupied territories and their replacement by German settlers. In the Nuremberg Trials, gross violations of economic/social/cultural rights (ESCR) were adjudicated under the auspices of two central themes; Germanization and spoliation. Germanization had as its goal the assimilation of conquered territories politically, culturally, socially, and economically into the German Reich. In order to achieve Germanization, the Nazi's sought obliteration of the former national character of the conquered territories and the extermination of all elements that could not be reconciled with the Nazi ideology.

The conduct associated with Germanization included forced displacement, deportation and/or population transfer of the inhabitants of occupied territories, as well as the transfer and settlement of German nationals into occupied territories or settlements encircling occupied territories.<sup>46</sup> Spoliation referred to the plunder, pillaging and

destruction of public or private property and the exploitation of the natural resources and the people of the occupied territory.

### *The First Prosecutions*

Among the 23 most-important military and political leaders of the Third Reich prosecuted at the IMT, defendants Alfred Jodl and Alfred Rosenberg were tried for crimes against humanity and war crimes, namely, destruction of property, plunder of private and public property, and deportation. Jodl's prosecution revealed extensive home demolitions committed by Nazi troops in occupied Europe as part of the effort to Germanize conquered territories. Serving in 1935–38 as chief of the National Defense Section in the German High Command and, later, chief of the Operations Staff of the High Command of the Armed Forces (Oberkommando der Wehrmacht), Jodl was accused of war crimes and crimes against humanity in his role in the German High Command for carrying out, "as a systematic policy, a continuous course of plunder and destruction."

On the territory of the Soviet Union the Nazi conspirators destroyed or severely damaged 1,710 cities and more than 70,000 villages and hamlets, more than 6,000,000 buildings and made homeless about 25,000,000 persons" in implementation of this systematic policy.<sup>47</sup>

On 28 October 1944, Jodl ordered the eviction of all persons in northern Norway and the burning of their homes so as to deter them from aiding Russian forces. Jodl testified that he opposed the operation, but Hitler had ordered it. He also testified that the order was not fully executed. However, the Norwegian government provided evidence that such an evacuation did take place, and that 30,000 houses were damaged. The IMT found Jodl guilty of all four counts of his indictment and he was sentenced to death by hanging.<sup>48</sup>

Alfred Rosenberg's case exemplified the practices of plunder and deportation. Rosenberg was an intellectual leader in the Nazi party who, in 1940, became head of the Centre of National Socialist Ideological and Educational Research. In his role, Rosenberg organized and directed the *Einsatzstab Rosenberg Initiative*, which was responsible for the plunder of museums, libraries, and private homes. In 1941 he was appointed Reich Minister for Occupied Eastern Territories during which time he devised policies of Germanization; giving orders to segregate Jewish populations and to orchestrate mass deportations of laborers from the Eastern Territories, specifically the "Heu Aktion" in which 40,000 to 50,000 youths were sent to the Reich in 1944. Rosenberg was found guilty on all counts of his indictment and was sentenced to death for war crimes and crimes against humanity.<sup>49</sup>

### *Further Clarification and Codification*

The IMT at Nuremberg was designed to hold criminally responsible individual perpetrators of crimes against peace, war crimes and crimes against humanity. Many victims, however, felt that the IMT criteria were not intended as a remedy for them,

rather only for the Allied Powers. Ruling on reparations to individuals and communities was not within the scope of the Tribunal.<sup>50</sup>

Subsequent to the Nuremberg and Tokyo Tribunals, States met at Geneva to adopt new norms to protect civilian persons in time of war and occupation. While the Tribunals established that population transfers and colonization in occupied territory constitute both a war crime and a crime against humanity, and that deportation of persons is illegal, the application of these norms set the precedent for codification in International Humanitarian Law. In particular, these crimes are proscribed in Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949. Article 147 classifies transfer of persons as a “grave breach,” and Article 146 establishes the obligations of High Contracting Parties to undertake measures to suppress such grave breaches, including pursuit, prosecution and enacting necessary legislation to ensure compliance with these obligations.

In light of the scourges of recent war, the States had revived the issue from the silence of its 1907 predecessor in The Hague Regulations. However, in addition to States, jurists and legal experts sought to clarify the legal prohibition of population transfers as especially problematic for international relations and pursuit of the peace and security, forward development and human rights tripod enshrined in the UN Charter (1945).

The Paris-based International Law Institute (ILI) addressed the question of “international population transfers” at its 1952 annual session.<sup>51</sup> Reflecting global concern at the nature and questionable legality of cross-border transfers, the ILI report and survey acknowledged the inadequacies of its own, narrow definition of the phenomenon, particularly in the light of the comparable human rights consequences and other legal questions arising from population transfers also *within* States. All but one of respondents implied or stated that, because of the human rights dimensions of transfer, domestic population transfers were, perforce, the subject of international law.<sup>52</sup>

Consistently, respondents agreed that population transfers based on an accord between two or more States were not sufficiently legitimate or legal, and that human rights concerns superseded reasons particular to and/or common among States.<sup>53</sup> They further concluded that any legitimate transfer must verifiably serve the affected populations.<sup>54</sup>

The jurists doubted assertions that population transfer could enhance stability and peace, but were convinced that transfer would undermine good relations among nations.<sup>55</sup> The experts spurned notions of “voluntary transfer” as *contradictio in terminis*.<sup>56</sup> More customary to population transfer were the elements of “discrimination, despoliation, arbitrary police action, menacing of minorities, the devastation of war and imperialist annexations.”<sup>57</sup> All elements have since been codified as violations and/or grave crimes.

The International Law Commission (ILC) remained seized with the codification and specification of law prohibiting the crime of population transfer. At its second session,

the UN General Assembly also had directed the ILC to formulate the principles of international law recognized in the IMT Charter and judgments. The ILC was to prepare a draft Code of Offences against the Peace and Security of Mankind, indicating clearly the place to be accorded to the Nuremberg Principles.<sup>58</sup> ILC adopted a draft code in 1954, but from 1954 to 1981, consideration of the draft code lapsed. It was only in 1991 that the ILC adopted a first reading of the draft Code.<sup>59</sup>

The draft articles 21 and 22 address population transfer. Article 21 enumerated five manifestations of “Systematic or mass violations of human rights” constituting crimes, including “deportation or forcible transfer of population.” The ILC Commentary to this article states:

that a crime of this nature could be committed not only in time of armed conflict, but also in time of peace...Deportation, already included in the 1954 Draft Code, 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 means 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.<sup>60</sup>

Draft article 22 lists exceptionally serious war crimes. Draft article 22(a) specifies “deportation or transfer of the civilian population and collective punishment,” while draft article 22(b) includes the “establishment of settlers in an occupied territory” and changes to the demographic composition of an occupied territory in this category. The ILC Commentary explains that:

it is a crime to establish settlers in an occupied territory and to change the demographic composition of an occupied territory. A number of reasons induced the Commission to include these acts in the draft article. Establishing 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.<sup>61</sup>

Legal developments in the next decade added further clarity to the prospects of prosecution. An ECOSOC resolution<sup>62</sup> led to a 1967 debate in the United Nations that resulted in an instrument affirming the nonapplication of a statute of limitations on war crimes and crimes against humanity.<sup>63</sup> Ten years later, the Additional Protocol I to the Geneva Conventions reaffirmed population transfer as a grave breach.<sup>64</sup>

### *The Human Rights Dimensions of Population Transfer*

While States discouraged it from addressing specific-country cases, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities had conducted its analytical mandate through a comparative lens. In 1992, the Sub-Commission adopted a resolution on “the human rights dimensions of population transfer, including the implantation of settlers and settlements,”<sup>65</sup> mandating a study.

The UN Commission on Human Rights already was considering the practice of “forced eviction, which it resolved in 1993 to constitute a gross violation of human rights, in particular the right to adequate housing.”<sup>66</sup> The Sub-Commission’s study enabled specialized focus on the inherent, tandem violation of (incremental and *en masse*) forced evictions, on the one hand, and colonization—in cross-border operations—and under a State’s domestic demographic manipulation. Thus, the Sub-Commission study<sup>67</sup> found that the “pull” factor of population transfer (implantation of settlers and settlements) likely would constitute a breach of international law, whether carried out within or across State borders.

The study also found that “population transfers,” in any case, violate a “bundle of rights.”<sup>68</sup> It clarified the legal term such that population transfer

...implies purpose in the act of moving a population; however, it is not necessary that a destination be predefined. The State’s role in population transfer may be active or passive, but nonetheless contributes to the systematic, coercive and deliberate nature of the movement of population into or out of an area. Thus, an element of official force, coercion or malign neglect is present in the State practice or policy. The State’s role may involve financial subsidies, planning, public information, military action, recruitment of settlers, legislation or other judicial action, and even the administration of justice....<sup>69</sup> Transfer can be carried out *en masse*, or as “low-intensity transfers” affecting a population gradually or incrementally.<sup>70</sup>

While the Sub-Commission’s population transfer rapporteur mechanism culminated in a model “Draft Declaration on Population Transfer and the Implantation of Settlers” in 1997,<sup>71</sup> that exercise preceded by one year the explicit prohibition and enforcement in a binding international treaty. The Rome Statute of the International Criminal Court defines “Deportation or forcible transfer of population” as a crime against humanity (Article 7) and “Unlawful deportation or transfer” as a war crime (Article 8).

Article 7.1(d) defines “deportation or forcible transfer of population” as

forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

Article 8.2 (vii) defines as a war crime the “unlawful deportation or transfer or unlawful confinement” as a punitive act. Article 8.2 (viii) specifies as a war crime within the jurisdiction of the International Criminal Court

the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.

### *International Criminal Justice*

In the special tribunals set up under the authority of the UN Security Council, cases are currently being tried selectively for crimes committed in former Yugoslavia, Rwanda, Liberia and Cambodia, including population transfer. In the context of the events of the former Yugoslavia in 1991–95, “ethnic cleansing”<sup>72</sup> has emerged as a term of art to describe various policies and practices with the effect and/or purpose of eliminating an

unwanted group from a society or territory, as by genocide or forced migration, in order to create an ethnically homogenous, or supposedly “pure” society, area or State.

Although no legal definition yet exists, “ethnic cleansing” has become a commonly used term in international legal writings, discourse and official documents, including UN documents.<sup>73</sup> A UN Commission of Experts on grave breaches and other violations of international humanitarian law in the former Yugoslavia defined the practice as “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area. ‘Ethnic cleansing’ is contrary to international law.”<sup>74</sup>

The International Criminal Tribunal for the Former Yugoslavia has tried and convicted at least 24 politicians and military commanders charged with “forced deportations” or “forced population” transfer (one acquitted).<sup>75</sup> Of the more than 30 Bosnian criminal suspects, at least nine have been tried and convicted for crimes amounting to population transfer.<sup>76</sup>

On 29 May 2013, the International Criminal Tribunal of the Former Yugoslavia sentenced six Bosnian Croat wartime leaders to lengthy prison sentences for the murder, rape and expulsion of Muslims from Bosnia during the breakup of Yugoslavia in the 1990s. The highest-ranking convict is Jadranko Prlić, prime minister of the self-proclaimed Herceg-Bosna State that Croats carved out in central and southern Bosnia during the 1992–95 ethnic conflict. Prlić received a sentence of 25 years in jail. Five other defendants, including the interior minister and two chiefs of staff, received prison terms of 10–25 years.<sup>77</sup>

The ICC has operated since 2002 and produced a total of one conviction to date.<sup>78</sup> However, other alleged perpetrators are under indictment for population transfer crimes and face trial, pending their apprehension. At least one ICC defendant from the Lord’s Resistance Army, Okot Odhiambo (Uganda), has been indicted for attacking displaced persons. All six ICC indictments for crimes in the post-election violence in Kenya include deportation or forcible population transfer.<sup>79</sup> For the crimes committed in Darfur, four Sudanese are under arrest warrant for offenses including deportation or forcible transfer of population.<sup>80</sup>

## **Conclusion**

While such trials are essential to the transitional justice processes in those affected countries, the prosecution of war crimes and crimes against humanity has remained selective. The question persists as to whether international criminal justice can achieve the intended deterrence of crimes such as population transfer.

Obsessed with the politicization of prosecutions, Zionist Israeli writers have warned of a “political misuse” of the crime of population transfer, particularly mindful of the potential of applying it against Israeli perpetrators.<sup>81</sup> In a sense, they are correct in noting the lack of integrity in which States have applied and enforced the prohibition. In the cases of population transfers in Cyprus,<sup>82</sup> East Timor and Western Sahara throughout the 1970s

and after, many States have not upheld even the *erga omnes* nonrecognition doctrine, which remains consistent in international law from the 1932 Stimson doctrine, through the “Namibia formula,”<sup>83</sup> the International Law Commission’s draft Articles on State Responsibility and the ICJ advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian.<sup>84</sup> The case of forced displacements, ethnic cleansing and related crimes in Sri Lanka,<sup>85</sup> remains unaddressed and likely to spawn future upheavals.<sup>86</sup>

Therefore, the enduring problem lies rather more with the selectivity and *disuse* of the prosecutions as a measure of remedy for victims and deterrence against the crime of population transfer. Meanwhile, no State party, High Contracting Party to the Geneva Conventions, or depositary government has fulfilled its obligation to ensure respect” for the Fourth Geneva Convention, including its quintessential prohibition under Article 49.<sup>87</sup> Thus, in the numerous cases without a statute of limitation and yet untried, impunity remains a countervailing norm.

## Endnotes

- <sup>1</sup> As defined in Commission on Human Rights resolution 1993/77 “forced eviction,” 10 March 1993.
- <sup>2</sup> The United States Congress adopted the “Indian Removal Act” of 1830, which provided a legal basis and funds for President Andrew Jackson to “negotiate” removal (land exchange) treaties. One of the most notorious applications of that removal policy was the forced migration of Cherokee Nation from their homeland in today’s State of Georgia to present-day Oklahoma in the 1835 “Trail of Tears,” or, in the original Cherokee language, “Nunna dual Tsunuy” [trail where they cried].
- In Australia, forced removal is commonly understood to describe an aspect of assimilationist policy whereby governments of Australian states forcibly separated Aboriginal children from their families in order to place them in non-Aboriginal institutions and families during the 1960s and 1970s. The victims of that policy are known as the “stolen generations.” South Africa’s apartheid parliament devised the Land Act, Group Areas Act and Pass Laws to dispossess and expel Africans from their lands and homes to distant locations. From the 1950s until the early 1980s, the Government of South African implemented a “resettlement” policy to force people into their designated “group areas.” Estimates place the number of affected persons at over three and a half million. One of the most well-known cases was the 1950s forced removal of some 60,000 Africans in Johannesburg to the new township of Soweto (an acronym for South Western Township).
- The detention and deportation of an individual or group of migrants is also common referred to as “forced removal.” International law strictly proscribes the practice and prohibits forced removals if carried out arbitrarily; without due process or access to affective remedies; collectively (against a particular group, amounting to discrimination); with undue or excessive force; against vulnerable persons, seriously ill persons, refugees, children or victims of trafficking. see “Common principles on removal of irregular migrants and rejected asylum seekers” (August 2005), at: <http://www.ccme.be/archive/2005/Common%20principles%20on%20removal%20lay-out.pdf>.
- <sup>3</sup> Deportation is the expulsion of a person or group of people from a place or country. Today the expulsion of foreign nationals is usually called deportation, whereas the expulsion of nationals is called banishment, exile, or penal transportation. Generally, definitions of deportation make no distinction between official and unofficial acts, and apply equally to nationals and foreigners. See: Henckaerts, Mass Expulsion in Modern International Law and Practice, 1995, p. 4–5.
- Some countries distinguish between deportation and penal transportation. For example, in the United States, “Strictly speaking, transportation, extradition and deportation, although each has the effect of removing a person from the country, are different categories of official and lawful acts with different purposes. Transportation is a form of punishment of a person convicted of an offense against the laws of the country. Extradition is the surrender to another country of a person accused of an offense against laws in the country of destination, where s/he is to be tried, and, if found guilty, punished. Deportation is the removal of an alien out of the country, because her/his presence is deemed inconsistent with the public welfare and without any punishment being imposed or contemplated either under the laws of the country out of which s/he is sent, or of those of the country to which s/he is taken.” See *Fong Yue Ting v. United States*, 149 U.S. 697, at 709 (1893), p. 149, ¶ 709, at: <http://supreme.justia.com/cases/federal/us/149/698/case.html>.
- <sup>4</sup> The act of forcing out, ejecting, forcing to leave official action. *Merriam Webster*, at: <http://www.merriam-webster.com/dictionary/expel>; The act of depriving a member of a body politic, corporate, or of a society, of his right of membership therein, by the vote of such body or society, for some violation of his[her] duties as such, or for some offence [that] renders him[her] unworthy of longer remaining a member of the same. <http://legal-dictionary.thefreedictionary.com/expulsion>.
- <sup>5</sup> See discussion below under “International Criminal Justice.”
- <sup>6</sup> Under the 1830 Indian Removal Act, the USA relocated the peoples of the Five Civilized Tribes east of the Mississippi River, to the Indian Territory in the west. These were also referred to as “relocations.” US government ordered military forcible relocation and internment of some 110,000 Japanese-Americans and Japanese residing in the United States to newly created “War Relocation Camps,” or internment camps, where most remained for the duration of World War III.
- <sup>7</sup> In apartheid South Africa, resettlement was a coercive practice from the 1950s until the early 1980s by which the Government of South African implemented a “resettlement” policy that forced people into their designated “group areas” under the Group Area Act, three acts of legislation assigning supposed racial groups to distinct residential and business sections in urban areas in a system of “urban apartheid.” This policy, amounting to “forced removal,” affected an estimated three and a half million.
- <sup>8</sup> Joseph Schechla, “Ideological roots of population transfer,” *Third World Quarterly*, Vol. 14, Issue 2 (June 1993), 239–75.
- <sup>9</sup> Nicholas P. Canny, “The ideology of English colonization: From Ireland to America,” *William and Mary Qtrly.*, 3d Ser., XXX (1973), 575–98; also Francis Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (New York and London, W.W. Norton, 1976).
- <sup>10</sup> Joseph Schechla, “A Covenant of Dispossession and Genocide,” in Barry Tharaud and Elizabeth Pallito, eds., *The Endangered Planet in Literature Selected Proceedings*, 16–18 November 2005 (Istanbul: Doğuş University, 2005), 328–46.
- <sup>11</sup> With particular reference to Colombia in *Congresos de Panamá* (1826) and *El Trato de Confederación* at *Congreso de Lima* (1847–48). See José León Suárez (Argentina), “El uti possidetis y los limites americanos,”

- Diplomacia Universitaria Americana: Argentina y el Brasil. Cielo de Conferencias (Buenos Aires: Escoffier, Caracciolo y Cie., 1918).
- <sup>12</sup> The Congress, attended by Gran Colombia (comprising the modern-day states of Colombia, Ecuador, Panama, and Venezuela), Peru, the then United Provinces of Central America (Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica), and Mexico. The Congress of Panama is also referred to as the Amphictyonic Congress, in homage to the Amphictyonic League of Ancient Greece.
- <sup>13</sup> Binding Peru, Bolivia, Chile, Ecuador and Nueva Granada (Colombia).
- <sup>14</sup> “Cuando alguna Nación extranjera ocupe o intente ocupar cualquiera porción de territorio que se halle dentro de los límites de algunas de las Repúblicas Confederadas, o haga uso de la fuerza para sustraer tal territorio del dominio y señorío de dicha República, sea cual fuere el pretexto que se alegue para ello; pues las Repúblicas Confederadas se garantizan, mutuamente y de la manera más expresa y solemne, el dominio y señorío que tienen a todo el territorio que se halle comprendido dentro de sus respectivos límites; y no reconocen, ni reconocerán, derecho de ninguna Nación extranjera, ni en ninguna tribu indígena, para disputarles aquel dominio y señorío.” (Artículo 2 párrafo 1º). Documento 26. Tratado de Confederación, Lima, 8 February 1848, at: [http://www.biblioteca.tv/artman2/publish/1848\\_137/Documento\\_26\\_Tratado\\_de\\_Confederaci\\_n\\_printer.shtml](http://www.biblioteca.tv/artman2/publish/1848_137/Documento_26_Tratado_de_Confederaci_n_printer.shtml).
- <sup>15</sup> “Las Altas Partes Contratantes (...) se garantizan mutuamente su independencia, su soberanía y la integridad de sus territorios respectivos, obligándose, en los términos del presente Tratado, a defenderse contra toda agresión que tenga por objeto privar a algunas de ellas de cualquiera de los derechos aquí expresados, ya venga la agresión de una potencia extraña, ya de algunas de las ligadas por este pacto, ya de fuerzas extranjeras que no obedezcan a un Gobierno reconocido” (Artículo 1). Documento 30. Tratado de Unión y Alianza Defensiva entre los Gobiernos de Colombia, Chile, Bolivia, Ecuador, Perú, El Salvador y Venezuela, Lima, 23 January 1865, at: [http://www.biblioteca.tv/artman2/publish/1865\\_160/Documento\\_30\\_Tratado\\_de\\_Uni\\_n\\_y\\_Alianza\\_Defensiva\\_entre\\_los\\_Gobiernos\\_de\\_Colombia\\_Chile\\_Bolivia\\_Ecuador\\_Per\\_El\\_Salvador\\_y\\_Venezuela\\_printer.shtml](http://www.biblioteca.tv/artman2/publish/1865_160/Documento_30_Tratado_de_Uni_n_y_Alianza_Defensiva_entre_los_Gobiernos_de_Colombia_Chile_Bolivia_Ecuador_Per_El_Salvador_y_Venezuela_printer.shtml).
- <sup>16</sup> “Instructions for the Government of Armies of the United States in the Field,” prepared by Francis Lieber and promulgated as General Orders No. 100 by President Abraham Lincoln, 24 April 1863.
- <sup>17</sup> Article 3: The American States reaffirm the following principles:...(g) The American States condemn war of aggression: victory does not give rights;... Signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993.
- <sup>18</sup> The debate was influenced by the U.S. conquests in the Southwest at Mexico’s expense a half-century before (Mexican-American War, 1846–48), and more dramatically by Chilean conquests in the War of the Pacific (1879–81). Peru and Bolivia, supported by Argentina, wanted a strong condemnation of any right by virtue of military conquest, but there was a real threat that the Chilean delegation would withdraw if they felt they were being attacked. See Dardo Cúneo, ed., *José Martí, Argentina y la Primera Conferencia Panamericana* (Buenos Aires: Ediciones Transición, undated) and Philip S. Foner, ed., *José Martí, Inside the Monster* (New York: Monthly Review Press, 1975), pp. 29–30.
- <sup>19</sup> Contrary to the evasive assertions of Lenk asserting that poptrans is prohibited most out of a deeper concern for abolishing forced labor. Arthur Lenk, “Development of the Crime of Population Transfer,” *Eyes on the ICC*, Vol. I, No. 1 (2004).
- <sup>20</sup> First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. Reaffirmed in Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec), resolution approved by the Inter-American Conference on Problems of War and Peace, Mexico City, 6 March 1945; entered into force 8 March 1945, 60 Stat. 1831; *Treaties and Other International Acts Series* 1543.
- <sup>21</sup> The Article specifies that “The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. Montevideo Convention on the Rights and Duties of States, at: <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>.”
- <sup>22</sup> In particular, Protocol No. 1 of the Treaty of Constantinople, 16–29 September 1913.
- <sup>23</sup> Treaty of Neuilly-sur-Seine, signed on 27 November 1919, entered into force on 9 August 1920. The Treaty of Neuilly was one of the series of treaties after World War I, which included the Treaty of Versailles, the Treaty of Saint-Germain, the Treaty of Trianon, and the Treaty of Sèvres, which were intended to diminish the military and political strength of the defeated members of the Central Powers.
- <sup>24</sup> Treaty of Neuilly-sur-Seine, Article 177(b).
- <sup>25</sup> See Carlile A. Macartney, *National States and National Minorities* (Oxford: Oxford University Press, 1934); also “The exchange of minorities and transfers of population in Europe since 1919,” Part I, *Bulletin of International News*, vol. XXI, No. 16 (July 1944), p. 580.
- <sup>26</sup> About 1.5 million Greeks (Christians) and half a million Muslims were moved from one side of the international border to the other, following creed-based criteria.
- <sup>27</sup> These included Zionist spokespersons Israel Zangwill, Baron Edmond de Rothschild, Arthur Ruppin, Nachman Syrkin, Max Nordau, Leo Matzkin, Chaim Weizmann and, most notably, David Ben Gurion, Israel’s first prime minister. See Shabtai Teveth, “The evolution of ‘transfer’ in Zionist thinking,” (Tel Aviv: Moshe Dayan Center for Middle East and African Studies, Shiloah Institute, Tel Aviv University, 1989); also Nur Massalha, *Expulsion of the*

- Palestinians: The Concept of "Transfer" in Zionist Political Thought, 1882–1948 (Washington: Institute for Palestine Studies, 1992).
- <sup>28</sup> In June 1927, interventionists thought it would lead to U.S. acceptance of the League of Nations; isolationists and peace groups hoped it would end war. Read more at: <http://www.answers.com/topic/kellogg-briand-pact#ixzz1rZrRrDO>.
- <sup>29</sup> "Signatories and adherents," at: [http://en.wikipedia.org/wiki/Kellogg%E2%80%93Briand\\_Pact#cite\\_note-7](http://en.wikipedia.org/wiki/Kellogg%E2%80%93Briand_Pact#cite_note-7)
- <sup>30</sup> Claire Palley, "Population Transfer," in Donna Gomein, ed., *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993), 229; and Claire Palley, "Population Transfer and International Law" (paper delivered at "UNPO Conference Population Transfer" conference, Tallinn, Estonia, 11–13 January 1992). See also "UNPO Conference Population Transfer" (conference report), at: <http://unpo.org/downloads/Population-Transfer-1992.pdf> and Ian Brownlie, *International Law and the Use of Force by States* (London: Clarendon Press, 1963), p. 410.
- <sup>31</sup> Robert Langer, *Seizure of Territory* (Princeton: Princeton University Press, 1947; reprint Westport CT: Greenwood Press, 1969); Meng, "Stimson Doctrine," in V. Rudolf Bernhardt, ed., *Encyclopedia of Public International Law* (Heidelberg: Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, 1982), Vol. IV, p. 690; and David Turns, "The Stimson Doctrine of Non-Recognition: its Historical Genesis and Influence on Contemporary International Law," *Chinese Journal of International Law*, vol. 2, no. 1 (2003), pp. 105–43, at: <http://chinesejil.oxfordjournals.org/content/2/1/105.full.pdf+html>.
- <sup>32</sup> *American Journal of International Law* I, 1 (1932), 342.
- <sup>33</sup> U.S., Department of State, Publication 1983, *Peace and War: United States Foreign Policy, 1931–1941* (Washington: U.S. Government Printing Office, 1943), pp. 3–8.
- <sup>34</sup> In addition to the First International Conference of American States in 1890, the United States Stimson Doctrine of 1932 and the 1932 League of Nations resolution on Japanese aggression in China is the Buenos Aires Declaration of 1936 and the Atlantic Charter of 1941. See Lynk, S. Michael, "Conceived in Law: The Legal Foundations of Resolution 242," 2 July 2007, at: <http://ssrn.com/abstract=1411698>.
- <sup>35</sup> Ben Gurion later testified that: "the prohibition of Jewish settlement on land and the arbitrary limitation of immigration, have been bitterly resented by the Jews who have represented that they are contrary to His Majesty's Government's obligations under the Mandate." Oral Evidence Presented at Public Meeting, Lake Success, New York" (transcript), United Nations Special Committee on Palestine, *Report of the General Assembly*, Vol. III, Annex A, A-364-Add.2 PV16, 4 July 1947, at: <http://unispal.un.org/UNISPAL.NSF/9a798adbf322aff38525617b006d88d7/7735b7dc144807b985256e8b006f4a71?OpenDocument&Highlight=0,McDonald>.
- <sup>36</sup> See Joseph B. Schechtman, "The option clause in the Reich's treaties on the transfer of population," *American Journal of International Law*, Vol. 38, No. 3 (July 1944), pp. 356–74.
- <sup>37</sup> Alfred-Maurice de Zayas, *Die Nemesis von Potsdam* (München: Herbig Verlag, 2005).
- <sup>38</sup> See, for instance, Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oxford and London: Oneworld Publications, 2006); Nur Masalha, *Expulsion of the Palestinians: The Concept of "Transfer" in Zionist Political Thought* (Washington DC: Institute for Palestine Studies, 1992); Walid Khalidi, *All That Remains: The Palestinian Villages Occupied and Depopulated by Israel in 1948* (Washington: Institute for Palestine Studies, 1992).
- <sup>39</sup> See, among others, John S. Hall, "Chinese Population Transfer in Tibet," *Cardozo Journal of International and Comparative Law* 9 (spring 2001), 173–99; Scott Leckie, *Destruction by Design, Housing Rights. Violations in Tibet* (Utrecht: Centre on Housing Rights and Eviction, 1994).
- <sup>40</sup> East Turkestan (The Hague: Unrepresented Nations and Peoples Organization, August 2009), at: <http://www.unpo.org/images/member%20profile%20east%20turkestan%2C%20august%2024%202009.pdf>.
- <sup>41</sup> *British and Foreign State Papers*, Vol. 144, p. 1072.
- <sup>42</sup> Louise W. Holborn, ed., *War and Peace Aims of the United Nations: 1 September 1939–31 December 1942* (Boston: World Peace Foundation, 1943), p. 462.
- <sup>43</sup> Article 6 (b) of the Charter of the International Military Tribunal; International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal (IMT), Nuremberg, 1945–1946, 42 vols. (London, H.M. Stationery Office, 1947–1949) vol. I, p. 11.
- <sup>44</sup> *Ibid.*
- <sup>45</sup> See General Assembly resolution 95 (1), adopted on 11 December 1946.
- <sup>46</sup> The earliest explicit mention of population transfer in an international legal document was the recognition of "forced resettlements" as a war crime in the Allied Declaration on German War Crimes, adopted by representatives of the nine occupied countries, exiled in London, in 1942. It stated, *inter alia*: "With respect to the fact that Germany, from the beginning of the present conflict, has erected regimes of terror in the occupied territories...characterized in particular by...mass expulsions...229 On 17 October 1942, the Polish Cabinet in Exile issued a decree on the punishment of German war crimes committed in Poland, which provided that life imprisonment or the death penalty would be imposed "if such actions caused death, special suffering, deportation or transfer of population."
- <sup>47</sup> Avalon Project, *Nuremberg Trial Proceedings*, Vol. 22. Available at: [http://avalon.law.yale.edu/subject\\_menus/imt.asp](http://avalon.law.yale.edu/subject_menus/imt.asp)
- <sup>48</sup> Avalon Project, *Nazi Conspiracy and Aggression, Volume 2, Chapter XVI, Part 7, Alfred Jodl*. Available at: [http://avalon.law.yale.edu/imt/chap16\\_part07.asp](http://avalon.law.yale.edu/imt/chap16_part07.asp) and *Judgement: Sentences*, <http://avalon.law.yale.edu/imt/judsent.asp>

- <sup>49</sup> Avalon Project, *Nazi Conspiracy and Aggression, Volume 2, Chapter XVI, Part 7, Alfred Rosenberg*. Available at: [http://avalon.law.yale.edu/imt/chap16\\_part07.asp](http://avalon.law.yale.edu/imt/chap16_part07.asp) and *Judgement: Sentences*, <http://avalon.law.yale.edu/imt/judsent.asp>
- <sup>50</sup> Yael Danieli, "Reappraising the Nuremberg Trials and their Legacy: the Role of Victims in International Law," *Cardozo Law Review*, Vol. 27, No. 4 (February 2006), (victim interviews) pp. 1642–44.
- <sup>51</sup> "Les transferts internationaux de populations" (quatrième commission), report and questionnaire by Giorgio Balladore Pallieri, responses by Baron F.M. van Asbeck, Max Huber, Herbert Kraus, Henri Rolin, Georges Scelle, Walter Schätzel, J. Spiropoulos, Alfred Verdross, Fernand De Visscher and Bohdan Winiarski, *Annuaire*, vol. 44, No. 2 (1952), pp. 138–199.
- <sup>52</sup> *Ibid.*, J. Spiropoulos, pp. 185–6; and Alfred Verdross, pp. 186–7. Only one respondent (Spiropoulos, p. 186) asserted the State's absolute right to act as long as "laws of humanity" were not violated.
- <sup>53</sup> The Polish expert transcended the original definition to observe that three categories of population transfer were to be addressed by international law: international transfers, internal transfers and transfers involving the rights and obligations of belligerent occupiers. *Ibid.*, B. Winiarski, pp. 190–191. Herbert Kraus establishes a hierarchy of three categories of rights involved: human rights, rights of individual States and common rights of States (*Menschenrechte, einzelstaatliche Rechte u. gemeinschaftliche Rechte*), pp. 170–171.
- <sup>54</sup> *Ibid.*, F.M. van Asbeck, p. 162.
- <sup>55</sup> *Ibid.*, Kraus, p. 173.
- <sup>56</sup> *Ibid.*, G. Scelle, p. 180.
- <sup>57</sup> *Ibid.*, p. 178.
- <sup>58</sup> General Assembly resolution 177 (II), 21 November 1947.
- <sup>59</sup> Report of the International Law Commission on its forty-third session, 1991, *Official Records of the General Assembly, Supplement No. 10 (A/46/10)*.
- <sup>60</sup> *Ibid.*, p. 268.
- <sup>61</sup> *Ibid.*, p. 271.
- <sup>62</sup> The Economic and Social Council urged States "to take any measures necessary to prevent the application of statutory limitations to war crimes and crimes against humanity". ECOSOC resolution 1158 (XLI), 5 August 1966, adopted with 22 votes in favor, none against and 2 abstentions.
- <sup>63</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968.
- <sup>64</sup> "(a) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention." Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art 85.4(a).
- <sup>65</sup> At its forty-fourth session, in resolution 1992/28 of 27 August 1992, adopted without a vote, the Sub-Commission entrusted Mr. Awn Shawkat Al-Khasawneh and Mr. Ribot Hatano as Special Rapporteurs with preparing a preliminary study on "the human rights dimensions of population transfer, including the implantation of settlers and settlements."
- <sup>66</sup> Resolution 1993/77, *op. cit.*
- <sup>67</sup> "The human rights dimensions of population transfer, including the implantation of settlers" (preliminary report presented by Mr. A.S. al-Khasawneh and Mr. R. Hatano), E/CN.4/Sub.2/1993/17, 6 July 1993.
- <sup>68</sup> *Ibid.*, p. 44.
- <sup>69</sup> *Ibid.*, paras. 14–15.
- <sup>70</sup> *Ibid.*, para. 31.
- <sup>71</sup> "to apply in all situations and to all persons, groups and authorities" (Articles 1 and 2 Draft Declaration on Population Transfer and the Implantation of Settlers. "Human rights and population transfer: Final report of the Special Rapporteur, Mr. Al-Khasawneh," E/CN.4/Sub.2/1997/23, 27 June 1997.
- <sup>72</sup> One author defines ethnic cleansing such that, "At one end, it is virtually indistinguishable from forced emigration and population exchange, while at the other it merges with deportation and genocide. At the most general level, however, ethnic cleansing can be understood as the expulsion of an 'undesirable' population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these." (Andrew Bell-Fialkoff, "A Brief History of Ethnic Cleansing," *Foreign Affairs*, Vol. 72, No. 3 (summer 1993.)) Ethnic cleansing could be defined broadly and narrowly. Broader definitions identify eviction or expulsion on the basis of ethnic criteria. Some narrower definitions add specific characteristics, including the "systematic," "forced" or "illegal" nature of the evictions/expulsions (however redundant these adjectives), involving gross violations of human rights or grave breaches of international humanitarian law, or describe their context of an ongoing internal or international war, and/or deliberate policy. For example, another author characterizes ethnic cleansing as "a well-defined policy of a particular group of persons...systematically [to] eliminate another group from a given territory on the basis of religious, ethnic or national origin. Such a policy involves violence and is very often connected with military operations. It is to be achieved by all possible means, from discrimination to extermination, and entails violations of human rights and international humanitarian law." (Drazen Petrović, "Ethnic Cleansing - An Attempt at Methodology," *European Journal of International Law*, Vol. No. 3, pp. 342–60, 352, at:

<http://www.ejil.org/journal/Vol5/No3/art3.html> and quoted in quoted by Ilan Pappé, *The Ethnic Cleansing of Palestine* (Oxford: Oneworld Publications, 2006), p.1.)

The term "ethnic cleansing" entered the English lexicon as a calque (loan translation) of the Serbo-Croatian/Bosnian phrase *etničko čišćenje*. In the early the 1990s journalists and news media used the term extensively in reporting on events in the former Yugoslavia, and it has since become popularized and used more generally to describe analogous situations. The term may have earlier antecedents in the military doctrine of the former Yugoslav People's Army, which adopted the phrase "cleansing the field" (*čišćenje terena*); i.e., eliminating enemy presence, in order to gain total control of a conquered territory. (David P. Forsythe, *Encyclopedia of Human Rights*, Vol. 1 (Oxford: Oxford University Press, 2009), p. 163.)

<sup>73</sup> See, for example, World Summit Outcome Document (2005), paras. 138–39; and S/RES/1674, para. 4.

<sup>74</sup> *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 55, para. 55.

<sup>75</sup> For instance, Momčilo Krajišnik is the highest ranking Serbian politician to be tried for crimes in former Yugoslavia. On 27 September 2006, Krajišnik was convicted of crimes against humanity, including persecution, deportation and forced transfer. For those crimes he was sentenced to 27 (reduced to 20) years imprisonment. View the sentencing at: <http://www.youtube.com/watch?v=eZVyXjpyZow>. Serving his sentence in Belmarsh, England, he is currently appealing for early release.

<sup>76</sup> **Vujadin Popović** was charged "with Genocide or Complicity in Genocide; Murder, Persecutions, Forcible Transfer and Inhumane Acts as Crimes Against Humanity; and Murder as a Violations of the Laws or Customs of War ... During the VRS attack on the Srebrenica enclave and the subsequent killings and executions of Bosnian Muslim men, Vujadin Popovic was a Lieutenant Colonel and was the Assistant Commander of Security on the staff of the Drina Corps. He was present and on duty in the Drina Corps zone of responsibility, which included Srebrenica, Potocari, Bratunac and Zvornik, from 11 July to 31 August 1995." (ICTY Prosecutor's Indictment).

**Ljubomir Borovčanin** was charged with one count of complicity in genocide, four counts of crimes against humanity and one count of violations of the laws or customs of war, because the Prosecutor of the ICTY "alleges that Ljubomir Borovcanin was present in and around the areas of Bratunac, Potocari, Sandici, Kravica, Srebrenica and Zvornik from 11 July to 18 July 1995. Units under his command were deployed in and around the areas of Potocari, Sandici, Kravica and Zvornik from 12 July to 18 July 1995. In the several days following the attack on Srebrenica, the VRS and Ministry of the Interior ("MUP") forces captured, detained, summarily executed, and buried over 7,000 Bosnian Muslim men and boys from the Srebrenica enclave, and forcibly transferred the Bosnian Muslim women and children of Srebrenica out of the enclave. Together with other VRS and MUP officers and units as identified in the indictment, Borovčanin was a member of ,and knowingly participated in a Joint Criminal Enterprise, the common purpose of which was, among other things: to forcibly transfer the women and children from the Srebrenica enclave to Kladanj on 12 July and 13 July 1995 (Borovcanin (IT-02-64) Case Information Sheet: The Indictment, at: <http://www.icty.org/x/cases/borovcanin/cis/en/cis-borovcanin.pdf>.)

**Drago Nikolić** was a 2nd Lieutenant who served as Chief of Security for the Zvornik Brigade of the VRS and reported to Vinko Pandurevic. He was accused of aiding and abetting genocide, extermination, murder, persecutions, forcible transfer, deportation. After his surrender to the Court on 20 April 2005, he pleaded not guilty to all charges and again on 4 April 2006. (ICTY, "Press Release: Popovic Et Al. Srebrenica Trial to Begin 14 July 2006," United Nations.)

**Vinko Pandurević**, former Lieutenant Colonel in command of the Zvornik Brigade of the Drina Corps of the VRS, was accused of aiding and abetting genocide, extermination, murder, persecutions, forcible transfer and deportation. He has twice pleaded not guilty to all charges. (ICTY, "Press Release: Popovic Et Al. Srebrenica Trial to Begin 14 July 2006," United Nations.)

**Radivoje Miletić** was found guilty on counts of murder, as a crime against humanity, persecution and inhumane acts (forcible transfer), as a crime against humanity. He was found not guilty on counts of murder, as a violation of the laws or customs of war and deportation. He was sentenced to 19 years imprisonment.

**Milan Gvero** was found guilty of two counts of crimes against humanity (persecution and inhumane acts (forcible transfer). He was found not guilty on counts of murder, as a crime against humanity, murder, as a violation of the laws or customs of war and deportation. He was sentenced to 5 years imprisonment.

**Vinko Pandurević** was found guilty of two counts of aiding and abetting crimes against humanity (persecution and inhumane acts [forcible transfer]). He was found guilty of aiding and abetting murder as a crime against humanity and as a breach of the laws of war. He was also found guilty as a superior, of murder as a crime against humanity and as a breach of the laws of war. He was found not guilty on counts of genocide, conspiracy to commit genocide, and of extermination and deportation (crimes against humanity). He was sentenced to 30 years imprisonment.

**Momcilo Krajsnik** was indicted by the ICTY and accused of genocide, complicity in genocide, crimes against humanity (namely extermination, murder, persecution, deportation, and forced transfer), and various war crimes, in relation to acts committed in 1992 in Bosnia and Herzegovina. (ICTY: The prosecutor of the tribunal against Momcilo Krajsnik - Amended Indictment.) He was arrested on 3 April 2000 by SFOR. After the death of Slobodan Milosevic, Krajsnik was the highest-ranking politician on trial at the ICTY. On 27 September 2006, Krajsnik was convicted of the following crimes against humanity: extermination, murder, persecution, deportation and forced transfer. He was acquitted of the charges of murder as a war crime, genocide and complicity in genocide. He was sentenced to 27 years imprisonment. (ICTY, "Judgment - Momcilo Krajsnik," at: <http://www.un.org/icty/krajsnik/trialc/judgement/kra-jud060927e.pdf>; "Bosnia Serb jailed for war crimes," *BBC News*

(27 September 2006), at: <http://news.bbc.co.uk/2/hi/europe/5384092.stm>.) On 17 March 2009 the ICTY Appeals Chamber reversed some of the Trial Chamber's convictions for crimes against humanity and reduced Krajisnik's sentence to 20 years. (ICTY, "Case Information Sheet for Radislav Krstić," at: [http://www.icty.org/x/cases/krstic/cis/en/cis\\_krstic.pdf](http://www.icty.org/x/cases/krstic/cis/en/cis_krstic.pdf); ICTY, "Judgment - Momcilo Krajisnik; Bosnia Serb jailed for war crimes," op. cit.) Krajisnik was transferred to the United Kingdom to serve his sentence.

**Milomir Stakić** (Prijedor). In ICTY indictment Stakić was charged with genocide, or alternatively complicity in genocide, murder as a crime against humanity, extermination, murder as a violation of the laws or customs of war, persecutions, deportation, and inhumane acts. On 31 July 2003 the Trial Chamber found him not guilty of genocide, complicity in genocide, or forcible transfer (a crime against humanity). (*Prosecutor v. Milomir Stakić*, ICTY TC II, 31 July 2003 (case no. IT-97-24-T; Staff 2003-07-31); "Bosnian Serb gets life sentence," *BBC* (31 July 2003), at: <http://news.bbc.co.uk/2/hi/europe/3112427.stm>, accessed 1 June 2013.) He was found guilty of: extermination, (a crime against humanity); murder, (a violation of the laws and customs of war); and persecutions (crimes against humanity, incorporating murder, and deportation both of which were also crimes against humanity). He was sentenced to life imprisonment with a minimum term of 20 years. (ICTY, "Case Information Factsheet, 'PRIJEDOR'" (IT-97-24): Milomir Stakić, at: [http://www.icty.org/x/cases/stakic/cis/en/cis\\_stakic.pdf](http://www.icty.org/x/cases/stakic/cis/en/cis_stakic.pdf).) The Appeals Chamber affirmed the Trial Chamber's decision to convict Stakić for his responsibility in exterminating, murdering and persecuting the non-Serb population in Prijedor. The Appeals Chamber also found that the Trial Chamber incorrectly failed to convict him for deporting and forcibly transferring the non-Serb population. The Appeals Chamber agreed with the Trial Chamber's decision to acquit Milomir Stakić of genocide and complicity in genocide. (*Prosecutor v. Milomir Stakić*, ICTY AC, 22 March 2006 (case no. IT-97-24-A), at: <http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf>.)

<sup>77</sup> Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, Berislav Pušić were convicted of 22 counts of war crimes and crimes against humanity. Stojić and Petković received 20-year jail sentences. Ćorić was sentenced to 16 years. Praljak was acquitted of two counts, convicted on 20, and sentenced to 20 years in prison. Pušić was acquitted of four counts, and sentenced to 10 years in prison over the remaining four counts.

<sup>78</sup> David Smith, "Congo warlord Thomas Lubanga convicted of using child soldiers," *The Guardian* (14 March 2012), at: <http://www.guardian.co.uk/world/2012/mar/14/congo-thomas-lubanga-child-soldiers>.

<sup>79</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.

<sup>80</sup> Ahmad Muhammad Harūn ("Ahmad Harūn"), the former Minister of State for the Interior of the Government of Sudan and Minister of State for Humanitarian Affairs of Sudan is allegedly criminally responsible for 42 counts on the basis of his individual criminal responsibility under articles 25(3)(b) and 25(3)(d) of the Rome Statute, including forcible transfer of population (article 7(1)(d)), and 22 counts of war crimes.

Ali Muhammad `Ali `Abd al-Rahmān ("`Ali Kushayb"), alleged leader of the Militia/Janjaweed, faces prosecution and an arrest warrant for 50 counts of individual criminal responsibility, of which 22 are for crimes against humanity, including deportation or forcible transfer of population.

`Umar Hasan Ahmad al-Bashīr, president of the Republic of Sudan since 16 October 1993, faces individual criminal responsibility for ten counts of crimes against humanity, including forcible transfer and genocide.

`Abd al-Rahīm Muhammad Husain, current Minister of National Defense and former Minister of the Interior and the Sudanese President's Special Representative in Darfur now faces 13 counts of his individual criminal responsibility for seven counts of crimes against humanity, forcible transfer (article 7(1)(d)); and six counts of war crimes that include attacks against a civilian population (article 8(2)(e)(i)) and destruction of property (article 8(2)(e)(xii)). International Criminal Court, at:

<http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/>.

<sup>81</sup> Arthur Lenk, "Political Misuses of International Law: Development of the 'Crime' of Population Transfer," *Eyes on the ICC*, Vol. I, No. 1 (2004).

<sup>82</sup> *Cyprus v Turkey European Court of Human Rights* [ECtHR] 10 May 2001; *Cyprus v Turkey* [European Commission of Human Rights] 4 October 1992).

<sup>83</sup> Legal Consequences for States of the Continued Presence of South-Africa in Namibia notwithstanding Security Council Resolution 276 (1970), ICJ Reports (1971) 6.

<sup>84</sup> (SC 384).

<sup>85</sup> Wayne Madsen, "Sri Lanka: Israel's dirty secrets," *Online Journal* (8 May 2009), at: <http://adamite.wordpress.com/2009/06/05/sri-lanka-israels-dirty-secrets/>.

<sup>86</sup> The Sri Lankan military's control over the political and economic life of the Northern Province is deepening the alienation and anger of northern Tamils and threatening sustainable peace. *Sri Lanka's North I: The Denial of Minority Rights* and *Sri Lanka's North II: Rebuilding under the Military*, two reports from the International Crisis Group, examine how de facto military rule and various forms of government-sponsored "Sinhalaisation" of the Tamil-majority region are impeding international humanitarian efforts after the forced transfers under the government's counterinsurgency policies throughout 2009.

<sup>87</sup> For a set of options for implementing corresponding State obligations under the Fourth Geneva Convention, see "Human Rights Groups Urge Meaningful Geneva 4 Conference," at:

<http://www.hic-mena.org/documents/HCP%20conference%20concept%20final.pdf>; and annex: "Toward the Conference of High Contracting Parties of the Fourth Geneva Convention relative to the Protection of Civilian

Persons in Time of War (1949) on measures to enforce the Convention in the occupied Palestinian territory,” at: <http://www.hic-mena.org/documents/HCP%20conference%20concept%20final.pdf>.