

# Population Transfer: The Untold Story of Self-determination<sup>1</sup>

## Part I: The Standard Account of the Historical Development of the International Law of Self-determination

The twentieth-century history of the right of self-determination, as told by international lawyers, can be broadly divided into two parts. The first is an enlightenment tale of ‘progress’, and records the struggle of the principle of self-determination to gain legal status and content determinacy. This standard account of the rise of self-determination can be recast as one meta-narrative (how self-determination made its pilgrim’s progress from politics to law) and a series of parallel narratives relating to the shifting content and disciplinary companions of self-determination (ethnicity to territoriality; objective to subjective self-determination; external to internal self-determination; and minority rights to human rights). As if to assist in the pedagogical process, the various chapters of the self-determination story are neatly illustrated by reference to a number of key dates and events: 1919 (ethnic, political principle of European peacemaking complemented by minority rights); 1945 (inclusion in the United Nations Charter and complemented by individual human rights); 1960 (the adoption of the Colonial Declaration, and the emergence of a customary, territorially-based right to external self-determination); 1966 (inclusion in the two International Covenants, and a shift in emphasis to include internal self-determination). The familiarity of this self-determination rags-to-riches story should not detract from the astonishing degree of consensus in what is otherwise a diverse, and occasionally dissident, literature.

The second part of the twentieth-century self-determination story reads as an ethno-nationalist tale of ‘crisis’, and records the post-1989 reversal in fortunes<sup>2</sup> of the principle of self-determination both in terms of content (territoriality back to ethnicity) and legal determinacy (law back to politics). It is here for the first time that we encounter disciplinary unease that the law of self-determination, far from being a casualty of the rise of ethno-nationalism, may rather be its co-accused. For the view that ‘post-modern tribalism’ and ethnic population transfer may be *allies* rather than *enemies* of self-determination, consider the following passage from Thomas Franck, writing in 1995:

Post-modern tribalism...seeks to promote both a political and a *legal* environment conducive to the breakup of existing sovereign states. It promotes the transfer of defined parts of the populations and territories of existing multinational or multicultural states in order to constitute new uninational and unicultural – or postmodern tribal – states... The legal claim it espouses is framed in terms of a well established existing right, perhaps even a peremptory norm: that of self-determination.<sup>3</sup> (emphasis in original)

Writing in the same period, Antonio Cassese expresses similar disciplinary anxieties:

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<sup>1</sup> Extensive footnotes have not been included in this draft but are available from <<[cd74@nyu.edu](mailto:cd74@nyu.edu)>>.

<sup>2</sup> Not all fortunes are reversed. Some narratives of ‘progress’ continue in the post-1989 era of ‘crisis’.

<sup>3</sup> T. M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) at 144.

The end of the Cold War...saw another revival of self-determination, but again with a new twist. *If, in the past, self-determination used the coin of 'progress', in its third apparition it has come to be seen increasingly as fuelling the currency of ethno-nationalist intolerance, rivalry, tribalism, xenophobia, and worse: a Golem turned on its Creators.*<sup>4</sup> (emphasis added)

It is the argument of this paper that notwithstanding its popular currency or its pedagogical convenience, the twentieth-century history of the right of self-determination, as told and taught by international lawyers, provides, at best, a partial account. The essence of my claim is this: while the standard account of self-determination treats the late twentieth-century encounter with ethnic cleansing as variously 'post-modern', 'post-communist' or 'post-colonial', a review of alternative sources reveals that, contrary to the humanitarian claims of the progress narrative, the twentieth-century history of self-determination has persistently been bound up with policies and practices of (voluntary and compulsory) population transfer. And while this argument can be pursued over all four historical periods drawn from the standard account (post-World War I; post-World War II; Decolonisation; and Post-Cold War), in this paper I tell only three of the untold stories of self-determination and population transfer: the *Lausanne Conference on Near Eastern Affairs*, 1922-1923; *The World War II Debates*; and the *Potsdam Tripartite Conference*, 1945.

## Part II: Revisiting the Standard Account

### *i. The Lausanne Conference on Near Eastern Affairs 1922-1923*

By far the most controversial, and influential, example of the post-war population exchange agreements emerged from the *Lausanne Conference on Near Eastern Affairs* 1922-1923, ('the Lausanne Conference') – the *Convention concerning the Exchange of Greek and Turkish Populations* 1923 (the *Greco-Turkish Exchange Convention*).<sup>5</sup> Article 1 laid down the basic principle that Greece and Turkey were to carry out a compulsory exchange of their national minorities:

As from the 1<sup>st</sup> May, 1923, there shall take place a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Moslem religion established in Greek territory...<sup>6</sup>

Under the terms of this *Greco-Turkish Exchange Convention*, approximately 1.6 million<sup>7</sup> members of the Greek and Turkish minorities were subject to compulsory exchange in what is widely hailed, still today, as the most far-reaching population exchange in

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<sup>4</sup> A. Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 4.

<sup>5</sup> *Greco-Turkish Exchange Convention*, 1923 XXXII L.N.T.S. (1925) 75.

<sup>6</sup> *Supra*, Article 1.

<sup>7</sup> B. Clark, *Twice A Stranger: The Mass Expulsions that Forged Modern Greece and Turkey* (Harvard University Press, 2006).

modern history. The historic significance of the compulsory nature of the exchange solution pioneered at Lausanne was not lost on those involved in its negotiation. Even in its day, the decision to carry out a *compulsory* transfer of minorities was regarded as controversial – a radical and regrettable adjunct to Balkan peacemaking. As Ladas and others report, the Conference plenipotentiaries were inundated with protests and petitions from affected, and disaffected, minorities.<sup>8</sup>

Indeed, such was the public outcry that the protagonists involved in its negotiation sought to deny paternity. Prime Minister Venizelos, who led the Greek delegation at Lausanne, publicly sought to pin paternity on both Dr. Fridtjof Nansen and the Turks:

[T]he idea of a compulsory exchange of population had not been put forward by the Greek delegation. On the contrary, such an exchange was repugnant to them... The idea of a compulsory exchange had been suggested by Dr Nansen, who believed that the Turkish Government would never allow the expelled Greeks to return to Turkey, as the only means of finding habitation for the shelterless refugees.<sup>9</sup>

Lord Curzon, the British Foreign Secretary, despite early endorsement, famously denounced the exchange as ‘a thoroughly bad and vicious solution, for which the world would pay a heavy penalty for a hundred years to come’.<sup>10</sup>

Yet, whatever disagreement persists over its morality, paternity or necessity, it is undisputed that the *Greco-Turkish Exchange Convention* marks a watershed in the twentieth-century history of population transfer. What may be less evident, however, is its interest to the self-determination genealogist. In contrast to the 1919 *Convention between Greece and Bulgaria respecting reciprocal emigration* (the *Greco-Bulgarian Convention*),<sup>11</sup> which was the product of the Paris Peace Conference and bound up with the post-World War I project of reconfiguring Europe along national lines, a cursory glance at the political origins of the *Greco-Turkish Exchange Convention* reveals no such self-determination provenance. Indeed, the Minutes of the Lausanne Conference suggest that the adoption of the principle of compulsory transfer reflected less a decision to carry out a transfer of minorities along national lines than *not* to repatriate the one million Greek refugees who had already fled Turkey to seek sanctuary in Greece. This is clear from the explanation of the Greek Prime Minister:

The expulsion of the Asia Minor population has not been a consequence of the Exchange Accord, but had been already an accomplished fact – in it I merely received the consent of Turkey to move the Turkish Muslims from Greece in order to reestablish the Greek refugees.<sup>12</sup>

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<sup>8</sup> See e.g., *Statement by Prime Minister Venizelos to the Territorial and Military Commission*, 14<sup>th</sup> December, 1922, *Minutes* at 223-224.

<sup>9</sup> *Minutes of the Fourteenth Meeting of the Territorial and Military Commission*, December 13, 1922.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Convention between Greece and Bulgaria respecting reciprocal emigration* signed at Neuilly-sur-Seine, November 27, 1919, I. *L.N.T.S.* (1920) 67.

<sup>12</sup> Quoted in N. Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe* (Cambridge MA.: Harvard University Press, 2001) at 54.

Indeed, to the extent that it recognised a *fait accompli* (the plight of 1,000,000 Greek refugees from Turkey; a humanitarian crisis; thousands of empty villages in Eastern Thrace; the urgent need to sow and harvest crops; an intransigent Turkish state; and the grave economic situation in both Turkey and Greece) the *Greco-Turkish Exchange Convention* appears to have been driven more by considerations of economic, agricultural and political expediency than by any lofty Wilsonian notions of national-self-determination. Moreover, far from constituting a complementary post-script to the post-World War I arrangements for solving the national question, the shift from *voluntary* emigration of minorities at Paris to *compulsory* exchange of minorities at Lausanne seems entirely at odds with any meaningful conception of minority rights or of self-determination as a right of free choice. On this account, the agreement on compulsory exchange soldered at Lausanne in 1923, is an abrogation rather than an application of the general post-World War I international thinking on the national problem. This is the view of Robinson *et al* who, reflecting upon the breakdown of minorities protection in the inter-war period from the vantage-point of World War II, wrote:

Perhaps the most drastic repudiation of the purpose of the Minorities Treaties was the bilateral agreement between Greece and Turkey.... This agreement, by providing for the *compulsory* exchange of Greek and Turkish populations, was in flagrant contradiction to the basic principle of international protection for minorities. Nevertheless, it carried the full sanction of the League.<sup>13</sup>

Yet, even if we accept that the *Greco-Turkish Exchange Convention* amounted to a ‘repudiation of the purpose of the Minorities Treaties’, it by no means follows that it should be left out of our international legal history of self-determination. In the first place, there is clearly no denying the international law character of the 1923 *Greco-Turkish Exchange Convention*. As Robinson *et al* acknowledge, in contrast to later ‘repudiations’ of the Minorities Treaties, such as that by Poland in 1934, the *Convention* was not simply ‘a bilateral agreement between Greece and Turkey’ – the act of disaffected States in defiance of a by-now weakened League of Nations – but was rather negotiated at the invitation of the Great Powers, sanctioned by the League of Nations, and constituted an adjunct to the final piece in the puzzle of postponed World War I peacemaking.<sup>14</sup> Indeed, the international legal character of the *Greco-Turkish Exchange Convention* was expressly affirmed by the Permanent Court of International Justice in its Advisory Opinion on the *Exchange of Greek and Turkish Populations* in 1925.<sup>15</sup>

Moreover, like the *Greco-Bulgarian Convention*, the *Greco-Turkish Exchange Convention* was endowed with all the international legal trappings of its day - a Mixed Commission with quasi-judicial powers and procedures, whose proceedings led to an Advisory Opinion from the Permanent Court of International Justice.<sup>16</sup> To embrace the

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<sup>13</sup> Robinson *et al*, *Were the Minorities Treaties a Failure?* (New York: Institute of Jewish Affairs of the American Jewish Congress and the World Jewish Congress, 1943) at 57.

<sup>14</sup> *Greco-Turkish Exchange Convention supra*, Article 19; *Treaty of Lausanne* 1923, XXVIII L.N.T.S. (1924) 11, Article 142.

<sup>15</sup> *Advisory Opinion No. 10, Exchange of Greek and Turkish Populations* 1925 P.C.I.J. Ser. B. No.10. (1925) at 17-18.

<sup>16</sup> *Supra*.

Minorities Treaties as a legal innovation and the forerunner (however flawed) to a universal law of minorities, but disown the *Greco-Turkish Exchange Convention* as some illegitimate offspring of political/economic/agricultural pragmatism, would be to engage in so much historical cherry picking.

Nor can the self-determination enthusiast, like the politicians at Lausanne, disavow the ‘paternity’ of the population exchange solution.<sup>17</sup> As the population transfer and minority rights scholarship makes clear, while the *Greco-Turkish Exchange Convention* may have been seen, rightly, as a disappointing departure from the dominant model of the minority rights solution adopted at Paris, it is nonetheless acknowledged as the direct descendant of Professor Georges Montandon’s proposal, submitted to the 1916 *Conférence des Nationalités*, to carry out mass population transfers as a solution to the minorities problem and as a complement to the principle of national self-determination. This lineage from war-time population transfer proposals to post-war population transfer practice is made clear by Naimark:

After the Balkan wars and the nationality struggles of World War I, academics and politicians of various stripes who looked at the problems of minority populations sometimes came to the same conclusion as Montandon: that population transfer was the only way to defuse antagonistic minority issues.<sup>18</sup>

That the politicians at Lausanne viewed population transfer, not only as a *post-facto*, pragmatic response to a humanitarian, economic or agricultural crisis but also as providing a ‘constructive’ solution to the minority problem is borne out by both the text and *travaux* of the 1923 *Greco-Turkish Exchange Convention*. In the first place, the *Convention* did not only legitimise *past* expulsions (the one million Greek refugees from Turkey), but sanctioned the *future* transfer of the remaining minorities. In other words, the *Greco-Turkish Exchange Convention* applied to two quite distinct groups: first, to the refugees who had already left the Ottoman Empire/Greece since the start of the Balkan wars of 1912 and who were forthwith, under its terms, prohibited from returning; and secondly (subject to those exempted under Article 2) to the remaining national minorities – 200,000 Greeks in Anatolia and the entire Moslem population of Greece (approximately 350,000). Indeed, it was this latter aspect of the *Convention* – the decision to remove the remaining minorities – that sparked particular public outcry and the deluge of petitions and protests to the Conference plenipotentiaries.

Secondly, a review of the Lausanne Conference proceedings reveals that, contrary to Robinson *et al* who, as we saw earlier, viewed population exchange as *contradictory* to minority rights, the Conference plenipotentiaries rather saw population exchange and minority rights as *complementary* tools for tackling the minority problem.<sup>19</sup> This is clear from Lord Curzon’s statement to the Lausanne Conference’s Sub-commission on

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<sup>17</sup> S. Ladas, *The Exchange of Minorities : Bulgaria, Greece and Turkey* ( New York: The MacMillan Company: 1932) at 336.

<sup>18</sup> Naimark, *Fires of Hatred op. cit.* at 18.

<sup>19</sup> I am borrowing this contradictory/complementary framework of analysis from N. Berman, “‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law’ 106 *Harv. L.R.* (1992-1993) 1792 at 1821-1824.

Minorities in which he outlined population transfer *and* minority rights as the two options available for tackling the problem of the Turkish minority in Western Thrace:

In Europe the greater part, if not the whole, of the Turkish population in Greek territory, with the exception of Western Thrace, will cease to be a minority population because they will return to Turkey. They are estimated about 350,000 persons. The exception, as I have said, will be the 124,000 Turks in Western Thrace whom the Greek Government is prepared to leave alone if the Greek population of Constantinople is also left undisturbed. *In that case the minority provisions will apply to the Turkish population.* If no such arrangement can be arrived at, *then they also will be turned out and there will be no Turkish population in Western Thrace for whom provision will be required...*<sup>20</sup> (emphasis added)

From this it becomes evident that whereas the Committee on New States at the Paris Peace Conference 1919 viewed voluntary population transfer as *supplementary* to minority rights, conversely, the politicians at Lausanne viewed minority rights as supplementary to compulsory population exchange: first, they would reach agreement on the scope of the population exchange; then, they would legislate minority protection for those not to be ‘turned out’.<sup>21</sup> This temporal aspect of the relationship between population exchange and minority rights can be seen further from Lord Curzon’s response to the Turkish Minister of Foreign Affairs, Ismet Pasha’s argument that the problem of minorities could be solved by the exchange of populations:

Ismet Pasha said that the question [of minorities] could best be solved by the exchange of populations. That was not so. They would never solve the question if they approached it in that spirit. Even when every possible exchange of population had been made, some minorities would always remain behind.<sup>22</sup>

It can be seen then that compulsory population exchange at Lausanne was viewed as both contradicting (Robinson *et al*) and complementing (Curzon *et al*) minority rights. Viewed from a self-determination perspective, however, the adoption of the principle of compulsory population transfer appears solely contradictory. To uproot entire national groups on the basis of compulsion rather than consent was surely at odds with such Wilsonian self-determination slogans as, ‘no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property’. This view of compulsory transfer as something both separate from, and contradictory to, the fledgling project of self-determination underlies Antonio Cassese’s passing reference to population exchange at Lausanne in his historical analysis of the aftermath of World War I. Having noted that the Allies had claimed that the primary purpose of their war effort was ‘the realization of the principle of nationality and of the right of peoples to decide their own destiny’,<sup>23</sup> he goes on to lament the lack of plebiscites in the post-World War I territorial settlement, *inter alia*, in the following terms:

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<sup>20</sup> *Minutes of the Thirteenth Meeting of the Territorial and Military Commission, December 12<sup>th</sup>, 1922, Lausanne Conference*, at 177.

<sup>21</sup> Lord Curzon, *ibid.*

<sup>22</sup> *Ibid* at 183.

<sup>23</sup> Cassese, *Self-Determination of Peoples op. cit.* at 24.

Similar cessions of territories without any prior consultation with the populations concerned were provided for in the Treaty of Neuilly, of 27 November 1919, with Bulgaria, whereas the Treaty of Lausanne with the Ottoman Empire, of 24 July 1923...no longer envisaged an independent State for the Armenians and large autonomy for Kurdistan, but merely made provision for an exchange of populations (the Greeks living in Turkey were to move to Greece and the Turks settled in Greece were to be transferred to Turkey)...Thus, on the whole, self-determination was deemed irrelevant where the people's will was certain to run counter to the victors' geopolitical, economic, and strategic interests.<sup>24</sup>

For Cassese, the compulsory population exchange solution pioneered at Lausanne is but further confirmation of the post-World War I failure to apply the principle of self-determination. The problem with this analysis is that it assumes that self-determination in this period was synonymous with *subjective* self-determination – the right of a people to a free choice. However, as Nathaniel Berman has shown, Wilsonian thinking on self-determination 'vacillated' between subjective and objective self-determination – between the plebiscite principle and the principle of nationality. Indeed, Cassese himself expressly recognises these two strands of the nascent self-determination principle when he refers to the claim made by 'most of the Allies' that the 'primary purpose of their war effort was the realization of the principle of nationality *and* of the right of peoples to decide their own destiny'. Deploying this framework, the shift from voluntary emigration in 1919, to compulsory exchange in 1923 can be recast, not, as Cassese suggests, away from self-determination altogether, but rather from its subjective to its objective form – from the principle of free choice back to the principle of nationality.

That the population exchange solution was viewed by the politicians at Lausanne as a companion to the principle of nationality is borne out by the Conference proceedings. Nansen's opening statement to the Lausanne Conference's Territorial and Military Commission on 'the proposed exchange of the Greek and Turkish minorities' makes explicit the underlying objective of separating the nationalities in Turkey and Greece:

I know that the Governments of the Great Powers are in favour of this proposal because they believe that to *unmix the populations* of the Near East will tend to secure the true pacification of the Near East....<sup>25</sup> (emphasis added)

Indeed, as the Minutes make clear, the Conference's decision to adopt the principle of *compulsory* rather than *voluntary* transfer was expressly justified on the basis of the benefits, not of short-term economic or agricultural pragmatism, but of long-term national homogeneity:

Lord Curzon wished to say once more ... that he felt sure all the delegates ... viewed with abhorrence and almost with dismay the principle of compulsory exchange... the conference had only yielded to the demand that the exchange should be compulsory because all those who had studied the matter most closely seemed to agree that the suffering entailed, great as it must be, *would be repaid by the*

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<sup>24</sup> *Ibid* at 25.

<sup>25</sup> *Statement of Dr Nansen, Minutes of the Eighth Meeting of the Territorial and Military Commission, December 1, 1922, Lausanne Conference, para. 2.*

*advantages which would ultimately accrue to both countries from a greater homogeneity of population and from the removal of old and deep-rooted causes of quarrel.*<sup>26</sup> (emphasis added).

Ladas's description of the logistics of exchange under the Mixed Commission's plan of evacuation similarly makes clear the *national* character of the exchange:

According to the plan of evacuation, the persons subject to exchange were required to leave their homes at the time appointed for each district and concentrate in the port where they were to board the steamer for their transportation to the country to which they were *nationally akin*.<sup>27</sup> (emphasis added)

On these accounts, the adoption of the principle of compulsory population transfer at Lausanne was a dismal solution to the minority problem and a regrettable but necessary post-script to the post-World War I project of reconfiguring Europe along national lines.

## *ii. The World War II Debates*

In contrast to World War I, the political debates and speeches of World War II barely feature in the standard account. So, while the student of self-determination could not but fail to be aware of the wartime speeches of Woodrow Wilson – the January 'Fourteen Points', the February 'Four Principles' – there is scarcely a mention of the equivalent speeches or debates during World War II. Instead, after dealing with World War I, narrators of the standard account – James Crawford, Thomas Franck, Hurst Hannum, Rosalyn Higgins – simply pass over the World War II years straight to varying degrees of discussion of the debates over the drafting, interpretation or status of provisions in the United Nations Charter. In the standard account, the only statement referred to with any regularity as an indication of the Allies' World War II aims in relation to self-determination, is the Atlantic Charter of 1941. Cassese, for example, dedicates two paragraphs to self-determination developments in the World War II years as an introduction to his discussion of the drafting of the United Nations Charter in 1945, and notes:

The Atlantic Charter drafted by President F. D. Roosevelt and Winston Churchill, and made public on 14 August 1941, proclaimed self-determination as a general standard governing territorial changes, as well as a principle concerning the free choice of rulers in every sovereign State (internal self-determination).<sup>28</sup>

If, however, we turn to other disciplinary accounts – namely the population transfer and minority rights literatures – we discover an abundance of World War II thinking and writing – debates, plans, conferences, pamphlets, policy statements, speeches, manifestos, committee reports – on the national question and its natural corollary, the problem of

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<sup>26</sup> Lord Curzon, *Minutes of the Twenty-third Meeting of the Territorial and Military Commission*, January 27<sup>th</sup>, 1923, *Lausanne Conference supra* 406 at 412.

<sup>27</sup> Ladas, *The Exchange of Minorities op. cit.* at 421-422.

<sup>28</sup> Cassese, *Self-determination of Peoples op. cit.* at 37.



national minorities. What is troubling about this discovery is not simply that it shakes our faith in our foundational narrative that these debates could exist and yet be omitted from our disciplinary history, but rather that, once reviewed, their content is impossible to reconcile with our international law view of history – that is, that the shift from World War I to World War II witnessed a shift from minority rights to human rights as the disciplinary companion to the principle of self-determination. Instead, these sources reveal that, while there was indeed widespread disillusionment with the League of Nations’ minority rights project, the preferred response – of professors, politicians and peacemakers alike – was not so much to move from minority rights to individual human rights as to (re)move the minorities themselves. The silence of the self-determination account on these crucial war-time debates is simply unfathomable.

Indeed, the dissonance between the self-determination account of the shift between World War I and World War II (*minority-rights-to-human-rights*) and the population transfer and minority rights literatures’ account (*minority-rights-to-population-transfer*) is so puzzling as to bear further illustration. Consider James Crawford’s analysis that the post-World War II shift away from minority rights in favour of human rights was based partly on the assumption that, ‘if you recognize general human rights, *the problems of minorities will thereby be resolved*’.<sup>29</sup> Compare Crawford’s statement with Inis Claude’s analysis of World War II thought on solutions to the minority problem from his seminal work on minority rights:

The idea of the transfer of populations was the dominant element in wartime thought regarding approaches to a solution of the minority problem. It was highly controversial ... Yet, ... the idea of transfer ... assumed far greater importance during the Second World War than ever before ...<sup>30</sup>

Or recall David Wippman’s historical appraisal that after World War II, ‘interest in the recognition and protection of minorities as collectivities declined in favour of the protection of individuals through adoption of universal human rights norms’.<sup>31</sup> After attributing this trend to the ‘increasing dominance of political liberalism and a lingering hostility to claims made by Nazi Germany’, he continues:

[T]he adoption of the Universal Declaration of Human Rights in 1948 reflected the prevailing belief in individual rights and equality as a sufficient basis for the protection of the legitimate interests of members of minority groups.<sup>32</sup>

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<sup>29</sup> Emphasis added. J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’ in P. Alston (ed.), *Peoples’ Rights* (Oxford: Oxford University Press, 2001) at 15.

<sup>30</sup> I. Claude, *National Minorities: An International Problem* (New York: Greenwood Press, 1969 [1955]) at 93-94 (hereinafter, *National Minorities*).

<sup>31</sup> D. Wippman, ‘Introduction: Ethnic Claims and International Law’ in D. Wippman (ed.), *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998) at 13.

<sup>32</sup> *Ibid.*

Contrast Wippman's appraisal with the conclusion offered by a recent assessment of the World War II years by a historian of Polish population transfers:

At the time [of World War I] it was widely believed that mass resettlement in the Balkans, justified by particular circumstances, could not serve as a model for solving problems between various nationalities in other parts of Europe. *But World War II revived the issue of population transfers, and once again forced migration seemed the proper solution to the question of national minorities within newly created state borders.*<sup>33</sup> (emphasis added)

That a paradigmatic shift in thinking about solutions to the minority problem occurred between World War I and World War II – from minority *rights* to minority *transfers* – and that this shift, while radical, was not confined to radicals but was rather part of mainstream political and academic debate is best exemplified by the inter-war conversion of that 'great liberal statesman' of the early twentieth century, Eduard Beneš. In the immediate post-World War I era, Beneš was a leading public proponent of minority rights. For example, in December 1925, he delivered a public lecture at King's College, London, to mark the ten-year anniversary of the then Professor Masaryk's inaugural lecture in which the 'virtually unknown' idea of Czechoslovak independence 'had first been presented to the learned world'.<sup>34</sup> On reflecting on the fate and record of the small nations after World War I, Beneš concluded that the principles of democracy had 'in the main' triumphed and that the 'new small *national* states' in Central Europe represented the realisation of the Allies' political philosophy. After rehearsing the problems of the League of Nations' minorities system from the perspective of both the minorities and the minority states, he nevertheless went on to endorse the League's minority policy in the following terms:

The carrying out of a reasonable and just minority policy is not therefore only a question as to whether we wish or do not wish to be true to the ideas in the name of which we fought for our own freedom and to the minority treaties which we have signed; it is also a matter of our own interests from the standpoint of internal and foreign policy.<sup>35</sup>

By World War II, Beneš's views on minorities and the possibility of accommodation within the new nation-states had undergone a radical sea change. As well-documented in the population transfer and minority rights literatures, and as evidenced in numerous war-time speeches, interviews, lectures, memos, and journal articles, Beneš, along with a number of other prominent politicians and academics (e.g., Winston Churchill, Franklin

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<sup>33</sup> K. Kersten, 'Forced Migration and the Transformation of Polish Society in the Postwar Period' in P. Ther and A. Siljak (eds.), *Redrawing Nations: Ethnic Cleansing in East-Central Europe, 1944-1948* (Lanham Md.: Rowman and Littlefield Publishers Inc., 2001) at 75.

<sup>34</sup> E. Beneš, 'The Problem of the Small Nations After the World War' (2 December, 1925, King's College) (On file with author).

<sup>35</sup> *Ibid* at 20.

Roosevelt, Sumner Welles, Herbert Hoover, Harold Butler, the British Labour Party, and Anthony Eden, to name but a few) had been converted into one of the leading – although some suggest reluctant– proponents of population transfer, and a vocal opponent of any return to the League of Nations’ minority system. So, for example, in 1941, he published an article in the leading United Kingdom magazine, *The Nineteenth Century and After*, in which, in marked contrast to his public endorsement of minority rights at King’s College in 1925, he openly canvassed the principle of population transfer as the solution to the minority problem in Europe:

The problem of national minorities will have to be considered far more systematically and radically than it was after the last war. I accept the principle of the transfer of populations.<sup>36</sup>

What is of interest to the self-determination genealogist is that this seismic shift in World War II thinking, from minority rights to population transfer, is generally attributed to two failures of the post-World War I policy on the national question. On the one hand, and most obviously, the turn to transfer was a direct response to the breakdown of the League of Nations’ minority system. As de Zayas puts it:

With the fresh memory of the failure of the League’s minority system in their minds, the planners of post-war Europe proposed to solve the problem of minorities not by redrawing frontiers nor by attempting another guarantee of minority rights, but rather by eradicating the minorities themselves.<sup>37</sup>

On the other hand, the rise of population transfer thinking is also explained as a response to the inability of the World War I peacemakers to redraw the boundaries of Europe in accordance with the principle of nationality:

[B]ecause it is patently impossible for any peace settlement to create a European order in which all states are nationally homogeneous, the opinion is gaining momentum that in several danger zones the answer to the territorial and minorities problems must be sought in an ethnic shifting of the minorities. It is felt that these persons should be resettled where they can become a part of larger ethnic groups whose language they speak, to whose customs they have the least antagonism, and to whom, spiritually, they owe allegiance.<sup>38</sup>

For its World War II proponents then, population transfer represented both a departure from, and a continuation of, World War I policy on the nationality question: a *departure* from the League of Nations’ policy of minority rights but a *continuation* of the World

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<sup>36</sup> E. Beneš, ‘The New Order In Europe’ CXXX *The Nineteenth Century and After* (1941) 150 at 154.

<sup>37</sup> A. de Zayas, *Nemesis at Potsdam* (London: Routledge, 1977).

<sup>38</sup> J.B. Schechtman, *European Population Transfers 1939-1945* (New York: Oxford University Press, 1946) at 454.

War I project of reconfiguring Europe along national lines. The preferred model for this next round of European peacemaking was not Paris 1919, with its plebiscites and minority rights, but Lausanne 1923 and the principle of compulsory population transfer. The 'success' of Lausanne was constantly invoked:

Populations were exchanged, successfully and on a large scale, between Greece and Turkey after the war of 1922.... If the problem is carefully considered and wide measures are adopted in good time, the transfer can be made amicably under decent human conditions, under international control and with international support.<sup>39</sup>

Lord Curzon had forecast, and doubtless feared, that it was by its treatment of minorities that the Lausanne Conference would be judged. He need not have worried. Viewed from the perspective of a post-Munich, war-torn Europe, the majority verdict on Lausanne was bound to be favourable. Next time, so the new thinking went, there would be no 'compensation prizes'. These World War II transferists displayed little of the angst, anxiety or ambivalence that afflicted the politicians at Lausanne. They spoke as Europe's physicians, diagnosing national minorities as 'cancers' to be 'cured' by 'clean cuts' and 'surgical operations'. Without what Beneš termed, 'the grim necessity of population-transfers'[sic], the prognosis for Europe was endless war.

I am not, of course, suggesting that the World War II revival in population transfer thinking amounted to a *consensus* that Europe's minorities should be transferred. On the contrary, the proposals to sanction and carry out population transfers of national minorities were highly controversial and contentious. As extensively documented by Schechtman, for its detractors, the very idea of transfer was vociferously denounced as, *inter alia*, 'anti-human rights', 'anti-peace', 'inhumane', 'nationalistic', 'criminal', 'catastrophic', 'dangerous', 'unnecessary' and 'incompatible with civilisation'. In a debate in the New York Herald Tribune in February 1944, population exchange was denounced as 'degrading man to an appurtenance of the race to which he is supposed to belong'.<sup>40</sup> Indeed, even within the pro-transfer camp, there was a distinct lack of consensus over such divisive issues as whether transfers should discriminate between loyal and disloyal members of minorities or, in a repeat of the debates from World War I, whether the transfers should be voluntary or compulsory. Nevertheless, the lack of consensus on either the principle or the practice of population transfer does not detract from the fact that the World War II years witnessed a radical shift in thinking away from minority rights in favour of population transfer as a solution to the European minority problem and as a complement to the principle of nationality.

Nor am I suggesting that the standard account of the shift in thinking from minority rights to human rights is a false history. My argument is not that the standard account of the

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<sup>39</sup> Beneš, 'The New Order in Europe' *loc. cit.* at 154.

<sup>40</sup> E. Hula, 'Exchange of Populations', *New York Herald Tribune*, 11 February, 1944, quoted in Schechtman, *European Population Transfers 1939-1945 op. cit.* at 460.

post-World War II abandonment of minority rights in favour of individual human rights is in error, but rather that it is incomplete. It tells only the ‘happier’ half of the story. Just as we saw earlier that *in addition* to minority rights and plebiscites, population transfer played a role in post-World War I peacemaking at Lausanne, so we find in revisiting World War II that *in addition* to the shift in thinking away from minority rights in favour of individual human rights, there occurred a parallel shift – a positive surge – in support of a *major* role for population transfer. Indeed, that World War II also saw a shift in thinking in favour of individual human rights is routinely recorded in the minority rights and population transfer literatures that document the parallel trend in favour of population transfer. For example, Claude, in his work on minority rights, is at one with the self-determination standard account when he writes that:

We have found that the idea of an international bill of rights received a great deal of emphasis in both official and unofficial circles during the Second World War. In many cases, the assumption was made, implicitly or explicitly, that the guarantee of rights to all individuals would obviate the need for the special protection of minorities.<sup>41</sup>

What becomes clear then is that contrary to the standard account’s tale of a smooth transition between World War I and World War II, where selective, group minority rights were replaced by universal, individual human rights, World War II is better seen as a deeply schizophrenic moment where two wildly different solutions to the minorities problem – individual human rights *and* population transfer – were simultaneously winning out in the debates of the day. Indeed, it is a measure of how deeply schizophrenic this moment was that these two *prima facie* incompatible solutions were put forward not only by opposing camps but by the very same people. For example, Eduard Beneš and Sumner Welles, both of whom were leading proponents of population transfer, are also routinely cited as leading figures in the school of thought that supported the idea of individual human rights over distinct minority rights. So, for example, in an article published in *Foreign Affairs* in 1942,<sup>42</sup> Beneš set forth as two of his three principles for solving minority problems after World War II, population transfer *and* individual human rights:

2. *It will be necessary after this war to carry out a transfer of populations on a very much larger scale than after the last war. This must be done in as humane a manner as possible, internationally organized and internationally financed.*

3. *The protection of minorities in the future should consist primarily in the defense of human democratic rights and not of national rights... On the other hand, it is necessary to facilitate emigration from one state to another, so that if national minorities do not want to live in a foreign state they may gradually unite with their own people in neighbouring states.*<sup>43</sup> (emphasis added)

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<sup>41</sup> Claude, *National Minorities op. cit.* at 77.

<sup>42</sup> E. Beneš, ‘The Organization of Postwar Europe’ 20 *Foreign Affairs* (1941-1942) at 226.

<sup>43</sup> *Ibid* at 238-239.

It is evident then that far from regarding population transfer and human rights as *contradictory*, population transfer proselytisers such as Beneš viewed them rather as *complementary*. This should be familiar. We have already seen that the politicians at the Lausanne Conference viewed population transfer and minority rights as two complementary solutions to the minority's problem. First they would agree a *population transfer* of (most of) the Greek and Turkish minorities; then there would be *minority rights* for those who remained. The temporal aspect of the relationship – first population transfer, then minority rights – is confirmed by the early conclusion of the *Greco-Turkish Exchange Convention* in January 1923, six months ahead of the final Treaty of Peace signed at Lausanne on 24<sup>th</sup> July, 1923. In a similar vein then, Beneš *et al* conceived of the relationship between population transfer and individual human rights in temporal (and so, perfectly complementary) terms. First, there would be a transfer of minorities; then there would be *individual human rights* (and not minority rights) for those who remained. This temporal interpretation of the relationship between population transfer and human rights finds support in Macartney's interpretation of Beneš's population transfer proposal published in *Foreign Affairs* in 1942:

In this and subsequent utterances he let it be seen that his solution was to expel (he called it "transfer") all or most of the minorities from the State of which he was President. This apart, the protection should consist *in the future*, "primarily in the defence of human rights and not of national rights."<sup>44</sup>(emphasis added)

The extent to which the World War II proposals of Beneš and his co-transferists translated into post-World War II population transfer practice we shall now see.

### *iii. The Potsdam Tripartite Conference 1945*

Whatever the San Francisco promise of human rights for all, back in Europe it was abundantly clear that its fulfilment was to be postponed until after the messy business of the post-World War II territorial settlement was complete. Within only weeks of the adoption of the United Nations Charter with its lofty ideals, its human rights sensibility, the three Great Powers (the Soviet Union, United Kingdom and the United States) meeting at Potsdam acceded to the requests of Czechoslovakia and Poland and authorised the compulsory transfer of German minorities in Czechoslovakia, Poland and Hungary to Germany. Article XII of the *Protocol of the Proceedings of the Berlin Conference* ('the Potsdam Protocol') provided that:

The Three Governments, having considered the question in all its aspects, recognise that the transfer to Germany of German populations or elements thereof, remaining in Poland, Czechoslovakia, and Hungary will have to be undertaken. They agree that

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<sup>44</sup> C.A. Macartney, *National States and National Minorities* (New York: Russell & Russell, 2<sup>nd</sup> ed., 1968), *Epilogue* at 505.

any transfers that take place should be effected in an orderly and humane manner....<sup>45</sup>

Of course, as is routinely noted in the literature, the expulsion of many of the Germans (at least from Czechoslovakia and Poland) preceded the Potsdam Protocol. Preparations for the expulsions are generally agreed to date back to September 1944. In what has become known as the ‘wild’ phase of the transfer – May 1945 to August 1945 – historians estimate that five million Germans were expelled unilaterally by Czechoslovakia and Poland. So, in a situation reminiscent of the Lausanne Conference of 1922-1923, the delegates at Potsdam were faced with a *fait accompli* – this time, of the expulsion of millions of ethnic, linguistic Germans from their erstwhile ancestral homelands. Indeed, that the expulsions preceded the Potsdam Protocol is clear from its (unsuccessful) attempt to impose a moratorium. Under Article XII, the Czechoslovak Government and the Polish Provisional Government were requested to ‘suspend further expulsions’ pending examination by the Governments of a report on further transfers to be prepared by the Allied Control Council in Germany.<sup>46</sup>

Yet, like the Lausanne Convention, the *Potsdam Protocol* did not only lend retrospective legitimacy to a violent *fait accompli*. It sanctioned, under international supervision, the expulsion of the remnant of the German minorities. On November 20<sup>th</sup> 1945, in preparation for this ‘organised’, post-Potsdam phase of the expulsions, the Allied Control Council in Germany adopted a resolution setting forth a detailed plan and timetable for the transfer of a further 6,650,000 Germans from Poland, Czechoslovakia and Hungary.<sup>47</sup> In total, historians estimate that Potsdam legitimised – whether retrospectively or prospectively – the transfer of thirteen million Germans from Eastern and Central Europe. And whatever the Tripartite Powers’ injunction that the transfer be ‘effected in an orderly and humane manner’, hundreds of thousands of Germans are estimated to have died in the process.<sup>48</sup>

Perhaps, however, it is necessary to make a pre-emptive strike against a likely objection to the argument being pursued here – that the acceptance of the principle of compulsory transfer at Potsdam unsettles the standard account of 1945 as a human rights highpoint in the self-determination story. Surely, it could be argued that the principle of compulsory transfer adopted at Potsdam was deployed, not as a response to the European minorities problem generally, but rather as a response to the problem of a particular minority – ethnic Germans. In other words, the German minorities were expelled not for being *minorities* but for being *Germans*. Accordingly, international acceptance of the principle

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<sup>45</sup> *Protocol of the Proceedings of the Berlin Conference 2<sup>nd</sup> August, 1945, Presented by the Secretary of State for Foreign Affairs to Parliament by Command of His Majesty*, Miscellaneous No. 6 (1947) Cmd. 7087, Article XII (entitled ‘Orderly Transfer of Germans’).

<sup>46</sup> Article XII, para. 3.

<sup>47</sup> The Allied Control Council authorised the transfer of the 6,650,000 Germans as follows: 3,500,000 from Poland; 2,500,000 from Czechoslovakia (to the US and Soviet Zones); 500,000 from Hungary; and 150,000 from Austria.

<sup>48</sup> The statistics are disputed. Some sources put the number of deaths at two million. M. Marrus, *The Unwanted: European Refugees in the Twentieth Century* (New York: Oxford University Press, 1985) at 330.

of population transfer as a solution at Potsdam should be understood, not in some wider context of the national question, but rather as a punitive or preventative response to the particular problem of German perfidy.

Indeed this dual justification – punishment for the German minorities’ past; security for the host-state’s future – is ubiquitous in the wartime and post-World War II calls to transfer the Germans. So, for example, a pamphlet published in Czechoslovakia entitled, *Why We Want to Transfer the Germans*, explains:

When we speak here of the *guilt of the German nation* we must include in the framework of that nation, not only the main stock of the Germans concentrated in the German Reich but also *all the elements and fragments of the nation domiciled outside the Reich*.<sup>49</sup> (emphasis added)

It goes on to argue:

Czechs and Slovaks liberated after six years of German yoke, raise one unanimous cry: from Czechoslovakia they call: ‘There will not be, *there cannot be a sure future for the Czech lands and Czech peoples* nor will there be peace in Central Europe if the Germans are not cleared out of the Czech territories and removed to the Reich homeland.’<sup>50</sup> (emphasis added)

Similarly, as regards Poland, Schechtman cites a *Polish Committee for National Liberation* broadcast of 28 September 1944, which recalled:

[T]he infamous role played by the Germans in Poland during the German invasion and under the occupation...after such terrible experiences there can be no question of the German remaining in Poland after the war...<sup>51</sup>

On these accounts, the Great Powers’ endorsement of the principle of compulsory transfer at Potsdam can be explained as a politically-motivated, *post-facto* acceptance of unilateral measures already initiated by victim States as retribution for, and future security against, German treachery. In other words, far from contradicting the standard account’s tale of the post-World War II shift from minority rights to a new order based on individual human rights, Potsdam either contradicted, or constituted an exception to, the new international legal order.

And it is this *politics-not-law* view of Potsdam that dominates international law retrospectives. The report on population transfers presented by M. Giorgio Balladore Pallieri at the Sienna Session of the *Institut de Droit International* in 1952 explained the ostensible contradiction between the decision taken at Potsdam and the post-World War II penchant for human rights in the following terms:

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<sup>49</sup> K. Sedivy, *Why We Want To Transfer the Germans* (Prague: Orbis, 1946).

<sup>50</sup> *Ibid.*

<sup>51</sup> Quoted in Schechtman, *European Population Transfers 1939-1945 op. cit.* at 453.



Mais il est assez évident que la décision de Potsdam concerne un cas particulier et exceptionnel. *On n'a pas appliqué aux Allemands, au lendemain de la dernière guerre, les principes généraux de la communauté internationale.* Il fallait réparer les torts qu'ils avaient causés et, à cette fin, il fallait faire usage contraire eux des mêmes méthodes qu'ils avaient employées. On ne pourrait donc raisonner sur cet exemple et en déduire des conséquences applicables à d'autres cas.<sup>52</sup> (emphasis added)

On this account, the German minorities were 'outlaws', exceptionally denied the humanitarian benefits of the new international legal order.

On the other hand, international lawyers in the human rights advocacy strand of scholarship tend to characterise Potsdam, not as an exception to the new legal order but rather as its 'nemesis'. The leading example of this genre of scholarship is Alfred de Zayas whose body of work on the expulsion of the East European Germans sets out to show that what happened at Potsdam – brute politics – was contrary to the embryonic post-1945 San Francisco and Nuremberg human rights and international criminal law. As such:

It may be safely concluded that the Potsdam Agreement did not and could not make the transfer of some 15 million Germans legal. The Potsdam Agreement thus provided a *political precedent for population transfers not a legal precedent*.<sup>53</sup> (emphasis added)

Yet, however comforting for the 'moral hygiene' of the self-determination story, it is unlikely that any one of these three strands of argument – 1) punitive or preventative, not national self-determination; 2) Germans, not minorities; 3) politics, not law – is sufficient to sustain an objection to my argument that Potsdam has been improperly omitted from the international law history of self-determination. In the first place, while the dual desire for *punishment-for-the-past* and *security-for-the-future* undoubtedly fuelled the programme of transfers approved at Potsdam this neither precluded, nor indeed was entirely distinct from, the desire for national self-determination. Early plans to distinguish between loyal and disloyal Germans (manifested in the award of the so-called 'Anti-Fascist' certificates) were soon abandoned in favour of the rhetoric of the collective guilt of the German *nation*. Indeed, for population transfer purists such as Schechtman, early transfer plans of the Czech government-in-exile, which sought to distinguish between guilty and innocent Germans, the loyal and the disloyal, were contrary to the 'intrinsic meaning' of transfer.

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<sup>52</sup> L'Institut de Droit International, 'Les transferts internationaux de populations' (Quatrième Commission) *Rapport présenté par M. Giorgio Balladore Pallieri*, 44 II *Annuaire de L'Institut de Droit International*, Session de Sienne (1952) 138-199 at 145-146.

<sup>53</sup> A.M. de Zayas, 'International Law and Mass Population Transfers' 16 *Harv. Int'l L.J.* (1975) 207 at 242 (emphasis added).

The new orthodoxy abroad was that peace would be secured only in a Europe organised in accordance with the principle of nationality. This gave rise to a natural alliance between the desire for a *secure* state and the desire for a *nation* state. This post-World War II tendency to associate minorities with treachery can be seen in one of Beneš's post-Potsdam Presidential Decrees (No. 5/1945), which, tellingly, juxtaposes in its list of 'unreliable' elements in Czech society: 'Germans, Magyars, traitors and collaborators'.<sup>54</sup> A similar belief in the nexus between insecurity and heterogeneous populations underlies Winston Churchill's speech to the House of Commons on the Polish-Russo border in December 1944, in which he endorsed the 'total expulsion of the Germans', declaring that 'there will be no mixture of populations to cause endless trouble',<sup>55</sup> and former United States President, Herbert Hoover's calculation that transferring minorities was less of a hardship than the 'constant recurrence of war'.<sup>56</sup> As Claude explains in his discussion of population transfer:

The case for state security merged, almost imperceptibly, with the case for realization of the national aspirations of the majority people. The ideal of the complete identification of nation and state was not dead. Ethnic homogeneity frequently appeared as a value in itself; the majority nation had the moral right to a state which would not be cluttered up with "alien" groups.<sup>57</sup>

That this identification of the secure state with the nation-state led the Allies to endorse the principle of compulsory population transfer as a means of implementing the principle of nationality can be seen from the following extract from Beneš's *Memoirs*:

[T]he British government had given careful consideration to our attitude in the matter of the transfer of minority populations ... [and] did not intend to oppose the principle to transfer the minority population from Czechoslovakia in an endeavour to make Czechoslovakia *as homogenous a country as possible from the standpoint of nationality*.<sup>58</sup> (emphasis added)

Secondly, while it is true that only the transfer of German minorities was sanctioned at Potsdam, an examination of the speeches, debates and news-coverage reveals that far from being regarded as some early population transfer 'Nuremberg' (*victors'-justice-against-Germans*), Potsdam was generally viewed through the wider historical lens of the European minorities problem. On the one hand, Article XII of the *Potsdam Protocol* was itself routinely justified (partly) on the basis that it contributed to a solution of the minority problem in Europe. This, for example, was the view of the United States House of Representatives Special Sub-Committee of the Committee on the Judiciary, which, reporting in March 1950, expressed the opinion that:

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<sup>54</sup> Presidential Decree 5/1945 quoted in B. Frommer, 'To Prosecute or to Expel? Czechoslovak Retribution and the "Transfer" of Sudeten Germans' in Ther & Siljak (eds.), *op. cit.* 221 at 222.

<sup>55</sup> *Speech on the Russo-Polish Border*, the House of Commons, December 15, 1944 at 1484.

<sup>56</sup> H. Hoover and H. Gibson, *The Problems of Lasting Peace* (Garden City: NY: Doubleday, Doran, 1942) at 233.

<sup>57</sup> Claude, *National Minorities op. cit.* at 98.

<sup>58</sup> E. Beneš, *Memoirs of Dr Eduard Beneš: From Munich to New War and New Victory* (London: George Allen Unwin Ltd., 1954) at 206.

Actually, this subcommittee is convinced that Article XIII [sic] of the Potsdam agreement constituted ... one more international effort to find a solution for the problem of national minorities, ... which is ever-pressing in heterogeneous states.<sup>59</sup>

On the other hand, Potsdam is also routinely singled out in the population transfer and minority rights literatures as signalling a paradigmatic shift in the international community's approach to national minorities generally. As Claude argues, its real significance was not that it legitimised the expulsion of so many million Germans *per se*, but rather that it constituted international acceptance of the principle of compulsory population transfer, a policy which had hitherto been carried out only on a unilateral or bilateral basis by the expelling States. In short, after Potsdam, population transfer became a regularised part of post-World War II peacemaking.

That population transfer became accepted as a post-World War II solution to the problem of European minorities – and not just ‘perfidious Germans’ – is borne out by the meteoric rise of the principle of transfer in relation to *non-German* minorities in Central and Eastern Europe. Within three days of the Potsdam Declaration, President Beneš issued Constitutional Decree No. 33/1945, which infamously disenfranchised not only ethnic Germans, but Czechoslovakia's Magyar minority.<sup>60</sup> As extensively documented by Schechtman, between 1945 and 1955, not only Czechoslovakia, but Poland, Hungary, the Soviet Union, Yugoslavia, Bulgaria and Rumania all entered into bilateral population exchange agreements or engaged in unilateral transfers of their *non-German* national minorities. So, while the compulsory exchange solution soldered at Lausanne certainly served as the model for Potsdam, there is inter-disciplinary consensus that Potsdam in its turn became the impetus for a post-World War II deployment of the principle of population transfer on an unprecedented scale. As Claude puts it:

In actuality, however, the real significance of the Potsdam Protocol for the problem of national minorities lay not in the restricted nature of its endorsement of the transfer principle, but in the fact that it contained the first formal, public indication that the statesmen who were in a position to dominate the framing of the postwar settlement were prepared to accept the transfer of populations as a respectable and useful device for the solution of minority problems.<sup>61</sup>

Finally, while it can readily be argued that the principle of forced population transfer adopted at Potsdam is totally at odds with, say, the emerging sensibility at Nuremberg or San Francisco, it is less clear on what basis the labels *law* (human rights at San Francisco) v. *politics* (population transfer at Potsdam) can be safely attached. We have already seen that World War II was a deeply schizophrenic moment where two apparently irreconcilable solutions to the minority problem – individual human rights *and*

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<sup>59</sup> United States House of Representatives, Special Subcommittee of the Committee on the Judiciary, *Expellees and Refugees of German Ethnic Origin*, 81<sup>st</sup> Congress, 2<sup>nd</sup> Session (Report No. 1841) (Washington DC: March 24, 1950) at 7.

<sup>60</sup> Decree No. 33 August 2<sup>nd</sup> 1945.

<sup>61</sup> Claude, *National Minorities op. cit.* at 116.

population transfer – dominated the discussions, discourse and debates on the post-World War II order. We have also seen that for advocates of population transfer such as Beneš, this ostensible contradiction between human rights and population transfer was to be resolved in temporal terms: first, transfer minorities to reconfigure the state in accordance with the principle of nationality; second, provide human rights for all in the newly configured nation-state. It is my argument then, that in 1945, this schizophrenia – *human rights v. population transfer* – resolved itself, not as de Zayas suggests, normatively in terms of *law* (human rights) *v. politics* (population transfer) but rather, as *per* Beneš, temporally and functionally: at San Francisco, for the *future* task of governing the nation-state, individual human rights in the United Nations Charter; at Potsdam, for the *present* task of peacemaking and reconfiguring Europe in accordance with the principle of nationality, population transfer in the legal framework of the *Potsdam Protocol*.

### **Some Concluding Questions ...**

This paper has dealt with only three episodes from the untold story of self-determination and population transfer. There are others. The question remains, however, whether it matters. What contribution to our discipline's present or future does it make to uncover the hidden history of the relationship between self-determination and population transfer? *Is there a contribution beyond a minor correction to the international law historical record?*

To conclude the paper but commence the discussion, I have drawn up some questions that suggest some of the reasons why I think that telling the untold story of self-determination and population transfer is important, and which I hope will provoke comment and conversation:

1. *How did it happen?* How could or did it happen that in chronicling the history of the principle of self-determination, international lawyers missed its integral connection to projects of population transfer? Is there a 'disciplinary blind-spot'?
2. *Are there lessons for international law historiography more generally?* Is international law historiography essentially 'whiggish'? At deeply schizophrenic moments do we simply edit out (as politics) the darker side of the international law historical picture?
3. *What are the contemporary resonances?* Does the international legal history of self-determination and population transfer provide us with an alternative historical and comparative framework within which to analyse or understand a) particular conflicts (such as Israel/Palestine in 1948); b) the post-1989 'neo-realist' revival of population transfer thinking (and proposals) as a solution to ethnic conflict; and c) the contemporary problem of so-called 'ethnic cleansing'?
4. *What future the international law of self-determination?* Does realigning self-determination with its population transfer history invite a reappraisal of the humanitarian credentials of self-determination as a fundamental human right?

