

State Responsibility for Ethnic Cleansing

*John Quigley**

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* Professor of Law, Ohio State University. L.L.B., M.A. 1966, Harvard Law School. In 1993, the author was Advocate and Counsel to the Republic of Bosnia and Herzegovina in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide. The author is grateful to Jennifer Larraguibel, Foreign and International Reference Librarian at the College of Law, Ohio State University, for locating documentary sources.

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INTRODUCTION

Criminal trials at The Hague for atrocities committed in the former Yugoslavia have focused public attention on legal liability for what has come to be called "ethnic cleansing." These trials involve the responsibility of individuals. The liability of states for ethnic cleansing has received less public attention. Through their command of resources and personnel, states have the potential to organize ethnic cleansing on a large scale. If the international legal community is to be effective in combating ethnic cleansing, it must focus on the responsibility of states.

States may be involved in ethnic cleansing in a variety of ways. They may perpetrate it directly. They may give arms or advice to a state or to a nonstate party that is perpetrating ethnic cleansing. States may be aware of ethnic cleansing being perpetrated without their involvement while possibly being in a position to stop it. As members of international organizations, states may be asked to take action to stop an episode of ethnic cleansing that is in progress. This Article examines the circumstances in which a state bears responsibility for acts of ethnic cleansing perpetrated by it or by others.

Preliminarily, this Article defines ethnic cleansing and indicates the bases on which it violates international law. Next, it analyzes the ways in which a state may be responsible for ethnic cleansing, an analysis that constitutes the bulk of this Article. Finally, this Article examines what a state must do to make amends for committing ethnic cleansing.

I. ACTS THAT CONSTITUTE ETHNIC CLEANSING

The term "ethnic cleansing" is of recent origin. Terminology referring to rendering a territory "clean" of a population group was, of course, used in Nazi Germany, with the term *Judenrein*, meaning "clean of Jews."¹ The term "ethnic cleansing," however, entered the vocabulary of diplomacy only in the 1990s, in connection with events in the former Yugoslavia.² One finds the term in

¹ Stephen Schwartz, *Rape as a Weapon of War in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 69, 72 (1994) (discussing German government's decision in 1942 to declare Belgrade *Judenrein*).

² See *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, Annex I, at 16, U.N. Doc. S/25274 (1993) [hereinafter

resolutions of international organizations. It is an umbrella term that covers a variety of delictual acts aimed at driving members of an ethnic group from their home area in order to reduce the number of members of that group. The term "ethnic cleansing," as used by Nazi Germany, was intended to make the activity seem benign (i.e., rendering clean something that, presumably, was previously dirty). In its more recent usage it has had a distinctly pejorative connotation.

Much of the learning on ethnic cleansing comes from the United Nations ("U.N.") Security Council. The U.N. Security Council called for the prosecution of individuals who participated in acts of ethnic cleansing during the early 1990s in the former Yugoslavia for breaches of humanitarian law. To that end, the Security Council established a commission of experts to analyze the facts and to prepare for prosecutorial proceedings.³ The Security Council asked the Commission to investigate the practice of ethnic cleansing.⁴

In an interim report, the Commission told the Security Council "that large-scale victimization has taken place."⁵ The Council then repeated its denunciation of ethnic cleansing in the former Yugoslavia and determined that this practice, as carried out, constituted "a threat to peace and security."⁶ The Council voiced

grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing," including for the acquisition and the holding of territory.⁷

The Commission in its interim report defined ethnic cleansing

Interim Report] (stating that "[t]he expression 'ethnic cleansing' is relatively new").

³ See S.C. Res. 780, U.N. SCOR, 3119th mtg. at 2, U.N. Doc. S/RES/780 (1992) (requesting that Security Council establish Commission of Experts to analyze breaches of Geneva Convention).

⁴ See S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. at 3, U.N. Doc. S/RES/787 (1992) (requesting that Commission of Experts investigate breaches of Geneva Convention, especially ethnic cleansing).

⁵ *Interim Report*, *supra* note 2, at 7.

⁶ S.C. Res. 808, U.N. SCOR, at 2, U.N. Doc. S/INF/49 (1994).

⁷ S.C. Res. 827, U.N. SCOR, 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993).

as “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.”⁸ In its final report, the Commission called it “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”⁹

As developed in U.N. practice, the term “ethnic cleansing” does not seem to be a category of legal wrong. Rather, it seems to be a term which encompasses a variety of acts which either a state or an individual may commit, and that violate other legal prohibitions. In the case of a state, these violations entail state responsibility.

Any mistreatment of an ethnic group may lead members of the group to emigrate. The U.N. Commission on Human Rights has criticized policies of intolerance towards ethnic groups as a cause of “forced migratory movements.”¹⁰ In 1991, upwards of one million Iraqis fled Iraq into neighboring Turkey and Iran as Iraqi government forces put down an uprising. The Security Council condemned Iraq for acts of suppression that precipitated the flight,¹¹ and troops operating under the U.N. facilitated the emigrants’ return to Iraq.¹²

It would seem that only when mistreatment of an ethnic group evidences an effort to induce emigration is the term ethnic cleansing applied. The killings of Tutsis in Rwanda in 1994, for example, would seem to show an effort to induce emigration.¹³ The killings were inspired by members of the predominantly Hutu government against Tutsis, and against Hutus who sympathized with Tutsis. The killings took place in the context of a civil war in which a Tutsi-led rebel movement challenged the Hutu-led government.¹⁴

⁸ *Interim Report*, *supra* note 2, at 16.

⁹ *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, Annex 1, at 33, U.N. Doc. S/1994/674 (1994) [hereinafter *Final Report*].

¹⁰ *Human Rights and Mass Exoduses*, Commission on Human Rights Res. 1995/88, art. 3, U.N. ESCOR, 50th Sess., Supp. No. 4, at 259, U.N. Doc. E/1995/23, E/CN.4/1995/176 (1995).

¹¹ See S.C. Res. 688, U.N. SCOR, at 1, U.N. Doc. S/INF/47 (1993) (“[C]ondemn[ing] the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region.”).

¹² See John Kifner, *Allies to Extend Safe Zone in Iraq 70 Miles Eastward*, N.Y. TIMES, May 2, 1991, at A1 (discussing efforts of British and American marines to protect Kurdish refugees).

¹³ See Peter Smerdon, *Rwandan Prisoners Say They Were Forced to Kill Tutsi*, N.Y. TIMES, June 6, 1994, at A8 (chronicling coerced killings of Tutsi by Hutu militia prisoners).

¹⁴ See *id.* (discussing history of conflict in Rwanda).

While the Hutu government never acknowledged inducing flight, the magnitude of the killings, approximately one half million victims, suggested an effort to frighten Tutsis into departing.

One other circumstance would seem to constitute ethnic cleansing. If a state undertakes to kill a given population, not so much with the intent of inducing flight, but with the intent of killing as many people as possible, perhaps all of them, this too would qualify.

Many of the means by which ethnic cleansing is carried out are cognizable as international wrongs that either an individual or a state can commit. In a resolution on Bosnia, the U.N. Commission on Human Rights stated that rape and other abuses of women were "a deliberate weapon of war in fulfilling the policy of ethnic cleansing carried out by Serbian forces in the Republic of Bosnia and Herzegovina."¹⁵ The Security Council's Commission of Experts said that ethnic cleansing was carried out "by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property."¹⁶

The Committee on the Elimination of Racial Discrimination condemned ethnic cleansing, which it said was being carried out in Bosnia, as including "forced population transfers, torture, rape, summary executions, the blockading of international humanitarian aid and the commission of atrocities for the purpose of instilling terror among the civilian population."¹⁷ The Committee said these violations were being committed "on the basis of 'ethnic identity' for the purpose of attempting to create ethnically pure States."¹⁸

Ethnic cleansing is a term that does not define an act for which there is responsibility under international law. Rather, it is an umbrella term for a number of acts for which a state does bear responsibility under international law.

¹⁵ *Report on the Forty-Ninth Session*, Commission on Human Rights, E.S.C. Res. 1993/8, U.N. ESCOR, Supp. No. 3, at 60, U.N. Doc. E/CN.4/1993/122, E/1993/23 (1993).

¹⁶ *Interim Report*, *supra* note 2, at 16.

¹⁷ *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 48th Sess., Supp. No. 18, at 91, U.N. Doc. A/48/18 (1993).

¹⁸ *Id.*

II. BASES OF A STATE'S RESPONSIBILITY FOR ETHNIC CLEANSING

Acts constituting ethnic cleansing are wrongful under international law.¹⁹ Three bodies of norms that have developed in the international community are relevant: the law of nationality, human rights law, and humanitarian law.

A. *Liability Under the Law of Nationality*

One way in which the acts involved in ethnic cleansing may be unlawful is that they adversely affect other states. A flow of persons displaced by ethnic cleansing into the territory of a state forces that state to deal with the arrivals. Because the affected individuals are not typically nationals of the state of refuge, it has no obligation to keep them. As explained by one authority:

If [a state] pushes large groups of its own citizens out of its territory, fully knowing that the victims of such arbitrariness have no right of entry to another country but will eventually have to be admitted somewhere else on purely humanitarian grounds, it deliberately affects the sovereign rights of its neighbours to decide whom they choose to admit to their territories.²⁰

As explained by another authority, a state that expels its nationals in a way that forces them onto another state violates "the respect it owes to other states."²¹ The state of refuge has every right to require the state of origin to readmit the individuals.²²

The dislocations from Bosnia affected other states of Europe in this way.²³ Germany received the largest number of Bosnians, more than one quarter million, on whose welfare it expended an estimated three billion dollars annually.²⁴ In 1997, Germany began to insist that the Bosnians be repatriated and even forced some of

¹⁹ See *Interim Report*, *supra* note 2, at 16.

²⁰ Christian Tomuschat, *State Responsibility and the Country of Origin*, in *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 71-72 (Vera Gowlland-Debbas ed., 1996).

²¹ Charles Dupuis, *Règles Générales du Droit de la Paix*, 32 *RECUEIL DES COURS* (Hague Academy of International Law) 5, 156 (1930).

²² See generally Tomuschat, *supra* note 20 (discussing obligations of state of origin).

²³ See generally William Drozdiak, *Germany Escalates Drive to Repatriate Bosnians; U.N. Says Refugees' Return Could Imperil Peace*, *WASH. POST*, Apr. 3, 1997, at A28 (discussing German efforts to deport Bosnian refugees due to expense of care).

²⁴ See *id.*

them to return against their will.²⁵

A century ago the United States charged Russia with responsibility for displacing Jews, many of whom sought admission to the United States:

The banishment, whether by direct decree or by no less certain indirect methods, of so large a number of men and women is not a local question. A decree to leave one country is, in the nature of things, an order to enter another — some other. This consideration, as well as the suggestions of humanity, furnishes ample ground for the remonstrances which we have presented to Russia.²⁶

The United States also protested to Roumania for mistreating Jews in a way that led many to immigrate to the United States:

Whether consciously and of purpose or not, these helpless people, burdened and spurned by their native land, are forced by the sovereign power of Roumania upon the charity of the United States. This Government cannot be a party to such an international wrong. It is constrained to protest against the treatment to which Jews in Roumania are subjected, not alone because it has unimpeachable ground to remonstrate against the resultant injury to itself, but in the name of humanity.²⁷

B. *Liability Under Human Rights Law*

Human rights are also implicated by acts of ethnic cleansing. The U.N. Commission on Human Rights condemned ethnic cleansing as a human rights violation.²⁸ Focusing on Bosnia, the Commission denounced practices “aimed at the dislocation or de-

²⁵ *See id.*

²⁶ Message to the Senate and House of Representatives (Dec. 9, 1891), in *FOREIGN RELATIONS OF THE UNITED STATES XIII* (1892).

²⁷ Jews in Roumania — Discussion of proposed naturalization convention between the United States and Roumania: Discriminations, in the latter country, against Jews, condition of helplessness to which they are reduced, and objection of United States Government to immigration of such persons (July 17, 1902), in *FOREIGN RELATIONS OF THE UNITED STATES 914* (1903).

²⁸ *See Report of the Commission on Human Rights on Its First Special Session*, U.N. Commission on Human Rights, Res. 1992/S-1/1, U.N. ESCOR, at 6, U.N. Doc. E/CN.4/1992/84/Add.1, E/1992/22/Add.1 (1992).

struction of national, ethnic, racial or religious groups and the practice of ethnic cleansing.”²⁹

Where acts involve violence or threat of violence, human rights norms are violated. Killing carried out by a state without just cause, whether to induce flight or not, is unlawful as arbitrary deprivation of life.³⁰ Acts of violence short of killing may qualify as degrading or inhuman treatment or punishment, which is also prohibited.³¹

Acts of ethnic cleansing may amount to genocide. The U.N. Commission on Human Rights, in condemning ethnic cleansing in Bosnia, noted that the states involved in the conflict were parties to the Genocide Convention and called on them to fulfill their obligations under the Convention.³² In another resolution on Bosnia, the Commission called on the states involved to consider “the extent” to which the acts occurring in Bosnia amounted to genocide.³³ The U.N. General Assembly, referring to events in Bosnia, declared that ethnic cleansing constitutes genocide.³⁴ The Security Council’s Commission of Experts said that the acts constituting ethnic cleansing could “fall within the meaning of the Genocide Convention.”³⁵ The International Court of Justice, issuing provisional measures in the Bosnia conflict, found *prima facie* that it had jurisdiction over the issue under the Genocide Convention.³⁶

A state is responsible for genocide if it undertakes certain specified acts “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”³⁷ These acts are:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

²⁹ *Id.* at 5.

³⁰ See International Covenant on Civil and Political Rights, art. 6, 999 U.N.T.S. 171, 174.

³¹ See *id.* art. 7, at 175.

³² See *Report of the Commission on Human Rights on Its First Special Session*, *supra* note 28, at 7.

³³ See *Report of the Commission on Human Rights on Its Second Special Session*, U.N. Commission on Human Rights, Res. 1992/S-2/1, U.N. ESCOR, at 6, Annex, U.N. Doc. E/CN.4/1992/84/Add.2, E/1992/22/Add.2 (1992) (discussing resolution of Subcommittee on Prevention of Discrimination and Protection of Minorities).

³⁴ See G.A. Res. 47/121, U.N. GAOR, 47th Sess., at 2, U.N. Doc. A/RES/47/121 (1993) (referring to “ethnic cleansing,” which is a form of genocide”).

³⁵ *Interim Report*, *supra* note 2, at 16.

³⁶ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serbia & Montenegro))*, 1993 I.C.J. 3 (Apr. 8).

³⁷ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, 280.

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.³⁸

Despite the fact that mass scale killings by Germany during World War II prompted the drafting of the Genocide Convention, the Genocide Convention does not require the killing of large numbers. The Convention has never authoritatively determined how many people one must kill in order to be guilty of genocide. Furthermore, the Convention's formulation as to intent has not been extensively construed, leaving it unclear precisely what it means, in particular, to entertain an intent to destroy a group "in part." Nonetheless, it seems clear that killing members of an ethnic group with the intent to kill a part of that group is genocide.³⁹

Moreover, as the above enumeration of acts makes clear, killing is not required.⁴⁰ Four other categories of acts qualify as genocide if done with the specified intent.⁴¹ The four categories include situations where members of an ethnic group: (1) flee after some are subjected to serious bodily or mental harm; (2) are subjected to conditions of life calculated to bring about the group's physical destruction in whole or in part; (3) are forced to endure measures intended to prevent births within the group; or (4) are subject to forcible transfer of children of the group to another group. In these four situations genocide would be present.⁴²

If members of an ethnic group are frightened into departing without use of any of the five categories of acts specified in article 2 of the Genocide Convention, then genocide is not present. When the Genocide Convention was being drafted, the question arose whether forcing a population group to flee constituted genocide.⁴³

³⁸ *Id.*

³⁹ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 36, at 24 (ordering Yugoslavia, as provisional measure, to ensure that entities acting under its direction or with its support not commit genocide in Bosnia).

⁴⁰ See Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 37, at 280.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See U.N. GAOR, 3d Sess., pt. 1, 81st mtg. at 176-86, U.N. Doc. A/C.6/SR/81 (1948)

Syria's delegate proposed language to make forced expulsion an additional category in article 2.⁴⁴ Syria's proposal read: "imposing measures intended to obligate members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment."⁴⁵ However, this proposal was defeated,⁴⁶ and most delegates who spoke against the proposal said they did not think that without this language the category of forced expulsion was included in article 2.⁴⁷ However, it is not necessary that the acts specified in article 2 actually be committed before the Genocide Convention is violated. In addition to actual commission of those acts, the Convention prohibits conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.⁴⁸

Forcing the flight of a population group may, even if it does not constitute genocide, nonetheless entail responsibility. Forcibly transporting a group out of a state, under an explicit or implicit threat of negative consequences, would be unlawful.⁴⁹ The American Law Institute has called the "mass uprooting of a country's population" a human rights violation under customary norms of international law.⁵⁰ "Simple expulsion [of population]," wrote one analyst, "is inconceivable under a regime of international law and irreconcilable with respect for human rights."⁵¹

(describing debate between Syrian delegate and several other countries concerning definition of genocide).

⁴⁴ See *id.* at 176.

⁴⁵ *Id.*

⁴⁶ See *id.* at 186 (listing results of vote: 29 against, 5 in favor, and 8 abstaining).

⁴⁷ See *id.* at 185 (Mr. Maktos, U.S.A.) (stating that proposal deviated too much from original concept of genocide); *id.* (Mr. Fitzmaurice, U.K.) (stating that proposal did not fall within definition of genocide); *id.* (Mr. Dihigo, Cuba) (stating that proposal did not come within definition of genocide, which he viewed as destruction of human group); *id.* (Mr. Morozov, U.S.S.R.) (stating that proposal fell outside scope of definition of genocide, but that forced migration might well be consequence of commission of genocide); *id.* at 186 (Mr. Raafat, Egypt) (stating that proposal went beyond accepted idea of genocide); *cf. id.* at 184 (Mr. Bartos, Yugoslavia) (citing Nazi dispersal of Slavs from certain parts of Yugoslavia and stating that "[g]enocide could be committed by forcing members of a group to abandon their homes").

⁴⁸ See Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 37, at 280.

⁴⁹ See 2 RESTATEMENT (THIRD) OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. m (1987).

⁵⁰ See *id.* at reporter's note 1.

⁵¹ Dupuis, *supra* note 21, at 167-68 (statement of Max Huber). See generally *id.* at 169 (statement of Herbert Kraus) (finding "unilateral transplanting of population" to be unlawful); *id.* at 146 (statement of Giorgio Balladore Pallieri) (noting that Universal Declaration of Human Rights "excluded rather clearly any form of pressure or threat to convince a

The U.N. International Law Commission has characterized the “deportation or forcible transfer of population” as a “mass violation of human rights.”⁵² The U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, invoking provisions on freedom of movement in the International Covenant on Civil and Political Rights, has said that “practices of forcible exile, mass expulsions and deportations, population transfer, ‘ethnic cleansing’ and other forms of forcible displacement of populations within a country or across borders deprive the affected populations of their right to freedom of movement.”⁵³

At Nuremberg, acts of expulsion of non-Germans from Germany were charged as crimes.⁵⁴ The Charter of the International Military Tribunal defined “crimes against humanity” to include “deportation,”⁵⁵ and the U.N. General Assembly endorsed this position.⁵⁶

In addition to direct compulsion to depart, responsibility lies as well for intimidation aimed at inducing departure (e.g., by threatening to kill or take other adverse action unless a person departs), or for fraudulently inducing persons to depart (e.g., by deceiving persons into thinking that a fatal epidemic is about to break out and thereby inducing them to depart).⁵⁷

population to abandon the territory on which it is located”).

⁵² *Report of the International Law Commission on the Work of Its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 250, U.N. Doc. A/46/10 (1992) (Draft Code of Crimes against the Peace and Security of Mankind).

⁵³ *U.N. Subcommission on Prevention of Discrimination and Protection of Minorities*, E.S.C. Res. 1995/13, U.N. ESCOR, 47th Sess., at 20, U.N. Doc. E/CN.4/Sub.2/1995/L.11/Add.3 (1995); see also *Report of the Commission on Human Rights on Its Second Special Session*, U.N. Commission on Human Rights, E.S.C. Res. 1992/S-2/1, U.N. ESCOR, Annex, at 6, U.N. Doc. E/CN.4/1992/84/Add.2, E/1992/22/Add.2 (1992) (condemning violation of fundamental human rights and “ethnic cleansing” in Bosnia and demanding termination of such practices).

⁵⁴ See 8 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 254-55 (S. Paul A. Joosten ed., 1947) (prosecuting expulsion of Slovenes from Germany as crime against humanity).

⁵⁵ Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279, 288.

⁵⁶ See *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95, U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/64/Add.1 (1946).

⁵⁷ See JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE 108 (1995) (stating that collective expulsion incurring state responsibility is defined more broadly than “direct expulsions through expulsion decrees,” but limits have not been clearly defined).

C. Liability Under Humanitarian Law

Humanitarian law, which regulates warfare, also prohibits forced displacement. A prohibition against expulsion of inhabitants flows from provisions requiring humane treatment of civilian populations.⁵⁸ A commission appointed by the World War I allies to inquire into criminal responsibility for acts committed during that war produced a list of offenses deemed prohibited by the customary law of war. The list included "deportation of civilians."⁵⁹

The Geneva Civilians Convention forbids expulsion by an occupier: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."⁶⁰ The General Assembly and Security Council have both found that the expulsion of inhabitants from occupied territory violates this provision.⁶¹ Forc-

⁵⁸ See 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 49 (1947) (Pierre Mounier, assistant prosecutor for France) (stating that deportations violated Hague regulations article 46, which requires respect for "family honor and rights, the lives of persons, and private property"); Alfred de Zayas, *The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context*, 6 PALESTINE Y.B. INT'L L. 17, 21 (finding expulsions to violate Hague regulations articles 42 to 56); see also Alfred de Zayas, *Population, Expulsion and Transfer*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 438, 439 (Rudolf Bernhardt ed., 1985) (stating that Hague regulations did not specifically mention expulsions, because "[t]he right of a population not to be expelled from its homeland is so fundamental that until after World War II it was not deemed necessary to codify it in a formal manner").

⁵⁹ *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95, 114 (1920), reprinted in INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 24 (M.C. Bassiouni et al. eds., 1996) (listing, in chapter headed "Violations of the Laws and Customs of War," offenses prohibited by customary law of war). Leading experts on international law served on the commission, which was appointed by the United States, United Kingdom, France, Italy, and Japan. See *id.* The original publication (which, unlike the version in the *American Journal of International Law*, includes an annex listing examples of violations of the laws of war committed during the war) is VIOLATION OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS (Carnegie Endowment for International Peace, Division of International Law, 1919), where the list of crimes appears at 18.

⁶⁰ Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 75 U.N.T.S. 287, 318 [hereinafter Geneva Convention]; see also *id.* art. 158 at 392 (forbidding state party to denounce Convention during armed conflict until it has repatriated protected persons).

⁶¹ See S.C. Res. 608, U.N. SCOR, 43d Sess., 2781st mtg. at 1, U.N. Doc. S/INF/44 (1988) (calling on Israel to cease deportations of Arabs from occupied territories); S.C. Res. 607, U.N. SCOR, 43d Sess., 2780th mtg. at 2, U.N. Doc. S/INF/44 (1988) (condemning deportation of Arabs). See generally G.A. Res. 36/147(C), U.N. GAOR, 36th Sess., Supp. No. 51, at 88, U.N. Doc. A/35/51 (1982) (condemning "evacuation, expulsion, deportation, displacement and transfer [by Israel] of Arab inhabitants of the occupied territories and denial of

ing the emigration of Jews from Austria was deemed a crime against humanity.⁶² When Israel tried Nazi leader Adolf Eichmann, it included charges of expulsions from occupied territories,⁶³ characterizing them as “war crimes” and as “crimes against humanity.”⁶⁴ Thus, acts of ethnic cleansing violate humanitarian law if carried out in connection with hostilities.

A state that occupies foreign territory is responsible for expulsion even if it sets up a purportedly independent government to administer the occupied territory, and the expulsion is carried out by that government. A state that occupies foreign territory is not at liberty to establish such a government, and if it does so, it does not thereby evade responsibility for the conduct of the occupation.⁶⁵

III. A STATE’S RESPONSIBILITY FOR ETHNIC CLEANSING BY ITS AGENTS

Acts of ethnic cleansing may violate norms in three separate bodies of international law: the law of nationality, human rights law, and humanitarian law. A state may be responsible for ethnic cleansing in a number of diverse circumstances. The remainder of this Article examines the various situations in which a state’s responsibility for ethnic cleansing may arise. The first of these is responsibility for ethnic cleansing carried out by a state’s own agents.

As an incorporeal entity, a state, like a corporation, acts through its agents. A state is responsible for the acts of its agents. According to the International Law Commission, “conduct of any State organ having that status under the internal law of that State shall

their right to return”); S.C. Res. 664, U.N. SCOR, 45th Sess., at 21, U.N. Doc. S/INF/46 (1990) (criticizing Iraq for taking Kuwaitis to Iraq as apparent hostages).

⁶² See 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 574 (1947).

⁶³ See *Attorney-General of the Gov’t of Israel v. Eichmann*, 36 I.L.R. 5, 8-9 (1968) (discussing counts 3, 5, 8, 9, 10, 11, and 12 of indictment); see also *id.* at 95-102 (reciting facts of expulsions Israel found to have been carried out or planned by Eichmann).

⁶⁴ *Id.* at 9. See generally Theodor Meron, *Deportation of Civilians as a War Crime Under Customary Law*, in BROADENING THE FRONTIERS OF HUMAN RIGHTS: ESSAYS IN HONOR OF ASBJORN EIDE 201 (Donna Gomien ed., 1993) (arguing that customary law prohibits deportation).

⁶⁵ See Case No. 40/1993/435/514, *Loizidou v. Turkey (Merits)*, Eur. Ct. H.R. (1996), summarized in 3 EUR. H.R. L. REV. 302 (1997) (holding Turkey responsible for property taking in territory occupied by Turkey, despite creation of Turkish Republic of Northern Cyprus); see also Case No. 40/1993/435/514, *Loizidou v. Turkey (Preliminary Objections)*, 310 Eur. Ct. H.R. 19-20 (1995) (stating that Turkish Republic of Northern Cyprus was unlawful regime).

be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.”⁶⁶ Thus, a state is responsible where agents of the state carry out ethnic cleansing, even if the state did not undertake ethnic cleansing as a matter of policy.

An example of ethnic cleansing by agents of a state is Israel’s expulsion of Arabs from the adjacent Palestine towns of Lydda and Ramleh in 1948.⁶⁷ After occupying the two towns, Israeli army units expelled 60,000 Arabs.⁶⁸ Because the army units were agents of Israel, it was responsible.⁶⁹ Reportedly, David Ben Gurion, the provisional prime minister of Israel, authorized and approved these expulsions.⁷⁰ However, high-level approval is not a prerequisite for state responsibility. If acts of ethnic cleansing are carried out by agents of a state, the state is responsible.

A state is responsible for the acts of its agents “even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.”⁷¹ The Inter-American Court of Human Rights has applied this rule, stating: “[U]nder international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”⁷² This rule applies in particular where the agents are military forces. A state, it was held in one case, must exercise superior vigilance over acts of military personnel, because of the potential for military forces to cause harm.⁷³ A

⁶⁶ *Report of the International Law Commission on the Work of Its Forty-Eighth Session, Draft Articles on State Responsibility*, International Law Commission, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) [hereinafter *Draft Articles on State Responsibility*].

⁶⁷ See BENNY MORRIS, 1948 AND AFTER: ISRAEL AND THE PALESTINIANS 2 (1990).

⁶⁸ See *id.* (reporting order issued July 12, 1948, by Lt.-Col. Yitzhak Rabin: “The inhabitants of Lydda must be expelled quickly without attention to age. They should be directed towards Beit Nabala. . . . Implement immediately,” and similar simultaneous order relating to adjacent town of Ramleh.); EDGAR O’BALLANCE, *THE ARAB-ISRAELI WAR*, 1948 147 (1957) (reporting Israeli army units forced nearly entire population of two towns to march east to area under Jordanian control, firing mortars to force inhabitants along road out of town).

⁶⁹ See *Progress Report of the United Nations Mediator on Palestine*, U.N. GAOR, 3d Sess., Supp. No. 11, at 47, U.N. Doc. A/648 (1948) (noting Israel’s occupation of Ramleh and Lydda and flight of inhabitants but not specifying circumstances leading to flight).

⁷⁰ See David K. Shipler, *Israel Bars Rabin from Relating ‘48 Eviction of Arabs*, N.Y. TIMES, Oct. 23, 1979, at A3 (reporting Yitzhak Rabin’s statement that Ben Gurion ordered him to carry out expulsion).

⁷¹ *Draft Articles on State Responsibility*, *supra* note 66, at 127.

⁷² Case 4, Inter-Am. C.H.R. 153, OEA/ser.C. (1988), *reprinted in* 28 I.L.M. 291, 325 (1989).

⁷³ See *Estate of Jean-Baptiste Caire (France) v. United Mexican States (Fr. v. Mex.)*, 5

state bears a high standard of care in controlling military personnel. According to one authority, "a higher standard of prudence in their [armed forces] discipline and control is required, for reasons which are sufficiently obvious."⁷⁴

A state's responsibility for the acts of its agents applies regardless of where the acts occur. If a state's military forces engage in unlawful acts abroad, that state is responsible. U.N. organs found Yugoslavia responsible for ethnic cleansing carried out by its troops in Bosnia.⁷⁵ In that situation, the Security Council's Commission of Experts said that elements of the Yugoslav army carried out ethnic cleansing in certain sectors of Bosnia.⁷⁶ The U.N. Commission on Human Rights, alluding to Yugoslav military units operating in Bosnia, condemned ethnic cleansing in Bosnia and said "that States are to be held accountable for violations of human rights which their agents commit upon the territory of another state."⁷⁷

However, if foreign troops commit ethnic cleansing abroad, the state in whose territory the acts occur is not responsible, at least if it is unaware of and does not contribute to the acts.⁷⁸ The contrary result would prevail, however, if a state places troops at the disposal of another state, such that the latter state directs their activity. In that case the latter state alone bears responsibility, at least if the sending state is not aware of or does not otherwise contribute to the act.⁷⁹

While agents of a central government may carry out acts of ethnic cleansing, so also might agents of subunits. At the international level, it is the state that bears responsibility, regardless of the type of subunit involved.⁸⁰ Thus, a state that is centrally structured

Rep. of Int'l Arb. Awards 516, 529 (1929) (discussing execution of French citizen by military).

⁷⁴ IAN BROWNLIE, *STATE RESPONSIBILITY*, PART I 140 (1983).

⁷⁵ See *Final Report*, *supra* note 9, at 35-36.

⁷⁶ See *id.*

⁷⁷ *Report of the Commission on Human Rights on Its First Special Session*, *supra* note 28, at 7.

⁷⁸ See *Draft Articles on State Responsibility*, *supra* note 66, at 128 (noting exceptions to rule of state responsibility for ethnic cleansing in its territory); see also [1975] 2 Y.B. Int'l L. Comm'n 47, at 83, U.N. Doc. A/CN.4/SER.A/1975/Add.1 (1976) (discussing state responsibility for acts of others).

⁷⁹ See *Draft Articles on State Responsibility*, *supra* note 66, at 127 (discussing state responsibility for acts of foreign troops); see also *Report of the Commission to the General Assembly*, [1974] 2 Y.B. Int'l L. Comm'n 286, U.N. Doc. A/CN.4/SER.A/1974/Add.1 (Part 1) (1975) (stating that state controlling organ is responsible when one state places its organ under direction of another state).

⁸⁰ See *Draft Articles on State Responsibility*, *supra* note 66, at 127 (stating that "[t]he conduct of an organ of a territorial governmental entity within a State shall also be considered

is responsible for an act of agents of a provincial, or equivalent, government.⁸¹ A state is also responsible for an act of agents of units enjoying a certain independence under domestic law, for example, agents of an ethnically based unit of self-governance, or agents of a constituent entity of a federation.⁸² The state is responsible even if it does not condone, or is unaware of, the acts of the subunit,⁸³ and even if, under internal law, the state has no mechanism to require the constituent entity to act differently.⁸⁴

IV. A STATE'S RESPONSIBILITY FOR ETHNIC CLEANSING BY INSURGENTS THAT BROUGHT THE STATE INTO EXISTENCE

A state may be responsible for ethnic cleansing that occurred even before the state existed. If hostilities result in the creation of a new state, that state is responsible for wrongful acts committed by military units that brought it into being.⁸⁵ The International Law Commission said: "The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a preexisting State or in a territory under its administration shall be considered as an act of the new State."⁸⁶ One author who earlier found such a rule in state practice rationalized it by saying that "the government set up by successful revolutionists must ac-

as an act of that State under international law, provided that organ was acting in that capacity in the case in question").

⁸¹ See *Report of the Commission to the General Assembly*, [1974] 2 Y.B. Int'l L. Comm'n 157, at 278, U.N. Doc. A/CN.4/SERA/1974/Add.1 (Part 1) (1975) (stating that "[t]he principle that the State is responsible for acts and omissions of organs of territorial governmental entities, such as municipalities, provinces and regions, has long been unequivocally recognized in international judicial decisions and the practice of States").

⁸² See Daniel Sneider, *US Death Penalty Stirs International Legal Controversy*, CHRISTIAN SCI. MONITOR, May 22, 1997, at 1 (reporting protest by Mexico to United States alleging violation by Texas of Mexico's rights under consular convention); *Report of the Commission to the General Assembly*, [1974] 2 Y.B. Int'l L. Comm'n 157, at 278, U.N. Doc. A/CN.4/SERA/1974/Add.1 (Part 1) (1975) (citing case in which Italy was held responsible for act of Sicily, despite Sicily's autonomy under Italian law).

⁸³ See BROWNIE, *supra* note 74, at 141 (citing arbitral jurisprudence as source of rule).

⁸⁴ See *Report of the Commission to the General Assembly*, [1974] 2 Y.B. Int'l L. Comm'n 157, at 279, U.N. Doc. A/CN.4/SERA/1974/Add.1 (Part 1) (1975) (stating, "a consistent series of legal decisions has affirmed the principle of the international responsibility of the federal State for the conduct of organs of component states amounting to a breach of an international obligation of the federal State, even in situations in which internal law does not provide the federal State with means of compelling the organs of component states to abide by the deferal [sic] State's international obligations").

⁸⁵ See BROWNIE, *supra* note 74, at 178 (finding "a categorical imposition of responsibility for all acts of the insurgent forces").

⁸⁶ *Draft Articles on State Responsibility*, *supra* note 66, at 128.

cept responsibility for their acts as insurgents from the beginning, a conclusion logically deducible from the fact that the acts of the insurgents have now become the acts of the government, for which it must accept responsibility."⁸⁷

Another author comes to a similar conclusion by reasoning that state practice supports holding a state responsible for the acts of successful insurgents because the new state ratifies the acts of the successful insurgents: "The decisions base this principle on the fact that victorious revolutionaries are taken to represent, by reason of their victory, the national will from the beginning of the conflict; there is also a kind of retroactive confirmation of the action of the insurgents, based on their ultimate success."⁸⁸

Whatever the rationale, the rule is accepted. On this basis, for example, Israel would be responsible for acts of ethnic cleansing by insurgents during the 1948 hostilities that led to its establishment. In one incident, proto-Israeli military forces killed 250 civilians in a village near Jerusalem, in an apparent effort to frighten Jerusalem's Arabs into fleeing the country.⁸⁹ The incident is widely considered to have achieved that end.⁹⁰

Several weeks after this incident Israel became a state and the insurgent forces that carried out these killings were incorporated into its army.⁹¹ That act might be taken as a ratification of their prior acts.

V. A STATE'S RESPONSIBILITY FOR ETHNIC CLEANSING BY ANOTHER STATE

A state may be responsible for aid or assistance to another state that commits wrongful acts. Thus, if one state assists another state that is carrying out ethnic cleansing, the former may be

⁸⁷ CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 147 (1928).

⁸⁸ CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 380 (1953).

⁸⁹ See 8 ARNOLD TOYNBEE, *A STUDY OF HISTORY* 290 (1954) (calling killings at Deir Yassin atrocious); Dana Adams Schmidt, *200 Arabs Killed, Stronghold Taken*, N.Y. TIMES, Apr. 10, 1948, at A6 (citing eyewitnesses claiming that killings of civilians at Deir Yassin occurred after fighting for village ended).

⁹⁰ See NAFEZ NAZZAL, *THE PALESTINIAN EXODUS FROM GALILEE 1948*, at 34, 44, 52, 90 (1978) (discussing flight of Arabs due to Israeli aggression); TOYNBEE, *supra* note 89, at 290 (suggesting Arabs left Jerusalem after killings at Deir Yassin); MICHAEL AKEHURST, *THE ARAB-ISRAELI CONFLICT AND INTERNATIONAL LAW*, 5 N.Z.U.L.R. 231, 233 (1973) (indicating many Palestinians left country soon after Deir Yassin incident out of concern that it might be repeated in their areas).

⁹¹ See generally BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947-1949*, at 113-15, 130, 134, 193 (1987) (discussing Deir Yassin massacre and its effects).

responsible.

According to the International Law Commission, a state is responsible for giving aid to another state "for the commission of an internationally wrongful act."⁹² The aid is wrongful only if it materially aids a state in bringing about the wrongful act. The Commission explained that the aid "must have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act."⁹³ Thus, if a state gives or sells armaments to a state carrying out ethnic cleansing, the arms delivery must make it "materially easier" for the recipient state to undertake the operations in question.⁹⁴ The aid would not, however, have to be directly related to the ethnic cleansing. Thus, if a state gives aid for environmental protection programs, thereby allowing the recipient state to divert funds into ethnic cleansing operations in a way that materially facilitates the latter, the aid would have made it materially easier to commit ethnic cleansing.⁹⁵

In the latter example, an additional element of liability relates to the donor state's intent. If the donor state is unaware of the diversion of resources, it would not be liable, even if its aid materially facilitates ethnic cleansing. The International Law Commission explained that, before liability attaches, aid must be rendered

with the specific object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient for it to be possible for aid or assistance provided without such intention to be used by the recipient State for un-

⁹² *Draft Articles on State Responsibility*, *supra* note 66, at 134.

⁹³ *Report to General Assembly*, International Law Commission, U.N. GAOR, 33d Sess., Supp. No. 10, at 254, U.N. Doc. A/33/10 (1978), *reprinted in* [1978] 2 Y.B. Int'l Law Comm'n 104, U.N. Doc. A/CH.4/SER.A/1978/Add.1 (Part 2).

⁹⁴ *See generally* *Draft Articles on State Responsibility*, *supra* note 66, at 134 (establishing that aid given from one state to another to assist in commission of crime constitutes internationally wrongful act).

⁹⁵ *See* 126 CONG. REC. S15048 (June 17, 1980) (proposing to reduce U.S. aid to Israel by amount Israel spent on settlements in occupied Arab territory, Senator Stevenson stated, "economic support funds made available to Israel free Israeli resources for use elsewhere, including the West Bank. There is no way to isolate or insulate this aid so that it does not provide indirect aid to Israel in the furtherance of its settlements policy."); Norman Kempster & Daniel Williams, *Baker Steps Up Pressure on Israel; Diplomacy: The Secretary Warns that Settlement Activity in West Bank and Gaza Must End if U.S. Funds Are to Be Used to House Soviet Emigres*, L.A. TIMES, Mar. 20, 1990, at A1 (regarding efforts by United States not to fund Israeli occupation of Arab territories, U.S. Secretary of State James Baker stated that it would not be good enough for Israel to promise not to spend U.S. money in occupied territories because U.S. money would free up other money to use there).

lawful purposes, or for the State providing aid or assistance to be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be "presumed"; as the article emphasized, it must be "established." Unless these essential requirements are fulfilled, an act which per se is lawful cannot become an unlawful act, and a possibly wrongful act cannot be invested with additional wrongfulness.⁹⁶

The Commission was concerned lest a state be held liable for providing aid innocently.⁹⁷ Although the commission stated that the donor state must act with the "specific object" that the recipient state use the aid wrongfully, the opposite situation it poses (as one in which liability is inappropriate) is that in which the donor state is merely aware of an "eventual possibility" of wrongful use by the recipient state. The Commission did not address the more problematic scenario lying between these two extremes, namely, that in which a donor state does not desire that the recipient state use the aid wrongfully but knows that it will be so used.⁹⁸

However, the Commission's rapporteur cited an example involving such a scenario as one in which facilitating a wrongful act is wrongful. The rapporteur referred to an accusation made by the Soviet Union against West Germany in 1958 in connection with the United States's intervention that year in Lebanon.⁹⁹ The Soviet Union charged West Germany with responsibility for allowing U.S. planes to take off from airbases in West Germany to fly to Lebanon as part of the intervention.¹⁰⁰

West Germany responded by asserting that the United States's action in Lebanon was lawful.¹⁰¹ The rapporteur said that by defending on this ground, West Germany tacitly acknowledged that if the U.S. action were wrongful, West Germany would be responsible if it knew, as it did, that the United States was using the bases for its

⁹⁶ Report to General Assembly, *supra* note 93, at 255.

⁹⁷ See *id.* (discussing Commission protection of state assistance).

⁹⁸ See *id.*

⁹⁹ See generally *Seventh Report on State Responsibility*, [1978] 2 Y.B. Int'l Law Comm'n 31, at 59, U.N. Doc. A/CN.4/SERA/1978/Add.1 (Part 1) [hereinafter *Seventh Report*].

¹⁰⁰ See *id.*

¹⁰¹ See Helmut Alexy, *Völkerrechtliche Praxis der Bundesrepublik Deutschland*, 20 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 636, 663 n.129 (1960).

action in Lebanon.¹⁰² One member of the International Law Commission would cast responsibility even more broadly. He said that responsibility arises “when a State should have known in advance that its territory would be used for an unlawful purpose by the organs of another State admitted to that territory.”¹⁰³ The Commission as a whole did not extend responsibility to situations in which a state should have known but did not know of the wrongful use by the direct perpetrator. The line between the two situations, however, is not always clear.

The U.N. General Assembly, in its Definition of Aggression, also prohibits allowing a state to use a military base to launch aggression. The Assembly defines the following as an act of aggression: “The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State.”¹⁰⁴ This formulation implies that a state that grants base rights is responsible if it is aware that the state operating the base is launching aggression and permits it to do so.

Difficulty may arise in determining what it means to know that a recipient state will use aid wrongfully. States typically aid another state out of considerations of their own advantage and may turn a blind eye to what the recipient state does with the aid. The minimal standard of liability is an awareness of a probability that the recipient state will use aid wrongfully. What is not clear is how strong that probability must be before liability attaches. Standards employed in domestic penal law may provide guidance. For example, a definition of knowledge which finds knowledge present if a person is “aware that it is practically certain that his conduct will cause” a certain result.¹⁰⁵ However, even such a formulation is not free of difficulty in application to particular facts.

In domestic law, on which international law often draws in such situations, complicity is typically defined to include one who provides material means with knowledge of unlawful use.¹⁰⁶ Thus, the French Penal Code includes as accomplices “those who procure

¹⁰² See *Seventh Report*, *supra* note 99, at 59 (discussing Commission findings in investigation).

¹⁰³ *Summary Records of 1312th Mtg.*, [1975] 1 Y.B. Int'l Law Comm'n 44, U.N. Doc. A/CN.4/SERA/1975 (quoting Endre Ustor).

¹⁰⁴ *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

¹⁰⁵ MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

¹⁰⁶ See *id.* § 2.06.

arms, instruments, or any other means that were used for the act, knowing that they were to be so used."¹⁰⁷ The Polish Penal Code considers an accomplice one who either "willing that another person should commit a prohibited act, or reconciling himself to it, provides him the means."¹⁰⁸ In the United States, courts follow a similar approach in defining the mental element of complicity.¹⁰⁹

In Yugoslav penal law "aiding" includes "the supply of tools of crime," and an accomplice is defined as one "who intentionally aids."¹¹⁰ The Yugoslavian Penal Code says that a person acts intentionally when he "was conscious of his deed and wanted its commission, or when he was conscious that a prohibited consequence might result from his act or omission and consented to its occurring."¹¹¹

It may be difficult to apply this standard where a state is aware that its aid is facilitating ethnic cleansing and threatens to terminate the aid if the activity continues. If an aid-giving state makes such representations to the recipient state about wrongful use of which it has become aware, it might argue that such representations free it of liability.

The greatest likelihood of convincing the recipient state to cease the violation may come in the form of a warning from the donor state that it will terminate aid unless the recipient state stops the violation. Such an approach may be more likely to succeed than a simple termination of aid. Yet, if a donor state takes this approach it cannot allow the recipient state too much latitude. If the recipient state continues the violations despite the threatened cutoff, then the donor state must terminate the aid or incur responsibility.

Whatever the difficulties may be in application, a state is responsible if it is aware that the recipient state is likely to use the aid to carry out ethnic cleansing.

¹⁰⁷ C. PÉN. art. 60 (1810) (amended 1959) (Fr.).

¹⁰⁸ PENAL CODE art. 18 § 2 (1969) (Pol.).

¹⁰⁹ See generally R. PERKINS & R. BOYCE, CRIMINAL LAW 747 (1982) (discussing state of mind requirement for complicity).

¹¹⁰ PENAL CODE art. 20 (1951) (Yugo.).

¹¹¹ *Id.* art. 7; see also PENAL CODE arts. 13, 24 (1976) (discussing intent and complicity similar to provisions in 1951 code).

VI. A STATE'S RESPONSIBILITY FOR ETHNIC CLEANSING BY A PRIVATE PARTY

In certain situations, a state is internationally responsible for the acts of private parties and, thus, a state may, in appropriate circumstances, be liable for ethnic cleansing carried out by a private party. A state may be directly responsible for the acts of private parties, may facilitate private parties' acts of ethnic cleansing, may fail to prevent ethnic cleansing, or even fail to prosecute private parties that engage in ethnic cleansing. This Article now looks at each of these circumstances in turn.

A. *Direct Responsibility for Ethnic Cleansing by a Private Party*

According to the International Law Commission: "The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (a) it is established that such person or group of persons was in fact acting on behalf of that State."¹¹² Under this rule, which is found in customary international law,¹¹³ a state answers for private parties that act "in fact" on its behalf, even if the private parties are not in a formal sense agents of the state. Most of the state practice here relates to cases in which a state employs or otherwise prompts a private party to carry out a wrongful act.¹¹⁴

The rule as stated by the International Law Commission does not make it clear how one "establishes" that a private party acted on behalf of a state. However, the issue has arisen in international litigation.¹¹⁵ In the International Court of Justice hostage taking case, Iranian youths held Americans hostage in an apparent response to a decision by the United States to admit the deposed Shah of Iran to its territory for medical treatment.¹¹⁶ The International Court of Justice, addressing the issue of whether Iran might be held responsible for the seizure of hostages, noted that there was "no suggestion" that the private persons involved, whom it called "the militants," had "any form of official status as recognized

¹¹² *Draft Articles on State Responsibility*, *supra* note 66, at 127.

¹¹³ *See generally* [1974] 2 Y.B. Int'l L. Comm'n 283, U.N. Doc. A/CN.4/SERA/1974/Add.1 (Part 1) (1975) (finding such principle in customary law).

¹¹⁴ *See id.* at 284.

¹¹⁵ *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24) (discussing Iranian abductions in response to United States policy decisions).

¹¹⁶ *See id.* at 30.

'agents' or organs of the Iranian State." The court, finding that "the militants" were not agents of Iran, said:

Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf [of] the State, having been charged by some competent organ of the Iranian State to carry out a specific operation.¹¹⁷

The court found Iran not responsible for the hostage taking despite the fact that Iran's governmental leader had made statements that apparently encouraged "the militants."¹¹⁸ The court noted that

a spokesman for the militants, in explaining their action afterwards, did expressly refer to a message issued by the Ayatollah Khomeini, on 1 November 1979. In that message the Ayatollah Khomeini had declared that it was "up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah,"¹¹⁹

The court referred to the quoted statement of the Ayatollah Khomeini as "general declarations" that fell short of "an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy."¹²⁰ The court noted evidence that the Ayatollah Khomeini telephoned the militants on the evening of the attack to congratulate them for the attack, and that he made "subsequent statements of official approval."¹²¹ The court said that even these statements did not render Iran responsible.¹²²

The court did find Iran responsible to the United States, however, on the ground that two weeks after the initial seizure, the Ayatollah Khomeini issued a decree in which he said that the U.S. Embassy was "a centre of espionage and conspiracy" and that it

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 31.

¹²¹ *Id.*

¹²² *See id.*

should remain occupied until the United States turned over the former shah to Iran for trial, and returned his property to Iran. The decree stated that the majority of hostages “will be under arrest until the American Government acts according to the wish of the nation.”¹²³

The court said that this statement turned the private acts into acts for which Iran as a state was responsible: “The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.”¹²⁴ In the context of ethnic cleansing, the court’s teaching would seem to be that a state is responsible for acts undertaken by private parties if the state either directs the private parties to undertake them, or if the acts are undertaken initially without state direction, the state subsequently directs that the acts be continued. Thus, a state may be responsible for ethnic cleansing carried out by private parties where the private parties act at its direction.

B. *Facilitating Ethnic Cleansing by a Private Party*

If, in a civil or international war,¹²⁵ a state aids a party that is carrying out ethnic cleansing then humanitarian law — the body of law that regulates hostilities — becomes an additional legal basis of liability.¹²⁶ Under article 1 of the 1949 Geneva Civilians Convention, a state party has an obligation to ensure respect for the convention in all circumstances.¹²⁷ One consequence of the duty to ensure respect is an obligation to endeavor to keep parties to conflicts from violating their obligations. Thus, if a state is aware that a convention norm is being violated, it must take appropriate measures to bring the offending party into compliance.¹²⁸ The U.N. Security Council referred to and insisted on this obligation in a resolution in which it called on states parties to the Geneva Civil-

¹²³ *Id.* at 34.

¹²⁴ *Id.* at 35.

¹²⁵ See *Interim Report*, *supra* note 2, at 14. The conflict in Bosnia-Herzegovina, according to experts appointed by the U.N. Security Council, bore an international character. See *id.* The Security Council’s Commission of Experts decided to apply “the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.” *Id.*

¹²⁶ See *id.* at 15 (discussing application of international armed conflict law to Yugoslavia).

¹²⁷ See Geneva Convention, *supra* note 60, art. 1 at 288.

¹²⁸ See *id.*

ians Convention to endeavor to bring Israel into compliance with humanitarian law in its exercise of powers as a belligerent occupant.¹²⁹ States parties are similarly obliged to endeavor to bring into compliance a nonstate entity that is a participant in civil hostilities, because the Geneva Conventions apply to the conduct of such entities.¹³⁰

1. Facilitating: The Nicaragua Case

In 1986, Nicaragua brought a case against the United States in the International Court of Justice. In one of its claims Nicaragua sought to hold the United States responsible for acts of the "Contras" (a revolutionary force in Nicaragua) which were alleged to be in violation of laws of warfare and humanitarian law and which were alleged to be encouraged by the United States.¹³¹ Although ethnic cleansing was not involved, the court made relevant observations concerning the obligations of an outside party (the United States) where the outside party assists a nonstate party (the Contras) involved in a civil war.¹³²

The court said that under common article 1 of the four Geneva Conventions of 1949 a state must "ensure respect" for all articles of the conventions. Among the articles for which states must ensure respect is article 3, which concerns the laws of warfare.¹³³ The court said that a duty to "ensure respect" to the laws of warfare applies even when the conflict is a civil war because the obligation to ensure respect derives not only from common article 1, but from customary law as well.¹³⁴

The International Court of Justice said, however, that even if the United States supplied the Contras, and even if it exercised some direction over their target selection and military planning, it was not responsible for particular acts the Contras might commit in

¹²⁹ See S.C. Res. 681, U.N. SCOR, 45th Sess., at 2, U.N. Doc. S/INF/46 (1990) ("[C]all[ing] upon the high contracting parties to the Fourth Geneva Convention, of 1949, to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof.")

¹³⁰ See Geneva Convention, *supra* note 60, art. 3 at 288.

¹³¹ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (discussing United States support of insurgent groups in Nicaragua to punish that country's support of guerrillas in El Salvador).

¹³² See *id.* at 114 (dismissing differences in international and noninternational conflicts and applying similar law to both).

¹³³ See *id.*

¹³⁴ See *id.*

violation of the laws of warfare.¹³⁵

The court did find the United States responsible for encouraging acts in violation of humanitarian law in connection with a manual supplied by the United States to the Contras that suggested assassination of local Nicaraguan government officials.¹³⁶ For this, the court held the United States responsible, though not for specific acts carried out by the Contras in line with the suggestions made in the manual.¹³⁷ The court's reasoning suggests that a state would bear responsibility for ethnic cleansing if it were to encourage a nonstate actor to carry out ethnic cleansing.

2. Facilitating: The Bosnia Case

Precisely such a situation arose in Bosnia, where evidence emerged that Bosnian Serb forces, a nonstate party, were carrying out acts of ethnic cleansing, and were being assisted and promoted by the state of Yugoslavia.¹³⁸ Yugoslavia was deemed responsible in this situation by the Human Rights Committee which administers the International Covenant on Civil and Political Rights.¹³⁹ The Committee referred to "the existence of links between the [Bosnian Serb] nationalists and Serbia which invalidated the [Yugoslavian] Federal Government's claim to be exempt from responsibility [for ethnic cleansing]."¹⁴⁰

Statements by governmental authorities of Yugoslavia suggested that Yugoslavia shared the aims of the Bosnian Serb forces to which Yugoslavia was providing material aid.¹⁴¹ In this way, acts of ethnic cleansing by a nongovernmental entity were arguably ratified by Yugoslavia and hence became attributable to Yugoslavia.

When the Yugoslav army withdrew from Bosnia in 1992, it left military equipment,¹⁴² as well as Serb-staffed units to become part

¹³⁵ See *id.* at 64.

¹³⁶ See *id.* at 68.

¹³⁷ See *id.* at 148.

¹³⁸ See *Comments of the Human Rights Committee*, U.N. GAOR, 47th Sess., at 3, U.N. Doc. CCPR/C/79/Add.16 (1992) (indicating Yugoslavia supported Bosnian Serb forces).

¹³⁹ See *id.* at 2.

¹⁴⁰ *Id.*

¹⁴¹ See *Summary of World Broadcasts*, BBC, May 13, 1993, Part 2 Eastern Europe, C.1 Special Supplement, at EE/1687/C1 (quoting Tanjug press agency).

¹⁴² See *President Addresses Federal Assembly* (Belgrade Radio Belgrade Network, radio broadcast, 0935 GMT, July 14, 1992), translated in FOREIGN BROADCAST INFORMATION SERVICE, July 15, 1992, at 36 (discussing statement of Dobrica Cosic, president of Yugoslavia (Serbia and Montenegro), that Yugoslav army left 231 tanks, 300 artillery pieces, and large

of the Bosnian Serb forces.¹⁴³ Yugoslav troops moved into Bosnia,¹⁴⁴ assisting Bosnian Serb forces during combat.¹⁴⁵ Serbian President Slobodan Milosevic acknowledged giving substantial aid to “people and fighters in Bosnia-Herzegovina,” meaning the Bosnian Serb forces.¹⁴⁶

The Bosnian Serb forces claimed two-thirds of Bosnia for an anticipated Bosnian Serb state.¹⁴⁷ Yugoslavia’s highest ranking general complained that the West sought to take away Serbia’s “Lebensraum” in Bosnia.¹⁴⁸ Milosevic impliedly acknowledged helping the Bosnian Serb forces drive Muslims out of Bosnia when he said: “Serbia has lent a great, great deal of assistance to the Serbs in Bosnia. Owing to that assistance they have achieved most of what they wanted.”¹⁴⁹ This evidence suggests that Yugoslavia was, at least, aware that its aid was being used to drive Muslims out of Bosnia. Yugoslavia’s close connection to the Bosnian Serb forces suggests that it was aware of their tactics.

The U.N. Security Council demanded the removal of the Yugoslav People’s Army from Bosnia-Herzegovina.¹⁵⁰ The U.N. General Assembly criticized Yugoslavia for “the direct and indirect support of the Yugoslav People’s Army for the aggressive acts in the Republic of Bosnia and Herzegovina.”¹⁵¹ It called on Yugoslav authorities to “use their influence with the self-proclaimed Serbian authorities

amount of infantry weapons and ammunition).

¹⁴³ See *Remnants of JNA (Yugoslav People’s Army) Said to Become ‘Serb Army’* (Belgrade Tanjug Domestic Service, 1223 GMT, May 7, 1992), translated in FOREIGN BROADCAST INFORMATION SERVICE, May 8, 1992, at 18-19; *Disposition of JNA Presents Problems* (Belgrade Borba, May 6, 1992, at 9), translated in FOREIGN BROADCAST INFORMATION SERVICE, May 14, 1992, at 26-27.

¹⁴⁴ See Blaine Harden, *Serbs Tighten Grip on Bosnian Town Despite Strong International Outcry*, WASH. POST, Apr. 16, 1992, at A33 (stating that U.S. government condemned Yugoslavia for promoting forcible disintegration of Bosnia).

¹⁴⁵ See *Federal Army Supporting Bosnian Serbs* (Belgrade Politika, Jan. 26, 1993, at 8), translated in FOREIGN BROADCAST INFORMATION SERVICE, Jan. 27, 1993, at 46-47; *Yugoslav Army Offensive Across Drina Detailed* (Zagreb Globus, Mar. 12, 1993, at 9-10), translated in FOREIGN BROADCAST INFORMATION SERVICE, April 16, 1993, at 41-43.

¹⁴⁶ See *Summary of World Broadcasts*, *supra* note 141, at EE/1687/C1 (quoting Tanjug press agency; Milosevic referring to period 1991-93).

¹⁴⁷ See *Serbian Leader Lays Claims to Bosnian Territory* (Vienna Kurier, Feb. 27, 1992, at 3), translated in FOREIGN BROADCAST INFORMATION SERVICE, Feb. 27, 1992, at 34.

¹⁴⁸ See *Serbs Will Fight to Bitter End, General Says* (Reuters (dateline Bonn), Apr. 24, 1993) (quoting General Zivota Panic, Chief of the General Staff of Yugoslavia). The Nazis used the word *Lebensraum* to describe their need for “living space” necessary for the economic survival of their country. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1287 (1993).

¹⁴⁹ *Summary of World Broadcasts*, *supra* note 141, at EE/1687/C1 (quoting Tanjug press agency; Milosevic referring to period 1991-93).

¹⁵⁰ See S.C. Res. 752, U.N. SCOR, 47th Sess., at 2, U.N. Doc. S/RES/752 (1992).

¹⁵¹ G.A. Res. 47/121, *supra* note 34, at 2.

in Bosnia and Herzegovina” to cease ethnic cleansing.¹⁵²

A state in Yugoslavia’s situation need not necessarily entertain a desire that its aid be used for ethnic cleansing before it is internationally responsible. Liability attaches as well, as indicated above, where a state is aware that a recipient state is using aid to further acts of ethnic cleansing.

3. Facilitating Genocide

The Genocide Convention specifically provides for liability for complicity in genocide, meaning that either a natural person or a state is responsible for assisting anyone, whether a natural person, an insurgent movement, a faction in a civil war, another state, or any other entity that itself commits genocide.¹⁵³ The International Court of Justice implied that Yugoslavia might be complicit in genocide for its aid to the Bosnian Serb forces.¹⁵⁴

The Genocide Convention does not further define complicity. Roberto Ago, the International Law Commission rapporteur on state responsibility, said that “complicity,” as defined by the International Law Commission, “may, for example, also take the form of provision of weapons or other supplies to assist another State to commit genocide.”¹⁵⁵ Complicity would be present if a state provides material aid to those committing genocide, intending that it be used to commit genocide.¹⁵⁶ It would be present as well if a state providing aid does not necessarily desire that the recipient commit genocide but understands that the aid will be so used. Under the Genocide Convention, “complicity” liability attaches where a state provides material means to those committing genocide, with an awareness that the recipient state will use the material means to commit genocide.

¹⁵² G.A. Res. A/48/153, U.N. GAOR, 48th Sess., at 5, U.N. Doc. A/RES/48/153 (1994).

¹⁵³ See Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 37, at 280 (describing liability of person or state assisting any entity in commission of genocide).

¹⁵⁴ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 36, at 25 (order of April 8, 1993) (ordering Yugoslavia, as provisional measure, to ensure that entities acting under its direction or with its support not commit genocide in Bosnia).

¹⁵⁵ *Seventh Report*, *supra* note 99, at 58.

¹⁵⁶ See *id.*

C. *Failing to Prevent Ethnic Cleansing by a Private Party*

Although a state does not answer for persons who do not act on its behalf,¹⁵⁷ it must take reasonable measures to maintain order in territory under its jurisdiction. Hence, if expulsion or other acts calculated to induce departure are being carried out by private parties, a state must endeavor to prevent them.¹⁵⁸ Under international law, if a violation of human rights is carried out by private parties, the state may become responsible if it does not respond.¹⁵⁹ Thus, the Inter-American Court of Human Rights has said that

[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention [on Human Rights].¹⁶⁰

The U.N. Secretary-General invoked this principle in connection with ethnic cleansing when he stated that ethnic cleansing in the former Yugoslavia was being carried out as a policy. The existence of such a policy, he said, "may . . . be inferred from the consistent failure to prevent the commission of such crimes and to prosecute and punish their perpetrators."¹⁶¹ One writer in this field has stated, with regard to expulsions, that "situations in which the government tolerates, or even abets such indirect measures by private persons or groups would also impose liability on a government for not having prevented a mass expulsion."¹⁶²

State responsibility attaches only if the state can reasonably be expected to take action to stop the wrongful act, or to provide

¹⁵⁷ See *Draft Articles on State Responsibility*, *supra* note 66, at 128 (discussing limitations on liability of states for actions of others).

¹⁵⁸ See Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532, 553-55 (1986) (discussing responsibility of state to halt certain activities).

¹⁵⁹ See BROWNIE, *supra* note 74, at 161 (citing cases in which state has been held responsible for failing either to prevent act of violence against person, or to prosecute and punish guilty party).

¹⁶⁰ 28 I.L.M. 294, 325 (1989).

¹⁶¹ *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, 49th Sess., at 2, U.N. Doc. S/1994/674 (1994).

¹⁶² HENCKAERTS, *supra* note 57, at 109.

whatever after the fact remedy might be appropriate.¹⁶³ A state bears no responsibility for acts of a private party if it could not reasonably have discovered the act in time to prevent it.¹⁶⁴

D. Failing to Prosecute a Private Party for Ethnic Cleansing

Even where a state cannot prevent ethnic cleansing by a private party, the state may be required to bring individual perpetrators to justice. Acts constituting ethnic cleansing may amount to “grave breaches” of humanitarian law.¹⁶⁵ If that is the case, then all states have an obligation to punish those in its jurisdiction who are responsible, or to facilitate their prosecution by another state.¹⁶⁶ This obligation led to considerable controversy in Bosnia, where an international peace-keeping force was present but was reluctant to arrest persons accused by an ad hoc international tribunal established by the U.N. Security Council to try war crimes committed in the former Yugoslavia.¹⁶⁷ Nonetheless, states bear an obligation to facilitate the prosecution of persons who have carried out ethnic cleansing.

A similar obligation arises under the complicity element of the Genocide Convention. The complicity element in the Genocide Convention may require a state to refrain from helping a perpetrator of genocide to escape detection.¹⁶⁸ In the preparation of the Genocide Convention, the U.S. representative said that the United

¹⁶³ See generally Report of the International Law Commission on the Work of Its Thirty-First Session, [1979] 2 Y.B. Int'l L. Comm'n 129 (Vol. 2, pt. 2, ch. III), U.N. Doc. A/CN.4/SER.A/1979/Add.1 (Part 2) (discussing responsibility of states).

¹⁶⁴ See 4 J.B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 4054 (1898) (claiming commission found Great Britain not responsible for raid by private parties on town in Vermont launched from Canada, because Britain prepared raid in such secrecy that “no care which one national may reasonably require of another in such cases would have been sufficient to discover it”).

¹⁶⁵ See Geneva Convention, *supra* note 60, arts. 146-47 at 386, 388.

¹⁶⁶ See *id.*

¹⁶⁷ See International Criminal Tribunal for the Former Yugoslavia: International Arrest Warrants and Orders for Surrender of Radovan Karadzic and Ratko Mladic, 35 I.L.M. 75, 92 (1997) (explaining military aspects of Bosnian peace agreement); Robert Kushen & Kenneth J. Harris, *Current Development: Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AM. J. INT'L L. 510 (1996) (discussing enactment of U.S. legislation to comply with Security Council requirement mandating arrest of international humanitarian law violators); David Usburne & Sarah Helms, *Pressure Mounts on the West to Arrest Bosnian War Criminals*, INDEPENDENT (London), July 18, 1996, at 10 (discussing pressure on Western powers to force NATO arrest of Bosnian Serb leaders).

¹⁶⁸ See Report of the Ad Hoc Committee on Genocide, U.N. ESCOR, 7th Sess., Supp. No. 6, at 8, U.N. Doc. E/794/Corr. 1 (1948) (discussing complicity and its application to states).

States agreed to the inclusion of “complicity” on the understanding that it referred to “accessoryship before and after the fact and to aiding and abetting in the commission of crimes enumerated in this article.”¹⁶⁹

Accessoryship after the fact means aiding a perpetrator to avoid liability.¹⁷⁰ An accessory after the fact may, for example, hide a perpetrator from the authorities, or keep investigators from uncovering facts that would disclose the perpetrator’s identity or liability. Thus, where a state has information about genocide being committed, the state is obliged to use that information to stop the genocide, and to bring to justice the perpetrators.

VII. A STATE’S RESPONSIBILITY FOR FAILING TO UTILIZE INTERNATIONAL MECHANISMS TO STOP ETHNIC CLEANSING

A state may be responsible for ethnic cleansing as a result of its participation in an international mechanism aimed at preventing it.

A. *Geneva Civilians Convention*

Under the Geneva Civilians Convention, which as indicated above, forbids ethnic cleansing by a belligerent occupant, states parties are required to “ensure respect” for compliance with Convention protected rights by other states parties.¹⁷¹ Thus, if a state in belligerent occupation of territory carries out ethnic cleansing, all states parties to the Geneva Civilians Convention must try to stop it.¹⁷² The U.N. Security Council has called on states parties to the Geneva Civilians Convention to fulfill this obligation, although without specifying precisely what they must do.¹⁷³

The scope of this obligation has not been clarified in state practice. States have, however, taken action aimed at pressuring an erring state to comply.¹⁷⁴ In the case of Israel’s post-1967 occupa-

¹⁶⁹ *Id.*

¹⁷⁰ See generally ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 748-51 (3d ed. 1982) (discussing four prerequisites to establish accessory after fact).

¹⁷¹ See Geneva Convention, *supra* note 60, art. 1 at 288.

¹⁷² See *id.*

¹⁷³ See S.C. Res. 681, U.N. SCOR, 45th Sess., at 1, U.N. Doc. S/INF/46 (1991).

¹⁷⁴ See G.A. Res 2727, U.N. GAOR, 25th Sess., Supp. No. 28, at 36, U.N. Doc. A/8028 (1971) (asking Israel “to comply with its obligations under the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, the Universal Dec-

tion of Palestinian and Syrian territories, the states parties to the Geneva Civilians Convention determined that Israel was in violation of various Convention obligations and acted through the United Nations to pressure Israel to comply.¹⁷⁵ They condemned identified violations by Israel,¹⁷⁶ established a special committee to investigate violations on a continuing basis,¹⁷⁷ and called on states to refrain from aid that might facilitate the violations.¹⁷⁸

At a minimum, a state would seem to be required to refrain from encouraging a state party to commit ethnic cleansing. The general international law norm that prohibits aid or assistance to another state for a wrongful act is not construed to prohibit moral encouragement or incitement.¹⁷⁹ However, under article 1 of the Geneva Civilians Convention, a state that gives moral encouragement to another state to engage in ethnic cleansing would be violating its obligation to ensure respect by the other state.¹⁸⁰

B. International Organizations

If ethnic cleansing continues for a prolonged period, regional or universal international organizations involved in security matters may be asked to try to stop it. Such organizations may call upon member states to initiate or vote on proposals to deal with an episode of ethnic cleansing. The question arises as to whether they may incur responsibility if they fail to take action to stop ethnic cleansing, or if they obstruct proposals aimed at stopping it. Such

laration of Human Rights and the relevant resolutions adopted by the various international organizations”).

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See G.A. Res. 2443, U.N. GAOR, 23d Sess., at 1, U.N. Doc. A/7218 (1969) (discussing formation of special committee to investigate violations of Geneva Convention).

¹⁷⁸ See U.N. Commission on Human Rights, E.S.C. Res. 1984/1, U.N. ESCOR, 38th Sess., Supp. No. 4, at 18, U.N. Doc. E/1984/14, E/CN.4/1984/77 (1984) (asking “all states, in particular the States parties to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, in accordance with Article 1 of that Convention,” to avoid “extending any aid which might be used by Israel in its pursuit of the politics of annexation and colonization”).

¹⁷⁹ See *Report to General Assembly*, International Law Commission, U.N. GAOR, 33d Sess., Supp. No. 10, at 244-46, U.N. Doc. A/33/10 (1978), reprinted in [1978] 2 Y.B. Int'l Law Comm'n 99-100, U.N. Doc. A/CH.4/SERA/1978/Add.1 (Part 2) (stating that state practice does not impose liability for incitement); *id.* at 251 (“Even incitement may sometimes assume forms that make it, in fact, aid or support for the ‘incited’ State to commit the wrongful act.”).

¹⁸⁰ See Geneva Convention, *supra* note 60, art. 1 at 288; *Report to General Assembly*, *supra* note 179, at 244-46 (stating that state practice does not impose liability for incitement).

a question would arise only if action that reasonably could be expected to thwart the ethnic cleansing in the particular situation can lawfully be taken under the founding treaty of the organization.¹⁸¹

Within the United Nations, which is the international organization most likely to act in such a situation, the Security Council is the appropriate organ. If a particular situation threatens the international peace, the Security Council must make that determination and take appropriate action.¹⁸² If a state member of the Security Council opposes Council action aimed at stopping ethnic cleansing, it may be in violation of its Charter obligation.

Similarly, such a state might be violating its obligations under general international law. The International Law Commission, in defining the kinds of "aid or assistance" that render a state responsible for the acts of another state, says: "there can also be aid or assistance of a legal or political nature, such as the conclusion of a treaty that may facilitate the commission by the other party of an internationally wrongful act."¹⁸³ Action within the framework of an international organization might be "aid or assistance of a legal or political nature."¹⁸⁴

In one instance, a state charged complicity against a permanent member of the Security Council who blocked proposed Council action to deal with a threat to the peace. In 1982, when Israel sent troops into Lebanon, the U.S.S.R., which considered Israel to be responsible for aggression, introduced in the Council a draft resolution that asked states to stop supplying arms or other military aid to Israel until Israel withdrew from Lebanon.¹⁸⁵ The draft resolution received eleven affirmative votes but failed because of a U.S. veto.¹⁸⁶ Following the vote, the U.S.S.R. said that, by virtue of its veto, the United States rendered itself responsible for Israel's alleged aggression.¹⁸⁷

¹⁸¹ See generally John Quigley, *The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism*, 17 MICH. J. INT'L L. 249 (1996) (discussing need for compliance by U.N. Security Council with U.N. Charter when Council responds to potential threats to peace).

¹⁸² See U.N. CHARTER, art. 39, para 1.

¹⁸³ Report to General Assembly, *supra* note 179, at 251.

¹⁸⁴ *Id.*

¹⁸⁵ See U.N. SCOR, 37th Sess., 2391st plen. mtg. at 4, U.N. Doc. S/PV.2391 (1982).

¹⁸⁶ See *id.* at 13.

¹⁸⁷ See *id.* at 21 (quoting Mr. Ovinnikov, U.S.S.R.: "Thus, the responsibility of the United States for what has taken place today [casting of veto by U.S.] is clear. For each further step of the Israeli occupiers into Lebanese territory, for each Lebanese and Palestinian child who is killed; for each old person who is killed, for each woman who is killed — I say that the

This issue arose as well with respect to ethnic cleansing. In 1991, the Security Council banned arms imports into Yugoslavia, with the aim of ending hostilities among the sectors of Yugoslavia that were separating to become independent states.¹⁸⁸ When ethnic cleansing began to be reported, particularly in Muslim areas in Bosnia, the government of Bosnia tried to stop it militarily but was hard pressed to acquire arms as a result of the embargo.¹⁸⁹ Because Yugoslavia equipped Serb forces in Bosnia, the ban put the government of Bosnia at a disadvantage.¹⁹⁰

A number of states at the United Nations, including the United States and many nonaligned states, suggested that the ban be lifted entirely, or that Bosnia be exempted from it, so that Bosnia might better defend the Muslim population from ethnic cleansing.¹⁹¹ However, the Security Council took no action in either direction.¹⁹² The United Kingdom and France, both of which had troops in Bosnia at the time, argued that exempting Bosnia from the arms embargo would widen the conflict, that it might even increase the genocide, and that Serb forces might retaliate against their troops.¹⁹³ The views of the United Kingdom and France were criti-

responsibility for all of that will be borne not only by Israel but also by the United States.”); *see also id.* at 39-40 (quoting Mr. Terzi, P.L.O.: “We shall hold the Council — or, to be more precise, the permanent member that obstructed the functions of the Council today — responsible for any military action by Israel, in particular in and around Beirut, in pursuing its criminal acts of aggression and in resuming its barbarous attacks against Beirut.”).

¹⁸⁸ *See* S.C. Res. 713, U.N. SCOR, 46th Sess., at 3, U.N. Doc. S/RES/713 (1991) (“Decid[ing], under chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.”).

¹⁸⁹ *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 36, at 441 (separate opinion of Judge Lauterpacht) (discussing arms embargo).

¹⁹⁰ *See id.* (stating that elements of fact are involved, namely, “that the arms embargo has led to the imbalance in the possession of arms by the two sides and that that imbalance has contributed in greater or lesser degree to genocidal activity such as ethnic cleansing”).

¹⁹¹ *See id.* “[T]he Security Council resolution [Res. 713] can be seen as having in effect called on members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.” *Id.*

¹⁹² A question might also arise of the responsibility of the organization as an entity. *See generally, e.g.,* MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES (1995); Mahnoush H. Arsanjani, *Claims Against International Organizations: Quis Custodiet Ipsos Custodes*, 7 YALE J. WORLD PUB. ORD. 131 (1981). This issue is beyond the scope of the present Article.

¹⁹³ *See* Anthony Goodman, *Bosnia to Sue Britain in World Court over Arms Ban*, REUTER LIBRARY REP., Nov. 15, 1993, at 1, available in LEXIS, News Library (discussing suit by Bosnia

cal, because, as permanent members of the Security Council, they held veto power, and, thus, could defeat any draft resolution to change the embargo already in place.¹⁹⁴

Bosnia notified the International Court of Justice in writing that it intended to sue the United Kingdom under the Genocide Convention, for failing to prevent genocide (article 1), and for complicity in genocide (article 3(e)), on the grounds that the United Kingdom supported a continuation of the ban.¹⁹⁵ Bosnia asserted that the United Kingdom had "illegally imposed and maintained an arms embargo" against Bosnia in violation of article 51 of the U.N. Charter, which gives a state the right to defend itself against aggression.¹⁹⁶ Bosnia said that the United Kingdom had "aided and abetted the ongoing genocide against the people and state of Bosnia and Herzegovina by actively opposing all of the efforts by other states to lift this illegal arms embargo."¹⁹⁷

With little prospect of action by the Security Council to end the arms ban against Bosnia, the U.N. General Assembly took up the matter and voted on a resolution calling on the Security Council to end the ban against Bosnia.¹⁹⁸ The United States was the only permanent member of the Security Council that voted in favor of this resolution. The other permanent members abstained, as did most Western nations.¹⁹⁹ Bosnia dropped its plan to file against the United Kingdom for genocide, in apparent response to a pledge by the United Kingdom to increase humanitarian aid and to promote a negotiated political settlement.²⁰⁰

against United Kingdom to lift arms embargo).

¹⁹⁴ See U.N. CHARTER, art. 27, para 3.

¹⁹⁵ See FRANCIS A. BOYLE, *THE BOSNIAN PEOPLE CHARGE GENOCIDE: PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE CONCERNING BOSNIA V. SERBIA ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE* 365 (1996) (discussing Bosnia's statement of intention to institute legal proceedings against United Kingdom before International Court of Justice on November 15, 1993); see also *Bosnia Prepares UK Genocide Charge*, *HERALD* (Glasgow), Nov. 17, 1993, at 4 (quoting Francis Boyle, agent for Bosnia, as saying that he had given court document stating Bosnia's intention to institute proceedings against U.K.).

¹⁹⁶ See BOYLE, *supra* note 195, at 366; Goodman, *supra* note 193, at 1.

¹⁹⁷ BOYLE, *supra* note 195, at 366 (implicating, without naming them, other state members of Security Council, as "aiders and abettors to genocide").

¹⁹⁸ See G.A. Res. 47/121, *supra* note 34, at 4 ("urg[ing] the Security Council . . . [t]o exempt the Republic of Bosnia and Herzegovina from the arms embargo as imposed on the former Yugoslavia under Security Council resolution 713 (1991) of 25 September 1991").

¹⁹⁹ See *id.* (listing result of vote: 109 in favor, none against, 57 abstentions).

²⁰⁰ See BOYLE, *supra* note 195, at 368 (indicating that Bosnia would not sue, and that U.K. had made new commitment on humanitarian aid); Michael Littlejohns, *UN Appeal for End to Bosnia Arms Embargo*, *FIN. TIMES* (London), Dec. 21, 1993, at 2 (stating that United Nations General Assembly recommended that Security Council lift arms embargo).

Nonetheless, Bosnia's charge against the United Kingdom for genocide pointedly raised the question of the responsibility of a state that thwarts Security Council action aimed at helping a state stop ethnic cleansing. One view expressed at the time was that the United Kingdom could not be deemed complicit in Yugoslavia's genocide.²⁰¹ However, Judge ad hoc Lauterpacht said in his separate opinion in the case Bosnia had raised against Yugoslavia in the International Court of Justice, that liability might attach to members of the Security Council.²⁰² Stating first that, when imposing the arms embargo, Council members may not have foreseen its impact, Judge Lauterpacht referred to a point in time at which "the operation of paragraph 6 of Security Council resolution 713 began to make Members of the United Nations accessories to genocide."²⁰³ This is a reference to the time at which the embargo began to work against the government of Bosnia.

To date no state has been held responsible in any legal forum for a position it took as a member of the U.N. Security Council. Acting in such capacity, states must be given broad discretion in deciding how to approach crisis circumstances. The efficacy of a particular proposed solution may be less than obvious. Various proposed means of pressuring an offending state may be debatable. Nonetheless, it may happen that a state as a member of the Security Council, with knowledge that its position will allow another state to carry out ethnic cleansing, might either promote a resolution that facilitates ethnic cleansing, or block action to revoke a resolution that facilitates ethnic cleansing. Such a state facilitates the wrongful act of the other state with awareness that it is doing so. In this situation responsibility on a complicity rationale would lie.

VIII. A STATE'S OBLIGATIONS ARISING FROM ITS RESPONSIBILITY FOR ETHNIC CLEANSING

This Article has considered a variety of circumstances in which a state may be responsible for ethnic cleansing. If such responsibility

²⁰¹ See *Court Likely to Reject Genocide Case Against Britain*, REUTER LIBRARY REP., Nov. 16, 1993, available in LEXIS, News Library (quoting Eric Suy, professor at Leuven University, Belgium, and Terry Gill, professor at Utrecht University, Netherlands).

²⁰² See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 36, at 408-48 (separate opinion of Judge Lauterpacht) (suggesting that Security Council members could be accessories to genocide).

²⁰³ *Id.* at 441.

is found, the next issue is the consequences. Because of the imperfections of the international legal order, not all states responsible for ethnic cleansing are likely to be held accountable. Only if another state institutes an action of some kind, or if an international organization addresses the matter, will a state be found responsible.

The tribunals established in the wake of the events of the early 1990s for both Rwanda and the former Yugoslavia were given jurisdiction to determine the liability of individuals, but not of states. However, if a state engages in acts constituting ethnic cleansing, it is liable for the consequences.

A. *Obligation to Repatriate*

Among the consequences of ethnic cleansing, the most pressing issue is repatriation of those displaced. State practice suggests that the state from which displacement occurs must repatriate.²⁰⁴ Thus, the U.N. Security Council stated with respect to Bosnia that “all displaced persons have the right to return in peace to their former homes”²⁰⁵ and “insist[ed] that all displaced persons be enabled to return in peace to their former homes.”²⁰⁶ In another statement on Bosnia, the Security Council “reaffirm[ed] the right of all refugees and displaced persons affected by the [Bosnia] conflict to return to their homes in secure conditions in accordance with international law.”²⁰⁷ The U.N. Commission on Human Rights, in addressing ethnic cleansing, has similarly found a “right of all its victims to return to their homes.”²⁰⁸

Repatriation may be more or less achievable, depending on the political situation following the displacement. In Israel a half century after the expulsions of 1948, no repatriation of any significant scope has occurred, and an agreement to negotiate the matter has

²⁰⁴ See Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207, 257 (stating that “[m]ass expulsions in any context violate important principles of international and/or municipal law. . . . The persons unjustly deported have a right to compensation and also the right to return to their homeland.”).

²⁰⁵ S.C. Res. 779, U.N. SCOR, 47th Sess., at 2, U.N. Doc. S/RES/779 (1992).

²⁰⁶ S.C. Res. 787, *supra* note 4, at 3.

²⁰⁷ *Security Council Fails to Reconfirm Resolutions Regulating Transport of Goods Between Federal Republic of Yugoslavia and Bosnia and Herzegovina*, FED. NEWS SERV., Dec. 5, 1994, available in LEXIS, News Library.

²⁰⁸ *Report of the Commission on Human Rights on Its Fiftieth Session*, E.S.C. Res. 1994/72, U.N. ESCOR, 49th Sess., Supp. No. 4, at 203, U.N. Doc. E/1994/24 (1994).

yet to be implemented.²⁰⁹ In Rwanda, on the other hand, Tutsis were repatriated soon after their displacement, because the Hutu-led government that carried out the ethnic cleansing was overthrown by a Tutsi-led government.²¹⁰

B. *Obligation to Facilitate Repossession of Property*

As part of the obligation to repatriate, a state responsible for ethnic cleansing must, to the extent possible, facilitate returnees' access to their homes and property. To be sure, homes may have been destroyed following the displacement, either by members of ethnic groups hostile to the group forced out, or by the government.²¹¹ Members of a dominant ethnic group may have occupied houses belonging to those forced out, as has occurred in Israel (Jews occupying Arab houses),²¹² Bosnia (Serbs occupying Muslim houses),²¹³ and in the Serb populated regions of Croatia (Croats occupying Serb houses).²¹⁴

Even if parties negotiate repatriation, as in Bosnia,²¹⁵ potential returnees may meet with violence if they attempt to reoccupy their

²⁰⁹ See Israel-Palestine Liberation-Organization: Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, 32 I.L.M. 1525, 1525 (1993) (requiring parties to negotiate issue of repatriation of Arab refugees).

²¹⁰ See generally Raymond Bonner, *French in Rwanda Discover Thousands of Hutu Refugees*, N.Y. TIMES, June 28, 1994, at A3 (stating that tens of thousands of Tutsis fled to Uganda or Burundi); Raymond Bonner, *Rwandan Rebels Name Cabinet of Hutu and Tutsi, but Those Fleeing Are Still Fearful*, N.Y. TIMES, July 20, 1994, at A6 (estimating one million Tutsis fled to neighboring states); *UN Organizes Return of Rwandan Refugees*, AGENCE FRANCE PRESSE, Dec. 20, 1994, available in LEXIS, News Library (stating that 350,000 Tutsis had returned to Rwanda since change of government in July 1994).

²¹¹ See MORRIS, *supra* note 91, at 148-50 (1987) (stating that Israeli government established and implemented policy of razing entire villages to preclude inhabitants from reclaiming them); Chris Hedges, *Croatia Resettling Its People in Houses Seized from Serbs*, N.Y. TIMES, May 14, 1997, at A1 (indicating that many returning Serbs found their houses demolished by fires of undetermined origin).

²¹² See BENNY MORRIS, *The Crystallization of Israeli Policy Against a Return of the Arab Refugees: April-December, 1948*, 6 STUDIES IN ZIONISM 85, 106, 109 (1985) (stating that Israeli government brought in Jews to settle in Arab housing in some areas).

²¹³ See Daniel Williams, *Nine Months After Bosnian War's End, Rage and Revenge Fuel Ethnic Division*, WASH. POST, Aug. 12, 1996, at A8 (detailing how ethnic cleansing included driving Muslims from their homes).

²¹⁴ See Hedges, *supra* note 211, at A1 (stating that many returning Serbs found their houses occupied by Croats).

²¹⁵ See *General Framework for Peace in Bosnia and Herzegovina: Annex 7: Refugees and Displaced Persons*, 35 I.L.M. 75, 138 (1996) (stating that "[t]he Parties shall facilitate the provision of adequately monitored, short-term repatriation assistance on a non-discriminatory basis").

home areas.²¹⁶ In Croatia, local authorities refused to help returning Serbs in repossessing their houses occupied by Croats.²¹⁷ Some sued in local courts for the right to repossess, but the courts rejected their claims, for no apparent valid reason.²¹⁸

C. Other Obligations

Beyond an obligation to repatriate, additional liability may attach. A state responsible for ethnic cleansing answers for the harm involved in the departure. While international organs have not addressed this matter, it would seem to include compensation for the indignity and hardship of the departure, for loss of property left behind, and for reduced income if, as is typically the case, a person loses income as a result of being taken from her native area.

Beyond this ordinary liability, a state engaging in ethnic cleansing is subject to collective international action designed to compel it to cease and desist. For acts endangering the peace, and for widespread human rights violations, in particular genocide, a state may be subjected to sanctions.²¹⁹ Other states are forbidden to recognize as lawful the situation created by an act of ethnic cleansing,²²⁰ meaning that if the state of displacement refuses repatriation, other states may not recognize the situation as lawful.²²¹

In Bosnia, the international community took collective action to oppose ethnic cleansing. The U.N. Security Council made a determination that the ethnic cleansing for which Yugoslavia was responsible constituted "a threat to peace and security."²²² On the basis of this finding it imposed economic sanctions on Yugoslavia.²²³

²¹⁶ See Dan DeLuce, *Bosnian Serbs Torch Homes of Muslim Refugees*, REUTERS N. AM. WIRE, available in LEXIS, News Library (stating that mob of Serbs burned homes of Muslims attempting to resettle).

²¹⁷ See Hedges, *supra* note 211 at A1.

²¹⁸ See *id.* (stating that Organization for Security and Cooperation in Europe assisted 160 Serbs in filing suit to reclaim houses but stopped such assistance after losing every case).

²¹⁹ See *Draft Articles on State Responsibility*, *supra* note 66, at 131 (defining "international crime" to include, among other acts, breach of peace and genocide).

²²⁰ See *id.* at 146 (outlining state's obligation to recognize situations created by ethnic cleansing).

²²¹ See *id.* (discussing state's responsibility not to render aid or assistance to another state that commits international crime).

²²² S.C. Res. 808, U.N. SCOR, 48th Sess., at 2, U.N. Doc. S/RES/808 (1993).

²²³ See S.C. Res. 713, *supra* note 188, at 3; S.C. Res. 787, *supra* note 4, at 3; S.C. Res. 820, U.N. SCOR, 48th Sess., at 3, U.N. Doc. S/RES/820 (1993); see also *OIC Urges U.N. to Authorize Use of Force Against Serbia*, AGENCE FRANCE PRESSE, Dec. 26, 1993, available in LEXIS, News Library (discussing request by Organization of Islamic Conference of Security Council to use

The Council terminated these sanctions only after it decided that Yugoslavia had stopped promoting ethnic cleansing.²²⁴

D. Possible Relief from Obligations

A state may not justify ethnic cleansing as a response to prior wrongs committed by another party. A state is permitted, under international law, to violate the rights of another state as a so-called countermeasure to a violation it has suffered at the hands of the other state.²²⁵ However, a state may not, as a countermeasure, engage in "conduct which derogates from basic human rights."²²⁶

Similarly, a state that is responsible for ethnic cleansing may not evade its obligation to repatriate and to make whole those persons forced out by referring to its own rights that may have been violated, even if the violation involved ethnic cleansing. Thus, Croatia may not refuse to repatriate Serbs in the Serb majority areas of Croatia (Krajina and eastern Slavonia) on the grounds that when a Serb republic was declared in those sectors (after Croatia declared independence from Yugoslavia in 1991) the Yugoslav army forced out Croats.

IX. JURISDICTION OVER A STATE RESPONSIBLE FOR ETHNIC CLEANSING

If acts of ethnic cleansing amount to genocide, a state responsible for them may be subject to the jurisdiction of the International Court of Justice to answer for its conduct. Genocide is one of few human rights violations for which the relevant treaty requires a violating party to submit to the court's jurisdiction.²²⁷ Article 9 of the Genocide Convention provides:

military force against Yugoslavia).

²²⁴ See S.C. Res. 1021, U.N. SCOR, 50th Sess., at 1, U.N. Doc. S/RES/1021 (1995), reprinted in 35 I.L.M. 257 (1996) (lifting military sanctions); S.C. Res. 1022, U.N. SCOR, 50th Sess., at 1, U.N. Doc. S/RES/1022 (1995), reprinted in 35 I.L.M. 259 (1996) (lifting of economic sanctions).

²²⁵ See *Draft Articles on State Responsibility*, supra note 66, at 144 (allowing state to forgo compliance with international obligations in order to retaliate against another state).

²²⁶ *Id.* at 146 (characterizing such conduct as "prohibited countermeasure").

²²⁷ See Convention on the Prevention and Punishment of the Crime of Genocide, supra note 37, at 282 (discussing jurisdictional requirements of Convention).

Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.²²⁸

The International Court of Justice found that this provision gave it jurisdiction to entertain a complaint brought by Bosnia against Yugoslavia.²²⁹ It thus concluded that, under the Genocide Convention, a state may be responsible, and that the court has obligatory jurisdiction over a state against which such an allegation is made.²³⁰

A state would be subject to the court's jurisdiction not only for genocide itself, but also for conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.²³¹ "Genocide" here includes not only acts by which a state commits genocide itself, but as well a failure to prevent or to detect and punish.

X. SECURITY COUNCIL ACTION TO STOP ACTS OF ETHNIC CLEANSING

In addition to a judicial response through the International Court of Justice, the international community can potentially respond to ethnic cleansing by political or military action, at the initiative of the U.N. Security Council. However, such action may face obstacles, particularly if the perpetrators and victims of the ethnic cleansing are within the territory of a single state.

In 1998, the U.N. Security Council adopted a resolution on Kosovo in which it invoked chapter VII of the U.N. Charter, asking the Yugoslav government and Kosovo separatist forces to cease hostilities and

²²⁸ *Id.* Acts other than genocide enumerated in article III are conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. *See id.*

²²⁹ *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 36, at 595 (discussing International Court of Justice decision); Keiron Henderson, *World Court Claims Jurisdiction in Bosnia Genocide*, REUTERS LIBRARY REP., July 11, 1996, available in LEXIS, News Library (discussing World Court decision to admit Bosnian genocide suit).

²³⁰ *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 36, at 606-09 (tracing *travaux préparatoires* of Genocide Convention to show intent to hold states responsible).

²³¹ *See id.* at 595-96 (establishing basis for jurisdiction of International Court of Justice).

to negotiate a settlement.²³² Because at the time it was the Yugoslav government forces that were taking the military initiative, and because much of Yugoslavia's military activity was aimed at civilians, the resolution was in effect a call on Yugoslavia to stop attacking civilians.²³³ The invocation of chapter VII was significant, because under chapter VII the Security Council may adopt sanctions, which could include economic and military measures.²³⁴

The Security Council invoked chapter VII with respect to Kosovo despite the fact that the situation in Kosovo was primarily a matter internal to one state (Yugoslavia), a circumstance that led China to abstain.²³⁵ The Council did not support calls for a separate Kosovo state, even though separatist elements in Kosovo were advocating statehood for Kosovo. Under the U.N. Charter, it is the international peace that is to be maintained, not peace within a state.²³⁶

The Security Council had, however, in two cases, stretched the concept of "international peace" to include conflicts that were primarily internal, but with an international element. When the Security Council decided in 1994 to intervene in Haiti to restore the elected government it invoked chapter VII, even though this was an internal matter within Haiti.²³⁷ The political difficulties in Haiti had, however, led to an outflow of refugees. In 1991, the Security Council invoked chapter VII with respect to the Iraqi government's treatment of the Kurdish population in the north of Iraq, again an internal situation, but again with an outflow of refugees.²³⁸ Because an outflow of refugees was occurring from Kosovo, the Security Council's invocation of chapter VII was not entirely unprecedented.²³⁹ Ethnic cleansing typically precipitates an outflow of refugees, and, thus, one can imagine that in many instances of ethnic cleansing the Security Council may be willing to determine that it creates a threat to the international peace.

While the Security Council was contemplating action in Kosovo,

²³² See S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg. at 1, U.N. Doc. S/RES/1199 (1998) (demanding halt of hostilities in Yugoslavia).

²³³ See Barbara Crossette, *Security Council Tells Serbs to Stop Kosovo Offensive*, N.Y. TIMES, Sept. 24, 1998, at A8 (indicating that civilian casualties were unacceptable).

²³⁴ See U.N. CHARTER art. 41, para 1; *id.* at art. 42, para 1.

²³⁵ See Crossette, *supra* note 233, at A8 (noting abstention of China).

²³⁶ See U.N. CHARTER, art. 42, para 1; *id.* at art. 43, para 1.

²³⁷ See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994) (citing chapter VII as support for United Nations's decision to intervene in Haiti).

²³⁸ See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 2, U.N. Doc. S/RES/688 (1991).

²³⁹ See S.C. Res. 1199, *supra* note 232, at 2 (demanding halt of hostilities in Yugoslavia).

the North Atlantic Treaty Organization ("NATO") made contingency plans to intervene militarily there.²⁴⁰ It was unclear, however, whether NATO could intervene absent a decision by the Security Council calling for such action. The United States took the position that NATO could act on the basis of the earlier Security Council resolution in which the Council invoked chapter VII. Other Council members took the position, however, that while the earlier resolution invoked chapter VII, it did not call for military action and, thus, did not provide a basis for NATO action. Russia, a permanent member of the Security Council, threatened to veto any draft resolution in the Council that might call for military action against Yugoslavia.²⁴¹

In such a situation, moreover, military action is problematic because it is likely to encourage separatist elements. In the case of Kosovo, the international community was not prepared to recognize an independent state but wanted Kosovo to remain within Yugoslavia.²⁴² Russia took the view that international military action against Yugoslavia would only exacerbate the situation in Kosovo, by prolonging the internal warfare.²⁴³

Even if one state is perpetrating ethnic cleansing in the territory of another, as occurred in Bosnia in the early 1990s, the Security Council may find it difficult to respond. In particular, the existence of the veto power for the five permanent members makes it difficult for the Security Council to act.²⁴⁴

XI. POLICY REFLECTED IN SCOPE OF STATE RESPONSIBILITY FOR ETHNIC CLEANSING

The scope of state responsibility for ethnic cleansing as here outlined reflects state-to-state relations in an aspect quite different from the nineteenth century paradigm. There remains some reality to the view of international law as reflected in the Permanent Court of International Justice *Lotus* opinion, namely, that states

²⁴⁰ See Steven Lee Myers, *U.S. Urging NATO to Step Up Plans to Act Against Yugoslavia*, N.Y. TIMES, Sept. 24, 1998, at A8 (discussing United States's request for missile strikes or air campaign against Yugoslav army).

²⁴¹ See Steven Lee Myers & Steven Erlanger, *U.S. Is Stepping Up Military Threats Against the Serbs*, N.Y. TIMES, Oct. 7, 1998, at A1 (noting Russian threat of "serious international consequences" for any unauthorized NATO attack).

²⁴² See S.C. Res. 1199, *supra* note 232, at 3.

²⁴³ See generally Celestine Bohlen, *Russia Vows to Block the U.N. from Backing Attack on Serbs*, N.Y. TIMES, Oct. 7, 1998, at A8 (quoting Russian Foreign Minister Igor S. Ivanov stating that "[a] military strike will not help normalize the situation but will have the opposite effect").

²⁴⁴ See U.N. CHARTER, art. 27, para. 3.

may do as they please so long as a norm has not developed to the contrary.²⁴⁵ To an increasing extent, however, contemporary international law reflects efforts to solve problems through concerted international action. Thus, with ethnic cleansing, states must avoid contributing to ethnic cleansing committed by others, and when ethnic cleansing occurs, they must endeavor to stop and punish it.

Contributing to this result is the emergence of a complicity doctrine in the law of state responsibility starting at midcentury. Such a concept was not found in customary law as it existed earlier.²⁴⁶ However, in the post-World War II period, states more frequently provided assistance to other states. The Cold War spurred this development, as antagonists gave weapons to other states and used their territory to station troops. In this context, a norm emerged to ensure that donor states did not facilitate wrongful acts by other states.²⁴⁷

The law has come to recognize that a state that provides aid to a wrongdoer, whether the wrongdoer be a state or a private party, can be just as serious a threat to the international legal order as a state or private party that directly carries out wrongful acts. The International Law Commission crystallized this tendency in its Draft Articles on State Responsibility. Increasing commerce and communication, as well as pressure on scarce natural resources, have promoted the trend towards the elaboration of more extensive regulation of the conduct of states. What has emerged is a model of international law that reflects not isolated states doing their will, but cooperating states seeking to solve problems.²⁴⁸ A significant contributing development has been the emergence of international and regional institutions to deal with economic and political issues. From the founding documents and practice of these organizations developed the notion of an obligation to coop-

²⁴⁵ See Case of the S.S. "Lotus," 1927 P.C.I.J. (ser. A) No. 10, at 18.

²⁴⁶ See *Seventh Report*, *supra* note 99, at 81 n.16 (stating that rapporteur could not find state practice reflecting complicity norm prior to World War II).

²⁴⁷ See generally John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT'L L. 77 (1986) (discussing role of complicity in international disputes).

²⁴⁸ See LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 118-38 (1989) (arguing in favor of affirmative duties on states, such as duty to provide development assistance to less affluent states); WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 367 (1964) (stating that whereas traditional law of nations assumed conflict between interests of states, newly emerging "cooperative" international law reflected "world-wide interests in security, survival and co-operation for the preservation and development of vital needs and resources of mankind").

erate to correct an unlawful situation.

At the same time, human rights law has made its appearance, not only imposing obligations on states to observe rights, but, importantly, requiring all states to be concerned if rights are violated anywhere. The International Court of Justice alluded to this aspect of human rights law in the *Barcelona Traction* case, where it referred to human rights norms as norms that all states have a legal interest in enforcing, regardless of who is victimized or where the victimization occurs.²⁴⁹ Procedures under human rights treaties have opened the possibility for states to file complaints against other states for rights violations, even where the filing state has no national harmed by the violation.²⁵⁰ The U.N. Security Council has gone so far as to authorize military action to correct a violation of rights.²⁵¹

Thus, the breadth of responsibility noted in this Article for ethnic cleansing is not an isolated phenomenon in international law. Increasingly, states are obliged to refrain from fostering wrongs by other states, and to take positive action in an effort to remedy situations regarded as unacceptable.

CONCLUSION

When ethnic cleansing occurs, one or more states may be involved directly or tangentially. The rules on state responsibility hold a state responsible not only where its agents are involved, but also where it acts through private parties. A state may be responsible for failing to prevent ethnic cleansing by private parties. It may be responsible for aiding another state, or a private party, to carry out ethnic cleansing. A state may be responsible for helping the responsible parties to avoid detection, or to evade international sanctions in an international organization.

²⁴⁹ See *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 6) (discussing claim brought by Belgium on behalf of shareholders in Belgian company to protest unlawful measures by Spain); *id.* at 32 (giving certain serious human rights violations as examples of norms in which all states have interest).

²⁵⁰ See International Covenant on Civil and Political Rights, art. 41, 999 U.N.T.S. 171, 182 (describing procedures for state action against non-compliant state under covenant). See generally *Denunciation*, 1969 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n on H.R.) 78 (giving example of state action against another state).

²⁵¹ See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413d mtg. at 2, U.N. Doc. S/RES/940 (1994) (authorizing member states to take military action to force out of power military group in Haiti that had assumed control over and against elected president, on rationale that right of people to representative government had been infringed).

While individual responsibility is an important focus of efforts to stop ethnic cleansing, state responsibility must also be addressed. In particular, individual responsibility, as the experiences of Nuremberg, Tokyo, Yugoslavia, and Rwanda show, operates after the fact, with the aim of deterring such conduct by others in the future. State responsibility can bring pressure on a state to stop ongoing acts, as seen in the legal action that Bosnia brought against Yugoslavia in the International Court of Justice at the height of the atrocities in Bosnia. Through its procedure of indicating interim measures, the International Court of Justice has the ability to act quickly to determine, at least in a provisional manner, where responsibility lies. In this way, a focus on state responsibility may stop the ongoing terrorizing of a population.

