

Constructing Citizenship through War in the Human Rights Era

Timothy William Waters*

Abstract

War's historical relationship to the creation of territorial nation-states is well known, but what empirical and normative role does war play in creating the citizen in a modern democracy? Although contemporary theories of citizenship and human rights do not readily acknowledge a legitimate, generative function for war – as evidenced by restrictions on aggression, annexation of occupied territory, expulsions, denationalization, or derogation of fundamental rights – an empirical assessment of state practice, including the interpretation of international legal obligations, suggests that war plays a powerfully transformative role in the construction of citizenship, and that international law and norms implicitly accept this.

Dominant discourses on citizenship in the liberal and cosmopolitan traditions focus on the individual as the unit of analysis and normative concern, and on his rights against the state. At the same time, the choice of how to construct citizenship – to whom to grant it or from whom to withhold it, and what content to give citizenship – is closely linked to questions of security and identity: citizenship either presupposes or purports to create some measure of common identity among citizens, and implies obligations as well as rights. This chapter argues that, in assessing legal and moral positions, this role – if not necessarily approved – must be accounted for to achieve a fuller understanding of how peace, war and rights are related.

Human rights may be conceptualized as universal, but their application and specific content are often mediated through the state, and therefore understanding how states retain the ability to define the contours of citizenship, including through the effects of war, is critical to an understanding of the actual scope of human rights as a legal enterprise and a lived experience.

The article will examine the formal limits placed on war as an instrument that could affect citizenship; then it will examine the evidence for war's continued effect (through means such as differentiation between citizens and alien residents, expulsion of aliens, assimilation of refugee flows, and border changes); then it will advance an argument about how the factual effects of war interact with legal doctrine (such as through selective definition and interpretation of wars, perfection of wartime changes in peace treaties, and novel demographic changes introduced by peace treaties).

* Professor at Indiana University Maurer School of Law. Email: tiwaters@indiana.edu

The article considers the concepts of participation, loyalty, and treason; the evidence and implications of wartime propaganda; the rules and practice governing transfer of populated territory between sovereigns; the incentives that the laws of war create for individuals' identification with the state; and the accommodation in peace plans of demographic change wrought by war.

Principal reference is made to changes in citizenship status following the wars of the former Yugoslavia, the Algerian decolonization, the postwar settlement of Europe, and to the debates about the contours of citizenship in Israel and the Palestinian territories.

I. The Argument

War's historical relationship to the creation of territorial nation-states is well known, but what role does war play in creating the citizen and state in contemporary conditions of internationalized security and democracy? Very little, we might suppose: The normative restrictions on war's scope to affect citizen-state relationships are numerous, far-reaching, and powerful: most prominently, the prohibitions of aggressive war, annexation of territory, and settlement of one's own population's in occupied territory, coupled with human rights law, make it nearly impossible, in normative terms, unilaterally to effect changes in citizenship through war. Other traditional methods of altering the demographic qualities of territory – such as expulsion and mass denationalization – are similarly disfavored.

These restrictions are uncontroversial in law and are generally accepted in policy circles as well. At a minimum, then, state rhetoric and practice has retreated from the dispensation prior to the First World War, when the right of conquest was an accepted practice, towards a position in which such acts are done, if at all, rarely and in much more limited, even disguised forms.

But this should not blind us to evidence of war's continued operation in the construction of political communities and identity. Although contemporary theories of citizenship do not acknowledge a legitimate, generative function for war (Martin O. Heisler, 2005), an empirical assessment of state behavior, including their interpretation of international legal obligations, suggests that war continues to play a persistent, at times powerfully transformative role in the construction of citizenship. This role may be in some important sense irreducible, something which law as a humanizing project cannot entirely exclude, and which law's operators may in fact not necessarily wish to.

The choice of how to construct citizenship – to whom to grant it or from whom to withhold it, and what content to give citizenship – is closely linked to questions of security and identity: citizenship either presupposes or purports to create some measure of common identity

among citizens, which implies obligations as well as rights. This paper argues that, in assessing legal and moral accounts of citizenship, this role must be accounted for, if not necessarily approved – and that, going further, there might be some minimum beyond which the defensive war-making functions of the modern state may imply, even indicate, a limited justification for altering the demography of a state.

The focus is war's effect on the formal institutions of citizenship – rules and practice on membership, rights, duties of individuals in relation to the state. It does not address the cultural and political contours of citizenship's meaning; these are important questions, and closely linked to the questions posed here about formal legal effects, as well as to debates between universalist and particularist or differentialist views of citizenship,¹ but this paper concerns the ways in which law and war interact to create formal changes to citizenship, membership, and affiliation that are recognized in international law and international relations.

This paper considers, principally, the interaction of war-making with international legal norms concerning displaced populations, and the accommodation in peace plans of demographic changes wrought by war; in addition, it draws on the rules and practice governing transfer of populated territory between sovereigns and the incentives the laws of war create for individuals' identification with the state. In particular, it argues that the continuing fact of war combined with increasing commitments to afford citizenship to all permanent residents of a given territory – included populations displaced by war – operate to create a predictable mechanism for the transference and assimilation of individuals, altering the demography of both source and recipient states. It is this particular interaction that forms the focus of this paper.

The effects described in this paper are, in some ways, quite obvious, but it is a useful reminder that these obvious things materially affect the constitution of citizenship. The philosophical and political study of citizenship – so attentive to questions of democracy and participation, transnationalism and globalization, identity and diversity (Martin O. Heisler, 2005), has largely ignored the problem of war, or assumed that,

1. See: "Citizenship," (Sec. 2.1), STANF. ENCYC. PHIL. <http://plato.stanford.edu/entries/citizenship/#3>. For purposes of this paper, we employ, as a default, the universalist depiction of citizenship – with its assumption that the benefits and duties of citizenship are normally equally accorded to all members – not as necessarily more accurate, but as the more dominant, doctrinally cognizable depiction in legal discourse about liberal democracies. See: MARSHALL, 1950.

because war is so circumscribed in normative terms, there is little of interest save the mobilizing role war plays in politics and identity formation. But that is a mistake – those limitations are the point at which one must begin the analysis, not a reason to end it.

II. Limits

In order to discern the role war plays today in the construction of citizenship, we must first note the sea change that war's role in the international system has undergone. That change has been clearly and consistently in the direction of reducing the scope of war to effect large-scale, legally cognizable demographic change.

Prior to the First World War, the right of a sovereign state to engage in aggressive war, to conquer territory and incorporate it into its own territory or otherwise occupy it was largely uncontested and uncontroversial. (OPPENHEIM, 1905: 288) There were certain humanitarian restraints on the conduct of war (though even these were very limited), but almost none on the resort to war or on the sovereign's right to determine the dispensation of people and territory after war. (GRABER, 1949) A given community – itself the victim of aggressive attack – might complain about the enemy's perfidy, or offer special reasons why this particular attack or seizure of territory was unjust, but the idea that such actions were unacceptable as such was largely an unavailable response. After all, in different circumstances, the victim might do the very same thing itself.

This permissive dispensation began to change in the interwar period, and by the early postwar period, the change was effectively completed. Aggressive war has been outlawed, replaced by a global system of collective security with an international legitimating institution, the United Nations.¹ More broadly, international legal norms have decreased the scope in which military action may be undertaken or in which its effects may be assimilated. Even when a state may legitimately resort to force (as in self-defense or as part of action authorized by the United Nations - U.N. Charter, Chapter VII), its options are limited: it may not annex territory that it conquers; it may occupy foreign territory, but doing so brings

1. U.N. Charter, Art. 2(4); U.N. Gen. Assembly, Declaration of Principles of International Law (1970) (“the territory of a state shall not be the objection of acquisition by another states resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.”). See: Shaw, 1997: 341; MCCOUBREY & WHITE, 1992: 17-138 (discussing prohibition of the use of force, non-aggression norms, self-defense and collective security). For a discussion of this system's operation in its first two decades – the period in which the contemporary normative structure was elaborated – See: BAILEY, 1982.

considerable obligations and only limited opportunities to expand – the occupier may not remove the extant population or settle its own population on the territory, for example. (McCoubrey & White, 1992: 279-294)

Looking beyond rules with a specifically territorial aspect, the changed normative landscape for states' behavior in conducting war – the *jus in bello* – arguably limits their ability to alter their own or neighboring states' populations. The development of human and minority rights and international criminal law – themselves hardly apparent on the legal landscape prior to the Great War – further restrict states' ability to alter the demography of a population, or at least to use the most effective methods to achieve that goal.

Thus there appears to have been a significant shift in the normative, or at least predictive, expectations around which states organize their behavior.¹ The net effect of this trend is considerably greater limits on states' ability to transform their own territory and citizenry, or that of other states, through the instrument of war. But this pacific vision may require a level of focus, or of generality, that elides some troubling particulars which suggest a different set of effects and a different vision.

III. Evidence of Effect

First, we should note evidence of war's continuing effect on the legal demographics of states' populations. We may divide the evidence into the following categories: differentiation among populations in preparing for war; refugee flows; changes in borders; and the fact of war's violence.

a. differentiation among resident populations in preparation for war

There is little traction for the idea that war, or preparation for it, allows states to make ultimate distinctions between its own citizens that it might not otherwise be allowed to make; at the same time, just such differences are evident in practice, if one focuses somewhere just below the level of formal legality.

In at least one relevant instance, the difference is apparent on the surface: Israel places different military obligations on its Arab and Jewish populations. Jews (and Druze, apparently at their request) are legally obliged to serve in the military, whereas the large Arab minority is not. The pragmatic reason for this policy is clear enough: An expressly Jewish state in a state of permanent hostility with several of its Arab neighbors, and in occupation of territory inhabited by the close co-ethnics of its own Arab population hardly trusts those Arabs to fight for its cause, and

1. See: "War," STANF. ENCYC. PHIL., <http://plato.stanford.edu/entries/war>.

would be uncomfortable at the thought of giving them weapons, training and access to strategic or operational planning.¹

Relatively few states make the kind of explicit, formal distinctions that Israel does, but in practice it is quite common that states discourage the full and equal participation of their whole citizenry in the war-making enterprise. The terms of military service – employing a standardized language, for example – can effectively privilege certain groups and exclude others; more broadly, disfavored groups may be conscripted but not admitted in significant numbers into the middle and higher officer ranks, creating a modern analogue to the great imperial and colonial armies in which the natives served but did not command. In states with ongoing civil unrest or conflicts, entire communities may in effect be excluded or exempted from military service, because they are in open rebellion or are the object of military operations.

And of course, where a state has a large *non-citizen* population, the differential obligations that citizen and non-citizen have in regard to defense (as to so many other things) may create an ethnically keyed security policy. Many African states have large, quasi-permanent populations of refugees, displaced persons, or illegal aliens who are outside the formal state structures, even though their own security is equally dependent on those structures as that of full citizens.² The consequences of not participating in defense – of not having membership in the warrior class (Stephen Castles, 2007) – can be devaluation, denigration, mistrust, marginalization, and exclusion – in brief the creation of a hierarchical, tiered concept of the citizen. (Eliyahu Matza, 2007)

b. refugee flows

Far more significant than the relatively limited and opportunistic expulsion of resident aliens, however, are the large refugee flows – including internally displaced persons – that result from modern wars.³ Large refugee flows in

-
1. Presumably the Pentagon has more regular access to Israeli military planning than the one-fifth of Israel's population that is Arab.
 2. Israel provides an example here as well, with relation to the non-citizen residents of the annexed areas of the West Bank around Jerusalem.
 3. A refugee is defined as “[a] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”→

post-colonial conflicts often have a distinctly ethnic character – those who flee are not a random sampling of the exporting state’s population – and while this might in some cases simply be a function of the unequal distribution of ethnic groups across territory (so that, for example, a localized conflict may affect one group more than others, just as an earthquake or flood might), often that ethnic differentiation is not an incident, but is an integral element of the conflict itself.

In a number of conflicts, particularly in sub-Saharan Africa, this pattern of ethnicized refugee flows consequent on war is well known; in many of these conflicts, the numbers of internally displaced has been considerably higher – though still within the borders of their state of citizenship, these individuals are functionally identical to refugees, as equally removed from the protection of the state, although without any alternative domicile. The Balkan conflicts of the 1990s arguably were driven by demographic considerations: their very purpose was to alter the ethnic composition of the populations, and thus the production of refugees and the internally displaced was a strategic war aim. And the Cisjordanian conflict is one of the leading examples of demographic alteration through war which has settled into a permanent refugee pattern.¹

In many of these cases, the ethnicity of refugee flows must be understood as a demographic consequence of war (or, again, as the demographic *raison de guerre*) which, if allowed or supported, implies sanction for the reconstitution of the population by war.

c. changes in borders and citizenship in consequence of war

While the international order has banished aggression and conquest, reconstitution of international frontiers – and with them of political communities – continues, most commonly through the division of states, but occasionally through their integration as well. Some of these are peaceful transformations approved through internally validated deliberative processes, but others are violent and involuntary, or occupy complex and ambiguous categories. The Soviet Union transmogrified into 15 sovereign states with separate citizenship; Yugoslavia has, to date,

←Convention Relating to the Status of Refugees, adopted 28 July 1951, entry into force 22 April 1954, http://www.unhchr.ch/html/menu3/b/o_c_ref.htm, as amended (Protocol Relating to the Status of Refugees, 1967){Refugee Convention}.

1. Even when the ethnic component is absent, war can generate large refugee flows, as with the conquest of South Vietnam by North Vietnam, the Chinese Nationalist-Communist conflict, the Spanish Civil War, and the Russian Revolution, each of which resulted in large scale flight (and in some cases expulsion) of defeated ideological opponents.

divided into six sovereign states and one international protectorate; Ethiopia and Pakistan each divided into two sovereign states following civil wars. In the integrative direction, a smaller number of states or territories have merged – the two Vietnams, the two Yemens, China and Tibet – following violent conflicts, as have a number of territories normally defined in the context of decolonization, such as Morocco and Spanish Sahara, or India and Goa.¹ In each of these cases, individual citizens of the prior states found their citizenship altered, through loss of common political bonds or creation of new bonds.

d. the continuing fact of war, and of war's violence

We must also acknowledge that war itself alters the demography of states: along with the differentiations that accompany the preparation for war and the dislocations that are consequent of war (or are the reason for war), the actual events of war may differentiate populations in patterned ways that have lasting effects on the demography of states.

In some cases, the killing alone makes a significant difference: the extermination of European Jews dramatically altered the demographic balance in large areas of Poland, Hungary and the western Soviet Union. The Rwandan genocide further entrenched the numerical dominance of Hutus. Ethnic cleansing in Bosnia was no mere incident of the fighting but itself a principal war aim, one that was comprehensively realized, with dramatic effects on residential patterns and all that follows from them: The dead and displaced no longer participate in the life of the community or make demands upon it.

Most basically, it is clear, as a matter of evidence, that wars continue to occur. The legalizing project of the 20th century may have proscribed many types and occasions of war, but it has not banished actual warfare, humanized its fundamental savagery, or removed the incentives, logics, and emotions that drive the resort to violence. (KORMAN, 1996: 305) To the degree that law acknowledges or authorizes war and its effects, even retrospectively, it further alters the contours of the prohibition. So: How are war's effects assimilated to the normative international regime? Do our laws, norms, and practices in fact sanction such acts? Do they facilitate or even perfect them?

1. Immediately after the Second World War territorial revisions occurred in both Europe and Asia, with Germany, Italy, Poland, Romania, Hungary, Czechoslovakia, Finland, and Japan all losing territory to other states, and Estonia, Latvia, and Lithuania losing *all* their territory. These events arguably predated the full development of the non-aggression/non-conquest norm, but they do occur conveniently, uncomfortably, and opportunistically close to – indeed, during – that process; Germany's loss of territory was not actually finalized until 1990.

IV. The Interaction of War as Fact with Legal Doctrine

Despite the general prohibitions on aggressive war and conquest, there are ways in which legal doctrines assimilate the facts of war to our normative global order, and specifically assimilate the demographic alterations war's violence creates to normatively approved definitions of citizenship in the territorial state.

a. the general concept – regulating international war, preserving bordered citizenship

As noted above, a number of states and territories have merged or divided as a direct consequence of violent conflict. Of course, the political and doctrinal mechanics of division (or integration) are notionally unrelated to war. Yet it would seem disingenuous to pretend that war and violent conflict is immaterial to this process more generally. Other cases, after all, were violent and coercive, and a naïve view of the doctrinal field would have one think that such things could not be recognized or tolerated. Yet as the Yugoslav case illustrates, division and reconstitution of the state and its population can be the very purpose of contestation and the defining strategic element in the war-fighting enterprise. So the real question involves those cases in which they are not peaceful: Where these kinds of transformations are violent in nature, why do they not fall afoul of the prohibitions against aggression and conquest?

First, some of these cases involved the division of existing states through civil war or secession, as in Yugoslavia, Eritrea, and Bangladesh. International law views the division of an existing state as a non-legal, factual matter – and nothing in international law prohibits the division of a state by its own people. (There is no recognized right to secession by sub-state groups; still the absence of a right does not imply prohibition, but rather the political nature of the question, and when secessionist groups have successfully prosecuted wars, they have also achieved recognition.¹) Technically, therefore, this does not involved aggression by another state, but that seems a thin distinction. At a minimum, we should acknowledge that, in outlawing external aggression, the normative order has, in a sense, fought last century's wars, but failed to say much about the internal conflicts that (perhaps because of the prohibition) predominate today.

Even in those cases in which an external actor intervenes, as in Vietnam, Bangladesh, Spanish Sahara, and Kosovo – and which therefore should notionally fall squarely within the prohibition against aggression and conquest – the violent transformations of war are assimilated,

1. See Reference re Secession of Quebec, Sup. Ct. Canada, 115 I.L.R. 537.

through peace processes (that is, through treaties and other arrangements that terminate hostilities) or through marginal interpretations of the conflict as a justified exception to the general norm, such as for decolonization or humanitarian intervention.

While the general prohibition has regulated the resort to war, it has also preserved the principle that citizenship generally follows, such that when, by whatever logic, a war is indeed approved, its demographic consequences can be approved as well.

b. characterizing wars as other than conquest

In some cases, states engage in acts that, on a technical analysis, would be characterized as aggression or conquest were it not for special pleading. This includes revanchist claims related historically to a colonial conquest as well as humanitarian interventions.

An anti-colonial revanchist war by its nature aims at a territorial-political revision, and so in such cases, assuming one accepts the historical claim, the change in territorial status is a necessary, even intended consequence. The question, however, is the whether those claims are merely pretextual. Morocco's claims to Spanish Sahara rely on an ancient, controversial claim of title, which itself has imperial overtones of the very kind that, we imagine, delegitimated colonial claims. India's claim against Goa seems even more problematic, since there was not an 'India' in the political sense prior to unification under the British Raj (in the way there was a Morocco). Why did the otherwise universal principle of colonial *uti possidetis* not apply to the Goan-British Indian frontier as well?

A more recent and more robust category is the claim of humanitarian intervention, most prominently elaborated in Kosovo, in which the partition of a sovereign state following its occupation by an international coalition has recently been recognized by the major Western powers. What is of note is not the permission to engage in fighting, but the territorial, demographic and political consequences that follow. It is one matter to authorize a defensive or humanitarian war, quite another to approve of changes to borders and sovereignty that result. The aims of a defensive war are properly limited to fending off the attack and perhaps to ensuring the aggressor is disabled from re-initiating hostilities; (WALZER, 1977) it is not clear that, absent particularly defined circumstances, it justifies permanent territorial revisions.¹

1. Obviously, in the case of Israel, neither its permanent occupation nor its annexation of West Bank areas adjacent to Jerusalem has been recognized by the broader international community. I am not aware of a defensive war which has resulted in significant territorial gain by the defending state, so this may be a currently empty category.

Recognition of Kosovo both implicitly approves the initial war – itself generally conceded to have been illegal¹ – and indicates the scope of consequences that can follow such an intervention.

c. perfecting demographic change in peace treaties

Much of the violence and dislocation that occurs in war is either illicit or is only licit in the context of the fighting, with the normative assumption that when the war stops, the violence and dislocation will also come to end. This is the very idea behind the principle that refugees – who are a fact of war – are supposed to be allowed to return home after the war, for example. However, often the formal termination of hostilities provides an imprimatur for wartime demographic changes that effectively insulates them against revision, providing legal sanction for illicit transformations.

Most saliently, while unilateral interventions and the conquest of territory are prohibited, little prevents the mutual exchange of territories and populations by willing sovereigns. (Shaw, 1997: 339-340) Yet when a state divides in the immediate aftermath of a war, or while war is still ongoing, one naturally questions how voluntary the decision really was. Ethiopia did not voluntarily cede sovereignty over Eritrea (Dias, 2006), nor Pakistan over Bangladesh; they did so at the termination of violent conflict (including, in Bangladesh's case, direct foreign intervention by India). The severing of joint citizenship ties resulting from these divisions were therefore consequences of war, though ones for which we have found an acceptable doctrinal pathway. The Vienna Convention prohibits treaties made under duress², but that general prohibition has never been extended to invalidate all treaties made in termination of hostilities, even though, obviously, the losing party in a war only accepts the treaty because of its military defeat. (Shaw, 1997: 339-340)

d. creating additional demographic change in peace plans

In addition to the effects of peace plans in *approving* wartime dislocations, we must consider the special problem when a peace plan – quite apart from approving what has already happened – creates *additional* effects not actually achieved, or even necessarily contemplated, by the process of war itself. We will consider a few examples in greater detail.

1. See: INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT, Executive Summary (2000) (“The Commission concludes that the NATO military intervention was illegal but legitimate.”). The international presence in Kosovo was approved, after the war, in Security Council Resolution 1244 (1999).

2. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, Art. 52 (treaties are void if they have been procured by force).

The Dayton Peace Accords,¹ which brought the Bosnian War to an end, not only sanctioned significant elements of the wartime division of the country, but specified additional territorial transfers. (Radan, 2002) The Accords provided for the right of refugee return, and in that sense vindicated the existing orthodoxy proscribing violent demographic change. However, other key provisions of the Accords arguably ran contrary to the return obligations: these include the creation (or approval) of the internal political structures and the highly decentralized, confederal nature of the state agreed at Dayton, which ensured and entrenched the ethnically exclusive regimes in control of various parts of the country. (William Waters, 2004: 423-452) Ten years on, the demographic map of Bosnia is radically altered – and formal governance structures, approved in international treaties, track, identify, confirm and support those alterations. As noted, the independence of Kosovo – in effect, the partition of Kosovo – is not a necessary consequence of the war itself, and therefore may be considered an added effect of the peace plan, including Security Council Resolution 1244 which approved the international protectorate and provided for a final status process which is still ongoing.

Similar arguments might be invoked in connection with the concluding phase of the Algerian War, following immediately after the Evian Agreement which provided for Algeria's independence, saw the flight of roughly 1.3 million European *pieds noirs* from Algeria – roughly ten percent of the population. (Alistair Horne, 1977) The departure and denationalization of the *pieds noirs* was not the mere perfection of war's effects as such; when Evian was signed – when, in other words, France and the FLN agreed that the new government would have the discretionary authority to denationalize the *pieds noirs* – the *pied noir* population of more than one million was intact and *in situ*, vested of citizenship in the state then holding sovereignty over the place where they lived.² Nor was this a case of the departure of a colonial administrative class, but a permanent population. In any event, adopting a colonial analysis simply demonstrates the doctrinal distinction in operation: if one actually thought that Algeria was an integral part of France, the

1. General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, 14 Dec. 1995, 35 I.L.M. 75 (1996).

2. France enacted the agreement under its own constitutional system; only after the independence of Algeria were the terms of Evian – to the degree they were still relevant – transferred into an international treaty. See Seung-Dae Kim, "Brief Report on the Special Relationship between South and North Korea and the Realisation of the Rule of Law," Venice Commission, [http://www.venice.coe.int/docs/1998/CDL\(1998\)046-e.asp](http://www.venice.coe.int/docs/1998/CDL(1998)046-e.asp).

doctrinally correct response would be democratization (as in South Africa), not expulsion. But in part because of the expulsions, the colonial analysis is necessary: those cases in which members of a political community are expelled must be something other than expulsion or conquest.

Lastly, we might consider the termination of the Second World War in Europe. The six years of war created enormous demographic dislocations, many of which were approved in the post-war settlements. But those same settlements – from the initial capitulation to the 1990 final peace treaty¹ – also perfected or provided for additional demographic and civic status changes of equal scale if not equal savagery. Between 12 and 14 million Germans were transferred westward (in some cases within Germany, in others from other states such as Czechoslovakia²); several million Poles were transferred from areas of eastern Poland into the new borders of postwar Poland. Some of these decisions, taken just after the war, predate the crystallization of the contemporary norms on war. But the expulsion of Germans was not actually completed until 1950, while the final settlement that assigned the territory from which those Germans fled to Poland and the Soviet Union was not signed until 1990.

As these three examples suggest, the conclusion of war does not only perfect those events which occurred during the fighting, but also creates entirely novel effects, both legal and political or factual. They do this, in part, through the doctrinal patina of the voluntary sovereign act, but here too, that act's proximate relationship to the violence and coercion of war seems impossible to ignore. Yet the very fact that these demographic, political and legal effects are created by international peace agreements suggests their highly embedded and legitimated normative value.

V. War and the Rationale of Citizenship

Our initial, humane intuition might well be that of course we should oppose these effects, as they constitute exceptions to the noble effort to

1. Report on the Tripartite Conference of Berlin, Babelsberg (Cäcilienhof), 2 August 1945, in BUNDESMINISTER DES INNERN, DOKUMENTE ZUR DEUTSCHLANDPOLITIK: II REIHE, BAND I, DIE KONFERENZ VON POTSDAM 2121–22 (1992); Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186. See: Convention on the Settlement of Matters Arising out of the War and the Occupation, 26 May 1952, 6 U.S.T. 4117, *as amended by* Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, 23 October 1954, *entered into force* 5 May 1955; Treaty of Mutual Relations Between the Federal Republic of Germany and the Czechoslovak Socialist Republic, Czech Rep.-F.R.G., 11 December 1973, BGBl. II at 990, 13 I.L.M. 19.

2. See: DE ZAYAS, 1989.

prohibit war. Yet in a world that is otherwise unprepared, unable, or unwilling to actually prohibit war in fact, is it plausible to deny legal sanction to war's effects? (Korman, 1996)

The earlier era in which the outright conquest of an alien people was normatively possible also presented fewer compelling problems of assimilation and political participation. But the end of aggression has coincided with the rise of democratization – which brings with it heightened concerns about the nature, quality, and identity of the polity, now no longer subject but sovereign. Many of the nationalist projects of the 19th century directly linked projects of standardization and homogenization to military modernization; there is no reason to think that such incentives have disappeared, and it would hardly be surprising to find even democratic societies responding to such incentives today in constructing their citizenry. (Avant, 2000) Where states confront demographic heterogeneity that directly or indirectly brings the cohesiveness of their fighting forces into question – regardless of the source – they presumably have a security interest in decreasing that heterogeneity, or at least in increasing loyalty. The concern of the modern warrior, more often, is not conquest of others but purification of the self – the creation of an acceptable polity. And to this goal, the alchemy of international norms provides a path. So it is not enough to seek greater enforcement if the normative structure contains predictable mechanisms for assimilation of what, in substance, one opposes.

The echoes of war in law and the normative order are fainter than and qualitatively different from the previous, less mediated expression of war's brutal operation. A world in which it was thought regrettable but not illegal for a sovereign to slaughter its own people is certainly very different from our world. But this difference should not deafen us to those echoes, which suggest an unacknowledged but quite evident set of effects directly ascribable to war and the particular way we terminate it, assimilating those effects to a post-war dispensation.

Despite the doctrinal fixity of borders, states and their communities are in continuous flux. The message conveyed by the official transformation of wartime shifts in demography may signal the limits of transnationalism and the minimum requirements of security that state communities reserve to themselves, whatever their formal doctrinal commitments. For all the limits we have placed upon it, even today war continues to act, no so much in contravention of the normative structure, but with and through it, to effect a more subtle conquest.

Bibliography

A) Books and Journals

1. Avant, Deborah (2000). "From Mercenary to Citizen Armies: Explaining Change in the Practice of War", *Cambridge Law Journal*, Vol.54, No.1, pp. 41-72.
2. Benvenisti, Eyal (1993). *The International Law of Occupation*, Princeton: Princeton University Press.
3. D. Bailey, Sydney (1982). *The United Nations and the Termination of Armed Conflict 1946-1964*, Oxford: Oxford University Press.
4. De Zayas, Alfred M. (1989). *Nemesis at Potsdam: The Expulsion of the Germans from the East*, Nebraska: University of Nebraska Press.
5. Dias, Alexandra (1998-2000). "From Brothers War to Border War: An Interstate War in the Post- Cold War Era Ethiopia- Eritrea " (paper presentation), *International Studies Association*.
6. Graber, Doris (1949). *The Development of the Law of Belligerent Occupation, 1863-1914: A Historical Survey*, Columbia: Columbia Univ Press.
7. Horne, Alistair (2006). *A Savage War of Peace: Algeria 1954-1962*, New York: New York Review of Books.
8. Korman, Sharon (1996). *The Right of Conquest*, Clarendon: Clarendon Press Oxford, pp.305.
9. Kymlicka, Will & Norman, Wayne (1994). "Return of the Citizen: A Survey of Recent Work on Citizenship Theory", *ETHICS*, VOL.104, NO.2, pp. 352-381.
10. Marshall, T.H.M (1950). *Citizenship and Social Class*, London: Pluto Press.
11. Mayer, Tamar (2007). "Dynamic Jewish Nationalism in Israel: the Connections among Nation, Military, Gender, and Homeland", *WAR, CITIZENSHIP, TERRITORY* (Deborah Cowen and Emily Gilbert, eds).
12. McCoubrey, Hilaire & D. White, Nigel (1992). *International Law and Armed Conflict*, Aldershot: Dartmouth Pub Co, pp.17-138.
13. Oppenheim, Lassa (1905). *International Law*, London: Longmans, pp. 288.
14. Radan, Peter (2002). *The Break-up of Yugoslavia and International Law*, Abingdon: Routledge Press.
15. Report on the Tripartite Conference of Berlin, Babelsberg (Cäcilienhof), 2 August 1945.
16. Shaw, Malcolm (1997). *International Law*, Cambridge: Cambridge University Press, pp. 339-40.
17. Walzer, Michael (1977). *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, New York: basic books Classics.
18. William Waters, Timothy (2004). "Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination", *Yale Journal of International Law*, Vol.29, pp. 423- 452.
19. William Waters, Timothy (2008). "The Blessing of Departure: Acceptable and Unacceptable State Support for Demographic Transformation – The Lieberman Plan to Exchange Populated Territories in Cisjordan", *Law & Ethics of Human Rights*, Vol.2, No.1, pp. 211.

B) Documents

20. *Convention on the Settlement of Matters Arising out of the War and the Occupation*, 26 May 1952, 6 U.S.T. 4117,
21. *General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes*, 14 Dec. 1995, 35 I.L.M. 75 (1996).

22. *INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT*, Executive Summary (2000)
23. *Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany*, 23 October 1954, *entered into force* 5 May 1955;
24. Security Council Resolution 1244 (1999).
25. Treaty of Mutual Relations Between the Federal Republic of Germany and the Czechoslovak Socialist Republic, Czech Rep.-F.R.G., 11 December 1973, BGBl. II at 990, 13 I.L.M. 19.
26. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186.
27. U.N. Charter.
28. U.N. Gen. Assembly, Declaration of Principles of International Law (1970).
29. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

C) Websites

30. HEISLER, MARTIN (2005). INTRODUCTION CHANGING CITIZENSHIP THEORY AND PRACTICE: COMPARATIVE PERSPECTIVES IN A DEMOCRATIC FRAMEWORK, 38 POLI. SCI. & POLITICS 667. [HTTPS://DOI.ORG/10.1017/S1049096505050316](https://doi.org/10.1017/S1049096505050316)
31. <http://plato.stanford.edu/entries/war>. <https://doi.org/10.1017/S1049096505050353>.
32. http://www.unhchr.ch/html/menu3/b/o_c_ref.htm.
33. Kim, Seung-Dae, "Brief Report on the Special Relationship between South and North Korea and the Realisation of the Rule of Law" Venice Commission, [http://www.venice.coe.int/docs/1998/CDL\(1998\)046-e.asp](http://www.venice.coe.int/docs/1998/CDL(1998)046-e.asp).
34. Matza, Eliyahu (2007). "Resisting Arab integration: Political leaders who object to civilian service for Arabs undermine equality," YNETNEWS.COM, 2 December, <http://www.ynetnews.com/articles/0,7340,L-3477953,00.html>.
35. Stanf. Encyc. Phil., <http://plato.stanford.edu/entries/citizenship/#3>.