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The ethnic dichotomy of 'self' and 'other' within Europe: inter-war minority protection in perspective

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I. Introduction

The concept of 'ethnicity' emanating from the Greek root *ethnos* has always been used to refer to the 'other' in a derogatory sense.[1] However, from about the mid-nineteenth century, in the German Romantic literature the notion of 'otherness' in *ethnos* shifted to the image of the 'self', expressed through the dominant political vocabulary of the nineteenth century – 'nation'.[2] Such a romantic image of the nation having its foundation in ethnicity was destined to exclude the remaining 'other' in the process of constructing the 'self'.[3] Conversely, if the liberal nation

* I am indebted to Professor Antony Anghie, Professor Matthew Craven and Professor David Kennedy for their insightful comments on the draft chapter.

[1] E. Tonkin, M. McDonald and M. Chapman, *History and Ethnicity* (Routledge, 1989), pp. 11–20.

[2] As the etymology of the term demonstrates, 'nation' used to refer to shared biological characteristics. Deriving from the past participle of the verb *nasci*, meaning to be born, the Latin noun *nationem* connotes breed or race. See W. Connor, 'A Nation Is a Nation, Is a State, Is an Ethnic Group, Is a ?' in J. Hutchinson and A. D. Smith (eds.), *Nationalism* (Oxford University Press, 1994), p. 38. Although at some medieval universities, a student's *nationem* designated the sector of the country from which he came, when introduced into the English language in the late thirteenth century, nation was with its primary connotation of a blood-related group (ibid.). In this sequence, it is also argued that in the nineteenth century, as in the Middle Ages, nations were conceived of as units of common biological descent as well as of common culture. See, S. Raynolds, 'Regional Sentiments and Medieval Communities' in Hutchinson and Smith (eds.), *Nationalism*, p. 139.

[3] J. G. von Herder, 'Reflections on the Philosophy of the History of Mankind (1791)' in O. Dahbour and M. R. Ishay (eds.), *The Nationalism Reader* (New Jersey: Humanities Press, 1995), pp. 48–57; J. G. Fichte, 'An Outline of International and Cosmopolitan Law (1796–97)' in H. S. Reiss and P. Brown (eds.), *The Political Thought of the German*

is conceived as the reflection of universal spirit in the temporal form, ethnicity must remain at the sidelines in the liberal construction of the nation.[4] Thus, the liberal discourse on whether the ethnic 'other' should be assimilated or allowed to maintain cultural distinctiveness is informed by an instrumental understanding of ethnicity.

Against this nineteenth-century backdrop, this chapter demonstrates how 'ethnicity' expressed through this dichotomy of 'self' and 'other' along the line of the liberal and conservative traditions informed the inter-war international law of minority protection at three different levels. First, the inter-war minority protection system came into being as a compromise between the liberal and conservative traditions vis-à-vis ethnicity and its role in the political organisation of nation-States. The idea of minority rights appeared as a fall-back position whenever Wilson's proposition of the right to self-determination in conservative terms could not be realised. In such a case, liberal individualism as well as the assimilationist agenda always coexisted with the conservative ethnic notion of the 'minority'. Second, a dichotomy of the liberal Western 'self' and the conservative Eastern 'other' was evident in the imposition of special minority protection obligations on Eastern and Central European (ECE) States, whereas minorities within Western Europe remained outside any international protection. And finally, the inherent drawbacks of the system (that became evident in its actual operation) demonstrated another layer of the self–other discourse in which bypassing the international system, the agenda of mutual exclusion of the ethnic 'other' was brutally pursued in the process of constructing the ethnic self-image along the conservative line.

II. Minority rights as the halfway between the liberal and conservative traditions

The Peace Conference following the Great War aggravated the minority issue by drastically redrawing the frontiers in Eastern and Central

Romantics (Oxford: Basil Blackwell, 1955), pp. 73–84; J. G. Fichte, 'Addresses to the German Nation – Thirteenth Address (1808)' in Reiss and Brown (eds.), *The Political Thought of the German Romantics*, pp. 102–8; L. von Ranke, 'The Great Powers (1833)' in Dahbour and Ishay (eds.), *The Nationalism Reader*, pp. 158–9.

[4] See, G. W. F. Hegel, *Lectures on the Philosophy of World History (1837)*, D. Forbes and H. B. Nisbet (eds.) (Cambridge University Press, 1975), pp. 76–97, 147–51; J. S. Mill, 'Considerations on Representative Government (1861)' in *Three Essays* (Oxford University Press, 1975), pp. 380–8; J. E. E. Dalberg-Acton (Lord Acton), *The History of Freedom and Other Essays*, J. N. Figgis and V. L. Reginald (eds.) (Macmillan & Co. Ltd., 1907), pp. 289–93.

Europe that followed the collapse of the old empires. In the aftermath of the war, international law had to respond to this minority 'problem' against the backdrop of the most influential notion of the time – self-determination. In his famous Fourteen Points, Wilson enshrined the notion of self-determination, without actually using the term, as one of the key guiding principles of the post-war international order.[5] In the aftermath of the war, his first draft of the Covenant categorically mentioned in Article III the principle of self-determination along with the provision of certain territorial adjustments which was to qualify the mutual guarantee of political independence and territorial integrity among the contracting powers.[6]

However, the Wilsonian proposition of self-determination, being premised on the centrality of ethnicity in the political organisation of nation-States, faced criticism even from other American delegates, as it transpired that the territorial adjustments made at the Paris Peace Conference were unlikely to satisfy all nationalist claims, and therefore, would not prevent ethnic tensions erupting. David Miller – an American jurist and also one of the draftsmen of the Covenant – in his comment on Wilson's draft, asserted that such a general provision of self-determination 'will make that dissatisfaction permanent, will compel every Power to engage in propaganda and will legalise irredentist agitation in at least all of Eastern Europe'.[7]

Miller was not alone in criticising Wilson's proposition. It is evident from the US Secretary of State, Robert Lansing's personal narrative of the peace negotiations in Paris, that he was extremely critical of the idea of self-determination as a general principle, let alone as a *right*.[8] Faced with vehement opposition from other statesmen, Wilson dropped the idea of self-determination in his fourth draft and also in the Covenant, nevertheless Lansing found it regrettable that such opposition did not obtain from Wilson an open disavowal of the principle as the standard for the determination of sovereign authority; hence, the phrase remained one of the general bases for peace negotiation.[9]

[5] For the full text of Wilson's address to the Congress, see, G. R. Suriano (ed.), *Great American Speeches* (Gramercy Books, 1993), pp. 143–6.
[6] See, D. H. Miller, *The Drafting of the Covenant*, vol. II (G P Putnam's Sons, 1928), p. 70.
[7] Ibid., p. 71.
[8] R. Lansing, *The Peace Negotiations: A Personal Narrative* (Houghton Mifflin Company, 1921), p. 95.
[9] Ibid.

Perhaps Wilson himself was aware of the limitations of his policy of self-determination expressed along the conservative line, and therefore, he had to deviate from this principle on a number of occasions. In a note written on 30 December 1918, Lansing claims that in the actual application of the principle Wilson, rather, relied on a number of exceptions to his own creation: millions of ethnic Germans were denied the right to self-determination and transferred to the new States of Poland and Czecho-Slovakia under the Treaty of Versailles; Austrian Tyrol was ceded to the Kingdom of Italy against the will of substantially the entire population of that region under the Treaty of Saint-Germain; Austria was denied the right to form a political union with Germany; the peoples of Estonia, Latvia, Lithuania, the Ukraine, Georgia and Azerbaijan were left to the mercy of Great Russia despite their distinct identities and aspirations to become independent States.[10]

However, during the peace negotiations, efforts were made to reconcile the classical notion of sovereignty and the conservative notion of self-determination. As Miller asserted, since the principle of self-determination could not be generally applied, '[i]t is submitted that the contrary principle should prevail; as the drawing of boundaries according to racial or social conditions is in many cases an impossibility, protection of the rights of minorities and *acceptance of such protection by the minorities* constitute the only basis of enduring peace'.[11]

Thus, on the one hand, instead of Wilson's initial proposal of incorporating self-determination as a general principle, an unqualified guarantee of political independence and territorial integrity of all State members of the League was stipulated, and on the other, the nationalities within the new States, which were not granted the right to self-determination due to pragmatic or strategic reasons, were put under an international mechanism of minority protection. In other words, the notion of the protection of minorities appeared as a fall-back position where the principle of self-determination in the conservative sense could not be applied.

Yet, it was not easy for the liberal West to design a mechanism for the protection of Eastern minorities, who not only were depicted as the product of the conservative Eastern tradition of relying on ethnicity for the political organisation of nation-States, but also allegedly desired to

[10] Ibid., pp. 98–100. See also, M. Mazower, *Hitler's Empire – Nazi Rule in Occupied Europe* (Penguin Books, 2009 [2008]), pp. 33–4.

[11] Miller, *The Drafting of the Covenant*, vol. II, p. 71, emphasis in original.

maintain their ethnic features.[12] This resulted in an attempt to reconcile both traditions. It is, therefore, a significant characteristic of the inter-war minority protection mechanism that while producing a number of legal experimentations to 'manage' nationalist passions,[13] it actually avoided any general recognition of minority rights. Instead of inserting any provision on minority protection in the League Covenant, as Wilson initially proposed, a series of minority treaties were concluded to put certain ECE States under the treaty obligation of protecting minorities within their territories, with the guarantee mechanism being entrusted to the League.[14]

However, the fact remains that Wilson himself had something else in mind. During the session of the Supreme Council on 23 June 1919, in a brief exchange with Headlam-Morley – a member of the British delegation – about the use of minority language as a medium of instruction in schools in Poland, Wilson is reported to have expressed the view that the American model of cultural assimilation should also be applicable to Eastern and Central Europe. When he was reminded that the German population was long established in the territories to be ceded and in some Polish towns even constituted the majority, he replied: 'Yes, but their properties will become part of Poland and it is not our wish that they remain German forever.'[15]

Nevertheless, it needs to be noted that throughout the Peace Conference, Wilson had to advance his pro-minority ideas under immense pressure from his counterparts in Europe, and even his deputies. Regarding the Jewish population in ECE States, at a session of the Council of Four on 1 May 1919, the US President indeed drew the attention of the Supreme Council to the anti-Semitic pogroms in Poland and Romania and read out

[12] This aspect of the inter-war minority protection mechanism will be detailed in the following section.

[13] See generally, N. Berman, 'A Perilous Ambivalence: Nationalist desire, Legal Autonomy, and the Limits of Interwar Framework', (1992) 33(2) *Harvard International Law Journal*, 353–80; also, N. Berman, 'But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law', (1993) 106 *Harvard Law Review*, 1792–904.

[14] In Article 12 of the Polish Minority Treaty, which served as a model minority treaty, Poland agreed that 'the stipulation in the Foregoing Articles, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations'.

[15] P. Mantoux, *Deliberations du Conseil des Quatres. Notes de L'Officier Interprete*, vol. II (Paris: 1955), p. 489, cited in C. R. von Frenz, *A Lesson Forgotten – Minority Protection under the League of Nations: The Case of the German Minority in Poland, 1920–1934* (London: St. Martin's Press, 1999), p. 66.

the Jewish draft treaty of 29 April, but he had to agree with the other members in their unanimous rejection of any demands for a 'group autonomy'.[16] Lloyd George adopted the same assimilationist approach towards the Jewish minorities in Poland: 'every effort ought to be made for the Jews of Poland to merge in Polish nationality, just as the Jews in Great Britain or France became merged in British and French nationality'.[17] He was particularly concerned about the risk of 'the creation of a state within a state' associated with the claim of autonomy for the minorities.[18]

Ultimately, while defining the protected minorities in the Polish Minority Treaty, the phrase 'persons belonging to linguistic, racial and religious minorities' rather than 'national minorities' was used in order to avoid their recognition as a separate legal corporation within the State.[19] Given the liberal underpinning of the French understanding of nationalism, France even initially refused to endorse any objective criteria such as ethnicity, language or religion as the basis of the application of the right to self-determination; instead, it proposed the principle of plebiscite that would guarantee the primacy of individual choice in conformity with the French liberal ideology.[20] Although the provision of plebiscite was not extended to most of the transferred territories, there was essentially a right for the transferred population to decide on their political allegiance, which again demonstrated the tendency of reducing the collectivism in the notion of minority to individualism.[21]

Thus, to what extent the *raison d'être* of the minority protection regime was the 'protection' of minorities at all (in line with the conservative tradition) remains an open question. The Report of de Mello-Franco[22] revealed that the architects of the minority protection system in no way envisioned the minorities as groups of inhabitants who would regard themselves as permanently foreign to the general organisation of

[16] Mantoux, *Deliberations*, vol. I, p. 440, cited in Frenz, *A Lesson Forgotten*, p. 59.
[17] Papers relating to the Foreign Relations of the United States (FRUS) 1913–21, *The Paris Peace Conference 1919*, vol. VI (Government Printing Press, 1942), p. 626.
[18] Mantoux, *Deliberations*, p. 440, cited in Frenz, *A Lesson Forgotten*, p. 59.
[19] See Article 12 of the Polish Minority Treaty.
[20] French government note of 15 November 1918 sent to the US Government. See FRUS, *The Paris Peace Conference 1919*, vol. I, p. 349.
[21] See Article 91(3) of the Versailles Treaty of 28 June 1919 which stipulated: 'Within a period of two years after the coming into force of the present Treaty, German nationals over 18 years of age habitually resident in any of the territories recognised as forming part of Poland will be entitled to opt for German nationality.'
[22] Report of A. de Mello-Franco, Council Meeting of 9 December 1925 in *League of Nations Official Journal*, 7(2) (February, 1926), 142.

the country; instead, they intended for the minorities certain legal protection which might gradually prepare the way for conditions necessary for the establishment of a complete 'national unity' within an environment of mutual respect. Joseph Roucek noted that the minority treaties never intended to mitigate the differences of groups within a State; in contrast, the treaties had a desire to promote the consolidation of the States who would then give to the minorities certain rights, and thereby protect them from ultra nationalism, and in this way, contain ethnic tensions leading to international conflict.[23] Legal adviser to the American Peace Commission to Paris, Manley Hudson, wrote in 1921 that in that troubled situation of world affairs, the first and foremost responsibility of the Peace Conference was to establish a stable peace, and in this connection, it was mandatory to anticipate new irredentisms, which might call for future vindication.[24] In that sense, the idea of minority protection, as a safety valve, came on board when it was more or less ascertained that the conservative right to self-determination could not be applied to all nationalities, a fact that had the necessary potential for destabilising the peace that the Paris Conference was expected to bring forth.

However, it would be less than fair to portray the interwar minority protection regime as a purely assimilationist mission. Instead, efforts were made to reconcile the victors' liberal ideology with the conservative ethnic-nationalism of the East, which ultimately provided the minority treaties with a hybrid character and the whole regime with a transitory nature. The Polish Minority Treaty that served as a model for other similar minority treaties is an archetypical example of such an effort of reconciliation. On the one hand, Poland guaranteed equality before law and undertook to assure full and complete protection of life and liberty as well as the free exercise of religion and language to *all inhabitants* of Poland without any distinction of birth, nationality, language, race or religion;[25] on the other hand, Poland had to guarantee that the minorities within its territory would enjoy the same treatment and security as the other Polish nationals, and also an 'equal right to establish, manage and control at their expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their

[23] J. S. Roucek, *The Working of the Minorities System under the League of Nations* (Orbis Publishing Co., 1929), p. 74.

[24] M. O. Hudson, 'The Protection of Minorities and Natives in the Transferred Territories' in E. M. House (ed.), *What Really Happened at Paris? The Story of the Peace Conference, 1918–1919 by American Delegates* (NY: Charles Scribner's Sons, 1921), p. 208.

[25] Articles 2 and 7 of the Polish Minority Treaty.

own language and to exercise their religion freely therein'.[26] Therefore, the Polish Minority Treaty adopted a hybrid character incorporating both liberal individualism and the conservative ethnic group phenomenon. As Thornberry notes, '[t]he first two classes of rights above, dealing with the rights of all inhabitants and nationals, reflect the preoccupations of Western statesmen, who were convinced that whatever rights minorities should have would be served best in a liberal setting'.[27]

The hybridity of the minority rights regime under the League appeared precisely in the Advisory Opinion of the Permanent Court in the *Minority Schools in Albania* case, wherein the Court declared:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peacefully alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuring special needs.[28]

Thus, to attain this object, the Court continued, it was necessary to ensure that not only were minorities treated equally to the other nationals of the State, but also that suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics were made available.[29]

Although Berman argues that in this case the Court, by relying on the minorities' view of their 'essential' requirement, attempted to deviate from the assimilationist approach of the peacemakers,[30] the Dissenting Opinion reveals that a simultaneous counter effort was made to underscore the assimilationist goal of the minority rights regime with the argument that the interpretation of the Albanian Declaration of 2 October 1921 concerning the protection of minorities must not deviate from the actual will of the State parties.[31] In the *German Settlers* case, while underscoring the primacy of the private rights of individual settlers, and thereby extending protection to the members of the ethnic German community under Polish repression, the Court bypassed the political aspects of the whole issue of

[26] Article 8 of the Polish Minority Treaty. Also Article 9 thereof relating to the use of minority language in schools located in minority-populated areas.
[27] P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991), p. 43.
[28] PCIJ Report (1935), Ser. A/B, No. 64, p. 17. [29] Ibid.
[30] Berman, 'A Perilous Ambivalence', pp. 370–2.
[31] PCIJ Report (1935), Ser. A/B, No. 64, p. 27.

Germanisation – a product of conservative German nationalist thrust – declaring that the political purpose behind the colonisation scheme could not affect the private rights acquired under the German Civil Code.[32] On the other hand, the Court refuted the Polish claim of constructing and consolidating their national 'self' through the process of de-Germanisation in this particular context.[33] The Permanent Court's attitude towards ethnicity located against the backdrop of liberalism – the ideology that had been juxtaposed with conservative Romanticism throughout the nineteenth century and now emerged victorious – symbolised the inter-war minority protection mechanism in the most significant way.

A similar compromising attitude was also demonstrated in the fact that although minority groups as separate entities were recognised in practice, formally the League repeatedly denied any international standing for minority groups. The League was rather comfortable with the understanding that the arrangements were between the treaty States and the League, the latter being the guarantor of the promises made by the former.[34] And in this way, the 'minority' itself was denied direct access to the mechanism supposedly designed for its protection, and thereby, pushed to the periphery in the discourse on the protection of their rights. As Roucek approvingly wrote in a publication of 1929, the minority treaties did not constitute the minorities as new special subjects of international law; the protection of minorities was, thus, given internationally, but *within* the State.[35]

Thus, the inter-war minority protection regime demonstrated an inherent tension between the conservative ethnic notion of minority protection and the liberal assimilationist agenda of the victors of the war. Efforts were made to mitigate this tension by various actors, the Permanent Court being the most prominent in this context. However, such efforts were marked with a clear message of undesirability of ethnic 'primitiveness' – a fact that characterised the whole minority protection regime in a number of ways.

[32] *Questions Relating to Settlers of German Origin in Poland Case*, PCIJ Report (1925), Ser. B, No. 6, p. 33.
[33] Ibid., p. 37. See also, *Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ Report (1926), Ser. A, No. 7; and *Case Concerning the Factory at Chorzow*, PCIJ Report (1925), Ser. B, No. 3; PCIJ Report (1928), Ser. A, No. 17.
[34] FRUS, *The Paris Peace Conference 1919*, vol. VI, p. 514.
[35] Roucek, *The Working of the Minorities System*, p. 75.

III. The liberal West and its conservative 'other' within Europe

Subjecting some States of Eastern and Central Europe to an international scrutiny of minority protection under the League, instead of creating a universal system of minority protection, naturally engendered protest and anger among the representatives of these States during the Paris Peace Conference.[36] While responding to such oppositions, the Western Great Powers attempted to locate the special obligations for the ECE States in a historical continuum – obligations that new entrants of the international society must commit to. This appeared clearly in Clemenceau's letter to Paderewski in response to Poland's position against any special obligation of minority protection for her under the Polish Minority Treaty.[37] Referring to the Congress of Berlin (the Protocol of 28 June 1878), Clemenceau asserted that the Principal Allied and Associated Powers would be false to the responsibility which rested upon them if they departed from this established tradition of stipulating additional responsibility for new States.[38]

Clemenceau's effort to historicise the imposition of special obligations on new States was later substantiated by a number of publicists. For example, Hudson shared the view that there were sufficient precedents before the peacemakers in Paris for imposing additional obligations on the new States, and on States to which large accessions of territory were to be made.[39] In a publication of 1928, Mair recorded the earliest

[36] See League of Nations, *The League of Nations and the Protection of Minorities*, p. 17. See also, FRUS, *The Paris Peace Conference 1919*, vol. VI, p. 88; ibid., vol. III, p. 400; H. W. V. Temperley (ed.), *A History of the Peace Conference of Paris*, vol. V (Henry Frowde and Hodder and Stoughton, 1921), p. 129. The meeting took place in an environment of confidentiality; the press were excluded and the proceedings were regarded as confidential.

[37] Letter addressed to the Polish President, M. Paderewski, by the President of the Conference and the French Premier, Clemenceau, transmitting to him the treaty to be signed by Poland under Article 93 of the Treaty of Peace with Germany (Paris, 24 June 1919). See FRUS, *The Paris Peace Conference 1919*, vol. VI, pp. 629–34; Temperley, *A History of the Peace Conference*, vol. V (Appendix IV), p. 433.

[38] Ibid.

[39] Hudson noted that the Conference of London in 1832 prescribed form of government to Greece on the occasion of her admission to the family of nations; the recognition of the acquisition of the Ionian Islands by Greece in 1864 was made subject to the guarantee of religious freedom. The Congress of Berlin in 1878 that Clemenceau specifically mentioned was another example he had in mind. He thus concluded that for almost a century, it had been an established practice, if not a principle of the public law of Europe, that guarantees to religious minorities should be included among provisions

precedent in which the Congress of Vienna of 1814 stipulated clear provisions of minority protection while creating the United Netherlands.[40] The most detailed account of such precedents is found in Temperley's edited volume, *A History of the Peace Conference of Paris*, published in 1921. However, his conclusion, which followed an apparently linear narrative of imposing special minority protection obligations on new States, threw light on rather a different aspect of the issue – that underlying the general claim of continuity of a tradition of imposing special minority protection obligations on new States or States to which territories had been ceded, there was a dichotomy of 'West' and 'East'. Throughout the nineteenth century, it was generally the non-Western States in Europe who had to consent to such obligations.[41]

Berman argues that the very idea of nationalism was at the heart of this East–West dichotomy. According to him, although the term 'national' was not ultimately used in the definition of protected minorities in the final version of the Treaty, the dichotomy between Eastern and Western Europe often centred on the implications of the word 'national' to describe the 'minority group', and '[t]he 1919 debate about the "nationalness" of minorities was understood not only as opposing states to minorities generally but also as opposing two different cultural conceptions of group identity – those of Western and Eastern Europe'.[42]

Berman's reference to 'nationalness' here needs to be understood in the nineteenth century's conservative Romantic sense of ethnicity as the foundation of the nation in contrast to the liberal version that characterises the Western 'self'. The liberal construction of Eastern Europe for the purpose of a special minority rights regime was premised upon the notion that Eastern Europe was the 'home' of conservative tradition of understanding the 'self' in ethnic terms. And it is in this process that the East becomes the 'ethnic other' of the liberal West, for which ethnicity has no real relevance. In other words, the minority problem was seen as the result of the conservative Eastern tradition of relying on the centrality of ethnicity in nation-building. As the instrumentalist intuition of this liberal construction

dealing with the transfer of territory inhabited by heterogeneous peoples. See Hudson, 'The Protection of Minorities', p. 209.

[40] L. P. Mair, *The Protection of Minorities – The Workings and Scope of the Minorities Treaties under the League of Nations* (Christophers, 1928), p. 30.

[41] Temperley, *A History of the Peace Conference*, pp. 116–17. Emphasis added.

[42] N. Berman, 'International Law of Nationalism: Group Identity and Legal History' in D. Wippman (ed.), *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998), pp. 40–2.

informs that the ethnic character of the East is a source of conflict it thus needs to be managed through the minority protection mechanism.

Therefore, it is no surprise that in its Advisory Opinion in *the Greco-Bulgarian Communities* case, the Permanent Court found the ethnic elements, such as 'sentiment of solidarity' and the salience of collective identity, as the attributes of 'Eastern Countries'. With reference to the mutual emigration of the Greco-Bulgarian communities, the Court held the view that the objective features of the community that unites it – same race, religion, language and traditions of their own – and the subjective factor, i.e. the willingness to maintain these characteristics, formed the core of a 'community'.[43] Having so defined the notion of 'community', the Court then attributed the ethnic character of the 'community' specifically to Eastern countries, by asserting that the very structure of the Greco-Bulgarian Convention (1919) that provided for the population transfer was designed to ensure that the individuals forming the communities could respectively make their homes permanently among their own race, 'the very mentality of the population concerned'.[44] Such an arrangement had its justification in the century-old (conservative) tradition of the Eastern countries, which the Court thought necessary to take into account in dealing with the case before them.

As a matter of fact, the protection of the League was not extended to any minorities within the Western States. Although German minorities suffered in a number of States both under and outside the League jurisdiction, Germany itself adopted increasingly brutal policies towards the minorities within its borders, and the League had no means to stop that.[45] Yet, while refuting the criticism that the Paris Conference did not bring defeated Germany under the minority protection obligation, Temperley relied on the scope of the provisions that these obligations were meant for completely new States, or States to which very extensive territories were assigned.[46] He thus argued that it would have been inappropriate to bring Germany under such a minority protection mechanism, in that she was neither newly emerged, nor gained any territory following the war.[47] Temperley then warned that the inclusion of Germany could have jeopardised the interests of other Great Powers,

[43] Advisory Opinion, PCIJ Report (1930), Ser. B, No. 17, p. 33. [44] Ibid., p. 21.

[45] J. J. Preece, 'Minority Rights in Europe: from Westphalia to Helsinki', (1997) 23(1) *Review of International Studies*, 75–92. Also, J. Preece, 'National Minorities and International System', (1998) 18(1), 17–23.

[46] Temperley, *A History of the Peace Conference*, p. 141. [47] Ibid.

who also had significant minorities within their territories, by engendering a universal system of minority protection and thereby bringing them under international scrutiny.[48] It is implied that only the non-Western States could be under such international supervision.

Thus, France and Italy, despite receiving extensive territories populated by minorities, similarly remained conspicuous exceptions to the League's scope of minority protection. France was not even asked to guarantee the protection of German minorities in Alsace-Lorraine; it was generally regarded as a case of annexation, hence no question of special obligation was raised.[49] Similarly, despite receiving South Tyrol with a quarter of a million ethnic Germans and 480,000 Yugoslavs, Italy was also exempted from any minority protection obligation. Although unlike Alsace-Lorraine, in the case of Trentito, a suggestion was made that Italy provide guarantees for the protection of German minorities, the Italian delegation held to the view that it was entirely inconsistent with its position as a principal Power to have any such suggestion made.[50] Therefore, Italy remained outside the scope of the minority protection mechanism.

Thus, the dichotomy of West and East within Europe is demonstrated in two ways: first, the problem of minorities is articulated as a concern for Eastern Europe alone by attributing 'special needs' for these States due to the different characters of these people, to use Temperley's words, as well as the conservative tradition of emphasising the centrality of ethnicity in the nation-building process. Second, to deal with these minorities, the political independence of East European States was restricted by international minority protection treaties and thereby, 'internationalising' the minority issue, to use Berman's term.[51] While the sovereign prerogatives of these countries were made subject to the protection of their minorities, the Allies continued the deference to Western European sovereignty in refusing to extend international scrutiny to all League members.[52] Even in the case of the restoration of Belgium, no such restriction to her sovereignty was imposed; instead, she enjoyed an unqualified right to self-determination, despite her heterogeneous demographic composition.[53]

[48] Ibid., p. 142. [49] Hudson, 'The Protection of Minorities', p. 212.
[50] Comments made by Hudson in an interview. See ibid., p. 474.
[51] Berman, 'But the Alternative is Despair', pp. 1858–9.
[52] Hudson, 'The Protection of Minorities', p. 49.
[53] Number seven of Wilson's fourteen points states that: 'Belgium, the whole world will agree, must be evacuated and restored, without any attempt to limit the sovereignty which she enjoys in common with all other free nations. No other single act will serve as

However, this ethnic discourse on the 'self' and the 'other' was not confined to the dichotomy of liberalism and conservatism alone. As the following discussion reveals, the tripartite interactions among minorities, their host-States, and kin-States – all in the process of defining the 'self' in the ethnic term, within the conservative Romantic framework – exposed the practical drawbacks of the inter-war minority protection mechanism.

IV. The ethnic 'other' within the ethnic 'self': a case of reciprocal exclusion

While re-creating Poland as a sovereign State, the Versailles Treaty unmistakably envisaged the Polish State along the conservative ethnic line. Article 91(2) of the treaty allowed Poland to deny citizenship to certain ethnic German residents in Poland.[54] Simultaneously, clauses 4 and 9 of the same Article provided for the inclusion within the Polish State of certain Poles who usually resided outside the territory of the new State.[55] Poland was then evidently determined to undo the Germanisation project advanced under Prussian rule. Nevertheless, in the actual implementation of this conservative nationalist project, the matter became much more complicated, given that as a precondition to the reacquisition of her sovereignty, Poland had to extend Polish citizenship to certain ethnic Germans who were born in Poland of 'parents habitually resident there, even if at the date of the coming into force of the present Treaty, they were not themselves habitually resident there'.[56]

this will serve to restore confidence among the nations in the laws which they have themselves set and determined for the government of their relations with one another. Without this healing act the whole structure and validity of international law is forever impaired.'

[54] Article 92(2) reads: 'German nationals, however, or their descendants who became resident in these territories after 1 January 1908, will not acquire Polish nationality without a special authorisation from the Polish State.'

[55] Clause 4 of Article 91 of the Versailles Treaty stipulates that: 'Poles who are German nationals over 18 years of age and habitually resident in Germany will have a similar right to opt for Polish nationality.' Again Clause 9 of the article mentions that. '[. . .] Poles who are German nationals and are in a foreign country will be entitled, in the absence of any provisions to the contrary in the foreign law, and if they have not acquired the foreign nationality, to obtain Polish nationality and to lose their German nationality by complying with the requirements laid down by the Polish State.'

[56] See Article 4 of the Polish Minority Treaty. According to Article 91(1), 'German nationals habitually resident in territories recognised as forming part of Poland will acquire Polish nationality *ipso facto and* will lose their German nationality.' Article 91(3) stipulated that within a period of two years after the coming into force of the present

When the Polish government refused to extend Polish nationality to former German nationals if their parents were not habitually resident in Poland both on the date of birth of the persons concerned and on the date of the enforcement of the Treaty, the Permanent Court in an Advisory Opinion held that such an interpretation by Poland amounted to breach of her international treaty obligations.[57]

In contrast, with the drastic defeat in the war and with no immediate hope of altering the Versailles settlement, German officials learned, at least officially, how to keep its nineteenth-century notion of ethnic nationalism at distance for an interim period that lasted only a little more than a decade. Although there existed an ultra-nationalist urge for confrontational policies towards Poland and the other Eastern European States, where a significant number of ethnic Germans faced discriminatory treatment, the official position in the 1920s held that a 'correct relation' had to be maintained with these countries.[58] The German Foreign Minister, Gustav Stresemann, was the proponent of such a policy with the strategic argument that if there were no Germans in the Eastern European countries, it would be difficult for Germany to advance its revisionist agenda. Thus, Stresemann took the policy of internationalising the plight of German minorities by joining the League and positioning Germany as the 'Protector of Minorities' for the continent.[59] As a part of the same project, Stresemann advocated for liberal minority schools within Germany with a view to rationalising the claim of more extensive rights for the overseas German minorities.[60] In the meantime, generous support was extended to a number of organisations, such as the European Nationalities Congress, to voice the rights of minorities, especially, German minorities. Protecting the *Kultur* of the ethnic Germans in the ceded territories was also a great concern, which demanded government aid to German newspapers as well as to boarding schools and club houses.[61] Yet, in another strategic move, Germany avoided any direct official involvement with minority organisations in the ceded territories; instead, it adopted a policy of supporting German minorities through a number of covert organisations.[62]

Treaty, German nationals over 18 years of age habitually resident in any of the territories recognised as forming part of Poland will be entitled to opt for German nationality.

[57] *The Question Concerning the Acquisition of Polish Nationality Case*, PCIJ Report (1923), Ser. B, No. 7.

[58] Mazower, *Hitler's Empire*, p. 35.

[59] Ibid., p. 38.

[60] Frenz, *A Lesson Forgotten*, p. 160.

[61] Ibid., p. 143.

[62] A. Komjathy and R. Stockwell, *German Minorities and The Third Reich* (Holmes and Meier Publishers, Inc., 1980), pp. 1–3.

However, the German politics on the minority issue drastically changed with the seizure of power by the Nazis in 1933. Being premised on the nineteenth-century concepts of Romanticism and cultural specificity as well as polygenic social Darwinism, the racial theory of law proposed that each of the various races and peoples had its own law which was inseparably bound up with that specific race or people; law was so specific to the cultural understanding that it could be neither replaced by the law of another people nor transferred to another race.[63]

Under such a construction of law, the obvious question was whether any idea of international law could be compatible with the Nazi ideology. In fact, shortly after the seizure of power by Hitler, Nazi international lawyer Schecher in a publication of 1933 reduced the whole idea of international law to 'an *emblem* of rules belonging exclusively to the German order of law'.[64] Nevertheless, such an approach to international law was pragmatically and strategically difficult to advance, given Germany's then weak military and economic position. What followed was a series of reconciliatory approaches to international law. Carl Schmitt, for example, in an article published by the National Socialist Party in 1934, explicitly presented the subjective dimension of international law, which for him had the foundation in the *volkische* character of States.[65] For him, the idea of law, *Nomos*, supposed a concrete order and a concrete community that stood above individuals in contrast to what the liberals proposed.[66] This idea of specificity premised upon the interplay of land and race found expression in his famous (or infamous) theory of *Grossraum* (Grand Space), developed in line with the American Monroe doctrine.[67]

[63] Ibid.

[64] See J. H. Herz, 'The National Socialist Doctrine of International Law and the Problems of International Organisation', (1939) 54(4) *Political Science Quarterly*, 539.

[65] A. Carty, 'Carl Schmitt's Critique of Liberal International Legal Order Between 1933 and 1945', (2001) 14 *Leiden Journal of International Law*, 31 (emphasis in original).

[66] A detailed criticism of individualism and liberal imperialism through the use of international law as a tool by the Anglo-American liberals appeared in his work, *The Nomos of the Earth*. See, C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press, Ltd., 2003 [1950]). Although published in 1950, this volume was completed just before World War II ended. Given that by that time the fate of Germany was more or less decided, much of his racial ideas did not appear directly in *The Nomos of the Earth*; rather, the book warns about the dominance of the Anglo-American ideologies and their potential disastrous consequences for the post-World War II world order.

[67] D. F. Vagts, 'International Law in the Third Reich', (1990) 84 *American Journal of International Law*, 687–90; Carty, 'Carl Schmitt's Critique', pp. 34–47; A. Gattinni, 'Sense and Quasisense of Schmitt's Grossraum Theory in International Law –

However, within the top Nazi official circle, Schmitt's theory of *Grossraum* got translated, much to the denial of his intellectual contribution, into the theory of *Lebensraum* (Living Space) that entitled Germany as a racially superior State to expand spatially as far as its biological needs carried it and in whatever manner it was deemed necessary for this purpose.[68]

Against this politico-legal backdrop, the Nazi lawyers thus claimed that treaties were binding as long as they did not jeopardise the racial health of a people; war, not law, was the ultimate arbiter of international order.[69] With such a perception of international order, Nazi Germany decided on a more explicit and direct involvement in the minority affairs. Given the racial foundation of the regime, such claims for involvement were often propgated along the lines of ethnic affiliation with the minorities.[70] Juxtaposing the ethnic phenomenon of minorities with the individualist framework of the minority protection mechanism under the League, Schmitt similarly argued that Germany must be assigned a special role in the minority protection system to protect the 'Eastern space' from the ideological hegemony of liberalism; there had to be a defence of the national peculiarity of each ethnic group against Western assimilation, and it had to be by Germany.[71]

Nazi Germany, under Hitler and his aides such as Himmler, was committed to its long-standing agenda of Germanising of Eastern Europe. However, such a vision of Germanisation was different in character to previous efforts, in that it was set to advance the nineteenth-century German philosophy of historicism and race on a previously unforeseen scale. Their invasion policy was marked by the conviction that the Eastern territories were what the Teutonic knights occupied many centuries ago.[72] But to match the racial underpinnings of the regime, such re-occupation of the 'ancient territories' had to be conducted to the exclusion of everything else. Such an idea was also rationalised by the social Darwinist notion of the 'survival of the fittest'. In his classic work, *Behemoth*, Neumann explains how the Nazi idealists had recourse to the works of the nineteenth-century

A Rejoinder to Carty's "Carl Schmitt's Critique of Liberal International Legal Order Between 1933 and 1945"', (2002) 15 *Leiden Journal of International Law*, 57–62.

[68] Carty, 'Carl Schmitt's Critique', p. 74; Vagts, 'International Law in the Third Reich', pp. 687–90.

[69] For details, see, Vagts, 'International Law in the Third Reich', pp. 692–3; also, Mazower, *Hitler's Empire*, pp. 44–5.

[70] For example, in a debate in the League Assembly in 1933, the German delegate defended interventions by the kin-States along the line of ethnic affiliations. See *League of Nations Official Journal*, spec. supp. 120 (1933), 23.

[71] See Carty, 'Carl Schmitt's Critique', p. 40.

[72] Mazower, *Hitler's Empire*, p. 181.

polygenist Gobineau, which were later reworked by Houston Stewart Chamberlain and Richard Wagner. They, along with conservative nationalist Friedrich List, offered the Nazis necessary ideological foundation for advancing imperialism on the basis of race.[73]

Himmler is reported to have said with reference to his predecessors' mild approach to Germanisation: 'Our mission is not to Germanise the East in the old sense – bringing the German language and laws to those living there, but rather to ensure that in the East dwell only men with truly German, Germanic blood.'[74] That was an open agenda for complete expulsion of the 'other', which of course was later to materialise into something much more sinister. Again, for Himmler such measures to reflect the diverse but increasingly serious nature of the policies employed, were part of the 'necessary ethnic separation of races and peoples in the European New Order as well as in the interest of the security and purity of the German Reich'.[75]

However, before such an exclusionist mission could be realised, the Nazi regime directed its minority policy towards transforming the international mechanism of minority protection under the supervision of the League into a bilateral issue, thereby, facilitating its involvement as a kin-State. Sidelining the British and the French, Germany started negotiating with the States hosting German minorities in bilateral terms. In this context, Schmitt argued that since the *Reich* had concluded a series of bilateral treaties for the protection of German minorities, the Versailles Treaty for minority protection was firmly rejected.[76] While Schmitt perceived such a disavowal of the Versailles system as an essential step towards the creation of *Grossraum*, other Nazi jurists, too, generally conceived bilateralism as a necessary attempt to minimise international law to contractual relations among individual States.[77]

Given that Poland was also unhappy about the Versailles arrangements (their special obligations regarding minority protection), by concluding a ten-year non-aggression pact on 26 January 1934, the Nazi regime offered Poland an incentive to violate her international treaty obligations. The pact allowed Germany considerable time for

[73] F. Neumann, *Behemoth* (Ivan R. Dee, 2009 [1942]), pp. 98–111.
[74] Quoted in Mazower, *Hitler's Empire*, p. 181.
[75] Quoted in ibid., p. 247. See also, M. Burleigh, *The Third Reich: A New Story* (Pan Books, 2001 [2000]).
[76] See, Carty, 'Carl Schmitt's Critique', p. 43.
[77] For the details of this argument, see Herz, 'The National Socialist Doctrine of International Law', p. 547.

rearmament, but simultaneously offered Poland an opportunity to re-Polonise the Prussianised Poles, as well as to clear up the border regions by displacing the disloyal German elements.[78] So, induced by the German politics on the minority issue, Poland increasingly deviated from the treaty obligations, and later, in November 1937, jointly signed the Minority Declaration with Germany, formally declaring the question of minority protection as a bilateral issue between them, and thereby accepting Germany as an advocate for German minorities.[79] As a principle it was clearly contrary to the Versailles understanding that kin-States would be kept out of minority affairs.

Having gained a recognised position in minority affairs inside Poland, Germany was now better equipped to manoeuvre the minority issue internally and internationally, and set a premise for her revisionist claims. At the same time, Poland relied on de-Germanisation in the process of constructing her own ethnic self-image, which the Great Powers moderately authenticated at Versailles. Even after the Declaration, 'untrustworthy' German families were relocated or expelled from strategically important areas under the Frontier Zone Decree of 22 January 1927.[80] The overall number of German minority schools and the percentage of German pupils declined, despite high demand for such schools.[81] Although 'land reform' had been a key policy of de-Germanisation since the beginning, the situation of the German minorities deteriorated significantly during this time. The area of German land redistributed, almost exclusively to Poles, under the land reforms, increased from 8,444 hectares in 1936 to 20,325 hectares in 1937; 22,254 hectares in 1938; and 22,732 hectares in 1939.[82] These land 'reforms' caused severe unemployment among the Germans, who were then compelled to emigrate to Germany.[83]

Thus, the foregoing account of the treatment of minorities in pre-World War II Germany and Poland demonstrates how the task of mutual exclusion of the ethnic 'other' was advanced in the process of constructing their ethnic self-image along the line of the conservative

[78] Komjathy and Stockwell, *German Minorities and The Third Reich*, pp. 71, 73.
[79] Ibid., p. 85. Behind the Declaration, the Polish motive was to gain commitment from Germany regarding the non-violation of Polish rights in Danzig. Poland also had the hope that such a declaration would ameliorate the condition of 1,300,000 Poles inside Germany who were outside any special minority protection mechanism. Hitler, on the other hand, had the purpose of neutralising Poland before taking over Austria and invading Czechoslovakia.
[80] Ibid., pp. 86–7. [81] Frenz, *A Lesson Forgotten*, p. 226.
[82] Komjathy and Stockwell, *German Minorities and The Third Reich*, p. 87.
[83] Frenz, *A Lesson Forgotten*, p. 248.

tradition of the nineteenth century. Although the extent of the measures employed in the process are in no way comparable, the ethnic dichotomy of 'self' and 'other' continued to inform the whole structure of the campaign that took final shape in the midst of the war.

V. Concluding remarks

The inter-war international law of minority protection relates to the nineteenth century's ethnic dichotomy of the European 'self' and the non-European 'other' as expressed in colonialism, in that the same ethnic discourse on 'self' and 'other' was translated through the liberal and conservative traditions into the dichotomy of the liberal Western 'self' and the conservative non-Western 'other' within Europe. The regime also witnessed the exclusionist response to the ethnic 'other' – minorities – in the process of constructing the ethnic self-image. At the same time, the inter-war minority protection mechanism demonstrated a tension that resulted from the efforts to reconcile the liberal assimilationism of the West with the ethnic underpinning of conservative minorities and their host-States in East Europe.

Nazism collapsed, as did the minority protection mechanism with its guarantor, the League. But the liberal–conservative dichotomy within Europe, as well as the tension emanated from the response of liberal individualism towards the ethnic phenomenon attributed to the concept of 'minority', survived much beyond the inter-war international law. International protection of minorities in the aftermath of the World War II, especially in the post-Cold War context, continued to demonstrate such a phenomenon. In this sense, the inter-war minority protection mechanism could be understood as an important link between the nineteenth-century ideas of colonialism and the post-World War II regime of minority protection, in each of which the ethnic dichotomy of 'self' and 'other' expressed through the liberal and conservative streams provides the necessary analytical framework for a better understanding of international law as was applied to these systems and also constructed in the process.