What are human rights? The technical answer is that they are norms of international law that are formulated in abstract, universally applicable terms. For example, Article 3 of the Universal Declaration of Human Rights reads: “Everyone has the right to life, liberty and security of person.” Such a norm contains no reference to any context or circumstances that might justify limiting those rights – and therein lies the power of human rights language. When lawyers or activists attach a particular situation to a human rights norm, they seek to persuade others to see that situation in isolation from its historical context and usual justifications, as a violation. Human rights norms are ahistorical and decontextualized, and that is the point of invoking them.

After the Second World War, activists around the world hoped that people would think ever more in terms of human rights norms, and the Allies encouraged that hope. However, the use of the ahistorical language of human rights in occupied and West Germany – the subject of this essay – was difficult and inevitably controversial. In practice, the language of human rights in West Germany highlighted the tension between the Federal Republic’s most prized moral claims: to have enshrined timeless, universal human rights, and to have accepted the specific historical responsibility of Nazism. While the former asks listeners to set aside context, the latter depends on a specific context for its significance.

There was and is no single, typical West German “take” on human rights. Rather, West Germans have applied a range of opinions and approaches. However, there have been certain highly typical confrontations among West Germans concerning human rights. One such confrontation emerged already under occupation in the second half of the 1940s, and it still animates human rights debate today in the Federal Republic. On one side stood those who wished to sharpen West Germans’ awareness of human rights by emphasizing Germans’ violations of others’ human rights under Nazism. These “others” were non-Germans and German minorities targeted according to racial, political, or sexual criteria. Informing the West German public about the
Nazi past and critically analyzing postwar Germany in light of that past were to be central to any discussion of human rights. On the other side of the confrontation stood those who attached human rights language to those Germans who, while not targeted under Nazism, had suffered under the Allied occupation. It was possible, but not technically necessary, to include the context of the Nazi past in order to define the norms violated here. As it happened, however, criticism of the Nazi past usually was absent on this side. This lack of a critical approach to the Nazi past provoked the irritation of the former side.¹

In the immediate postwar period, those Germans who claimed that the Allies had violated their or other Germans' human rights were dominant in this confrontation, and not just on the right.² They cited aerial bombardment, arbitrary seizure of property, extended detention for prisoners of war, and the expulsion of ethnic Germans from Poland, Czechoslovakia, and other points in Eastern Europe.³ During the Allied occupation, organizations representing the expellees were banned; the Allies feared their far-right political potential.⁴ After the creation of the Federal Republic in 1949, the Basic Law guaranteed the right of such groups to form, and they quickly grew. German international lawyers worked with these groups, applying their professional skills to defining occupation and expellee issues as human rights violations. The tension between the Federal Republic's two moral claims, to universal human rights and to the historical responsibility for Nazism, emerged most sharply in these claims that the Allies had violated Germans' human rights.

This essay focuses on one actor in this confrontation, the international lawyer Rudolf Laun (1882-1975). Laun, a professor of law and legal philosophy at the University of Hamburg, was the earliest of the German international lawyers to criticize the Allies for violating Germans' human rights. His insistence on applying concepts consistently, in spite of their different political meanings in different contexts, exemplifies the confrontation described above. Yet Laun's case is more than merely illustrative, for his arguments allow us to connect that typical West German confrontation to larger themes in the twentieth-century history of human rights. Laun's case certainly shows us that human rights functioned as a political language, allowing Germans to cast themselves

Rudolf Laun and the Human Rights of Germans

127

as victims and to suggest that Germans' own earlier heinous actions had been balanced out. Yet his human rights concepts also had a specifically legal significance. Laun helped to import discussions about self-determination and peace from Habsburg Austria and from the Western European progressive international law movement into the postwar West German international law field. The problems that Laun foregrounded continue to be important and controversial today. Germans' claims against the Allies fed into the larger question of whether individuals and non-state groups (such as ethnic groups) could be subjects of international law with standing in international institutions. The German expellees' claims also raised the question of whether such groups had a right to self-determination, including, by right of indigeneity, a right not to just any homeland, but to a specific and irreplaceable homeland. These discussions are part of the history of those globally resonant concepts. This may not be well known to historians, but it ought to be familiar to West German international lawyers working today on minority and indigenous peoples' rights. Politically, by the end of Laun's career in the late 1950s, the expellee issue had become associated with the right, yet the human rights concepts with which he worked are associated today with the left. Such divergent disciplinary and political histories, with their mutual antagonisms and borrowings, belong in a more comprehensive narrative of human rights in the twentieth century.

Laun's Concepts: The Autonomy of Law, the conscience publique, and the Right to National Self-determination

Laun was an important figure in interwar German jurisprudence. An ethnic German from the Bohemian lands of Austria-Hungary, he became involved with pacifism while serving as an officer in the First World War. He was active in attempts to revise the Austrian Constitution's treatment of nationalities both during and immediately after the war. Laun strongly advocated the union of Austria and the Sudetenland region with Germany. When the Entente forbade that and instead placed the Sudetenland inside the new Czechoslovakian state, Laun experienced one of the greatest disappointments of his life. He left Austria for Germany to become professor of public law

5 On these topics, see Christian Tomuschat, Human Rights. Between Idealism and Realism (Oxford, 2003), 305–309 (on the individual as a subject of international law); the German contributions in Catherine Brölmann, René Lefeber, and Marjoleine Zieck (eds.), Peoples and Minorities in International Law (Dordrecht, 1993) (on ethnic groups); and Christian Tomuschat (ed.), Modern Law of Self-Determination (Dordrecht, 1993) (on self-determination).


and legal philosophy at the newly created University of Hamburg. By the end of the First World War, Laun had become a Social Democrat (though not a Marxist), and he joined the SPD in Hamburg. He was a vocal defender of the Weimar Republic. At the same time, he continued to advocate the union — through peaceful means — of Austria and the Sudetenland with Germany. His work in legal philosophy, meanwhile, contributed to debate on administrative discretion, and the relationship between morality and law. These were vital concepts for the new democracy.

During the Weimar Republic, Laun set out his basic concepts regarding international law's sources. These were: the notion of the autonomy of law, that is, that law was a category of human action separate from mere power or coercion; the notion of a *conscience publique*, or widely held sense of justice; and the right of national (today one might say ethnic) self-determination. This last concept was, in his view, an outgrowth of the first two. Laun drew these concepts from the work of the Belgium-based progressive Institut de droit international, founded in 1873.

To turn to the first of these concepts: the autonomy of law, a Kantian concept, held that it was impossible to impose genuine law on people without their participation, such as through autocratic political authority or brute violence. Rather, genuine law was created when people obeyed statutes out of their own conviction that those statutes were moral. For Laun, a state could not govern over people, but only through them. That was a significant limitation on state sovereignty. The autonomy of law in effect shifted to ordinary persons the power to define law. The autonomy of law also applied to


12 Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (New York, 2001), 14–16, 43–42, 51, and chapters 1 and 3. Laun’s emphasis on national self-determination was not typical of all progressive international lawyers, but some did share it, including Pasquale Mancini, one of the founders of the *Revue de droit international et de législation comparée* and much admired by Laun. See Koskenniemi, *The Gentle Civilizer of Nations*, 14, 63.

international law contexts. For example, if a state annexed territory and denied self-administration in a manner that violated inhabitants' nationality rights, that state would be ruling through sheer coercion. Coercion was a fragile form of rule, Laun argued, because if rule were based merely on power, then no one could be certain who would hold power in the future, and the door would be opened to anarchy as various factions vied for power. As this brief summary suggests, Laun was vehemently opposed to legal positivism, the conventional doctrine in nineteenth- and early-twentieth-century Germany (and elsewhere), according to which law consisted of the explicit, positivized acts of sovereign states, rather than deriving from some source outside or above the state such as God or nature. While traditional international law, which confined itself to the willed acts of sovereign states, fit well with legal positivism, the progressive international law movement argued that states had obligations that limited their power to act unilaterally and arbitrarily. For Laun, adherence to legal positivism was tantamount to capitulating to amoral state coercion, and could not be reconciled with democracy.

The second of Laun's central ideas was the conscience publique, which he defined as people's views regarding what was just. Like the autonomy of law, the conscience publique gave ordinary people the power to define law. It emerged from individual persons' moral reflection, and Laun claimed that it was remarkably consistent among the majority of populations and across state boundaries. He conceded that this form of public opinion could not be observed at moments when people's views were likely to be deformed by propaganda or warfare. Like the founders of the progressive international law movement, Laun argued that the conscience publique was a valid source of international law, just like treaties and customary law. The concept of the conscience publique allowed progressive international lawyers to locate a source of power beyond the reach of any state. That may sound similar to natural law, but progressive international lawyers in fact wished to distance themselves from natural law doctrine as well. Laun considered the German historical school of law of the early nineteenth century to have invalidated natural law, and held that efforts to revive natural law merely promoted arbitrary legal reasoning. Laun and other progressive international lawyers claimed that the conscience publique, unlike natural law, was grounded in sociological reality.

Over the long term, Laun insisted, the conscience publique favored democracy and popular sovereignty. Given the chance to express themselves without coercion, most people would prefer democracy over undemocratic forms of state rule. Coercion could never be the ultimate guarantor of state power in a

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14 Ibid., 27.
15 Rudolf Laun, La Démocratie. Essai sociologique, juridique et de politique morale (Paris, 1933).
16 Rudolf Laun, Der Wandel der Ideen Staat und Volk als Äusserung des Weltgewissens (Barcelona, 1933), 335-337. See also Koskenniemi, The Gentle Civilizer of Nations, 24.
democracy. Violence as a means of settling human affairs was being steadily displaced by “voluntary obedience and above all autonomous juridical-moral action.” Obviously, there was reason to doubt this trend in the years before 1933. Yet Laun saw Soviet Communism, Italian fascism, and Hitler’s seizure of power as only temporary aberrations. A dictator’s rule did not mean that the population had by and large rejected democracy; if people could speak without fear, they would still prefer democracy, he argued. He also noted that even dictators invoked mass support, which revealed that the idea of democracy retained its power. In his July 1933 afterword to his book-length exposition of the conscience publique, he insisted that “the recent events in Germany do not authorize us to change the judgment regarding this ancient process of twenty-five centuries that we have set forth in the last chapters of our work.”

Laun’s third major concept was the right to national self-determination. Just as the conscience publique had come to embrace democracy, so had it come since the nineteenth century to embrace the value of nationality. Laun believed that nationality, like the conscience publique, was natural, prepolitical, and perduring: people naturally valued freedom, and if they were free, they would naturally seek to sustain and express their nationality. It is important to note that Laun rejected the nation-state as a political goal. While I will use a literal translation of his terms Nationalität (nationality) and nationale Selbstbestimmung (national self-determination), the reader must bear in mind that Laun does not mean here a right or a movement to achieve state power for a nationality. For Laun, state power and a nationality’s power ought not to be combined, because a nation-state, once established, would simply use state coercion to oppress the inevitable minorities inside its borders. In fact, he also rejected the term “minority,” because he held that in a multinational, federal state each group deserved to exercise its cultural rights regardless of the numerical proportions among groups.

For Laun, the political, amoral state was a threat to the natural, moral nationality. Nationalities needed international law to protect themselves from state coercion. Displaying the Austro-Marxist influence on his thinking, Laun described his ideal political arrangement as a federal, multinational state that was limited domestically by its constitution as well as internationally by strong international law controls. Only such a state would reliably enable the
democratic exercise of cultural rights. True nationality rights, then, required stronger international law: “The more validity that the national idea conquers in the legal sensibility and conscience of the world, and the more the idea of state sovereignty recedes accordingly, the stronger the influence of international on domestic law must be in all areas that are in any way connected with the national question.” Moreover, strong international law controls promised to democratize international law, by giving non-state groups a place on the international law stage—a stage that had been dominated for so long by states. Laun thereby separated the right to national self-determination from state sovereignty—an approach quite different from that, for instance, of post-colonial politicians, who have wielded the right of national self-determination as a state’s prerogative.

By 1933, then, Laun had laid out his basic concepts of the autonomy of law, the conscience publique, democracy, and the right of nationalities to self-determination. Genuine law emerged from people’s voluntary obedience based on their moral beliefs, which had come to include nationality and democracy, he argued. Domestic and international law ought to take account of these. For Laun, the clauses in the peace treaties after the First World War that forbade the union of Austria and the Sudetenland with Germany were both illegal and undemocratic—a position with which the Nazis would have agreed.

Laun after 1945: The Individual as a Subject of International Law and the Right to the Homeland

As an active Social Democrat, Laun faced dismissal under the Law for the Restoration of the Professional Civil Service in 1933. However, he managed to keep his professorial post, at a reduced salary, probably due to his activism on behalf of German minorities in interwar East-Central Europe.

In 1935 Laun published a new, expanded edition of his main work on the relationship between morality and law. In 1942 he published Der Satz already departed from Renner in one important respect by the time of the First World War peace settlement: While Renner and his colleague Otto Bauer advocated the “personality principle” (Personalitätprinzip), which allowed scattered individuals to administer their national affairs collectively, Laun favored a “territorial principle” (Territorialprinzip) that granted regional autonomy over a homogeneous enclave of a multinational state. See Rudolf Laun and I. Lange, Czecho-Slovak Claims on German Territory, 3rd ed. (The Hague, 1919), 22.

Laun, Der Wandel der Ideen Staat und Volk, 326.


Rudolf Laun, Recht und Sittlichkeit, 3rd, exp. ed. (Berlin, 1935). It contained the unchanged 1924 text as well as new essays. In the new essays, he reiterated that racial or economic categories could not serve as sources of law, and that only the “autonomous conscience and legal sensibility of individuals” was the source of law. Laun, Recht und Sittlichkeit (1935), 98.
vom Grunde. Ein System der Erkenntnistheorie (1942), his most complete account of the autonomy of law. It implicitly criticized Nazi concepts such as the Führerprinzip and racial hierarchy, stating, for example, that "there are many religions, many peoples, many states, many languages, but only one science."\(^7\) In 1945, that anti-Nazi reputation propelled Laun into leading positions at the university: He became dean in May 1945 and once again rector in 1947. Laun was also pivotal in his field's professional society, as the re-founder and first postwar Chairman of the German Society for International Law (Deutsche Gesellschaft für Völkerrecht, DGVR). Before 1933, this group had been the forum of German progressive international lawyers such as Walther Schücking and Hans Wehberg.\(^8\)

The Allied occupation of Germany shocked and infuriated Laun. He continued to write about nationality rights and democracy after 1945, just as he had before and during Nazism. Laun pointed out his consistency to his students with sarcastic pride, telling them that his lectures, "which had their roots in Imperial Austria, could be given again, essentially unchanged, in the Austrian Republic, the Weimar Republic, National Socialist Germany and most recently in the British Military Government's regime of the military leadership principle (soldatischen Führerprinzips)."\(^9\) Two aspects of his thinking emerge here. First, he clearly considered the cause of German nationality politics in East-Central Europe to be unscathed by its horrific mobilization in dictatorship, world war, and genocide. Second, he perceived a continuum of German victimhood across 1945: Germans had been victimized by the Paris peace settlement, Nazi rule, Allied occupation, and as expellees.

Immediately after 1945, Laun applied his basic concepts to Germans qua victims. Referring to the autonomy of law, he argued that Germans' compliance with the Nazi regime was overwhelmingly due to coercion. What the Nazis imposed was not genuine law, because it had been imposed on the Germans; they had not embraced it. Using the conscience publique, he made a similar point, arguing that just because many Germans obeyed Nazi precepts did not mean that they accepted them. On the contrary, he insisted, most Germans had favored democracy and human rights all along.\(^10\) Laun seemed to reason that if coercion were present at all, then any inquiry into political will or opinion was moot. His idea of a conscience publique allowed him to avoid considering the possibility that dictatorship could be genuinely popular (or that that popularity


\(^8\) On Schücking and Wehberg, see Koskenniemi, The Gentle Civilizer of Nations, 215–222.

\(^9\) Rudolf Laun, Studienbehelf zur Vorlesung über Allgemeine Staatslehre, 2nd ed. (Hamburg, 1946), 7.

could be complexly layered). Laun insisted that coercion — now Allied coercion — could not create genuine law. He argued that Germans were victims of numerous human rights violations under Allied occupation, and cited the right of national self-determination to condemn the expulsions of ethnic Germans from Poland, Czechoslovakia, and elsewhere in Eastern Europe.

Indeed, Germans were the unrecognized pioneers in the history of human rights thought for Laun. Religious freedom was the first human right to gain recognition, and “thus human rights first emerged in the first half of the sixteenth century in Germany,” demanded by the Anabaptists and Luther. Germans — including a delegate from Austria — had also produced the Weimar Constitution, the “freest constitution in the world.” No wonder Laun was popular in those years immediately after the war: He had a clean political past, he imparted clear lessons in law that were explicitly informed by morality, and he reassured Germans that they were valuable people with a distinguished past who were being maltreated. Laun repeatedly likened the Allies to Hitler and the Nazi regime. Both were, for Laun, the pure expression of amoral coercion legitimized by legal positivism, under which Germans had to suffer: “We yield to the new positive law ... as we had to yield to the positive law of the Hitler regime.” Everyone ought to be concerned about the treatment of defeated Germany after 1945, Laun insisted, because it was a warning to all who may one day experience defeat themselves. His was not a discussion of human rights that was intended to provoke Germans’ critical introspection. For that reason, some in Germany as well as abroad responded angrily to his writings, seeing him as nationalist and — unfairly — as an apologist for Nazism. It is indeed frustrating to read arguments as narrowly cast and self-pitying as Laun’s, but Laun was no apologist for Nazism. For that reason, some in Germany as well as abroad responded angrily to his writings, seeing him as nationalist and — unfairly — as an apologist for Nazism.

Laun formulated two new concepts in the post-1945 era: the individual and non-state group as full (or fuller) subjects of international law, and the right to the homeland. They were outgrowths of his work before 1933: The autonomy of law and conscience publique had already broached the issue of the individual’s voice in international law, and the right to the homeland was a reformulation of the right to national self-determination. As was true of his interwar concepts, these new concepts in his late work were not unique to Laun. Along with many others in the post-1945 era, Laun claimed that an

32 Ibid., 12 (quote) and 13.
34 Laun, Die Menschenrechte, 5, 6, 8, 14, 26.
35 For example, Ernst J. Cohn, “German Legal Science Today,” International and Comparative Law Quarterly, 2 (April 1953), 191.
“international law of human rights” was gradually displacing an older “international law of the sovereignty of state power.” His postwar concepts fit with that development, by limiting state power and augmenting the voice of non-state actors (individual persons, nationalities) in international law. In his international professional context, Laun’s distinctiveness lay in applying these concepts to Germans.

According to traditional international law, only states were recognized actors in international law. If an individual were to be recognized as a subject of international law, the international legal order would place states in a very different position. A plaintiff could advance directly to an international forum to have a complaint heard or a case tried, without having first to find a state to represent him or her. The states’ monopoly on international law would be broken. The standing of individuals was important not just as an abstract ideal, but as a practical reality for Germans under occupation between 1945 and 1949. The German state had ceased to be effective; in the view of some, it had ceased to exist entirely. The Allies stepped into its place: Neither annexing nor occupying Germany in the traditional sense, they replaced the state. In such a case, traditional international law seemed to afford individual Germans no standing to raise complaints. They seemed to be outside the realm of international law.

Laun’s own position was that Germans did have standing under international law to protest violations of human rights by the Allies. First, he argued that international law had recognized individuals as a kind of subject in the Hague Convention of 1907, which outlined the laws of war. The Hague Convention defined a military occupier’s obligations to protect individual civilians, thereby protecting the rights of individuals, not governments. For example, it set limits on requisition in order to protect individuals’ private property, it banned collective punishment to protect individuals, and civilians were not to be relocated unless it was militarily necessary. It also protected soldiers as individuals, by requiring adequate care for prisoners of war, freedom from forced labor, and their earliest possible release. Second, Laun argued that Germans were not in fact without a state after 1945: If the Allies had eliminated the state, then they must have annexed the territory, giving the population the rights of their own citizens. If the Allies were occupying the

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state, then the Hague Convention covered Allied actions. Either way, issues such as forced deportation, forced labor, and requisitioning were subject to review. And, importantly for Laun, the Hague Convention mentioned—and thereby positivized—the **conscience publique** as a source of law. ⁴⁰

One of the most important tools for enacting individuals’ status as subjects of international law was the right of individual petition. Like numerous other human rights advocates in the wake of the Second World War, Laun insisted that the right of individual petition was the only effective way to protect human rights. Yet, as Laun complained, it was already falling victim to the opposition of the great powers by 1950, when the UN’s Commission on Human Rights decided that its human rights convention would permit petitions from individuals and NGOs, but that these petitions would not entail a binding hearing before the Commission. This amounted to an empty right of individual petition, as Laun pointed out, and indeed petitions were filed away, unheard, for years. ⁴¹ The right of individual petition was also discussed, though initially rejected, during the drafting of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). After a few years, the right of petition became part of an optional protocol, so that signatory countries were not obliged to accept it. ⁴² Here again, we see that Laun’s concepts were part and parcel of current thinking in progressive international law. What was unusual, at least outside of Germany, was Laun’s expectation that Germans might use them effectively on their own behalf.

Laun’s arguments concerning the Hague Convention and occupied Germany appeared mostly in law journals. In more popular versions of his arguments, Laun summarized the issue as a matter of “human rights.” *Human Rights (Die Menschenrechte)* was the title of a 1948 public lecture for a lay audience, given on the fifteenth anniversary of Hitler’s appointment as chancellor. ⁴³ That date, together with his lecture’s content, were intended to indicate that Germans were now subject to dictatorship for a second time. Laun explained that human rights were, by their very nature, rights held by individuals against states—their own as well as foreign. ⁴⁴ As such holders of human rights, Germans could not be legitimately subjected to the “total authority” (totale Gewalt) of the Allies that the formula of unconditional surrender implied. ⁴⁵ Laun’s main examples of such total authority were the expulsions of ethnic Germans and

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⁴⁰ Ibid., 22; see also Laun, “Allgemeine Rechtsgrundsätze,” 132–133.
⁴¹ Rudolf Laun, “Die Menschenrechte der Heimatvertriebenen,” *Der Weg/El Sendero*, 4 (October 1950), 919–920. This was a Nazi-apologetic periodical published in Argentina. The convention referred to here was eventually passed by the United Nations General Assembly as two documents in 1966: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.
⁴³ Laun, *Die Menschenrechte*; see also Laun, “Die Menschenrechte der Heimatvertriebenen.”
⁴⁵ Ibid., 18.
the retention of German POWs. He argued that the Allies ought to be held to their own standard as enunciated in the United Nations Charter and the Nuremberg Charter. (The latter, in the course of asserting the illegality of certain acts by Nazi Germany, held that all states had recognized Hague rules as recently as 1939.) With such lectures and publications, Laun contributed to his German audience’s understanding of “human rights” as concerning Allied wrongs and German victimhood.

In 1949, the Allied military occupation came to an end. From then on, Laun focused his international law work on the expulsions of ethnic Germans, in the hope that one day a case could be brought before an international forum. While his work on the law of war focused on the individual gaining a voice in international law, his work on the expellees turned to the non-state group, here the nationality, as a fuller subject of international law. Laun saw no tension between individual rights and group rights: An individual’s cultural rights clearly implied group rights, as cultural rights could not be exercised in isolation. The innovative concept Laun sought to advance here — the other major concept in his postwar arguments for an “international law of human rights” — was the “right to the homeland” (Recht auf die Heimat). This concept, which overlapped with the more general concept of national self-determination, has been theorized mainly by Germans and Austrians associated with the expellee lobby. However, the concept certainly reaches beyond that context, as it addresses problems of indigenous and ethnic groups’ rights that have arisen all over the world.

Specific aspects of the Sudeten expellee case, along with Laun’s progressive international law background, helped to propel him to a radical position on limiting state sovereignty. Like other spokespeople for the expellee cause, Laun tended to lump together two categories of displaced Germans and refer to a total number of about fifteen million “expellees” (Vertriebene). While the lived experience of brutalization and trekking westward was similar among persons in this large group, they did have varying legal statuses with corresponding ramifications. At least seven million of them were from the former Prussian provinces and were properly refugees (Flüchtlinge), not expellees. German citizens living inside the boundaries of Germany, they fled to escape the advance of the Red Army. A second, legally distinct group was the three and a half million German citizens who found their region of Germany transferred to Poland by the Potsdam Agreement of August 1945.

46 Ibid., 16, 18, 20–21.
48 Ahonen, After the Expulsion, 42–44. The major text is Otto Kimminich, Das Recht auf die Heimat, 3rd, rev. and exp. ed. (Bonn, 1989).
50 Ahonen, After the Expulsion, 16.
1945. They were denied the possibility of remaining in the postwar Polish state: The Polish government expelled them. At the same time, postwar Czechoslovakia expelled its three million ethnic German citizens. Unlike the Polish case, almost all of these expellees had been Czechoslovak citizens and, if they were old enough, Habsburg citizens before that. Now they were stripped of their Czechoslovak citizenship; specifically, the Czechoslovak government upheld Nazi-era law that had made ethnic Germans there into citizens of Germany. Finally, postwar Hungary, Romania, and Yugoslavia expelled about 600,000 ethnic Germans from among their own citizens. As many as one and a half million of all these refugees and expellees died in these ordeals. By 1950, about eight million refugees and expellees lived in West Germany, four million in East Germany, and half a million in Austria.

Just as Laun and other expellee spokespeople conflated the refugees and expellees, they also conflated the basis for claims to their homelands. There was a clear legal basis (though little political chance of success) for protesting Poland’s annexation of German lands. As West Germany formally asserted until 1990, the Oder-Neisse Line between East Germany and Poland was not to be considered permanent until it was confirmed by a peace treaty between all of Germany, on the one hand, and all four of the Allies, on the other – as had been envisioned before the Cold War. Until such time, West Germany maintained, the legal borders of Germany were those of 1937 (the baseline for determining what was Germany proper, before Nazi Germany’s territorial gains). By contrast, ethnic Germans from places outside Germany’s 1937 borders had no such legal claim. The largest group in West Germany for whom this was true was the Sudeten Germans. The Sudetenland had never been German territory.


Eagle Glassheim, “The Mechanics of Ethnic Cleansing: The Expulsion of Germans from Czechoslovakia, 1945–1947,” in Ther and Siljak (eds.), Redrawing Nations, 209. It is hard to be precise about who held which citizenship in early 1945, because under Nazi occupation some were pressured to take on German citizenship, then changed back after the war. See Chad Bryant, Prague in Black. Nazi Rule and Czech Nationalism (Cambridge, 2007), 244–249.


Laun uses the figure of 2 million deaths, which West German scholarship of the 1950s generally did. More recently, Rüdiger Overmans has revised the mortality figures for civilian ethnic Germans downward to half a million. Rüdiger Overmans, Deutsche militärische Verluste im Zweiten Weltkrieg (Munich, 1999), 298–299. I am using Ahonen’s estimate: Ahonen, After The Expulsion, 21.

Ibid., 20–21.

Inside West Germany, the breakdown of refugees and expellees by place of origin was about five and half million from Poland and the Soviet Union, two million from Czechoslovakia, and half a million from southeastern Europe. Ibid., 21.
been part of any German state except for Hitler's, after the 1938 Munich Agreement. Of all the expellee spokespeople, those claiming to represent the Sudeten Germans were the most in need of legal innovations that would help them outmaneuver traditional, state-based international law. The specific legal predicament of the Sudeten German expellees led legal experts such as Laun to commit themselves to concepts and institutions that would place strong limits on state sovereignty. That, in turn, situated them on the radical edge of international law and human rights argument. They became committed to that radical approach because they had no choice: No state would espouse their complaints. Certainly the expelling states and the Allies would not revisit the issue. And while West Germany offered the majority of the expellees a home as well as extensive social legislation and political sympathy, it did not—and could not—bring a case for international deliberation.58

No international agreement expressly banned state-ordered mass deportations or expulsions at Laun's time of writing—that happened only in 1963, and then only at the European level.59 However, the expulsions of ethnic Germans obviously violated numerous basic human rights. It was a simple matter for Laun to establish that individuals had suffered loss of property, liberty, and life without due process.60 According to Laun, these violations of widely recognized basic human rights showed that a right to the homeland—in its narrowest definition, the right not to be forcibly removed from one's home region—was already practically in existence. To develop the argument for a right to the homeland further, Laun revived his old concept from progressive international law, the conscience publique. While mass expulsion was a technique that belonged to traditional international law based on state sovereignty, Laun argued, the new international law of human rights accepted the conscience publique's high valuation of nationality.61 (Laun never discussed the possibility that expulsions could be truly popular, rather than merely the act of a sovereign state, just as he had not raised the question of whether dictatorship could be popular. To do so would have threatened to dismantle the concept of the conscience publique.) Had the conscience publique not been drowned out by the hatreds of the First World War and subjected to the coercion of an international law of state sovereignty, Laun continued, it would have offered self-determination for Sudeten and other Habsburg Germans in 1919, permitting

57 That is why the expellee lobby argued for the continued validity of the Munich Agreement. So did Laun: Rudolf Laun, Das Recht auf die Heimat (Hanover, 1951), 22-23, 25.
59 The first international document to prohibit it was concluded by the Council of Europe in 1963. See Jean-Marie Henckaerts, Mass Expulsion in Modern International Law and Practice (The Hague, 1995), 9-10.
60 Laun, Die Menschenrechte, 17.
61 Laun, Das Recht auf die Heimat, 27, 29-30.
the Sudetenland and Austria to join Germany. Sudeten Germans’ rejoicing in 1938 reflected the end of their long-denied national self-determination, Laun insisted, not their admiration for the Nazis: “They would have applauded any German regime.”62 Once again, Laun placed nationality on one plane, and politics on another.

Given the ongoing coercion of sovereign states and the ineffectiveness of individual petitions that went unheard, Laun called for extending the right to self-determination to non-state groups: “We stand before the legal question: can a people, in the sense of a natural formation arising from a common descent, sedentary nature and mother tongue, appear in the international law community as an independent legal subject, one that is different in kind from states, but that nevertheless can realize its own rights?”63 He hoped the answer was yes, and cited two precedents for that. The first was Pasquale Mancini’s 1851 argument for the “principle of nationalities,” which held that nationality, not domicile, should determine the law under which a person was placed.64 The second was the Entente’s decision during the First World War, in 1917 and early 1918, to deal diplomatically with the Czechoslovak National Council as a valid treaty partner. At that time, Laun pointed out, the Habsburg Empire was still intact, and so the Czechoslovak National Council was a natural, not a political, state-like unit.65 To treat the nationality as a fuller subject of international law, Laun insisted, would radically democratize international law, which had traditionally been so undemocratic.66 It certainly would mean a profound transformation of existing international law.

Laun also called for nationalities, newly empowered with his proposed right of self-determination, to link themselves legally to specific territories, through making “homeland” (Heimat) a category in international law.67 The Universal Declaration of Human Rights did state that a person had a right to leave and return to that person’s country (Article 13), but here “country” seemed to be defined merely as any state in which a person was normally permitted to live. Laun did not seek a right to just any homeland (after all, the Sudeten Germans did have a legal home in West Germany, where they immediately gained citizenship), but rather to a nationality’s supposedly unique and irreplaceable homeland. The Universal Declaration of Human Rights said nothing about what Laun saw as the necessarily collective nature of a homeland, and it did not distinguish between a recent arrival to a given region and a person whose ancestors had lived there for generations.68 Here Laun was obviously

62 Ibid., 20.
65 Laun, “Das Recht der Völker auf die Heimat ihrer Vorfahren,” 159-163. No doubt he relished this part of his argument as a way to trap his Czech nationalist opponents in their own logic.
66 Ibid., 152-153, 165.
67 Laun, Das Recht auf die Heimat, 24.
68 Ibid., 35.
thinking of the Czechoslovak government’s policy of dispatching settlers to formerly German-speaking areas after the expulsion. Using a phrase redolent of decades of German nationalism and anti-Slav racism, he complained that the excessively individualist Article 13 could not prevent “Slavs and Mongols” from saying tomorrow that the Sudetenland was their land.\(^6\) There had to be a way, Laun insisted, to differentiate among various meanings of the word homeland and various claims of individuals and groups to it. To give priority to a group that could claim greater antiquity for its residence in a given territory, he suggested this refinement to the right to the homeland: a “right to the ancestral homeland” (*Recht auf die angestammte Heimat*).\(^7\)

Laun’s idea of international law subject status and self-determination for nationalities and his proposed right to the homeland raised the problem of how to define membership in a group. In the first years after the Second World War, Laun emphasized that nationality was a matter of the individual’s choice of affiliation, and not of descent. Like religion, he explained, one’s national affiliation was a “spiritual and moral” (*geistig-sittlich*) matter.\(^7\) To determine nationality by descent, which no one could choose, would therefore be absurd, he reasoned, and in any case, inherited traits were often indeterminate. Such arguments fit well with those of his Viennese mentor Edmund Bernatzik, as well as the Austro-Marxists.\(^7\) Yet in 1958, near the end of Laun’s scholarly life, he instead emphasized the permanence of inherited traits: “One can no more get rid of one’s descent than one can get rid of the history of one’s ancestors and one’s homeland, or of inherited, physical racial traits and inherited mental qualities of character.”\(^7\) He did concede that factors other than descent could affect one’s choice of homeland, such as if a child moved with its parents to a different country and learned a new language there. But rather than allowing such real-life ambiguity to stand, he now impatiently asserted that there were limits to it. Contrasting such contingent events with supposedly clearer racial differences, he asserted: “through sudden events and acts of will, a Catholic can become a Protestant, a capitalist can become a proletarian, and vice versa, but an Anglo-Saxon cannot become a Russian or Chinese, for example.”\(^7\)


\(^7\) Laun, “Das Recht der Völker auf die Heimat ihrer Vorfahren,” 149, 151.

\(^7\) Rudolf Laun, *Die Lehren des Westfälischen Friedens* (Hamburg, 1949), 34. In a 1919 article, he was even more relativist, mentioning that it was a “fact that people may change their nationality in the course of time.” Rudolf Laun and I. Lange, *Czecho-Slovak Claims on German Territory*, 3rd ed. (The Hague, 1919), 18.


\(^7\) Laun, “Das Recht der Völker auf die Heimat ihrer Vorfahren,” 153.

\(^7\) Ibid.
He now insisted that the legal definition of homeland had to account for these permanent traits.

In addition to calling for the development of a new international law concept of homeland, Laun also proposed to solve the problems of nationality and homeland in Europe by turning back the clock, legally speaking. He cited a precedent for such legal time travel from the Thirty Years' War. To undo the expulsions of Protestant princes, the Peace of Westphalia of 1648 had determined a baseline year of 1624: Princes expelled between that year and 1648 were to be allowed to return home. Laun likened the right to the homeland to religious freedom, and argued that the rights of the Protestant princes "correspond to the right to the homeland of the Poles, Jews, Germans, etc. expelled since 1933 or better since 1914." He proposed turning the clock back to 1914; for Laun, clearly, the First World War and its peace settlement was when everything had begun to go wrong. By declaring a particular date to be the point of departure for the proper or natural arrangement of nationalities, he was implicitly suggesting that all the intervening events, including the genocide of European Jewry, be simply forgotten. (In fact, Laun mentioned Jews only rarely in any of his work. In his post-1945 work, he mentioned them as an example of a nationality, and Zionism and the Israeli state as evidence of the strength of the right to the homeland. He thereby implied that Jews had never had a proper home in Europe. Meanwhile, he claimed the term "genocide" for the expelled Germans.)

Laun's proposal to turn back the legal clock was absurd, but it did show the coherence of his interventions over the previous decades: He had been fighting the Treaty of St. Germain all his life.

Laun and West German International Law after 1945

Laun was no outlier, politically or professionally, in the first postwar years. Yet his standing declined from about 1949 on. His arguments remained the same, but now they began to embarrass his West German colleagues. His polemics had suited the mood of the early occupation era, but as West Germans sought legitimacy for their new state in the new context of the Cold War, his bitter attacks on all four Allies ensured his obsolescence. It is also likely that by the 1950s his opposition to Nazism was no longer so important as a qualification for a public intellectual: While in the late 1940s he was able to lend some respectability and legitimacy to highly compromised colleagues who shared his concern with Germans' ethnic rights but not his liberal principles, by the late 1950s that was probably felt to be unnecessary. Two of his professional

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71 Laun, Das Recht auf die Heimat, 31. See also Laun, Die Lehren des Westfälischen Friedens, 46.
76 See, e.g., Laun, Das Recht auf die Heimat, 6.
77 Laun, "Das Recht der Völker auf die Heimat ihrer Vorfahren," 156. He used the term génocide as well as Völkermord to make that point.
78 Laun wrote many Persilscheine, the letters of reference from opponents and victims of Nazism that supported the postwar careers of colleagues who had been close to Nazism.
endeavors suggest this pattern of early postwar prestige and then rapid obsolescence: his leadership in reconvening the German Society for International Law, and his participation in the massive research project on the expellees, published as the Documentation of the Expulsion of the Germans from East-Central Europe.79

The German Society for International Law, founded in 1917 as the associational home of Germany’s progressive international lawyers, had held its last prewar meeting in 1932.80 Laun gathered about twenty old members and newcomers for a conference in 1947; in 1948 he hosted a second conference that drew over forty. A third conference in 1949 marked the Society’s official refounding, with Laun as chairman. The Society’s proceedings in the early years show that not everyone agreed with Laun’s criticisms of the Allied occupation—or, if they did agree with them, they did not wish to dwell upon them.81 Nevertheless, Laun did use the Society as a vehicle for his criticisms of the Allies. In 1947 and 1948 the Society voted unanimously in favor of eight resolutions that summarized Laun’s arguments. The first three in 1947 concerned Germany’s international law status, holding that the German state had existed continuously before, during, and after Nazism; that Germany was a subject of international law; and that the Hague principles applied to the Allied occupation. Two more resolutions focused on “human rights,” stating that “universal human rights” were part of international law and had been violated by both sides in both world wars, and that the human right of


79 In addition to his work with the DGVR, Laun also founded and directed the Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht at the University of Hamburg in 1946, and co-founded and co-edited a new journal, the Jahrbuch für internationales und ausländisches öffentliches Recht, which today appears under the title German Yearbook of International Law/Jahrbuch für internationales Recht.


81 While the Hamburg contingent (Hans-Peter Ipsen, Eberhard Menzel, and Rolf Stödtler) did hew closely to Laun’s arguments, others differed openly (such as Erich Kaufmann), and yet others simply launched into their own topics without referring to Laun (such as Gerhard Leibholz and Hermann Jahrreiss). The strongest dissents from Laun’s arguments at these meetings came from Wolfgang Abendroth (apparently the only one present who held that the German state had ceased to exist) and from Adolf Arndt, who eloquently pointed out that the German state was hardly free of deformation before 1945. See “Die zweite Hamburger Tagung der deutschen Völkerrechtler 1948,” 251–252. In fact, however, Arndt did agree with Laun’s criticisms of the Allied occupation. Dieter Gosewinkel, Adolf Arndt. Die Wiederbegründung des Rechtsstaats aus dem Geist der Sozialdemokratie (1945–1961) (Bonn, 1991), 144–147.
individual freedom included the "right to the homeland." The next two resolutions focused on the expulsions: They held that mass deportations violated international law. The final 1947 resolution concerned German prisoners of war, stating that retention of POWs beyond the cessation of hostilities violated international law. 82 In 1948 the group passed one overarching resolution: that the German people had a right to self-determination and could demand protection of their basic rights from the Allies. 83 The fact that all of these resolutions were passed unanimously indicates that Laun was hardly an outlier.

Yet the next year saw a sharp turn. The Society’s members voted in 1949 not to issue any more resolutions that took scholarly positions on controversial topics; to do so would “run the risk of lending scientific authority to opinions.” 84 In 1953 Laun stepped down as chairman and board member, and the Society’s meetings ceased to focus on German issues from that time onward. Instead, they took up topics of general concern among international lawyers everywhere, such as decolonization, economic treaties, and multiple states’ use of natural resources. Hermann Mosler, an advocate of this new approach, avoided criticizing Laun directly in an internal history of the Society, but made clear that the Society was only to be taken seriously on the international level after 1953, when it had joined the international consensus regarding which topics were important. 85 Human rights, whether Germans’ or anyone else’s, were not a major concern in the Society’s proceedings.

Laun’s last institutional engagement was to join the editorial board of a massive research project on the German refugees and expellees, the Documentation of the Expulsion of the Germans from East-Central Europe (Dokumentation der Vertreibung der Deutschen aus Ost-Mitteleuropa). 86 This project, which lasted from 1951 until the early 1960s, was sponsored by the Federal Ministry for Expellees, Refugees and War-Damaged (Bundesministerium für Vertriebene, Flüchtlinge und Kriegsbeschädigte). Laun, the sole nonhistorian on the board, was to advise regarding the usefulness of the documentation as evidence on behalf of Germans during peace negotiations with the Allies and for a planned

84 Mosler, “Die Deutsche Gesellschaft für Völkerrecht,” 3. From then on, it passed resolutions only on such unpolitical topics as increasing the prominence of international law in the curriculum. There were two exceptions: a 1970 resolution on the UN Charter’s enemy state clauses, and a 1973 resolution on the right of self-determination.
85 Ibid., 2-4.
complaint to the United Nations. Yet the unfolding political situation was such that a peace treaty or a United Nations case on behalf of the expellees was hardly feasible. Meanwhile, as the project’s team of historians waded through the massive documentary material, their own goals changed. Rather than present the expulsions as unique events, they shifted toward seeing them in the context of Nazi-era forced population movements and the longer history of German nationalism and imperialism in Eastern Europe. This had nothing in common with Laun’s analytical or political approach, and he apparently disengaged from the project. Nor did the project’s sponsors support such a broad contextualization of the expulsions, fearing that that would seem it would appear to excuse the expulsions. Several volumes were published, but the project remained unfinished. Rudolf Laun did not publish any more scholarly work after 1960.

Laun’s usage of human rights points to four elements in the history of human rights thinking in the old Federal Republic. First, his usage of human rights—on behalf of Germans as victims—was one of the earliest major usages among Germans after 1945. It extended from the Social Democrats to the far right. Second, “human rights” came to be associated with a discourse of German victimhood and, by ca. 1960, the right. Soon after Laun concluded his scholarly career, Amnesty International was founded in Britain in 1961, and the first West German local groups formed later that same year. When one of the West German founders, the journalist Carola Stern, was first approached with the idea of Amnesty, however, she noted that some of her colleagues were skeptical, believing that “Then old Nazis will just come and demand that the war criminals imprisoned in the Spandau Citadel be set free.” While Laun had sought to attach Germans as victims to the concept of “human rights,” Stern and others sought to fuse a critical approach to the Nazi past to that concept—and they thereby developed a third element. Fourth, Laun’s call for individuals to have some kind of immediate standing in international law and his defense of group rights and a “right to the homeland” did not disappear, even as the West German political context changed. Indeed, in the context of national liberation movements, decolonization, and indigenous resistance in postcolonial states, these ideas appeared on the left of the German political spectrum. In all cases, the language of human rights served the goals of both universal justice and politics. Both are irreducible—and irreducibly controversial—aspects of using the language of human rights.

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88 Personal communication with Mathias Beer, 14 February 2008, confirmed Laun’s inactive role.