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A Unified Concept of Population Transfer (Revised)

Keywords

Demography, Humanitarian Law, Self-Determination, Criminal Law, International Criminal Law

A Unified Concept of Population Transfer (Revised*)

CHRISTOPHER M. GOEBEL**

Population transfer is an issue arising often in areas of ethnic tension, from Croatia and Bosnia and Herzegovina to the Western Sahara, Tibet, Cyprus, and beyond. There are two forms of human population transfer: removals and settlements. Generally, commentators in international law have yet to discuss the two together as a single category of population transfer. In discussing the prospects for a unified concept of population transfer, this article is the first to compare and contrast international law's application to removals and settlements.

I. INTRODUCTION

International attention is focusing on uprooted people, especially where there are tensions between ethnic populations. The Red Cross has spent a significant proportion of its budget aiding what it called "displaced persons,"¹ removed *en masse* from their abodes. Ethnic cleansing, a term used by the Serbs, was a process of population transfer aimed at removing the non-Serbian population from large areas of Bosnia and Herzegovina.² The large-scale Jewish settlements into the Israeli-occupied Arab territories continue to receive publicity. Why not examine these and other mass removals and settlements of people under a single category, called population transfer?

Recent discussions at the United Nations and elsewhere, led by human rights activists, have hinted at such a unified treatment of population transfer in an effort to focus attention on "stateless people" faced

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** Associate, Curtis, Mallet-Prevost, Colt & Mosle, on leave as a Fulbright scholar in France, 1993-94. J.D., 1991, Harvard University. An early draft of this Article was presented at the Unrepresented Nations and Peoples Organization [hereinafter U.N.P.O.] Conference on the Human Rights Dimensions of Population Transfer, Tallinn, Estonia, January 11-13, 1992. The author expresses gratitude for comments on drafts by Henry Steiner and Michael van Walt van Praag. Support also came from Marc Granowitter, Christa Meindersma and the author's father, Edward W. Goebel, Jr. The foregoing do not necessarily share the views expressed herein.

1. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUMMARY RECORD OF THE 36TH MEETING (SECOND PART), at 20, U.N. Doc. E/CN.4/1992/SR.36/Add.1 (1992). These operations were in Africa, Latin America, Asia, the Middle East, and Europe, which reflects the broad scope of the problem.

2. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102D CONG., 2D SESS., THE ETHNIC CLEANSING OF BOSNIA-HERCEGOVINA 5 (Comm. Print 1992).

with either removal from an area or settlement into one.³ A conference in 1992 deliberated on situations that occurred in what conference participants called "sovereign states" (e.g. Poland, claiming to have experienced principally large-scale removals in the form of expulsions by Hitler and Stalin), as well as areas "occupied" now or at some point in the recent past (e.g. Western Sahara, the Baltics States, East Timor and Tibet, by massive settlements and removals), "nations without a state" (e.g. Kurdistan, principally by removals), the lands of "indigenous peoples" (e.g. Aborigines of Australia and Chakmas of the Chittagong Hill Tracts, by settlements and removals), the lands of "ethnic minorities" (e.g. Albanians in Kosova, principally by removals), and others.⁴ This approach toward removals would take into account situations ranging from the more traditionally recognized expulsion of a minority from a country to the forced removal of a significant number of indigenous people for a dam project. Settlements would include those occurring on a large scale both across U.N.-recognized borders and internally. In any event, population transfer, however defined, should be confused neither with refugee movements⁵ nor with normal migration on an individual basis for economic

3. Just in the last three years, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities [hereinafter U.N. Sub-Commission] has begun to adopt resolutions covering both forms of movement under the single category of population transfer. See UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT OF THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-FOURTH SESSION, 70-72, U.N. Doc. E/CN.4/Sub.2/1992/58 (1992) [hereinafter U.N. Sub-Commission Resolution 1992/28]; UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT OF THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-SECOND SESSION, U.N. Doc. E/CN.4/Sub.2/1990/59 (1990) [hereinafter U.N. Sub-Commission Resolution 1990/17]; UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT OF THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-THIRD SESSION, U.N. Doc. E/CN.4/Sub.2/1991/65 (1991) [hereinafter U.N. Sub-Commission Resolution 1991/28].

4. UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION, HUMAN RIGHTS DIMENSIONS OF POPULATION TRANSFER: CONFERENCE HELD IN TALLIN, ESTONIA, JANUARY, 1992, at 6 (David Goldberg, rapporteur, 1992) [hereinafter U.N.P.O. CONFERENCE REPORT].

5. Although when refugee movements are large, such a distinction becomes difficult. Refugees, strictly defined, move freely out of their own political motivation. Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967); RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 393 (2d ed. 1988). See also *Institute of International Law: Resolutions Adopted at its Bath Session*, art. 1, 45 AM. J. INT'L L. 15 (Supp. 1951). In contrast, settlers and removed people in the context of this Article, rather than being motivated by a personal, individual desire for political asylum, are treated as group phenomena whereby planning and implementation of the movement, as well as the ultimate motivation, belong to governments. It is often difficult to tell whether a refugee moves freely. On a practical level, then, the categories of population transfer and refugee movements may overlap. One difference is that refugee movement, strictly defined, occurs across international frontiers, whereas population transfer can also occur within states. Regarding the Kurdish people, the period before the Gulf War saw movements that were population transfer, the removal of Kurdish people caused in part by the Iraqi government's use of poison gas. See MINORITY

reasons.⁶ For years now, some in the policy-making community have mingled population transfer's two forms.⁷ Despite such discussions, commentators on international law traditionally have not followed suit.⁸ Besides a handful of scholars, including those recognized herein, few have published lately on either form of population transfer. A unique aspect of the present Article is that, while examining a broad concept of population transfer, it compares removals and settlements under applicable international law. Indeed, to some extent population transfers must be examined on a case-by-case basis. Rather than do so, however, this Article serves as an overview of issues relating to population transfer.

In the context of this Article, as a basic rule, transfers of both types are meant to have in common the element of moving a large number of people, in relative rather than absolute terms,⁹ and state involvement or significant acquiescence in the movement. The specific people involved can be categorized as removed people, settlers, and, where there are settlers, original inhabitants of the area receiving the settlers. From there, analysis becomes more difficult. Forced removals, in specific circumstances, have been adjudged crimes against humanity. Settlements as well as removals, under certain restrictions, have violated doctrines of humanitarian law. Discrepancies exist between the two types of transfer along

RIGHTS GROUP, *THE KURDS: MASSACRE BY GAS* (1989); MIDDLE EAST WATCH, *HUMAN RIGHTS IN IRAQ* (1990); Judith Miller, *Iraq Accused: A Case of Genocide*, N.Y. TIMES, Jan. 3, 1993, § 6 (Magazine), at 12, 16. By contrast, flows of Kurdish population in the post-Gulf War period, more than beforehand, involved refugees. For example, the landmark U.N. Security Council Resolution 688 addressed Kurdish refugees from Iraq. See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991).

6. Regarding migration, see generally PLENDER, *supra* note 5. See also Myron Weiner, Security, Stability and International Migration (Dec. 5-6, 1991) (unpublished manuscript presented at the Conference on the Impact of International Migration on the Security and Stability of States, Center for International Studies, Massachusetts Institute of Technology) (differentiating between normal migration, on the one hand, and population movement with substantial government involvement on the other).

7. See, e.g., Thayer Scudder & Elizabeth Colson, *From Welfare to Development: A Conceptual Framework for the Analysis of Dislocated People*, in INVOLUNTARY MIGRATION AND RESETTLEMENT 267 (Art Hansen & Anthony Oliver-Smith eds., 1982).

8. Some analyses, such as Israel Shahak, *A History of the Concept of "Transfer" in Zionism*, 18 J. PALESTINE STUD. 22 n.3 (1989) and Alfred M. De Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L. J. 207 (1975) [hereinafter De Zayas, *Law and Transfers*], treat population transfer as principally the removal of people, whereas other writings touch on settlements as a phenomenon isolated from removals. See, e.g., Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990).

9. Cf. U.N.P.O. CONFERENCE REPORT, *supra* note 4, at 7 ("Should numbers be part of the definition, or should the definition focus on the rationale and intention involved in the transfer?"). This conference report proposed a unified definition of "population transfer": "the movement of large numbers of people, either into or away from a *certain territory*, with state involvement or acquiescence of government and without the free and informed consent of the people being moved or the people into whose territory they are being moved." *Id.* (emphasis added). This definition turns on the element of consent. Also, it raises the issue of territorial definition, treated herein.

such doctrinal lines, and also as to whether the element of consent is a criterion proper to population transfer.¹⁰ The extent to which those and other differences resolve themselves, and to which the two types of transfer thus collapse into a unified and coherent category of treatment, will depend on the future development of international law towards not only the practices of population transfer but also their effects on removed people, settlers, and original inhabitants.

II. PRACTICES OF POPULATION TRANSFER

A. *Population Transfer as a Crime Against Humanity and Possible Extensions*

The mass removal of citizens across internationally recognized borders of a state is called mass deportation or expulsion. Mass deportations, such as those perpetrated by Nazi Germany, may violate the Nuremberg principles and, therefore, constitute war crimes or crimes against humanity in times of international¹¹ and, it has been argued, civil war.¹²

As a recent example, the expulsion of masses of non-Serbs from eastern Croatia across front lines, by bus and other methods, was accomplished through coercion, including threats, violence and discrimination.¹³ Similarly, in Bosnia and Herzegovina, the mass deportation of people to create ethnically pure areas was a strategy important to Serbia.¹⁴ These

10. The U.N. Sub-Commission was "[c]oncerned that the movement of people is often achieved either without free and informed consent of those people being moved or without the consent of those people into whose territory they are being moved." U.N. Sub-Commission Resolution 1990/17, *supra* note 3. See also U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble).

11. Charter of the International Military Tribunal, Aug. 8, 1945, arts. 6(b)-(c), 59 Stat. 1546, 1547, 82 U.N.T.S. 284, 288; Indictment of the International Military Tribunal, in 1 OFFICIAL DOCUMENTS OF THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 27, Count 3, §§ B, J, at 51-52, 63-65 (1947). See also Alfred-Maurice De Zayas, *Forced Resettlement*, in 8 ENCYCLOPEDIA PUB. INT'L L. 234, 235-36 (Rudolf Bernhardt ed., 1975) [hereinafter De Zayas, *Forced Resettlement*]; U.N. Sub-Commission Resolution 1991/28, *supra* note 3. Mass deportations should be distinguished from deportations on an individual basis. Ruth Lapidot, *Expulsion of Civilians from Areas under Israeli Control in 1967*, 2 EUR. J. INT'L L. 97, 102-04 (1991) (It is more inconclusive whether customary international law has prohibited the deportation of individuals, as opposed to *en masse*). U.N. General Assembly Resolution 95 (1) of December 11, 1946, gave expression to the general applicability of the Nuremberg principles. 2 LASSA OPPENHEIM, INTERNATIONAL LAW 616-19 (7th ed. 1952). *But see* JULIUS STONE, NO PEACE, NO WAR IN THE MIDDLE EAST 17 (1969).

12. De Zayas, *Law and Transfers*, *supra* note 8, at 221; UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808, at para. 47, U.N. Doc. S/25704 (1993) [hereinafter SECURITY COUNCIL 808 REPORT].

13. HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 75-81 (1992).

14. See *id.* at 71; John F. Burns, *Bosnian Strife Cuts Old Bridges of Trust*, N.Y. TIMES, May 22, 1992, at A8 (noting that although non-Serbs also carried out deportations of Serbs, the process appeared to have been more systematic in the case of Serbs deporting non-Serbs).

expulsions contributed a substantial number of the non-Serbs who exited Bosnia and Herzegovina.¹⁵ Occurring during international war, these expulsions surely could face adjudication for crimes against humanity. Had they occurred earlier, before the international community recognized the independence of Croatia and Bosnia and Herzegovina, the situations would have been deemed uniquely civil wars with the front lines inside national boundaries.¹⁶ Nevertheless, the coercive tactics of "ethnic purification"¹⁷ allegedly used by Serbian militia would not have changed with the varying classification of the war. This case weighs against drawing a strong distinction between international and civil war in determining whether population transfers are crimes against humanity.

As seen through the nature of the above examples, the treatment under international law of removals of people depends on whether the transfers occur during belligerency. Yet even in peacetime, mass expulsions across borders of citizens¹⁸ or of aliens who were in the originating territory lawfully, such as Asians from Uganda,¹⁹ are circumscribed closely by human rights law.²⁰ This is triggered by the presence of discriminatory or racist characteristics in the expulsions.²¹

Of course, not all governments undertaking removals across international borders lack concern for those being removed. The desire as a sovereign to "save" a threatened minority abroad by "inviting" it into the sovereign territory motivates some of these governments. An example is where an element of exchange is involved, like the 1922-23 swap of Greeks and Turks.²² In such cases, despite any state benevolency, jurists

15. HELSINKI WATCH, *supra* note 13, at 199 (categorizing the war as an international armed conflict involving two states, Yugoslavia and Bosnia and Herzegovina).

16. For an analysis of the conflict in former Yugoslavia as a civil war, see generally Charles Lewis Nier III, Note, *The Yugoslavia Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflict in the Modern World*, 10 DICK J. INT'L L. 303 (1992).

17. Burns, *supra* note 14.

18. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Protocol 4, art. 3, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

19. See Richard Plender, *The Ugandan Crisis and the Right of Expulsion Under International Law*, 9 INT'L COMM. JURISTS REV. 19, 27-30 (1972).

20. See PLENDER, *supra* note 5, at 474 n.174, 477; R.C. Chhangani, Notes and Comments, *Expulsion of Ugandan Asians and International Law*, 12 INDIAN J. INT'L L. 400, 402, 405-07 (1972); De Zayas, *Law and Transfers*, *supra* note 8, at 244-45.

21. According to the U.N. Sub-Commission, "the practice of population transfer [referring to both removals and settlements] is discriminatory in its application and . . . inherently leads to widespread and systematic discrimination." U.N. Sub-Commission Resolution 1991/28, *supra* note 3. See also U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble).

22. See Alfred M. De Zayas, *A Historical Survey of Twentieth Century Expulsions, in REFUGEES IN THE AGE OF TOTAL WAR* 15, 17-20 (Anna C. Bramwell ed., 1988) [hereinafter De Zayas, *Historical Survey*]. During the Nuremberg trials, it was recognized that the motive for transfer could go beyond ill-treatment of those transferred. A government official could escape liability if military necessity motivated him. De Zayas, *Forced Resettlement*, *supra*

focus on more than just the attitude of the state. The perspective of the transferees counts, too. For example, the Institut de Droit International, in its 1952 session, expressed concern for those being removed, especially as to whether their movement was voluntary.²³

The argument has been advanced that crimes against humanity apply outside of armed conflict even to the removal of people that starts and finishes within the territory of a state. The argument relies on the analogy to apartheid in South Africa.²⁴ The relocation of millions of blacks to artificially created homelands in the land-locked interior of that country, an effort by zonation programs of a development branch of the government, raised sufficient international condemnation to be considered censured under customary international law. Integral to the government's action of transferring the people were racism and discrimination. Yet, other massive removals within borders, such as occurred in Guatemala,²⁵ East Timor,²⁶ Australia,²⁷ Brazil,²⁸ Egypt, Argentina and Paraguay,²⁹ met less international disapproval. At least in the last five instances, which were relatively without belligerency in the sense of armed conflict, some deference may have been given to governments' motivations for economic development.³⁰ Still, as in South Africa, whether the

note 11, at 236.

23. 44 ANNUAIRE INSTITUT DE DROIT INTERNATIONAL 138 (1952) (Sienna Session). See also PLENDER, *supra* note 5, at 474. Writing about removals, De Zayas comments that "most transfers of population are not likely to be voluntary." Alfred M. De Zayas, *The Legality of Mass Population Transfers: The German Experience 1945-48*, 12 E. EUR. Q. 1, 6 (1978) [hereinafter De Zayas, *German Experience*].

24. De Zayas, *German Experience*, *supra* note 23, at 253; De Zayas, *Forced Resettlement*, *supra* note 11, at 236. But see Lapidoth, *supra* note 11, at 104 (Drafters of the Nuremberg Charter may have meant to cover mass deportations undertaken specifically for forced labor and extermination).

25. See WEARNE PHILLIP, THE MAYA OF GUATEMALA (Minority Rights Group Report No. 62, 1989); *Counterinsurgency and the Development Pole Strategy in Guatemala*, CULTURAL SURVIVAL Q., vol. 12, No. 3, 1988, at 11; CULTURAL SURVIVAL, THE INDIANS OF GUATEMALA: PROBLEMS AND PROSPECTS FOR SOCIAL AND ECONOMIC RECONSTRUCTION (1987); CRAIG W. NELSON, WITNESS TO GENOCIDE: THE PRESENT SITUATION OF INDIANS IN GUATEMALA (1983); SURVIVAL INTERNATIONAL, GUATEMALAN REFUGEES NOW THREATENED BY RELOCATION (1984).

26. See JULIAN BURGER, REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES 142 (1987); FINNGEIR HIORTH, TIMOR PAST AND PRESENT 61 (1985); Steven Erlanger, *East Timor, Reopened by Indonesia, Remains a Sad and Terrifying Place*, N.Y. TIMES, Oct. 21, 1990, at A18.

27. See MINORITY RIGHTS GROUP, REPORT NO. 35, ABORIGINAL AUSTRALIANS (1988) (In Queensland, mining policies, which effectively destroyed some of the economic and social basis of Aboriginal traditional lifestyle, involved large scale removals).

28. See MINORITY RIGHTS GROUP, REPORT NO. 15, WHAT FUTURE FOR THE AMERINDIANS OF SOUTH AMERICA? (1977). In Brazil, the Sobradinho Dam project resettled about 60,000 urban and rural people. MICHAEL CERNEA, INTERNAL REFUGEES AND DEVELOPMENT-CAUSED POPULATION DISPLACEMENT (Harvard Institute for International Development, Development Discussion Paper No. 345, 1990).

29. See CERNEA, *supra* note 28, at 24-25. In Egypt, dam projects have removed and resettled at least 100,000 people; in the border between Argentina and Paraguay, submersion projects have removed some 45,000. *Id.*

30. If there is sufficient public interest for the transfer and proper compensation to-

effects on those being moved rise to the level of systematic racial discrimination is a factor that should be considered in determining whether any large scale population transfer violates customary international law.³¹

At least one international body has treated removal within borders with disapproval. The invasion of Cyprus by Turkish troops in 1974 resulted in the widespread eviction and population transfer of over 170,000 Greek Cypriots from their homes in the northern part of Cyprus. In *Cyprus v. Turkey*, the European Commission on Human Rights discussed population transfer: "The Commission . . . considers that the transportation of Greek Cypriots to other places, in particular the forcible excursions *within* the territory controlled by the Turkish army, and the deportation of Greek Cypriots . . . constitute an interference with their private life."³² The Commission therefore linked a form of population transfer, the removal of people, to the right to private life. This right is related to the right to security of persons. Because the Commission saw forced transportation as an infringement of the right to private life, the case set a precedent regarding the use of force to transfer populations. The case emphasized the voluntariness of the transfer.

Most importantly, in terms of any division between transfers across borders and those only within, the language in *Cyprus v. Turkey* distinguished between those removals within the boundaries of the territory controlled by the Turkish army and those across borders. The Commission condemned both extents of transfer. This condemnation invites greater scrutiny towards removals occurring under belligerent conditions, such as military occupation, even though only within state borders.

In brief conclusion about removals, belligerency is present in situations highly condemned under international law, though the need for belligerency is reduced by the presence of systematic racial discrimination, as in Uganda or South Africa. Voluntariness is an important issue for removals. In order to invoke crimes against humanity, the blatant lack of voluntariness characterizing the victims of World War II-era transfers is

wards those being moved, these factors should play into the determination of the transfer's permissibility. Claire Palley, *Population Transfer and International Law* 3 (Jan. 3, 1992) (draft paper presented at the U.N.P.O. Conference, on file with author of this Article).

31. "A state violates international law if, as a matter of state policy, it practices, encourages or condones (a) genocide . . . (f) systematic racial discrimination, . . . or (g) a consistent pattern of gross violations of internationally recognized human rights." *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 702 (1987) [hereinafter *RESTATEMENT ON FOREIGN RELATIONS*]; *accord* *Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5). *See also* *International Convention on the Elimination of All Forms of Racial Discrimination*, Mar. 7, 1966, art. 5(d)(i), (ii), 660 U.N.T.S. 194, 220, 5 I.L.M. 352, 356 [hereinafter *Discrimination Convention*] (prohibiting racial discrimination within the borders of a state, occurring in conjunction with limitations on freedom of movement and residence); Palley, *supra* note 30, at 4. For further discussion of freedom of movement, see *infra* notes 90-91 and accompanying text.

32. *Cyprus v. Turkey*, App. Nos. 6780/74 and 6950/75, 4 Eur. H.R. Rep. 482, 519-20 (1976) (Commission report) (emphasis added).

vital. Furthermore, the issue of voluntariness has some importance regardless of state intention. As shown by *Cyprus v. Turkey*, it also has some consequence whether or not a transfer crosses international borders.

B. *Population Transfer Under Humanitarian Law*

The Baltic States, Cyprus, East Timor, the West Bank, Tibet, the Western Sahara, and Eritrea have been locations of the other form of population transfer: settlements.³³ These movements, unlike some expulsions, have never been formally adjudged crimes against humanity. Because these locales have been sites of military occupations, the settlements of the occupants' people have raised the issue of humanitarian law, a part of international law that emphasizes the protection of the individual not only during and following belligerency, but, according to some scholars, also during peacetime occupations.³⁴

Article 49 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War presents one of the clearest examples of positive international law governing population transfer:

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies. . . . Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited regardless of their motive.³⁵

Furthermore, the Geneva Convention may outlaw population transfers into occupied lands not only during hostilities, but also afterwards until a final political settlement has been reached in those lands.³⁶ Protocol I to the Geneva Convention states that the Geneva Convention applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self determination as enshrined by the Charter of the United Nations"³⁷ and contains language similar to article 49.

33. Palley, *supra* note 30, at 5. For situations not documented elsewhere in the present article, see MINORITY RIGHTS GROUP, REPORT NO. 5, ERITREA AND TIGRAY 4-14 (1983). See generally U.N.P.O. CONFERENCE REPORT, *supra* note 4, at 26-33.

34. See *infra* note 57 and accompanying text.

35. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3516, 3548, 75 U.N.T.S. 287, 318 [hereinafter Geneva Convention]. Regarding the extent to which the Geneva Convention constitutes customary international law, see SECURITY COUNCIL 808 REPORT, *supra* note 12, at para. 37 ("The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflict").

36. See Geneva Convention, *supra* note 35, at arts. 1, 2, 4, 17, 47, 6 U.S.T. at 3518, 3518, 3520, 3530, 3548, 75 U.N.T.S. at 287, 288, 290, 300, 318.

37. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 1, para. 4, 1125 U.N.T.S. 3, 7, 16 I.L.M. 1391, 1397 [hereinafter Protocol I]. Regarding the extent to which Protocol I constitutes customary international law, see Palley, *supra* note 30, at 7

These provisions dictate that, but for certain specific exceptions, settlements in an occupied territory contravene international law. While forced or forcible movement is illegal under these codes,³⁸ an important issue is that of voluntary movement. On the one hand, the voluntary nature of an act should not be interpreted to legalize what would otherwise be considered a violation of an international standard.³⁹ This is especially true if the movement involves the purposes and effects, on both those transferred and original inhabitants, that the Geneva Convention was crafted to prevent.⁴⁰ On the other hand, there are legal difficulties inherent in defining "voluntary." In this regard, it should be pointed out that most settlements, if not forced, are facilitated by government actions. One such tool is incentives, like increased industrialization in the area targeted for transfer as occurred in Soviet-occupied Estonia and Latvia.⁴¹ Even if voluntary settlement on an individual basis is permissible under article 49, the settlement programs of the 1980s and 1990s, especially the ambitious programs like those of the Indonesian⁴² and Chinese⁴³ governments, must be examined on an individual basis to determine whether

(stating that "many states have not ratified [Protocol I], and it remains doubtful to what extent the Protocol is a reflection of customary law").

38. Cf. De Zayas, *Forced Resettlement*, *supra* note 11, at 236. Regarding the other form of transfer, i.e. removals, the "clear prohibition of forced resettlement in time of war has been codified." *Id.*

39. The U.N. Sub-Commission has recognized the link between the right to security of persons and the issue of population transfer. See U.N. Sub-Commission Resolution 1990/17, *supra* note 3; U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble). In other contexts involving that right, the consent of an individual does not legitimize violations of an international norm. See Richard B. Lillich, *Civil Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 120-124 (Theodore Meron ed., 1984) (explaining the right to security of persons in connection with the right-to-life norm).

40. Roberts, *supra* note 8, at 84.

41. See Romauld J. Misiunas, *The Baltic Republics: Stagnation and Strivings for Sovereignty*, in THE NATIONALITIES FACTOR IN SOVIET POLITICS AND SOCIETY 214 (Lubomyr Hajda & Mark Bessinger eds., 1990); cf. GEOFFREY A. HOSKING, THE FIRST SOCIALIST SOCIETY: A HISTORY FROM WITHIN 399 (1st ed. 1985). See generally Alan Cowell, *Pope, in Baltics, Faces Tangle of Ethnic Issues*, N.Y. TIMES, Sept. 11, 1993, at A3.

42. See generally MARIEL OTTEN, *TRANSMIGRASI: MYTHS AND REALITIES, INDONESIAN RESETTLEMENT POLICY, 1965-1986* (1986).

43. See HUMAN RIGHTS ADVOCATES & THE INTERNATIONAL CAMPAIGN FOR TIBET, THE LONG MARCH: CHINESE SETTLERS AND CHINESE POLICIES IN EASTERN TIBET 5-9 (1991) [hereinafter EASTERN TIBET]; ASIA WATCH, MERCILESS REPRESSION: HUMAN RIGHTS ABUSES IN TIBET 15 (1990); Sechin Jagchid, *Discrimination Against Minorities in China*, in HUMAN RIGHTS CASE STUDIES 389, 401-02 (Willem A. Veenhoven ed., 1975); 134 CONG. REC. S15,500, S15,501-02 (daily ed. Oct. 11, 1988) (China trip report by Sen. Leahy); Note, *Human Rights in Tibet: An Emerging Foreign Policy Issue*, 5 HARV. HUM. RTS. J. 193 (1992) (China has been attempting since 1983 to dilute the Tibetan identity by transferring numerous Han Chinese into Tibet). While this Note adds that "[w]hether the Chinese are intentionally transferring Han into Tibet is a matter of complex debate," *Human Rights in Tibet: An Emerging Foreign Policy Issue*, *supra* at 196 n.25, see *infra* text accompanying notes 115, 117 and 121 for other important issues besides that of the intent of the transferring government.

the participants meet the criteria of "voluntary" settlers.

In the case of settlements, these difficulties about voluntariness lead to the question of whether consent should be relevant at all to a broad concept of population transfer. Yet, in the instance of removals, voluntariness is of paramount concern. The differing weight put on voluntariness will have to be reconciled for the two categories of transfers to be collapsed satisfactorily into a single category for legal treatment.

Just as national security might motivate governments to remove minorities through expulsion,⁴⁴ civilian settlements across the internationally recognized borders of a state are sometimes claimed necessary for the security of the transferring power and, therefore, essential to preserve public order and safety.⁴⁵ For example, the Indonesian government in controlling regions at the borders of lands that it dominated was said to have an explicit strategic objective that depended on settlements.⁴⁶

In the Israeli Supreme Court's most important decision on population transfer, *Beth-El*,⁴⁷ Justice Witkon sustained a prior opinion that the fact that requisitioned lands were intended for Jewish *civilian* settlements did not deprive such requisitioning of its security character.⁴⁸ In addition, although no terrorist activity actually took place, Justice Witkon refused to distinguish *Beth-El* from a case in which terrorism had occurred.⁴⁹ The position of the Israeli court reflected the above-mentioned rationale behind Indonesian settlements. Both allowed the movement of civilians to gain control of other civilians. Even if population transfer is intended for national security purposes, settlements can cause such conflicts among settlers and original inhabitants that settlements may only exacerbate security problems.⁵⁰ Such cases suggest the illegiti-

44. See De Zayas, *Forced Resettlement*, *supra* note 11, at 236.

45. Roberts, *supra* note 8, at 84.

46. Carmel Budiardjo, *The Politics of Transmigration*, *THE ECOLOGIST*, vol. 16, No. 2/3, 1986, at 111 (as related in 1985 by the Indonesian minister for population transfer).

47. H.C. 606/78, Ayub v. Minister of Defense, 33(2) PISKEI DIN 113, *translated and summarized in* 9 ISR. Y.B. HUM. RTS. 337 (1979) [hereinafter *Beth-El*].

48. *Id.* at 340.

49. *Id.* at 339. See GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 186 (1957); *cf.* H.C. 302/72, Sheikh Suleiman Abu Hilu v. Israel, 27(2) PISKEI DIN 169, *translated and summarized in* 5 ISR. Y.B. HUM. RTS. 384 (1975) (court unanimously upholding arguments that steps taken were necessary due to the terrorist activities and acts of sabotage which in fact took place in the area).

50. See generally Marcus Colchester, *The Social Dimensions of Government Sponsored Migration and Involuntary Resettlement: Policies and Practice* (Jan. 1986) (unpublished manuscript prepared for the Independent Commission on International Humanitarian Issues in Geneva, available through author of this Article). In the context of the occupied Arab territories, Roberts, Falk, and Weston lend support for two points: first, settlements are almost never necessary for genuine military or security purposes and do not, in fact, serve any such purposes; second, even if justified for military needs, transfers still violate rules of international law. See Roberts, *supra* note 8, at 84; Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 *HARV. INT'L. L. J.* 129, 147-48 (1991); *cf.* U.N.

macy of the national security rationale.

The issue of control over civilians exercised through population transfer causes some concern from the viewpoint of original inhabitants. True, voluntariness or consent, from the perspective of settlers, is a confusing, inconclusive subject. However, regarding original inhabitants, the subject gains significance, as will be explained below.⁵¹

National security arguments, such as the above, may lead to attempts to suspend respect for human rights. The International Covenant on Civil and Political Rights,⁵² article 4(1), permits states in urgent circumstances to suspend or breach the right to security of the person, a right which population transfer may affect. Such derogation, however, has little relevance, if any, where a government undertakes settlements in order to change the demographic structure or the political, cultural, religious, or other characteristics of the original inhabitants in the receiving area.⁵³ The permanent nature of such changes means that the population transfer should never be justified on the temporary grounds necessary for derogation.

This is especially true where transfer occurs during prolonged military occupations. Prolonged military occupations have received some attention as a distinct category, having the characteristic of "belligerency ending."⁵⁴ The main conventions relating to military occupations, including the Geneva Convention and the 1907 Hague Regulations,⁵⁵ provide no meaningful variation in their rules because of the length of an occupation.⁵⁶ Indeed, in addition to covering belligerent occupations, these conventions may also address occupations in which the belligerency has subsided.⁵⁷ The rights of the occupant during peacetime diminish markedly

Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble).

51. See *infra* text accompanying notes 109-116.

52. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter Political Covenant].

53. The U.N. Sub-Commission was "[d]isturbed by reports concerning the implantation of settlers and settlements in certain countries, including particular occupied territories, with the aim to changing the demographic structure and the political, cultural, religious, and other characteristics of the countries concerned." U.N. Sub-Commission Resolution 1990/17, *supra* note 3. See also U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble). Derogation, generally, is "extremely troublesome from the human rights viewpoint." Lillich, *supra* note 39, at 120.

54. See Roberts, *supra* note 8, at 51-53; cf. Falk & Weston, *supra* note 50, at 142.

55. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 3, 36 Stat. 2277, 2290, 205 CONSOL. T.S. 277, 295-97 [hereinafter Hague Regulations].

56. The exception is the "one year after" provision of the Geneva Convention. Geneva Convention, *supra* note 35, at art. 6, para. 3, 6 U.S.T. at 3522, 75 U.N.T.S. at 292. However, this provision is of little importance. See Roberts, *supra* note 8, at 55-56; COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949 22 (Jean S. Pictet ed., 1958); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 57, 59 (1982).

57. See Roberts, *supra* note 8, at 52; Adam Roberts, *What is Military Occupation?*, 1984 BRIT. Y.B. INT'L L. 249, 253. But see THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 43 (1987) ("[T]here are, in fact, so many situa-

relative to its rights during belligerency.⁵⁸ Where population transfer extends from belligerent to prolonged occupation and then into peacetime, the occupant may assert progressively fewer rights. This, again, brings into doubt the temporariness justification for population transfer mentioned above.

Yet Justice Landau, concurring in *Beth-El*, supported the Israeli settlements against this obvious doubt by saying that the hope that a political solution someday will be reached justifies population transfer.⁵⁹ Regarding any particular occupation, Israeli or otherwise, even if one is satisfied that the Hague Regulations, and not the Geneva Convention, are in effect,⁶⁰ article 43 of the Hague Regulations limits the freedom of the occupant to undertake population transfer. This is especially true in extended or peacetime occupation.⁶¹ Although many of the above-cited sources concern the occupied Arab territories, it bears mentioning that the Chinese and Indonesian governments see Tibet and East Timor, respectively, as important military zones.⁶² Even if these are legitimate governmental interests related to national security during peacetime, the governments do not automatically gain free discretion to undertake population transfer into those areas.

If conventional law, including the relatively lenient Hague Regulations, applies to a given case of population transfer, governmental discretion to undertake transfer must include reference to the humanitarian concerns of all individuals affected by the population transfer.⁶³ The needs of both settlers and original inhabitants become particularly relevant as an occupation moves through its stages, from belligerent to prolonged and into peacetime.

If prolonged and peacetime, in addition to belligerent, occupations

tions in which the applicability of the Geneva Conventions . . . has been denied that the common practice has been rejection of the law, rather than its formal recognition and implementation").

58. C. Llewellyn Jones, *Military Occupation of Alien Territory in Time of Peace*, 9 GROTIUS SOC'Y TRANSACTIONS 149, 159-60 (1923). See also Roberts, *supra* note 57, at 273-79. Where military necessity exists, an occupying government has "considerable discretion." Falk & Weston, *supra* note 50, at 138. However, military necessity generally ends when belligerency stops.

59. *Beth-El*, *supra* note 47, at 392.

60. See Yoram Dinstein, *The Judgment in the Matter of Pitchat Rafiah*, 3 TEL AVIV UNIV. L. REV. 934 (Hebrew, 1973).

61. See Falk & Weston, *supra* note 50, at 142 (A duty is imposed upon the occupant vis-a-vis the original inhabitants); cf. H.C. 337/71, Christian Society for the Holy Places v. Minister of Defense, 26(1) PISKEI DIN 574, translated and summarized in 2 ISR. Y. B. HUM. RTS. 354, 355 (1972).

62. Regarding East Timor, see BURGER, *supra* note 26, at 142-43; Budiardjo, *supra* note 46, at 111. See generally FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 378-83 (1990). Concerning Tibet, see EASTERN TIBET, *supra* note 43, at 2-4; *What McMahon Wrought*, THE ECONOMIST, May 23, 1987, at 59.

63. Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 111-12 (1978); Falk & Weston, *supra* note 50, at 142.

are reasons for continuing prohibition of settlements, that signifies that the positive law prohibiting settlements is moving away from any necessity for belligerency. This may be compared to cases of removals. As mentioned above, a presence of racism or discrimination pushes the prohibition of removals away from a dependence on belligerency.

C. *Population Transfer Under Principles Regarding Colonialism*

The practice of population transfer is also part and parcel of colonialism. One case of population transfer into territory that was "colonized," according to the formal U.N. regime, occurred in the Western Sahara.⁶⁴ The Moroccan takeover of this area was marked by the settlement of over 200,000 Moroccans into it, as well as the removal by "brutal tactics" of some groups of original inhabitants of the area.⁶⁵ The Western Sahara situation went before the International Court of Justice.⁶⁶ The connection between population transfer and colonialism was patently clear. Condemnations of colonialism came from the ICJ⁶⁷ and, subsequently, the U.N. General Assembly⁶⁸ and noted experts.⁶⁹ In situations of traditional colonialism earlier than the Western Sahara, a nexus had been established between the use of force and its impact on a people's identity.⁷⁰

64. See generally VIRGINIA THOMPSON & RICHARD ADLOFF, *THE WESTERN SAHARANS: BACKGROUND TO CONFLICT* (1980); DAVID LYNN PRICE, *THE WESTERN SAHARA* (The Washington Papers, vol. 7, No. 63, 1979).

65. CLAUDE BONTEMS, *LA GUERRE DU SAHARA OCCIDENTAL* [THE WAR OF THE WESTERN SAHARA] 72 (1984). See also JOHN DAMIS, *CONFLICT IN NORTHWEST AFRICA: THE WESTERN SAHARA DISPUTE* 61-69 (1983). Although the brutality of Moroccan forces is well known and documented, it should be noted that not all of the population movement was forced by the Moroccans. Some of it was encouraged by the Polisario Front, a pro-independence movement, in face of the invasion. *Id.* at 72.

66. *Western Sahara*, 1975 I.C.J. 12 (Oct. 16). See THOMPSON & ADLOFF, *supra* note 64, at 167.

67. The ICJ declined to declare the Western Sahara "terra nullius" but also failed to declare the territory Moroccan or Mauritanian. *Western Sahara*, 1975 I.C.J. at para. 162. While the Western Sahara case does not discuss population transfer directly, the opinion is important nonetheless for the connection it makes between self-determination and colonialism. *Id.*; Myron H. Nordquist & Nells P. Nordquist, *Self-Determination: The Cases of Fiji, New Caledonia, and the Western Sahara*, in 82 *PROC. AM. SOC'Y INT'L L.* 429, 439-42 (Michael P. Malloy ed., 1988). From this connection it is arguable that population transfer affects the right to self-determination. See Nordquist & Nordquist, *supra* at 443 (discussing this possible effect). *But see* DAMIS, *supra* note 65, at 60 (positing that the ICJ's decision was essentially political).

68. See DAMIS, *supra* note 65, at 94.

69. See, e.g., UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, *THE RIGHT TO SELF-DETERMINATION; IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS*, para. 69 U.N. Doc. E/CN.4/Sub.2/405/Rev. 1, (1980) [hereinafter *SELF-DETERMINATION*].

70. The U.N. General Assembly, in the context of colonialism, noted that "the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principles of non-intervention." G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter *Declaration on Friendly Rela-*

The Western Sahara and its aftermath furthered this link.

D. *Some Limits on the Prohibition of Population Transfer Practices*

The Western Sahara may be contrasted with situations of indigenous groups, such as the Chakmas of the Chittagong Hill Tracts or the people of various sparsely inhabited Amazonian provinces of Bolivia, Peru, Ecuador, Colombia, Venezuela, and Brazil. These also faced what most considered to be settlements by ethnically distinct, dominating groups encouraged or even forced by U.N.-recognized governments.⁷¹ The above-mentioned nexus between force and its effect on a people's identity may have existed even in these instances of transfer.⁷² In contrast to the Western Sahara and other examples of traditional colonialism, however, these settlements occurred within the governments' U.N.-recognized borders. At issue, then, was the possible constraint of article 2(7) of the U.N. Charter, which states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State."⁷³ As with removals solely within domestic frontiers,⁷⁴ in the case of settlements the concurrent presence of systematic discrimination, genocide,⁷⁵ or gross and persistent violations of human rights⁷⁶ countenances article 2(7). So does the moral pressure of publicists like Theodoropoulos who recognize colonialism outside the traditional U.N. definition. Theodoropoulos asserts that South Africa was the chief paradigm of "settler colonialism."⁷⁷

tions]. The prohibition on the use of force is also now a rule of customary international law. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 1, 14, 98-101 (June 27).

71. See Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 668 n.71 (1988) (Approximately 300,000 Bengalis were settled in the Chittagong Hill Tracts from 1978 to 1988); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, DISCRIMINATION AGAINST INDIGENOUS PEOPLES; WRITTEN STATEMENT SUBMITTED BY THE NORDIC SAAMI COUNCIL, INUIT CIRCUMPOLAR COUNCIL, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS AND ANTI-SLAVERY INTERNATIONAL, NON-GOVERNMENTAL ORGANIZATIONS IN CONSULTATIVE STATUS, U.N. Doc. E/CN.4/Sub.2/1991/NGO/3 (1991); Colchester, *supra* note 50, at 12 (regarding the other regions, besides the Chittagong Hill Tracts, that the text accompanying the present note mentions).

72. See Hannum, *supra* note 71, at 668; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble).

73. U.N. CHARTER art. 2, para. 7. The U.N. Sub-Commission has not limited its concern to settlements occurring across international frontiers. See U.N. Sub-Commission Resolution 1990/17, *supra* note 3; U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble).

74. See, e.g., *supra* text accompanying note 24 (example of South Africa).

75. See discussion *infra* part III.B.2.

76. See RESTATEMENT ON FOREIGN RELATIONS, *supra* note 31, § 702.

77. CHRISTOS THEODOROPOULOS, COLONIALISM AND GENERAL INTERNATIONAL LAW: THE CONTEMPORARY THEORY OF NATIONAL SOVEREIGNTY AND SELF-DETERMINATION 51-52 (1988). Theodoropoulos writes of "settler colonialism," calling it "colonialism" where restrictions are "imposed on a colonial people by a colonial power existing geographically not apart from its colony but instead within the colonial territory." *Id.* Cf. ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 182 (1986) (Whether a state enjoys exclusive

The South African government undertook removals, through zonation, to clear the way to accomplish the other form of population transfer, settlements.⁷⁸ Both types of transfer started as well as finished within the boundaries of that state.

However, for settlements as well as removals occurring within such territorial limits, prohibition would be more meaningful if it came from positive law in a rule explicitly about population transfers. Then, such a ban would be less sensitive to issues defining territory. The following analysis, though limited in scope, concludes that prohibitions on removals within international frontiers are closer to benefitting from positive law such as the Geneva Convention, and from doctrines such as those on crimes against humanity, than are prohibitions on similarly located settlements.

The most significant positive law directly prohibiting settlements comes from the Geneva Convention. Therein, the condition of a given territory is crucial. Whether an occupation is belligerent or peaceful, the Geneva Convention requires that the territory be under some form of occupation.⁷⁹ It is true that Protocol I, also addressing transfers, generally applies beyond cases of military occupation,⁸⁰ but the language in Protocol I prohibiting transfers still refers strictly to transfers into or out of areas under occupation. These two instruments also refer to removals that, therefore, are somewhat constrained by the need for occupation.⁸¹ Yet, removals, unlike settlements, have become the subject of crimes against humanity. Related commentary shows that, in general, prohibitions on removals may be less constrained by the very idea of territorial definition. For example, there is the view espoused by some scholars, such as Palley, that it was just as "unlawful" for the Allies and other countries after World War II to deport Germans *en masse* as it was for Germany to transfer populations during that war.⁸² One example is the deportation of Germans from Sudetenland. The governments that transferred the Germans did not technically "occupy" this area. Furthermore, there is the

power over a territory, such as through annexation thereof, is no longer a precise criterion for determining what constitutes a colonial territory). Admittedly, international bodies today do not emphasize decolonization. For example, the U.N. did not oppose apartheid in South Africa under the pretext of decolonization. Therefore, any law that develops on settlements within domestic frontiers will likely develop apart from doctrines on traditional colonialism.

78. Colchester, *supra* note 50, at 20.

79. Massive and permanent settlements across borders of states, excluding mass repatriation of refugees, are policies implemented uniquely into areas experiencing prolonged occupations. Settlements, as defined in this Article, almost never occur anymore from one sovereign state to another. See John Hucker, *Migration and Resettlement Under International Law*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 338-39 (Ronald St. John Macdonald et al. eds., 1978). In this respect, settlements differ from removals.

80. See *supra* text accompanying note 37.

81. See Lapidoth, *supra* note 11, at 98-99.

82. Palley, *supra* note 30, at 17. See generally De Zayas, *Historical Survey*, *supra* note 22.

argument, buttressed by analogy to events occurring in former Yugoslavia, that crimes against humanity also apply to removals that, while occurring during civil war, take place in unoccupied land.⁸³

More authoritative in dealing with the last-mentioned removals than the opinion of scholars is Protocol II to the Geneva Convention, which applies to armed conflicts without an international character.⁸⁴ Protocol II restricts population transfer, through article 17, in the form of removals but does not refer to settlements.⁸⁵ This exclusive reference to removals further supports the above comparison. International deliberations reinforce this comparison. *Cyprus v. Turkey* condemned removals that, while occurring in an area technically under occupation, started and ended there.⁸⁶ By contrast, settlements starting and ending within a territory under occupation have not fallen subject to comparable concerted deliberations. Thus, there may be some imbalance in existing international legal treatment of the two types of transfers when they occur within international frontiers. However, future developments in international law towards dealing with the effects of population transfer may overcome any such imbalance.

III. EFFECTS OF POPULATION TRANSFER

An adequate recognition of the effects of population transfer, along with an accounting of the actual movement of people, is important, even though these effects may be less detectable than the movement itself.⁸⁷ If the effects of any population transfer escalate to the level of gross and consistent violations of international human rights, that may give rise to a violation of customary international law, although the law violated may not necessarily refer directly to population transfer.

83. De Zayas, *Law and Transfers*, *supra* note 8, at 221. See also *supra* notes 13-17 and accompanying text.

84. Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II]. Protocol II supplements the Geneva Convention, article 3, which applies "in the case of armed conflict not of an international character," by extending article 3 to certain conflicts where signatories are capable of carrying out "sustained and concerted military operations." *Id.* at art. 1. Regarding the extent to which Protocol II constitutes customary international law, see Palley, *supra* note 30, at 7 (stating that "many states have not ratified [Protocol II] and Protocol II is not yet customary law").

85. "The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand." Protocol II, *supra* note 84, at art. 17.

86. See *supra* note 32 and accompanying text.

87. The notion that "[p]eople and socio-cultural systems respond to forced relocation in predictable ways," Scudder & Colson, *supra* note 7, at 267, suggests some hope for the establishment of international norms recognizing any costly and disruptive results from population transfer.

A. *Effects on Those Being Moved: Freedom of Movement and Other Rights*

The most significant limitations on a state's right to control the movement of people are based not on principles of economic interdependence but rather on rules designed to protect human rights.⁸⁸ The Universal Declaration of Human Rights,⁸⁹ article 13, provides that

- (1) Everyone has the right to freedom of movement and residence within the borders of each State.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.

The right to freedom of movement, an essential part of the right to personal liberty,⁹⁰ is most likely part of customary international law.⁹¹ An example of that status is the inclusion of freedom of movement in the Discrimination Convention.⁹² Yet, despite any special status for freedom of movement, international law has yet to prescribe a satisfactory framework for the movement involved in population transfer.

Just as the issue of the voluntary nature of movement is more complicated in cases of settlements than removals, so also is the matter of freedom of movement. The Universal Declaration, article 13, refers to movement both within and across a state's internationally recognized borders.⁹³ Settlers moving across borders unquestionably have the right to leave their country. This raises a threshold question: are settlers *freely* leaving their country? A government may participate in population transfer to various degrees. It may sponsor settlers, for example financially, or

88. PLENDER, *supra* note 5, at 62.

89. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

90. Lillich, *supra* note 39, at 189. Cf. U.N. Sub-Commission Resolution 1990/17, *supra* note 3; U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble) (all documents referring, in conjunction with population transfer, to freedom of movement and security of persons).

91. UNITED NATIONS, SECRETARIAT, EUROPEAN WORKSHOP ON THE UNIVERSAL DECLARATION; PAST, PRESENT AND FUTURE, U.N. Doc. HR/PUB/89/1, at 101 (1989); Daniel Turack, *A Brief Review of the Provisions in Recent Agreements Concerning Freedom of Movement Issues in the Modern World*, 11 CASE W. RES. J. INT'L L. 95, 95-96 (1979). Cf. Lillich, *supra* note 39, at 151 (Rights to transnational movement "seem well-established in conventional and perhaps even customary international human rights law"). But see *id.* for the position that the right to internal movement, distinct from movement across internationally-recognized borders, is not part of customary international law. Lillich's reasoning, however, is based on the weak evidence that internal exile, such as that practiced by the former Soviet Union, was not universally condemned.

92. See Turack, *supra* note 91, at 96.

93. The latter movement refers to the right to leave and to return to a country. The Universal Declaration grants both citizens and aliens the right to leave any country but limits the right to return to citizens of that country. See Universal Declaration, *supra* note 89, at art. 13(2). Article 12(1) and article 12(2) of the Political Covenant also allow both citizens and aliens the right to leave any country but subject this right to article 12(3) thereof. See Political Covenant, *supra* note 52, at art. 12; see also *infra* note 98 and accompanying text.

encourage their movement, possibly without any monetary support. In either case, the degree to which settlers are informed about all aspects of their transfer, including their destination, affects whether they are consenting to their transfer in an informed manner. If uninformed, they are not voluntarily, or freely, leaving the country.⁹⁴ The Discrimination Convention prohibits the use of racially discriminatory measures restricting an individual's right to leave or return to his or her country. After a population transfer has taken place, settlers who move across borders have the right to return to their home land should they so choose.⁹⁵

Population transfer within a state's recognized borders can violate the right to free internal movement. Under the Universal Declaration, the right to free internal movement is linked inextricably to the right to choose one's residence.⁹⁶ Depending on the specifics involved, a government may violate both rights by removing people from their residences due to, or as part of, transfer across as well as within a country's borders.⁹⁷

Although containing language similar to that of the Universal Declaration, the Political Covenant is qualified by article 12(3), which permits restrictions on the right to internal movement if such restrictions "are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others. . . ." Article 12(3) may come into play where governments undertaking economic development cause massive forced removals.⁹⁸ Limits on

94. That poses further problems for the transferring government as well as settlers when the latter, facing rough conditions, choose to return to the country of origin. A government might not have an adequate infrastructure to aid them as equally in their return as in their original movement. For example, settlers from the central islands of Indonesia reportedly were not adequately informed of conditions in the outer, Indonesian-dominated islands. See generally Ria Gondowarsito, *Transmigrasi Bedol Desa: Inter-Island Village Resettlement from Wonogiri to Bengkulu*, 26 BULL. INDONESIA ECON. STUD. 48 (1990); WORLD BANK REP. NO. 5597-IND, reprinted in INDONESIA REP. — HUM. RTS. SUPP. NO. 10 (1985).

95. If the motivation of the sponsoring or encouraging government is to create permanent change in an occupied area, this casts doubt on the existence of a meaningful right to return. See, e.g., Camille Mansour, *L'Émigration des Juifs Soviétiques et le Processus de Paix Israélo-Palestinien [The Immigration of Soviet Jews and the Israeli-Palestinian Peace Process]*, LA POLITIQUE ÉTRANGÈRE, Summer 1990, at 327, 329 (discussing the effects of administrative barriers).

96. The same article 13 of the Universal Declaration mentions both rights. Universal Declaration, *supra* note 89, at art. 13.

97. Given the absolute character of the right to free movement, people should enjoy that same right whether or not they are classified as citizens of the state whose government is undertaking population transfer. A possible objection is that the Discrimination Convention fails to prohibit general discrimination against aliens by states based on nationality, citizenship, and exclusions as between citizens and noncitizens. See Discrimination Convention, *supra* note 31, at arts. 1-3.

98. Cf. De Zayas, *Forced Resettlement*, *supra* note 11, at 236. Without mentioning whether states may properly derogate from the relevant provision of the Political Covenant, De Zayas writes that forced resettlement is "incompatible" with the freedom of movement provisions in both the Universal Declaration and the Political Covenant. *Id.*

governmental abuse include article 12(3) provisions that restrictions on freedom of movement be "necessary" and "consistent with other rights recognized in the present Covenant." Regarding removals within international borders, then, one can make a distinction between transfers such as those in Egypt, Paraguay, and Argentina, which may have had some development rationale, and transfers such as those in East Timor and Guatemala, which seem to have featured relatively less.

Other removals within international frontiers are unquestionably void of a legitimate economic foundation. For instance, population transfer also can occur during international and civil wars in which masses of dislocated people suffer due to armed conflict. At the time of writing, in Bosnia and Herzegovina, arrangements involving Serbs and Croats were reported that were to carve Bosnia and Herzegovina into "communal protectorates."⁹⁹ The comparison to zonation in South Africa¹⁰⁰ was vivid. These arrangements threatened thousands of Bosnian Muslims, whose coalition had tried to preserve a multi-religious community, with removal *within*, as well as across, the Bosnian borders.¹⁰¹ The extent to which those who caused population transfers within those frontiers violated international law depended in part on a balancing of the right to internal free movement, backed by Protocol II prohibiting dislocation related to conflict,¹⁰² with the Political Covenant's derogations and restrictions on the right to free movement.

Where the occurrence of settlements results in the practice of removals, conflicts may arise between different aspects of the right to freedom of movement. Although part of customary international law, the rights to leave and to return to a country are "difficult if not impossible to implement."¹⁰³ For example, in the present context, these rights might conflict with the right to internal movement. Unless consistent with the Political Covenant, article 12(3), settlers entering foreign lands cannot force original inhabitants to be removed against their will; as a logical extension, settlers cannot force original inhabitants into exile.¹⁰⁴ Should original inhabitants go into exile, they must enjoy the right to return. Furthermore, original inhabitants have both the right to choose their residence and the right to security of persons.¹⁰⁵

99. *Lean on Croatia, Too*, INT'L HERALD TRIB., May 14, 1992, at 8.

100. See *supra* text accompanying notes 24, 77 & 78.

101. See HELSINKI WATCH, *supra* note 13, at 13; Burns, *supra* note 14. For treatment of removals occurring in Bosnia and Herzegovina and resulting in the movement of people across international frontiers, see *supra* text accompanying notes 11-17.

102. See *supra* notes 84-85 and accompanying text.

103. Lillich, *supra* note 39, at 151.

104. The Universal Declaration, article 9, states that "[n]o one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration, *supra* note 89, at art. 9.

105. The right to security of persons is given more concrete meaning by the guarantees against arbitrary arrest and detention and against interference with one's privacy, family, home, or correspondence spelled out in the Universal Declaration, articles 9 and 12, respectively. See Universal Declaration, *supra* note 89, at arts. 9, 12.

The problem that settlements across international borders may pose with the right to free internal movement takes on an added complication in cases of prolonged military occupation. Humanitarian law might conflict with human rights law. The Universal Declaration guarantees original inhabitants the right to freedom of movement and residence within the borders of each state, but article 78, paragraph 1 of the Geneva Convention provides that "[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or internment."¹⁰⁶ A case-by-case analysis of population transfer during prolonged occupation, where an occupant transfers its own people into the occupied territory and these people in turn obstruct the movement of original inhabitants, may turn on an assessment of "imperative reasons of security" upon which the occupant relies.

Where such arguments fail, there is a clear connection between settlements and the violation of human rights, stemming from the right to free internal movement. Nevertheless, the violation does not occur to settlers' rights, but rather to the rights of original inhabitants. The infringement is a by-product, though an important one, of population transfer; whereas in cases of isolated, massive removals any infringement on human rights may be more part and parcel of the actual population transfer because those whose rights are violated more likely are the actual transferees. At least where gross and persistent, violations of this type support the permeability of internationally recognized frontiers for U.N. or other attention.

This last comparison supports the above-mentioned conclusion that, as a general rule, removals, more easily than settlements, may overcome any limitations of territorial definition.¹⁰⁷ Further developments in human rights are important if a unified concept of population transfer, encompassing both types of movement, is to develop in such a direction that moves further away from the requirement of belligerency that originated from crimes against humanity and humanitarian law.

B. *Effects on Original Inhabitants*

1. Effects of Population Transfer on Self-Determination

The voluntariness, or consent, of original inhabitants facing population transfer is important to more than just their freedom of movement. For example, where a government in undertaking population transfer through settlements is motivated by a desire to have control over original inhabitants of settled areas, the perspective of these last people becomes relevant in another respect: did the original inhabitants agree to receive settlers?

106. Geneva Convention, *supra* note 35, at art. 78, para. 1.

107. See *supra* text accompanying notes 79-86.

Consider original inhabitants to whom self-determination applies¹⁰⁸ and who also face population transfer. One historical example occurred after World War II. The original inhabitants of Germany received Germans removed from Poland and Czechoslovakia by these countries' governments. De Zayas is of the opinion that these population transfers violated international law because the legitimate sovereign, the receiving state of Germany, had not *consented* to receive them.¹⁰⁹

By virtue of self-determination's applicability, the original inhabitants on the receiving end of such removals must have unique identifiable characteristics, including race or ethnicity, language, religion, culture, tradition and history, that set them apart from their neighbors. However, original inhabitants may not enjoy Germany's status as a well-established sovereign. Instead, the unit of self-determination of original inhabitants may be as an ethnic minority, indigenous people, nation without a state, or people in a territory under occupation. In any such event, it is more likely that population transfer will endanger the above special characteristics than in the instance of a sovereign state.¹¹⁰

Any group to which self-determination applies should have the opportunity to "freely determine their political status and freely pursue their economic, social and cultural development. . . ."¹¹¹ When their land

108. The right, or even the principle, of self-determination in contemporary international law is still to a large extent unclear in its precise scope and content. *See generally* Daniel Thurer, *Self-determination*, in 8 ENCYCLOPEDIA PUB. INT'L L. 470 (Rudolf Bernhardt ed., 1975); SELF-DETERMINATION, *supra* note 69, at para. 7 (Self-determination pertains "to all peoples and nations, and [is] . . . a prerequisite of the enjoyment of all the rights and freedoms of the individual"); HURST HANNUM, AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 41 (1990) (Most countries either have not specifically addressed the right to self-determination or have done so in such general terms that nothing is added to an understanding of its content). The author of this Article does not intend to express an opinion on such scope and content but, rather, for purpose of discussion only, assumes that self-determination applies to original inhabitants in question.

109. De Zayas, *Historical Survey*, *supra* note 22, at 18.

110. *See* U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 70-71 (preamble); Colchester, *supra* note 50, at 4. Third World countries often "view themselves as unrepresented and disfavored in the development of international law," Mose L. Floyd, *Iraq's Invasion of Kuwait Sparks Migration into Jordan: A Third World Nation Copes With the Administrative Nightmare of a Refugee Population*, 5 GEO. IMMIG. L.J. 57, 65 (1991), and thus without as much protection from international law. Minorities, indigenous, and other "stateless" groups have greater reason to view themselves as unrepresented, disfavored, and unprotected. *Cf.* P.J.I.M. de Waart, *Statehood and International Protection of Peoples in Armed Conflicts in the "Brave New World": Palestine as a U.N. Source of Concern*, 5 LEIDEN J. INT'L L. 3, 24 (1992) (expressing concern over the U.N. protecting the right to self-determination of a stateless group against a state's discrimination based on race, creed, or color).

111. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 13, at preamble, para. 2, U.N. Doc. A/4684 (1960). *See also* Declaration on Friendly Relations, *supra* note 70, at 121. The International Covenant of Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, 52, U.N. Doc. A/6316 (1967) [hereinafter Economic Covenant], imposes the obligation on states to "promote the realization of the right of self-determination" and to "respect that right." *Id.* at art. 1. Relevant to self-determination is

is subject to an occupying or otherwise alien power's population transfer, original inhabitants may be stripped of the opportunity to determine their status and to pursue their development and, thus, denied in overt ways their access to self-determination. In the case of settlements, the denial might occur when administrators and settlers of an occupying or dominating power flood into the land of a distinct people, i.e. of original inhabitants, and appropriate for themselves superior positions in different aspects of society.¹¹²

The problem becomes more acute and troublesome if alien superiority results in subjugation, domination and exploitation of the original inhabitants, effects which have been denounced as contrary to the U.N. Charter and as constituting denials of fundamental human rights.¹¹³ In his writings about the other form of transfer, removals, at the level of sovereign or occupied states, De Zayas recognizes the economic risks of exploitation. He believes that in addition to being willing to receive masses of expelled people, a state must also have the economic capacity to do so.¹¹⁴ "In addition, the social and cultural adequacy of the receiving state ought to be considered,"¹¹⁵ he adds, thereby referring to political domination and social subjugation. But slower to be recognized is that these same effects may play out in cases of settlements as well as removals. For example, if the sheer scale of a population transfer causes original inhabitants to become a minority in their own homeland, that dampens the possibility that they will ever realize self-determination.¹¹⁶ This may

whether people are distinct and have a capacity for self-management and ". . . a common desire to establish an entity capable of functioning to ensure a common future." SELF-DETERMINATION, *supra* note 69, at para. 56. For other elements of self-determination, see generally HANNUM, *supra* note 108, at 27-49.

112. That reasoning applies in cases of military occupation. See Asbjorn Eide, *Human Rights in a Pluralistic World*, in THE UNIVERSAL DECLARATION IN SPACE AND TIME 23, 42 (U.N. Educational, Scientific and Cultural Organization ed., 1990) (Those under military occupation are entitled to express self-determination). However, such a denial is also possible in cases of outside domination that do not involve military occupation. Such cases might jeopardize a people's right to "enjoy and utilize fully and freely their natural wealth and resources," provided for in the Economic Covenant, *supra* note 111, at arts. 1, 25. The Economic Covenant also states, in the same article referring to self-determination, that "[i]n no case may a people be deprived of its own means of subsistence." *Id.* at art. 1. Furthermore, a transferring government might violate original inhabitants' right to an adequate standard of living, provided in the Economic Covenant, article 11, by restricting their freedom of movement. See U.N. Sub-Commission Resolution 1990/17, *supra* note 3; U.N. Sub-Commission Resolution 1991/28, *supra* note 3; U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble) (mentioning all above rights in conjunction with population transfer).

113. Declaration on Friendly Relations, *supra* note 70.

114. De Zayas, *Historical Survey*, *supra* note 22, at 3. He adds: "The arrival of millions of expellees in a country already incapable to feed itself necessarily leads to chaos, both for the native population of the receiving state and for the arriving expellees." *Id.* (emphasis added).

115. *Id.* Cf. VERNON VAN DYKE, HUMAN RIGHTS, ETHNICITY AND DISCRIMINATION 76 (1985) (referring to the effect on political processes of mixing societies deeply divided along cultural lines).

116. See Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L

happen even if the unit of self-determination being affected is not that of an occupied state.

Whether international law takes account of such effects will depend on resolution of the dilemma over how to measure respect for a country's domestic jurisdiction. For the future, the key factor may be whether and how original inhabitants in areas flooded by settlers, originating and ending within U.N.-recognized borders, are accorded and then able to realize self-determination. Developments in the rights of indigenous peoples and related land rights are also relevant,¹¹⁷ but change has come slowly. For instance, in the revised text of the Draft Universal Declaration on the Rights of Indigenous Peoples, the right to self-determination was included in only a compromising manner.¹¹⁸ Moreover, in an important convention on indigenous rights, there were provisions dealing only with removals, and these provisions were "weak."¹¹⁹

Self-determination does not always imply total independence from outside groups, but it does give those to whom it applies some control over their own destiny.¹²⁰ Logically, settlements, whether across or within international frontiers, may prevent a distinct group from determining its

& COMP. L.Q. 105, 109 (1976) (referring to the effects resulting from diluting and dispersing a minority).

117. For example, as land rights relate to self-determination. For a discussion of the relationship between self-determination, land and indigenous rights, see generally Hannum, *supra* note 71, at 670-77. De Zayas makes the connection between land rights, respect therefor, and humane approaches to the problem of population transfer. However, his examples, which are removals and not settlements, occur across international frontiers. Nevertheless, he points out the gradual public sensitization to the "right of peoples to their native soil," and opines that "the best and most humane solution [to problems caused by population transfer] would be the increased permeability of national frontiers." De Zayas, *Historical Survey*, *supra* note 22, at 33-34. See also *id.* at 23; De Zayas, *German Experience*, *supra* note 23, at 5-6 ("The broad authority of sovereign states to pursue legitimate ends [through population transfer] should not be exercised to the detriment of a people's right to inhabit their native soil").

118. UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, DISCRIMINATION AGAINST INDIGENOUS PEOPLES; REPORT OF THE WORKING GROUP ON INDIGENOUS POPULATIONS ON ITS EIGHTH SESSION, at Annex II, U.N. Doc. E/CN.4/Sub.2/1990/42 (1990). Only minor changes were introduced for the 1991 session.

119. Hannum, *supra* note 71, at 668 n.72 (citing the International Labor Organization Convention No. 107, art. 12).

120. VAN DYKE, *supra* note 115, at 221 ("[A]n exercise of self-determination does not necessarily mean that the choice will be for independence. One of the potential choices is for autonomy within the framework of the state and given reasonableness on both sides this is the choice, or compromise that will be made"); Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 EUR. J. INT'L L. 114, 124 (1991) (referring to self-determination as a "sufficient degree of autonomy within the existing state structure"); UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT ON THE UNITED NATIONS SEMINAR ON THE EFFECTS OF RACIAL DISCRIMINATION ON THE SOCIAL AND ECONOMIC RELATIONS BETWEEN INDIGENOUS PEOPLES AND STATES, U.N. Doc. E/CN.4/1989/22 (1989) (Self-determination may only imply "self-development").

own status and development *particularly* when the group's members do not *want* to receive the influx. Therefore, self-determination, should it apply to original inhabitants faced with population transfer, brings into play the element of consent. Self-determination thereby plugs a gap that otherwise exists between removals and settlements on the issue of consent. In this Article's discussion of this issue, before this section on self-determination, the conclusion has been that consent pertains more to removals than settlements. Self-determination, however, with its focus on the original inhabitants affected by settlements, brings out the importance of voluntariness to the process of settlements. It is, therefore, an important factor to a unified approach to population transfer.

The foregoing analysis advocates a shift in international attention away from governmental motives for undertaking settlements and towards the point of view of those directly affected by settlements. This shift parallels existing international treatment of removals. The Institut de Droit International recognized that, in addition to the importance of examining governmental motives for causing removals, the perspectives of removed people are also a significant factor in determining the permissibility of transfers. Yet governmental motives retain importance. The governmental practices of racism and discrimination lead to condemnation of removals. Where governments act on similar motives in undertaking settlements, this overlap also supports a unified concept of population transfer.

2. Effect of Population Transfer on Rights Regarding Genocide

There has been concern that people subjected to massive population transfer, either by facing settlers or by themselves being removed, have been threatened with genocide.¹²¹ For instance, in Indonesian-ruled East Timor population transfer occurred in both forms. Concurrently, due to the inhumane conditions imposed there, some commentators believe that genocide happened.¹²² The U.N. has adopted the following definition of genocide through the Convention on the Prevention and Punishment of the Crime of Genocide: "Genocide means . . . acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group,

121. See U.N. Sub-Commission Resolution 1992/28, *supra* note 3, at 71 (preamble); DeZayas, *Forced Resettlement*, *supra* note 11, at 236 (expressing concern over genocide for removals but not for settlements). As an instance of concern expressed over genocide for settlements as well as removals, which the author of this Article cannot confirm as actual genocide, see CHITTAGONG HILL TRACTS COMMISSION, LIFE IS NOT OURS: LAND AND HUMAN RIGHTS IN THE CHITTAGONG HILL TRACTS, BANGLADESH (1991); *The Chittagong Hill Tracts*, INTERNATIONAL WORKING GROUP FOR INDIGENOUS AFFAIRS NEWSLETTER, July/Aug. 1991; INTERNATIONAL WORKING GROUP FOR INDIGENOUS AFFAIRS, DOC. NO. 5, THEY ARE NOW BURNING VILLAGE AFTER VILLAGE: GENOCIDE IN THE CHITTAGONG HILL TRACTS (1984).

122. See CHALK & JONASSOHN, *supra* note 62, at 379; Erlanger, *supra* note 26 (100,000 to 200,000 East Timorese died from 1974 to 1980); Budiardjo, *supra* note 46 (200,000 died); Hiorth, *supra* note 26, at 61 (In 1975, an estimated 650,000 East Timorese lived on the island).

as such."¹²³

According to Dinstein, "[t]he right of peoples to physical existence corresponds to the prohibition of genocide."¹²⁴ In focusing, therefore, on the effects of population transfer on the right to existence, at least two issues arise. One is the distinction between genocide and ethnocide. The latter is a sub-category of the former. Yet, "[t]he suppression of a culture, a language, a religion, and so on is a phenomenon that is analytically different from the physical extermination of a group."¹²⁵ Concern over genocide in the sense of mass death applies to relatively few cases of population transfer. The meaning of ethnocide, which might also coincide with the denial of self-determination, pertains to relatively more instances of population transfer.¹²⁶

A second issue important to the relationship between population transfer and the right to existence is *intent*: "the essence of genocide is not the actual destruction of a group — in our case, a people — but the intent to destroy it as such (in whole or in part)."¹²⁷ This implies that if a group, for example a "people," however defined, is destroyed, but no intent to destroy exists, then no genocide occurs. Conversely, one individual murder fits this essence of genocide if the act of murder is designed to further the extinction of a people.

The situation of the Kurds after the Gulf War involved less the removal of people than did the Kurdish plight before that war.¹²⁸ Nonetheless, Payam Akhavan believes that after the war the requisite intent for genocide existed. He states that "it was not in question that the deliberate policy of the Iraqi authorities had resulted in conditions which were so extreme as to cause the mass exodus of Kurds to neighboring States."¹²⁹ Given that the receiving area consisted of "inhospitable regions where their survival may [have been] threatened," Akhavan recom-

123. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, 28 I.L.M. 763 [hereinafter Genocide Convention]. Specific acts include "(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." *Id.* Cf. RESTATEMENT ON FOREIGN RELATIONS, *supra* note 31, § 702.

124. Dinstein, *supra* note 116, at 105.

125. CHALK & JONASSOHN, *supra* note 62, at 23.

126. Distinctions between ethnocide and genocide are de-emphasized by focusing on existence rather than extermination. This is a constructive, preventative approach to such comparison. Some causes are common to both ethnocide and genocide, one of which causes is discrimination. For example, prevention of discrimination would remove religious intolerance. One commentator refers to intolerance as "one of the decisive causes of genocide." WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 121 (1983).

127. Dinstein, *supra* note 116, at 105 (citing NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* 58 (1960)).

128. See *supra* note 5.

129. Payam Akhavan, *Enforcement of the Genocide Convention Through the Advisory Opinion Jurisdiction of the International Court of Justice*, 12 *HUM. RTS. L.J.* 297 (1991).

mends that the International Court of Justice give an advisory opinion on whether the Iraqi policy constituted " 'deliberately inflicting on the group conditions of life calculated to bring about its destruction in whole or in part' within the meaning of the Genocide Convention."¹³⁰ A positive response, meaning genocide occurred, would carry significance despite article 2(7) of the U.N. Charter.¹³¹

Depending upon circumstances, the governmental intent required to raise an act to genocidal level may vary. For example, a high degree of centralized authority and quasi-bureaucratic organization in the government, like that of Iraq, is not always required. According to Chalk and Jonassohn, an exception has been "when the victim group is numerically small." They give as an example the phenomenon of population transfer, "such as the indigenous tribes wiped out by colonizing settlers."¹³² Despite their loose use of the term "colonizing," under their analysis settlements may cause of genocide. An analysis such as theirs should be examined for its validity in the case of the Indonesian presence in East Timor.

In summary regarding genocide, governmental participation in population transfer might take the form of force, as in the case of some removals. Or it might take the form of encouragement or sponsorship, as in the example of some settlements. Although containing less obvious intent, the latter involvement needs to be examined further, through concerted case study, for the possibility that such settlements may result in the genocide of original inhabitants. Like the arguments in regard to voluntariness and freedom of movement, legal reasoning regarding genocide is more obvious to cases of removals but may apply also to settlements. As the concept of genocide is relatively blind to issues of the permeability of international frontiers and as it applies even outside of belligerency, it is crucial to any broad concept of population transfer.

IV. CONCLUSION

The law on genocide, like that on self-determination, refers to groups rather than individuals. Development of the consciousness of international law towards collectivities is important to a holistic legal approach towards uprooted people. However, given the differences between removals and settlements mentioned herein, international law is distant from treating removals and settlements as one category *per se*. A broad treatment should be pursued, especially where the motivations for and the effects of both types are egregious. Some variances or differences between the two types may be just noise. The law on population transfer is unde-

130. *Id.* at 297-98.

131. Akhavan states that "given its status as a 'crime against humanity,' an inference that genocide exists would definitely put into question the proposition that the matter is one 'essentially within the jurisdiction' of Iraq." *Id.* at 298. See also Leslie Gelb, *The Strange Story of Mr. Bush Dealing With Saddam*, INT'L HERALD TRIB., May 5, 1992, at 4.

132. CHALK & JONASSOHN, *supra* note 62, at 28.

veloped and, thus, somewhat confusing. The coherent legal study of population transfer will gain speed as the realization grows that it is "inaccurate to use the passive voice to describe much of the world's population flows."¹³³

133. Weiner, *supra* note 6, at 7.

