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## A Unified Concept of Population Transfer

### Keywords

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

# A Unified Concept of Population Transfer

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 such a broad treatment, this article is a 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 of ethnic proportions. The Red Cross spent a significant proportion of its budget aiding what it called "displaced people,"<sup>1</sup> 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-Herzegovina.<sup>2</sup> The large-scale Jewish settlements into the Israeli-occupied Arab territories continue to receive publicity. Theoretically speaking, why not take these and other mass removals or settlements of people, and examine them 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 with either removal from an area or settlement into one.<sup>3</sup> A conference in 1992 deliberated on situations occurring in what were called "sovereign

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\* J.D. 1991, Harvard University. Associate, Curtis, Mallet-Prevost, Colt & Mosk. Earlier draft presented at the Unrepresented Nations and Peoples Organization [hereinafter "UNPO"], Conference on Human Rights Dimension of Population Transfer, Tallinn, Estonia, January 11-13, 1992. The author expresses gratitude for comments on earlier drafts by Henry Steiner, Michael van Walt van Praag, and John Quigley. Support also came from Marc Granowitter and Christa Meindersma.

1. International Committee of the Red Cross, statement at the 48th Session of the U.N. Commission on Human Rights (Feb. 19, 1992). These operations were in Africa, Latin America, Asia, the Middle East, and Europe, which reflects the broad scope of the problem.

2. Congressional Committee Print, *Ethnic Cleaning* at 5.

3. Just in the last two 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 "The Human Rights Dimensions of Population Transfer Including the Implantation of Settlers and Settlements," U.N. Doc. E/CN.4/Sub.2/1990/17; U.N. Doc. E/CN.4/Sub.2/1991/21.

states" (e.g. Poland, claiming to have experienced principally large-scale removals in the form of expulsions by Hitler and Stalin), as well as countries "occupied" now or at some point in recent time (e.g. Western Sahara, The Baltics, East Timor and Tibet, by massive settlements principally, plus 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 Hills Tracts, by settlements and removals) and the lands of "ethnic minorities" (e.g. Albanians in Kosova, principally by removals), and others.<sup>4</sup> 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 or forcible resettlement 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 not be confused with refugee movements<sup>5</sup> nor normal migration on an individual basis for economic reasons.<sup>6</sup> For years now, some in the policy-making community have mingled population transfer's two forms.<sup>7</sup> Despite such discussions, commentators on international law traditionally have not followed suit.<sup>8</sup>

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4. Report of the U.N.P.O. Conference on Human Rights Division of Population Transfer (D. Goldberg, Rapporteur) (published by U.N.P.O., the Hague, 1992) [hereinafter *U.N.P.O. Conference Report*].

5. Though when refugee movements are large, such a distinction becomes difficult. Refugees are defined as moving freely out of their own political motivation. RICHARD PLENDER, *INTERNATIONAL MIGRATION LAW* 393 (2d ed. 1988); Resolution on Asylum, 1950, Institute of International Law at its Bath Session, art. 1, 45 *AM. J. INT'L L. SUPP.*, 15 (1951). In contrast, settlers and removed people in the context of this paper, rather than being motivated by a personal, individual desire for political asylum, are treated as a group phenomenon whereby planning and implementation of the movement, and the ultimate motivation, belongs to governments. It is often difficult to tell whether a refugee moves freely. One difference is that refugee movement always occurs across international frontiers, whereas population transfer can also occur within them. Regarding the Kurdish people, the period before the Second Persian Gulf War saw movements that were population transfer, the removal of people caused in part by Iraqi government's use of poison gas, see *Minority Rights Group, The Kurds: Massacre by Gas* (1989); *Middle East Watch, Human Rights in Iraq* (Jan., 1990), whereas flows post-Second Gulf War, involve refugee flows. For example, the landmark UN Security Council Resolution 688, adopted by the Security Council at its 298th meeting, addressed refugees. U.N. Doc. S/RES/688 (1991).

6. Regarding migration, see generally PLENDER, *INTERNATIONAL MIGRATION LAW*, *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) (differentiates between normal migration and population movement with substantial government involvement).

7. See, e.g., T. Scudder & E. Colson, *From Welfare to Development: A Conceptual Framework for the Analysis of Dislocated People*, in *INVOLUNTARY MIGRATION AND RESETTLEMENT* 267 (1982).

8. Existing literature 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. REV.* 207 (1975) [hereinafter *Law and Transfers*], treats population transfer as principally the removal of people, whereas other

Besides a handful of scholars, including those recognized herein, few have published lately on a form of population transfer. A unique aspect of this paper is that, while examining a broad conception of transfer, it does compare removals and settlements under applicable international law from World War II onward. Indeed, to some extent population transfers must be examined on a case-by-case basis; rather than doing so, this paper serves as an overview of issues.

In the context of this paper, as a basic rule, transfers of both sorts are meant to have in common the element of moving a large numbers of people, in relative rather than absolute terms,<sup>9</sup> and state involvement or acquiescence in the movement. The specific people involved can be categorized as either removed people or settlers, and in the latter case original inhabitants of the area receiving 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 such doctrinal lines, but also whether the element of consent is a criteria proper to population transfer.<sup>10</sup> The extent to which those differences resolve themselves and the two types of transfer collapse into a broad, yet coherent category of treatment will depend on the future development of international law towards, not only the practices themselves, but their effects on all those affected by population transfer.

## II. THE PRACTICE 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 deportations or expulsions. Transfers, such as those at the hands of Nazi Germany, violate the Nuremberg principles and constitute war crimes or any crimes against humanity in times of

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writings touch on "settlements" as an isolated phenomenon as compared with 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 rational and intention involved in the transfer?"). The 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). That definition turns on the element of consent. Also, it raises the issue of territorial definition, treated herein.

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. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3. See also U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

international<sup>11</sup> and, it has been argued, civil war.<sup>12</sup>

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.<sup>13</sup> Similarly, in Bosnia, the deportation or mass displacement of people in order to create ethnically pure areas was an important strategy to Serbia.<sup>14</sup> These expulsions contributed to a substantial number of the masses of non-Serbs who exited Bosnia.<sup>15</sup> Occurring during international war, these expulsions could surely be adjudged crimes against humanity. Had they occurred earlier, before the international community reconized the independence of Croatia and Bosnia-Herzegovina, the situation would have been deemed civil war with the front lines inside national boundaries.<sup>16</sup> The coercive tactics of "ethnic purification"<sup>17</sup> allegedly used by the militia would not change with the varying classification of the war. It would be arbitrary to use crimes against humanity to draw a strong distinction between international and civil war.

As seen through the nature of the above examples, the treatment, under international law, of removals of people depends on whether the transfer occurred during belligerency. Yet, out of belligerency and into peacetime, mass expulsions across borders of citizens,<sup>18</sup> or aliens who were in the originating territory lawfully such as Asians from Uganda,<sup>19</sup> are

11. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 279, 39 AM. J. INT'L. L., Supp. 257, 260 (1945), arts. 6(b)-(c) Aug. 8, 1945 [hereinafter "Major War Criminal Agreement"]; Nuremberg Indictment, Count 3, §§ B, J; See Alfred M. De Zayas, *Forced Resettlement*, 8 ENCYCLOPEDIA PUB. INT'L L., 234, 235-36 [hereinafter De Zayas, *Forced Resettlement*]; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3. This should be distinguished from deportations on an individual basis. Lapidoto, *Expulsion of Civilians from Areas under Israeli Control in 1967*, 2 EUR. J. INT'L L., No. 1, 97, 102-04 (1991) (it is inconclusive whether deportation of individuals, as opposed to *en masse*, has been prohibited under customary international law). U.N. General Assembly Resolution 95 (1) of December 11, 1946, gave expression to the general applicability of the Nuremberg principles. 2 OPPENHEIM, INTERNATIONAL LAW 616-19 (7th ed., 1952). *But see* J. STONE, NO PEACE NO WAR IN THE MIDDLE EAST 17 (1969).

12. *Law and Transfers*, *supra* note 8, at 221.

13. See Human Rights Watch, *War Crimes and Bosnia-Herzegovina*, at 75-81.

14. See *id.* at 71. See also John F. Burns, *Bosnian Strife Cuts Old Bridges of Trust*, N.Y. TIMES, May 22, 1992, at A-8 (noting that although forced deportations have also been carried out by Muslim Slavs against Serbians, the process appears to have been more systematic on the part of the Serbs).

15. Human Rights Watch, *supra* note 13, at 199. (categorizing as an international armed conflict involving two states, Yugoslavia and Bosnia-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, Protocol 4, art. 3, Nov. 4, 1950, came into force Sept. 3, 1953, 213 U.N.T.S. 222.

19. See Richard Plender, *The Ugandan Crisis and the Right of Expulsion Under In-*

circumscribed closely by human rights law.<sup>20</sup> This is due to any presence of discriminatory or racist characteristics in the expulsions.<sup>21</sup>

Of course, not all governments undertaking removals across international borders lack concern for those being removed. Some are motivated by the desire as a sovereign to "save" a threatened minority abroad by "inviting" it into its territory. An example has been where an element of exchange is involved, like the 1922-23 swap of Greeks and Turks.<sup>22</sup> In such cases, despite any state benevolency, jurists have focused on more than just the attitude of the state. The perspective of the transferees counts, too. The Institut de Droit International, in its 1952 session, expressed concern for those being removed, especially as to whether their movement is voluntary.<sup>23</sup>

The argument has been forwarded that crimes against humanity should apply to the removal of people outside of armed conflict that starts and finishes within the territory of a state. It relies on the analogy to apartheid in South Africa.<sup>24</sup> Relocation of millions of blacks to artificially created homelands in the land-locked interior of the country, an effort by zonation programs of the development branch of the government, met sufficient international condemnation to be considered censured under customary international law. Part of the government's action in transferring the people was racism and discrimination. Yet, other massive removals within borders, such as have occurred in Guatemala,<sup>25</sup> East

*ternational Law*, 9 INT'L COMM. JURISTS, REV. 19, 27-30 (1972).

20. See PLENDER, INTERNATIONAL MIGRATION LAW, *supra* note 5, at 474 n.174, 477; R.C. Chhangani, Notes and Comments, *Expulsion of Uganda Asians and International Law*, 12 INDIAN J. INT'L L. 400, 402, 405-07 (1972); *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. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

22. See Alfred M. De Zayas, *A Historical Survey of Twentieth Century Expulsions, REFUGEES IN THE AGE OF TOTAL WAR* 15, 17-20 (A. Bramwell, ed., 1988) [hereinafter De Zayas, *Historical Survey*].

23. 44 *Annuaire* 138 (1952) (Sienna Session of 1952). See also PLENDER, INTERNATIONAL MIGRATION LAW, *supra* note 5, at 474. During the Nuremberg trials, it was recognized that the government's motive for transfer could go beyond ill-treatment of those transferred. An individual could escape liability if he was motivated by military necessity. De Zayas, *Forced Resettlement*, *supra* note 11, at 236. Writing about removals, De Zayas says, "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 *German Experience*].

24. *German Experience*, *supra* note 23, at 253; De Zayas, *Forced Resettlement*, *supra* note 11, at 236. But see Lapidot, *supra* note 11, at 104 (drafters of the Nuremberg Charter may have considered mass deportations for forced labor and extermination).

25. See Philip, *The Maya of Guatemala* (Minority Rights Group Report No. 62, 1989); *Counterinsurgency and the Development Pole Strategy in Guatemala*, 12 CULTURAL SURVIVAL Q. 3 (1988); *The Indians of Guatemala: Problems and Prospects for Social and Economic Reconstruction* (Cultural Survival, Fall, 1987); *Witness to Genocide* (Survival International, 1983); *Guatemalan Refugees Now Threatened by Relocation* (Survival International Urgent Action Bulletin, 1984).

Timor,<sup>26</sup> Australia,<sup>27</sup> Brazil,<sup>28</sup> Egypt, Argentina and Paraguay,<sup>29</sup> have not met with the same degree of international disapproval. At least in the last five instances, relatively without belligerency in the sense of armed conflict, some deference may have been given to governments' motivation for development.<sup>30</sup> Still, if, as in South Africa, the effect on those being moved rises to the level of systematic racial discrimination, any large scale population transfer may violate customary international law.<sup>31</sup>

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."<sup>32</sup> The Commission thus 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 transpor-

26. See JULIAN BURGER, *REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES* 142 (1987); F. 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 18.

27. See Minority Rights Group, *Aboriginal Australians*, Report No. 35 (1988)(in Queensland, mining policies effectively destroyed some of the economic and social basis of Aboriginal traditional lifestyle and involved large-scale removals).

28. See Minority Rights Group, *What Future for the Amerindians of South America*, Report No. 15 (1977). The Sobradinho Dam project resettled about 60,000 urban and rural people. Michael Cerna, *Involuntary Resettlement in Development Projects* (World Bank Technical Paper No. 80, 1988).

29. See Cerna, *supra* note 28. In Egypt dam projects have removed and resettled at least 170,000 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 towards those being moved, these factors should play into the determination of the transfer's permissibility. Claire Palley, *Population Transfer and International Law* 3 (draft paper presented at the UNPO Conference).

31. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 (1987) [hereinafter RESTATEMENT FOREIGN RELATIONS]:

"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." *Accord Barcelona Traction, Light & Power Co., Ltd.*, 1970 I.C.J. 3, 32. See also International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 5(d)(i),(ii), 660 U.N.T.S. 195 [hereinafter "Discrimination Convention"], which prohibits 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. See *infra* note 88 for further discussion of freedom of movement.

32. *Cyprus v. Turkey*, Cases 6780/74 and 6950/75, 4 EUR. HUM. RTS. REP. 72-74 (1976)(Commission report)(emphasis added). There were also settlements of Turks coming from Turkey.



tation as an infringement of the right to private life, the case sets a precedent regarding the use of force to transfer populations. Thus, emphasizing voluntariness.

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

In brief conclusion about removals: Belligerency has been present in situations highly condemned under international law, though this constraint is reduced by the presence of systematic racial discrimination, as in Uganda or South Africa. Voluntariness is an important issue to removals. In order to invoke crimes against humanity, the blatant lack of voluntariness in the victims of World War-II era transfers is key. Furthermore, the issue of voluntariness has some importance regardless of the state's intention.

#### B. *Population Transfer Under Humanitarian Law*

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

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. It states:

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.<sup>35</sup>

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33. Palley, *supra* note 30, at 5. For the only situations not documented elsewhere in this article, see Minority Rights Group, *Eritrea and Tigray*, Report No. 5, at 4-14 (1983); International Federation for the Protection of Ethnic, Religious, Linguistic and Other Minorities, Comm. H.R., 43rd Sess., Agenda item 8, 1991.

34. See *infra* note 53.

35. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 49, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter

Furthermore, the Geneva Convention may outlaw population transfers into occupied lands, not only during hostilities but afterwards until a final political settlement has been reached in those lands.<sup>36</sup> 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,"<sup>37</sup> and contains language similar to article 49.

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,<sup>38</sup> 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;<sup>39</sup> especially if the movement involves the purposes and effects, on both those transferred and original inhabitants, that the Geneva Convention was crafted to prevent.<sup>40</sup> 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. Once such tool is incentives, like increased industrialization in the area targeted for transfer as occurred in Soviet-occupied Estonia and Latvia.<sup>41</sup> Even if voluntary settlement on an individual basis were permissible under article 49, the settlement programs of the 1980s and 1990s, especially the ambitious ones like those of the Indonesian<sup>42</sup> and Chinese<sup>43</sup> governments, must

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Geneva Convention].

36. See *id.* 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 to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1, para. 4, 1125 U.N.T.S. 3, 7 [hereinafter Geneva Protocol I].

38. Cf. De Zayas, *Forced Resettlement*, *supra* note 11, at 236 (regarding the other form of transfer, removals: "The clear prohibition of forced resettlement in time of war has been codified.")

39. The UN Sub-Commission has recognized the link between the right to security of persons and the issue of population transfer, broadly defined. U.N. Doc. E/CN.4/Sub.2/1990/L.60, *supra* note 3; U.N. Doc. E/CN.4/Sub.2/1991/28, *supra* note 3. 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 INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 120-124 (Theodore Meron ed. 1984) (explaining 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). See also V. PURINA & J. JANSEVICS, LATVIJAS PSR SOCIALISTISTIKA DARBA DALISANAS SISTEMA [THE SOCIALISTIC DIVISION OF LABOR SYSTEM IN THE LATVIAN S.S.R.] 48 (1978); U.N. GAOR, Comm. H.R., 48th Sess., Agenda Item 12, (1992) (Statement of the Estonian Delegation, Feb. 26, 1992). Cf. GEOFFREY A. HOSKING, THE FIRST SOCIALIST SOCIETY: A HISTORY FROM WITHIN 399 (1st ed. 1985).

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

be examined to determine whether they meet the criteria of "voluntary" settlements on an individual basis.

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. Comparing these to settlements, the different 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,<sup>44</sup> civilian settlements across the internationally recognized borders of a state are sometimes claimed to be necessary for the security of the transferring power and, therefore, essential to that power in order to preserve public order and safety.<sup>45</sup> For example, control of the regions at the borders of Indonesian-dominated lands has been said to have an explicit strategic objective that depends on settlements.<sup>46</sup>

In the Israeli Supreme Court's most important decision on population transfer, *Beth-El*,<sup>47</sup> Justice Witkon sustained a prior opinion that the fact that requisitioned lands are intended for Jewish *civilian* settlements does not deprive such requisitioning of its security character.<sup>48</sup> In addition, although no terrorist activity actually took place, Justice Witkon refused to distinguish the present case from one in which it had occurred.<sup>49</sup> Those stances, regarding control of border regions, have in common the use of civilians to gain control of other civilians, i.e. original inhabitants and their areas. Even if population transfer were intended for national security purposes, settlements can cause conflicts among people that set-

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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 *Tibet Report*]; 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. 15,500, 15,501-02 (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 the note adds in a footnote 25 that "[w]hether the Chinese are intentionally transferring Han into Tibet is a matter of complex debate," *id.* at 196. See *infra*. text accompanying notes 115 and 119 for other issues on the transfer that are important.

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

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

46. Budiardjo, *The Politics of Transmigration*, 16 THE ECOLOGIST No. 2/3, at 111 (1986) (as related in 1985 by the then Indonesian transmigration [i.e., resettlement] minister).

47. H.C. 606/78, Ayub v. Minister of Defense 33(2) PISKEI DIN 113 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 summarized in 5 ISR. Y.B. HUM. RTS. 384 (1975) (Court unanimously upheld arguments that steps taken were necessary due to the terrorist activities and acts of sabotage which in fact took place in the area).

tlements may only exacerbate security problems.<sup>50</sup>

The issue of control over civilians points to the viewpoint of original inhabitants. Though voluntariness or consent from the settlers' perspective is a confused, inconclusive subject, it might gain significance, as further explained below,<sup>51</sup> regarding how others are affected by the settlements.

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

This is true where transfer occurs during prolonged occupations. Prolonged occupations have received some attention as a distinct category, having the characteristic of "belligerency ending."<sup>54</sup> The main conventions relating to military occupations, including the Geneva Convention and 1907 Hague Regulations<sup>55</sup> provide no meaningful variation in the rules because of the length of an occupation<sup>56</sup> and, indeed, may cover not

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50. See generally Marcus Colchester, *The Social Dimensions of Government Sponsored Migration and Involuntary Resettlement: Policies and Practice*, (1986) (unpublished manuscript prepared for the Independent Commission on International Humanitarian Issues in Geneva)(available through author of present article). In the context of the occupied Arab territories, Roberts and, Falk & 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 purpose; second, even if justified for military needs, the transfer still constitutes a violation of 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. J. 129, 147-48 (1991). Cf. U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

51. See *infra* text accompanying notes 107.

52. International Covenant on Civil and Political Rights, art. 4(1), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 174 [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. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3; see also U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3. 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, with Annexed Regulations, *signed* Oct. 18, 1907, § 3, 36 Stat. 2277, 205 CONSOL. T.S. 277, 295-97 [hereinafter *Hague Regulations*].

56. The exception is the "one year after" provision of article 6, paragraph 3 of the Geneva Convention. Geneva Convention, *supra* note 35, art. 6, para. 3, at 3522, 75 U.N.T.S. at 292. However, this provision is of little importance. See Roberts, *supra* note 8, at 55-56;

only belligerent occupations but, also situations in which the belligerency has subsided.<sup>57</sup> Moreover, in peacetime the rights of the occupant diminish markedly as compared with those of a belligerent occupation.<sup>58</sup> Where population transfer extends from belligerent to prolonged occupation and then into peacetime, the occupier may assert relatively fewer rights. That, again, brings into doubt the "temporariness" justification mentioned above.

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

Should conventional law, including the relatively lenient Hague Regulations, be applicable, that discretion must include reference to the hu-

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COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 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?*, 55 BRIT. Y. B. INT'L L. 249, 253 (1984). *But see* THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 43 (1987). "[T]here are, in fact, so many situations 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." *Id.*

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. But 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, 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 JONASSON, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES 378-83 (1990). Concerning Tibet, *see* TIBET REPORT, *supra* note 43, at 2-4; *What McMahon Wrought*, THE ECONOMIST, May 23, 1987, at 59.

manitarian concerns of all individuals affected by population transfer.<sup>63</sup> The needs of both the settlers and original inhabitants who are affected become particularly relevant as an occupation moves through the stages, from belligerent, to prolonged, and into peacetime.

If prolonged and even peacetime occupations are reasons for continuing prohibition of settlements, that is a sign that the positive law prohibiting settlements is moving away from any necessity for belligerency.<sup>64</sup> This may be compared to cases of removals, where any presence of racism and discrimination may be pushing any prohibition, based on either positive or normative law, away from the need for 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 has been "colonized", according to the formal U.N. regime, is the Western Sahara.<sup>65</sup> The Moroccan takeover of this area was marked by clear tactics including the settlement of over 200,000 Moroccans as well as removal by "brutal tactics" of some groups of original inhabitants in the area.<sup>66</sup> The Western Sahara situation was before the International Court of Justice.<sup>67</sup> The connection of population transfer to colonialism is patently clear. Condemnations of colonialism came from the ICJ,<sup>68</sup> and subsequently the U.N. General Assembly<sup>69</sup> and noted experts.<sup>70</sup> In situations of traditional

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.

64. The literature on prolonged occupations has not addressed population transfer in its other forms.

65. 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).

66. CLAUDE BONTEMS, *LA GUERRA 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.

67. Western Sahara, 1975 I.C.J. 12 (Oct. 16). See THOMPSON & ADLOFF, *supra* note 65, at 167.

68. 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. 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. See Western Sahara, 1975 I.C.J. at para. 162; See also *Self-Determination: The Cases of Fiji, New Caledonia, and the Western Sahara*, 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 effects the right to self-determination. See *Id.* at 443 (discussing this possible effect). *But see* DAMIS, *supra* note 66, at 60 (positing that the Court's decision was essentially political).

69. See DAMIS, *supra* note 66, at 94, citing U.N. Doc. A/35/595 (1980), also referring to the right of the Sahrawi population to self-determination.

70. See, e.g., The Right to Self-Determination, Implementation of United Nations Resolutions, U.N. Doc. E/CN.4/Sub.2/405/Rev. 1, para. 69 (1980).

colonialism, a nexus has been established between the use of force and its effect on a people's identity.<sup>71</sup> As a result, the U.N. acted.

#### D. *Some Limits on Jurisprudence and Positive Law*

*Western Sahara* and its aftermath may be contrasted with situations of indigenous groups, such as the Chakmas of the Chittagong Hills Tracts, or various sparsely inhabited Amazonian provinces of Bolivia, Peru, Ecuador, Colombia, Venezuela, and Brazil. These face what most consider to be settlements by ethnically distinct, dominating groups encouraged or even forced by U.N. recognized governments.<sup>72</sup> The above-mentioned nexus between force and peoples' identity may exist even in these situations of transfer.<sup>73</sup> In contrast to the *Western Sahara* and other situations of traditional colonialism, however, these settlements have occurred within the governments' U.N. recognized borders. At issue is 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."<sup>74</sup> Like situations of removals solely within domestic frontiers,<sup>75</sup> the concurrent presence of systematic discrimination, genocide,<sup>76</sup> or gross and persistent violations of human rights<sup>77</sup> countenances article 2.7. So does the moral pressure of publicists like Theodoropoulos who recognizes colonialism outside the traditional U.N. definition. He asserts that South Africa is the chief paradigm of "settler colonial-

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71. 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." Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. Doc. A/5217, Supp. No. 28, at 121 (1970) [hereinafter Declaration on Friendly Relations]. The prohibition on the use of force is also now a rule of customary international law. *Nicar. v. U.S.*, 1986 I.C.J., at 98-101.

72. 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 Tracts from 1978-88); Written statement submitted by The Nordic Saamic Council et al. at the U.N. Sub-Comm., 43rd Sess. Item 15, U.N. Doc. E/CN.4/Sub.2/1991/NGO/3. Colchester, *supra* note 50, at 12 (regarding the other regions)

73. See Hannum, *supra* note 72, at 668; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

74. U.N. CHARTER, 59 Stat. 1031, TS No. 993, 3 Bevans 1153 (1969). The U.N. Sub-Commission has not limited its concern to settlements occurring across international frontiers. See U.N. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3.

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

76. See discussion *infra* III.B.2.

77. See RESTATEMENT FOREIGN RELATIONS, *supra* note 31, § 702. U.N. resolutions directly or indirectly authorize the U.N. Sub-Commission to undertake studies or working groups to address consistent patterns of extreme human rights violations, even though they occur within the borders of a given state. Admittedly, international bodies today do not emphasize de-colonization. For example, the U.N. did not oppose apartheid under the pretext of decolonization. Therefore, any law on settlements within domestic frontiers will develop apart from traditional colonialism.

ism."<sup>78</sup> The South African government undertook removals, through zonation, in order to clear the way for accomplishment of the other form of population transfer: settlements.<sup>79</sup> These started as well as finished within the boundaries of that state.

For settlements as well as removals occurring in such territorial limits, prohibition would be more meaningful if the prohibition came from positive law in a rule explicitly about transfer. Then they would be less sensitive to issues defining territory. The following issues point to the conclusion, based on a limited analysis, that removals within international frontiers are closer to benefitting from concrete law, such as the Geneva Convention and doctrines on crimes against humanity, than are settlements.

The only positive law directly prohibiting settlements comes from the Geneva Convention. The definition of territory covered by the laws is crucial. Whether an occupation is belligerent or peaceful, the territory must be under some form of occupation.<sup>80</sup> It is true that Protocol I, also addressing transfers, applies beyond situations of military occupation,<sup>81</sup> but its language prohibiting transfer still refers strictly to transfer into or out of areas under occupation. These two instruments also refer to removals, which are somewhat constrained by the need for occupation.<sup>82</sup> Removals, unlike settlements, have fallen subject to 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 after World War II to deport Germans *en masse* as it was for the Germans to do so to others during that War.<sup>83</sup> Upon further examination such a view may implicate, e.g., the deportation of Germans from Sudetenland, even though this area was not

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78. C. THEODOROPoulos, COLONIALISM AND GENERAL INTERNATIONAL LAW: CONTEMPORARY THEORY OF NATIONAL SOVEREIGNTY AND SELF-DETERMINATION 65 (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.* A. JAMES, SOVEREIGN STATEHOOD 18 (1986) (Whether a state enjoys exclusive power over a territory is not a precise criteria for determining what constitutes a colonial territory). Today, the U.N. does not emphasize de-colonization; for example, de-colonization was not the pretext for U.N. efforts against apartheid.

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

80. Unlike removals, massive and permanent settlements across borders of states, excluding repatriation of refugees, are a policy implemented uniquely into areas experiencing prolonged occupations. Settlements, as defined in this paper, almost never occur anymore from one sovereign state to another. See Hucker, *Migration and Resettlement Under International Law*, in *The International Law and Policy of Human Welfare* 338-9 (R. MacDonald et al. eds. 1978).

81. See *supra* text accompanying note 35. Note, few states have ratified.

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

83. Palley, *supra* note 30, at 17. See generally De Zayas, *Historical Survey*, *supra* note 21.



technically "occupied" by the responsible transferors.<sup>84</sup> Furthermore, there is the argument, buttressed by the analogy to the situation in ex-Yugoslavia, that crimes against humanity also apply to removals during civil war within international frontiers.<sup>85</sup>

Referring to these last such removals, more authoritatively than the opinion of scholars, is the Protocol Additional II to the Geneva Convention, which applies to armed conflicts with or without an international character.<sup>86</sup> Protocol II restricts population transfer, through article 17 in the form of removals but not settlements. This exclusivity further supports the above comparison.<sup>87</sup> The comparison is reinforced by reference to international deliberations. *Turkey v. Cyprus* condemned removals that, while occurring in an area technically under occupation, started and ended there.<sup>88</sup> By contrast, settlements starting and ending within a territory under occupation have not fallen subject to comparable concerted deliberations. Thus as the above analysis—though limited in scope—indicates, there may be some imbalance in a comparison of existing law about the two sorts of transfers when they occur within frontiers. Any imbalance may be overcome by future developments in international law towards dealing with the effects of population transfer.

### III. THE EFFECTS OF POPULATION TRANSFER

Along with the actual movement of people, an adequate recognition of the effects of population transfer is important, even though these effects may be less detectable than the movement itself.<sup>89</sup> Discrepancies under international law may exist between the two forms of population transfer, for example the question of territorial status. If the effects of any population transfer rise to the level of gross and consistent violations of international human rights, that may be a violation of customary inter-

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84. Also regarding state practices, the definition of a territory as "occupied" is key for settlements.

85. De Zayas, *Law and Transfers*, *supra* note 8, at 221. *See supra* note 13 and accompanying text.

86. 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, *entered into force* Dec. 7, 1978, U.N. Doc. A/32/144 (1977) [hereinafter Protocol II]. Protocol II supplements Article 3 of the Geneva Convention, which applies "in the case of armed conflict not of an international character," by extending it to inter-state conflicts where signatories are capable of carrying out "sustained and concerted military operations." *Id.* at art. 1.

87. Article 17 reads: "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." *See* International Committee of the Red Cross, statement at the 48th Session of the U.N. Commission on Human Rights, at 3, Feb. 1992.

88. *See supra* note 30 and accompanying text.

89. The fact 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.

national law, though not necessarily codified *per se* to refer directly to population transfer.

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

In modern times, the most significant limitations on a state's right to control the movement of people is based not on principles of economic interdependence, but on rules designed to protect human rights.<sup>90</sup> Article 13 of the Universal Declaration of Human Rights<sup>91</sup> provides:

- (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,<sup>92</sup> is most likely part of customary international law.<sup>93</sup> Emphasis of that status is the inclusion of freedom of movement in the Discrimination Convention.<sup>94</sup> Yet, despite any special status for freedom of movement, international law has yet to prescribe a satisfactory framework for movement involved in modern population transfer.

As the issue of voluntariness is more complicated in cases of settlements than removals, so goes freedom of movement. The Universal Declaration, article 13, refers to movement both within and across a state's internationally recognized borders.<sup>95</sup> Settlers moving across borders unquestionably have the right to leave their country. That raises a threshold question: are settlers *freely* leaving their country? A government will have varying levels of participation in population transfer: it will sponsor

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

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

92. Lillich, *supra* note 39, at 189; *cf.* U.N. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3 (freedom of movement and security of persons in conjunction with population transfer).

93. Rapporteur's Report by Fausto Pocar, Vice-Chairman of the Human Rights Committee, at the European Workshop on the Universal Declaration of Human Rights: Past-Present-Future, U.N. Doc. HR/PUB/89/1, at 101 (1988); 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 (Winter 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 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.

94. *See* Turack, *supra* note 93, at 96.

95. 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, of course, to citizens of that country. Article 12(1) and (2) of the Political Covenant also allows both citizens and aliens the right to leave, but subjects the right to article 12(3).

settlers, for example financially, or encourage their movement, possibly without any financial support. In either situation, the degree to which settlers are informed about all aspects of their transfer, including their destination, affects whether they are consenting thereto in an informed manner. If uninformed, they are not voluntarily, or freely, leaving the country.<sup>96</sup> The Discrimination Convention prohibits the use of racially discriminatory measures restricting the individual's right to leave or return to his or her country. After the population transfer has taken place, settlers who move across borders have the right to return to their home land, should they so choose.<sup>97</sup>

Population transfer within a state's recognized borders can violate the right to internal movement. Under the Universal Declaration, the right to free internal movement is inextricably linked to the right to choose one's residence.<sup>98</sup> Depending on the specifics involved, governments may violate them both by removing people from their residences due to, or as part of, transfer across as well as within a country's borders.<sup>99</sup>

Although containing similar language as the Universal Declaration, the Political Covenant is qualified by its 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. . . ." These restrictions may come into play in situations of economic development causing massive forced removals.<sup>100</sup> Limits on governmental abuse include article 12(3) provisions that such exceptions be

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96. 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 have not been adequately informed of conditions in the outer, Indonesian dominated islands. See generally Ria, *Transmigrasi Bedol Desa: Indonesian Island Village Resettlement from Wonogiri to Bengkulu*, 26 BULL. OF INDONESIAN ECON. STUD. No. 1, 48 (April 1990); World Bank Rep. No. 5597-IND, in *Indonesia Rep.—Hum. Rts. Supp. No. 10* (Aug. 1985).

97. The motivations of the sponsoring or encouraging governments, to create permanent change in an occupied area, cast doubts on the existence of a meaningful right to return. See, e.g., Mansour, *L'emigration des juifs sovietiques et le processus de paix israelo-palestinien [The immigration of Soviet Jews and the Israeli-Palestinian peace process]*, LA POLITIQUE ETRANGÈRE 329 (July 1990).

98. Article 13 of the Universal Declaration mentions both rights.

99. 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 non-citizens. See arts. 1, 2 & 3.

100. 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.

“necessary” and “consistent with other rights recognized in the present Covenant,” and that exceptions for *ordre public* require specific, factual justifications of a compelling state interest. Regarding removals, then, one can make a distinction—extremely preliminary, only—between such transfers in Egypt, Paraguay and Argentina, which may have some development rationale, and cases like East Timor and Guatemala, which seem to feature relatively less.

Cases of internal dislocation, or removal, occur in situations of interstate or civil war where masses of dislocated people suffer due directly to armed conflict. At the time of writing, in Bosnia, deals involving Serbs and Croats were reported towards carving Bosnia into “communal protectorates,”<sup>101</sup> where the comparison to zonation in South Africa is vivid. This threatened thousands of Bosnian Muslims, whose coalition had tried to preserve a multi-religious community, with displacement or removal within borders.<sup>102</sup> The extent to which those who caused any transfer violated international law depends on a balancing of the right to internal free movement, backed by the Protocol II<sup>103</sup>—doubtfully customary law<sup>104</sup>—prohibiting dislocation related to conflict; and the Political Covenant’s derogations and restrictions on the right to free movement, permissible for state parties signatories.

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.”<sup>105</sup> They become difficult in the context of population transfer, because they might conflict with the right to internal movement. Unless consistent with article 12(3) of the Political Covenant, settlers entering neighboring lands cannot force original inhabitants, against their will, to be removed; as a logical extension, settlers cannot force original inhabitants into exile.<sup>106</sup> Should original inhabitants go into exile, they must enjoy the right to return. Furthermore, they have both the right to choose their residence and the right to security of persons.<sup>107</sup>

The conflict that settlement across borders poses with the right to free internal movement takes on an added complication in cases of prolonged military occupation. There might be an element of conflict between humanitarian and human rights law. The Universal Declaration

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

102. See Human Rights Watch, at 13; See also Burns, *supra* note 14. For treatment of removals occurring across international frontiers, see *supra* text accompanying notes 12.

103. See *supra* Section II.D.

104. See Palley, *supra* note 30, at 7 (Few states have signed Protocol II).

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

106. Article 9 of the Universal Declaration states that “No one shall be subjected to arbitrary arrest, detention or exile.”

107. 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 articles 9 and 12 of the Universal Declaration, respectively.

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: "If 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."<sup>108</sup> 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" given by the occupant.

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, as in the preceding paragraph the violation does not occur to settlers' rights, but to original inhabitants'. The infringement is a by-product, though an important one, of transfer; whereas in cases of isolated, massive removals the infringement on this right may be more part and parcel of the actual population transfer because those to whom it occurs more likely are the actual transferees. At least where gross and persistent such violations would support the permeability of internationally recognized frontiers for U.N. or other attention, this supports the above-mentioned possibility that removals as a general rule may more easily overcome any limitations of territorial definition. Yet case-by-case analysis may prove otherwise. In any event, further developments in human rights are important, if a broad concept of population transfer is to move even further away from the requirement of belligerency that originates 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 is important for more than just freedom of movement. For example, when a transfer policy, such as settlements, is motivated by a desire to control original inhabitants, the perspective of these people becomes relevant: did they accept to receive settlers?

Take original inhabitants to whom self-determination applies,<sup>109</sup> and

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

109. The right, or principle, of self-determination in contemporary international law is still to a large extent unclear in its precise scope and content. See generally Thurer, *Self-determination*, in *Encyclopedia Pub. Int'l L.* Instalment 8, 470 (R. Bernhardt ed. 1975). The author of the present article does not intend to express an opinion on such scope and content, but rather, for purpose of discussion, assumes that self-determination applies to original inhabitants in question. See also U.N. Doc. E/CN.4/Sub.2/405/Rev. 1, *supra* note 70, at para. 7 (self-determination pertains "to all peoples and nations, and . . . a prerequisite of the enjoyment of all the rights and freedoms of the individual"); but see HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CON-*

who are also faced with 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 were illegal in international law because the legitimate sovereign, the receiving state, had not *consented* to receive them.<sup>110</sup>

By virtue of self-determination's applicability, the original inhabitants on the receiving end must have had unique identifiable characteristics, including race or ethnicity, language, religion, culture, tradition and history, which set them apart from their neighbors. Original inhabitants may not be like Germany, a well-established sovereign; instead the self-determination of original inhabitants may be as an ethnic minority, indigenous people, nation without a state, or territory under occupation. In such an event, it is more likely that population transfer will endanger the above special characteristics than in the instance of a sovereign state.<sup>111</sup>

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. . . ."<sup>112</sup> When their land 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

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FLICTING 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).

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

111. See U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3; 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 *TOWN 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 (Feb., 1992) (concern expressed 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).

112. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16), U.N. Doc. A/4684 (1960), Preamble, para. 2. See also Declaration on Friendly Relations, *supra* note 71, at 121. The International Covenant of Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR 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." Relevant to self-determination is 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." Right to Self-Determination, *supra* note 70, at para. 56. For other elements relevant to self-determination, see generally Hannum, *supra* note 109, at 27-49.

dominating power flood into the land of a distinct people, i.e. original inhabitants, and appropriate for themselves superior positions in different aspects of society.<sup>113</sup>

The problem becomes more acute and troublesome if alien superiority resulted in subjugation, domination and exploitation of the original inhabitants, which effects have been denounced as contrary to the U.N. Charter and as constituting denials of fundamental human rights.<sup>114</sup> In his writings about the other form of transfer, removals, at the level of sovereign or occupied states, De Zayas has recognized the economic risks of exploitation. He believes that in addition to being willing to receive masses of expelled people, a state must also be economically capable of doing so.<sup>115</sup> "In addition, the social and cultural adequacy of the receiving state ought to be considered,"<sup>116</sup> thereby referring to political domination and social subjugation. But slow to be recognized is that these same effects may play out in cases of settlements, and that may happen even where the unit of self-determination being affected is not an occupied state. 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.<sup>117</sup>

International law's taking 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 recognized as being accorded and then realizing self-determination. Developments in rights of indigenous peoples and related land rights are also relevant,<sup>118</sup> but these have come

113. That reasoning applies in cases of military occupation, see Eide, *Human Rights in a Pluralistic World*, in *THE UNIVERSAL DECLARATION IN SPACE AND TIME* 23, 42 (UNESCO, 1990) (those under military occupation are entitled to express self-determination), but such a denial is also possible in cases of outside domination that do not involve military occupation. A people's right to "enjoy and utilize fully and freely their natural wealth and resources," provided for in articles 1 and 25 of the Economic Covenant, might be jeopardized. That Covenant also states, in the same article referring to self-determination, "In no case may a people be deprived of its own means of subsistence." Furthermore, a transferring government might violate original inhabitants' right to an adequate standard of living, in article 11 of the Economic Covenant, by restricting their freedom of movement. See U.N. Doc. E/CN.4/Sub.2/1990/17, *supra* note 3; U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3 (all above rights mentioned in conjunction with population transfer).

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

115. 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" (emphasis added). *Id.*

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

117. See Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 *INT'L & COMP. L.Q.* 105, 109 (Jan. 1976) (effects of diluting and dispersing a minority).

118. 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,

slowly. 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.<sup>119</sup> In what has been considered as a bedrock convention on indigenous rights, there are provisions dealing with removals identified in the Draft as "forcible relocation," and these are "weak."<sup>120</sup> The possibility was mentioned that there may be some imbalance in a comparison of positive law about the two sorts of transfers when they occur within frontiers. Depending on future developments in indigenous rights, settlements may make up some of that differential.

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.<sup>121</sup> Logically, settlements across or within international frontiers may prevent a distinct group from determining its own status and development *particularly* when the influx to them is *unwanted*. Therefore, self-determination, should it apply to original inhabitants faced with population transfer, brings into play the element of consent. Self-determination would thereby plug a gap that existed between removals and settlements by virtue of the relatively greater pertinence to removals of other concepts of consent. Shifting attention, in cases of settlements, away from governmental motives for transfers and towards the point of view of those directly affected is not inconsistent with existing treatment of the more traditionally recognized form of transfer, removals. For removals, it was recognized that, in addition to the motives of any

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*supra* note 72, at 670-77. In his article *A Historical Survey of Twentieth Century Expulsions*, De Zayas makes the connection between land rights, respect therefore, and humane approaches to the problem of population transfer. However, his examples, which are removals and not settlements, occur across international frontiers. Nevertheless, he opines that the gradual public sensitization to the "right of peoples to their native soil," and that "the best and most human 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.").

119. U.N. Doc. E/CN.4/Sub.2/1990/42, Annex II. Only minor changes were introduced for the 1991 session.

120. Hannum, *supra* note 72, at 72, citing to International Labour Organization Convention No. 107 concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, art. 12, *reprinted in* 1 Study of the Problem of Discrimination Against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1986/7 & Add.1-4 (1986) (Jose R. Martinez Cobo, Special Rapporteur), 96, 100, *originally released as* E/CN.4/Sub.2/1982/2 Add. 1, 63, 67.

121. Van Dyke, *supra* note 116, at 221 ("an 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. No. 2, 114, 124 (1991) ("sufficient degree of autonomy within the existing state structure"); United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, U.N. Doc. E/CN.4/1989/22 (self-determination may only imply "self-development").



government, the perspective of those affected—in particular, their voluntariness—counted also. In addition, where it can be shown that the governmental motivations, racism and discrimination, condemned under removals, exists also for governments undertaking settlements, will lend more support for a broad 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.<sup>122</sup> For instance, in Indonesian-ruled East Timor population transfer occurred in both forms, and, due to inhumane conditions imposed, genocide happened concurrently.<sup>123</sup> The U.N. has adopted the following definition of genocide, through the Genocide Convention: "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," then names several specific acts.<sup>124</sup>

"The right of peoples to physical existence corresponds to the prohibition of genocide."<sup>125</sup> 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."<sup>126</sup> 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 denial of self-determination, is proper in situations of population transfer.<sup>127</sup>

122. See U.N. Doc. E/CN.4/Sub.2/1991/21, *supra* note 3; DeZayas, *Forced Resettlement*, *supra* note 11, at 236 (expressed concern over genocide for removals, but not for settlements). For some concern expressed over genocide for settlements as well as removals, which the author of the present 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* (May, 1991); The Chittagong Hill Tracts, INTERNATIONAL WORKING GROUP FOR INDIGENOUS AFFAIRS [IWGIA] NEWSLETTER No. 1 (July/Aug., 1991); *They Are Now Burning Village After Village: Genocide in the Chittagong Hill Tracts*, IWGIA Doc. No. 51 (W. Mey ed. Dec. 1984).

123. See CHALK & JONASSOHN, *supra* note 62, at 379. See also Erlanger, *supra* note 26 (100,000 to 200,000 East Timorese died from 1974 to 1980); Budiardjo, *supra* note 46 (200,000 died); F. HIORTH, *TIMOR PAST AND PRESENT* 61 (1985) (in 1975, an estimated 650,000 East Timorese lived on the island).

124. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1949, 78 U.N.T.S. 277. Those 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 FOREIGN RELATIONS, *supra* note 31, § 702.

125. Dinstein, *supra* note 117, at 105.

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

127. Distinctions between ethnocide and genocide are de-emphasized by focusing on

A second issue important to the relationship between population transfer and the right to existence is *intent*. "[T]he essence of genocide is not the actual destruction of a group—in our case, a people—but the intent to destroy it as such."<sup>128</sup> This implies that if a group, for example a "people" however defined, is destroyed, but no intent to destroy existed, then no genocide occurred. Conversely, one individual murder would fulfill this definition of genocide if the act was designed to further the extinction of a people.

The situation of the Kurds after the Second Gulf War involved population transfer in the form of massive removal.<sup>129</sup> Payam Akhavan believes the requisite intent existed, stating 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."<sup>130</sup> Given that the receiving end was "inhospitable regions where their survival may be threatened," Akhavan recommends that the International Court of Justice give an advisory opinion on whether this constitutes "'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."<sup>131</sup> A positive response would mean genocide occurred, and could not be overlooked by those who cite to Article 2(7) of the U.N. Charter.<sup>132</sup> Depending on such a judgement, removals could cause genocide.

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, has not always been 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

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existence rather than extermination, a constructive, preventative approach to the subject. Some causes are common to both forms, one of which is discrimination. For example, prevention of discrimination would remove religious intolerance, described by a U.N. Sub-Commission study as "one of the decisive causes of genocide." The Genocide Study, U.N. Doc. E/CN.4/Sub. 2/416, cited in WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 121 (1983).

128. N. ROBINSON, *THE GENOCIDE CONVENTIONS*, as quoted in Dinstein, *supra* note 117, at 105.

129. Some of the international discussion of post-second Gulf War Kurdistan was in terms of refugees rather than forced transfer. *See, e.g.*, Security Council Resolution 688, *supra* note 5.

130. Payam Akhavan, *Enforcement of the Genocide Convention Through the Advisory Opinion Jurisdiction of the International Court of Justice*, 12 *HUM. RTS. L.J.* No. 8/9, 297 (1991).

131. *Id.* at 297-98.

132. 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 TRIBUNE*, May 5, 1992, at 4.

transfer, "such as the indigenous tribes wiped out by colonizing settlers."<sup>133</sup> Settlements would be a possible cause of genocide. One need think no further than the Indonesian presence in East Timor.

In summary about 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 even further through concerted case study for the extent to which it may raise the results on those affected by the movement to the level of genocide. Like voluntariness or consent, and freedom of movement arguments, legal reasoning regarding genocide is more obvious to cases of removal, but may apply also to settlements. Relatively blind to issues of the permeability of frontiers, while not requiring a state of belligerency, the concept of genocide is crucial to any broad concept of population transfer.

#### IV. CONCLUSION

The law on genocide, like self-determination, refers to groups rather than individuals. Any development of the consciousness of international law towards collectiveness is important to a wholistic legal approach towards uprooted people.<sup>134</sup> Given the varying constraints along the lines of belligerency and territorial definitions, as well as other differences between removals and settlements mentioned above, international law is distant from treating removals and settlements as one category *per se*. A broad treatment should be pursued, however, especially where the motivations and effects of both types may be egregious. Some of what were called variances or differences may be just noise, coming from the law on population transfer being undeveloped 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."<sup>135</sup>

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

134. Should a wide concept of population transfer take hold, a legal regime that relies on rights, especially those of groups, will avoid confusing legal categories. As shown by the cumbersome distinction between pre- and post- Second Gulf War movements of Kurds, it might be difficult to divide refugee flow as a more individual phenomenon from any acceptable, broad definition of massive population transfer. *Cf.* Palley, *supra* note 30, at 3 n.2.

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

