

Population Transfer and International Law

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Claire Palley, professor of law at All Soul's College, Oxford and member of the UN Subcommission on Prevention of Discrimination and Protection of Minorities, presented the attached paper at the Unrepresented Nations and Peoples Organization-sponsored International Conference on Population Transfer, Tallinn, Estonia, January 1992.

note March - April

point," with no economic means. ✓

The 'Uqbi clan, whose village bears their name, were forcibly transferred already in 1951 from their homes near Bi'r Sab'a. Today, under the Markowitz plan, they must move again and their homes and lands given over to the state. In 1982, an Israeli court ordered Khalil 'Uqbi to demolish his home in the "unrecognized" 'Uqbi village, as it was "illegal." Khalil complied. However, in time his wife built a home for the family on the same site, and Khalil now faces charges of the Naqab Regional Planning Authority that he defied the original order. A year before the case came to court, the family house burned down accidentally. Nevertheless, the state prosecutor pursued the case, which resulted in a sentence of one year in jail¹⁸ and a NIS 3,000 fine. Not content with this, the prosecutor is appealing the sentence, pressing for a longer prison term and a fine of not less than NIS 100,000.¹⁹

*Postpone or demolish is above
the village must be demolished
at the end of the year
a. m. b. to be...*

The majority of villagers facing demolition orders are not represented by legal counsel. With representation, the legal process of appealing such an order generally takes two years, and the Bi'r Sab'a courts (Settlements Court and High Court) are burdened with 40 to 60 cases daily.²⁰

The pretexts of demolition vary; however, most are based on a 1985 construction code that forbids any building whatsoever in the unrecognized villages after that year. In a typical case, the Green Patrol²¹ observed a villager in 1987 replacing a portion of his zinc room which blew off during a storm. For this transgression, the Settlements Court ordered the immediate demolition of the house.²²

In addition to legal advocacy and defense of the villagers' housing rights, the local Association for the Support and Defence of Bedouin Rights in Israel has presented an alternative Master Plan which provides for the basic needs of this community. The Plan makes two central recommendations: (1) to revamp the existing planned "townships" in their present form and provide for their future social and economic development, and (2) to recognize retroactively twelve existing villages, plus two especially for shepherding. Further, the Plan calls for the equitable inclusion of Palestinian Arab communities which are now near, or within the jurisdiction of (the more recent) Jewish settlements into the plans of these settlements. In a recent survey, this Master Plan was endorsed by 88 percent of the Bedouin community which it would affect.

¹⁸ With seven months suspended, unless he rebuilds on the site within three years. The Settlements Court ruled on 10 January 1991. Association for the Support and Defence of Bedouin Rights in Israel, Bi-monthly Report (January-February 1991).

¹⁹ See Haim Chertok, "Slated for Destruction: Every 48 Hours, Another "Illegal" Beduin House is Demolished in the Negev," Challenge Vol. II, No. 4 (July-August 1991); also Association for the Support and Defence of Bedouin Rights in Israel, op. cit.

²⁰ Association for the Support and Defence of Bedouin Rights in Israel, op. cit.

²¹ Ostensibly a nature conservation service, the Green Patrol is a branch of the Agriculture Ministry which enforces restrictions on construction and land use by Palestinian citizens of Israel.

²² The case was decided on 18 February 1991. The villager's lawyers obtained a postponement of the order until 23 March 1991.

DRAFT PAPER

Population Transfer and International Law

I. Differing Situations, Complexities of the Facts and Varying Issues

1. This paper can only be suggestive of ideas. Population transfer, as a coherent subject matter, is in need of study, with initial consideration only recently commencing as a result of U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities' resolutions (1990/17 of 30 August 1990 and 1991/38, 22 August 1991), the first of which led to Mrs. Christi Mbonu's working paper (E/CN.4 / sub.2 / 1991/ 47), concentrating on the economic development-related aspects of re-settlement.

2. The topic of population transfer is of crucial significance, because in the long-term it causes threats to the peace by exacerbating ethnic sensibilities and perceptions of grave injustice, both internationally and nationally, often being in breach of human rights, humanitarian treaties and major principles of customary law. Normative rules prohibiting such happenings, or relevant to their consequences, have evolved, but these have not been enforced by the international community either diplomatically or judicially. This is so, because self-interest often precludes taking a position, even on obligations erga omnes ('') or matters of jus cogens, and because the world community has

1. Obligations of a State towards the international community as a whole. By their very nature such rights are the concern of all States. In view of the importance of the rights involved, all States have a legal interest in their protection. According to the Barcelona Traction, Light and Power Case I.C.J. Reports 1970, p.3, such obligations derive, for example, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning basic rights of the human person.

lacked the will to develop appropriate judicial machinery.

3. Any suggestions must be tentative, because grave humanitarian issues are involved. The consequences of illegality are never easily resolved, the more so because there are conflicts of interest: the rights of those who have initially been injured have to be weighed against consequential humanitarian problems when undoing the results of the original injury. Paradoxically, such undoing may itself involve population transfer: for example, by repatriating settlers en masse many years after their arrival raises questions as to the circumstances in which and to what extent a reparatory or restorative transfer is appropriate or lawful.

4. It should be obvious that it will be difficult to invoke one single legal principle alone to apply to all population transfers, even though they have the common feature of large-scale movement of groups of people. The circumstances in which large-scale movements occur are various, with different issues being raised and with differing legal principles being appropriate. For example, the rules which are relevant will be affected by whether the population transfer occurred

- (a) in aggressive war, declared or otherwise, when relatively developed international criminal law is applicable, including the rules governing war crimes and crimes against humanity;

- (b) under belligerent occupation, when there are specific rules prohibiting population transfer under Article 49 of the Fourth Geneva Convention 1949;⁽¹⁾
- (c) in internal non-international armed conflict, either by deliberate action or by provoking refugee problems in consequence of military action;⁽²⁾
- (d) in time of peace and whether the transfers were for genuine ordre public or public interest purposes, such as necessary security or economic development, and were accompanied by proper compensation and resettlement costs;
- (e) across national boundaries or internally to a State;

1. "Article 49. 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.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

2. It is unwise to define "population transfers" by any references to "free consent" of people being moved or moving. There will inevitably be arguments about the existence of duress, whereas creation of conditions in which large numbers of persons decide to become refugees should automatically be considered as giving rise to population transfer and to State responsibility. The worst example of alleged voluntary movement is the creation of the Arab refugee problem in Palestine in 1948. Not only did Israeli forces provoke flight, but Israel has permanently deprived Arabs, who moved as little as 5 kilometres from their homes, of their lands, characterising them as refugees.

- (f) with unlawful intention, for example adopting state policies designed to alter the relevant unit of external self-determination⁽³⁾ or of internal self-determination⁽²⁾ by way of demographic manipulation, or to give effect to discrimination, or to create an apartheid system, or whether done wilfully, or with intent to destroy in whole or in part a national, ethnical and/or religious group (genocide), in all of which cases this will be contrary to customary human rights law as developed;
- (g) by way of expulsion (or pressurised departure) of existing inhabitants and/or by implantation of settlers; and

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1. The right of a "people" freely to choose its international status, namely whether it wishes to be governed in an independent state or as part of another state, whether federal or unitary. This right belongs only to dependent peoples (colonial at the time) and to peoples subject to foreign domination. Once exercised, separate "peoples" within an existing state cannot again separately exercise external self-determination, although the "people of the state as a whole" may do so. The principle of carence de souveraineté may also be applicable where a territory is so badly misgoverned that it is alienated from the metropolitan state: J. Crawford, The Creation of States in International Law, Oxford, 1979, pp. 87, 100, 115-118.
 2. The right of the people of a sovereign (independent) state to elect and keep the government of its choice: A. Cassese, International Law in a Divided World, Clarendon Press, 1986, p. 134. Choice of government structure comes within the concept. It has been contended that where an independent state does not have "a government representing the whole people belonging to the territory without distinction as to race, creed or colour" (Declaration on Principles of International Law 1970, G.A. Res. 2625, (XXXV)) or where "a people" is subjected to alien subjugation or domination, the right of internal self-determination revives. This begs the question of whether a population group is "a people" or "a minority" within the whole "people".

- (h) in such a way that there is a consistent pattern of gross violations of internationally recognised rights, in which event it will be unlawful according to customary human rights law.

The point that the circumstances circumscribe the applicable legal rule is obvious when particular population transfers are examined. In cases where there has been invasion and belligerent occupation, population transfer will constitute grave breaches of humanitarian law, both under Article 49 of the Fourth Geneva Convention of 12 August 1949 and under customary international law. Such breaches occurred after the invasion and occupation of the Baltic states by the U.S.S.R. (1940) / Cyprus by Turkey (1974) / East Timor by Indonesia (1975) / Eritrea by Ethiopia (1950) / ^{3/4} the West Bank / of Palestine, until then under Jordanian + Egyptian jurisdiction, ^{respectively} by Israel (1967), Tibet by China (1951) and the Western Sahara by Morocco (1975). All such occupations were followed by implantation of settlers from the belligerent (invading) power. Yet further grave breaches occurred in Turkish-occupied Cyprus (1974-1977) and in the Israeli-occupied West Bank, because there were also ^{Palestinian territories} large-scale expulsions of sections of the population. In all these instances the aim has been to manipulate the unit of self-determination by altering the population balance and also to enhance the security and control of the occupying power. In Cyprus' case there has been the additional exacerbating feature of an attempt to create an apartheid -type system with permanent "demographic homogeneity" in the Turkish-occupied area from which more than 99% of the Greek Cypriot population were either driven out or pressurised into

1. The UN Security Council authorised the establishment of a federation with autonomy for Eritrea. No genuine federation or autonomy eventuated.

leaving as refugees⁽¹⁾. Moreover, Turkish Cypriots were concentrated in the occupied area, in part by threat in August 1975 of another Turkish invasion of the free area. The Turkish presence was supplemented by importation of mainland Turkish settlers, who, according to the Turkish Cypriot opposition, now form about half of the total civilian population of the Turkish occupied area⁽²⁾. The Turkish position in negotiations to settle the Cyprus problem is that Greek Cypriot refugees may not return to their homes even

1. The European Commission of Human Rights has repeatedly found that the overwhelming majority of Greek Cypriots, whose human rights were violated by being compelled to leave the Turkish-occupied area, has been prevented from returning by reason of the Turkish army sealing off the area: Cyprus v. Turkey, Applications Nos. 6780/74 and 6950/75, Report of the Commission, 10 July 1976, para. 203; Application No. 8007/77, Admissibility Decision, 10 July 1978, The Law, para. 36; and by in late 1983 transmitting its Report on events until early 1983 to the Committee of Ministers of the Council of Europe for their decision on whether the European Convention on Human Rights had been violated by Turkey. After 8 1/2 years the Committee has failed to decide. The Commission's Report may not be published without the Committee's permission. Meanwhile, the Commission has in further applications found that the Turkish Army still seals off the occupied area and controls all movement: Ahmet Cavit An v. Cyprus, 8 October 1991. The dilatoriness and ineffectiveness of the Committee of Ministers shows the lack of political will of other States to deal even with middle-range Powers which violate international human rights law.
2. Yeniduzen, 23.2.90, claims that there are 80,000 Turkish settlers. Turkish Cypriot opposition politicians have expressed concern that are being swamped. The civilian Turkish Cypriot population of the Turkish - occupied area was in 1990 estimated at about 165,000, but there has been a refusal to publish census figures. In addition to this civilian population figure there are 35,000 men of the Turkish army of occupation, plus their families. The UN General Assembly has repeatedly deplored "unilateral actions that change the demographic structure of Cyprus" (G.A. res. 33/15 (1978); 34/30 (1979) and 37/253 (1983)). The Security Council has expressed its deep concern about threats of Turkish settlement of the evacuated Greek Cypriot town of Varosha (Security Council Res. 550 (1984)) and the United Nations Secretary-General has repeatedly urged that nothing be done to change the island's demographic composition (e.g. Report, S/19927, 31 May 1988, para. 25).

under new federal arrangements because this would deny Turkish Cypriots political control of the Turkish-occupied area and would affect their security.

By contrast, although there has been the same outcome of population transfer in the civil wars in the Sudan, Ethiopia and Uganda, where refugees have fled to neighbouring States, the aim has not been manipulation of the self-determination unit and introduction of apartheid. Because the causes have been internal armed conflicts, fewer international law rules are applicable, reliance having for the most part to be placed on the still-developing customary law of human rights and Article 3 of the Fourth Geneva Convention of 1949, which merely requires persons to "be treated humanely, without any adverse distinction founded on race, colour, religion or faith or any other similar criteria". Although Article 3's application was extended by Additional Protocol II of 10 June 1977, to inter-state conflicts where dissidents control such a part of territory as to enable them to carry out sustained and concerted military operations, many States have not ratified and Protocol II is not yet customary law. Additional Protocol I Article 1 supplements the protection of the 1949 Convention where there is inter-state conflict by extending it to situations where "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". Again, many States have not ratified, and it remains doubtful to what extent the Protocol is a reflection of customary law. Where Protocol I is applicable, Article 85 provides

*Recall by Law
& Criticism, Committee*

"4. the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

- (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention; ...
- (c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; ...

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes. "

Article 86 imposes duties on the Parties to the conflict and all High Contracting Parties as follows:

"Article 86 - Failure to act

1. The High Contracting Parties and the parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so. "

Hague [In wars in which there is belligerent occupation, there is also the protection of Articles 43 and 46 of the Hague Rules 1907, which require an Occupying Power to have respect for the laws in force in the country, including private rights.

Until the Additional Protocols are clearly part of customary law, it is problematic to characterise as illegal certain population transfers by States, unless they come under other heads of unlawfulness according to customary law⁽¹⁾, such as genocide, systematic discrimination, a consistent pattern of

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1. The following formulation is adopted from United States practice as set out in the Restatement of the Law: Third Restatement of U.S. Foreign Relations Law, Vol. 2 (1987), 702, p. 165.

gross violations of internationally recognised human rights, or interference with the right to internal self-determination (something confined to racial and religious groups within the state).⁽¹⁾ States can rely on Articles 25 and 47 of the Economic, Social and Cultural Rights and Civil and Political Rights Covenants respectively, as saving "the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources", and on Article 12.3 of the Civil and Political Rights Covenant to subject freedom of choice of residence and liberty of movement to restrictions to protect national security or ordre public. Those Articles seem, for example, arguably to countenance Iraq's 1989 creation of a cordon sanitaire 20 kilometres wide along its border with Iran; Indonesian settlement in West Papua and the Mollucas; settlement of lowland Bangladeshis in the Chittagong Hill Tracts; and Han Chinese settlement in Chinese regions such as Inner Mongolia or East Turkestan. They would also not invalidate bona fide villagisation or de-urbanisation schemes, clearing land for dams, and defence research projects. A great gap in international law protection exists because of failure to accord or protect property rights, especially of indigenous peoples, so that tracts of State land are regarded as uninhabited and available for allocation to settlers, with consequential displacement of the inhabitants and traditional owners.

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1. See A. Cassese, "The Rights of Self-determination and Non-State Peoples", an as yet unpublished paper delivered in April 1989 in a conference held by the Harvard Centre for Human Rights at St. Anne's College, Oxford. Professor Cassese relies on a clause in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations 1970 (General Assembly Res. 2625 (XXV), 24 October 1970) which impliedly authorises action against governments which do not represent "the whole people belonging to the territory without distinction as to race, creed or colour".

The international instruments afford little protection to aliens. Even in case of discrimination against aliens, where this is in respect of rights of liberty of movement and freedom of choice of residence or in respect of expulsion following due and lawful process, the protections are, by Articles 12 and 13 of the Civil and Political Rights Covenant, confined to aliens "lawfully within the territory of a State". Mass expulsion of unlawful immigrants/settlers is therefore lawful, except it be specially excluded, as by Article 4 of the 4th Protocol to the European Convention on Human Rights, which prohibits "collective expulsion of aliens", but only binds ratifying States. Not even the Convention on the Elimination of All forms of Racial Discrimination (General Assembly res. 2106 A (XX), 21 December 1965) prohibits general discrimination against aliens by States in respect of nationality, citizenship, and exclusions as between citizens and non-citizens (see Article 1.2 and 3). Similarly, the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live (General Assembly res. 40/144 of 13 December 1985) fails to protect illegal entrants or to limit States' rights to restrict their stay. Accordingly, mass deportations in mid-1991 of Haitian workers, following criticism of the Dominican Government's failure to ensure the human rights of cane cutters, cannot be characterised as unlawful in so far as expellees were illegal immigrants. Even where they were legal immigrants, their expulsion was permissible so long as due process was followed.

II. The Uncertainties Due to Developing International Law

Because - fortunately- international law is rapidly being developed, partly through UN bodies, especially the International Law Commission and the General Assembly, and by changing state practice, it is difficult to pronounce with certainty on the legal consequences of population transfers.

The topic raises problems of "inter-temporal law" : which century's law is to be applied to determine the validity of title to territory? (1) The relevance to population transfer is that in the past conquest conferred title to territory and the conqueror would then often populate the territory with settlers. However, this view has been displaced. The first major development was the General Treaty for the Renunciation of War 1928 (known as the Kellogg - Briand Pact). Subsequently, following Japanese creation of Manchukuo, the American government announced with the Stimson Note of 1932 that it would not recognise situations brought about by aggression. League of Nations resolutions followed, as did State practice. By the end of world war II the view had evolved that an obligation of non-recognition rests on States where another State has forcibly acquired territory (2). This culminated in a prohibition by the UN Charter on the use of force, other than in self-defence or with the authority of an organ of the United Nations. Article 2 (4) of the United Nations Charter provides that

"All members will refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."

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1. M. Akehurst, A Modern Introduction to International Law, Harper Collins, 6th ed., 1987, p. 154.
 2. See I. Brownlie, International Law and the use of force by states, Clarendon Press, 1963, pp. 418 et seq.

The prohibition on use of force is also now a rule of customary international law.⁽²⁾ Any annexation can only now come about following use of force, if there is a treaty of cession by the former ruler or there is international recognition. The position of inhabitants of a conquered or occupied territory is reinforced by Article 47 of the Fourth Geneva Convention which provides:

" Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

*Kalings
Private File*

The outcome is that, subject to remaining colonial situations in which the doctrine of self-determination is applicable, conquests and annexations prior to 1928 are valid, as are consequential implantations of settlers (unless other relevant law is broken). For example, no international lawyer would contend that the establishment of States in North, Central and South America was illegal and therefore urge the repatriation of persons of European, African or Asian descent. Difficult questions are, however, raised by U.S.S.R. incorporation of the Baltic States in 1940: were Russian settlers lawfully settled in territory which was acquired even though forcibly? was this conquest recognised by the legislative bodies of the States concerned? was the fact that major powers, such as the U.S.A., never recognised the annexation relevant to contend that it was legally invalid?

It can also be argued that there was an interregnum during a subsequent period of peace, followed by reversion to the

1. Nicaragua v. U.S.A. I.C.J. Reports 1986, pp. 14, 98-101.

see also up to 10 out of 10

legitimate sovereign, the respective peoples of the three Baltic States, and that acts done during that interregnum were lawful.⁽³⁾ In contrast, some might argue, as Polish writers did after World War I, that the period of "Russian" incorporation was followed by post-liminium. This would mean that once the subjugations ended and the authority of the U.S.S.R. was withdrawn, the former sovereigns were automatically revived, but illegal acts effected during the occupations would remain illegal and settlers could be repatriated. Adoption of the doctrine of post-liminium would cause grave humanitarian problems. The proper view seems to be that all States concerned have a duty peacefully to negotiate such matters by treaty and to regulate both rights of settlers to remain and questions of nationality, including the right to opt for nationality of other successor States to the U.S.S.R.

Once the United Nations had been established, it became clear that if there had been aggression followed by annexation or establishment of puppet regimes, illegal acts, such as transfer of populations by expulsion or settlement, would remain illegal. This rule applies to all post-1945 transfers, for example, in Cyprus, East Timor, Tibet, Morocco, ~~the West Bank~~ and Eritrea.

A major uncertainty is the responsibility of States for crimes against the peace and crimes against humanity and the scope of such crimes. The principles established by Article 6 of the Charter of the International Military Tribunal of 1945, and the judgement of the Nuremberg Tribunal were confirmed by resolution of the General Assembly in 1946 (General Assembly Resolution 95 (I)). They deal with individual liability. Since then, the International Law Commission has approved the first draft of the draft Code of Crimes against the Peace and Security

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1. See Oppenheim's International Law, ed. H. Lauterpacht, 7th ed. 1952, Vol. II, pp. 619-620.

of Mankind⁽²⁾, which will clearly indicate the place of the Nuremberg principles. Draft Article 21 makes "deportation or forcible transfer of population" a crime (under the category "systematic or mass violations of human rights") and Draft Article 22 categorises "establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory" as "an exceptionally serious war crime [which] is an exceptionally serious violation of principles and rules of international law applicable in armed conflict". Draft Article 20 on Apartheid is also relevant. The Draft provides:

" 2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:

....

(b) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;

(c) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;

(d) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof...

1. For draft Articles and comments see Report of the International Law Commission on the work of its forty-third session, 29 August - 19 July 1991, G.A. Official Records: 46th Session, Supplement No.10 (A/46/10), pp. 238-276.

The I.L.C. comment (at p. 270) points out "exceptionally serious war crimes" are constituted by acts which are violations of principles and rules of international law applicable in armed conflicts when the violation is exceptionally serious -something which relates to its effects. "Armed conflict" covers not only international armed conflicts within the meaning of Additional Protocol I, Article 4, para. 4, but also non-international armed conflicts covered by article 3, common to the four 1949 Geneva Conventions. The commentary explains:

" Under subparagraph (b) it is a crime to establish settlers in an occupied territory and to change the demographic composition of an occupied territory. A number of reasons induced the Commission to include these acts in the draft article. Establishing settlers in an occupied territory constitutes a particularly serious misuse of power, especially since such an act could involve the disguised intent to annex the occupied territory. Changes to the demographic composition of an occupied territory seemed to the Commission to be such a serious act that it could echo the seriousness of genocide" (p.271).

Although the Code is not to be retroactive, nothing in it is to preclude trial and punishment for acts which at the time they were committed were criminal in accordance with international law (Draft Article 10). It is submitted that deportations in war were already war crimes and crimes against humanity as set out in Article 6 of the Charter of the International Military Tribunal :

"War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to ... deportation to slave labour or for any other purpose of civilian population of or in occupied territory, ...

Crimes Against Humanity: namely ... deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

Criminal liability of the state itself is being considered by the International Law Commission under the topic "state responsibility". Under Part One, draft Articles have been provisionally adopted concerning the origin of international responsibility⁽¹⁾. Article 19 of the Draft provides that all breaches of international obligations are internationally wrongful acts. However, breach of an international obligation "so essential for the protection of fundamental interests of the international community that its breach is recognised by the community as a whole" is an "international crime", for which draft Articles provide for remedies such as reparations and reprisals and other countermeasures. But development of state criminal liability is a controversial matter for the future. At present only the crime of genocide imposes liability on Contracting Parties to the Genocide Convention (General Assembly res 260A(111), 9 December 1948) to take action to punish persons involved. Population transfer could, depending upon the facts, constitute genocide. Article 11 provides:

" In the present 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: ...

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ..."

1. See Yearbook of the I.L.C., 1980, Vol. II (Part II), pp. 26-63, document A/35/10, chap. XXI.

It has been suggested that one major series of deportations, namely those of ethnic Germans following the 1945 Potsdam Agreement, were lawful. The principle, put forward by Brownlie, is that where a war of sanction, or enforcement action authorised by a competent organ of the United Nations, results in the final defeat and occupation of the aggressor state and there are measures of security designed to remove the possibility of a recurrence of aggression, there is not a regime of normal belligerent occupation and the Occupying Powers may make basic changes in the structure of government and the political life of the country⁽²⁾. In a subsequent work Brownlie continued that

" The movement of ethnic Germans by the Potsdam Agreement may be justified as part of the sanctions and measures of security imposed by the principal members of a coalition which had fought a lawful war of collective defence against Nazi Germany".⁽³⁾

Since 1945 there have been major developments in human rights law, which would certainly invalidate such a policy applied after creation of the UN. Furthermore, the formulation of the Geneva Conventions and Additional Protocols do not recognise the existence of such an exception. I submit that even in 1945 it was as unlawful for the Allied powers or some of them to deport Germans (and indeed Hungarians, Poles and other Central European population groups) as it was for Germany to deport groups.

In the past such matters have been settled by Treaties by both victors and vanquished. Two problems in particular arise: the first is changes in nationality where there is a change of sovereignty, either with a new or with reversion to an older regime; and the second is relocation of populations. The law is as uncertain so far as concerns nationality as it is regarding population transfer. The leading authority on state succession,

1. International Law and the Use of Force, p. 406.

2. Principles of Public International Law, Oxford, 4th ed., p. 561.
See also Oppenheim, vol. II, p. 604.

Professor D.P.O' Connell, has pointed out that

"The effect or change of sovereignty upon the nationality of the inhabitants of absorbed territories is one of the most difficult problems in the law of state succession."⁽¹⁾

Latitude is left to successor states to establish their own municipal nationality law, provided they do not claim as nationals persons they are not entitled to exercise jurisdiction over by reason of insufficiency of any link. What international law does not do is to dictate to successor states whether they should retain inhabitants as nationals. To a limited extent international law has plugged this gap by the Convention on the reduction of statelessness (General Assembly Res. 896 (IX), 4 December 1954). Article 9 provides that "a Contracting state may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds". But not all states are parties. It may be that in future the international minimum standard for treatment of aliens will develop to give them greater protection.

Actual or
implied
"State Succession"
See p. 25

As said earlier, nationality arrangements have been made by treaties, especially the series of treaties after World War I, which conferred options to elect for citizenship of various successor states. A distinctive feature of Turkey's nationality policy, as residual state of the dismembered Ottoman Empire, was her insistence, relying on the option provisions, that Turks be repatriated to Turkey. This policy was pursued in earlier treaties with Greece at the end of the Balkan Wars and with Great Britain under the Treaty of Lausanne Article 21.⁽²⁾

1. State succession in Municipal Law and International Law, Cambridge, 1967, Vol. I, p. 497.

2. British documents reveal that the Colonial Office obstructed Turkish repatriation and considered "the presence of the Turkish community [in Cyprus] is an asset from a political standpoint." CO 67/227/39536-Minute to No. 154, Nicholson to Amery, May 8, 1929, cited in G.S. Georgiades, A Political and Administrative History of Cyprus 1910-1936, Nicosia, 1979, p.413.

There was no question of insistence in any Treaties that settlers be required to return to their ancestral nation states, unless they took up the option of such citizenship and then sought to remain in the new State in which they were resident. In those circumstances Poland was held entitled to return Germans to Prussia.

These difficulties raise questions as to the effect of passage of time and the possibility of acquisition of rights by prescription. Where settlers have come in peacefully under an overtly lawful regime and been in peaceful possession for, say 30 years, the equivalent of longi temporis praescriptio seems analogous. Alternatively, it can be said that they have a territorial link, almost a territorial status. There must, on humanitarian grounds, be a time when settlers and their descendants are not liable to deportation, even if their initial immigration was facilitated by an unlawful occupation. However, their personal knowledge would be relevant: persons who knowingly come to a newly-occupied country to provide technical services or to make their fortunes do not deserve special protection against being repatriated upon the occupation ending.

Until there is international agreement on the consequences of international crimes and delicts, i.e. whether they are void, voidable or valid, there will be great uncertainty. On principle it can be said that criminal procedures should result in justice to victims, reparation, deterrence against repetition and punishment. It is now for the International Law Commission to examine these matters further. The Special Rapporteur has already indicated limits on countermeasures, including reprisals and reparation, such as

"the prohibition of force, respect for human rights, inviolability of protected persons [i.e. under occupation] and relevance of jus cogens and erga omnes obligations"⁽³⁾

1. Yearbook 1991, G.A. O.R. 46th session, Suppl. No.10, (A/46/10), p. 327.

Proportionality is obviously another aspect.⁽¹⁾ So is the need for prior invocation of dispute settlement procedures⁽²⁾; those are particularly appropriate, as the State which effected the settlement will have duties of caring for its own nationals and can best rehabilitate them.

Included among the human rights factors, when dealing with settlers, would be any potential right to asylum, the duty not to increase statelessness, the duty not to act arbitrarily,⁽³⁾ especially as a change of sovereignty carries with it responsibility. There is also a procedural duty to give due consideration to claims to stay in the country and to maintain family ties. Equally there is the duty not to discriminate - even though the International Convention on the Elimination of All Forms of Racial Discrimination 1966 Article 2 expressly saves the rights of States to exclude aliens and to end ~~to~~ their stay. Under the European Convention Fourth Protocol para.4, collective expulsions are also unlawful.

Last, any successor State must have respect for the human rights of all within their jurisdiction - especially if that State is a member of the Council of Europe, bound by article 1 of the European Convention on Human Rights.

1. Ibid., 331.

2. Yearbook 1989, (A/44/10) p. 218, quotes Draft Article 4, which subjects the consequences of a wrongful act to the provisions of the UN Charter relating to the maintenance of international peace and security.

3. "Arbitrary interference" with family is prohibited by Article 17 of the Political and Civil Rights Covenant. This wording leaves the Human Rights Committee a large interpretative role.

There are, nonetheless, strong countervailing arguments against permitting legalisation of the stay of unlawfully implanted settlers¹. Certainly too, it cannot be accepted that the absolute right of all refugees to return to their homes should be denied for "security" reasons and because of the practical difficulties of implementation following their return.

If illegal settlers en bloc or in very large numbers were to be given the right of staying after restoration of the sovereignty of the injured Power, this would then be tantamount to condonation of a grave war crime and a crime against humanity. It would be an incentive to aggressive Powers to create faits accomplis in the certain knowledge that the settlement would ultimately be legalised once the imported civilian population had de facto been present for any length of time. Indeed, the "settling" power would be aware that the lawful government, when restored to power, would be incompetent to restore the status quo ante and demographic balance.

Moreover, it can be strongly argued that to accord rights of stay to wrongfully implanted settlers en masse would be the equivalent of allowing indirect violation of the relevant international rules. This would be participated in by the revived sovereign state. It will be recollected that Additional Protocol I to the Geneva Conventions, Article 86, requires the Parties to the conflict to repress grave breaches of the convention (such as population transfer by an Occupying Power). Furthermore, by Article 1

" The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances".

1. I am indebted to Mr. L.C. Loucaides, jurist and Cypriot member of the European Commission on Human Rights for having given me sight of his article on "The Legal Aspects of the Problem of the Turkish Settlers in Cyprus".

To condone and give effect to the wrongful consequences of a grave breach of the Protocol and Fourth Convention would thus be unlawful. It is absurd to contend that the successor/reviving state should simultaneously be subject to two conflicting sets of duties: to repress grave war crimes and to allow implanted settlers to remain, as well as agreeing that its own subjects, who have been made refugees, should not be permitted to return to their own homes in safety. The State cannot simultaneously maintain its obligations under the Protocol and Fourth Convention and be prevented from expelling settlers and required to countenance non-return of refugees. Such an interpretation would lead to an illegal result. Accordingly, the Convention and Protocol should be interpreted so as to give meaning to their terms in their context and in the light of their object and purpose⁽¹⁾. It is also arguable that the Geneva convention is a lex specialis superior to other Treaty obligations, even other human rights obligations. Arguably the Geneva Convention, read with Protocol I, is jus cogens, because of the High Contracting Parties' undertakings to respect the Protocol in every instance and its subject matter⁽²⁾.

Either way, settlers, as aliens, will have no automatic right to remain in the new/revived State and state discretion will have to be exercised concerning their stay or exclusion, taking into account the factors outlined earlier.

1. Article 31.1 of the Vienna Convention on the Law of Treaties 1980.

2. Schwartzberger, International Law, Vol. II, p. 458.

III. Tentative Submissions

(1928-1945)

1. In the case of historic population transfers, subject only to any exercisable right of external self-determination, population transfers should not be subject to invalidation - certainly not after the relevant state has become a United Nations member with its territorial integrity and existing self-determination unit being recognised. Thus, for example, in former colonies of settlement, the settler population has the right to remain e.g. in Latin America, Australia, South Africa, and Israel within its 1948 boundaries - possibly, subject to a peace settlement, in its 1949 cease-fire boundaries, while the continuance of the Turkish Cypriots, settled in Cyprus by firmans of the Ottoman Sultans between 1571 and 1800, as Cypriots has never been questioned.

1928-1945

Belgian

2. Population transfers effected since 1939, in course of war or belligerent occupation, are illegal. Accordingly,

1939-1945

(i) Those expelled have a right of return, should they elect to exercise it; and

(ii) Those settled do not have a right to remain, although they have the right to be considered for possible permission to stay as aliens or even to be considered for conferment of citizenship.

3. Population transfers in non-international armed conflicts will, as the law now stands, only be unlawful if the state is a party to Additional Protocol 1, or the particular transfer is contrary to international customary law, being in violation of human rights by reason of constituting a gross and consistent pattern of

violations of human rights, or being systematically discriminatory, or being in violation of self-determination, or being genocidal in intent and effect.

4. Those who have unlawfully been settled must

- (a) be the subject of negotiations between the states concerned in peaceful dispute settlement procedures, with prime responsibility resting on the "settling" Power, which may well have forcibly implanted the settlers, given financial incentives, or demobilised its army in the occupied territory and made land grants to discharged military personnel - as in Turkish-occupied Cyprus;
- (b) be treated with humanity;
- (c) not be discriminated against, except specifically and narrowly on grounds of non-citizenship where the law so provides;
- (d) be dealt with without arbitrariness, with due regard being paid to relevant considerations affecting their human rights, such as their family situation and privacy, especially taking account of any intermarriage with persons from the local population and whether any children of the family have been born in the State of settlement and are entitled to citizenship on jus soli principles;
- (e) be considered, not collectively, but on an individual basis (even though this will admittedly cause practical problems) under any discretion exercisable under immigration law of the new/revived State, while giving due weight to the settlers' knowledge and intent at the time of their settlement;

- (f) be granted asylum in necessary cases;
- (g) not be made stateless. This difficulty will probably relate only to one-time third-party nationals, because most settlers will be nationals, and remain such, of the "settling" state or one of its successors in the event of a dismembered federation, as in the case of the U.S.S.R. Indeed, responsibility voluntarily to agree to repatriation in the short-term will rest on the settling state and in the long-term responsibility to receive the expelled alien will in any case of expulsion rest on the state of which such alien settler is a national.
5. In dealing with the outcome of population transfers, it must always be a background consideration, that, where the transfer is unlawful, for example, having occurred under belligerent occupation or in circumstances where the 1949 Geneva Conventions and 1977 Protocols are binding, grave crimes have been committed. Faits accomplis should not be encouraged by adoption of an international attitude that because of humane considerations settlers, who are the instruments of the illegality, will lightly be permitted to remain after a return to legality. Accordingly, the special conditions of the entry and stay of any settlers must always be borne in mind. In contrast, the position of deportees (i. e., persons earlier expelled by the occupying Power) is not so problematic. Deportees' / refugees' rights of return should be inviolable. Indeed, for the state of which deportees are nationals, and which will be acting as agent on their behalf to enforce their rights by diplomatic means, to negotiate these away in any settlement would be contrary to their human rights.

6. Every encouragement should be given

- (i) to governments, who are due by 1 January 1993 to submit to the UN Secretary-General any comments or observations on the "Draft Code of Crimes against the Peace and Security of Mankind", to support the International Law Commission's Draft;
- (ii) to the International Law Commission to continue its work on draft Articles on "State responsibility" and to present a complete draft as soon as possible;
- (iii) to the UN General Assembly to initiate action to draft a declaration on the principles of International Law, including Human Rights Law, Applicable in Armed conflicts whether within or Between States, with the objective of a convention ultimately being derived from such a declaration; and
- (iv) to the U.N. Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to keep the matter under consideration and to authorise an extensive study of the questions involved in population transfers. In such study it might be appropriate for two special Rapporteurs to co-operate, with one concentrating on the criminal and human rights aspects, and the other concentrating on environmental and developmental aspects, with their work being co-ordinated and inter-related.

Claire Palley.

3 January, 1992.