READING POPULATION TRANSFER IN INTERNATIONAL HUMAN RIGHTS LAW, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW THROUGH THE PRINCIPLE OF HUMANITY

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Reading Population Transfer in International Human Rights Law, International Humanitarian Law and International Criminal Law through the Principle of Humanity

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Résumé

Le transfert de population est la cause et la conséquence de plusieurs conflits armés. Il comprend le déplacement arbitraire de la population, le transfert de colons ainsi que le confinement des civiles en temps de guerre. Le transfert de population est un crime en droit international des droits de l'homme, en droit international humanitaire et en droit pénal international. Néanmoins, il est encore considéré comme une solution aux problèmes de minorités et aux conflits 'ethniques'. Cette thèse étudie comment le crime de transfert de population est défini, interprété et appliqué en droit international et par les tribunaux régionaux et internationaux et la communauté internationale selon l'État de droit.

Mots-clés: Déplacement forcé, déplacement arbitraire, transfert forcé de population, déportation, expulsion de masse, colons, colonisation, autodétermination, conflits de droit, droit pénal international, droit international humanitaire, droit international des droits de l'homme, état de droit, dignité humaine.

Abstract

Population transfer is a cause and consequence of armed conflict. It entails the arbitrary displacement of the population, the implantation of settlers and unlawful confinement. It is a violation of international human rights law and international humanitarian law and a crime in international criminal law. Yet, it is still considered a solution to minority and 'ethnic' problems. Using the rule of law as theoretical framework, this thesis assesses how the crime of population transfer is defined, interpreted and applied under international law and by regional and international courts as well as by the international community.

Keywords: Forced displacement, arbitrary displacement, population transfer, deportation, mass expulsion, settlers, colonization, self-determination, conflicting rights, international criminal law, international humanitarian law, international human rights law, rule of law, human dignity.

Aux victimes.

À Klara, Adam et Basem.

À ma mère.

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GENERAL INTRODUCTION – WHY POPULATION TRANSFER?

> *No. It wasn't the choice of anyone. [...]They decided about what would happen with us. They decided we had to leave and in what way. All that story of free choice is absurd viewed in those circumstances. Basically, throughout the war we had no choice.*[1]

> *If everything is done in a proper way – justice is served and compensation is granted – then the people can go back and live again in that area.*[2]

The names of these people will not be familiar to most readers because they are unknown. We don't know their names because they are victims of population transfer. Yet, their voice has been heard which allows me to cite them here.

Whatever you choose to name it, deportation, population transfer, forced displacement, or arbitrary displacement is an attack on human dignity.[3] Population transfer strikes at our sense of belonging: an individual, a family, a community, a people, and to what we hold dear: a home, a land, a culture and traditions. Being uprooted from what makes sense to humans attest to the frailty of life's dignity. Lorna Fox O'Mahony and James Sweeney put forward the "premise that it is a necessary aspect of human existence that, at the most basic level, everyone must exist in some relationship with place and either with a meaningful connection to home; or, in the absence of such a meaningful connection, in a state of alienation."[4] In his separate opinion in *Moiwana*, Judge Cançado Trindade cited Simone Weil who wrote on being rooted as "perhaps the most important and least recognized necessity of the human soul" and one of

[1] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 647 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[2] *Moiwana Community v Suriname* (2005), Judgement, Inter-Am Ct HR (Ser C), No 124 at para 80.
[3] *Note*: Although I speak of deportation and population transfer and sometimes forced displacement, I contend that they are one and the same crime. Hence, both deportation and population transfer are the same crime. The only distinction between the two is that deportation occurs across international frontiers whereas forcible population transfer takes place within a state or territory. For ease of reading, I will employ the term population transfer although I sometimes use deportation or forced displacement interchangeably.
[4] Lorna Fox O'Mahony and James Sweeney, "The Idea of Home in Law: Displacement and Dispossession" in Lorna Fox O'Mahony and James Sweeney, eds, *The Idea of Home in Law, Displacement and Dispossession*, (Burlington: Ashgate e-Book, 2011) at 4, 8.

the "most difficult to define".[5] Hannah Arendt also warned against "the sufferings of the uprooted (the loss of home and familiarity of day-to-day life, the loss of profession and the feeling of usefulness to the others, the loss of the mother-tongue as a spontaneous expression of the sentiments)" and against the illusion of "trying to forget the past (given the influence exerted over each one by his ancestors, the previous generations)."[6] For Judge Cançado Trindade, uprootedness is a human rights problem challenging the "universal juridical conscience."[7] Protecting human dignity is the main reason why we should care about population transfer.

This viewpoint on humanity and human dignity, the purpose and structure of law, inhabits my study of population transfer in international human rights, international humanitarian law and international criminal law. I thus propose a study of population transfer that transcends legal regimes in an attempt to better understand the crime and evaluate the international response to situations of population transfer. My main assumptions are that the practice of transferring populations is in need of a more cogent definition across legal regimes and that the international response largely fails to ensure respect for the rule of law and protect victims of the crime.

1. For an internatonal response that better protects against population transfer

War is omnipotent in international law and in international relations and remains a much fashionable political means.[8] The transfer of population is a cause, mean, and consequence of warfare and, strangely enough, in some circumstances, an alleged condition of 'peacemaking'.

[5] S. Weil, *The Need for Roots* (London: Routledge, 1952) at 41 cited in *Moiwana Community v Suriname* (2005), Judgement, Separate Opinion of Judge A.A. Cançado Trindade, Inter-Am Ct HR (Ser C), No 124 at para 14.
[6] Hanna Arendt, *La tradition cachée* (Paris: Ch Bourgois, 1987) at 58-59 cited *Moiwana Community v Suriname* (2005), Judgement, Separate Opinion of Judge A.A. Cançado Trindade, *ibid*.
[7] *Moiwana Community v Suriname*, Judgment, Separate Opinion of Judge A.A. Cançado Trindade, *ibid* at para 15.
[8] Dominique Gaurier, *Histoire du droit international, de l'Antiquité à la création de l'ONU* (Rennes: Presses universitaires de Rennes, 2014) at 37.

The international legal response to conflict needs to address the injustice that is population transfer and to protect victims embroiled in conflicts. Out of the 54 million persons of concern to UNHCR in 2014[9] and of the 5 million Palestine refugees registered with UNRWA's[10], a significant number are likely victims of the crime of population transfer. Both the concepts of refugees and internally displaced persons attest to this reality. The definitions of refugee and internally displaced person[11] are constructed on the premise that people are displaced because they fled persecution and other serious violations of human rights and international humanitarian law.[12] This means that beyond statuses and labels, people's displacement need to be examined to determine whether displaced persons are victims of the crime of population transfer. Because if one is unable to identify and determine whether population transfer takes place, one is unable to take the necessary legal actions to prevent, stop and undo it and, ultimately to ensure accountability and reparation to victims. In other words, one is unable to carry out the universal obligation to protect[13] and ensure respect with fundamental provisions of international law.

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[9] UNHCR, Global Report 2014, Online: http://www.unhcr.org/5575a7840.html

[10] UNRWA, Palestine Refugees, Online: http://www.unrwa.org/palestine-refugees

[11] IDPs "are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border." Francis Deng, *Report of the Representative of the Secretary-General, submitted pursuant to Commission resolution 1997/39, Addendum: Guiding Principles on Internal Displacement*, UNHRC, E/CN.4/1998/53/Add.2 (1998) at introduction, para 2.

[12] A refugee is a person who: "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." *Convention Relating to the Status of Refugees* (28 July 1951)189 UNTS 137 (entry into force 22 April 1954) at Art 1 (A)(2). Reiterating the definition of the 1951 Refugee Convention, the African Convention adds to its definition of refugee a person who: "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")* (10 September 1969), 1001 UNTS 45 (entry into force 20 June 1974) at Art 1(2). The 1984 *Cartagena Declaration* also broadens the definition of refugees: "the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order." *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, (22 November 1984) at para 3.

[13] On the concept of protection as *erga omnes*, read: *Dominican Republic Case. Case of Haitian and Haitian-Origin Dominican Persons in the Dominican Republic (Provisional Measures Requested by the Inter-American*

It is therefore imperative that displacement be not only conceived as a humanitarian problem, which it is, but also as a violation of international human rights, international humanitarian law and international criminal law to which a comprehensive legal response respecting the rule of law is required. There is a growing and widespread recognition that the international legal response must address the root cause of humanitarian crisis.[14] UNHCR for instance recognizes the importance of "addressing the factors that trigger mass movements of populations" and calls upon states to "give greater priority to dealing with root causes" and to "use appropriate means at their disposal, in the context of their foreign, security, trade, development and investment policies, to influence developments in refugee-producing countries."[15] However, reponses that address the responsibility of refugee inducing states and their accomplice are politically sensitive and remain the exception.

In 1992, the Unrepresented Nations and Peoples Organisation (UNPO) Conference on Human Rights Dimensions of Population Transfer "criticized the lack of effective action with respect to [population transfer] by the UN and other international organizations."[16] I believe this criticism to be valid twenty five years later. Hence the question: Is the current international legal response to victims of the crime of population transfer respecting the rule of law? Are the legal guarantees afforded by the prohibition of population transfer in international human rights, humanitarian and criminal law defined and implemented in a manner that respects the rule of law by national, regional and international courts and the United Nations? No. I submit the international legal response to the crime of population transfer does not respect the rule of law. This is attributable to two main factors, namely, (i) the lack of a comprehensive systemic conceptualisation and interpretation of the crime of population transfer across relevant international legal regimes; and, (ii) a politicized international response at odd with the rule of law.

Commission on Human Rights), (2000), Provisional Measures, Concurring opinion of Judge A.A. Cançado Trindade, Inter-Am Ct HR at para 10.

[14] Michèle Morel, Maria Stavropoulou & Jean-François Durieux, "The history and status of the right not to be displaced" (2012) 41 Forced Migration Review at 8.

[15] See UNHCR, *Agenda for Protection*, 3rd ed (UNHCR, 2003) at 11, 40.

[16] Unrepresented Nations and Peoples Organization (UNPO), *UNPO Conference Report, Human Rights Dimensions of Population Transfer, held in Tallinn, Estonia January 11-13* (1992) at 3.

First, and as will become clear throughout this thesis, the definitions and interpretations of population transfer and related terms are unclear, contradictory and inconsistent within and across international human rights law, international humanitarian law and international criminal law. As Emily Haslam rightly puts it "the absence of a single international instrument on population transfer leads to overlap, inaccessibility, and disparity in the level of protection available to victims of different forms of population transfer."[17] As a result, the law on deportation and population transfer is blurry, unstable through time. While the crime of population transfer is crucial to addressing unlawful displacement in time of war, it is neither clear nor well understood by politicians, practitioners as well as jurists and judges providing the political, humanitarian and legal responses to unlawful displacement.[18] Grant Dawson and Sonia Farber came to a similar conclusion and affirmed that "in spite of the international community's recognition that forcible displacement constitutes a pervasive problem, the challenge of defining the dimensions of the problem and its root causes − let alone its eradication − has thus far proved difficult."[19] The confusion may stem from the lack of an authoritative definition of population transfer under international law,[20] the absence of a right to stay and to rapid, but parallel developments of the law on population transfer in international law, namely in human rights law and in international criminal law.

The law of population transfer is a product of international law found in international human rights, international humanitarian law and international criminal law. Each legal regimes

[17] Emily Haslam, "Population Expulsion and Transfer," Max Planck Encyclopedia of Public International Law (Oxford University Press, 2013) at para 27, Online: www.mpepil.com.
[18] Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff: 2012) at 115; "Although many national laws have introduced the crime of forced displacement, the reality is that, in general, national judges, prosecutors, and judicial investigators are not very experienced in dealing with the crime, particularly in terms of criminal investigations." Frederico Andreu-Guzmán, "Criminal Justice and Forced Displacement: International and National Perspectives" in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) at 233, 247, 249.
[19] Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 44.
[20] "The foregoing analysis shows that there is no authoritative definition of deportation." *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para 16 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); "Forcible displacement, on the other hand, is still a crime in search of a definition upon which everyone agrees." Grant Dawson and Sonia Farber, *ibid* at 68.

developed its own terminology and interpretations throughout the years. And although these three branches of international law interoperate when it comes to population transfer and related practices, since they build meaning on each other's definitions and interpretations, none of their conceptualisation has yet made consensus. As a result, their relationship remains complex, as will be seen in Chapter I, II and III of Part II. But all three legal regimes aim to protect human dignity and increasingly converge conceptually and to some extent, in judicial decisions. In their own merits, they bring relevant considerations to understanding the crime of population transfer. As a result, there is flourishing, sometimes imbricated or parallel developments of the crime of deportation and population transfer under various international legal regimes and jurisdictions that require uniformization to better protect victims. Needed, therefore, is a cogent conception of population transfer as unlawful under international law − one that will transcend international human rights, international humanitarian and international criminal law and respect the rule of law both interpretatively and practically.

To this end, I contend the rule of law requires a 'defragmented approach' or systemic approach to the three relevant fields of law in their treatment of population transfer as a violation of the right to stay. Only if taken together can the three relevant international legal regimes capture the meanings, manifestations and legal implications of population transfer. And only a comprehensive reading of the law surrounding population transfer in these legal regimes can ensure conformity with the rule of law.[21] Integrating relevant law into legal reasoning is also encapsulated in the doctrine of treaty parallelism, which calls for a coordinated reading of treaties and their treatment in a "mutually supportive light".[22] As explained in the report of the International Law Commission on the fragmentation of international law:

> The point is only − but it is a key point − that the normative environment cannot be ignored and that when interpreting the treaties, the principle of integration should be borne in mind. This points to the need to carry out the interpretation so as to see the rules in view of some comprehensible and

[21] More generally, see Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006); On the interplay between humanitarian and other 'human' branches of international law, notably IHL, refugee law and IHRL see Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 7-14.

[22] See for instance: Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess, UNGAOR, UN Doc A/CN.4/L.682 (2006) at 210.

> coherent objective, to prioritize concerns that are more important at the cost of less important objectives. [23]

Hence, a study of population transfer in international law must follow the principle of systemic integration. Again, the report of the ILC is informative in its conclusions on the principle of systemic integration as defined in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*:

> All international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction −endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment − that is to say "other" international law. This is the principle of systemic integration to which article 31 (3) (c) VCLT gives expression.[24]

In other words, what matters to the conception of population transfer is not so much the definitions found in each individual regime of international law, but their synergy and the core values they all defend − i.e., human dignity, as will be further discussed in Chapter I of Part I. Simply put, where conceptualisation, interpretation or application creates a protection gap by leaving victims in limbo, it fails to protect human dignity and to uphold the rule of law. Quite logically, only greater respect for the rule of law can fill these protection gaps. Grant Dawson and Sonia Farber similarly concluded that "it may be that any approach that is too specialised will carry with it inherent flaws, whereas a comprehensive and consistent understanding of forcible displacement may be a more successful strategy for combating the crime."[25] More generally, Hans-Peter Gasser goes along the same lines:

> International criminal law, human rights law and international humanitarian law have different origins. They have developed each their own way − up to a certain point. Today, these domains meet together. Their principal legal instruments

[23] Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi *ibid* at 211.
[24] "Without the principle of "systemic integration" it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or "regime"." Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi *ibid* at 212-213, 243-244.
[25] Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 116.

> must be read in conjunction with each other. Opting out of one of them [...] throws doubt over the commitment to respect the other domains.[26]

Thus my focus on understanding the different manifestations of population transfer, surrounding concepts and interpretations and extracting conceptual commonalities in order to devise a progressive, in the sense of its victim protection orientation, comprehensive and flexible understanding of the crime of population transfer applicable to relevant national, regional and international institutions.

An analysis of case law demonstrates the adequacy of a purposive or evolutive approach to the interpretation of international law.[27] Although we cannot identify a definate single legislative will behind international law, I contend that the law on population transfer must be construed, read and interpreted as a way to protect the dignity of people, as individuals and as a collective. Indeed,

> if legal reasoning is understood as a purposive activity, then it follows that it should be seen not merely as a mechanic application of apparently random rules, decisions or behavioural patterns but as the operation of a whole that is directed toward some human objective. [...] Much legal interpretation is geared to linking an unclear rule to a purpose and thus, by showing its position within some system, to providing a justification for applying it in one way rather than in another.[28]

Interpretating international human rights law and international humanitarian law "should be directed at serving protective goals and avoid paralyzing the legal process."[29] Indeed a purposive approach interprets international human rights and humanitarian law as a mean to protect human dignity and eschews technical and overly formalistic interpretation. In a nutshell, the reading of the law of population transfer I propose aims to ensure effective

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[26] Hans-Peter Gasser, "The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 1117; Statement at the International Association of Refugee Law Judges World Conference, Stockholm, 21-23 April 2005, by Emanuela-Chiara Gillard cited in ICRC "Humanitarian Law, Human Rights and Refugee Law – Three Pillars", *Statement* (23 April 2005) Online: http://www.icrc.org/eng/resources/documents/misc/6t7g86.htm.

[27] See Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 12th ed (Paris: Dalloz, 2012) at 354, 357; See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion [1971] ICJ Rep 16 at paras 128 at 31.

[28] Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess, UNGAOR, UN Doc A/CN.4/L.682 (2006) at 23.

[29] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 35.

protection of victims through greater respect for the rule of law and the steering principle of human dignity.

The second deficiency undermining the treatment of the crime of population transfer stems from a growing, but insufficient access to courts by victims; stymied enforcement of UN and judicial decisions affecting law's effectiveness; and, unequal handling of similar cases by the UN and courts. Limited access, uneven compliance and differentiated treatment of similar cases affect the right to justice of victims, in particular their right to reparation and remedy. All this can largely be attributed to the tension between law and politics. The gap between international law and the reality within which it evolves is not new and the response to the crime of forcible population transfer is not immune to it.[30] As Theodor Meron suggests, "humanization may have triumphed, but largely rhetorically."[31] This is something that should be kept in mind, particularly when reading the case studies of Chapter II of Part III and the analysis of *faits accomplis* in Chapter IV of Part III. Thus the gap between normativity and actuality is real in the midst of hostilities as much as it is in higher diplomatic spheres.

The resulting double-standard means that the law on population transfer is not applied to member states of the international community equally, because power still determines whether, to whom and how the law is to be applied. This is particularly true when transfer is or has become the *de facto* 'chosen' political solution to conflicts. In a situation where the wrongful act continues, the international law on state responsibility requires states to "cooperate to bring to an end through lawful means any serious breach" and not to "recognize as lawful the situation created by a serious breach."[32] In these circumstances, however, statal responses remain largely dictated by extraneous considerations of power and *realpolitiks*. Moreover, the rule of law is undermined by the lack of enforcement measures against states who refuse to

[30] Oscar Schachter, *International Law in Theory and Practice*, Vol 13 (Dordrecht: Martinus Nijhoff, 1991); Diane F. Orentlicher, "Universal Jurisdiction: A Pragmatic Strategy in Pursuit of a Moralist's Vision" in Leila Nadya Sadat & Micheal P. Scharf, eds, *The Theory and Practice of International Criminal Law, Essays in Honor of M. Cherif Bassiouni* (Leiden: Martinus Nijhoff, 2008).
[31] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 86.
[32] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), ILC 53rd Sess, UNGAOR, UN Doc A/56/10, II:2 Yearbook of the International Law Commission at Art 41 at 17, 113.

comply with judicial decisions, again contradicting states' obligations.[33] Political will and *realpolitik* calculus cannot be underestimated. Consequently, effectiveness is lacking because the law on population transfer is in tension with politics, which unfortunately perpetuates the belief that international law, or law itself is not an effective framework to the conduct and resolution of war.

Another obstacle to the legal response to population transfer may be found in the 'fragmentation' of the law or what could otherwise be termed competing legal orders or frames of references.[34] This occurs notably when there is 'competition' between national and international legal orders resulting in the selective or non-enforcement of the norm. Such 'competition' may be explained by the different perspective or reference frame of courts. As Martti Koskenniemi explains, "the choice of the relevant language ('frame of reference') − whether the normative field is seen in terms of 'human rights' or, for example, 'economic development' or 'national security' − reflects upon a prior political decision independent of the language finally chosen, often having to do with which authority should have the competence to deal with a matter."[35] Hence, the choice of the relevant field of law explain largely the decision of judges, which in the case of population transfer in time of war is often between national self-defence/security and the protection of civilians/human rights. This conflict occurs especially when more than one court provides judicial decisions, each grounded in a different

[33] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGAOR, UN Res 60/147 (2005) at part IX, para 17.

[34] "Some commentators have been highly critical of what they have seen as the erosion of general international law, emergence of conflicting jurisprudence, forum-shopping and loss of legal security. Others have seen here a merely technical problem that has emerged naturally with the increase of international legal activity may be controlled by the use of technical streamlining and coordination. [....] In this regard, the fragmentation of the substance of international law - the object of this study - does not pose any very serious danger to legal practice. It is as normal a part of legal reasoning to link rules and rule-systems to each other, as it is to separate them and to establish relations of priority and hierarchy among them. The emergence of new "branches" of the law, novel types of treaties or clusters of treaties is a feature of the social complexity of a globalizing world." [....] "In an analogous fashion, the emergence of conflicting rules and overlapping legal regimes will undoubtedly create problems of coordination at the international level. But - and this is the second main conclusion of this report - no homogenous, hierarchical meta-system is realistically available to do away with such problems. International law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions. In order for it to do this successfully, increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions." Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess, UNGAOR, UN Doc A/CN.4/L.682 (2006) at 11-12, 114-115, 249.

[35] Martti Koskenniemi**,** *The Politics of International Law* (Oxford: Hart, 2011) at 140-142.

legal referential frame, as is apparent in the study of rulings pertaining to population transfer in Chapter III of Part III.

Divergent interpretations also expose the legitimacy struggle unfolding within and in between legal orders, to the detriment of the international legal order. Enforcement depends not so much on the 'correct' or 'best' legal interpretation, but on effective control of the situation on the ground, resulting in a legal stalemate reverberating the political one.

Lack of access to justice by victims of transfer also undermines the response. Although this point will not be developed in this thesis, it is worth pointing out that individuals and non-states actors do not have access to international courts, which restricts the likelihood that situations of population transfer be brought to justice, states being unlikely to bring difficult case against each other. Seeking justice at the international level is not really an option for victims and civil society since the system is still not open to them. In addition, few victims access regional courts whereas foreign national courts remain suspicious of victim-driven proceedings often involving contentious conflicts. Yet, states should ensure that their domestic systems are consistent with their international legal obligation by, among other things, "adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice."[36] In fact, states have the "obligation to respect, ensure respect and implement" IHRL and IHL, including to provide "equal and effective access to justice."[37] The main obligation of the perpetrator is to provide remedies and reparation to the person displaced as a result of population transfer.

Cognizant of the unfavorable context pertaining to acces to justice for victims, I nevertheless submit that victims are part of the solution to improve the international legal response and, ultimately, to uphold the rule of law. While enforcement remains largely the realm of states, victims of war crimes and crimes against humanity, civil society and lawyers increasingly

[36] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGAOR, UN Res 60/147 (2005) at part I, 2(b).
[37] *Basic Principles and Guidelines on the Right to a Remedy and Reparation, ibid* at part II, 3(c).

require justice through the enforcement of the law.[38] By seeking the application of international norms relating to population transfer in foreign national and regional courts, where the rule of law (including procedural justice) is most mature, victims and civil society contribute to a rights-based response to serious violations of international law.

I believe victims can make a concrete difference on the international legal response in a context where "the rest of the world is not proactively concerned."[39] This is attributable to the nature of cases brought by victims and civil society, who raise issues that would otherwise not be undertaken by state-initiated proceedings. Engaged in proceedings against their perpetrators, victims may want "to gain social recognition, to seek justice, to benefit from reparations, to influence public opinion, to highlight the guilt of perpetrators."[40] The legal system slowly but surely sends the message to victims partaking in the procedure that they are recognized members of the international society. Victims' actions are not inherently politicized, nor do their actions amount to the pejorative expression that is 'forum shopping'; merely are they attempting to have the rule of law extended to them, because they too want the protection that purports to offer international human rights and humanitarian law.

In this sense, "the universalisation of the Rule of Law calls for the realisation of criminal responsibility in the international as in the domestic sphere. In the liberal image, there should

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[38] See Frédéric Mégret, "Le droit international peut-il être un droit de résistance? Dix conditions pour un renouveau de l'ambition normative internationale"(2007) Social Science Research Network at 4, Online: http://ssrn.com/abstract=1212542; Yuval Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary " (2009) 20:1 The European Journal of International Law 73 at 79, 84; International Federation for Human Rights (FIDH) & REDRESS, *Universal Jurisdiction Developments: January 2006 - May 2009*, Draft update, NGO report, (2009), at 1; "On the thirty-seven cases addressed in this report, progress was made in more than twelve cases, while in five other cases, individuals were found guilty of having participated in the 1994 genocide in Rwanda. In the twelve countries addressed, thirty-one cases are still ongoing,
involving nineteen charges of genocide, fifteen charges of crimes against humanity and eight charges of war crimes." Valérie Paulet, *Universal Jurisdiction Annual Review 2015, Make Way for Justice* (FIDH, TRIAL & ECCHR) at 3, 49-51, Online: https://www.fidh.org/IMG/pdf/trial-ecchr-fidh_uj_annual_review_2014-2.pdf

[39] Jeremy Levitt, "Conflict Prevention, Management, and Resolution: Africa−Regional Strategies for the Prevention of Displacement and Protection of Displaced Persons: The Cases of the OAU, ECOWAS, SADC, and IGAD" (2001) 20:1 Refugee Survey Quarterly 156 at 190.

[40] Valerie M. Meredith, "Victim Identity and Respect for Human Dignity: A Terminological Analysis" (2009) 91:874 International Review of the Red Cross 259 at 261; Jo-Anne Wemmers, "Where Do They Belong? Giving Victims a Place in the Criminal Justice Process" (2009) 20 Criminal Law Forum 395 at 401.

be no outside-of-law: everyone, regardless of formal position, should be accountable for their deeds."[41] The fear of politicizing domestic courts should not prevent judges from being more 'friendly' to victim-led initiatives, especially in foreign national courts where international law is increasingly being applied, albeit timidely. True, some conflicts are highly polemic and divisive and far removed from foreign national courts which constitutes a challenge for them. But as law becomes more globalized, so must national courts. It has been argued that the globalization of law signals the beginning of the "emergence of a universal legal system", where merged is the line between the national and the international frontier.[42] Greater access by victims and civil society to foreign national and regional courts following the incorporation of the principle of universal jurisdiction or provisions of international law into national and regional legal systems attest that such changes have begun.

Actions taken by victims and civil society 'open up' international law as a means of resistance against population transfer and other serious violations of international law. As Antony Anghie wrote "international law can be transformed into a means by which the marginalized may be empowered [...] law can play its ideal role in limiting and resisting power."[43] From this perspective, the victim, as an individual and member of civil society, is a subject of international law and becomes the agent of his own protection.[44] Empowered, the victim is capable of realising its rights and regain a lost dignified life, entitlements fundamental to constructing social justice and rebuilding war torn societies.[45] Struggling to survive, however, many, maybe even the majority of victims, are clearly not in a position to partake in any legal actions. Indeed, a 'victim-led' system is not the panacea to the strengthening of the international legal response. Victims must nevertheless have the capacity and the freedom to choose to

[41] Martti Koskenniemi**,** *The Politics of International Law* (Oxford: Hart, 2011) at 172.
[42] Philip Allott, *Health of Nations, The Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002) at 59; Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 271.
[43] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 318.
[44] "Despite the continuing controversy on whether the individual already is a subject of international law, there is no doubt that he has acquired a status of international law." Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 318.
[45] See Martha C Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice" in Thom Brooks, ed, *The Global Justice Reader* (Singapore: Blackwell Publishing, 2008) at 598.

become an agent of their own protection and of a just solution to armed conflict by acceding judicial mechanisms.

Making states, victims and other non-state actors use and accept international law requires a certain 'belief' in the law, namely that 'the law should and can rule.' As Tamanaha explains in his study of the rule of law, "above all else, for this cultural belief to be viable, people must identify with the law and perceive it as worthy of ruling."[46] But for such a belief to take hold, especially in war torn societies, law must prove it is effective, tangible and capable of making a difference on the ground. If attempts by victims and civil society are perceived to be unjustly rejected or remain unenforced, international law risks losing its appeal and may leave victims with armed resistance as the only remaining option to protect and enforce their rights. As Yves Sandoz succintly put it,

> to have a truly preventive effect, the punishment of war criminals should be broadly perceived first as impartial and independent of political pressures; second as part of a coherent system of international sanctions; and third as in accordance with a general sense of justice. These conditions are today far from being perfectly met and therefore have to be considered as ongoing challenges rather than achievements.[47]

Indeed, effective protection of human dignity and of the dignity of victims requires accountability, coherence and predictability, as well as justice.

2. Population transfer is not a solution to conflict

Emer de Vattel, deemed a founder of the concept of sovereignty, is known for having vested power into one political body representative of the people and transposed sovereignty "from the internal plane to the international plane".[48] Writing on the transfer of territories, Vattel took

[46] Brian Z Tamanaha, "A Concise Guide to the Rule of Law" (2007), St-John's University, School of Law, Legal Studies research Paper No. 07-0082 at 14, Online: http://ssrn.com/paper=1012051.
[47] Yves Sandoz, "International Penal Law and International Humanitarian Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 1062.
[48] Stéphane Beaulac, "Vattel's Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America" (2003) 63:4 Louisiana Law Review 1327 at 1331, 1333, 1337.

the stance that such transfer required the "express and unanimous consent of the citizens"[49] arguing that a nation, which he used synonymously with the state, had the duty to protect its members "who joined the society for the purpose of being members of it – they submit to the authority of the state, for the purpose of promoting in concert their common welfare and safety, and not of being at its disposal, like a farm or an [sic] herd cattle."[50] Unless there was a case of necessity calling for the preservation of the state, a state ought not to abandon its members.[51]

In 1758, Vattel also directly addressed population transfer in relation to sovereignty in two ways. Vattel conceived voluntary transfer as part of the right to emigrate, such as through voluntary population exchange. He argued that the right to emigrate "may be derived from some treaty made with a foreign power, by which a sovereign has promised to leave full liberty to those of his subjects, who, for a certain reason − on account of religion, for instance − desire to transplant themselves into the territories of that power."[52] Vattel also defined involuntary population transfer as an unlawful means to change the demographic composition of a territory. As he reasoned,

> whoever agrees that robbery is a crime, and that we are not allowed to take forcible possession of our neighbour's property, will acknowledge, without any other proof, that no nation has a right to expel another people from the country they inhabit, in order to settle in it herself.[53]

Vattel's position on voluntary and involuntary transfers still reverberates among academics, jurists, politicians and decision-makers today. It is in fact a progressive stance, considering that involuntary transfers were upheld numerous times since he wrote these thoughts over 250 years ago, and continue to be advocated as a tool of statecraft.

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[49] Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereign*, translated by J Chitty (Johnson Law Booksellers, 1863) at 31 cited in Stéphane Beaulac, *ibid* at 1343.
[50] Emer de Vattel, *ibid* at 118 in Stéphane Beaulac, *ibid* at 1344.
[51] Stéphane Beaulac, *ibid* at 1344.
[52] Emer de Vattel, *Law of Nations; or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Philadelphia: T & J.W. Johnson & Co, 1863) at 105.
[53] Emer de Vattel, *ibid* at 168.

By the end of the nineteenth century, population transfer came to be used as an instrument of nation-state formation in Europe.[54] Leaders used the principle of nationality, the idea that territory and nation should be congruent[55] in "regions with heterogeneous populations and where emerging nation-states were defined along narrow and exclusive ethno-linguistic lines."[56] The concept of population transfer as the idea that homogeneous nation-state could and should be crafted by exchanging minority populations is attributed to George Montandon, who appears to be the first to use the expression in an article published in *Frontières nationales* in 1915.[57] In search of the criteria that will establish stable frontiers, he proposes national frontiers for nations, which he defines according to Topinard in the following: "Issue du hasard des évènements, plus encore que de la disposition géographique des lieux, la nation s'affirme par la communauté des intérêts, des souffrances et des gloires; les coeurs battant à l'unisson d'un bout à l'autre du territoire en sont la caractéristique."[58] To ensure long term stability along national borders, he suggests the following : "après la fixation d'une frontière (si possible) naturelle, *par la **transplantation massive**, au-delà de la frontière, des non-nationaux (ou de ceux que l'on décrète tels), puis par l'interdiction du droit de propriété ou même du droit de séjour pour les étrangers dans les provinces-frontières."*[59] This expression of the principle of nationality was considered necessary before nations could establish confederations and cooperation.

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[54] James Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, Vol 8 (Leiden: Martinus Nijhoff, 2007) at 87-90; See Christa Meindersma, "Population Exchanges: International Law and State Practice - Part 1" (1997) 9:3 International Journal of Refugee Law 335 at 342; Jennifer Jackson Preece, "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms" (1998) 20 Human Rights Quarterly 817 at 824.

[55] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc. E/CN.4/Sub.2/1997/23 (1997) at paras 19-21; James Summers, *ibid* at 107; see also Matthew Frank, *Expelling the Germans, British Opinion and Post-1945 Population Transfer in Context* (Oxford: Oxford University Press, 2008) at 15.

[56] Matthew Frank, *ibid* at 15; Heather Rae, *State Identities and the Homogenisation of Peoples. Cambridge Studies in International Relations*, Vol 84 (Cambridge: Cambridge University Press, 2002) at 49; James Summers, *ibid* at 10, 21.

[57] George Montandon, *Frontières nationales: Détermination objective de la condition primordial nécessaire à l'obtention d'une paix durable* (Lausanne, 1916).

[58] George Montandon, *ibid* at 7.

[59] [Emphasis in original] George Montandon, *ibid* at 9.

This idea, as was summed up by Robert RedSlob in 1931, "ce n'est pas conformer l'État à la nation, mais adapter la nation à l'État."[60] As was further explained, this transfer can be total or partial and can affect the whole or part of inhabitants with an anational character in the form of voluntary or compulsory migration.[61] Although open to the idea of 'voluntary' transfer, Robert RedSlob made a vivid and valid pleading against compulsory (involuntary) transfers worth quoting in full:

> La transplantation forcé d'une peuple ne peut être approuvée parce qu'elle est en contradiction avec un droit primordial. Certes, la migration obligatoire se met au service d'une cause utile, elle crée l'unité nationale dans le cadre politique existant, elle rassemble en une vie commune les membres épars d'une même famille. Ce procédé réalise ainsi l'État unique et homogène que les conationaux postulent au nom du principe de l'autodétermination collective; il le réalise par des moyens mécaniques. Mais, en le constituant, il sacrifie un autre bien suprême que l'homme revendique au nom d'un droit non moins sacré : ce bien, c'est la terre. Elle aussi, la terre, est l'objet d'une revendication initiale qui plonge ses racines dans des croyances de justice. Il est un droit à la terre, c'est un droit de l'homme. Or, à regarder le fond des choses, le droit de l'homme est de la même famille que le droit des nationalités. Tout deux procèdent d'une même croyance : l'autodétermination. Il n'y a entre eux qu'une différence de style : le droit de l'homme incarnant l'autodétermination individuelle, le droit des nationalités l'autodétermination collective. Il s'ensuit que l'échange forcé n'est pas une solution, mais un simple déplacement du problème. […] C'est là que gît la contradiction de cette méthode. On satisfait à un axiome de justice, mais on viole une autre liberté qui lui est connexe. […] On statue, de par une sentence autoritaire, que la nationalité pèse plus lourd que l'attachement au sol.[62]

As a solution to compulsory transfer somewhat aligned with Vattel, he recommended the implementation of the right of option to allow individuals and communities to choose their state of nationality.[63]

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[60] Robert RedSlob, "Le principe des nationalités" (1931) 37 Recueil des cours 1 at 42.
[61] Robert RedSlob, *ibid*.
[62] Robert RedSlob, *ibid* at 45-46.
[63] "Tandis que naguère, il ne portait que sur le citoyen qui se trouvait détaché de son État par une cession territoriale, il prévoit aujourd'hui qu'un homme établi dans un pays quelconque et voyant se constituer un nouvel État qui répond à ses aspirations ethniques aura le droit de s'y rallier et de se démettre à cet effet de l'allégeance qui le lie, soit à l'État cédant, soit à quelque État qui lui est assimilé». Robert RedSlob, *ibid* at 47-48.

As it becomes clear, the project of the modern nation-state is built as an "exclusive moral community from which the outsider must be expelled."[64] Catriona Drew similarly opined that population transfer is the "untold story of the right to self-determination" because unwanted groups within the self-determination unit are expelled while groups remaining are protected as minorities[65] More precisely, she sees "the international legal history of self-determination as one inextricably, yet irreconcilably, bound up with proposals for, and policies and practices of, population transfer." [66] This is because population transfer allows the un-mixing of populations, in particular minorities, considered a source of pacification for intra and inter-state conflicts[67] and their regrouping into racially constructed homogenized national majorities necessary to the nation-state.[68] As A.S. Al-Khasawneh and R. Hatano concluded in their study on the human rights dimensions of population transfer, "one present deficiency in the law lies in the fundamental ideological assumption that nation and State are congruent concepts."[69] People are thus displaced because they do not belong or are a threat to the dominant 'racial', 'ethnic' or 'national' group.[70] Their displacement becomes the means to building the state envisioned. From this perspective, population transfer can be said to be "politically motivated

[64] Heather Rae, *State Identities and the Homogenisation of Peoples,* Vol 84 (Cambridge: Cambridge University Press, 2002) at 3.
[65] Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (Doctor of Philosophy Thesis, London School of Economics and Political Science, University of London, Law, 2005) [Unpublished].
[66] Catriona Janet Drew, *ibid* at 14.
[67] See Christa Meindersma, "Population Exchanges: International Law and State Practice - Part 1" (1997) 9:3 International Journal of Refugee Law 335 at 340, 346; Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics 159; Chaloka Beyani, "A Political and Legal Analysis of the Problem of the Return of Forcibly Transferred Populations" (1997) 16:3 Refugee Survey Quarterly 1.
[68] Jennifer Jackson Preece, "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms" (1998) 20 Human Rights Quarterly 817 at 820.
[69] AS Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc. E/CN.4/Sub.2/1993/17 (1993) at para 365.
[70] Ethnic group and racial group are used interchangeably. Both terms are constructed and dynamic identities developed as a result of perceived common cultural, economic, national, religious, or biological traits and as a result of the projected or imposed image(s) of the other(s.) The term 'ethnic group' is defined by Max Weber as "those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization and migration; this belief must be important for group formation; furthermore it does not matter whether an objective blood relationship exists." Max Weber, *Economy and Society*, Guenther Roth & Claus Wittich, eds, (Berkeley: University of California Press, 1978) at 389.

and often rooted in racism."[71] Indeed, persons thus displaced are victims of conflicts where the primary goal is the pursuit of a 'pure' and homogeneous nation-state.[72]

Human rights law was born in part to prevent transfers, such as those that took place between the 16th and the 18th century as a result of religious intolerance.[73] Nevertheless, both voluntary and involuntary population transfer agreements gained notoriety as a way for states to evade the system of minority protection developed at the beginning of the 20th century.[74] There is an estimated twenty population transfer treaties between 1913 and 1945, which by the beginning of the 1950s was still considered an acceptable, albeit exceptional, solution to most members of the Institut de Droit International.[75]

The debates of the Institut de Droit International that took place in 1951 following the report of Giorgio Balladore Pallieri on international population transfers illustrates the polemy inherent to the transfer of populations in international law. Members of the Institut took very different stances on the lawfulness, feasibility and desirability of population transfer. These contradictory points of views result primarily from one's assessment of individual human rights against state interests and broader concerns for peace and international public order.[76] Essentially, it is about whether the individual is an object or a subject of international law. Briefly put, if involuntary and voluntary transfers are allowed, the invidiual is considerd an

[71] Unrepresented Nations and Peoples Organization (UNPO), *UNPO Conference Report, Human Rights Dimensions of Population Transfer, held in Tallinn, Estonia January 11-13* (1992) at 7; See generally, Joseph Schechla, "Ideological Roots of Population Transfer" (1993) 14:2 Third World Quarterly 239.
[72] Sergio Vieira de Mello, "Forcible Population Transfer and 'Ethnic Cleansing" (1997) 16:3 Refugee Survey Quarterly vi.
[73] Max Hubert and M Walter Schätzel, "Transferts Internationaux de Populations" (1952) 44 Annuaire de l'Institut de Droit International at 165, 182-183.
[74] Dominique Gaurier, *Histoire du droit international, de l'Antiquité à la création de l'ONU* (Rennes: Presses universitaires de Rennes, 2014) at 1074.
[75] The Rapporteur Giorgio Balladore Pallieri "concluded, with the logic of an ethnic cleanser, that there was nothing in international law to oppose the legitimacy of population transfers and that they were even, in certain circumstances, desirable. They were the consequences of the legitimate desire of all modern states to have loyal citizens, he said." William A Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (2003-2004) 3 European Yearbook of Minority Issues 109 at 118.
[76] See F van Asbeck, "Transferts Internationaux de Populations" (1952) 44 Annuaire de l'Institut de Droit International at 156.

object, whereas if they are forbidden altogether, the individual is considered a full subject.[77] In this regard, the position taken by Herbet Kraus resounds throughout the work of this thesis:

> Il faut trancher la question de savoir si, en cas de contradiction avec les intérêts spéciaux de l'État […] ou bien avec les intérêts communs des États […], les intérêts de l'humanité prévalent ou doivent au contraire passer après les deux autres espèces d'intérêt.
>
> Du point de vue juridique, on peut formuler cela de la manière suivant : Quel est l'ordre hiérarchique des trois espèces de droit, à savoir des droits de l'homme, des droits particuliers des États, et des droits communs des États […] dans leurs rapports mutuels?
>
> À mon avis, ce sont les droits de l'homme qui occupent le premier rang. L'État et la communauté des États […] existent pour les hommes, et non pas les hommes pour eux. Protéger et favoriser les biens humains […] est une tâche imposée à l'État; c'est pourquoi l'État […] agit en quelque sorte comme un fidéicommissaire de l'humanité, quand il protège les biens humains. C'est la conception de la *dignité humaine* […] qui embrasse tous ces biens. Il en résulte comme conséquence *positive* le droit à la protection et au développement de la personnalité de l'homme par tous les États, comme conséquence *négative* l'interdiction du traitement des hommes comme des choses.[78]

Thoroughly against all forms of population transfer is Georges Scelle, who argued it was in contradiction with the evolution of international law, notably naturalization, nationality options, plesbiscite, and self-determination.[79] Most jurists recognized that population transfers took place in time of war or at the end of war and as a result of governmental policies.[80] This may explain why the majority of members, including members who were supportive of transfers, seriously questioned the voluntariness of transfers, when they did not acknowledged outright it was a legal fiction.[81] For instance, Georges Scelle was adamant when he wrote that "il n'y a pas de "transfert" volontaire: les deux termes sont contradictoires. Le transfert est collectif ; ce qui est volontaire ne peut être qu'individuel. Il s'agit en ce dernier cas d' "établissement" libre, à l'intérieur d'un État ou dans un État étranger, d'option de nationalité, d'émigration, de naturalisation, etc…"[82]

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[77] See for instance, Max Hubert, *ibid* at 167.
[78] [Italic in original] Herbert Kraus, *ibid* at 170-171.
[79] Georges Scelle, *ibid* at 177.
[80] See F van Asbeck, *ibid* at 153.
[81] See F van Asbeck, Max Hubert, Herbert Kraus, Georges Scelle, Walter Schätzel, Fernand De Visscher, *ibid* at 156, 165, 172, 178, 181, 188.
[82] Georges Scelle, *ibid* at 180.

In truth, history shows that many agreements served to 'legalize' *faits accomplis* which would otherwise be unlawful.[83] For instance, the 1919 *Convention on Reciprocal Voluntary Emigration* regulated the exchange of populations between Greece and Bulgaria, although people came under pressure to relocate shedding doubts on the voluntariness of the transfer.[84] The oft cited *Convention Concerning the Exchange of Greeks and Turkish Populations* in 1923 is the first convention on compulsory transfer.[85] This internationally sanctioned forcible transfer is explained as follows by the League of Nations High Commissioner for Refugees, Dr. Nansen: "the governments of the Great Powers are in favor of this proposal because they believe that to unmix the populations will tend to secure the true pacification of the Near East."[86] It is this *Convention*, more than any others, that reinforced the belief in "orderly and humane" transfers.[87] The *Convention* was perceived as having achieved "ethnic homogeneity, economic development, interstate relations, and international cooperation."[88] Analysing the precedent created by the Greek-Turkish population exchange, Alfred De Zayas concludes

> This compulsory population exchange was not seen by the international community as the brutal uprooting of hundreds of thousands of persons from their homelands; instead it was hailed by many as a legal measure intended to bring peace on the basis of an international treaty and under the auspices of the League of Nations. Thus, State interests were given priority over human rights and mass expulsions gained international respectability as a legitimate solution of demographic problems; in fact, the principle of compulsory population transfers was seen by many as a panacea, a final solution to the troublesome minority problem. [...] Thus, a too optimistic appraisal of the results of the Greek-Turkish population exchange under the Convention of Lausanne led both the politicians and world public opinion to exhibit a peculiar euphoria over the conceptual simplicity of the solution.[89]

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[83] See for instance Matthew Frank, *Expelling the Germans, British Opinion and Post-1945 Population Transfer in Context* (Oxford: Oxford University Press, 2008) at 17.
[84] See Jennifer Jackson Preece, "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms" (1998) 20 Human Rights Quarterly 817 at 824.
[85] *Convention Concerning the Exchange of Greek and Turkish Populations*, 30 January 1923, 32 LNTS 76.
[86] Christa Meindersma, "Population Exchanges: International Law and State Practice - Part 1" (1997) 9:3 International Journal of Refugee Law 335 at 340.
[87] Jennifer Jackson Preece, "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms" (1998) 20 Human Rights Quarterly 817.
[88] Matthew Frank, *Expelling the Germans, British Opinion and Post-1945 Population Transfer in Context* (Oxford: Oxford University Press, 2008) at 23.
[89] Alfred de Zayas, "A Historical Survey of Twentieth Century Expulsions" in Anna C Bramwell, ed, *Refugees in the Age of Total War* (London: Unwin Hyman, 1988) 14 at 20; Arguing the exchange of minorities between Greece and Turkey was the final stage in the disintegration of the Ottoman Empire and a galvanizing force in

Population transfer was deemed a rational and surgical solution to minority problems,[90] to preserve internal stability and external security.[91] For Umut Özsu the population-exchange mechanism was distinctive because "it marked a departure both from the practice of introducing protective instruments for minorities."[92] Overall, state interest were prioritized over the interest of humanity[93] and the rights of individuals.

Population transfer was incremental to Nazism during World War II[94] and continued to shape the post-WWII order. Invoking the principle of nationalities and of racial ideals, Hitler said the most important was the establishment of a "new order of ethnographical conditions, that is to say, resettlement of nationalities" to obtain "better dividing lines."[95] Despite transfer being defined as a war crime and crime against humanity in the *Charter of the International Military Tribunal*, the 1945 *Potsdam Protocol* allowed population transfer, providing a "mantle of legality" over the compulsory transfer of German minorities from Poland, Czechoslovakia and Hungary who believed the Germans had been accomplice.[96] As a result, over 14 million

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legally formalized nation-building, see Umut Özsu, *Formalizing Displacement, International Law and Population Transfer* (Oxford: Oxford University Press, 2015) at 5, 7, 11.

[90] Matthew Frank, *Expelling the Germans, British Opinion and Post-1945 Population Transfer in Context* (Oxford: Oxford University Press, 2008) at 15, 27, 32.

[91] Stefan Wolff, "Can forced population transfers resolve self-determination conflicts? A European perspective" (2004) 12:1 Journal of Contemporary European Studies 11 at 13.

[92] Umut Özsu, *Formalizing Displacement, International Law and Population Transfer* (Oxford: Oxford University Press, 2015) at 15, 21.

[93] Alfred de Zayas, "International Law and Mass Population Transfers" (1975) 16 Harvard International Law Journal at 223.

[94] Joseph B Schechtmann, "The Option Clause in the Reich's Treaties on the Transfer of Population" (1944) 38 American Journal of Internatonal Law 356 at 357; Deportation took place on a massive scale as part of the Nazi programmes of extermination of the Jews, Poles, Gypsies and others, of slave labour and of annexation and expansion for 'vital space' (Lebensraum). Close to 6 million Jews were murdered and between 5 and 7 million civilians (Indictment 44) were forcibly transferred to Germany as slave labour, where many perished. See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol 1, Nuernberg, October 1946-April 1949 (Washington: US Government Printing Office), Indictment at 40, 44, 51 and Case 7 at 789, 798 and 808, Online: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-I.pdf
See also Alfred de Zayas, "The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia" (1995) 6 Criminal Law Forum 2 at 264.

[95] Hitler's speech of Oct 6th, 1939 quoted from the authorized English translation cited in Joseph B Schechtmann, *ibid* at 356.

[96] Alfred de Zayas, "Ethnic Cleansing 1945 and Today: Observations on Its Illegality and Implications" Pittsburg lecture, published in Steven Vardy and T Hunt Tooley, eds, *Ethnic Cleansing in 20th Century Europe* (Boulder: Social Science Monograph, 2003) at 788; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 57.

Germans were expelled from Poland, Czechoslovakia, Hungary, as well as from Yugoslavia and Romania with the acquiescence of the United States, France, Great Britain and the Soviet Union. As Alfred de Zayas rightfully pointed out in relation to the post-War German expulsions, "at issue is the problem of the limits of the sovereignty of a state and the validity of the positivistic argument that an action is legal merely because it is ordered by sovereign authority."[97] Bilateral transfer agreements regarding national minorities were also carried out in 1946 between Czechoslovakia and Hungary, Hungary and Yugoslavia, Yugoslavia and Italy, the Soviet Union and Poland, and the Soviet Union and Czechoslovakia.[98] This succinct survey of population transfer agreements attest that most European nation-states are the product, at least partially, of population transfer.

Population transfer also shaped the decolonisation era. For instance, when India was partitioned in 1947 resulting in the creation of Pakistan, over 12 million Hindus, Sikhs and Muslims were displaced and approximately 2 million died during formal population exchanges and spontaneous flight.[99] The *New Delhi Accord* between India and Pakistan was "merely a formal recognition of a fait accompli, not as evidence of the use of law to enforce transfer."[100] Partition was the "unacknowledged underside of partition."[101]

Despite the cristalization of the crime of population transfer in international humanitarian law and international criminal law in the 20th century, debates remain open among jurists, historians and political scientists as to whether international population transfer is a means to protect human rights and resolve armed conflict. As Domique Gaurier wrote in his review of

[97] Alfred de Zayas, "International Law and Mass Population Transfers" (1975) 16 Harvard International Law Journal at 230.
[98] Andrew Bell-Fialkoff, "A Brief History of Ethnic Cleansing" (1993) 17 *Foreign Affairs* 1 at 115 cited in Alfred de Zayas, *ibid* at 819, 829; For a review of population transfers in Europe and during and after WWII, see Stefan Wolff, "Can forced population transfers resolve self-determination conflicts? A European perspective" (2004) 12:1 Journal of Contemporary European Studies 11 at 17-24.
[99] Barbara Metcalf and Thomas R. Metcalf, *A Concise History of Modern India* (Cambridge: Cambridge University Press, 2006) at xxxiii, 372; AS Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at para 141.
[100] See AS Al-Khasawneh & R. Hatano, *ibid* at para 141.
[101] See Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [Unpublished] at 189.

the history of international law, "ce que l'on peut constater est que, si la morale s'oppose sans nul doute à de tels transferts, les considérations politiques peuvent cependant inciter à les envisager, dès lors que les irrédentismes ethniques sont tels qu'ils sont un obstacle majeur au maintien de la paix."[102] Proposals for transfer as a solution to conflict abound, especially when the national and international authorities fail to protect fundamental rights, leaving the reality of *faits accomplis* dictate the peace.[103] Advocates of population transfers are proponents of partition because they contend that 'ethnic separation' is the only solution providing security to conflicts involving "ethnic groups."[104] In a BBC radio programme entitled 'ethnic divorce', the presenter asked: "does [ethnic cleansing] actually solve problems?"[105] Chaim Kaufmann is adamant: "to save lives threatened by genocide, the international community must abandon attempts to restore war-torn multi-ethnic states. Instead, it must facilitate and protect population movements to create *true* national homelands."[106] One could certainly wonder whether a *true* national homeland exists since national identity is a perpetual construction. But adherents of Kauffman's position believe that "orderly and humane" population exchanges are feasible and invoke the Greek-Turkish compulsory population transfer in 1923[107] as proof. From their perspective, international human rights law has not contributed to peace, but in fact undermined the potential for population exchange to become a peacemaking tool.[108] In other terms, paramount is not the rights of people expelled or transferred but the easiest route to 'peace' and 'security'.

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[102] Dominique Gaurier, *Histoire du droit international, de l'Antiquité à la création de l'ONU* (Rennes: Presses universitaires de Rennes, 2014) at 1074.

[103] For the position that transfer or exchange is the main solution, see for instance, Joseph Schecthman, *Population Transfers in Asia* (New York: Hallsby Press, 1949); See also, "Israeli FM Lieberman's UN Speech 'not cleared with PM', *BBC News Online*, 28 September 2010. Online: http://www.bbc.co.uk/news/world-middle-east-11429959; Donna E Arzt and Karen Zughaib, "Return to the Negotiated Lands: The Likelihood and Legality of a Population Transfer Between Israel and a Future Palestinian State" (1991-1992) New York Journal of International Law and Politics 1400 at 1511; Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 263, 267.

[104] Jan Tullberg & Birgitta S. Tullberg, "Separation or Unity? A Model for Solving Ethnic Conflicts" (1997) 16:2 Politics and the Life Sciences 237.

[105] BBC Radio Transcript, 'Ethnic Divorce'*, BBC transcript of radio documentary*, Radio 4, London, broadcasted on 15 April 2004.

[106] [Emphasis added] Chaim Kaufmann, "Possible and Impossible Solutions to Ethnic Civil Wars" (1996) 20:4 International Security at 136; See also Chaim D. Kaufmann, "When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century" (1998) 23:2 International Security at 120.

[107] See Chaim Kaufmann, "Possible and Impossible Solutions to Ethnic Civil Wars", *ibid* at 171.

[108] Micheal William Anthony Dark, *Population Exchange and Peacemaking* (Doctor of Philosophy Thesis, Princeton University, 2005) [Unpublished].

Discussions as to whether population transfer is a solution inevitably involves the competing conceptions of national identity, varying from the civic identity in a multicultural state to the 'ethno' national identity in a uni-cultural state.[109]Proponents of population transfer as the least bad solution, including 'voluntary' transfer, indirectly support the homogeneous nation-state, an idea that contradicts human rights law and ideals of equality, human dignity and tolerance as well as multiculturalism. The idea that a nation can live without others migrating or immigrating into their realm is not supported by history. [110] But the myth of the nation-state is what it is, a myth. Even European states which emerged as 'cleansed' after 1945 are heterogeneous again.[111] States cannot remain 'pure'. There might be resistance to migration, as history attests, but population movement is as much part of history as is resistance to it. Brendan O'Leary summed up the choice of multicultural or multiethnic states; they either manage differences or they seek to eliminate them through genocide, mass expulsion, population transfer, partition or forced assimilation.[112] It could therefore be said that voluntary population transfer upholds the homogenous nation-state while the prohibition of population transfer upholds the cosmopolitan multicultural state. The biggest impediment to the protection of people's right to stay is therefore ideological.

I argue population transfer floats among solutions envisaged to resolved conflicts, in part, because lawful (that is, voluntary) population transfer subsists in international law. Although Jean-Marie Henckaerts concedes that "no rule of international law prohibits an exchange conditioned on the voluntary departure of people", he is quick to add that "most instances of population exchange operate, however, under the pretext of voluntary migration, but are in fact compulsory. Population exchange is then nothing short of a mass expulsion and is unlawful."[113] The idea that population transfer is lawful when voluntary is perhaps the most important loophole in the law of population transfer, a legacy of the principle of nationality grounded on state interest which is further addressed in Part II. Suffice it to say for now that this is where I

[109] Jennifer Jackson Preece, "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms" (1998) 20 Human Rights Quarterly 817 at 840.
[110] Benny Morris (guest), Ethnic Divorce, *Transcript of a Recorded Documentary, BBC Radio 4*, London, Andrew Brown (presenter), broadcasted on 4 April 2004, Tape No PLN414/04VT1015.
[111] Eric Hobsbawm (guest), Ethnic Divorce, *ibid*.
[112] Brendan O'Leary (guest), Ethnic Divorce, *ibid*.
[113] Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 123.

depart from the international law of population transfer and call for the exclusion of voluntary transfer as a lawful practice under international law.

Implementing the right of return of displaced and dispossessed persons is similarly considered to jeopardize the peace by confronting the "security of separation".[114] But can there ever be security for the collective through a policy of exclusion and separation founded on a breach of fundamental rights? There is indeed a conscious choice made by leaders and decision-makers to forego the rights of individuals for the sake of a more easily achievable peace and stability aligned with the interests of the state. This raises the difficult equilibrium between peace and justice, indeed, how much justice can be compromised for peace to remain just.

In the context of war, pro-transfer position reduces 'peace' to the acceptance of *faits accomplis*; the product of war crimes and crimes against humanity.[115] As Christa Meindersma and A. Arakelian maintain, "to retain the idea of population exchanges as potential solutions to conflicts undermines attempts to prevent human rights violations as a root cause of generating large-scale displacement."[116] As a solution, it victimises the victim and reinforces the philosophy of ethnic hatred, revenge and intolerance. What's more, it contravenes the founding principles of the international community, namely the principle of humanity and human dignity; undermines the capability and credibility of the international community to ensure compliance with its norms, public order and the rule of law; and, rewards through impunity the perpetrators of serious violations of international law.[117] As Stefan Wolff concludes from a study of population transfers in Europe, "while it may achieve ethnically homogenous states, it intensifies problems in other areas, such as the expelling state's economy and its bilateral relations with the receiving state. In other words, contrary to proclaimed goals, internal stability may be endangered and external security diminished."[118] To sum it up thus far:

[114] Carl Dhalman & Gearoid O Tuathail, "The Legacy of Ethnic Cleansing: The International Community and the Returns Process in Post-Dayton Bosnia-Herzegovina" (2005) 24 Political Geography 569 at 578.
[115] Christa Meindersma & A Arakelian, *Human Rights Concerns in Situations of Population Transfers and Population Exchanges: Case Studies and Recommendations*, UNHCR, (1994), at 108.
[116] *Ibid* at executive summary.
[117] *Ibid* at 120.
[118] Stefan Wolff, "Can forced population transfers resolve self-determination conflicts? A European perspective" (2004) 12:1 Journal of Contemporary European Studies 11 at 25.

population transfer as a solution is giving in to the law of the strongest, as opposed to the rule of law.

PART I

CHAPTER ONE - THE RULE OF LAW AS LEGAL FRAMEWORK

The rule of law is a multi-faceted[119] and legitimating ideal;[120] essentially a contested concept[121] with an elastic meaning [122] subject to a "*surcharge de significations*" and mythic characteristic.[123] Frankly, it is hard to define. Or at least, is it hard to find or provide a consensual definition. This difficulty is attributable to the nature of the rule of law, which is not only about law, but about the relationships between law, politics and economics and how these should rein in power and how it relates to society. Indeed, the rule of law is "most commonly associated with a political ideal about how governance by law might best proceed."[124] The legitimacy of the state is therefore contingent on judicial elements. But the rule of law means different things depending on one's theoretical outlook, conception of law, political inclination, economic orientation, or simply, depending on the development of society.[125] L'*État de droit*,[126] the Rule of Law and *Rechtsstaat* generally refer to the curtailment of arbitrary power following abuses by monarchies, the patrimonial state or the

[119] Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Georgia Law Review 1 at 5-6.
[120] Brian Z Tamanaha, "A Concise Guide to the Rule of Law" (2007) St-John's University, School of Law, Legal Studies research Paper No. 07-0082 at 19, Online: <http://ssrn.com/paper=1012051>.
[121] Randall Peerenboom, "Varieties of Rule of Law, An Introduction and Provisional Conclusion" in Randall Peerenboom, ed, *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (London: Routledge, 2004) 2.
[122] Mark Ellis, "Toward a Common Ground Definition of the Rules of Law Incorporating Substantive Principles of Justice" (2010-2011) 72 University of Pittsburgh Law Review at 192.
[123] Jacques Chevalier, "L'État de droit" (1988) 104 Revue du droit public et de la science politique 313 at 314-315.
[124] Mark Bennett, 'The Rule of Law" Means Literally What it Says: The Rule of the Law: Fuller and Raz on Formal Legality and the Concept of Law" (2007) 32 Australian Journal of Legal Philosophy 90 at 90.
[125] See Jacques-Yan Morin, "The Rule of Law and the Rechtsstaat Concept" in Edward McWhinney, Jerald Zaslove and Werner Wolf, eds, *Federalism-in-the-Making, Contemporary and German Constitutonalism, National and Transnational* (Doordrecht: Martinus Nijhoff, 1992) at 80.
[126] «Réduit à sa plus simple expression, l'État de droit suppose que la liberté d'action de tous les organs de l'États, à quelque niveau que ce soit, doit être limité par l'existence de normes juridiques supérieures dont le respect est garanti par la saisine éventuelle d'un juge, peu importe qu'il s'agisse de justice constitutionnelle, de justice judiciaire ou de justice administrative." Daniel Mockle, "L'état de droit et la théorie de la *rule of law*" (1994) 35 Cahier de droit 823 at 834.

police state (*Polizeistaat*), but means different things within legal and political litterature and is implemented differently across time and across legal traditions.[127]

In the romano-germanic tradition, the constitution steams from universal concepts, such as liberty and equality, whereas in the English tradition, principles of equity, fairness, natural justice and fundamental justice are induced from the decisions of courts.[128] This has produced a *Rechtsstaat/État de droit* guided by constitutions such as in Germany, France and Canada that are enforced by constitutional courts through the judicial interpretation of constitutional norms, thus reaffirming the primacy of law over parliamentary sovereignty, or a rule of law characterized by the absence of a constitution in England.[129] In England, power, not to say unlimited sovereignty, is vested with Parliament although judges have reaffirmed judicial review.[130] In a sense, the rule of law has quite recenty moved beyond unlimited and discretionary parliamentary sovereignty or l'*État légal*[131] through judicial review by constitutional courts or the integration of supranational law into internal law, among others, but there are still limits to judicial review in time of national crises or conflict for instance.[132]

[127] See Daniel Mockle, *ibid* at 846-847, 850; See Jacques-Yan Morin, "The Rule of Law and the Rechtsstaat Concept" in Edward McWhinney, Jerald Zaslove and Werner Wolf, eds, *Federalism-in-the-Making, Contemporary and German Constitutonalism, National and Transnational* (Doordrecht: Martinus Nijhoff, 1992) at 69-70; Arguing l'État de droit is originally German and on the development of l'*État de droit* in France through administrative law and in Germany, see Jacques Chevalier, "L'État de droit" (1988) 104 Revue du droit public et de la science politique 313 at 329-331.

[128] See Jacques-Yan Morin, *ibid* at 81; See Daniel Mockle, *ibid* at 833

[129] On the increasing constitutional control by Canadian courts, the role of judges, and the decline of the political decline of parliament, See Daniel Mockle, *ibid* at 874, 878-879, 901; On the evolution of the *Rechtsstaat*, which the German Constitutional Court has never defined, see Jacques-Yan Morin, *ibid* at 72-75.

[130] See Jacques-Yan Morin, *ibid* at 62-63, 68; On British parliamentary sovereignty, see Daniel Mockle, *ibid* at 867; Also warning of the contradiction between unlimited parliamentary power to legislate and the rule of law, see Mockle, *ibid* at 841-842, 869. France was under a similar regime, which was defined as *l'État légal*, founded on parliamentary supremacy, not *l'État de droit*. (at 823) This system offered no guarantee against the arbitrary of the legislator. There is still resistance in France to the constitutional control of law. (Daniel Mockle, *ibid* at 853-854, 856, 870.

[131] "L'état légal se rattache à une "conception politique ayant trait à l'organisation fondamentales des pouvoirs" et "tend purement à assurer la suprématie du Corps législatif". Jacques Chevalier, "L'État de droit" (1988) 104 Revue du droit public et de la science politique 313 at 314-315.

[132] See Daniel Mockle, "L'état de droit et la théorie de la *rule of law*" (1994) 35 Cahier de droit 823 at 880, 902-903; See Jacques-Yan Morin, "The Rule of Law and the Rechtsstaat Concept" in Edward McWhinney, Jerald Zaslove and Werner Wolf, eds, *Federalism-in-the-Making, Contemporary and German Constitutonalism, National and Transnational* (Doordrech: Martinus Nijhoff, 1992) at 68; Jacques Chevalier, *ibid* at 327-328.

That said, common elements intersect at some point to form a particular definition of the rule of law through judicial review to curb power and, inspired by liberal ideals, to protect individual rights and freedoms, as well as in the German context, by social justice. [133] The historical developments of the rule of law and of l'*État de droit* in the XIX and XX century have shown it is a socioliberal project.[134] The rule of law, l'*État de droit* and *Rechtsstaat* are linked to social and political dynamics. Elsewhere in the world, including third world countries, the principle of the rule of law must thus be appropriated by internal legal orders to fit the social reality and legal tradition of the place.[135]

Yet, underlying discussions on the rule of law across legal traditions also appears to be the dichotomy between positivist and non-positivist conceptions of law or as law as the product of the state or as anterior and superior to the state.[136] Nevertheless, the rule of law has two core societal functions, which can be summed up as follow: governance by law, not men, to curb arbitrary state power and, the protection of citizens against one another.[137] Put from a different angle by W Leisner, "l'essence de l'État de droit, c'est le normativisme. Ce n'est pas le gouvernement des hommes, c'est le règne des normes."[138] The best description of the different dimensions of the rule of law is given by Jacques Chevalier, which I choose to quote at length because it encapsulates the dicusssion to come:

> D'abord, l'état de droit renvoie à une certaine *conception de l'ordre juridique étatique*: à travers la soumission des gouvernants à la loi, assortie de la garantie d'un recours possible devant un juge indépendant, c'est le principe de la hiérarchie

[133] See Jacques-Yan Morin, *ibid* at 60, 77-78; See Daniel Mockle, *ibid* at 830; "L'État de droit repose en fin de compte sur l'affirmation de la primauté de l'individu dans l'organisation sociale et politique, ce qui entraîne à la fois *l'instrumentalisation de l'État*, dont le but est de servir les libertés, et la subjectivisation du droit, qui dote chacun d'un statut, lui attribue un pouvoir d'exigibilité et lui confère une capacité d'action." Jacques Chevalier, *ibid* at 366.

[134] See Daniel Mockle, *ibid* at 898-899.

[135] See Jacques-Yan Morin, "The Rule of Law and the Rechtsstaat Concept" in Edward McWhinney, Jerald Zaslove and Werner Wolf, eds, *Federalism-in-the-Making, Contemporary and German Constitutonalism, National and Transnational* (Doordrecht: Martinus Nijhoff, 1992) at 84-85.

[136] Jacques Chevalier, "L'État de droit" (1988) 104 Revue du droit public et de la science politique 313 at 348-357.

[137] Jacques Chevalier, *ibid* at 315; Mark Ellis, "Toward a Common Ground Definition of the Rules of Law Incorporating Substantive Principles of Justice" (2010-2011) 72 University of Pittsburgh Law Review at 192; Adriaan Bedner, "An Elementary Approach to the Rule of Law" (2010) 2 Hague Journal on the Rule of Law 1 at 50-51.

[138] W Leisner, "L'État de droit : une contradiction?" *Mélanges Eisenmann* (Cujas, 1974) at 67 cited in Jacques Chevalier, *ibid* at 372.

> des normes qui se trouve posé ; les divers organes de l'État sont tenus au respect des normes supérieures et l'État de droit sera d'autant plus développé que cette dépendance sera mieux assurée. Mais le problème de l'État de droit peut être posé au niveau plus profond de la *soumission de l'État au droit* : il s'agit alors de trouver un principe de limitation subjective ou objective de l'État par le droit, qui interdise toute possibilité d'arbitraire étatique ; la question de l'État de droit devient dès lors indissociable de celle de la nature même de l'État. Enfin, et à un troisième niveau, l'État de droit se caractérise par un certain contenu du droit en vigueur, soustendu par un ensemble de valeurs et de principes visant à assurer aux citoyens des garanties effectives contre l'État : trouvant "son principe, sa fin et sa détermination dans l'individu concret", l'État de droit ne serait réductible à un simple dispositif technique d'aménagement de l'ordre juridique ; et tout progrès dans la défense et la protection des droits de l'homme devrait être assimilé à un renforcement de l'État de droit.[139]

Below is a review of some conceptions of the rule of law and of their commonality. The underlying value of these surveyed conceptions of the rule of law, at least those considered substantive, is the protection of human dignity through notably, individual autonomy, although this is not always explicit.[140] I then define my own conception of the principle from an international perspective, which is necessary given the utilitarian nature of the idea. Increasingly, regional and international law constrain unlimited national parliamentary sovereignty.[141] There is thus an emerging international rule of law, albeit it is safely argued as

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[139] [Italic in original and footnotes omitted] Jacques Chevalier, *ibid* at 317.

[140] In the Canadian context for instance: "The Charter and the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the Charter [….] Dignity has never been recognized by this Court as an independent right but has rather been viewed as finding expression in rights, such as equality, privacy or protection from state compulsion." *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, paras 76-77; "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological empowerment and integrity. Human dignity is harmed by unfair treatment premised on personal traits or circumstances which do not relate to individual needs, capacities, or merits. […] Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society." *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC) at para 59; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 at para 109; *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 145; Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 120; For instance, the German Constitutional Court has indicated a hierarchy of values and "has declared on occacion, when facing conflicts of values, that certain were more fundamental than others, human dignity being the ultimate foundation of the constitutional system." Jacques-Yan Morin, "The Rule of Law and the Rechtsstaat Concept" in Edward McWhinney, Jerald Zaslove and Werner Wolf, eds, *Federalism-in-the-Making, Contemporary and German Constitutonalism, National and Transnational* (Doordrecht: Martinus Nijhoff, 1992) at 78.

[141] See Daniel Mockle, "L'état de droit et la théorie de la *rule of law*" (1994) 35 Cahier de droit 823 at 872.

a formal conception of the rule of law.[142] Mattias Kumm proposes an international rule of law involving the obedience of international law by states, which they should "treat as authoritative and let it guide and constrain their actions."[143]

The evolving international rule of law is characterized by (1) a plurality of legislative authorities at the regional and international level, which curtails unlimited state power in international relations and their relation with individuals and groups under their jurisdiction; (2) developing, although consensual, supranational judicial review in different fields of international law;[144] (3) and, monist states, which have integrated regional and international law into their national legal order as constitutional norms. The international rule of law has, among other things, for purpose to ensure compliance with international law through state responsibility and more generally, accountability for serious violations of international law committed by individual and non-state actors, such as corporations and international organizations. What is also universally appealing in the international rule of law is a legal system aimed at the protection of human dignity or more broadly, the principle of humanity. In other words, states are accountable to humanity, not only to national parliament and their constituents.

1.1 The spectrum of the rule of law

Conceptions of the rule of law are numerous depending on the legal tradition from which they steam and the historical period studied. Within and across Western legal traditions, they are nuanced and can be categorised on a gradient ranging from 'thin to thick'. Definitions of the rule of law are not mutually exclusive; they in fact build into one another. As they thicken, they further constrain the framework within which the political and judicial operate. The main

[142] See Brian Tamaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) at 127 cited in and also discussing an externalized rule of law and an emerging international rule of law, Stéphane Beaulac, "The Rule of Law in International Law Today" in Gianluigi Palombella and Neil Walker, eds, *Relocating the Rule of Law* (Oxford: Hart, 2009) at fn 9 and p 200, 220-221. (Stéphane Beaulac argues from a formal perpective that the process of exernalization relates to the sources of law, legal subjects and compliance." (at 204).
[143] Mattias Kumm, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model" (2003-2004) 44 Virginia Journal of International Law 19 cited in Stéphane Beaulac, *ibid* at 205, fn 48.
[144] See Stéphane Beaulac, *ibid* at 214-215.

'frontier' that separates the 'thin' from the 'thick' version of the rule of law are the dividing issues of human rights and justice, including substantive equality, which are considered 'political goals' – i.e., 'not-law'– by proponents of a 'thin' conception.[145] Brian Tamanaha has identified six main definitions of the rule of law, ranging from the thinnest to the thickest.[146]

'Thin' definitions protect against abuse of power, but not against the abuse enshrined in the law. Formal or a 'thin', conception of the rule of law provides the 'body', 'shell' or structure within which law should be made and applied in order to be valid. The three 'thin' versions identified by Tamanaha are the "rule by law" (law as an instrument of government action); "formal legality" (law as general, prospective, equal, clear and certain); and, "democracy + legality" (consent determines content of law).[147] Most legal theorists have allegedly adopted 'formal legality'.[148] Waldron captures the main goal of a 'thin' conception of the rule of law when he writes that it "is an ideal designed to correct dangers of abuse that arise in general when political power is exercised, not dangers of abuse that arise from law in particular."[149] A minimalist or 'thin' conception of the rule of law is often associated with positivism, "which generally holds that the concept of 'law' should take identification and explanation of systems of legal norms as its focus, and eschews moral evaluation of those systems (leaving such evaluation to moral or political philosophy)."[150]

A founder of the rule of law as formal legality in the Anglo-Saxon legal tradition, Albert Venn Dicey, identified three main components to the rule of law: "(1) to be ruled by law, not by discretionary power, (2) to be equal before the law, private individuals as well as government

[145] See for instance Simon Chesterman, "An International Rule of Law?" (2008) 56 American Journal of Comparative Law 331 at 333.
[146] Brian Z Tamanaha, "A Concise Guide to the Rule of Law" (2007) St-John's University, School of Law, Legal Studies research Paper No. 07-0082, Online: Online: http://ssrn.com/paper=1012051.
[147] Mark Bennett, 'The Rule of Law" Means Literally What it Says: The Rule of the Law: Fuller and Raz on Formal Legality and the Concept of Law" (2007) 32 Australian Journal of Legal Philosophy 90 at 94; Stéphane Beaulac, "An Inquiry into the International Rule of Law" (2007) 14 European University Institute Max Weber Programme Series Working Paper at 5, Online: http://ssrn.com/abstract=1074562.
[148] Tamanaha defines formal legality as "law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms." Brian Z. Tamanaha, "A Concise Guide to the Rule of Law" (2007) St-John's University, School of Law, Legal Studies research Paper No. 07-0082 at 3, Online: Online: http://ssrn.com/paper=1012051; Mark Bennett, *ibid* at 94.
[149] Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Georgia Law Review 1 at 11.
[150] Mark Bennett, 'The Rule of Law" Means Literally What it Says: The Rule of the Law: Fuller and Raz on Formal Legality and the Concept of Law" (2007) 32 Australian Journal of Legal Philosophy 90 at 99-100.

officials, and (3) to be submitted to the general jurisdiction of ordinary courts, the best source of legal protection."[151] This means that "people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong."[152] His main argument is to subject public bodies and officials to ordinary law and the jurisdiction of ordinary courts. [153] Building on Dicey's definition found in *The Morality of Law*, Lon Fuller identifies eight principles that define law. The rule of law means that:

1) Laws and rules must exist;
2) Laws should be promulgated;
3) Laws should not be retroactive;
4) Laws should be written with reasonable clarity;
5) Law must avoid contradictions;
6) Law must not require the impossible;
7) Law must stay constant through time, it should not be changed too frequently;
8) Official action should be congruent with the declared rule.[154]

Nothing in Fuller's definition relates to the content of the law, although he believed his conception would enhance human dignity and to a certain extent, it does.[155] Fuller explained how "law is an enterprise that respects people's dignity as self-determining agents, not a 'one-way projection of authority'."[156] As David Luban explains:

> The point is not that the rule of law is logically incompatible with despotic government or harsh laws. Rather, the point is that the rule of law robs despotism of some of its most characteristic devices, and in this way it is practically incompatible with despotism. Why would repressive governments want to burden themselves by restricting the laws they enact to those permitted by Fuller's

[151] Stéphane Beaulac, "An Inquiry into the International Rule of Law" (2007) 14 European University Institute Max Weber Programme Series Working Paper at 4, Online: http://ssrn.com/abstract=1074562.
[152] Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Georgia Law Review 1 at 6.
[153] See Jacques-Yan Morin, "The Rule of Law and the Rechtsstaat Concept" in Edward McWhinney, Jerald Zaslove and Werner Wolf, eds, *Federalism-in-the-Making, Contemporary and German Constitutonalism, National and Transnational* (Doordrecht: Martinus Nijhoff, 1992) at 64; For a discussion of critics of the theory of Dicey, see Daniel Mockle, "L'état de droit et la théorie de la *rule of law*" (1994) 35 Cahier de droit 823 at 882.
[154] Lon L Fuller, *The Morality of Law* (London: Yale University Press, 1969) at 46-91.
[155] For a discussion of Fuller's definition of the rule of law and effect on human dignity. David Lubman concludes that Fuller's theory does indeed enhance human dignity, but that Fuller's conception is "too thin to be accepted". David Luban, "The Rule of Law and Human Dignity: Re-examining Fuller's Canons" (2010) 2 Hague Journal on the Rule of Law 1 at 32-33.
[156] Lon L Fuller, *The Morality of Law* (London: Yale University Press, 1969) at 207.

> canons? It seems overwhelmingly likely that they would not, because their power to intimidate their subjects would diminish.[157]

Adding to the explanation, Jeremy Waldron sums up Lon Fuller's conception of the rule of law:

> It was not just that he believed that observing them made it much more difficult to do injustice; though this he did believe. It was also because he thought observing the principles he identified was itself a way of respecting human dignity.[158]

In other words, Fuller's conception of the rule of law makes it harder for tyrants and dictators to rule, because they have to follow elements of legality. Fuller believed that political regimes that did not respect his elements of legality where not making law nor were they establishing a legal system. As he wrote,

> To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system … [I]t is not hard for me, at least, to deny it the name of law.[159]

Hence, it could be advanced that legality inherently contributes to protect human dignity.

Also part of the school of 'formal legality', but perhaps more trenchant than Fuller is Joseph Raz who clearly stressed the rule of law must not be "confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man."[160] In other words, unjust laws are still laws. Yet, Joseph Raz later

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[157] David Luban, "The Rule of Law and Human Dignity: Re-examining Fuller's Canons" (2010) 2:1 Hague Journal on the Rule of Law at 40.

[158] [Emphasis added] Jeremy Waldron, "How Law Protects Dignity" (2012) 71:1 The Cambridge Law Journal 200 at 205.

[159] Lon L Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 Harvard Law Review 630 at 650 cited in Mark J. Bennett, "Hart and Raz on the Non-Instrumental Moral Value of the Rule of Law: A Reconsideration" (2011) 30 Law and Philosophy 603 at 606.

[160] Raz also emphasized the importance of institutions and the curtailing of the arbitrary exercise of power. Joseph Raz, "The Rule of Law and its Virtue," (1977) 93 Law Quarterly Review 195 at 196 cited in Mark Ellis, "Toward a Common Ground Definition of the Rules of Law Incorporating Substantive Principles of Justice" (2010-2011) 72 University of Pittsburgh Law Review at 194.

recognized the link to *fairness*[161] and, in a twisted way, that respect for the rule of law protects human dignty, even if the law is contrary to dignity:

> observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future. [….] Naturally, there are many way s in which one person's action may affect the life of another. Only some such interferences will amount to an offence to the dignity or a violation of the autonomy of the person thus affected. Such offences can be divided into three classes: insults, enslavement, and manipulation.Observing the rule of law by no means guarantees that such violations do not occur. But it is clear that deliberate disregard for the rule of law violates human dignity. It is the business of law to guide human action by affecting people's options. The law may, for example, institute slavery without violating the rule of law. But deliberate violation of the rule of law violates human dignity. The violation of the rule of law can take two forms. It may lead to uncertainty or it may lead to frustrated and disappointed expectations.[162]

Emphasizing a culture of legality, Raz's vision is centered on the functioning of institutions and their division to ensure the independence of actors in the creation and application of the law.[163] He also insists on conformity to the law. As he further writes "since conformity to the rule of law is the virtue of law in itself, law as law regardless of the purposes it serves, it is understandable and right that the rule of law is thought of as among the few virtues of law which are the special responsiblity of the courts and the legal profession."[164] In terms of its treatment of the relation between the rule of law and human dignity, it is most wanting, indeed completely absent. A law denying dignity cannot entail a violation of dignity if breached.

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[161] As Mockle explains, "De même, si J. Raz rejette explicitement dans *The Authority of Law* l'association proposée par Lon Fuller entre le droit et la moralité, il n'en reconnaît pas moins ultérieurement l'existence de liens avec les exigences de *fairness*. J. Raz n'accepted pas pour autant une vision transcendante ou universalite de la rule of law en rappelant qu'elle est le produit d'un contexte historique déterminé et ne peut être dissocié d'une certaine conception du rôle du droit (a culture of legality)." Daniel Mockle, "L'état de droit et la théorie de la *rule of law*" (1994) 35 Cahier de droit 823 at 895.

[162] [Emphasis added] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, 1979) at 221-222, Oxford Publishing Online: http://nw18.american.edu/~dfagel/Philosophers/Raz/Rule%20of%20Law%20and%20its%20Virtue_%20%20Joseph%20Raz.pdf

[163] See Daniel Mockle, "L'état de droit et la théorie de la *rule of law*" (1994) 35 Cahier de droit 823 at 886-887.

[164] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, 1979) at 226, Oxford Publishing Online: http://nw18.american.edu/~dfagel/Philosophers/Raz/Rule%20of%20Law%20and%20its%20Virtue_%20%20Joseph%20Raz.pdf

Randall Peerenboom defines a slightly thicker rule of law by adding the element of acceptance by the majority of the population, namely, that "the laws must be acceptable to a majority of the populace *or* people affected by the laws."[165] Peerenboom's conception of the rule of law includes the consent of the majority *or* of the affected people. This is important. What happens if the majority accepts a law that discriminates against a minority, such as what occurred in Britain and Canada through the enactment of racist laws by Parliament? Would this be acceptable or is this the limit of the rule of law? This construction shows the limits of political freedoms. As Mockle writes in the British context, "ce problème résulte d'une confusion originelle entre libertés politiques et libertés fondamentales, l'approche britannique ayant postulé, sur une base implicite, que les secondes devaient découler, en toute logique, des premières."[166] Without a reference to human rights law, it is. I suggest a law should be accepted by the majority *and* minority populations. In addition, Peerenboom's conception of consent does not need to be expressed through democratic channels. It is far from evident that dissent can be expressed without imperiling one's security in undemocratic regimes or in regimes where opinions cannot be freely expressed. Hence, expression of consent or dissent must take place in a context conducive to freedom of expression.

With the concept of 'public good', Jeremy Waldron proposes a slightly 'thicker' version of the rule of law for a legal system to be characterized as a legal system. As he explains: "we recognize as law not just any commands that happen to be issued by the powerful, but norms that purport to stand in the name of the whole society and to address matters of concern to the society as such."[167] However, he characterises his idea as "aspirational or orientational", "not

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[165] [Empahsis added]. The other listed elements of the rule of law are:

1) The meaningful restraints of state actors;
2) The presence of rules or norms that determine which body makes law, including courts;
3) The making of laws in accordance with these rules or norms;
4) The laws must be valid, public and readily accessible;
5) The general applicability of law that is, law must not be aimed as a particular person and must treat similarly situated people equally for the most part (formal equality);
6) The laws must be relatively clear, consistent on the whole, stable and generally prospective rather than retroactive;
7) The laws must be enforced.

Randall Peerenboom, "Varieties of Rule of Law, An Introduction and Provisional Conclusion" in Randall Peerenboom, ed, *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (London: Routledge, 2004) 2 at 11.

[166] Daniel Mockle, "L'état de droit et la théorie de la *rule of law*" (1994) 35 Cahier de droit 823 at 869.

[167] Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Georgia Law Review 1 at 31.

a substantive one."[168] That may be the reason why he makes a subtle distinction with regard to the relationship between law and the public good. As he explains, "instead of saying that nothing is law unless it promotes the public good, we might say that nothing is law unless it *purports* to promote the public good."[169] The 'public good' is an abstract construct that varies greatly depending on the perspective. Hence, Jeremy Waldron's conception could be said to be on the border of a substantive conception.

Accordingly, the content of the law from a thin lens of the rule of law can be and mean anything; it could in fact provide a veil of legality to institutionalised discrimination or colonialism. Because it refuses to inquire into the content of the law, a 'thin' rule of law is said to be flexible, applying in diverse contexts, where institutions, rules and practices differ.[170] Indifference as to the substance of the law explains why a 'thin' conception adopts formal equality, which means that the content of the law is irrelevant, as long as the status of a person does not affect how the law is applied. A 'thin' version is concerned with *equal enforcement* of the law, not with the *substantive content* of the law, which "means that oppressive or immoral rules laws can be enacted—for example, imposing slavery, apartheid, and religious or caste distinctions—without running afoul of the requirements of the rule of law."[171] Moreover, by advocating a 'neutral' or 'content free' approach to law, such conception of the rule of law nevertheless, and despite its pretention, takes a political and ideological stance; namely, that by respecting the requirements of a 'thin' rule of law, oppressive, colonial and discriminatory laws are valid, should be applied and obeyed. This, I believe, is a dangerous political, legal and social stance. Needless to say that a 'thin' conception of the rule of law is unsatisfactory to marginalized groups, victims and of civil society organisations, who may correctly conceive the rule of law as yet another structure legitimizing domination or

[168] The rule of law also includes: First, a legal system requires courts; second, a legal system requires general public norms, which should be general and public; and, third, the norms need to be man-made. Jeremy Waldron, *ibid* at 32.
[169] Jeremy Waldron, *ibid* at 20, 24-25, 28, 32.
[170] Randall Peerenboom, "Varieties of Rule of Law, An Introduction and Provisional Conclusion" in Randall Peerenboom, ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (London: Routledge, 2004) 2 at 4.
[171] Brian Z Tamanaha, "A Concise Guide to the Rule of Law" (2007) St-John's University, School of Law, Legal Studies research Paper No. 07-0082 at 17, Online: http://ssrn.com/paper=1012051; See also Mark Ellis, "Toward a Common Ground Definition of the Rules of Law Incorporating Substantive Principles of Justice" (2010-2011) 72 University of Pittsburgh Law Review at 194.

oppression. One could ask what the added value of a system conforming to the rule of law is, if it is to more efficiently oppress and dominate? True, it can bring stability, order and necessary economic conditions. But is this sufficient to protect the principle of the rule of law? As Jacques Chevalier writes:

> Si les systèmes totalitaires ne sont pas des États de droit, c'est parce que leur conception de l'État et du droit se situe aux antipodes de la conception libérale. D'une part, l'emprise totale acquise par l'État sur la vie sociale prive de toute pertinence les concepts de "sujet de droit", de "Nation" et de "sphère privée" : l'individu ne saurait opposer à l'État des droits subjectifs tirés de sa qualité d'homme […] enfin, il n'y a plus face à l'État de société civile structurée […] D'autres part si les systèmes totalitaires connaissent une profusion de règles et mettent en place un ordre juridique structuré, leur droit présente des caractéristiques fondamentalement différentes par rapport à celui des sociétés libérales : perdant toute dimension protectrice, il n'est plus qu'un simple instrument d'action au service du pouvoir[…][172]

In all cases, it is difficult to reconcile a 'thin' conception of the rule of law with law itself, or at least with a conception of law based on international human rights and humanitarian law and the principle of humanity. Underneath many 'thin' conceptions, however, is the idea that constitutive elements of the rule of law will contribute to protect human dignity.

A substantive conception of the rule of law builds on notions of human rights, substantive equality and on the legality of laws. Substantive or 'thicker' conceptions of the rule of law include in addition to the 'thin' version, other elements, such as human rights and forms of economic systems. Tamanaha distinguishes three sub-categories within the 'thick' rule of law: "individual rights" (private property, contract); "right of dignity or justice"; and, "social welfare" (substantive equality, welfare and preservation of community).[173]

Contributing to a substantive conception of the rule of law, Lord Bingham included protection of human rights and compliance by the state with its international obligations as constitutive

[172] Jacques Chevalier, "L'État de droit" (1988) 104 Revue du droit public et de la science politique 313 at 374.
[173] Mark Bennett, 'The Rule of Law" Means Literally What it Says: The Rule of the Law: Fuller and Raz on Formal Legality and the Concept of Law" (2007) 32 Australian Journal of Legal Philosophy 90 at 94; Stéphane Beaulac, "An Inquiry into the International Rule of Law"(2007) 14 European University Institute Max Weber Programme Series Working Paper at 5, Online: http://ssrn.com/abstract=1074562.

of the rule of law.[174] Trevor Allan, also associated to the category of 'right of dignity and justice', considers due process and "equality of application of law" a component of fundamental justice central to the rule of law. Combined, these principles "amount to a basic requirement of justification, or condition of legitimacy, whereby the legality of a person's treatment, at the hands of the state, depends on its being shown to serve a defensible view of the common good."[175] Hence policies, regulations and legislation must conform to certain standards of justice, as established by the common good, such as "the basic liberties of thought, speech, conscience, and association."[176] Allan proposes a substantive definition of equality according to which equality,

> does not demand the universal applicability of laws, or forbid coercive measures intended to promote the public good: it insists only that all forms of governmental discrimination between persons should be adequately *justified*. [...]The relevant criterion is not conformity to any particular conception of justice, derived from abstract political philosophy, but compatibility with those principles accepted as constitutionally fundamental, within a particular regime or polity, and the *underlying values of human dignity and freedom* that these principles characteristically assume.[177]

In practice, the principle of justice means that there are 'valid laws' – those that serve the common good − and 'improper measures' that victimize specific persons or groups.[178] From this point of view, "majority rule deserves no special political or constitutional reverence except in so far as it is truly consistent with the values of equal human dignity and individual autonomy: politics, in its ordinary institutional forms, should be the servant of justice rather than its master."[179] Hence, if an individual citizen judges that 'laws' or policies are unjust because they contravene the common good, "such measures may, and sometimes should, be resisted in exercise of a genuine duty of 'fidelity to law."[180] The same approach was taken by

[174] See Mark Ellis, "Toward a Common Ground Definition of the Rules of Law Incorporating Substantive Principles of Justice" (2010-2011) 72 University of Pittsburgh Law Review at 195.
[175] Trevor R.S. Allan, *Constitutional Justice, A liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) at 2.
[176] Allan, *ibid*.
[177] [Emphasis added] Allan, *ibid* at 22.
[178] Allan, *ibid* at 3.
[179] Allan, *ibid* at 25.
[180] Allan, *ibid* at 7.

Mark Ellis, who considers that justice cannot be excised from the rule of law without rendering it meaningless. As he writes:

> a country that has a solid institutional legal framework but fails to protect fundamental human rights is at best a country ruled by the law but should not be considered a country based on the rule of law. And this is the paradigm shift that must occur. It is disingenuous to refer to a country as adhering to the rule of law when it fails to protect fundamental, substantive rights found in international law. [181]

For Daniel Mockle, l'*État de droit* is:

> La hiérarchie des normes, la multiplication des recours et des guaranties formelles, le développement des contrôles, la suprématie du droit constitutionnel et la justice constitutionnelle, la pluralité des autorités indépendantes, la division fonctionnelle des pouvoirs, la nécessité des habilitations pour assurer le fondement des pouvoirs et compétences, l'encadrament du pouvoir discrétionnaire par des normes de toute nature (législatives, réglementaires, administratives), la proclamation de droit fondamentaux dans des chartes et déclarations, l'indépendance des juges et l'émancipation des organes juridictionnels.[182]

A step further ahead is the International Commission of Jurists (ICJ), who determined that the whole gamut of fundamental rights constituted the rule of law. This is probably one of the 'thickest' form of the rule of law. The ICJ declared in Athens in 1955 that:

1) The State is subject to the law;
2) The Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement;
3) Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges;
4) Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial. [183]

[181] Mark Ellis, "Toward a Common Ground Definition of the Rules of Law Incorporating Substantive Principles of Justice" (2010-2011) 72 University of Pittsburgh Law Review at 199, 215.
[182] Daniel Mockle, "L'état de droit et la théorie de la *rule of law*" (1994) 35 Cahier de droit 823 at 834.
[183] See International Commission of Jurists, *Justice Enslaved: a Collection of Documents on the Abuse of Justice for Political Ends,* Report of the Congress of Athens 13-20 June, 1955, Bulletin of the International Commission of Jurists, No 3 and No 5 (1955).

The ICJ's concept of the rule of law was further expanded in New Delhi in 1959 to safeguard and advance civil and political rights as well as economic, social and cultural ones.[184] Adriaan Bedner identified substantive elements as (1) subordination of all laws and their interpretations to fundamental principles of justice; (2) protection of individual rights and liberties; (3) furtherance of social human rights; and, protection of group rights.[185] Bedner argues that social rights permit the realization of other elements of the rule of law, this being particularly true for the poor and marginalized.[186]

At the international level, it is probably the definition provided by the United Nations that holds sway. The 2004 report of the Secretary-General of the United Nations provided the following definition of the rule of law:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[187]

Through its model of governance, the rule of law aims to ensure values of justice and fairness.[188] Indissociable and "mutually reinforcing" are therefore "peace and security, development, human rights, the rule of law and democracy."[189] The UN further addressed the rule of law in the 2012 *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels* which reaffirmed that "human rights, the

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[184] See International Commission of Jurists, *The Rule of Law in a Free Society, Working paper on the Rule of Law* (New Delhi, 1959); International Commission of Jurists, *Development, Human Rights and the Rule of Law,* Report of the Conference held in The Hague on 27 April-1 May 1981, The Review of the ICJ, No 26 (1981), at 1-2.
[185] Adriaan Bedner, "An Elementary Approach to the Rule of Law" (2010) 2:1 Hague Journal on the Rule of Law at 64.
[186] Adriaan Bedner, *ibid* at 66.
[187] Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UNSCOR, UN Doc S/2004/616 (2004) at para 6.
[188] Report of the Secretary-General, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, UNGAOR, UN Doc A/66/749 (2012) at para 1.
[189] United Nations Rule of Law, "What is the Rule of Law?", Online: http://www.unrol.org/article.aspx?article_id=3

rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations."[190] Transitional justice also entails a substantive conception of justice based on political participation namely, a democratic rule of law.[191] Whether democracy is part of or parallel to the rule of law is debatable; what is much less debatable, however, is that the rule of law cannot guarantee the governance it purports to without respect for human rights and democracy.

From a thick perspective, the rule of law works in synergy with human rights and democracy to ensure, justice, peace and security. Elements constitutive of the rule of law are subject to debate, which could well benefit from an internationally agreed and binding definition. Until greater consensus exists as to what the rule of law entails, academics, politicians, practicioners as well as concerned citizens will need to define what they mean by the 'rule of law'.

1.2 Situating oneself: A substantive conception of the rule of law is necessary to protect human dignity

Situating oneself on the spectrum of the rule of law is intrinsic to one's conception of law. It brings questions such as what is the role, the purpose of law in society. And what, in the context of deportation and population transfer, is the role of law in attempting to respond to serious crimes? The role of law is to implement human rights and humanitarian law, essentially encapsulated in the principle of humanity and human dignity. This conception of the rule of law is necessary to an international legal response to the crime of deportation and population transfer. It would be impossible to assess legal responses to serious international crimes if international human rights and humanitarian law did not inform how the response should take place and whether indeed it did take place. My conception of the rule of law is, therefore, substantive, somewhere along the 'justice and dignity' classification of Tamanaha to which can be said to include the following 'thin' and 'thick' elements:

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[190] *Declaration of the High-Level eeting of the General Assembly on the Rule of Law at the National and International Levels*, UNGAOR, 67th Sess, UN Res A/RES/67/1 (2012) at para 5; The 1990 Conference on Security and Co-operation in Europe links human rights, democracy and the rule of law when it posites democracy as "the only system of government of our nations" as founded on human rights and the rule of law and as the bedrock of freedom, justice and peace. CSCE, *Charter of Paris for a New Europe* (1990) at 3.
[191] Pablo de Greiff, "Theorizing Transitional Justice" in Melissa S Williams, Rosemary Nagy & Jon Elster, eds, *Transitional Justice* (New York: New York University Press, 2012) 31 at 55-57.

1) Laws are made in accordance with the rules, increasingly international law recognizes the need for a democratic system;[192]
2) Laws must respect international human rights and humanitarian law and the principle of humanity;
3) Laws must be known and made publicly available;
4) Laws are prospective, not retroactive;
5) Laws are clear;
6) Laws do not contradict each other (coherence of laws);
7) Laws are stable or constant through time;
8) The officials of the state and non-state actors are bound by the law, nobody is above the law nor immune (supremacy of law and non-arbitrariness, equal enforcement of law and fairness in the application of law);
9) Individuals and non-state actors must have access to courts at the national, regional and international level (access to justice and fair trial);
10) The judiciary is independent;
11) Laws are complied with and enforced by governments and relevant regional and international actors (effectiveness);[193]
12) Laws and legal systems must ensure justice[194] and promote peace (accountability, dignity and substantive equality);
13) The legal system must provide reparation and remedy to victims.

My modest contribution to the discussion on the rule of law is located in the emphasis on humanity and human dignity in addition to international humanitarian law and the rights of victims to reparations. That is because the rule of law is most challenged in situations of armed conflicts, which triggers the application of both international human rights law and international humanitarian law and processes of transitional justice involving international criminal law. These legal regimes are both relevant, interdependent and linked by the principle of humanity.

[192] For a discussion on democracy, see Adriaan Bedner, "An Elementary Approach to the Rule of Law" (2010) 2:1 Hague Journal on the Rule of Law at 62-63.
[193] The principle of effectiveness of fundamental rights is a core component of the concept of the rule of law. According to Jacques-Yvan Morin, who studied the international rule of law, the effective protection of rights and freedoms relies on detailed and precised rules, among which he retains justiciability of rights and freedoms, recourse to *habeas corpus*, independence of judiciary, interdiction of arbitrary arrest or detention, presumption of innocence and reparation of violations. Jacques-Yvan Morin, *L'État de droit: émergence d'un principe du droit international* (The Hague: Martinus Nijhoff 1995) at 181, 207, 239, 281.In international law, the concept of effectiveness is enshrined in a number of documents, notably the *International Covenant on Social and Political Rights*, Article 2.
[194] 'Justice" is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large.' Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UNSCOR, UN Doc S/2004/616 (2004) at para 7.

Ultimately, the rule of law aims to protect humanity and a public order of human dignity. While human dignity is central to the rule of law, it is also to the *New Haven School of International Law*, which proposes an international system aimed at advancing a public order of human dignity and an evaluation of case law in light of their contribution to human dignity and human rights law.[195] For the *New Haven School*, public order is characterized by limiting the risk of violence and increasing the level of respect for human rights.[196] In this sense, the right to peace can only be conceived in relation to the inherent dignity of the human family; the right to peace is a right of humanity.[197] The right to peace is essentially the right to refuse war as a means to resolve conflicts through, among other, peaceful means of conflict resolution and education.[198]

More generally, international public order is also understood to include international humanitarian law.[199] To apprehend law, the *New Haven School* studies the law of words as well as 'law in action', requiring a wider study of actors and practices protecting public order in the decision-making process and of the values it purports (e.g, power, wealth, enlightment, empowerment, affection, wellness, respect, etc).[200] From the perspective of this school of legal jurisprudence, law is about how social choices are made and how values are produced and shared.[201] International institutions and practices protecting public order include: (1) human rights law and the law of state responsibility; (2) international criminal tribunals; (3) universal jurisdiction for international crimes; (4) non-recognition for actions considered illegal; (5) financial support and rewards; (6) commissions of inquiry or truth and reconciliation; (7) compensation commission; (8) amnities.[202] Hence case studies of public order require a contextual and careful evaluation of numerous actors, institutions and practices.

[195] Micheal Reisman, *L'école du New Haven de droit international* (Paris: Éditions Pedone, 2010) at 256.
[196] Micheal Reisman, *ibid* at 99.
[197] *Universal Declaration of Human Rights*, UNGAOR, UN Res 217A (III) (1948) at preamble; Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 232.
[198] *Declaration on the Right of Peoples to Peace*, UNGAOR, UN Res 39/11 (2004); Catherine Le Bris, *ibid* at 223.
[199] Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen, eds, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge: Cambridge University Press, 2013) 23 at 52-53.
[200] Micheal Reisman, *L'école du New Haven de droit international* (Paris: Éditions Pedone, 2010) at 45-47.
[201] Micheal Reisman, *ibid* at 43.
[202] Micheal Reisman, *ibid* at 99.

Equally important is the application of the rule of law beyond statal realms to other actors of the international community, such as coporations, as well as those tasked to respond to population transfer, chiefly among which are the United Nations and courts.[203] Traditionally considered to cover relations between a state and its citizens and between citizens, the application I make of the rule of law encompasses regional and international courts and international organizations. In this regard, the rule of law defined above provides a benchmark against which I evaluate the capacity of the international response to protect victims against the crime of deportation and population transfer.

In the context of armed conflict, the rule of law has a protective as well as a transitional, peace-building function. When upheld during war, the rule of law protects the human dignity of individuals. As Dieter Fleck rightly puts, "principles of humanity, whether or not these are covered by conventional law or custom, are essential for reaching the aim of the law of all armed conflict: to maintain the rule of law by protecting victims of violence."[204] This is the ideal scenario. In fact, war dehumanizes the 'other', civilians included. Just as societies undergo massive turmoils in time of war, so does the rule of law.

Transitional justice is, among other things, about reconstructing the rule of law in war-torn societies.[205] This is a gradual, generational, process, but central to victims of serious violations of the law of war is regaining dignity through notably accountability, reparation and remedy. In its 2012 report entitled Delivering Justice, the Secretary-General called for 'the age of accountability' following international crimes and gross violations of human rights. He recognized that ensuring accountability and effective redress "are key to increasing public trust in justice and security institutions, and to building the rule of law and sustainable peace."[206] However, in post-conflict situations, foreign national courts and regional and international courts must take over national systems to ensure accountability. In other words, until the national rule of law is rebuilt in war torn countries, other legal systems need to fill the gap. The

[203] The rule of law is applicable to international organisations including the UN, see *Declaration of the High-Level eeting of the General Assembly on the Rule of Law at the National and International Levels*, UNGAOR, 67th Sess, UN Res A/RES/67/1 (2012).
[204] Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 620.
[205] Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002) at 31.
[206] Report of the Secretary-General, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, UNGAOR, UN Doc A/66/749 (2012) at para 36.

'age of accountability' will come when the international legal response to atrocities will ensure a continuum of the rule of law filling the national vacuum where necessary.

However, the magic recipe that can be the rule of law does not operate in a political vacuum. Martti Koskenniemi is correct to point out that the ideal of "the rule of law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, for reasons internal to the ideal itself, rely on essentially contested – political – principles to justify outcomes to international disputes."[207] The UN Secretary-General similarly concludes that "efforts to strengthen the rule of law are inherently political and require the support and involvement of key national stakeholders to ensure the authority, credibility and legitimacy required for rule of law initiatives to achieve results."[208] Granted, the rule of law is a concept relying to a large extent on political will. But this is the case of all concepts, of all ideas; they depend on human will for their realisation. As a result, a study of the rule of law cannot take place without a study of the political environment and of the factual context within which it is applied.

Throughout this thesis, I will apply the rule of law as a benchmark to study the definition of the crime of population transfer and evaluate the international legal response of states, tribunals and the United Nations.

[207] Martti Koskenniemi**,** *The Politics of International Law* (Oxford: Hart, 2011) at 38.
[208] Report of the Secretary-General, *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, UNGAOR, UN Doc A/66/749 (2012) at para 48.

CHAPTER TWO – HUMANITY AS LAW'S TRANSCENDING PRINCIPLE

Intertwined and complimentary are international human rights law, international humanitarian law and international criminal law.[209] Human rights law protects the individual against state power whereas international humanitarian law is a constant compromise between military necessity and the dictates of humanity[210] aimed at protecting civilians and other victims of war. More recently, international criminal law has rapidly evolved to enforce both human rights and humanitarian law.[211] Human rights protect individuals by granting them rights and obliging states to "respect, protect and fulfil human rights."[212] The same obligations to respect and ensure respect exist in IHL. Core IHL principles are the principle of distinction[213] between military and civilian objects, the principle of necessity,[214] and the principle of precaution[215] or

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[209] Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris : Lextenso éditions, 2012) at 116-117.

[210] Christopher Greenwood, "Historical Development and Legal Basis" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 37.

[211] Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess, UNGAOR, UN Doc A/CN.4/L.682 (2006) at 14; More generally, see Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 58.

[212] UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflicts* (Geneva: UN Publication, 2001) at 14.

[213] *Additional Protocol I*, Article 48 provides a definition of the principle of distinction:
In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.
Article 51 of *Additional Protocol I* defines indiscriminate attacks as:
(a) those which are not directed at a specific military objective;
(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Arts 48 and 51(4).

[214] Mario Bettati, *Droit humanitaire* (Paris: Dalloz, 2012) at 98; Christopher Greenwood, "Historical Development and Legal Basis" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 38; See also *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 33; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) at* Art 52(2).

[215] Mario Bettati, *ibid* at 102.

unnecessary suffering[216] and proportionality in attacks,[217] the goal being the protection of civilians and protected persons, such as combatants no longer taking part in hostilities.[218] Permeating these legal regimes is the protection and preservation of human dignity in the context of armed conflicts.[219]

Divided in three sub-sections, this section on the interdependency of law aims to show that the principle of humanity and human dignity is the guiding principle of law. At issue is the concurrent application of international human rights law and international humanitarian law, in particular in the context of deportation and population transfer. This conclusion shows that international criminal law is increasingly becoming an important enforcement tool of the law of war.

2.1 Humanity is the guiding principle of the universal legal conscience of law

The principle of humanity is the source of law, the foundation of the rule of law and human dignity is at the crossroad of international human rights law, humanitarian law and criminal law. [220] Antônio Augusto Cançado Trindade advocates the common universal juridical conscience of human's need for dignity and justice is the source of all law.[221] But the concept of humanity is polysemic, undefined and controversial in international law because there is no consensus over its meaning or application.[222] As Catherine Le Bris points out, humanity is a legal concept that needs to be apprehended through a legal discourse, i.e., construction,

[216] On the notion of humane treatement, see *Geneva Convention relative to the Protection of Civilian Persons in Time of War,* 12 August 1949, 75 UNTS 135 at Arts 27 and 37.
[217] *Additonal Protcol I*, Article 57(1) provides that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 57(1).
[218] See ICRC, "What is international humanitarian law?" (2004) Legal Fact Sheet, Online: www.icrc.org; See also ICRC and Humanitarian Policy Group (HPG), "The Concept of Protection: Towards a Mutual Understanding" Roundtable on Civil-Military Coordination, Roundtable Summary, 12 December 2011 at 1.
[219] Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 74.
[220] See Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 75-.
[221] See Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 159-160, 393-400.
[222] Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris : Lextenso éditions, 2012) at 29-30, 73.

functioning to systemize the international legal order.[223] Humanity is often best understood in relation to other concepts which it structures, such as crime against humanity, humane treatment or the principle of humanity.[224] Humanity is not a neutral concept; it is an ideal, a legal symbol portraying a certain image aimed at ensuring respect for the human nature.[225] From the principle of humanity emerges norms; the right of humanity to human dignity, human rights and the prohibition of torture and slavery giving to the principle an interpretative function.[226]

This sub-section argues that human dignity touches upon a common human desire to be accorded equal respect of one's dignity and equal treatment of one's freedoms. Expressed in the negative, dignity is opposed to humiliation and discrimination.[227] Among central human capabilities, Martha Nussbaum identifies "having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others."[228] Everyone is therefore entitled to a humane treatment and this is what law ought to protect as a minimum.

Originally, the concept of dignity was equivalent to the recognition of one's rank. Gradually, the concept expanded to all humans and not only to kings and nobles. Jeremy Waldron explains the mainstreaming of dignity as "an upwards equalisation of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility."[229] Interestingly, Waldron understands the concept of dignity as a status idea:

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[223] Catherine Le Bris, *ibid* at 43, 45-46.
[224] Catherine Le Bris, *ibid* at 44-45, 71.
[225] Catherine Le Bris, *ibid* at 48, 50, 69.
[226] For an interesting discussion on the relation between human dignity and human rights and the conclusion that human dignity is protecting the equal dignity of Men and human rights the equal freedoms of Men. Human dignity is part of the law of humanity and can be understood to protect the human family and the human person. Catherine Le Bris, *ibid* at 70-83, 96-101.
[227] On considerations of humanity in matters of racial discrimination and self-determination, see Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 27.
[228] Martha C Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice" in Thom Brooks, ed, *The Global Justice Reader* (Singapore: Blackwell Publishing, 2008) at 604-605.
[229] "We have evolved a more or less universal status – a more or less universal legal dignity – that entitles everyone to something like the treatment before law that was previously confined to high-status individuals." Jeremy Waldron, "How Law Protects Dignity" (2012) 71:1 Cambridge Law Journal 200 at 213, 215.

> Dignity is the status of a person predicated on the fact that she is recognised as having the ability to control and regulate her actions in accordance with her own apprehension of norms and reasons that apply to her; it assumes she is capable of giving and entitled to give an account of herself (and of the way in which she is regulating her actions and organising her life), an account that others are to pay attention to; and it means finally that she has the wherewithal to demand that her agency and her presence among us as a human being be taken seriously and accommodated in the lives of others, in others' attitudes and actions towards her, and in social life generally.[230]

The dignity of victims of international crimes is shaken because of loss of control over one's life, of participation in the society and of a space in the social life, at least momentarily. For victims of serious international crimes or human rights violations, regaining dignity means regaining control over one's life.

The driving force behind the prohibition of population transfer is the concept of human dignity central to humanitarian law and human rights law. Central, in fact, to the post World War II legal order enshrined in the *United Nations Charter*, which reaffirms its belief "in the dignity and worth of the human person"[231] Numerous human rights instruments are built on the idea of human dignity. For instance, the *Universal Declaration of Human Rights* recognizes that "all human beings are born free and equal in dignity and rights."[232] Human dignity is not only a fundamental right, but also a constitutional right of most countries in the world.[233] However, human dignity predates the 1948 *UN Charter*.

The principle of humanity applicable to both IHL and IHRL derives from 'unwritten rules' intrinsic to these bodies of law.[234] Despite the apparent inherent contradiction, IHL aims to 'humanize war' by setting limits on the means and methods of warfare, by protecting civilians

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[230] Jeremy Waldron, *ibid* at 202.
[231] *Charter of the United Nations*, 26 June 1945, Can TS No 7 at Preamble.
[232] The preamble also recognizes the inherent dignity and equal and inalienable rights of all "as the foundation of freedom, justice and peace in the world." *Universal Declaration of Human Rights*, UNGAOR, UN Res 217A (III) (1948) at preamble, para 1 and Art 1.
[233] For the argument human dignity is recurrent in international law and constitutional law throughout the world, see Luís Roberto Barroso, "Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse" (2012) 35 Boston College International & Comparative Law Review 331 at 337-338, 341.
[234] See Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 619.

and those no longer taking part in hostilities, and more generally, by mitigating the effects of war.[235] The principle of humanity in IHL was originally linked to the notion of charity on the battlefield and is a founding principle of humanitarian law.[236] Perhaps the first modern Western legal code was the 1863 *Lieber Code* written by a German-American professor of political science and law at Columbia University named Francis Lieber, which was first used in the Union Army of the United States during the American Civil War. It encapsulated the idea of dignity:

> War [...] by no means absolves us from all obligations towards the enemy, on various grounds. They result in part from the object of war, in part from the fact that the belligerents are human beings, that the declaration of war is, among civilised nations, always made upon the tacit acknowledgement of certain usages and obligations, and partly because wars take place between masses who fight for others, not for themselves.[237]

Not long afterwards, Article 6 of the *Geneva Convention* of 1864 posited the universality of the principle of humanity by affirming the responsibility of states towards all individuals, including their nationals.[238] In the context of war, the Martens Clause developed by professor Friedrich von Martens as delegate of Tsar Nicholas II at the Hague Peace Conferences epitomizes the principle of human dignity and "will always be applicable", including in new

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[235] International humanitarian law, the law of war and the law of armed conflict are used interchangeably; See International Criminal Law Services, "Module 8: War Crimes" (2011) Training Materials at 8, Online: http://wcjp.unicri.it/deliverables/docs/Module_8_War_crimes.pdf

[236] See Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris : Lextenso éditions, 2012) at 120.

[237] *1863 Lieber Code* cited in Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed(Manchester University Press, Manchester, 2008) at 21; See also Christopher Greenwood, "Historical Development and Legal Basis" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 21; "It may be said that independently of the international laws existing on this subject, there are to-day certain principles of justice which guide the public conscience, which are manifested even by general customs, but which it would be well to fix and make obligatory. […] A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts -- which battle always awakens, as much as it awakens courage and manly virtues, -- it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity." Institute of International Law, *Manual of the Laws and Customs of War*, 9 September 1880, Oxford at preface and Art 4, Art 28, Art 33, Art 63, Art 79, Online: https://www.icrc.org/ihl/INTRO/140?OpenDocument

[238] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public* (Paris: Dalloz, 2010) at 715; Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) at 221-222.

and unforeseen situations.[239] The Martens Clause is found in the 1899 *Hague Conventions on the Laws and Customs of War on Land* and provides that,

> the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[240]

The 1907 *Hague Convention* similarly referred to the "usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience" to keep civilians and belligerents bound for acts not yet defined in its regulations codifying the laws of war.[241] However, the Clause was only taken seriously after the Second World War, because prior to that IHL was largely giving way to state freedom.[242] The Martens Clause was invoked at Nuremberg as proof that "deportation of inhabitants of occupied territories was prohibited."[243] Lord Wright, who was the editor of the *Law Reports of Trials of War Criminals* prepared by the UN War Crimes Commission wrote about the relevancy of the Martens Clause that,

> the governing effect of that sovereign clause which does [....] really in a few words state the whole animating and motivating principle of the law of war, and indeed, of all law, because the object of all law is to secure as far as

[239] See Christopher Greenwood, "Historical Development and Legal Basis" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 34; Mario Bettati, *Droit humanitaire* (Paris: Dalloz, 2012) at 99-100.

[240] *Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, 29 July 1899 at preamble; Theodor Meron explains the chivalric origin of this clause going back to natural law and the 1643 *Articles and Ordinances of War for the Present Expedition of the Army of the Kingdom of Scotland*. "The Clause was originally designed to provide residual humanitarian rules for the protection of the population of occupied territories, especially armed resisters in those territories." Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 17-18, fn 56.

[241] *Hague Convention (IV) respecting the Laws and Customs of War on Land its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907 at preamble.

[242] On the evolution of IHL in four phases, from municipal military law, to freedom of action of the belligerents based on sovereignty and the centrality of military necessity, to concern with the protection of victims to a humanized or homo-centric regime increasingly characterized by its merger with human rights law. See Robert Kolb, "The Main Epochs of International Humanitarian Law since 1864 and their Related Dominant Legal Constructions" in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen, eds, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge: Cambridge University Press, 2013) 23 at 23-25, 43-44.

[243] See Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 18.

> possible in the mutual relations of the human beings concerned the rule of law and of justice and of humanity.[244]

The Clause, repeated in subsequent humanitarian law conventions over the last 100 years,[245] remains important as a reminder that what is not prohibited is not necessarily lawful and that acts and omissions are subject to the principle of humanity and the dictate of public conscience, referring to elements that are *jus cogens*.[246] In other terms, "the Martens Clause impedes, thus the *non liquet*, and exerts an important role in the hermeneutics and the application of humanitarian norms"; it is the "*raison d'humanité*" limiting the "*raison d'État*".[247] Today, the Martens Clause is relevant in all types of armed conflicts[248] and argues "for interpreting international humanitarian law, in case of doubt, consistently with the principles of humanity and the dictates of public conscience."[249] It thus has a positive interpretative function.

Irrespective the legal regime, the principle of humanity and human dignity intersect and are recognized as transcending the protection of individual and collective rights.[250] The principle of humanity and human dignity are invoked by national and international courts alike. In 1949, for instance, the International Court of Justice invoked the general and well-recognized

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[244] *Law Reports of Trials of War Criminals* at xiii cited in Theodor Meron, *ibid* at 19.
[245] For instance, the clause was repeated in its mention of the laws of humanity in *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31 at Art 63; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85 at Art 62; *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135 at Art 142; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 158; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at preamble.
[246] For reading on Martens Clause, humankind and *jus cogens*, see Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 151-152, 275-276; Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 125.
[247] Antônio Augusto Cançado Trindade, *ibid* at 151-152.
[248] Christopher Greenwood, "Historical Development and Legal Basis" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 35.
[249] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 27; Arguing there is a distinction between the *principles* of humanity and the *laws* of humanity of the Martens Clause: Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 122.
[250] For a discussion of universal juridical conscience in treaties, jurisprudence and doctrine as well as human dignity as the ultimate aim of law, see Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 147-156, 279.

principles of "elementary considerations of humanity."[251] In its advisory opinion on the *Legality of the threat or use of nuclear weapons* in 1996*,* the Court confirmed that the principle of humanity is at the heart of IHL and that basic considerations of humanity "constitute intransgressible principles of international customary law."[252] This stance can also be found in *Furundzija* for instance, where the ICTY Trial Chamber affirmed that,

> the general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.[253]

Theodor Meron opines likewise when he writes that the "common denominator of both systems" is the principle of humanity.[254] Similarly, the ICRC's rules on customary law recognize the notion of "humane treatment", "dignity" and the interdiction of "ill-treatment" as indicative of an "overarching concept" found in both human rights law and humanitarian law and as evolving with societal changes.[255] Considerations of humanity cover for instance the prohibition of indiscriminate attacks against civilian populations, humane treatment, unnecessary suffering, humanitarian assistance, as well as fundamental guarantees enshrined in common Article 3 to the *Geneva Conventions* of 1949 for instance. All of these rules relate

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[251] *Corfu Channel Case* (*United Kingdom v Albania)*, Judgment, [1949] ICJ Rep 4 at; *Corfu Channel Case* (*United Kingdom v Albania)*, Judgment, [1949] ICJ Rep 4 at paras 215, 218, In public international law, "elementary considerations of humanity" can be two things, as Catherine Le Bris explains: "la notion de "considerations élémentaires d'humanité" a une double signification : elle désigne à la fois, le processus de prise en compte de la norme éthique par la norme juridique et le résultat de ce processus, c'est-à-dire la norme elle-même." [Emphasis in original] Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris : Lextenso éditions, 2012) at 130-131;

[252] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at paras 257, 262.

[253] *Prosecutor v Furundzija*, IT-95-17/1-T, Judgment (10 December 1998) at 72 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

[254] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 6; A similar position can be found in Claude Emmanuelli*, International Humanitarian Law* (Cowansville: Éditions Yvon Blais, 2009) at 24.

[255] ICRC, *Customary IHL Database*, Rule 87, Humane Treatment, Online: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule87; See Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 239-240, 261.

to the right to dignity because they relate to the right to life, the principle of non-discrimination and the prohibition of slavery and torture.[256]

The concept of humanity is however criticized as best an "extra legal consideration" that informs the creation of legal norms, but does not amount to law.[257] Yoram Distein argues:

> Humanity is not an obligation (or a set of obligations) incorporated per se in positive IHL. There is no overarching, binding, norm of humanity that tells us what we must do (or not do) in wartime. What we actually encounter are humanitarian considerations, which pave the road to the creation of legal norms and thus explain the evolution of IHL. While impacting on law, these considerations do not by themselves amount to law; they are meta-juridical in nature.[258]

That is correct: humanity transcends IHL, but it is more; humanity also translates directly into law, in the form of positive and binding principles such as limiting unnecessary suffering or the principle of precaution. In fact, I would argue the principle of humanity informs not only the creation of legal norms and the right to human dignity, and more broadly, the right to peace and justice, but is also at the heart of an evolutive and purposive interpretation closest to the rights of victims.

Human dignity has also been more forcefully attacked as 'human rights fundamentalism'; a nostalgia towards natural law; a position based on arguments that go beyond conventions and politics of modernity for instance; and, a concept left open with no clear authority to determine its meaning.[259] This is an easy and unsubstantiated criticism. The idea of human rights implies a minimum of universalism and of a common human nature. Hence of the rights not of the citizens, but of the human being as such.[260] Human dignity is everywhere to be found: in the

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[256] Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 138-139.
[257] Yoram Distein, "The Principle of Proportionality" in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen, eds, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge: Cambridge University Press, 2013) 72 at 73.
[258] Yoram Distein, *ibid*.
[259] "To think of law as a technical instrument for goal-values such as 'democracy', 'human dignity', 'fairness' or 'global governance', leaves unexplained uncertainties in the causal relations between technical norms and such goals and leaves open the question of who determines what such goals in practical terms mean." Martti Koskenniemi**,** *The Politics of International Law* (Oxford: Hart, 2011) at 165, 283.
[260] Annyssa Bellal, *Immunités et violations graves des droits de l'homme, vers une evolution structurelle de l'ordre juridique international?* (Bruxelles: Bruylant, 2011) at 28-29.

rule of law, in the three regimes of international law (the subject of this thesis), in national law and in the case law of national, regional and international courts and tribunals. True, human dignity may be vague and it is left open to define, but is this not true of most general concepts, chiefly among which is the rule of law?

So why is it so problematic if human dignity has origins in natural law, spiritual beliefs or something intrinsic to human nature? There is no need to categorically reject principles found in most religions and traditions and which have a universal appeal to something intrinsic. A cross-religious study on the norms of war found similar core ideas among religions, including

> that force may be used to protect innocent third parties from attack, that grievances should be openly aired before redress is sought through armed force, that non-combatants should not be directly targeted in war, that promises even to enemies should be kept, that prisoners should be treated humanely, or that especially cruel means of warfare should be banned.[261]

Values held by individuals and by peoples, such as empowerment, enlightment, affection, health and wellness, respect and honesty, and the production of wealth are key components of the study of international law, and ultimately, of human dignity and the promotion of peace.[262] In other words, international law is a process of decision-making oriented towards the promotion of values held by individuals and peoples; it is about attempting to achieve effective and coherent decision-making aligned with communities' expectations' of justice.[263] In all cases, I fail to see why the concept of 'human dignity' could be problematic. To the contrary, dignity is incremental to human and a *humane* life.

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[261] Gregory Reichberg, Nicholas Turner and Vesselin Popovski, "Norms of war in cross-religious perspective" in Gregory Reichberg, Nicholas Turner and Vesselin Popovski, eds, *World Religions and Norms of War* (New York: United Nations University Press, 2009) 303 at 306, 310; See for instance Christopher Greenwood, "Historical Development and Legal Basis" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 15-17; For instance, two thousands five hundred years ago, the Emperor of Persia known as Cyrus the Great (539 BC) promulgated the 'Cyrus Cylinder' in which mention is made that deported people who had been captured and enslaved could return home and practice their religion freely. The Cylinder is today described as the "earliest declaration of human rights" and the "oldest articulation of a multifaith, multicultural state" in the world's largest empire that was Persia. "Why is the Cyrus cylinder important?", *The Economist* (3 April 2013), Online: http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-0

[262] Micheal Reisman, *L'école du New Haven de droit international* (Paris: Éditions Pedone, 2010) at 15-16, 43.

[263] Micheal Reisman, *ibid* at 18, 45.

As can already be drawn thus far, international human rights, humanitarian and criminal law apply concurently in situations of armed conflicts to protect human dignity.

2.2 International human rights law, international humanitarian law and international criminal law intersect to protect in armed conflict

The law of war is anterior to human rights as it existed during Antiquities.[264] Classically, human rights law is concerned with the relation between individuals and states whereas humanitarian law binds all actors: states, armed groups and individuals, but aimed principally to protect the individual against the enemy state.[265] Increasingly, human rights law is extended to armed groups in control of a territory and private companies whereas individuals can be held responsible under international criminal law for crimes against humanity, which are serious violations of human rights law.[266]

The two legal regimes therefore increasingly interact and intersect. Theodor Meron and Robert Kolb submit that human rights law has humanized international humanitarian law,[267] which has become increasingly "homo-centric" instead of "state-centric" since 1949.[268] Meron explains how the tension between restraint based on the principles of humanity, proportionality and military necessity has tilted in favor of the former in the creation and interpretation of norms, although this shift is much less visible in the field.[269]

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[264] See Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 117.
[265] ICRC "Humanitarian Law, Human Rights and Refugee Law – Three Pillars", *Statement*, 23 April 2005, Online: http://www.icrc.org/eng/resources/documents/misc/6t7g86.htm; Catherine Le Bris, *ibid* at 117.
[266] ICRC "Humanitarian Law, Human Rights and Refugee Law – Three Pillars", *ibid*; UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflicts* (Geneva: UN Publication, 2001) at 21, 23, 25-26; See also Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 10.
[267] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 1, 6, 45.
[268] Robert Kolb, "The Main Epochs of International Humanitarian Law since 1864 and their Related Dominant Legal Constructions" in Kjetil Mujezinovic Larsen, Camilla Guldahl Cooper and Gro Nystuen, eds, *Searching for a 'Principle of Humanity' in International Humanitarian Law* (Cambridge: Cambridge University Press, 2013) 23 at 52.
[269] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 2.

A turning point often cited is the 1968 *UN Resolution on Human Rights in Armed Conflict* and the reports of the Secretary-General of the United Nations on the Respect of Human Rights in Armed Conflict.[270] The shift resulted in the integration of human rights issues in *Additional Protocol I* and in *Additional Protocol II to the Geneva Conventions*.[271] An important factor in the growing importance of human rights law in humanitarian law is attributable to the nature of conflicts, which are increasingly internal or in an internationalized grey zone making classification complex.[272] The International Court of Justice has recognized the simultaneous and overlapping application of human rights law and humanitarian law during armed conflicts.[273] In addition, UN human rights bodies and regional courts indiretly contribute to the application of IHL by taking into consideration or referring to its principles.[274] Consequently, and although the two bodies of law differ in scope, human rights law and humanitarian law inform each other's legal regime and are, indeed, complementary in time of war.[275]

In the context of population transfer, international human rights and humanitarian law apply concurrently, although the latter is generally deemed the more specialised regime. This position will be further developed throughout this thesis, because human rights law is

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[270] *Respect for Human Rights in Armed Conflict*, UN GA 2444 (XXIII), UNGAOR, 23rd Sess, UN Doc 2444 (XXIII)(1968); UN Secretary-General, *Reports of the Secretary-General of the United Nations on the Respect of Human Rights in Armed Conflict*, UNGAOR, 24th Sess, UN Doc A/7720 (1969) and UN Doc A/8052 (1970).

[271] "The clearest evidence for the "intrusion" of the law on human rights into humanitarian law is evidenced by Article 75, a monument among the various provisions of Protocol I touching on human rights issues. Moreover, Article 72 of Protocol I declares human rights law to be a subsidiary source of law to be respected in armed conflict. [...] Protocol II, on non-international armed conflict, covers a conflict situation which is considered to be an internal affair of the concerned State. Thus, human rights considerations must be in the forefront of the search for solutions which take into account the specific problems of warfare in a civil war. And Protocol II does just that. One of its preambular paragraphs sets the tone by recalling "that international instruments relating to human rights offer a basic protection of the human person. Part II, entitled "Humane Treatment" is pure human rights law, with its fundamental guarantees for the human person, its rules on detention and its provisions on penal prosecution." Under the Hans-Peter Gasser, "The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 1114-1115.

[272] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 3.

[273] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at para 240; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 136 at para 106.

[274] RüdigerWolfrum and Dieter Fleck, "Enforcement of International Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 715-716.

[275] See for instance, UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) at para 11.

fundamental to understanding population transfer, especially with regard to settler implantation. For now, suffice it to say that it is an accepted mechanism of legal interpretation that, when there is a conflict between two rules, it is the more specialized rule that takes precedence.[276] The principle of *lex specialis derogat legi generali* which regulates the relationship between a general and a specific rule may, in fact, be understood in two ways. First, a specific rule might be read and interpreted against a general one, which means that the rule are interdependent; or second, two applicable rules may lead to opposite or contradictory result, which is where the *lex specialis* principle applies *per se*.[277] In a nutshell, population transfer is overall best defined in humanitarian law, although human rights law is essential to capture the repercussions of the crime on the gamut of rights.

International humanitarian law, human rights law and criminal law construct reciprocally since international criminal law applies human rights and IHL.[278] Indeed, the concept of crimes against humanity is largely built on the crime of persecution whereas the concept of war crime is built on grave breaches of IHL. The growing importance of international criminal law complements the accountability mechanisms of human rights and human humanitarian law regimes. Human rights law remains difficult to apply and enforce in the context of armed conflict.[279] Accountability mechanisms under the two regimes, however, are not wholly ineffective. For instance, commission of inquiry, regional courts and truth and reconciliation commissions have contributed to transitional justice as well as compensation commission, although the latter are still uncommon.

Yet, more actions are needed to enforce international human rights and humanitarian law. Without national and international criminal law, international humanitarian law is practically

[276] "The effect of the *lex specialis* principle is that specific rules of human rights law are applied by reference to the standards of humanitarian law." Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 75.
[277] Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess, UNGAOR, UN Doc A/CN.4/L.682 (2006) at 20; UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflicts* (Geneva: UN Publication, 2001) at 58-59.
[278] See for instance, RüdigerWolfrum and Dieter Fleck, "Enforcement of International Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 678.
[279] See Dieter Fleck, "The Law of Non-International Armed Conflicts", *ibid* at 609.

toothless. Indeed, and despite provisions in IHL for a protecting power mandated to protect the interests of a party to the conflict[280] and to encourage compliance with IHL, they have not been commonly used in recent conflicts.[281] Another mechanism are international fact-finding missions,[282] such as the International Humanitarian Fact Finding Commission established in 1991 with the mandate to investigate grave breach or serious violation of IHL in accordance with Article 90 of Additional Protocol I.[283] However, the Commission has not carried a single investigation under Article 90 API since its establishement more than twenty years ago.[284] This being said, UN-mandated fact-finding missions based on Article 89 API and the UN Charter.[285] The main weakness of mechanisms such as protecting power and fact finding commission is that they depend on the voluntary consent of states, which in time of armed conflict is rarely forthcoming. This context is why the punishment of war criminals is essential to an effective IHL regime.[286]

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[280] Protecting powers have the right to have access to protected persons regardless of their location. The status of protecting power is either carried out by a state, the ICRC or another impartial organization recognized by the party. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31 at Arts 8, 10; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 5; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 143.

[281] RüdigerWolfrum and Dieter Fleck, "Enforcement of International Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 711.

[282] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31 at Art 52; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85 at Art 53; *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135 at Art 132; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at 149; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 90.

[283] See RüdigerWolfrum and Dieter Fleck, "Enforcement of International Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 711.

[284] The International Humanitarian Fact-Finding Commission, *Report on the work of the IHFFC on the Occasion of its 20th Anniversary* (2011) at 18, 20.

[285] "Commissions of inquiry are increasingly viewed as effective tools to draw out facts necessary for wider accountability efforts. Since 2004, international inquiries have examined situations in Côte d'Ivoire, Guinea, Lebanon, Liberia, Libya, Pakistan, the Solomon Islands, the Sudan (Darfur), the Syrian Arab Republic, Timor-Leste and the occupied Palestinian territories (Gaza). These inquiries have encouraged national authorities to take action and are laying the groundwork for prosecutions. […] Commissions of inquiry have also made a range of broader recommendations for non-judicial measures, including truth-seeking, reparations and institutional reform." Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UNSCOR, UN Doc S/2011/634 (2011) at para 25; see also RüdigerWolfrum and Dieter Fleck, "Enforcement of International Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 713.

[286] See RüdigerWolfrum and Dieter Fleck, *ibid* at 685.

Originally *pacta sund servanda* was thought sufficient to ensure compliance with international humanitarian law, however, this soon proved to be wishful thinking as there is a lack of bilateral and multilateral initiatives for the principle to play its role.[287] In 1870, the reality of war brought a founder of the ICRC, Gustave Moynier, to call for an international criminal court. [288] Recommendations for penal sanctions in national legislations were all the implementation measures that could be achieved in 1880.[289] Although the *Hague Conventions* of 1899 and 1907 contained no provision concerning individual responsibility, it did not limit individual responsibility or state's right to initiate prosecution.[290] But no treaty provided a mechanism for the enforcement of IHL against war criminals prior to WWI.[291]

The Second World War constituted a breakthrough in the development of international criminal law, human rights law and humanitarian law. Most contemporary treaties are inspired by a desired not to repeat WWII and so is the search for greater accountability. Nuremberg epitomizes the beginning of 'modern' accountability. In contradistinction to the peace of Versailles, where national trials were considered "hopelessly political and doomed", Nuremberg clearly established an accountability mechanism under the control of the Allied, albeit imperfect and tainted with victor's justice.[292] As Ruti Teitel explains,

> Nuremberg has shaped the dominant scholarly understanding of successor justice with the shift in approach, from national to international processes, as well as from the collective to the individual. Successor criminal justice − Nuremberg style − implied a whole novel and international judicial forum, multinational criminal procedure, as well as offenses such as the "crime against humanity.[293]

Yet, despite increased internationalization, national courts have also held accountable perpetrators of war crimes and crimes against humanity, notably for those involved in WWII

[287] See Yves Sandoz, "International Penal Law and International Humanitarian Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 1052.
[288] See Yves Sandoz, *ibid* at 1051.
[289] See Yves Sandoz, *ibid*; Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 116.
[290] RüdigerWolfrum and Dieter Fleck, "Enforcement of International Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 679.
[291] See RüdigerWolfrum and Dieter Fleck, *ibid*.
[292] Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002) at 31.
[293] Ruti G Teitel, *ibid*.

and other dictatorial regimes such as in Greece and Argentina.[294] Following the War, what were once recommendations for greater accountability became binding on state parties to the *Geneva Conventions*. Grave breaches of the *Geneva Conventions* of 1949 codify the principle of universality for war crimes as developed by the WWII tribunals and the *Genocide Convention*.[295] The concept of grave breach however still requires states to enact penal legislation and does not amount to an autonomous and applicable criminal code.[296] The ICRC commentary explains that additional domestic penal legislations will need to be enacted to cover "all offenders, whatever their nationality and whatever the place where the offence has been committed."[297] From its inception, the enforcement of grave breaches in the context of international armed conflict called for a broad application of universal jurisdiction, but it remained dependent upon the development of national criminal law, with mitigated results.[298] Otherwise said, leaving the enforcement of IHL to states has proven ineffective.[299]

Since the mid-1990s, development and enforcement of grave breaches, war crimes and other serious violations of the law of war has increasingly been done through international criminal law. Gradually, the internationalized enforcement of IHL is merging the concepts of grave

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[294] Ruti G Teitel, *ibid* at 39-40.

[295] See Jackson Maogoto, "The Work of National Tribunals under Control Council Law 10" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 60; See ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 147, Commentary of 1958, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=659A26A51BB6FE7AC12563CD0042F063

[296] See Marko Divac Öberg, "The absorption of grave breaches into war crimes law" (2009) 91:873 International Review of the Red Cross 163 at 166.

[297] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 147, Commentary of 1958, at conclusions, para 1, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=659A26A51BB6FE7AC12563CD0042F063; "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 146.

[298] For a discussion see Yves Sandoz, "International Penal Law and International Humanitarian Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 1054; Hans-Peter Gasser, "The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law" in *ibid* at 1116

[299] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 271.

breaches and war crimes.[300] Grave breaches were to apply to international armed conflict in national criminal law whereas war crimes were to apply in international criminal law.[301] Common to the concept of grave breaches and war crimes is the fact that both entail the criminal responsibility of the individual and constitute a violation of IHL.[302] A conceptual change took place during the preparation of the 1977 *Additional Protocol I* and it was decided that grave breaches would be regarded as war crimes in international armed conflicts.[303] As Marko Divac Öberg explained, in contradistinction to grave breaches, "war crimes, [...], are acts and omissions that violate international humanitarian law and are criminalized in international criminal law."[304] The wars in the former Yugoslavia constitute a turning point in the application of humanitarian law in international criminal law. The *Statute of the International Tribunal for the Former Yugoslavia* attests that grave breaches are crimes under the jurisdiction of the tribunal and more specifically, a distinct category of war crimes in the *Rome Statute of the International Criminal Court*.[305]

In armed conflicts not of an international character, the concept of grave breach and war crime were inexistant because of preoccupations with state sovereignty; this said, *Additional Protocol II* presumes that national criminal law will be applied to non international conflicts.[306] Violations of IHL in non international conflicts were thus defined as 'serious violations of the law of war'. In the *Tadic* case, however, the ICTY extended the concept of war crimes to non

[300] "War crimes were certain acts and omissions carried out in times of war and criminalized in international law. Grave breaches were a limited set of particularly serious violations of the Geneva Conventions of 1949 that gave rise to special obligations of the States Parties for the enactment and enforcement of domestic criminal law." Marko Divac Öberg, "The absorption of grave breaches into war crimes law" (2009) 91:873 International Review of the Red Cross 163 at 163-164.
[301] Marko Divac Öberg, *ibid* at 166.
[302] Marko Divac Öberg, *ibid* at 167.
[303] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 85(5).
[304] Marko Divac Öberg, "The absorption of grave breaches into war crimes law" (2009) 91:873 International Review of the Red Cross 163 at 164.
[305] Marko Divac Öberg, *ibid* at 168-169.
[306] For the punishement and prosecution of criminal offences, see *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at Art 6; See Yves Sandoz, "International Penal Law and International Humanitarian Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 1055.

international armed conflicts, which was later confirmed by the *Rome Statute*.[307] The recent expansion of the concept of war crimes to all armed conflicts, as well as individual criminal responsibility regardless of the nature of the armed conflict[308] reflect the desire of the international community to prosecute all serious crimes wherever they occur.[309] Hence, the concept of grave breach is now part of international criminal law and somewhat merged with war crimes, which was extended to non international armed conflicts. International criminal law has thus encompassed the concepts of grave breach and serious violation of the law of war in international and non-international armed conflict under the concept of 'war crimes'.

Although international criminal law is heralded as the new arm of IHL and IHRL, when it comes to war crimes and crimes against humanity, it has a number of flaws: it is slow, expansive, accused of victor's justice and of struggling between punishment and show trials.[310] International criminal law cannot deal alone with all the moral, political and historical implications of war crimes and crimes against humanity.[311] Nor does it pretends to do so. The idea behind a criminal trial is also about establishing the truth and memory, part of the process of restoring victims' dignity.[312] In this sense, trials are not so much about punishment or deterrence as a tool in a process of transitional justice.[313] As Roger Duthie explained,

> it is increasingly acknowledged in displacement discourse and practice that truly resolving displacement often requires not just a rights-based approach but also that past human rights abuses be specifically addressed. The actors that work most directly to achieve durable solutions − humanitarian, development, human rights, and peacebuilding actors − are realizing that they may not be able to achieve their aims without engaging the justice claims of the displaced.[314]

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[307] *Prosecutor v Tadic*, IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 141 (International Criminal Tribunal for the former Yugoslavia).
[308] In particular since 1994 *ICTR Statute*, see Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: C.H.Beck, 2008) at 286.
[309] See Yves Sandoz, "International Penal Law and International Humanitarian Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 1061.
[310] See for instance Martti Koskenniemi**,** *The Politics of International Law* (Oxford: Hart, 2011) at 171.
[311] Martti Koskenniemi**,** *ibid* at 172.
[312] Martti Koskenniemi**,** *ibid* at 172-173, 179.
[313] For a definition of transitional justice, see International Center for Transitional Justice (ICTJ), "What is transitional justice?", Online: http://ictj.org/about/transitional-justice; See also Roger Duthie, "Incorporating Transitional Justice into the Responses to Displacement" in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) at 12.
[314] Roger Duthie, *ibid* at 13.

In the same vein, failure to prosecute forced displacement undermines transitional justice imperatives, namely accountability for perpetrators, recognition of victims, trust-building and the rule of law.[315] It prevents victims who so wish to return and reintegrate.[316] Criminal trials can thus be said to contribute to the realisation of victims' rights to remedy and reparations.

[315] Frederico Andreu-Guzman, "Criminal Justice and Forced Displacement: International and National Perspectives" in Roger Duthie, ed, *Transitional Justice and Displacement* (New York: Social Science Research Council, 2012) at 233.
[316] Frederico Andreu-Guzman, *ibid* at 234.

CHAPTER THREE - THE LEGAL SETTING

This chapter lays down armed conflict as the terrain of this study.[317] Doubtless, population transfer takes place in situations other than armed conflict, with often the same root causes.[318] In fact, population transfer occurs in a number of often interrelated circumstances, such as expulsions or evictions under the guise of national security; transfer of territory; demographic manipulation preceding or consequent upon the formation of a new State; punitive transfer across or within a state border; development projects; induced degradation of the environment calculated to cause migration; slavery or conditions of slavery; and, the implantation of settlers.[319] However, for the purpose of this thesis, the crime of population transfer will be treated in the context of war only.

The advent of the UN Charter formally changed the goal of war from the "complete submission" of the enemy to the more limiting exercise of the right to self-defense.[320] In other words, a war will only be considered necessary if it is a defensive measure that ensures a state's security or existence. War is thus meant to neutralise the adversary from harming. Although there is no single binding definition of armed conflict in IHL, it is quite clear when an armed conflict exists based on the situation on the ground.[321] Often more challenging is the classification of the conflict. Besides setting out the classification of armed conflicts in international humanitarian law, in this section, I submit that there should be one definition of

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[317] *Note*: Although the concept of 'war' traditionally refers to a 'declared war' and an 'armed conflict' to all situations, including undeclared wars, I will use the two interchangeably since a 'war' no longer requires a formal declaration.
A High Contracting Party is a sovereign State.

[318] "Poverty, the effects of climate change, scarcity of resources, political instability, and weak governance and justice systems may all be catalysts for conflict-induced displacement"." Toni Pfanner, *Editorial* (2009) 875 International Review of the Red Cross at 1-2.

[319] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc E/CN.4/Sub.2/1997/23 (1997) at para 11; In addition, Marco Simons identifies transfer to deprive insurgents of a sympathetic population and to provide a ready pool of forced labor. Marco Simons, "The Emergence of a Norm against Arbitrary Forced Relocation" (2002-2003) 34 Columbia Human Rights Law Review 95 at 95.

[320] See Christopher Greenwood, "Historical Development and Legal Basis" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 35-37.

[321] See Rogiers Bartels, "Timelines, borderlines and conflicts, The historical evolution of the legal divide between international and non-international armed conflicts" (2009) 91:873 International Review of the Red Cross at 35; See Christopher Greenwood, *ibid* at 47.

armed conflict with one set of rules applying to all armed conflicts to ensure the equal protection of individuals' dignity. I first discuss the concept of armed conflict and then argues for a unified concept of armed conflict since IHL must adapt to changing realities.

3.1 How state sovereignty undermines the protection of civilians in time of war

The protection of civilians from the effects of war, including population transfer, is impeded by the multiple definitions of armed conflicts. Indeed, that is because state sovereignty supports different classifications of armed conflicts and a gradation of protection accorded to civilians.

From its onset, international law, including the law of war, was only concerned with inter-state armed conflicts.[322] The *Fourth Geneva Convention of 1949* applies to "all cases of declared war or other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and to "all cases of partial or total occupation of the territory of a High Contracting Party."[323] In other words, the classical position construes an international armed conflict as an inter-state conflict and 'war' as a declared one. As formal declarations of war no longer reflect the reality of contemporary conflicts, the expression 'armed conflict' became more representative. The Jean Pictet Commentary to Article 2 mentions that armed conflicts are "any difference arising between two States and leading to the intervention of members of the armed forces [...] even if one of the Parties denies the existence of a state of war."[324] The Commentary further specifies that "it makes no difference how long the conflict lasts, or how much slaughter takes place."[325] An off cited definition is the one given by the ICTY in *Tadic*, which provides that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within

[322] See Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester University Press, Manchester, 2008) at 66.
[323] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 2; Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 45-46, 49.
[324] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 2, Commentary of 1958 at Art 2, para 1 - Armed conflicts involving the application of the Convention.
[325] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958 Commentary, *ibid*.

a State."[326] International law has thus loosened the criteria of the definition of war and conflict over the years to adapt to the reality of conflicts and ensure greater application of international humanitarian law.

Occupation, also a form of armed conflict, occurs when a territory is under the effective control of a hostile army against the will of the legitimate sovereign, even if the occupation does not result from hostilities.[327] Article 42 of the 1907 *Hague Regulations* is clear: a territory is occupied "when it is actually placed under the authority of the hostile army [and when] the occupation extends only to the territory where such authority has been established and can be exercised."[328] In other words, occupation is a form of "foreign domination",[329] although it is meant to be "provisional and temporary" because international law prohibits the acquisition of territory by force − that is, annexation.[330] The occupying power exercises its authority as a trustee of the sovereign,[331] manages the occupied territory to protect civil life and follows relevant provisions of international law.[332] Effective control presupposes the occupying power is the sole authority in the territory, but as situations of occupation evolves, it has been successfully argued that the application of occupation laws to situations beyond traditional occupation is taking roots in contemporary international law.[333] The result of a unified conception of war, it is also argued, is a unified conception of occupation law applying no longer to international armed conflict, but also to non international ones.[334] Situations of

[326] *Prosecutor v Tadic*, IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at paras 70, 84 (International Criminal Tribunal for the former Yugoslavia).
[327] Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91:873 International Review of the Red Cross 69 at 74; Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley Journal of International Law 551 at 563-564.
[328] *Hague Convention (IV) respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907 at Art 42.
[329] Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 272.
[330] Tristan Ferraro, ed, *ICRC project on occupation: Occupation and Other Forms of Administration of Foreign Territory*, Expert meeting report (Geneva: ICRC, 2012) at 35.
[331] Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley Journal of International Law 551 at 563.
[332] See Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 276.
[333] Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley Journal of International Law 551 at 566-567; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 60.
[334] Eyal Benvenisti, *ibid* at 61.

population transfer and occupation shall be further studied in Chapter II and Chapter III of Part III, which involve case studies and application of the law by courts.

Additional Protocol I marks a "controversial" shift in international thinking by expanding the concept of international armed conflict to situations previously considered the prerogative of state sovereignty.[335]Article 1(4) of the *Protocol* further extends the concept of international armed conflicts to situations traditionally regarded as non-international, such as 'wars of national liberation' taking place in the exercise of the right to self-determination.[336] This means that non-states actors can be party to an international armed conflict. As Leslie Green explains, "the former distinction betwen an international and non-international armed conflict has been blurred by Article 1 of Protocol I."[337] Since 1977 at least, therefore, an international armed conflict may involve a non-state party such as peoples fighting against colonial domination, alien occupation or racist regime in the exercise of their right to self-determination, although the customary nature of Article 1(4) remains uncertain.[338] For the *Protocol* to apply, however, the armed group representing a people in a war of national liberation must declare its commitment in accordance with Article 96(3) and must be recognized by a regional organization, the UN or a number of States.[339] Problematic is the lack of a clear definition of 'people' in the context of self-determination − as will be further discussed in Chapter II of Part III − which means that "the decision as to whether the conditions specified in Article 1(4) of the *Protocol* have been met would appear to be completely subjective and within each state's

[335] See Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester University Press, Manchester, 2008) at 66-69; Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 49.
[336] ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 1(4) Commentary of 1987 at para 6; Leslie Green, *ibid* at 75.
[337] Leslie Green, *ibid*.
[338] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 1(4); See Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 49.
[339] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 96(3). According to Christopher Greenwood, Add. Protocol I was first applied in 1999 in the war in Kosovo involving the Federal Republic of Yugoslavia and NATO states which were party to the Protocol. Christopher Greenwood, "Historical Development and Legal Basis" in *ibid* at 30.

discretion."[340] Originally, the article was meant to apply to situations of decolonization. As Christopher Greenwood explains, it was not meant to cover situations of secession from a state, although the concept of self-determination has been extended outside the realms of colonisation with the application of self-determination to the former Yugoslavia.[341]In brief, an international armed conflict encompasses hostilities between states, occupation and wars of liberation between a state and a non-state armed group.

In conflicts not of an international character, Article 3 common to the *Geneva Conventions* and *Additional Protocol II* apply "automatically once there is a de facto situation of armed conflict."[342] In fact, common Article 3 is customary law and applies regardless of the nature of conflict. As the ICJ stated, it is the "minimum yardstick" applicable to all armed conflicts.[343] Non-international conflicts can take place between government forces and non-governmental forces or between non-state entities.[344] However, the application of Article 3 does not grant belligerent status, which means that non-governmental parties may not be treated as prisoners of war, although it is a recommended practice in the field,[345] and this is precisely why states want to preserve the disctintion between international and non-international armed conflicts. More specifically, common Article 3 applies when there are,

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[340] "This implies that an election in which all parts of the population participate is sufficient, and would mean that only those revolutions that are aimed at the overthrow of a government made up of a minority section of the population, as was the case in South Africa, or which is a colonial territory seeking independence, as was the case in Angola, Southern Rhodesia or Namibia, would qualify as true seekers of self-determination." [....] "In pactice, however, the United Nations and international conferences held under its auspices or associated in any way have adopted the practice of allowing regional organisations within the area in which there is alleged to be a national liberation movement seeking self-determination to make the decision, and then to accept it." Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester University Press, Manchester, 2008) at 77, 79-80.

[341] Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 48.

[342] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, Art 1, Commentary of 1987 17 at para 4438, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15781C741BA1D4DCC12563CD00439E89

[343] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v Unites States of America)*, Judgment [1986] ICJ Rep 14 at para 218.

[344] Institute of International Law, *Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-state Entities are Parties*, Resolution, Berlin, 1999 cited in Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester University Press, Manchester, 2008) at 369.

[345] Leslie Green, *ibid* at 346.

> armed conflicts, with armed forces on either side engaged in hostilities − conflicts, in short, which are in many respects similar to an international war, but take place *within the confines of a single country*. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front.[346]

To be distinguished from internal tensions, a non-international armed conflict must involve 'protracted armed violence' in a state which will be evaluated based on the level of violence and the organization of the parties.[347] Also relevant to civil wars is Article 1(1) of *Additional Protocol II* which applies to conflicts,

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[348]

Although it provides greater protection, *Additional Protocol II* does not apply to all non-international armed conflicts; it only covers conflicts between a government (state) and an armed group (rebel movement) within the territory of the state.[349] The application of *Additional Protocol II* is stricter, not to say "extremely reduced",[350] compared to common Article 3

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[346] See ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 3, Commentary of 1958 at General Section (A), Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE12C9954AC2AEC2C12563CD0042A25C

[347] "These two components of the concept of non-international armed conflict cannot be described in abstract terms and must be evaluated on a case-by-case basis by weighing up a host of indicative data. With regard to the criterion of intensity, these data can be, for example, the collective nature of the fighting or the fact that the State is obliged to resort to its army as its police forces are no longer able to deal with the situation on their own. The duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces, the number of victims (dead, wounded, displaced persons, etc.) are also pieces of information that may be taken into account." [...] "As for the second criterion, those involved in the armed violence must have a minimum level of organization. With regard to government forces, it is presumed that they meet that requirement without it being necessary to carry out an evaluation in each case. As for non-governmental armed groups, the indicative elements that need to be taken into account include, for example, the existence of an organizational chart indicating a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants or the existence of internal rules." Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91:873 International Review of the Red Cross 69 at 76.

[348] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at Art 1(1).

[349] Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 55; See also Dieter Fleck, "The Law of Non-International Armed Conflicts", *ibid* at 610.

[350] Dieter Fleck, "The Law of Non-International Armed Conflicts", *ibid*.

because it requires the armed group to have a "particularly high level of organization" and to control part of the territory.[351] In addition, conflicts taking place only between non-state armed groups would not fall under *Additional Protocol II*.[352] In reality, the characterization of conflict as non-international under *Protocol II* is complex since states or parties seldom acknowledge that a situation amounts to an armed conflict not of an international character under the definition provided in *Additional Protocol II*, which has led to a very limited application of the Protocol in practice.[353] Accordingly, most non-international armed conflicts fall under common Article 3, but not under *Additional Protocol II*.[354] As previously mentioned, common Article 3 applies *ipso facto* as soon as there is a non-international armed conflict. However and inspite of a reluctance to apply Article 1 of *Additional Protocol II*, most of its provisions remain applicable since they have reached customary law status.[355] One may thus legitimately wonder whether the classification of conflicts based on these two types of non-international armed conflicts is not in fact a non-debate, since their provisions increasingly apply regardless of the formal classification. In a nutshell, two IHL regimes may apply to non-international armed conflicts depending on whether the conflict falls under Article 3 of *Geneva Conventions* or Article 1 of *Addition Protocol II*, although in practice, the expansive application of IHL has blurred the effect of this distinction.

Situations not considered an armed conflict include internal disturbances and tensions, such as riots and isolated and sporadic acts of violence.[356] This is one of the grey areas where

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[351] Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91:873 International Review of the Red Cross 69 at 79.
[352] Sylvain Vité, *ibid*.
[353] "The definition of a non-international armed conflict in Protocol II has a threashold that is so high, in fact, that it would exclude most revolutions and rebellions, and would probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government." Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester University Press, Manchester, 2008) at 83; Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 30; According to Christopher Greenwood, it was first applied in the civil war in El Salvador in the 1980s. See Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 55.
[354] Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91:873 International Review of the Red Cross 69 at 80; Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed(Manchester University Press, Manchester, 2008) at 73.
[355] Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 622.
[356] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at Art 1(1).

international humanitarian law and international human rights law overlap. Here again, the threeshold between 'tensions' and non-international armed conflicts is blurred. Jean Pictet has indentified conditions to identify a non-international conflict, such as the existence of an organized military force respecting the *Geneva Conventions*, the involvement of the army of the government or recognition of the group by the belligerent or an international organisation.[357] However, some authors contend that these criteria should not restrict the application of common Article 3 and advocate for the widest possible application since it reiterates fundamental principles of humanity predating the *Geneva Conventions*.[358] This is important since the threshold between internal violence and non-international armed conflict is not clearly delimited and may lead to protection gaps.[359] As Mélanie Jacques pointed out, "the confusion created by the different legal regimes is easily abused by governments, to the sole detriment of the civilian population."[360] That is why international human rights law applies as do the "principles of humanity and the dictates of the public conscience."[361] As Mélanie Jacques writes,"it is nevertheless essential that at least the humanitarian provisions of Common Article 3 and *Protocol II* apply in situations of internal disturbances and be respected by all actors. Should it be otherwise, the difference of protection for civilians in boderline situations would be unfair and contrary to the purposes of international humanitarian law." [362] Beyond

[357] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 3, Commentary of 1958, at p 35-36, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE12C9954AC2AEC2C12563CD0042A25C

[358] See Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 617.

[359]"As a result, a certain confusion may exists as to whether, in a concrete case, a situation of armed violence should be characterized as a non-international armed conflict or as a situation of internal distrubances and tensions." Claude Emmanuelli, *International Humanitarian Law* (Cowansville: Éditions Yvon Blais, 2009) at 125.

[360] Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 75.

[361] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at preamble; See also *Declaration of Minimum Humanitarian Standards*, Adopted by an expert meeting convened by the Institute for Human Rights, Abo Adademi University, Turku, Finland, 2 December 1990 at preamble; See also Dieter Fleck, "The Law of Non-International Armed Conflicts"in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 619.

[362] Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 76.

this, human rights law and humanitarian law do "not adequately protect human beings" in these 'grey' zones situated somewhere between peace and war.[363]

Attempts at delineating humanitarian standards from which no derogation is permitted have been made as the 1990 *Turku Declaration of Minimum Humanitarian Standards* attest.[364] Pertaining to unlawful displacement, Article 7 of the *Declaration* fusions human rights law, notably Article 12 of the *International Covenant on Civil and Political Rights* and Article 49 of the *Geneva Convention IV* to come to the following stipulation:

> 1. The displacement of the population or parts thereof shall not be ordered unless their safety or imperative security reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health, safety, and nutrition. Persons or groups thus displaced shall be allowed to return to their homes as soon as the conditions which made their displacement imperative have ceased. Every effort shall be made to enable those so displaced who wish to remain together to do so. Families whose members wish to remain together must be allowed to do so. The persons thus displaced shall be free to move around in the territory, subject only to the safety of the persons involved or reasons of imperative security.
> 2. No persons shall be compelled to leave their own territory.

Noteworthy in this 'hybrid' definition is the use of the concept of 'displacement' to encompass deportation and population transfer, reference to exceptions and evacuations as well as to both human rights and humanitarian laws. From paragraph two of the definition can also be inferred a ‘right to stay’, a topic which will be further addressed in Chapter I of Part II.

The traditional classification of conflicts no longer reflects the complex nature of contemporary conflicts. They include (i) occupation without troops on the ground; (ii) foreign intervention in a non international armed conflict by one or more states or a multinational force; or (iii) non international armed conflict taking place in many states, such as transfrontiers non international armed conflicts and exported non international armed conflicts.[365] A

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[363] *Declaration of Minimum Humanitarian Standards*, Adopted by an expert meeting convened by the Institute for Human Rights, Abo Adademi University, Turku, Finland, 2 December 1990, preamble.
[364] *Declaration of Minimum Humanitarian Standards*, *ibid* at Art 1.
[365] On these forms of conflicts, see Sylvain Vité, “Typologie des conflits armés en droit international humanitaire: concepts juridiques et réalités” (2009) 91:873 Revue international de la Croix-Rouge 1; Different types of armed conflicts also include: "Borderline situations in non-international armed conflicts" such as third

recurrent question therefore is whether the distinction between an international and a non-international armed conflict is still relevant.[366] The lack of transparency surrounding the role of external powers and proxies should not be underestimated. States providing support to an armed group may not volunteer information on the extent of their involvement, making it difficult to assess the level of control exercised by external actors and whether the conflict has become internationalized.[367] Moreover, international case law is contradictory as to what is the required level of 'control'. The International Court of Justice, for instance, developed the concept of 'effective control' but finding it too stringent, the ICTY sought to replace it with 'overall control'.[368]

The following section argues the typology of armed conflict is no longer pertinent because the classification protects state sovereignty at the expense of individual rights.

3.2 An armed conflict is an armed conflict: time for the non-discriminatory protection of civilians in time of war

state intervention on invitation of the national government and cross-border operations as long as no other state is involved; and, "internationalised armed conflicts" such as outside state control of insurgents (necessary level of control is controversial), "national liberation wars" and "armed conflicts between states and transnational armed groups" (ex. Taliban in Afghanistan until 2001). For this classification, see Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 605-608.

[366] Rogier Bartels, "Timelines, borderlines and conflicts, The historical evolution of the legal divide between international and non-international armed conflicts" (2009) 91:873 International Review of the Red Cross at 36 and fn 2; See also Claude Emmanuelli, *International Humanitarian Law* (Cowansville: Éditions Yvon Blais, 2009) at 134-136.

[367] Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91:873 International Review of the Red Cross 69 at 71; On internationalized non-international armed conflict, see Claude Emmanuelli, *ibid* at 115-120.

[368] In the *Nicaragua*, the ICJ ruled that the US could not be held "responsible for the acts of the Nicaraguan contras merely on account of organizing, financing, training and equipping them" because it did not meet the test of "effective control". The ICTY rejected the effective control test arguing it "set too high a threshold for holding an outside power legally accountable for domestic unrest." According to the Court, the power only needed to have "a role in organizing, coordinating, or planning the military actions of the military group", namely "overall control" to amount to an "international armed conflict". "The contrast between *Nicaragua* and *Tadic* is an example of a normative conflict between an earlier and a later interpretation of a rule of general international law. *Tadic* does not suggest "overall control" to exist alongside "effective control" either as an exception to the general law or as a special (local) regime governing the Yugoslav conflict. It seeks to replace that standard altogether." Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess, UNGAOR, UN Doc A/CN.4/L.682 (2006) at 31-32.

This affirmation is not a new one.[369] The paradigm on which IHL and, in fact, international law develops, is shifting from the state to the individual; from sovereignty to humanity, the two in often tensed interactions.[370] The title of this section is motivated by the belief that the principle of humanity should outweight the principle of sovereignty. Following this reasoning, it becomes primordial for law to offer equal protection to individuals irrespective of the type of armed conflict. To be clear, what is needed to ensure equal treatment is an approach that puts the protection of the individual first and the sovereignty of states second. In fact, the original draft of Article 3 proposed by the International Committee of the Red Cross requested the application of all the provisions of the *IV Convention* to non-international conflicts, a suggestion categorically rejected by States.[371] Despite much resistance, change has begun in this direction.

Although states' desire to protect their sovereignty in situations of internal conflicts was prioritised at the time of drafting the *Geneva Conventions*, the balance has since shifted in favor of human rights law,[372] as it increasingly covers situations of armed conflicts regardless of the nature of the conflict.[373] The same, it is thus argued, should be true of international humanitarian law. The UN High Commissioner for Human Rights therefore concludes that:

> As the range of international human rights protections particularly pertinent to situations of armed conflict increases, and because international human rights law applies to both international and non international conflict, it becomes arbitrary to exclude similar international humanitarian law protections that had previously been reserved for one category of conflict. [374]

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[369] See Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 611; Calling for a unified regime, see James G Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict" (2003) 85:850 International Review of the Red Cross 313.

[370] See Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public* (Paris: Dalloz, 2010) at 29.

[371] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 3, Commentary of 1958, at General Section, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE12C9954AC2AEC2C12563CD0042A25

[372] See Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 92-93.

[373] See for instance the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* which applies irrespective of the type of conflict. UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflicts* (Geneva: UN Publication, 2001) at 41; Claude Emmanuelli, *International Humanitarian Law* (Cowansville: Éditions Yvon Blais, 2009) at 135.

[374] UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflicts*, *ibid* at 41.

So why the distinction between international and non international conflicts remains? The main reason for this distinction is the question of the status of combatants.[375] States want to preserve their "prerogative to prosecute under national law non-state armed groups for their partaking in the hostilities."[376] In other words, states do not want to grant protected status to non-governmental armed groups, either as combatants or prisoners of war, because such recognition grants them the immunity afforded to combatants to legitimately attack governmental armed forces.[377] More precisely, Dieter Fleck explains that "the progressive development of customary law has not led to a complete amalgation between rules for international and non-international armed conflicts. Specific distinctions still remain. They apply to the status of combatants/fighters, public property, the time of release of persons deprived of their liberty, and belligerent reprisals."[378] Consequently, the actual classification of conflicts is dictated by concerns over state sovereignty, because it is the status of the belligerent that determines the level of protection afforded and not the individual involved in the war.[379]

Yet, the trend towards a unified conception of 'armed conflict' is well underway.[380] It is worth mentioning that the core principles of IHL, namely distinction, necessity, proportionality and humane treatment, apply to all types of armed conflicts.[381] Besides, in the midst of war, it is more practical to apply the whole body of rules than arguing about the type of conflict and

[375] Distinctions pertains to the status of POW. See Rogier Bartels, "Timelines, borderlines and conflicts, The historical evolution of the legal divide between international and non-international armed conflicts" (2009) 91:873 Review of the Red Cross at 41.
[376] See Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 612.
[377] Dieter Fleck, *ibid* at 613.
[378] Dieter Fleck, *ibid* at 611, 615, 627; The distinction between international and non international armed conflicts affects the status of members of non governmental armed groups, who are not considered combatants and not entitled to the status of prisoners of war under common Article 3 and Additional Protocol II; Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law,* Vol 1: Rules (Cambridge: Cambridge University Press, 2005), Rule 3 - All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel, Definition of Combatants (also Online: www.icrc.org).
[379] See Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 58-59.
[380] See Theodor Meron, *ibid* at 31.
[381] See Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 614.

whether the rule applies or not. Therefore the higher level of protection accorded to international armed conflicts are *de facto* applied to all armed conflicts.[382]

International criminal law also tends to blur the lines as it extends war crimes to non international armed conflicts, which is another noteworthy development. As explained by Meron, there were demands for the international criminalization of violations of common Article 3 and *Additional Protocol II*.[383] Indeed, "there is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars."[384] In addition, international tribunals also refer to the whole *Geneva Conventions* and *Protocol I* to interpret common Article 3 and *Protocol II*, which tends to indicate that non international conflicts are increasingly subject to the same rules as international conflicts.[385] A passage from the Appeals Chamber in the case of *Tadic* illustrates the changing mindset:

> A state-sovereignty-oriented approach has been supplanted by a human-being-oriented approach. Gradually, the maxim of Roman Law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between inter-State wars and civil wars is losing its value as far as human beings are concerned.[386]

Citing *Tadic* once more: "what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife." [387] Clearly, rules that were developed for international conflicts are increasingly applied in non international armed conflicts.[388] More specifically, the congruence within the law of war is obvious in relation to

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[382] UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflicts* (Geneva: UN Publication, 2001) at 40; See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: C.H.Beck, 2008) at 285.

[383] See Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 110-111.

[384] Theodor Meron, *ibid* at 111.

[385] Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press: Cambridge, 2002) at 33 cited in Rogier Bartels, "Timelines, borderlines and conflicts, The historical evolution of the legal divide between international and non-international armed conflicts" (2009) 91 International Review of the Red Cross 873 at 40.

[386] *Prosecutor v Tadic*, IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 97 (International Criminal Tribunal for the former Yugoslavia).

[387] *The Prosecutor v Tadic*, Case IT-94-AR72, *ibid* at para 119.

[388] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: C.H.Beck, 2008) at 285; Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 132.

deportation and population transfer. In fact, deportation and population transfer would be equally prohibited in all types of armed conflicts due to their customary nature. In addition, war crimes in the *Rome Statute* are practically the same in both international and non international armed conflicts.[389] As will be shown in this thesis, international law essentially applies the same prohibition to deportation and population transfer in international and non international armed conflict.

Perhaps the only 'downside' to conceptualizing international and non international armed conflict is the concept of 'war crimes', which still requires a demonstration of the type of conflict. The *Statute of the Criminal Tribunal for the Former Yugoslavia* and the *Rome Statute* of the International Criminal Court have maintained the distinction between international and non-international armed conflict making it more complicated to prosecute war crimes than crimes against humanity, this may explain why there are more cases on deportation and population transfer as a crime against humanity than as a war crime, as will be seen in Chapter III of Part II.

Indeed, from a prosecutorial perspective, proving the type of conflict is not easy as the situation on the ground at the time of event may be hard to assess. And since the crime of deportation and population transfer is both a war crime and a crime against humanity, the balance often tilts in favor of the latter. As the Expert Commission concluded in the context of the Yugoslav wars, "determining when these conflicts are internal and when they are international is a difficult task because the legally relevant facts are not yet generally agreed upon."[390] In *Tadic*, the Court recognized that the conflict in the former Yugoslavia has been defined "at different times and as either internal or international armed conflicts, or as a mixed internal-international armed conflict."[391]

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[389] See Rogier Bartels, "Timelines, borderlines and conflicts, The historical evolution of the legal divide between international and non-international armed conflicts" (2009) 91:873 International Review of the Red Cross at 40.

[390] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN Doc S/1994/675 (1994) at 13; Christopher Greenwood, "Scope of Application of Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 56; Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 30.

[391] *Prosecutor v Tadic*, IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 73 (International Criminal Tribunal for the former Yugoslavia).

Concluding this section, the distinction between international and non-international armed conflicts remains a central feature of positive IHL.[392] Classifying these conflicts and determining the applicable law therefore requires a careful application of IHL mindful of the situation on the ground, of the identity of belligerents and of their association with other parties as well as the allegiance of civilians. In light of the nature of conflicts, it has become increasingly problematic to uphold the classification because of the discriminatory effect of a sovereignty-based conception of the applicability of law and of the difficulty in determining the type of conflict. Thus international humanitarian law has become detached from its reality.

3.3 Civilians are protected against deportation and population transfer in time of war

Civilian victims of population transfer are the principal concern of this thesis. Civilians may become internally displaced persons (hereinafter IDP), refugees, stateless and victim of the crime of population transfer or deportation. These statuses evidence the failure of the international response to protect them. First, there is a failure to resolve the conflict by peaceful means; hence war and the accompanying status of civilian and/or protected persons. Failure to protect against the effects of war leads to the status of refugee/IDP, stateless and often, victim of war crimes and crimes against humanity. Worse is when the status of human dignity is taken from an individual. This escalation, or regression, of statuses is the direct result of a receeding protection of human dignity. However, beyond this layer of statuses is an individual capable of effecting change and of regaining one's lost dignity, and in this regard, law has a role in furthering access to justice. This section defines who is a civilian.

Civilians can be divided into two categories; (1) civilians in need of protection against the general effect of military operations and hostilities; and, (2) civilians who are protected persons

[392] "The adoption of a single definition of armed conflicts and the application of common rules to all armed conflicts seems difficult to achieve. The reluctance of States for such a solution has already been mentioned and without their support it seems unrealistic." Claude Emmanuelli, *International Humanitarian Law* (Cowansville: Éditions Yvon Blais, 2009) at 135.

because they are in the hands of an adversary.[393] Broadly speaking, Article 50 of *Additional Protocol I* defines civilians negatively *vis-à-vis* combatants, namely persons who are not:[394]

- Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;
- Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory;
- Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power;
- Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war;[395] (*levée en masse*) and,
- Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention).[396]

Simply, a civilian is someone who does not take an active part in the military hostilities.[397] Included are nationals of the state, aliens,[398] refugees and stateless persons.[399] In the context of

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[393] Hans-Peter Gasser, "Preotection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 237. The Fourth Geneva Convention deals with the general protection of civilians in countries in conflicts in Part II, Article 13 whereas PART III deals with protected persons, namely those in the hands of a party.

[394] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 50.

[395] *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135 at Art 4.

[396] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 43 (2).

[397] A non-combatant part of the armed forces will be granted POW status. The same applies to a civilian taking arms in a *levée en masse*. Civilians taking part in the hostilities who are not granted POW or protected status should be treated humanely. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Arts 45(3) and 75. For a discussion of non-combatant, see Knut Ipsen, "Combatants and Non-Combatants" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 96-107; See Hans-Peter Gasser, "Protection of the Civilian Population" in *ibid* at 239. 'Taking a direct part in hostilities' always means activities which adverserly affect military operations of an adversary or directly inflict death, injury or destruction on persons or objects." Hans-Peter Gasser, "Protection of the Civilian Population" in *ibid* at 262.

[398] "Aliens in the territory of a party to the conflict" are, first and foremost, nationals of the state with which their state of residence is in armed conflict. They also include nationals of a neutral state not involved in the conflict, who do not enjoy actual protection due to the absence of diplomatic representation in their state of residence." *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 4 (2); See Hans-Peter Gasser, "Protection of the Civilian Population" in *ibid* at 312.

[399] "Refugees and stateless persons shall be regarded as protected persons in every respect. As expressly laid down by Article 44 GCIV, refugees may not be regarded as enemy aliens on the mere basis of their nationality." Hans-Peter Gasser, "Protection of the Civilian Population" in *ibid* at 317. Article 73 is also clear that protected status applies to refugees: "Persons who, before the beginning of hostilities, were considered as stateless

war, refugees must be broadly understood as "any person who does not in fact enjoy the protection of a government."[400] Civilians include also non-combatants accompanying the armed forces, such as war correspondents.[401] In case of doubt, a person should be considered a civilian. And if non-civilians are present in a civilian population, the civilian character of the population remains.[402]

In non-international armed conflict, *Additional Protocol II* does not include a specific definition of civilians, although it can be inferred that civilians are those who are not members of "dissident armed forces or other organized armed groups."[403] Clearly, civilians taking part in the hostilities remain civilians; IHL knows no concept of 'unlawful combatant'.[404] Civilians are entitled to protection of their persons, honour, family rights, religious convictions and customs and should not be discriminated against.[405] As Hans-Peter Gasser puts it: "the adversary has no right to tear a civilian out of his or her social surroundings or to destroy that context through fundamental alteration."[406] Civilians should not be killed, wounded or

persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction." *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 73.

[400] Hans-Peter Gasser, "Protection of the Civilian Population" in *ibid* at 317.

[401] See Hans-Peter Gasser, "Protection of the Civilian Population" in *ibid* at 239.

[402] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 50 (1)(3).

[403] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at Art 1. The ICRC however notes that "practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians" ICRC, *Customary IHL Database*, Rule 5 - Definition of Civilians, summary, Online: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule5. If a civilian takes part in combat operations, he shall be treated humanely in conformity with Common Article 3 and Articles 4 to 6 of Additional Protocol II, although they may be prosecuted under national law for having taking part in hostilities or for having committed violations of international law or national law.

[404] Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 263.

[405] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Arts 27(1) and 13; *Hague Convention (IV) respecting the Laws and Customs of War on Land its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907 at Art 46(1).

[406] See Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 241.

detained without sufficient reason[407] nor should they be the target of attacks.[408] Their private property is protected.[409] In a nutshell, war cannot be waged against civilians.[410]

The status of 'protected persons' covers people who are 'in the hands of' the adverse party. It is a status that fills the gap when diplomatic protection is lost. Article 4 *GC IV* provides that protected persons "are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[411] 'In the hands of a party to the conflict' has been interpreted differently; some authors contend that it requires 'physical control'[412] by the adverse party or occupying power whereas the ICRC posites that "the expression 'in the hands of' need not necessarily be understood in the physical sense; it simply means that *the person is in the territory* which is under the control of the Power in question."[413] Hence, if the latter interpretation is adopted, 'in the hands of' means that a person is either in the territory of an adversary or in its territory, but under occupation.

Protected persons encompass the "whole population", as well as nationals of neutral or co-belligerents states that no longer have diplomatic relations, refugees and stateless persons. The

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[407] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Arts 27, 76 and 79-134; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Arts 11, 75; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at Art 5.

[408] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 51(2); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at Art 13.

[409] *Hague Convention (IV) respecting the Laws and Customs of War on Land its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907 at Art 46(2).

[410] See Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 240.

[411] "The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances: travellers, tourists, people who have been shipwrecked and even, it may be, spies or saboteurs." ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War,* 12 August 1949, 75 UNTS 135 at Art 4, Commentary of 1958 at general section and para 1 of definition.

[412] Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester University Press, Manchester, 2008) at 257.

[413] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 4, Commentary of 1958 at Art 4, para 1 – definition, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=18E3CCDE8BE7E2F8C12563CD0042A50B

only 'unprotected' persons are nationals of the occupying state in occupied territory, such as settlers transferred in the territory, and nationals of a neutral or co-belligerent state still having diplomatic relations with the belligerent in whose hands they are; these persons are nevertheless protected by human rights law and by the general protection afforded to the population in the *IV Geneva Convention*, which acts as a 'legal safety net'.[414]

Generally speaking, protected persons are persons under the control of the adverse party and possessing a different nationality.[415] Nationality is central to the concept of protected persons because the principle of non-intervention in the relations of a state with his own nationals dictates against intervention.[416] That said, the notion of 'nationality' has evolved under the ICTY to mean “effective diplomatic protection and allegiance", which signifies that a victim of the same nationality as the perpetrator could be considered a protected person if there is no bound of allegiance, no protection, or no loyalty for instance.[417] The Commentary on *Protocol*

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[414] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Arts 13 to 24 and Commentary of 1958 to Art 4, general section, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=18E3CCDE8BE7E2F8C12563CD0042A50B; Article 85(2) of Additional Protocol I also extends the concept of protected persons, to the wounded, sick and shipwrecked of the adverse party [...] or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse party." ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Arts 75 and 85(2), Commentary of 1987 at Art 85, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7BBCFC2D471A1EAAC12563CD00437805
See also Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 48; See Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 271-272, 311-319.

[415] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135, Commentary of 1958 at Art 4, general section and para 1 of definition, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=18E3CCDE8BE7E2F8C12563CD0042A50B; "A State's own nationals are thus excluded from the definition of 'protected persons'. International humanitarian law is indeed based on the premise that civilians do not need special protection from their own government in time of war." Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 37.

[416] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135, Commentary of 1958 at Art 4, para 1 of definition, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=18E3CCDE8BE7E2F8C12563CD0042A50B

[417] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 37. Not everyone agrees that nationals can be protected persons. Claude Emmanuelli for instance writes: "Nationals of a party to the conflict may need protection from their own government in times of war. However, with the exception of Part II, their protection is not governed by the Fourth Geneva Convention. Indeed, they are not

I encapsulates the essential about the meaning of 'nationality': "in protecting civilians against the dangers of war, the important aspect is not so much their nationality as the inoffensive character of the persons to be spared and the situation in which they find themselves."[418] A contextual analysis is thus required when assessing nationality for the purpose of protection.

To sum up at this stage, this thesis is concerned with the protection of civilians, including protected persons, against population transfer in the context of both international and non-international armed conflicts. Whereas legal protection of civilians is equal, the lack of tangible protection on the ground means that many civilians become victims. Protection often becomes a euphemism for 'advocacy' since actual physical protection is the exception, not the norm. Ineffective protection on the ground leads to serious violations of international law in armed conflicts and the escalation of statuses unravelling disempowerment, dispossession and uprooting.

3.4 From civilian to victim or when the international response fails to protect

Victims are persons displaced by population transfer. Generally speaking, a victim is "understood as someone who is or has been affected, injured or killed as a result of a crime or accident."[419] In other terms, 'victims' means groups of human beings whose fundamental human rights or whose essential needs are endangered."[420] I adopt the definition of victim of the *UN guidelines on the right to a remedy and reparation for victims of gross violations of human rights and serious violations of international humanitarian law:*

> victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with

included in the definition of persons protected by the Convention (Art. 4)." Claude Emmanuelli, *International Humanitarian Law* (Cowansville: Éditions Yvon Blais, 2009) at 200.

[418] Yves Sandoz *et al*, Commentary on the Protocols at 610 cited in Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 6.

[419] Valerie M Meredith, "Victim Identity and Respect for Human Dignity: A Terminological Analysis" (2009) 91:874 International Review of the Red Cross 259 at 260.

[420] Institute of International Law, *Humanitarian Assistance*, Res, 16th Comm, Bruges Sess (2003) Definitions at para 3.

> domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. [421]

I consider 'victims' those who identify as such following population transfer; hence, an 'identity' largely based on self-perception.[422] From a criminal perspective, and close to the definition provided by the UN Guidelines is Rule 85 of the International Criminal Court rules of procedure and evidence, which defines a victim as: (a) "Natural persons who have suffered harm as a result of any crime within the jurisdiction of the Court"; (b) "organizations or institutions that have sustained direct harm to any of their property." Rule 85 therefore covers all persons who have directly or indirectly suffered harm as a result of the commission of any crime within the jurisdiction of the court.[423]

Victims' right to a remedy is enshrined in international human rights, international humanitarian law and international criminal law.[424] Victims deserve to have their human dignity respected.[425] States as well as legal persons or other entity liable for the crime of population transfer are required to make full reparation for injury caused by the crime.[426] In

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[421] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGAOR, 60th Sess, GA Res, UN Doc 60/147 (2005) at preamble.

[422] Valerie M Meredith, "Victim Identity and Respect for Human Dignity: A Terminological Analysis" (2009) 91:874 International Review of the Red Cross 259 at 260.

[423] International Criminal Court, *Rule of Procedure and Evidence*, 9 September 2002, ICC-ASP/1/3 at Rule 85; Cherif Bassiouni, "International Recognition of Victims' Rights" (2006) 6:2 Human Rights Law Review 203 at 243, 256.

[424] See for instance, *UN Universal Declaration of Human Rights*, Art 8; ICCPR, Art 2; *International Convention on the Elimination of All Forms of Racial Discrimination*, Art 6; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art 14; *The Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV)*, Art 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977*, Art 91; *Rome Statute of the International Criminal Court*, Arts 68 and 75; Taking a victims' approach to defining victims' rights, see Cherif Bassiouni, "International Recognition of Victims' Rights" (2006) 6:2 Human Rights Law Review 203.

[425] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGAOR, 60th Sess, GA Res, UN Doc 60/147 (2005) at Part VI, para 10.

[426] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) ILC 53rd Sess, UNGA (A/56/10), II:2 Yearbook of the International Law Commission, article 31 at 91; See also *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGAOR, 60th Sess, GA Res, UN Doc 60/147 (2005) at Part IX, para 15.

this respect, victims' ongoing displacement as a result of population transfer is a breach of their dignity and a denial of justice. The UN Human Rights Committee affirmed that "cessation of an ongoing violation is an essential element of the right to an effective remedy."[427] Recognition of victims' rights to remedy and reparation by the international community is closely tied to the principles of justice, accountability and the rule of law.[428]

The *UN guidelines on the right to a remedy and reparation for victims of gross violations of human rights and serious violations of international humanitarian law* illustrate the need for a systemic and comprehensive response to the provision of remedy and reparation in international human rights, humanitarian and criminal law.[429] Victims' right to remedy includes: (1) equal and effective access to justice; (2) adequate, effective and prompt reparation for harm suffered; (3) access to relevant information concerning violations and reparation mechanisms.[430] Access to justice means "the right to obtain justice" or "the right that justice should be done", which Judge Cançado Trindade explains as "a true right to law" enshrined in a national and international legal systems to safeguards the rights of the invidual.[431] Indeed, "without the *right to the Law*, there is no rule of law, there is ultimately no Law at all."[432] Essentially, reparation includes restitution, compensation and satisfaction.[433] Restitution "involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have

[427] UN Human Rights Committee, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) at para 15.
[428] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGAOR, 60th Sess, GA Res, UN Doc 60/147 (2005) at Part V, para 8.
[429] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims, ibid* at preamble.
[430] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims, ibid* at Part VII, para 11.
[431] (foonotes omitted) *Ituango Massacres v Colombia* (2006), Judgement, Separate opinion of Judge A.A. Cançado Trindade, Inter-Am Ct HR (Ser C) No 148, at para 46.
[432] [Emphasis in original] Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 309.
[433] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) 53rd Sess, UNGAOR, UN Doc A/56/10, II:2 Yearbook of the International Law Commission at Art 34 at p 95; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGAOR, 60th Sess, GA Res, UN Doc 60/147 (2005) at Part IX, paras 18-23.

occurred in that situation may be traced to that act."[434] Following population transfer, the re-establishment of the situation involves the voluntary return of the displaced persons and restitution of property and the repatriation of settlers, a difficult question addressed in Chapter IV of Part III dealing with the consequences of *faits accomplis*. Financial compensation is to cover prejudice caused by the wrongful act that is not covered by restitution[435] while satisfaction may take the form of recognition of the wrongful act or an apology for instance.[436] Although symbolic, satisfaction is often necessary for victims to embark upon a process of reconciliation. Property restitution is pivotal to restore normal relationships, even if the chosen solution is not voluntary repatriation. As the introduction to the Pinheiro Principles makes clear "restitution offers the displaced the promise that a history of injustice, the abuse of basic rights, or terror and harassment can actually, at least in this one important respect, be reversed."[437] UN's experience confirms that reparation is important for reconciliation, confidence in the state and to a stable and durable peace.[438] When the international community fails to prevent, stop and undo war and its effects, the result is injustice, lack of protection of victims and impunity; the seed of the next armed conflict.

At the heart of the process of humanization of international law[439] is, therefore, the protection of victims' rights. Judge Cançado Trindade maintains a new international legal order transcending state consent is the obligation *erga omnes* of protection per which restoration of human dignity, human rights, access to justice−or a *right to the Law* and due process of law stands above all else.[440] If understood correctly, the fusion of international human rights law, international humanitarian law and international criminal law creates what could be termed

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[434] International Law Commission, *ibid* at Art 35 at p 96. "Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property." *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims,* ibid at Part IX, para 19.
[435] International Law Commission, *ibid* at Art 36 at p 98.
[436] International Law Commission, *ibid* at Art 37 at p 105.
[437] See for instance Scott Leckie, *The Pinheiro Principles, United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (Geneva: Centre on Housing Rights and Evictions) at 3.
[438] Report of the Secretary-General, *The rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UNSCOR, UN Doc S/2011/634 (2011) at para 26.
[439] Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 637-645.
[440] On the obligation *erga omnes* of protection, see Antônio Augusto Cançado Trindade, *ibid* at 312-320, 323-324, 390.

'the law of protection.' However, while the obligation of protection *erga omnes* increasingly binds parties to international human rights law treaties and is found in jurisprudence, "such case-law has not yet extracted the juridical consequences of the affirmation of the existence of such obligations, nor of their violations, and has not defined sufficiently their legal regime either." [441] The deficient relationship between *erga omnes* and *jus cogens* norms with the obligation of non-recognition of unlawful acts under international law is only one of many illustrations of current lacunae of the international response to population transfer, as further developed in Chapter I and Chapter II of Part III.

3.5 The three manifestations of the crime of population transfer in time of war

The three forms of population transfer are crimes under international humanitarian law, international human rights law and international criminal law. This thesis is thus construed along the types of population transfer found in relevant international legal regimes. Based on the *Convention (IV) relative to the Protection of Civilian Persons in Time of War*,[442] these manifestations are:

> (1) the arbitrary displacement or expulsion of a person or group outside or within an area or territory, usually a state;
> (2) the implantation of settlers into the territory, often occupied or annexed, of another group;
> (3) the unlawful confinement of protected persons in times of war, also known as arbitrary detention, imprisonment, retention, siege, containment.[443]

These manifestations of population transfer affect the gamut of fundamental rights and contravene international human rights law, international humanitarian law and international criminal law. However, literature often presents only two forms of population transfers: namely, the displacement of civilians and settler colonialism.[444] Part II and III of this thesis are

[441] Antônio Augusto Cançado Trindade, *ibid* at 323.
[442] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 49.
[443] See Joanna Dingwall, "Unlawful Confinement as a War Crime: The Jurisprudence of the Yugoslav Tribunal and the Common Core of International Humanitarian Law Applicable to Contemporary Armed Conflicts" (2004) 9 Journal of Conflict and Security Law 133 at 133.
[444] See for instance Unrepresented Nations and Peoples Organization (UNPO), *UNPO Conference Report, Human Rights Dimensions of Population Transfer, held in Tallinn, Estonia January 11-13* (1992) at 7; See also Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under*

built on the two main forms of deportation and population transfer in times of war, namely (1) the forcible displacement of civilians and (2) the implantation of foreign settlers.

However, I contend that there is a third form, namely, the confinement of civilians, but it will only be shortly discussed in the following lines. Yet, it does deserve more in depth analysis, particularly considering the policies of collective punishment, sieges and blockades applied in many contemporary conflicts.

Forms of deportation and population transfer and their violations of international law

Population transfer/deportation in international law	International Human Rights Law	International Humanitarian Law	International Criminal Law
Unlawful displacement of the civilian population	Violation of fundamental rights: Freedom of movement and to choose place of residence, right to privacy, home, family, nationality, genocide, etc.	Grave breach or serious violations of the laws and customs of war.	War crime Crime against humanity Genocide
Transfer of settlers	Violation of fundamental rights: Colonialism, unlawful use of force, violation of the right to self-determination, etc.	Grave breach or serious violations of the laws and customs of war.	War crime Crime against humanity
Unlawful confinement of civilians	Violation of fundamental rights: Apartheid, arbitrary detention, imprisonment, freedom of movement, etc.	Grave breach or serious violations of the laws and customs of war	War crime Crime against humanity

The rights protected by the prohibition of deportation, population transfer, mass expulsion and arbitrary displacement are the same, namely the right to stay in one's home and community, the right to choose where to reside, the right to enter and leave one's country and the right not to lose one's property as a result of forced displacement.[445] The relationship between these

International Humanitarian Law (Cambridge: Cambridge University Press, 2012), chapt 1; See also Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics 159.

[445] See *Prosecutor v Blagoje Simic et al*, IT-95-9-T, Judgement (17 October 2003) at para 130 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II); *Prosecutor v Slobodan Milosevic*, IT-02-54-T,

concepts will be further examined in Chapter I of Part II. Suffice it to say that "the prohibition against deportation serves to provide civilians with a legal safeguard against forcible removals in time of armed conflict and the uprooting and destruction of communities by an aggressor or occupant of the territory in which they reside."[446] Population transfer is thus a crime against the individual and the community as well as a victimization of humanity itself.

Deportation and population transfer breach a number of human rights, such as non-discrimination and the right to self-determination.[447] Population transfer, as a violation of international humanitarian law creates an *erga omnes* obligation and is arguably *jus cogens* since it contravenes fundamental rights, such as non-discrimination, and may amount to an attack against civilians in armed conflicts and potentially constitute or evidence genocide.[448] That is particularly true when the transfer amounts to a war crime, a crime against humanity or genocide. As *jus cogens* norms, they also become *erga omnes* obligations since it is in the interest of all to enforce *jus cogens* norms; stressing no longer reciprocity, but universal juridical obligations in international relations.[449] Hence although the two concepts are

Decision on Motion for Judgement of Acquittal (16 June 2004) at para 68 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

[446] *Prosecutor v Milomir Stakic*, IT-97-24-T, Judgement (31 July 2003) at para 681 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[447]As most commentators point out, it is not only that there is no single authoritative list of *jus cogens* norms, there is no agreement about the criteria for inclusion on that list. Overall, the most frequently cited candidates for the status of jus cogens include: (a) the prohibition of aggressive use of force; (b) the right to self-defence; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and apartheid, and (i) the prohibition of hostilities directed at civilian population ("basic rules of international humanitarian law"). Report of the Study Group of the International Law Commission finalized by Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess, UNGAOR, UN Doc A/CN.4/L.682 (2006) at 188-189; See also Alfred De Zayas, "Forced Population Transfers," Max Planck Encyclopedia, (Oxford University Press, 2013) at para 4; On non-discrimination as a peremptory norm, see James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 345.

[448] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 136 at paras 155-157. However, Judge Higgins disagrees on the invocation of *erga omnes* to impose obligations on third parties. As she writes, "that an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of "*erga omnes*.' [...] "The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of *erga omnes*." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, Separate Opinion of Judge Higgins, [2004] ICJ Reports 136 at paras 37-39; See also, Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 296-307.

[449] See Antônio Augusto Cançado Trindade, *ibid* at 286.

different, they are interrelated since *jus cogens* norms trigger *erga omnes* enforcement; however, not all *erga omnes* obligations are *jus cogens*.[450]

Deportation and population transfer is a grave breach and a serious violation of the law of war in international and non international armed conflicts. In the context of the humanitarian law of international armed conflicts, population transfer is either termed a 'serious violation of the laws and customs of war' or a 'grave breach'.[451] A violation is 'serious' if protected persons or objects are endangered or if important values are breached, such as the principle of humane treatment.[452] The concept of grave breaches is for the most serious violations of IHL and applies only to international armed conflicts.[453] Under Article 147 of *IVGC*, they include "the unlawful deportation or transfer [...] of a protected person."[454] Grave breaches also cover the transfer of foreigners when there is a persecution risk or when the receiving state is not a party to the *Geneva Convention* or is unwilling or unable to comply with the *Convention*.[455] *Additional Protocol I*, applicable in international armed conflict, also defines deportation or population transfer of protected person as a grave breach when committed willfully and in violation of Article 49 of the *IVGC* or Article 85 of the *Protocol*.[456] The particularity of Article 85(4) is that it requires the grave breach to be committed wilfully, understood as wrongful

[450] Report of the Study Group of the International Law Commission finalized by Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess, UNGAOR, UN Doc A/CN.4/L.682 (2006) at 225.

[451] The term 'war crimes' was proposed during the drafting conference, but the term 'grave breach' was retained because the meaning of 'crime' differ in national legislation. See ICRC Commentary, Article 147, note 1.

[452] Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law,* Vol 1: Rules (Cambridge: Cambridge University Press, 2005), Rule 156: Definition of War Crimes (also Online: www.icrc.org).

[453] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: C.H.Beck, 2008) at 301.

[454] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 147.

[455] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid* at Art 45; See Knut Dörman in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munnich: C.H.Beck, 2008) at 316.

[456] ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 85, Commentary of 1987 at paras 3501-3502, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7BBCFC2D471A1EAAC12563CD00437805

intent or recklessness, but not ordinary negligence.[457] Grave breaches require parties to enact legislation, search for alleged suspects and bring them before their own court or for trial elsewhere.[458] By 1949, one can see, mandatory universal jurisdiction already existed for the crime of population transfer although enforcement mechanisms through domestic courts remain weak to say the least.

In non international armed conflicts, violations of IHL are usually understood as 'other serious violations of international humanitarian law' or 'violations of the laws or customs of war'.[459] Although the concept of 'grave breaches' is not employed, violations of the laws or customs of war in a non international armed conflict also amount to a war crime.[460] In this sense, violations of common Article 3 and Article 17 of *Additional Protocol II* are war crimes. Thus, the traditional terminological distinction between 'grave breaches' and 'serious violations of the laws or customs of war' tends to fade away since the concept of war crimes encompasses the concept of serious violations and grave breach.[461] Irrespective the type of conflict, deportation and population transfer can trigger individual criminal responsibility under international law.

Confinement is a neglected but actual component of population transfer deserving greater attention. The addition of confinement to the study of population transfer is a modest contribution of this work, despite its summary treatment here. My main contention is that confinement is the first step in a series of measures of *refoulement* that maintains a person in an unsafe situation in violation of military necessity, civilian protection and the obligation of states towards asylum-seekers. Confinement to a specific area or camp to impede the departure of civilians as a tool of war is often compounded by measures of control to steam refugee/IDP flow within the state or in neighbouring states and internationally, by intergovernmental

[457] ICRC, *ibid*, Commentary of 1987 at para 3474; See also Marko Divac Öberg, "The absorption of grave breaches into war crimes law" (2009) 91:873 International Review of the Red Cross 163 at 173.
[458] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 146; See also Marko Divac Öberg, *ibid* at 178.
[459] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN Doc S/1994/675 (1994) at 16.
[460] See Marko Divac Öberg, "The absorption of grave breaches into war crimes law" (2009) 91:873 International Review of the Red Cross 873 at 170.
[461] See Marko Divac Öberg, *ibid* at 172.

policies of containment of irregular migration for asylum seekers.[462] Civilians are restrained in a situation that puts their life at risk at the local, statal and international level; 'invisible' boundaries exist beyond the official borders. The graph illustrates the chain of events amounting to *refoulement*, of which the most localized form is confinement.

By the time persons leave the confined area, they may already be victims of war crimes and crimes against humanity. Confiment can take many forms that need to be studied in relation to other concepts, such as arbitrary detention, unlawful imprisonment and internment, assigned residence, siege, blockades and collective punishment, to name a few. [463]

Law has yet to grapple with the status of persons in situations of confinement. People who have been unable to leave in the context of armed conflict have been described as "internally stranded persons", internally stuck persons, communities under siege or "blocked communities."[464] But I would suggest that the expression 'confined persons' is preferable and more meaningful when juxtaposed to 'displaced persons'.

Contrary to the other forms of population transfers, the prohibition of confinement is relatively recent in international law. The *Lieber Code*, for instance, allowed siege and armies to drive back non-combatants fleeing a besieged place "so as to hasten on the surrender."[465] Oppenheim similarly wrote that "assault, siege, and bombardment are in themselves, severally and jointly, perfectly legitimate means of warfare."[466] Just as Lieber, he maintained that it is permitted to cut water and not to allow civilians out of an area under siege.[467] And while he believed that enemy civilians may not be made prisoners of war, a number of exceptions existed depending

[462] Measures to prevent irregular migration include: "imposition of visas for all regufee-producing countries, carrier sanctions, "short stop operation," training of airport or border police personnel, lists of "safe third countries," lists of "safe countries of origin," readmission agreements with neighbouring countries forming a "buffer zone," regional migration agreements, economic co-operation agreements, common databases on individual files, immigration intelligence sharing, police co-operation and interventions, criminalization of migrant smuggling, reinforced border controls systematic detention, armed interventions on the high seas, military intervention, etc." See for instance, at Janet Dench and François Crépeau, "Interdiction at the Expense of Human Rights: A Long-term Containment Strategy" (2003) 21:4 Refuge at 3.
[463] See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (Cambridge: Cambridge University Press, 2003) at 112-113.
[464] See Josep Zapater, *Prevention of Forced Displacement: The Inconsistencies of a Concept, New Issues in Refugee Research*, Research Paper No 186 (Geneva: UNHCR, 2010) at 15.
[465] Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983) at 49, principle 18.
[466] H Lauterpacht, ed, *International Law; A Treatise, Disputes, War and Neutrality by L. Oppenheim*, 7th ed. (London: Longmans, Green and Co, 1952) at 417.
[467] H Lauterpacht, *ibid* at 419.

on the nature of the military operation and of the need to maintain order and tranquility in the occupied territory. For instance, citizens of the occupied territory who incited to armed resistance against the occupation could be arrested and put into captivity; in fact, "even the whole population of a province may be imprisoned in case a levy *en masse* is threatening."[468] The imprisonment of a whole population to prevent resistance is no longer permitted under the law of war and amounts to collective punishment.

Article 49 of the *Geneva Convention IV* prohibits the detention by the Occupying Power of protected persons "in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand."[469] The movement of persons may be restricted by the Occupying Power, "even if they are in an area particularly exposed to the dangers of war, if the security of the population or imperative military reasons so demand."[470] But as the Commentary on the *Geneva Convention IV* makes clear: "the measures taken must not be merely an arbitrary infliction or intended simply to serve in some way the interests of the Occupying Power."[471] For example, a siege or a blockade that confines a population in order to punish it or speed its surrender is illegal. As Hans-Peter Gasser wrote in relation to confinement, "the occupying power must permit the inhabitants of an occupied territory to seek safety from the effects of military operations. Their freedom of movement may be curtailed and the affected persons detained in their place of residence for two reasons only: for the safety of the population itself, or for compelling military considerations of the occupying power."[472]

For its part, Article 54 of *Protocol I* precises that starvation of civilians is a prohibited method of warfare and more precisely that:

> It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas

[468] H Lauterpacht, *ibid* at 417.
[469] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 49.
[470] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49, Commentary of 1958 at 283, Online: http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument;
[471] *Ibid*, Commentary of 1958 at 283.
[472] Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 284; "For imperative reasons of security, the occupying power may subject individual civilians to assigned residence or internment." *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 78.

> for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, *to cause them to move away*, or for any other motive.[473]

Any action taken to reduce food or acces to necessities essential to the survival of the civilian population with a view to inducing its departure from its home and land is unlawful. The position of the ICRC is unequivocal on this issue: "IHL prohibits forced displacements by intimidation, violence or starvation."[474]

Confinement is therefore the unlawful deprivation of freedom of movement or denial of the right to leave through for instance illegal detention, retention or containment of protected persons.

Confinement in the context of the *IV Geneva Convention* usually occurs in an international armed conflict whereas arbitrary imprisonment as a crime against humanity can occur in both an internal or international armed conflict.[475] The 1993 *Statute of the International Criminal Tribunal for the Former Yugoslavia* includes as violations of the laws of war, "unlawful confinement of a civilian."[476] With regard to confinement, the Tribunal referred to the *IV Geneva Convention* and determined that, "internment and assigned residence, whether in the occupying power's national territory or in the occupied territory [...] are never to be taken on

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[473] [Emphasis added] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) at Art 54(2). Excluded from this prohibition are objects used by the adverse party not as sustenance and "in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or *force its movement*." (Emphasis added) *Additional Protocol I*, *ibid* at Art 54(3)(b). The ICRC Commentary stipulates: "When objects are used for a purpose other than the subsistance of members of the armed forces and such use is in direct support of military action, attacks and acts of destruction are legitimate unless they are bound to have serious effects on supplies for the civilian population and the latter would thereby be reduced to starvation or forced to move away." ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 54, Commentary of 1987 at para 2112(2), Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=6377CFD2C9D23F39C12563CD00434C81

[474] ICRC, "Civilians protected under international humanitarian law", *Overview*, 29 October 2010, Online: https://www.icrc.org/eng/war-and-law/protected-persons/civilians/overview-civilians-protected.htm

[475] *Prosecutor v Kordic*, IT-95-14/2-A, Judgement (17 December 2004) at para 115 (International Tribunal for the former Yugoslavia, Appeals Chamber).

[476] *Statute of the International Tribunal for the Former Yugoslavia*, 25 May 1993 (last updated September 2009), UN SC Res. 827, article 2(g).

a collective basis."[477] Beginning in 1992, the warring parties in the Former Yugoslavia did operate over 700 detention facilities and concentration camps.[478]A network of camps existed from which people were transferred.

The Commission of Experts pursuant to UN Security Council resolution in the context of the Yugoslav wars opined that "using these pre-existing facilities allows for quick and easy control and displacement of the targeted population of a controlled or conquered geographic region by one of the warring factions."[479] Camps are used to control the movement of people following their displacement from a town or a region.[480] Many camps also had a specific purpose, such as mass executions, torture, rapes and sexual assaults as well as prisoner exchange.[481] As a result, the Commission concludes that "camps are ultimately intended to achieve 'ethnic cleansing'."[482]

Persecution based on unlawful imprisonment occurred in *Krnojelac*, where non-Serbs were detained without regards to regular procedure because of their ethnicity and religion.[483] The Appeal Chamber in *Krnojelac* recognized the relation between unlawful imprisonment and population transfer when it affirmed that "without illegal imprisonment, it would not have been possible to continue carrying out exchanges."[484] Similarly, the Trial Chamber in *Naletilic* held that unlawful confinement is a grave breach of the *Geneva Convention* and, when committed with discriminatory intent, may amount to persecution.[485] The Trial Chamber in *Kordic*

[477] *The Prosecutor v Zejnil Delalic and Others*, IT-96-21-T, Judgment (16 November 1998) at para 578 cited in Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2003) at 116.
[478] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN Doc S/1994/675 (1994) at 51.
[479] *Final Report of the Commission of Experts*, *ibid* at 51, 53.
[480] *Final Report of the Commission of Experts* at 51, 54.
[481] *Final Report of the Commission of Experts* at 52, 53.
[482] *Final Report of the Commission of Experts* at 53.
[483] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg (17 September 2003) at paras 13, 15 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) at paras 47,113.
[484] *Prosecutor v Krnojelac*, IT-97-25-A, *ibid* at para 246.
[485] In this case, an attack in Sovici in Bosnia and Herzegovina took place and all Bosnian Muslim adult males and hundreds of civilians were forcibly interned in a school. The civilian population, including children, women and elderly, was later confined to a hamlet for approximately two weeks, from which they were transferred to Gornji Vakuf, an area under the control of ABiH. The Trial Chamber found that civilians were detained collectively and targeted because they were Muslims. It also found that the confinement lasted for a long period and was not necessary for the security of the detaining power or justified on any other legal basis.

identified the same requirements for imprisonment as a crime against humanity as for confinement as a grave breach of the *Geneva Convention*. This means that imprisonment is unlawful when civilians are detained in contravention of the *Geneva Convention IV*, namely Article 42 (security of detaining power) and Article 43 (procedural safeguards) and when imprisonment occurs as part of a widespread or systematic attack directed against a civilian population.[486] However, the Trial Chamber in *Krnojelac* differed slightly maintaining that imprisonment as a crime against humanity can meet the requirements of confinement as a grave breaches, but it is not restricted by them.[487] For the Chamber, "any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment" as long as the requirements of crimes against humanity are fulfilled.[488] To establish a crime of imprisonment or unlawful confinement as a crime against humanity, the Trial Chamber in *Krnojelac* identified the following elements:

> 1. An individual is deprived of his or her liberty.
> 2. The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.
> 3. The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.[489]

The *Rome Statute* defines as crime against humanity, the imprisonment or other severe deprivation of physical liberty and, as grave breach of the *IV Geneva Convention* (war crime), the confinement of protected persons.[490]

The Chamber thus found that the attack was systematic because the plan was to detain Bosnian Muslim civilians in order to transfer them and discriminatory. *Prosecutor v Naletilic*, IT-98-34-T, Judgement (31 March 2003) at paras 639, 641, 646, 648 and 671 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

[486] *Prosecutor v Kordic*, IT-95-14/2-A, Judgement (17 December 2004) at paras 78, 116 (International Tribunal for the former Yugoslavia, Appeals Chamber); See also *Prosecutor v Krnojelac*, IT-97-25-T, Judgement (15 March 2002) at para 111 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[487] *Prosecutor v Krnojelac*, IT-97-25-T, *ibid*.

[488] *Prosecutor v Krnojelac*, 2002 ICTY, Trial Chamber [2002] 15 March 2002, para 112.

[489] *Prosecutor v Krnojelac*, *ibid* at para 115.

[490] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 5(e) and Art 2(g).

The 2004 *Law of the Extraordinary Chambers in the Courts of Cambodia* includes deportation as a crime against humanity when committed against a civilian population on discriminatory grounds[491] and as grave breaches of the *Geneva Conventions* the "unlawful deportation or transfer or unlawful confinement of a civilian."[492] In *case 001*, the court ruled that detainees, including children, were subject to enslavement, which occurred in a situation of forced labour under detention.[493] It found that the civilian detainees at the S-21 complex, including Vietnamese protected persons, had been unlawfully confined because they were detained without reasonable ground, were unable to challenge their detention and did not constitute a threat to the security of Cambodia.[494] The Extraordinary Chambers linked confinement as a grave breach under the *IV Geneva Convention* to imprisonment as a crime against humanity.[495]

Siege or blockade is another form of confinement in the context of war. The situation in the Gaza Strip has been described as collective punishment analogous to an 'open-air prison'[496] and as "occupation by siege".[497] As the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Richard Falk, highlighted following the bombardments in 2009:

> Refugee denial under these circumstances of confined occupation is an instance of "inhumane acts", during which the entire civilian population of Gaza was subjected to the extreme physical and psychological hazards of modern warfare within a very small overall territory. It should be kept in mind that this restriction on free movement, to escape from the war zone, was imposed on a population already severely weakened by the effects of the blockade.[498]

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[491] *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004*, NS/RKM/1004/006 at Art 5.
[492] *Law on the Establishment of the Extraordinary Chambers*, *ibid* at Art. 6.
[493] *Law on the Establishment of the Extraordinary Chambers*, *ibid* at Sect 2.5.3.3, p 120-121.
[494] *Case 001*, 001/18-07-2007/ECCC/TC (26 July 2010) at Sect 2.6.3.9, paras 464-469 (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber), Online: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf
[495] *Case 001*, *ibid* at Sect 2.6.3.9, para 464.
[496] John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 898; Internal Displacement Monitoring Center (IDMC), *OPT: Gaza Offensive Adds to Scale of Displacement*, IDMC and Norwegian Refugee Council (Geneva, 2009) at 4.
[497] See Palestine Liberation Organization (PLO), Negotiations Affairs Department, "Gaza: Occupation by Siege". Online: http://www.nad-plo.org/etemplate.php?id=114
[498] Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Richard Falk, *Human Rights Situations in Palestine and Other Occupied Arab Territories,* UNHRC, 10th Sess, UN Doc A/HRC/10/20 (2009) at para 19.

The Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict similarly found that "closed into the Strip, with no possibility to exit at times, 44 per cent of Gaza was either a no-go area or the object of evacuation warnings. These terrifying circumstances created a sense of entrapment, of having 'no safe place' to go."[499] The Commission went on to say that "the blockade and the military operation have led to a protection crisis and chronic, widespread and systematic violations of human rights, first and foremost the rights to life and to security, but also to health, housing, education and many others."[500]

Similarly, the situation in some areas of Syria is a clear form of siege to force surrender through starvation and denial of humanitarian aid.[501] The Report of the Commission of Inquiries is telling and worth the lengthy quote:

> Le Gouvernement recourt à l'arme du siège, instrumentalisant ainsi les besoins humains fondamentaux que sont l'eau, l'alimentation, le logement et les soins médicaux, dans le cadre de sa stratégie militaire. Des sièges ont été imposés à des villes dans tous les recoins de la République arabe syrienne. Les zones assiégées ont été pilonnées et bombardées sans relâche. Les forces gouvernementales ont interdit la distribution de l'aide alimentaire, y compris des fournitures chirurgicales, au motif qu'elles peuvent être utilisées pour traiter les combattants blessés. De telles tactiques contreviennent directement aux dispositions contraignantes du droit international humanitaire, qui imposent de veiller à ce que les blessés et les malades soient recueillis et soignés et d'assurer le passage rapide et sans entrave des secours humanitaires. Le déni d'aide humanitaire, de vivres notamment, se prolonge dans de nombreuses zones, provoquant malnutrition et famine. Aller jusqu'à affamer la population civile en tant que méthode de conduite de la guerre est chose interdite.[502]

Although confinement is a term specific to the law of war, under human rights law, situations of confinement are most commonly known as the arbitrary denial of freedom of movement

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[499] *Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, UNHRC, 29th Sess, UN Doc A/HRC/29/52 (2015) at para 22.
[500] *Report of the Independent Commission of Inquiry, ibid* at para 24.
[501] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 54(5).
[502] *Rapport de la commission d'enquête Internationale indépendante sur la République arabe syrienne*, UNHRC, 25th Sess, UN Doc A/HRC/25/65 (2014) at para 132; See Anne Barnard, Hwaida Saad and Somini Sengupta, "Starving Syrians in Madaya Are Denied Aid amid Political Jockeying" *The New York Times* (10 January 2016).

and arbitrary detention or imprisonment of a group or persons. Confinement can therefore contravene the right to freedom of movement and choice of residence when people are deprived of their right to move or not to move − that is, the right to stay or leave − and to choose where to reside.[503] For instance, people may be forcibly displaced and relocated into a specific and closed area from which they are not allowed to leave freely, such as in the context of "bantustanization" and "villagization programmes."[504] Indeed, one of the aims of Apartheid South Africa was to denationalize non-whites by making them citizens of 'homelands', commonly known as 'Bantustans'. Non-whites whose labour was not required were deported to homelands of which four were declared 'independent' by the South African government; therefore, denationalising millions of South Africans.[505] Between 1951 and 1986, policies and laws of the Apartheid regime in South Africa, such as the Bantustan system, are believed to have displaced four million people.[506] Confinement thus occurs in time of peace and war through control of freedom of movement and of the right to leave and seek refuge.

So far, I have discussed the importance of population transfer and the need for an international response protective of victims. Engaging with the discussion surrounding population transfer, I argued it is built on the myth of the pure nation-nation state, a utopia that no transfer can definitely satisfy. I have also surveyed the many conceptions of the rule of law and situated myself along a substantive spectrum informed by the principle of humanity and human dignity transcending international human rights, international humanitarian and international criminal law. Lastly, I have layed the ground to the main protagonists of this work, namely, armed conflict, civilians and victims and the different manifestations of population transfer.

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[503] See Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc. E/CN.4/1998/53/Add.1 (1998), at part II(A), para 1.
[504] See Francis Deng, *ibid* at part II(A), para. 2; Marco Simons, "The Emergence of a Norm against Arbitrary Forced Relocation" (2002-2003) 34 Columbia Human Rights Law Review 95 at 127.
[505] United Nations, *The United Nations and Apartheid, 1948-1994* (New York: The United Nations Department of Public Information, 1994) at para 103.
[506] Joseph Schechla, "Ideological Roots of Population Transfer" (1993) 14:2 Third World Quarterly 239.

The diagram below sums up my central argument, which insists on the interactions between relevant regimes of international law in the protection of victims of population transfer through a conception of the rule of law that protects the dignity of individuals.

PART II

INTRODUCTION–THE DISPLACEMENT OF THE CIVILIAN POPULATION IS THE CENTRAL ELEMENT OF THE CRIME OF DEPORTATION AND POPULATION TRANSFER IN TIME OF WAR

The most common form of the crime of population transfer in time of war is the forcible or arbitrary displacement of civilians from their homes to another area within or outside their country without grounds permitted under international law. Part II defines the unlawful displacement of the civilian population under the three relevant branches of international law; namely, international human rights law, international humanitarian law and international criminal law. It is accordingly divided into three chapters.

In the first chapter, it will be argued that population transfer is a multiple violation of human rights lacking a clear binding definition and enforceable norm. This legal ambiguity results in other human rights being invoked by regional and international courts, notably the right to freedom of movement, freedom from interference with one's home and the right to property. This lacunea, it is submitted, results from the implicit nature of the right to stay and the right to one's homeland. Human rights law thus needs to explicitly recognize the right to stay and to one's homeland in order for freedom from population transfer to be a clear, tangible and effective human right. It will also be argued that international human rights law needs to clearly define and revitalize population transfer by eschewing lawful population transfer and incorporating the transfer of individuals if it is to respect public order and the rule of law.

Chapter two contends that international humanitarian law is the legal regime providing a stable, binding and clear definition of deportation and population transfer. I argue the prohibition of deportation and population transfer in IHL is equally applicable to all armed conflicts and to all stages as long as transfer is accomplished through a certain amount of control over civilians. This position results from an evolutive interpretation of the law grounded in the principle of humanity and human dignity and is informed by the contemporary nature of armed conflicts.

Chapter three demonstrates that international criminal law's contribution to the crime against humanity and war crime of deportation and population transfer is unprecedented, mainly because it actualizes the law in the context of contemporary armed conflicts. International criminal law is at a fascinating time in its development. Through case law, it greatly contributes to the progressive development of international human rights and international humanitarian law. However, a study of the case law of international tribunals shows that ICL's understanding of the crime against humanity and war crime of deportation and population transfer does suffer from what is at the moment a highly technical and complex legal regime, which is at time difficult to decipher. To avoid contradictions, ICL would benefit from adopting an evolutive approach at the forefront of which is the principle of humanity and human dignity. Such an approach would facilitate the application of relevant legal regimes to the changing nature of armed conflicts.

CHAPTER ONE– POPULATION TRANSFER AS A MULTIPLE VIOLATION OF HUMAN RIGHTS

This chapter aims to understand the position of human rights law with regard to the crime of deportation and population transfer in the context of armed conflict. In so doing, it presents population transfer as it is currently conceptualized, namely, a situation that violates a number of human rights, but does not constitue a specific violation in international human right law *per se*. As will be demonstrated throughout this chapter, population transfer is implicitly prohibited in international human rights law, but suffers from the lack of a clear definition and binding treaty.

The absence of any binding definition and enforcement mechanism renders ineffective the prohibition of population transfer. This conceptual gap may be attributable to the post-War context from which emerged the modern human rights system. Indeed, there is no explicit mention of a prohibition of mass expulsion or population transfer in the 1948 *Universal Declaration for Human Rights* because at the time of drafting in the aftermath of the Second World War, numerous peacetime population transfers where underway with the acquiescence of the Allies.[507] The reasons for this absence may partly explain why population transfer is missing from subsequent treaties and conventions. From its inception, the silence of the human rights system is symptomatic of a certain ambivalence towards population transfer.

Today, this uncertainty translates into a confused and confusing conceptual body of law. Arbitrary or forced displacement, forced eviction, mass expulsion and 'ethnic cleansing' are used interchangeably with population transfer and suffer from a lack of clarity and effectivity due to their apparent non-bindingness. This state of affair also highlights the need for human rights actors to distinguish concepts and terms, to agree on clear definitions and to develop a binding treaty on population transfer. But, in order to formalize population transfer, the human rights community will first need to determine whether there is a right to stay in one's home and in one's homeland.

[507] See Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 9.

Population transfer affects the gamut of rights and is analysed as such by international and regional courts. Displacement in the context of armed conflict often results from massive violations of human rights such as mass killings, arbitrary arrests, torture, rape and property demolition.[508] The prohibition of population transfer in human rights law is inferred from the (1) right to freedom of movement; (2) the right to property; and, (3) the right to housing. That is certainly because population transfer affects a spectrum of rights, such as the right to self-determination, equality, housing, family and privacy, and freedom of movement.[509] In fact, it could safely be argued that population transfer may affect all human rights.[510] Such interpretation is consistent with the indivisibility and interdependence of all human rights.

Within the context of population transfer, denationalization is often a 'foreigner-making' mean.[511] This is because population transfer is often the result of political problems arising out of the nexus between population and territory. This nexus is embodied in the principle of nationality, which symbolizes the link between territory, individual and group.[512] In cases of territorial transfer, the general principle of state succession is to avoid statelessness and for the population to stay on the territory.[513] This ensures the emerging rights to a nationality and the right of option.[514] Yet, this principle is not always respected and new decrees or laws effectively denationalize people.[515] Denationalization denies the right to freedom of

[508] See for instance Roger Duthie, "Incorporating Transitional Justice into the Responses to Displacement" in *Transitional Justice and Displacement*, Roger Duthie, ed (NewYork: Social Science Research Council, 2012) at 13.
[509] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UN ECOSOC, 49th Sess, UN Doc. E/CN.4/Sub.2/1997/23 (1997) at paras 15-16.
[510] e.g., the right no to be subject to torture or inhuman treatment, prohibition of forced labour, the right to liberty and security, the right to return, the right to a faire hearing, the right to privacy, right to familiy, the right to political participation, minority rights, the prohibition of incitement to violence and racial hatred, the right to work, the right to eduction, prohibition of racial discrimination, etc. See Alfred De Zayas, "Forced Population Transfers", Max Planck Encyclopedia (Oxford University Press, 2013) at para 14.
[511] On the right to a nationality and permissible deprivation of nationality, see *Convention on the Reduction of Statelessness*, 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) at Art 8: "A Contracting Party shall not deprive a person of his nationality if such deprivation would render him stateless."
[512] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UN ECOSOC, 49th Sess, UN Doc. E/CN.4/Sub.2/1997/23 (1997) at para 21.
[513] *Convention on the Reduction of Statelessness*, 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) at Art 10.
[514] See Claude Emanuelli, *Droit international public: contribution à l'étude du droit international selon une perspective canadienne* (Montreal: Wilson & Lafleur, 2010) at paras 723-744.
[515] For instance, Rohingya Muslims in Burma were denationalized and are now stateless; see "Preventing Mass Atrocities against the Stateless Rohingya in Myanmar: A Call for Solutions" (2015) 68:2 Journal of International Affairs 137; See also Liliana Gamboa and Julia Reddy, "Judicial Denationalisation of Dominicans

movement, among other things, and symbolizes the severance of the person from her home and land. Denationalization also occurs following regime change. Deprivation of citizenship in this context may affect nationals as well as settlers who unlawfully moved or were forcibly transferred to the land under a previous regime.[516] In this sense, denationalization is a form of punishment often grounded on discrimination.[517] Not uncommon to population transfer in armed conflict is the destruction or confiscation of identity cards, passports, birth certificate and other documents proving a link to the homeland in an attempt to erase the person's right to live in the homeland. Statelessness has also been linked to intractable refugee and IDP situations and protracted armed conflicts.[518] As the report of the UN Secretary-General recognized, "statelessness is also increasingly recognized as a significant source of insecurity, human rights violations, forced displacement and violent conflict."[519] In sum, denationalization is either a cause or effect of population transfer and results in statelessness.

1.1 Regional courts consider the ongoing violation of rights, but not the lawfulness of displacement *per se*

Case law from the Inter-American Court of Human Rights and the European Court of Human Rights confirm that a right to stay and to be protected against arbitrary displacement may be inferred from human rights law. The Inter-American Court and the European Court have construed displacement under the right to freedom of movement and the right to property and

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of Haitian Descent" (2014) 46 Forced Migration Review 52; On the right not to be stateless or to a nationality or to be a citizen of a state and the distinction between *de facto* and *de jure* statelessness, see David Weissbrodt and Clay Collins, "The Human Rights of Stateless Persons" (2006) 28:1 Human Rights Quarterly 245 at 248, 251-253.

[516] An occupying power cannot change the nationality of the occupied population. For an example of Israel changing the nationality of Syrian citizens in the Golan, see Éric David, *Principes de droit des conflits armés*, 4th ed (Bruxelles: Bruylant, 2008) at 578; See Al-Khasawneh, A S & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UN ECOSOC, 45th Sess, UN Doc. E/CN.4/Sub.2/1993/17 (1993) at para 262.

[517] UNHCR, *Self-study Module on Statelessness*, 2012 at 20, 30, Online: http://www.refworld.org/docid/50b899602.html

[518] IDPs "are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border." UN *Guiding Principles on Internal Displacement*, introduction, para 2.

[519] Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UNSCOR, UN Doc S/2011/634 (2011) at para 51.

respect for family and home. The jurisprudence of the Inter-American Court of Human Rights and of the European Court of Human Rights involved displacements in non-international armed conflicts attributable to house demolition, eviction and the loss of home. This may explain the connection made by both courts to the right to freedom of movement and residence, the right to property or enjoyment of possessions and the right to respect privacy, family and home. However, the courts have not ruled on the lawfulness of the displacement *per se*. Instead, they based their decisions on events surrounding the displacements and its effects, which triggered multiple violations of human rights. In order to fully assess the legality of displacement, a clearly defined concept of population transfer needs to gain consensus. Hence, both courts have not directly invoked forced displacement, deportation or population transfer as a crime.

1.1.1 The European Court of Human Rights' focus on property and family life

In *Doğan and Others*, the European Court of Human Rights based itself on the right to peaceful enjoyment of possessions and the right to respect for private family life and home to rule on the denial of return of internally displaced persons following the destruction of their homes and evictions during the conflict with the Kurdish armed group PKK.[520] Displaced persons have been refused access to their village by Turkish authorities on the ground of terrorist activities in the area. The Court found a violation of the right to the peaceful enjoyment of possessions, which guarantees the right to property and found a serious and unjustified interference with the right to respect family lives and homes.[521]

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[520] *Doğan and Others v Turkey,* Nos 8803-8811/02, 8813/02 and 8815-8819/02, [2004] VI ECHR 81 at para 143. In the case of *Akdivar and Others v Turkey*, which also involves the burning of homes and forced displacement of inhabitants of the village, the Court also found a violation of the right to peaceful enjoyment of possessions and the right to respect for private and family life and home. *Akdivar and Others v Turkey* (1996), No 21893/3, ECHR at para 88; See also, *Yöyler v Turkey* (2003), No 26973-95, ECHR at para 80. In a similar case people were displaced by the burning of their homes and forced eviction and were denied return, the Court found that the displacement and denial of return constituted a violation of the right to respect for private and family life and home. *Menteş and Other v Turkey* (1997), No. 58/1996/677/867, ECHR. The Court also found as a result of the burning of houses and displacement a violation of the right to respect for his private and family life and home in *Özkan and Others v Turkey* (2004), No. 21689-93, ECHR, at paras 405-409.

[521] *Doğan and Others v Turkey*, *ibid* : "The Court notes that it is not required to decide whether or not in the absence of title deeds the applicants have rights of property under domestic law. The question which arises under this head is whether the overall economic activities carried out by the applicants constituted "possessions" coming within the scope of the protection afforded by Article 1 of Protocol No. 1. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may

In *Xenides-Arestis v. Turkey*, Mrs. Myra Zenides-Arestis, a Cypriot national, lodged a complaint against Turkey under the European *Convention for the Protection of Human Rights and Fundamental Freedoms* in November 1998. Mrs. Zenides-Arestis contended that Turkey prevented her from accessing, using and enjoying her property in Famagusta in northern Cyprus because she was orthodox and of Greek-Cypriot origin. She invoked a violation of Article 1 (peaceful enjoyment of possessions), Article 8 (interference with right to respect for her home) and taken in conjunction or alone, Article 14 (discrimination in respect of her home and property) of the Convention. In August 1974, she was forced to leave her home, properties and possessions in Famagusta by the Turkish military. She has been unable to return to her home and property since then as it is occupied by Turkish military force. Turkey argued that Mrs. Zenidas-Arestis did not have title to the properties, a contention rejected by the European Court.[522] Turkey also argued that Greek-Cypriot authorities were responsible for rejecting proposals for resettlement of the area and that Turkey could not open Famagusta unilaterally.[523] This argument was also rejected by the Court, who pointed out "that the Government continued to exercise overall military control over northern Cyprus and that the fact that the Greek Cypriots had rejected the Annan Plan did not have the legal consequence of bringing to an end the continuing violation of the displaced persons' rights." [524] In brief, title to property remains despite prolonged occupation and human rights violations do not cease because of a political deadlock.

The Court found Turkey in violation of Article 1, as a result of "denied access to and control, use and enjoyment of her property and any compensation for the interference with her property rights" and of Article 8, because of denial of respect for her home.[525] This situation, the Court noted, affects large number of people given the practice or policy of the northern Cyprus

qualify as "possessions" for the purposes of Article 1." (Paras 138-139, 143, 159-160). In the case of *Akdivar and Others v Turkey*, which also involves the burning of homes and forced displacement of inhabitants, the Court found a violation of the right to possessions and the right to respect for private and family life and home. *Akdivar and Others v Turkey*, *ibid* at para 88. Again in a similar case people were displaced by the burning of their homes and forced eviction and were denied return, the Court found that the displacement and denial of return constituted a violation of the right to respect for private and family life and home. *Menteş and Other v Turkey*, *ibid*. The Court also found as a result of the burning of houses and displacement a violation of the right to respect for his private and family life and home in *Özkan and Others v Turkey*, *ibid* at paras 405-409.

[522] *Xenides-Arestis v Turkey* (2005), No 46347/99, ECHR at para 15.

[523] *Ibid*.

[524] *Ibid* at para 27.

[525] *Ibid* at paras 22, 32.

government; indeed, there are approximately 1,400 such cases against Turkey before the Court.[526] The Court further determined that it is not necessary to examine the complaint of discrimination under Article 14. Accordingly, Turkey must ensure effective protection of the rights enshrined in Article 1 and 8 and provide effective redress to Mrs. Zenides-Arestis as well as "all similar applications pending before it."[527] In a subsequent decision, the Court ruled on the matter of compensation for damage for loss of use of the land and opportunity to lease or rent it. The Court determined that the "Law on Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus" could not be regarded as an "effective" or "adequate" remedy and ordered Turkey to pay approximately 468,000 and 30,000 Cyprus pounds to Mrs. Zenides-Arestis for loss of use of land and opportunity to lease it and for "anguish, feeling of helplessness and frustration."[528] The Court thus considered the ongoing violation of rights following displacement.

1.1.2 The Inter-American Court of human rights: Evolutive interpretation at work

In the case of *Ituango Massacres*, population transfer was used as a weapon of war in order to achieve victory and was clearly related to the conflict. Civilians inhabiting *La Granja* and *El Aro* caught in the internal conflict in Colombia were killed, had their houses destroyed and burned and their livestock, the means of their subsistence, stolen by paramilitary groups with the acquiescence and, at times, the collaboration of the Colombian army.[529] These massacres were intended to terrorize the population and cause its displacement in order to gain territory against the guerrilla.[530] As a result, hundreds of people were displaced. The Inter-American Court for Human Rights found among others a violation of the right to life, property, private life and home and freedom of movement and residence.[531] Adopting an evolutive approach, the Court invoked *Additional Protocol II of the Geneva Conventions* in its interpretation of

[526] *Ibid* at para 38.
[527] *Ibid* at paras 1-5; *Xenides-Arestis v Turkey* (2006), No 46347/99, ECHR at para 6.
[528] *Xenides-Arestis v. Turkey*, *ibid* at paras 5, 25, 42, 47.
[529] *Ituango Massacres v Colombia* (2006), Judgement, Inter-Am Ct HR (Ser C) No 148, at para 113.
[530] "This Court also considers that setting fire to the houses in El Aro constituted a grave violation of an object that was essential to the population. The purpose of setting fire to and destroying the homes of the people of El Aro was to spread terror and cause their displacement, so as to gain territory in the fight against the guerrilla in Colombia." *Ituango Massacres v Colombia*, *ibid* at paras 125, 177, 182, 219.
[531] *Ituango Massacres v. Colombia*, *ibid* at paras 138, 182-183, 197.

Article 21 of the American Convention on the right to property.[532] In applying the right to freedom of movement and residence to the displaced, the Court recognized this right as essential to the "free development of a person" [533] and in furtherance of its evolutive interpretation, determined that the right to freedom of movement "protects the right not to be forcibly displaced within a State Party to the Convention."[534] In this sense, the Court explained "that human rights treaties are living instruments whose interpretation must evolve with the times and, in particular, actual living conditions." [535] As a result, the Court used the *UN Guiding Principles on Internal Displacement* to interprete the right to freedom of movement in the context of internal displacement in Colombia as well as Article 17 of *Additional Protocol II*.[536] The Court's reasoning was informed by other relevant fields of law to revitalize and contextualize the right to freedom of movement to the Colombian conflict. However, the Court did not find a crime of population transfer as defined under international humanitarian law since it is outside its mandate.

The Court considered the scope of human rights violations, the level of vulnerability and the lack of protection to invoke state responsility. Due to the complex nature of displacement, the number of human rights affected and the vulnerability of displaced persons, the Court conceived the displaced persons' situation as one of *de facto* lack of protection by the Colombian state, holding that,[537]

> the displacement originated from the lack of protection during the massacres, due not only to the violations of the right to life [...] to humane treatment...and to personal liberty [...], but also to the theft of the livestock and the destruction of the housing, in violation of the right to property[...] and the right to privacy [...] All these violated rights lead the Court to consider that, in addition to the provisions of Article 22 of the Convention, the situation of displacement examined has also

[532] The Court invoked Articles 13 (Protection of the civilian population) and 14 (Protection of the objects indispensable to the survival of the civilian population) of Protocol II of the Geneva Conventions. *Ituango Massacres v Colombia*, *ibid* at paras 179-180.
[533] *Ituango Massacres v Colombia*, *ibid* at para 206.
[534] Paragraphs 1 of Article 22 of the American Convention establish that: "Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law." *Ituango Massacres v Colombia*, Judgment, *ibid* at paras 205, 207; See also *Mapiripán Massacres v Colombia* (2005), Judgement, Inter-Am Ct HR (Ser C), No 122 at para 188.
[535] *Ituango Massacres v Colombia, ibid* at para 233.
[536] "the Court finds it necessary to examine, as it has in other cases, the problem of forced displacement in light of international human rights law and international humanitarian law, as well as the manifestation of this phenomenon in the context of the internal armed conflict in Colombia" *Ituango Massacres v Colombia* at paras 208-209.
[537] *Ituango Massacres v Colombia*, *ibid* at para 210.

> affected the right of the victims and their next of kin to a decent life, in the terms indicated above, in relation to the State's failure to comply with the obligation to respect and guarantee the rights embodied in these articles.[538]

The Court found the loss of homes and the ongoing displacement to constitute an inhuman treatment.[539] The Court also found the Colombian judiciary unable to hold to account both the paramilitary and the state's armed forces, therefore failing to meet the international obligations of the state.[540] This case illustrates the difficulty for national courts of ensuring accountability in the context of armed conflict, especially non international armed conflicts. Finally, among several forms of reparationn, the Court determined it is the responsibility of the state to ensure the return of the victims to their place of origin.[541] In *Ituango Massacres*, the Court framed forced displacement as a violation of multiple human rights through an evolutive interpretation including soft law and humanitarian law while applying the law of state responsibility with regard to the right to a remedy of victims.

The case of the *Moiwana community* brings at the forefront the unlawfullness of ongoing displacement as a result of impunity and state irresponsibility. *Moiwana* is another important case involving this time the forced displacement of an indigenous community in Suriname during a non international armed conflict. The *Moiwana* community is composed of N'djuka, former African slaves spread among several villages in a traditional territory belonging to the larger group known as Maroon. They are dependent on the land to maintain their cultutral integrity and identity.[542] The N'djuka community was displaced within Suriname and to the French Guiana following a massacre committed by Surinamese armed forces in 1986, in retaliation for the acts of the Jungle Commando, whose leader operated in the area and was a

[538] *Ituango Massacres v Colombia*, *ibid* at para 234.
[539] *Ituango Massacres v Colombia*, *ibid* at paras 274, 277.
[540] "In summary, the partial impunity and lack of effectiveness of the criminal proceedings in this case are reflected in two aspects: first, most of those responsible have not been investigated or have not been identified or processed – bearing in mind that the State has acknowledged its participation in the massacres and that the Court has established its responsibility, because they could not have been perpetrated without the knowledge, tolerance and acquiescence of the Colombian Army in the zones where the events occurred. Second, most of those who have been sentenced to imprisonment have not been arrested." *Ituango Massacres v Colombia*, *ibid* at para 324.
[541] *Ituango Massacres v Colombia*, *ibid* at para 393; *Chitay Nech et al v Guatemala* (2010), Judgement, Inter-Am Ct HR (Ser C), No 212 at para 149.
[542] *Moiwana Community v Suriname* (2005), Judgement, Inter-Am Ct HR (Ser C), No 124 at paras 86(1), 86(6).

Maroon.[543] During the military operation, 39 civilians were killed, properties burned and survivors forced to flee.[544] Scattered, the N'djuka live in poverty while their land lays abandoned and their way of life compromised.[545] The community has a strong sense of collective responsibility that requires justice for the spirit of the dead to rest.[546] They have been unable to return due to fear and lack of justice, the perpetrators still holding positions of power.[547] The Court ruled not on the massacre, but on the state's obligation to ensure a humane treatment. The Court found that the failure to investigate has, among other things, forced the continued separation of the N'djuka from their land and access to justice for the victims in violation of human treatment under Article 5(1) of the *American Convention*.[548] The Court also examined the consequence of the ongoing displacement and found a violation of the right to freedom of movement (Article 22 of the *Convention*),[549] because of the community's inability to return as a result of impunity.[550] Once more, the Court interpreted the right to freedom of movement by considering the soft law instrument that is the *UN Guiding Principles on Internal Displacement*. The court found the state failed to ensure the safe and dignified return of the community to their ancestral land therefore contravening their right to freedom of movement and residence.[551] The Court explained its position in these words:

> Thus, the State has failed to both establish conditions, as well as provide the means, that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands, in relation to which they have a special dependency and attachment – as there is objectively no guarantee that their human

[543] *Moiwana Community v Suriname*, *ibid* at para 86(12).
[544] *Moiwana Community v Suriname*, *ibid* at paras 3, 86(15), 86(19).
[545] *Moiwana Community v Suriname, ibid* at paras 86 (18), 101-102. On the effects of displacement on indigenous people read *Chitay Nech et al v Guatemala* (2010), Judgement, Inter-Am Ct HR (Ser C), No 212 at para 147.
[546] *Moiwana Community v Suriname*, *ibid* at paras 86(10), 95-96.
[547] *Moiwana Community v Suriname*, *ibid* at paras 86(1), 86(6).
[548] *Moiwana Community v Suriname, ibid* at paras 93, 103.
[549] Article 22 of the American Convention, cited in *Moiwana Community v Suriname, ibid* at para 109: 1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
[550] *Moiwana Community v Suriname*, *ibid* at paras 105, 108.
[551] *Moiwana Community v Suriname*, *ibid* at paras 111, 120-121.

> rights, particularly their rights to life and to personal integrity, will be secure. By not providing such elements – including, foremost, an effective criminal investigation to end the reigning impunity for the 1986 attack – Suriname has failed to ensure the rights of the Moiwana survivors to move freely within the State and to choose their place of residence. Furthermore, the State has effectively deprived those community members still exiled in French Guiana of their rights to enter their country and to remain there.[552]

The Court further found a violation of the right to property (Article 21 of the *Convention*) and determined that although the community did not possess formal legal title to the territory, the community is the legitimate owner of their traditional lands: "mere possession of the land should suffice to obtain official recognition of their communal ownership."[553] However, because of the massacre and the state's failure to carry a state-sponsored investigation, the Court ruled that they have been deprived of their right to use and enjoy their land.[554] Regarding the state's duty to conduct a criminal investigation, the Court held that "such an investigation must be undertaken in a serious manner and not as a mere formality predestined to be ineffective. Moreover, this effective search for the truth is the State's responsibility, and decidedly does not depend upon the initiative of victims and their family members or upon their submission of evidence."[555] The Court found a violation of judicial guarantees and protection enshrined in Article 8(1).[556] The Court linked ongoing displacement to state responsibility, more precisely the failure to carry out a criminal investigation and ensure accountability.

[552] *Moiwana Community v Suriname, ibid* at para 120.
[553] *Moiwana Community v Suriname*, *ibid* at paras 130-135.
[554] *Moiwana Community v Suriname*, *ibid* at para 134.
[555] *Moiwana Community v Suriname*, *ibid* at para 146. Suriname's manifest inactivity in the face of this case's extremely serious facts – despite pressures to investigate the 1986 attack from the alleged victims as well as the State's own legislative branch – shows a patent disregard for the principle of due diligence. Paras 156. 163. In consideration of the many facets analyzed above, the Court holds that Suriname's seriously deficient investigation into the 1986 attack upon Moiwana Village, its violent obstruction of justice, and the extended period of time that has transpired without the clarification of the facts and the punishment of the responsible parties have defied the standards for access to justice and due process established in the American Convention. (Para 163).
[556] *Moiwana Community v Suriname*, *ibid* at para 164.

In a separate opinion, Judge Cançado Trindade additionally invoked the effects of uprootedness on the right to cultural identity, part of the right to life.[557] Overall, the Inter-American Court for Human Rights did not directly address the legality of the displacement at the time the events took place, but its ongoing detrimental consequences in the absence of a serious criminal investigation. In regard to displacement, it did not invoke the *Additional Protocol of the Geneva Conventions*, but recognized the convergence and complementary application of human rights, including refugee law, and humanitarian law.[558]

Concluding this section, the European and Inter-American Courts have not directly adressed the legality of displacement, but rather its ongoing effects on other human rights, notably the right to freedom of movement, property and self-determination. This may be attributable to the lack of a clear and binding definition prohibiting population transfer in international human rights law, which does not permit courts to find a violation of the right to stay or a violation of population transfer. The legal response is thus limited by the lack of a clear and applicable definition. At the moment, courts address displacement indirectly by finding displacement has caused ongoing violations of human rights.[559]

1.2 The definition of population transfer must close the door to lawful population transfer

Until recently, population transfer was not defined in international human rights law and in fact "has been largely absent from the human rights debate."[560] The 1986 *International Law Association Declaration* concluded that "compulsory transfer or exchange of population on the basis of race, religion, nationality of a particular social group or political opinion is inherently

[557] *Moiwana Community v Suriname* (2005), Judgement, Separare Opinion of Judge A A Cançado Trindade, Inter-Am Ct HR (Ser C), No 124 at para 13.
[558] *Ibid*, Separare Opinion of Judge A A Cançado Trindade at para 140; See also: *Moiwana Community v Suriname* (2005), Judgement, Inter-Am Ct HR (Ser C), No 124 at para 22.
[559] For a similar conclusion: "Displacement, on the other hand, will be a human rights violation not so much because of what caused it but because of the human rights violations resulting from it, as was shown earlier." Maria Stavropoulou, "The right not to be displaced" (1993-1994) 9 American University Journal of International Law and Policy 3 at 744-745.
[560] Council of Europe, PA, Committee of Legal Affairs and Human Rights, 1st Part Sess, *Enforced population transfer as a human rights violation*, Report, Doc 12819 (2012) at introduction and para 2.

objectional, whether effected by treaties or by unilateral expulsion."[561] The human rights dimension of population transfer resurfaced in the 1990s, as a number of conflicts with discriminatory overtones involved displacement carried out to separate 'unwanted' groups and achieve 'ethnic' homogenisation.[562] In 1992, the *UNPO Conference on population transfer* held in Estonia proposed the following working definition of population transfer:

> The movement of large numbers of people, either into or away from a certain territory, with government involvement or passive acquiescence and without the free and informed consent of the people being moved or the people into whose territory they are being moved.[563]

The working definition highlights the three following elements: (1) there are two components to transfer, namely the displacement of people and the implantation of settlers; (2) there is explicit or tacit intent of the gouvernent; and, (3) there is an absence of free and informed consent of the people affected. Interesting also is the concept of territory, which could equate 'homeland', not necessarily statal boundaries.

Concurrently, Special Rapporteurs on Human Rights and Population Transfer, Mr. Al-Khasawneh and Mr. Ribot Hatano, were appointed to study the question of population transfer in 1992.[564] They produced a *Draft Declaration on Population Transfer and the Implantation of Settlers* in their final report in 1997. It proposed a definition of unlawful population transfer in Article 3:

> *a practice or policy* having the *purpose or effect* of moving persons *into or out* of an area, either *within or across* an international border, or within, into or out of an occupied territory, *without the free and informed consent* of the transferred population and any receiving population.[565]

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[561] International Law Association (ILA), *Declaration of Principles of International Law on Mass Expulsions*, 62nd Conference, Seoul, 1986 at principle 14 cited in Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff: the Hague, 1995) at 109, 132.
[562] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess., UN Doc E/CN.4/1998/53/Add.1 (1998) at part II(E), para 1.
[563] Unrepresented Nations and Peoples Organization (UNPO), *Conference Report, Human Rights Dimensions of Population Transfer,* Tallinn, Estonia January 11-13, 1992 at 8.
[564] A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UN ECOSOC, 45th Sess, UN Doc. E/CN.4/Sub.2/1993/17 (1993) at introduction.
[565] [Emphasis added] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc E/CN.4/Sub.2/1997/23 (1997) at Annex II, at 141, Art 3.

The definition of the *Draft Declaration* includes important elements. First, population transfer can occur to change the demographic composition of an area, as part of a discriminatory policy or practice or from conditions of insecurity and disorder.[566] Commonly, transfers occurs during situations of "territorial changes, state-building carried out through demographic manipulation, collective punishment, development projects, induced degradation of the environment, slavery, transfer of settlers or under false pretence of national security or military imperative."[567] Second, transfer takes place in either peace or wartime, such as "disturbances and tensions, internal violence, internal armed conflict, mixed internal-international armed conflict, international armed conflict and public emergency situations."[568] Third, the definition covers all persons, irrespective of their legal status, thus including nationals, stateless persons and refugees, for instance.[569] Fourth, transfer is conceived as the displacement of a collective, a population, and not of individuals. This construct is peculiar to human rights law since both humanitarian and criminal law conceive of individual transfers, although transfer usually affects a population or part thereof. To be consistent with other branches of law, human rights law should include the individual within the scope of its definition of population transfer. Fifth, the transfer requires a practice or a policy having either the intent or the consequence of displacing a population. Sixth, the notion of border is irrelevant; transfer can take place across or within a state or within, into or out of an occupied territory. The legal status of the boundary crossed is unimportant and will not affect a determination of population transfer. This is in constrast with international criminal law, where the legal status of the line crossed at the time of the displacement is an element of the definition of the crime. Lastly, two of the three forms of transfer are acknowledged, namely the displacement of the population and the implantation of settlers. It also has the advantage of facilitating the application of transfer to movements occurring in the context of volatile boundaries. Confinement is, however, absent from the definition.

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[566] Awn Shawhat Al-Khasawneh, *ibid* at para 67.
[567] Awn Shawhat Al-Khasawneh, *ibid* at para 11 and *Draft Declaration of Population Transfer and the Implantation of Settlers* at Art 1.
[568] Awn Shawhat Al-Khasawneh, *ibid* at para 11 and *Draft Declaration of Population Transfer and the Implantation of Settlers*, *ibid*.
[569]Art 2 stipulates: "These norms shall be respected by, and are applicable to all persons,"groups and authorities, irrespective of their legal status." Awn Shawhat Al-Khasawneh, *ibid, Draft Declaration of Population Transfer and the Implantation of Settlers* at Art 2.

The *Report on Population Transfer* concludes that population transfer violates international law when one or more of the following criteria are met:

a) They are *collective* in nature...The population transfers can involve large number of people in a single event or they can be gradual, incremental or phased;
b) They are carried out by *force or threat of force*;
c) They are *involuntary*, without the full informed consent of the affected population(s);
d) They are *deliberate* on the part of the government or other party conducting the transfer, with or without whose knowledge the violations occur;
e) They are *systematic,* forming a pattern of policy or practice;
f) They are *discriminatory*, affecting a distinct population or distinct populations; and,
g) They take place *without due process*.[570]

Although the *Report* concludes that one criterion is sufficient to constitute transfer; a careful reading of the definition would suggest that a combination of these elements is probably required.

The proposed definition of population transfer grants much weight to the free and informed consent of populations affected by transfer as a determinative criterion of lawfulness. The rationale is that a population can freely consent to being transferred or to receive transferred people. As Emily Haslam explains, "in certain narrowly defined circumstances population transfers may be lawful. [Article 3 of the *Declaration*] makes the legality of population transfer dependent on the informed consent of host and transferred populations."[571] As construed lawfulness is determined by the free and informed consent of the population or more exactly, its representatives, as opposed to the free and informed consent of individuals. The *Declaration* includes a safeguard specifying that population transfer "cannot be legalized by international agreement when they violate fundamental human rights norms or preremptory norms of international law."[572] Population transfer is therefore considered lawful (1) if it is voluntary; and, (2) if the agreement protects basic rights. But then again, there is broad agreement that

[570] [Emphasis added] Awn Shawhat Al-Khasawneh, *ibid* at para 10.
[571] Emily Haslam, Population, "Expulsion and Transfer", Max Planck Encyclopedia of Public International Law (Oxford University Press, 2013) at para 14, Online: www.mpepil.com. "The criteria governing forcible transfer rest on the absence of consent and also include the use of force, coercive measures, and inducement to flee." Awn Shawhat Al-Khasawneh, *ibid* at para 64.
[572] Awn Shawhat Al-Khasawneh, *ibid* and *Draft Declaration of Population Transfer and the Implantation of Settlers*, at Art 7.

defining the conditions of "free" and "informed" consent is a challenge[573] and that the required "conditions are extremely difficult to meet."[574] The central question is really whether transfer can ever be a consensual affair. Do individuals and communities really volunteer to be transferred from their homes if their rights are not baffled in the first place?

The notion of lawful population transfer based on the criteria of free and informed consent and respect for human rights is a gap in international law. The underlying rationale according to which transfer can be carried in conformity with human rights law and the free and informed consent of the population is a remnant of population exchange treaties disconnected from the often coercive environment within which transfer takes place, the need to respect both collective and individual self-determination and freedoms as well as public order. As law stands, it leaves open voluntary population transfers through consent and human rights safeguards.

But consent can be imputed and used to cloak what would otherwise be an unlawful transfer. As Claire Palley cautions with regard to consent:

> such a requirement will open endless disputes as to the presence of consent and more easily avoid imputing state responsibility. This is evident from Israeli allegations that the Arabs of Palestine voluntarily left their homes, and Turkish suggestions that Greek and Turkish Cypriot refugees, who moved across the cease-fire line following Turkeys 1974 invasion of Cyprus, did so by way of voluntary agreed population exchanges. [...] Precise motivation and state of mind when moving is irrelevant when the outcome is grave suffering and individual perception that movement was under duress.[575]

I find the notion of lawful population transfer unconvicing for the two reasons I have just identified and on which I shall now expound.

Lawful population transfer in the form of an agreement on voluntary exchange presupposes populations will be transferred voluntarily. The principal will and intent of the parties to such

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[573] Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Oxford: Hart Publishing, 2007) at 7-8, 11.
[574] Christa Meindersma and A Arakelian, *Human Rights Concerns in Situations of Population Transfers and Population Exchanges: Case Studies and Recommendations*, UN High Commissioner for Refugees (UNHCR), (1994) at 7.
[575] Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) at 225.

agreement is to move a population or a people to another area, territory or country.[576] Whether the will of one of the parties weighted more on the agreement is irrelevant; it remains a contract.[577] But if there is no real or genuine common will, the question then becomes at which level of constraint does the will of one party renders the contact *null and void*.[578]

Assessing the free and informed consent of a party representing a population and of inviduals part of this population is difficult because population transfer takes place in contexts characterised by coercion, incompatible with human rights. The agreement may respect human rights, but not in view of the context from which it stems. As Jeremy Webber wrote in relation to the study of consent, "our ability to give consent – in any situation – is severely bounded by the circumstances in which we find ourselves."[579] Moreover, an agreement on population transfer reduces lawfulness to a contractarian conception of consent. That said, a coercive context affects the freedom to contract of the parties and when physical or moral violence or threat to violence lead to fear, it may render the agreement null and void.[580]

Inherent to the exercice of free and informed consent in the context of population transfer is fear and fear vitiates consent in contractual matters.[581] Clearly, physical violence is illegal and threat to violence illegitimate. Both affect consent and nullifies the contract, and this is true especially when the victim is in a position of weakness.[582] Arguably, in most contexts involving population transfer, fear felt by one or more parties is not only subjective; it is objectively verifiable.[583] Moreover, population transfer is known to take place for motives that are often illegitimate and illegal, such as national homogeneity, discrimination or military

[576] On contract, see Jacques Ghestin, "La notion de contrat" (1990) Recueil Dalloz Sirey at 9.
[577] See Jacques Ghestin, *ibid* at 17.
[578] See Jacques Ghestin, *ibid*.
[579] Jeremy Webber, "The Meaning of Consent" in Jeremy Webber and Colin M Macleod, eds, *Between Consenting Peoples*, *Political Community and the Meaning of Consent* (Toronto: UBC Press, 2010) at 5, 28.
[580] Benoît Moore and Didier Lluelles, *Droits des obligations*, 2nd ed (Montreal: Éditions Thémis, 2013) at 355-356; Steven Blair Sharpe, *Informed Consent, Its Legal Basis in Traditional Legal Principles* (Toronto: Butterworths, 1979) at 9.
[581] On the effects of physical and moral violence on fear, see Aude Valoteau, *La théorie des vices du consentement et le droit pénal* (Aix-en-Provence: Presses Universitaires d'Aix-Marseilles, 2006) at 109, 112-113, 134-135; Benoît Moore and Didier Lluelles, *ibid* at 366-367.
[582] Aude Valoteau, *La théorie des vices du consentement et le droit pénal* (Aix-en-Provence: Presses Universitaires d'Aix-Marseilles, 2006) at 113-115, 118-122.
[583] Benoît Moore and Didier Lluelles, *Droits des obligations*, 2nd ed (Montreal: Éditions Thémis, 2013) at 356-359; for a discussion of duress against a representative of the state or the state under international law, see Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 14th ed (Paris: Dalloz, 2014) at 317-318; Jean Combacau and Serge Sur, *Droit international public*, 11th ed (Paris: Lextenso éditions, 2014) at 131.

gains. The intent, context and effect of the agreement shape the right to choose where to reside and in some cases, one's nationality. As mentioned, the recurring concern, therefore, is whether transfer can ever be a consensual (i.e., contractual) affair between parties to a conflict; that is, between states or between a government and a population, if the context is such that members of a population fear for their security if they do not consent to move or if movement is the only way to save their community. To put it differently, would all the parties have signed the agreement absent a certain context and certain consequences associated to not moving?

In addition, parties to an agreement on population tranfers have already made a choice in the name of the collectivity, to the detriment of the rights of individuals to choose. This presumption diminishes the capacity of individuals to exercise a free choice and may inherently violate their rights to privacy, family and home; freedom of movement and to choose their place of residence. Based on individual autonomy and human dignity, the consent of the victim requires a power to authorize an act which would otherwise be unlawful and the capacity (or at least the belief) that he or she can stop the act.[584] But once a transfer agreement is concluded, the choice of the individual is constrained by his belonging to a specific group or people for whom the retained option is transfer. This inherent limitation on the right of the individual to exercice an unforced choice is compounded by external force, namely a coercive context.[585] The individual's autonomy to choose is undermined because the fate of its population has been decided, its consent deemed and options alternative to moving made unwelcomed. In these circumstances, would the individual find the differential treatment imposed by the agreement on his/her community a violation of human dignity? In such context, can there be an exercice of the right to free will? That the "utmost liberty of contracting" has been respected?[586]

That said, individual rights can be subordinated to "substantial and compelling collective interests," but this balancing test requires an assessment of the context. The Supreme Court of Canada recognized when it affirmed that "this balancing process will necessarily be contextual,

[584] Antoun Fahmy Abdou, *Le consentement de la victime* (Paris: Librairie générale de droit et de jurisprudence, 1971) at 33; On consent and a rights-led approach, see Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Oxford: Hart Publishing, 2007) at 5-7, 29-31.
[585] See Deryck Beyleveld and Roger Brownsword, *ibid* at 131-134.
[586] Steven Blair Sharpe, *Informed Consent, Its Legal Basis in Traditional Legal Principles* (Toronto: Butterworths, 1979) at 3, 18.

insofar as the particular right asserted, the extent of its infringement, and the state interests implicated in each particular case will depend largely on the facts."[587] As I have so far argued, the coercive context within which population transfer is negotiated, agreed and implemented is not conducive to shifting the balance towards collective interests.

More to the core, context and human rights bring into question the validity of an agreement on population transfer in light of public order. Would a court find the intent of the parties (a common law concept), namely the recrafting of populations through demographic manipulation, unconscionable?[588] Following an analogy with private civil law, this time, would it find the agreement contrary to public order,[589] conceptualized as inclusive of international human rights law, including the right to choose one's residence, and more broadly, the principle of human dignity?[590] It is fair to assume an agreement on population transfer would most likely be nullified because contravening the right to privacy and more broadly, public order. As the Canadian Supreme Court determined in a different context involving a clause mandating employees to reside in a certain municipality:

> Choosing where to establish one's home is a quintessentially private decision going to the very heart of personal or individual autonomy and the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so. Support for this view is found in the fact that the right to choose where to establish one's home is afforded explicit protection in the *International Covenant on Civil and Political Rights* to which Canada is a party.[591]

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[587] *Godbout v Longueuil*, [1997] 3 SCR 844, 152 DLR (4th) 577 at para 1.

[588] "On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger." For a discussion of unconscionability, see Steven Blair Sharpe, *Informed Consent, Its Legal Basis in Traditional Legal Principles* (Toronto: Butterworths, 1979) at 8, 10.

[589] On whether the right to choose one's home falls within the right to privacy and whether the residence requirement of an employment contract was invalid mainly because it was contrary to public order, see *Godbout v Longueuil*, [1997] 3 SCR 844, 152 DLR (4th) 577; on the illegality of the object and goal of a treaty in international law, see Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 14th ed (Paris: Dalloz, 2014) at 319.

[590] Arguing the European *Convention for the Protection of Human Rights and Fundamental Freedoms* is "a constitutional instrument of European public order (ordre public)." *Loizidou v Turkey* (Preliminary Objections)(1995), No 15318/89, ECHR at para 75; *Al-Skeini and Others v the United Kingdom* (2011), No 55721/07, ECHR at para 141; For a discussion of public order, see Michelle Cumyn, "L'ordre public et le droit civil" in Benoît Moore, dir, *Mélanges Jean-Louis Baudouin* (Montreal: Éditions Yvon Blais, 2012) at 277-280, 293; see also for an assessment in the Canadian context, Jean-Louis Baudouin, Pierre-Gabriel Jobin et Nathalie Vézina, *Les obligations*, 7th ed (Montréal: Éditions Yvon Blais, 2013) at 169-170, 185-186, 195-196, 198.

[591] *Godbout v Longueuil*, [1997] 3 SCR 844, 152 DLR (4th) 577 at para 1.

Consequently, I argue a lawful population transfer respecting the criteria of free and informed consent and international human rights law is a fiction, because it leaves out the context and the illegitimate objectives underpinning such agreements and infringes on the rights to privacy and to choose one's residence, among other things. Therefore, it is contrary to free and informed consent and public order, inclusive of human dignity, and ultimately, the principle of humanity.[592] Human dignity militates against recognizing agreements on collective population transfer because it amounts to rewarding the cause and fruit of conflict in defiance of national and international public order. Indeed, contractual law (or treaty law) is subject to peremptory norms, such as non-discrimination and the right of humanity to dignity; thus highlighting the relation between international public order and *jus cogens*.[593]

I would lastly add that the notion of lawful population transfer is an anachronistic legal construct. Lawful population transfer comes from an epoch where almost all governments and states were founded on force, or at best a pretence of consent, either through usurpation or conquest; a legacy many governments have still to address.[594] The legal definition of population transfer thus needs to be revitalized in light of the development of international human rights law.[595]

In time of emergency, human rights law permits the suspension of some rights.[596] The UN Human Rights Committee stated that "even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."[597] Derogations are thus exceptional measures.

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[592] Grant Dawson and Sonia Farber, *Forcible Displacement Throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 44; For examples of case law where it was ruled that human dignity was breached despite consent and that human dignity is part of public order, see Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 96-98, 108, 110-111.
[593] Catherine Le Bris, *ibid* at 492.
[594] Jeremy Webber, "The Meaning of Consent" in Jeremy Webber and Colin M Macleod, eds, *Between Consenting Peoples*, *Political Community and the Meaning of Consent* (Toronto: UBC Press, 2010) at 3-4.
[595] On the need to systematically revitalize laws to ensure decisions are not anachronistic, see Micheal Reisman, *L'école du New Haven de droit international* (Paris: Éditions Pedone, 2010) at 256, 259.
[596] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) at Art 4.1
[597] UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflicts* (Geneva: UN Publication, 2001) at 47-48.

What's more, certain rights may never be derogated from, namely the right to life[598] and the prohibition of torture or cruel, inhumane or degrading treatment or punishment. However, the right to freedom of religion, movement, expression, peaceful assembly and association for instance, may be derogated from. A justified derogation will be necessary, proportionate and of limited intrusiveness or effect on other rights.[599] A state that suspends rights must also publicly inform the population.[600] International human rights law allows for non-consensual – i.e., forced − evacuation and displacement in accordance with permissible human rights derogations. Article 4(3) of the *Draft Declaration* stipulates that "the displacement of the population or parts therefof shall not be ordered, induced or carried out unless their safety or imperative military reasons so demand."[601] Safety and imperative military reasons can justify a forced – non-consensual – displacement or evacuation under international human rights and humanitarian law. As Francis Deng, the first Representative of the Secretary-General on Internally Displaced Persons explained, the movement of population may be undertaken,

> during genuine public emergencies, such as armed conflicts, severe communal or ethnic violence, and natural or human-made disasters. These, however, must be "strictly required by the exigencies of the situation" and must not be inconsistent with other State obligations under international law or involve invidious discrimination.[602]

Looking at the right to freedom of movement, the *Covenant on Civil and Political Rights* allows limitations "to protect national security, public order (*ordre publique*), public health or moral or the rights and freedoms of others", as long as they are consistent with other rights and principles such as non-discrimination.[603] These restrictions must also meet the test of necessity,

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[598] IHL permits killing a combatant and also civilians if necessary to attain military objective, such attack would be evaluated against the principles of necessity and proportionality. For a discussion on concurrent application with regard to the right to life, see UN Office of the High Commissioner for Human Rights, *ibid* at 55-64.
[599] UN Office of the High Commissioner for Human Rights, *ibid* at 50-51.
[600] See Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 311.
[601] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc E/CN.4/Sub.2/1997/23 (1997), *Draft Declaration of Population Transfer and the Implantation of Settlers* at Art 4.
[602] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc E/CN.4/1998/53/Add.1 (1998) at Part II (D)(1).
[603] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) at Art 12.3; UN Human Rights Committee, *General Comment No. 27: Freedom of movement*

requiring that measures are necessary to achieve their purpose, and to meet the test of proportionality, namely to be appropriate to attain the desired protection, be the least intrusive possible, and be proportionate to the purpose protected.[604]

Displacement and evacuation in the context of safety and military reasons need to be distinguished because evacuation is temporary and does not pre-empt return although it should be scrutinized so as not to become population transfer. The *UN Human Rights Committee,* commenting on the right to freedom of movement which serves to construe the prohibition of population transfer, mentionned that:

> The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. *It implies the right to remain in one's own country.* It includes not only *the right to return* after having left one's own country [...] *It also implies prohibition of enforced population transfers or mass expulsions to other countries*.[605]

This comment is informative in its reference to an individual right to stay, as part of the right to freedom of movement, and in casting the prohibition of population transfer, as part of the right to freedom of movement. Affirming the non-derogability of population transfer in states of emergency, the Human Rights Committee concluded that, "the legitimate right to derogate from article 12 of the Covenant during a state of emergency can never be accepted as justifying such measures [deportation and population transfer]."[606] There is thus a clear conceptual difference between population transfer and temporary displacement or evacuation during emergencies or disasters. But to make it clearer, there should be no lawful population transfer so as not to allow a forced displacement or evacuation to be presented as a lawful population transfer. As remarked by the Special Rapporteurs on human rights and population transfer:

> Even though it is a general rule that exceptions to a principle must be interpreted restrictively, so as not to undermine the principle, the rather broad terms "public safety" and "national security" warrant concern as to their possible use and have

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(Art. 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999), at paras 2, 18; See also Walter Kalin, "Guiding Principles on Internal Displacement; Annotations" 32 *ASIL Studies in Transnational Legal Policy* at 14.

[604] UN Human Rights Committee, *General Comment No. 27 (Freedom of movement, Art. 12)*, *ibid* at paras. 14, 16.

[605] [Emphasis added] UN Human Rights Committee, *General Comment No 27 (Freedom of movement, Art 12)*, *ibid* at para 19; See also UN Human Rights Committee, *General Comment No 29 (State of Emergency, Art 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2011) at para 13 (d).

[606] UN Human Rights Committee, *General Comment No 29 (State of emergency, Art 4)*, *ibid* at para 13 (d).

been noted to be not sufficiently precise to be used as a basis for limitation or restriction of certain rights and freedoms of the individual.[607]

Having said this, there is a caveat to the notion of consent in contexts of displacement, which requires an analysis of the nature of displacement to ensure it is not population transfer in disguise.

The broad scope of the definition of population transfer proposed in the *Draft Declaration* if adopted in a binding treaty, could serve to enrich international humanitarian law and international criminal law. The main advantage of the proposed definition is that it goes to the heart of what transfer is about, encompassing both internal and external displacements, international and non-international armed conflicts, as well as the crime of deportation and population transfer in international humanitarian and international criminal law. Coherence between IHRL and IHL on the law of deportation and population transfer is crucial to their concurrent and complementary application in time of tension and armed conflict.

The main problem with the proposed definition of unlawful population transfer is lawful population transfer. It has been affirmed that transfer under the guise of voluntariness should minimally be considered skeptically.[608] I go a step further and call for a contemporary interpretation of population transfer that gives greater weight to human rights, human dignity and public order and eschews lawful transfer. In addition, the concept should include individual and collective movements, although the practice usually targets communities. If the movement of persons is voluntary, we should perhaps speak not of transfer, but in terms of existing categories of voluntary immigrants and emigrants. In other words, legal concepts and categories other than population transfer already exist to capture lawful and voluntary

[607] A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at para 230.
[608] See Unrepresented Nations and Peoples Organization (UNPO), *Conference Report, Human Rights Dimensions of Population Transfer,* Tallinn, Estonia January 11-13,1992 at 7.

movement of individuals; population transfer is a policy or a practice that is illegal and there must be no exception (i.e., loophole) to it. To be sure, a determination of population transfer involves illegality, not unlawfulness.

International momemtum to move the *Draft Declaration* into a binding treaty is weak. Since its publication in 1997, a perusal of UN human rights documents does not permit the conclusion that the concept has taken hold. However, in 2012, the Committee of Legal Affairs and Human Rights of the Council of Europe did publish a resolution and a report on enforced population transfer as a human rights violation in which it referred to the Draft definition.[609] Moreover, population transfer is defined differently in international humanitarian law and criminal law, whose regimes already have binding provisions on population transfer, as well as a growing body of case law. Further undermining the proposed definition of population transfer in international human rights law is the fact that concepts such as forced and arbitrary displacements, mass expulsion or forced eviction have overlapping meanings and are used interchangeably.[610]

1.3 Lost in semantic? Human rights law is prolific, but confusing

[609] The Council of Europe define population transfer as: "a practice or policy having the purpose or effect of moving persons into or out of an area, either within or across an international border, or within, into or out of an occupied territory, without the free and informed consent of the transferred population and any receiving population. It involves collective expulsions or deportations and often ethnic cleansing." Council of Europe, PA, *Enforced Population Transfer as a Human Rights Violation*, Res 1863 (2012) at para 1. However, further in the report, population transfer is explained differently as: "All population transfers have the common feature of large-scale movement of groups of people. They entail the permanent movement of a large group of people, often defined by their ethnicity or religion, from one region to another." Council of Europe, PA, Committee of Legal Affairs and Human Rights, 1st Part Sess, *Enforced population transfer as a human rights violation*, Report, Doc 12819 (2012) at paras 1, 11, 14.

[610] Other terms related to unlawful situations of forced displacement are forced relocation, deportation, mass exodus, ethnic cleansing, which are also unclear under international human rights law. According to some, this proliferation of terms is confusing because "all refer to arbitrary coerced movement of persons, irrespective of their number, and irrespective of the extent of the state's involvement in the process." Maria Stavropoulou, "Displacement and Human Rights: Reflections on UN Practice" (1998) 20 Human Rights Quarterly 515; Guy S Goodwin-Gill notes in general that "mass expulsions, however, is inherently suspect. In almost every case, xenophobia will be an element and often the very foundation of measures, which, in the suddenness of their application, will disregard presumptively the individualization of basic human rights which is required by existing instruments and the provisions of general international law." Guy S Goodwin-Gill,"Mass expulsion: Comment", Yearbook of the Institute of Humanitarian Law (San Remo: International Institute of Humanitarian Law, 1984) at cited in Al-Khasawneh, A S & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UN ECOSOC, 45th Sess, UN Doc. E/CN.4/Sub.2/1993/17 (1993) at 105.

Human rights law offers a patchy and somewhat confusing understanding of population transfer as many similar concepts overlap and are used interchangeably, illustrating semantical fuzziness. Population transfer is not the sole pretender to conceptualizing unlawful displacement. Human rights law is prolific when it comes to describing pretty much the same phenomenom involving the coerced movement of persons.

In fact, examples abound of semantic overlap and interchangeable terminology. For instance, in a 2009 report, the UN Secretary-General identified violations that may consitute the crime of genocide as among others "ethnic cleansing, forced population transfer or displacement, segregation, isolation or concentration of a group."[611] The UN Sub-Commission in a resolution on the right to freedom of movement urged "Governments and other actors involved to do everything possible in order to cease at once all practices of forced displacement, population transfer and 'ethnic cleansing' in violation of international legal standards" which constitute threats to peace and security.[612] Similarly, Francis Deng, author of the *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, stated "few express international legal norms exist which protect people against individual or collective eviction and displacement or transfer from one region to another within their own country."[613] The UN Secretary-General in his Report on human rights and mass exoduses spoke of victims of mass exoduses.[614] Of the above mentioned concepts, only

[611] Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, *Efforts of the United Nations system to prevent genocide and the activities of the Special Adviser to the Secretary-General on the Prevention of Genocide*, UNHRC, UN Doc A/HRC/10/30 (2009) at para 8.

[612] United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (SUBCOM), *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 46th Sess, UN Doc E/CN.4/Sub.2/1994/56 (1994) at UN Res 1994/24, *The Right to Freedom of Movement*, preamble. In another resolution, the Sub-Commission considered "que l'exil forcé, les expulsions et les déportations massives, les transferts forcés de population, les échanges forcés de populations, les évacuations illégales, les expulsions et les réinstallations forcées, le "nettoyage ethnique" et d'autres formes de déplacement forcé de population à l'intérieur d'un pays ou hors des frontières, non seulement privent les populations concernées de leur droit à la liberté de circulation, mais menacent aussi la paix et la sécurité des États.» UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (SUBCOM), "Transferts forcés de populations", 50th Sess, SUBCOM Res 1998/27, UN Doc E/CN.4/SUB.2/RES/1998/27 (1998).

[613] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc E/CN.4/1998/53/Add.1 (1998) at Part II, para 1.

[614] There is no definition of mass exodus in international law, however, it is clearly linked to deportation and population transfer. See UN Commission on Human Rights, *Human rights and Mass Exoduses*, UNCHR, 56th

expulsion, and to some extent arbitrary displacement, can be said to have made it into 'hard binding' law. Other concepts are deduced from other human rights. Eviction, displacement and transfer are somewhat amalgamated to highlight an inferred right to stay or to remain in one's home and homeland, but all lack a clear binding definition. Conceptual competition, overlapping and confusion undermine clarity, consistence and coherence when it comes to understanding and identifying the abitrary movement of persons.

What is the difference between forced population transfer and forced or arbitrary displacement, forced eviction, mass expulsion or ethnic cleansing? In my view, the relationship appears to be as follow. First, all of these concepts originate from the same rights: freedom of movement, right to housing, freedom from interference with one's home and family, right to choose one's residence, right not to be arbitrarily exiled and right to a nationality. In that sense, they are not fundamentally different. It could be asserted that the "starting premise" to all concepts is the right to stay or to remain in one's home – that is, a right to be free not to move.[615] As the Special Rapporteurs on human rights and population transfer explained, "whether people are forcibly relocated within a country, or settlement of others on their lands is encouraged, or people are forced to cross international borders, these practices violate a people's basic right to remain."[616]

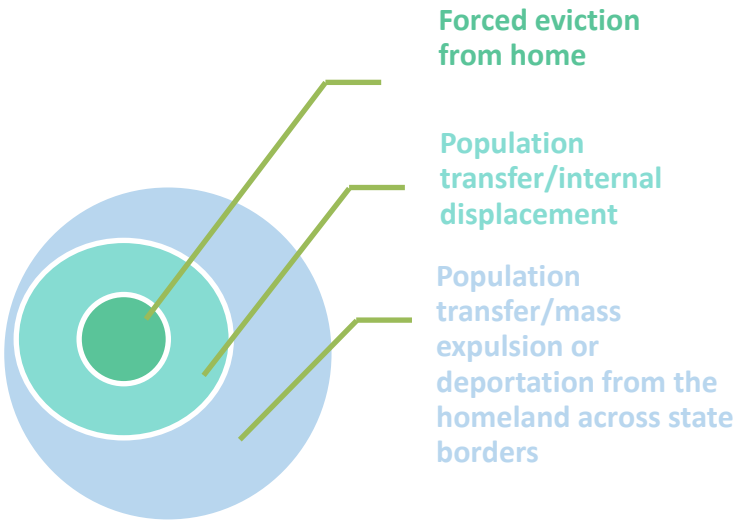
Second, most concepts qualify what is often an unstoppable chain of events: people are evicted from their homes and become internally displaced in their homeland as a result of what can be termed forced, arbitray displacement or population transfer. As the practice of 'pushing out' people continues, people leave their territory altogether and cross an international border, which is then population transfer, mass expulsion or forced or arbitrary displacement. Arbitrary or forced displacement and population transfer in human rights law are bordeless concepts, whereas forced eviction (internal), mass expulsion (cross-border) and deportation are sensitive to the location or destination of the displaced. The following sequence attempts to illustrate this ongoing process of dislocation and the relationship between these concepts.

Sess, HCR Res 2000/55, UN Doc E/CN.4/RES/2000/55 (2000); UN Report of the Secretary-General, *Human rights and Mass Exoduses*, UNGAOR, 60th Sess, UN Doc A/60/325 (2005) at para 50.

[615] See A S Al-Khasawneh, & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc. E/CN.4/Sub.2/1993/17 (1993) at para 228; Grant Dawson and Sonia Farber, *Forcible Displacement Throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 45.

[616] A S Al-Khasawneh & R Hatano, *ibid* at para 228.

Practices of internal and external arbitrary or unlawful displacement



1.3.1 Arbitrary or forced displacement is a generic concept for all unlawful movements of persons

One could arguably make the assertion that forced displacement and population transfer as construed in the *Draft Declaration* are in fact one and the same concept. Perhaps the concept most similar to the human rights law definition of population transfer is forced displacement. According to the *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, forced displacement "involves policies that have the purpose or the effect of compelling people to leave their home and place of habitual residence, including in some cases relocating them to another area of the country, against their will."[617] Forced displacement is also understood as:

> the denial of the exercise of freedom of movement and choice of residence, since it deprives a person of the choice of moving or not and of choosing where to reside. Under existing law, therefore, protection against *individual or collective internal transfers* is inferred, *inter alia*, from the right to freedom of movement and choice of residence.[618]

[617] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc. E/CN.4/1998/53/Add.1 (1998) at intro, para 3.
[618] Francis Deng, *ibid* at Part II (A)(1).

Hence construed, forced displacement is therefore the denial of the rights to freedom of movement and choice of residence. Interestingly, it is defined as an internal phenomenom, but this may be attributable to the emphasis of this study on internal displacement.

Marco Simmons, for his part, makes the argument that the concept of displacement is closest to arbitrary forced relocation, which he defines as "the use or threat of force to effectuate transfer or resettlement of people, motivated by an illegal purpose or conducted without legal process."[619] This definition of arbitrary forced relocation is closest to the conception of population transfer proposed in this book.

In the *Compilation and Analysis of Legal Norms Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, Francis Deng conceives lawfulness as voluntariness when he posits:

> The relevant question then is whether such coercion is lawful. If a *real choice* exists for the persons concerned as to whether to leave or not, in other words, if they could *reasonably* be expected to choose to remain in their home areas, their movement is voluntary. The same applies to situations where the movement is undertaken with the *genuine and informed consent* of the persons concerned. [620]

This statement is confusing because it equates lawfulness with voluntariness, which is problematic, as previously underscored. It also relies on subjective and undefined notions, such as 'real choice' and 'genuine consent', to assess the lawfulness of coercion. As Maria Stavropoulou wrote, "the problem is that there is no agreement as to when a movement is forced and when it is voluntary, nor is there consensus in philosophy and psychology as to the notion of "free will" in general."[621] This reality is particularly acute in the context of a displacement that is coerced.

A coercitive context inherently militates against real choice, free will and genuine consent. Assuming voluntariness must involve a *real* choice, including the option to stay in one's home,

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[619] "Forced relocation can be considered a distinct sub-species of population displacement." On the definition of arbitrary forced relocation, see Marco Simons, "The Emergence of a Norm against Arbitrary Forced Relocation" (2002-2003) 34 Columbia Human Rights Law Review 95 at 96, 99.

[620] [Emphasis added] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc. E/CN.4/1998/53/Add.1 (1998) at intro, para. 3.

[621] Maria Stavropoulou, 'The right not to be displaced' (1993-1994) 9 American University Journal of International Law and Policy 3 at 743-744.

how does one determine whether a *real* choice exists? And what is a *real* choice? How then to assess real choice and genuine consent in the context of coercion? In other words, can we speak of a *real* choice in the presence of coercion? I believe not, and this the case, even if coercion could theoretically respect human rights law. The problem with the proposed definition is its difficult application.

Besides, an involuntary, unconsented and coerced displacement may well be lawful if it respects human rights law. The choice to remain – that is, the exercice of the right to stay in one's home −is not positively recognized in human rights law, whereas the same body of law allows people to be lawfully displaced against their will. Again, forced displacement may legally take place if coercion respects international law, including human rights law and procedural guarantees. So why bother to determine whether people have a *real choice* if this choice does not really determine lawfulness?

Exceptions or derogations allowing forced displacement are based on human rights law provisions, in particular freedom of movement, adequate housing and freedom from arbitrary interference. [622] Coercion must contravene national or international law for forced displacement to amount to unlawful or arbitrary displacement.[623] The *Compilation of Legal Norms relating to the Protection against Arbitrary Displacement* identifies four possibilities of unlawful displacement, namely: (1) an eviction or displacement of persons not based on grounds permissible under international law; (2) a failure to comply with minimum procedural guarantees; (3) an eviction carried out in a manner that violates human rights; (4) an eviction and displacement that significantly affect the enjoyment of other human rights.[624]

[622] "Article 12 UDHR, Articles 12(1) and 17 CCPR, Articles 11 and 22(1) ACHR, Article 8 ECHR and Article 2(1) of Protocol No.4 to the ECHR, Article 12(1) AfCHPR, Articles 49 and 147 Geneva Convention IV, Article 51(7), 78(1) and 85(4) of Protocol I, Articles 4(3)(e) and 17 of Protocol II, and Article 16 of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries." Walter Kalin, "Guiding Principles on Internal Displacement; Annotations" (2000) 32 *ASIL Studies in Transnational Legal Policy* at 14.
[623] "Upon closer analysis, however, it emerges that the coercion may be defined in terms either of human rights violations that have occurred or the fear thereof." Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc. E/CN.4/1998/53/Add.1 (1998) at part II (B), para 2; Maria Stavropoulou, 'The right not to be displaced'(1993-1994) 9 American University Journal of International Law and Policy 3 at 744-745.
[624] Francis Deng, *ibid* at intro, para. 4.

Whereas the lawfulness of displacement depends on how the displacement is carried out, arbitrary displacement is unequivocally unlawful often both in process and purpose. Confusion exists in the literature and in international documents, which sometimes equate forced displacement with unlawful displacement.[625] In other words, no exception can permit an abitrary displacement because forced displacement can be lawful whereas arbitrary displacement can not. Arbitrariness is to be interpreted broadly to include "inappropriateness, injustice, lack of predictability, and due process of law."[626] Because of its clarity, I contend the concept of 'arbitrary displacement' is preferable to that of 'forced displacement'.

There are four main situations amounting to arbitrary displacement: (1) if displacement is not based on lawful grounds under international law; (2) if minimal procedural guarantees are not complied with; (3) if the manner in which the eviction is carried out violate other human rights, such as personal liberty or constitute inhuman and degrading treatment; (4) or, if the effects of the displacement have a negative impact on other human rights.[627] The *Guiding Principles on Internal Displacement* affirm a right to be protected against arbitrary displacement. The most common forms of arbitrary displacement are identified in Principle 6 of the *UN Guiding Principles on Internal Displacement*, which consider a displacement arbitrary when it is:

a) based on policies of apartheid, "ethnic cleansing" or similar practices aimed at or resulting in alteration of the ethnic, religious or racial composition of the affected population;
b) in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
c) in cases of large-scale development projects that are not justified by compelling and overriding public interests;
d) in cases of disasters, unless the safety and health of those affected requires their evacuation; and

[625] "In general human rights law, by contrast, this prohibition is only implicit in various provisions, in particular the right to freedom of movement and choice of residence, freedom from arbitrary interference with one's home and the right to housing. These rights, however, do not provide adequate and comprehensive coverage for all instances of arbitrary displacement, as they do not spell out the circumstances under which displacement is permissible." Francis Deng, *ibid* at Part IV(1).
[626] Francis Deng, *ibid* at part II (B), para. 2; UN Human Rights Committee, *Draft General Comment No. 35 (Art 9: Liberty and security of person)*, UNHRC, 107th Sess, UN Doc CCPR/C/107/R.3 (2013) at para 13.
[627] Francis Deng, *ibid* at intro, para. 4.

e) used as a collective punishment.[628]

The classical international humanitarian law and criminal law conception of population transfer can be found in Principle 6, paragraphs (a) (b) and (e), because these instances may involve the unlawful displacement of the civilian population, the implantation of settlers and confinement. From this viewpoint, population transfer is a subset of arbitrary displacement. However, if one takes the definition of population transfer proposed in the *Draft Convention*, one would be hard pressed to find a difference between arbitrary displacement and population transfer since they cover all these instances in both peacetime and wartime. A narrower reading would place population transfer as a subset of arbitrary displacement because of its link to armed conflict.

Particularly interesting with the *Guiding Principles* is their broad scope of application, including in the context of armed conflict. In fact, the type of conflict is irrelevant to a finding of arbitrary displacement, as is the envisaged draft definition of population transfer. The *Principles* therefore apply in international and non-international armed conflicts, as well as to internal tensions or strife.[629] The *Principles* are soft law but are used in the field, by tribunals and in drafting conventions. As already noted, jurisprudence of the Inter-American Court of Human Rights refers to the *Guiding Principles*. The *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* incorporated the *Principles* and posits the obligation of states to refrain, prohibit and prevent arbitrary displacement, which means the *Principles* "could provide a model for an international convention prohibiting all types of forcible displacement."[630] In sum, the *Guiding Principles* and the *Declaration on Indigenous Peoples* among other soft law instruments as well as the *African Convention*, deserve recognition of an increasing willingness to prohibit and protect people against forced, or more precisely, arbitrary displacement.

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[628] Francis Deng, *Report of the Representative of the Secretary-General, submitted pursuant to Commission resolution 1997/39, Addendum: Guiding Principles on Internal Displacement*, UNHRC, E/CN.4/1998/53/Add.2 (1998) at Principle 6.

[629] See Toni Pfanner, *Editorial* (2009) 875 International Review of the Red Cross at 2.

[630] Grant Dawson and Sonia Farber, *Forcible Displacement Throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 60; *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, 22nd October 2009 (entered into force on 6 December 2012) at Arts 3(1) and 4.

1.3.2 Forced eviction is the first step towards population transfer

The prohibition of forced eviction stems from the right to housing and the right to be free from arbitrary interference with one's home.[631] In fact, the right to adequate housing is construed as prohibiting forced eviction and the main responsibility of states with regard to this right is to prevent forced eviction.[632] The UN General Comment on the right to adequate housing states that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."[633] The Committee on Social, Economic and Cultural Rights defines forced eviction as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."[634] Proposing a slightly different conception, the *Comprehensive human rights guidelines on development-based displacement*

> apply to instances of forced evictions in which there are acts and/or omissions involving the coerced and involuntary removal of individuals, groups and communities from their homes and/or lands and common property resources they occupy or are dependent upon, thus eliminating or limiting the possibility of an individual, group or community residing or working in a particular dwelling, residence or place.[635]

[631] See UNOHCHR, *Forced Evictions and Human Rights*, Factsheet No 25 (Geneva: UN, 1996) at 8.
[632] UNOHCHR, *Forced Evictions and Human Rights*, *ibid* at 8-9; The right to adequate housing includes: "(1) protection against forced evictions and the arbitrart destruction of one's home; (2) the right to be free from arbitrary interference with one's home, privacy and family; and (3) the right to choose one's residence, to determine where to live and to freedom of movement." See also UNOHCHR & UN Habitat, *The Right to Adequate Housing*, Factsheet No 21 (Geneva: UN, 2009) at 3.
[633] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 4: The right to Adequate Housing (Art 11.1 of the Covenant)*, 6th Sess, UN Doc E/1992/23 (1991) at para 8(a).
[634] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 7: The right to adequate housing (Art. 11.1): forced evictions*, 16th Sess, UN Doc E/1998/22 (1997) at para 3.
[635] Report of the Secretary-General, *Expert Seminar on the Practice of Forced Evictions* (Geneva, 11-13 June 1997), UNCHR, 49th Sess, UN Doc E/CN.4/Sub.2/1997/7 (1997) at para 2.

The United Nations describes forced eviction as a practice of "de-housing" through "the involuntary removal of persons from their homes or land, directly or indirectly attributable to the State."[636] In this respect, states have an obligation to prevent homelessness.[637]

Interestingly, the UN position on forced eviction clearly recognizes the context of persistent threat, insecurity or physical violence within which evictions take place to posite that "no one volunteers to be an evicte" and that "there is invariably an element of "force" or coercion in forced evictions."[638] This stance could appear to settle the question of voluntariness, at least as it comes to forced evictions. The UN position nevertheless admits of eviction in well-defined exceptional circumstances, such as if a tenant unjustifiably destroys a rented property, persistently refuses to pay rent despite an ability to pay, has a persistent antisocial behaviour which threatens public health or safety or, in the context of war, when the land or homes of occupied populations are occupied by nationals of an occupying power.[639] These evictions while forced are lawful. In addition, in the case of collective evictions, arbitrariness is presumed to exists.[640]

Similar limitations exist to the right to freedom from arbitrary interference with one's home whereby "interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant."[641] The challenge, as the Committee on Economic, Social and Cultural Rights pointed out, is that lawful forced evictions "leave open one of the most critical issues, namely that of determining the

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[636] UNOHCHR, *Forced Evictions and Human Rights*, Factsheet No 25 (Geneva: UN, 1996) at 2-3.
[637] Report of the Secretary-General, *Expert Seminar on the Practice of Forced Evictions* (Geneva, 11-13 June 1997), UNCHR, 49th Sess, UN Doc E/CN.4/Sub.2/1997/7 (1997) at para 13.
[638] UNOHCHR, *Forced Evictions and Human Rights*, Factsheet No 25 (Geneva: UN, 1996) at Introduction and 3.
[639] UNOHCHR, *Forced Evictions and Human Rights*, *ibid* at Introduction and at 4; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 4: The right to Adequate Housing (Art 11.1 of the Covenant)*, 6th Sess, UN Doc E/1992/23 (1991) at paras 3, 18.
[640] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc E/CN.4/1998/53/Add.1 (1998), at Part II (C)(1).
[640] Francis Deng, *ibid* at Part II (B)(2).
[641] In its General Comment, the Human Rights Committee seems to equate unlawful interference with arbitrary interference. "In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances." UN Committee for Human Rights, *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17)*, UNHRC, 32nd Sess,1988 at paras 3-4.

circumstances under which forced evictions are permissible."[642] There is an acknowledged need to clearly define permissible exceptions to interference to strengthen the protection of *home* under international law.

Forced eviction of the civilian population and destruction of private property often take place in the context of armed conflict triggering international humanitarian law. [643] It is recognized that forced eviction might take place "with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements."[644] But the UN position distinguishes forced eviction from internal displacement, mass exodus, refugee flows and population transfer.[645] In so doing, it makes a number of arguments: first, that forced evictions is always directly related to specific decisions, legislation or policies of states, or to their failure to stop evictions carried out by other parties; second, that forced eviction always entails an element of coercion through, often, the demolition of homes; third, that all forced evictions are planned and usually announced; and, fourth, that both individuals and groups are affected.[646] I find these distinctions unconvincing because the same four characteristics could easily be applied to population transfer or other forms of arbitrary displacement. Somewhat blurring its own distinction, the UN concludes that "whether labelled as eviction, displacement, resettlement or removal, this practice continues, in one form or another, in all countries."[647] It even adds:

> Legal obligations enshrined in the 1949 Geneva Conventions and the 1977 Additional Protocols thereto prohibit the displacement of the civilian population and the destruction of private property as these relate to the practice of forced eviction in the context of both international and non-international armed conflict.[648]

Construed as such, forced eviction is an element or a step in the process of population transfer in international humanitarian law. So what then is the 'real' difference between forced eviction and internal displacement, mass expulsion or population transfer? I submit the main difference

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[642] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 7: The right to adequate housing (Art. 11.1): forced evictions*, 16th Sess, UN Doc E/1998/22 (1997) at para 2.
[643] Committee on Economic, Social and Cultural Rights (CESCR), *ibid* at paras 6, 12.
[644] Committee on Economic, Social and Cultural Rights (CESCR), *ibid* at para 5; UNOHCHR, *Forced Evictions and Human Rights*, Factsheet No 25 (Geneva: UN, 1996) at 3.
[645] UNOHCHR, *Forced Evictions and Human Rights*, *ibid* at 3.
[646] UNOHCHR, *Forced Evictions and Human Rights*, *ibid* at 3-4, 7.
[647] UNOHCHR, *Forced Evictions and Human Rights*, *ibid* at 7.
[648] UNOHCHR, *Forced Evictions and Human Rights*, *ibid* at 9.

is that forced eviction concerns the specific displacement from the 'home' and does not cover subsequent displacement to the loss of one's home.[649] From this angle, forced eviction is not so different from population transfer or expulsion; rather, it is a step in a continuum of displacement characterised first by homelessness and then by homelandness.

When it comes to displacement, most human rights affected and concepts suffer from the same problem, namely determining when exactly an act involving coercive movement of persons is arbitrary. Delineating this fine line is crucial to the practical application of these concepts.

1.3.3 Mass expulsion or mass deportation of nationals and aliens is *prima facie* unlawful

Population transfer may be tainted by discrimination whereas mass expulsion is inherently discriminatory. The International Law Association (ILA) defined mass expulsion in 1986 as "an act or a failure to act, by a State, with the intended effect of forcing the departure of persons against their will from its territory for reasons of race, nationality, membership of a particular social group or political opinion."[650] Mass expulsion is thus an act grounded on discrimination. According to Jean-Marie Heanckearts, the actions of the state need to be "clearly geared towards one or more well-defined groups, as groups, and [intended] to drive those groups out."[651] For Walter Kälin mass expulsions "are expulsions of groups of aliens - eg, persons of a particular national origin - that are ordered without an individual decision regarding each of the affected persons taking into account the individual circumstances of each case."[652] The Special Rapporteur on human rights and population transfer makes the important link between the discriminatory motive to collective expulsion and population transfer when he writes that

[649] "International action on forced evictions has made a distinction between this practice and the related practices of forced expulsions over an international border and other acts of deportation." UNOHCHR, *Forced Evictions and Human Rights*, Factsheet No 25 (Geneva: UN, 1996) at 3.
[650] International Law Association (ILA), *Declaration of Principles of International Law on Mass Expulsions*, 62nd Conference, Seoul, 1986 cited in Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc. E/CN.4/Sub.2/1997/23 (1997) at para 354.
[651]On the concept of indirect mass expulsion, Henckaerts considered the occurance of an indirect mass expulsion "when the same result is achieved by imposing such conditions of life on a group of people that they cannot reasonably be expected to stay any longer in the territory." Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 119.
[652] Walter Kälin, "Aliens, Expulsion and Deportation", Max Planck Encyclopedia (Oxford University Press, 2010) at para 22, Online: http://www.mpepil.com/

"collective expulsions or population transfers usually target ethnic, religious or linguistic minorities and thus, *prima facie*, violate individual as well as collective rights contained in several important human rights instruments."[653] Deportation also relates to expulsion.

The relationship betwen expulsion and deportation is unclear in international law. In fact, it could be said that expulsion is equivalent to deportation in international humanitarian and international criminal law. For instance, expulsion is the term used in the French version of the *ICTY Statute* but has made it into the English case law of the Tribunal and was used interchangeably with deportation. The Tribunal does not seem to have addressed the terminological difference between deportation in English and expulsion in French. According to judge Schomburg, "the crime of 'deportation' (English version of the Statute) or 'expulsion' (misleading French version of the Statute) would need to be discussed and defined, this being a question of *lex specialis."*[654] However, Walter Kälin explains the relation between expulsion and deportation differently:

> expulsions and deportations are a State's unilateral acts of ordering a person to leave its territory and, if necessary, of forcefully removing him or her. The terminology used at the domestic or international level is not uniform but there is a clear tendency to call expulsion the legal order to leave the territory of a State, and deportation the actual implementation of such order in cases where the person concerned does not follow it voluntarily.[655]

In international law, expulsion can be inferred from the prohibition of arbitrary exile in the *Universal Declaration of Human Rights*. It is not clear whether the prohibition of arbitrary exile found in Article 9 of the UDHR encompasses a prohibition of expulsion, because the meaning of exile is itself subject to debate.[656] The prohibition of exile has been held not to

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[653] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc. E/CN.4/Sub.2/1997/23 (1997) at para 14.
[654] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg (17 September 2003) at para 11 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber). In fact, the Tribunal has at least on one occasion employed the concept of expulsion instead of deportation in its jurisprudence in English. See *Kupreškić*, were the expulsion of civilians was considered the crime of persecution, cited in *Prosecutor v Krnojelac*, Separate Opinion of Judge Schomburg, *ibid* at para 4.
[655] Walter Kälin, "Aliens, Expulsion and Deportation", Max Planck Encyclopedia (Oxford University Press, 2010) at para 1, Online: http://www.mpepil.com/
[656] "No one shall be subjected to arbitrary arrest, detention or exile." *Universal Declaration of Human Rights*, UNGAOR, GA Res 217 A (III) (1948) at Art 9.

encompass the prohibition of expulsion,[657] but the opposite has also been said, namely that customary law is reflected in Article 9, affording absolute protection against individual and mass expulsions.[658] As Maria Stavropoulou pointed out, "the prohibition of 'exile' in the Universal Declaration may cover some of the gap, but given its unclear meaning little reliance can be placed on its effectiveness."[659]

That said, international law prohibits individual and mass expulsions of nationals, as well as the mass expulsion of aliens. The prohibition of mass expulsions covers nationals and non-nationals lawfully present such as refugees,[660] stateless persons[661] and migrant workers.[662] In case of mass expulsions, minority groups who are not nationals are also covered since their expulsion would be discriminatory. However, mass expulsion may be permitted "where the security and existence of a State may be seriously endangered."[663] In such cases, the principle of non-discrimination applies. In fact, equality before the law applies to all, hence no group or

[657] On the dicussion, see Maria Stavropoulou, 'The right not to be displaced' (1993-1994) 9 American University Journal of International Law and Policy 3 at 719.
[658] Maria Stavropoulou, "The Question of a Right Not to be Displaced" (1996) 90 American Society of International Law Proceedings at 550.
[659] Maria Stavropoulou, *ibid* at 725.
[660] *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) at Art 32: (1) "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order" and (2) "The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law" and Art 33: (1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, member ship of a particular social group or political opinion. (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."
[661] *Convention relating to the Status of Stateless Persons*, 28 September 1954, 118 UNTS 1960 (entered into force 6 June 1960) at Art 31: "The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order."
[662] *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res 45/158, UNGAOR, UN Doc A/RES/45/158 (1990) (entry into force 1 July 2003), at Art 22: "(1) Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually. (2) Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law." For a good overview of who is protected against expulsion, see Maria Stavropoulou, "The Question of a Right Not to be Displaced" (1996) 90 American Society of International Law Proceedings at 551.
[663] Walter Kälin, "Aliens, Expulsion and Deportation", Max Planck Encyclopedia (Oxford University Press, 2010) at para 23, Online: http://www.mpepil.com/

individual may be expelled on discriminatory grounds.[664] Yet, national security leaves much space to states to carry out expulsions which would otherwise be unlawful.

Therefore, only permitted is the expulsion of individual aliens after an individual determination. Article 13 of the ICCPR regulates the expulsion of lawfully present individual aliens. Unlawfully present aliens and illegal entrants are not covered by Article 13,[665] a loophole since they are likely to be the most vulnerable.[666] Lawfully present aliens may be expelled,

> only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.[667]

In its General Comment, the UN Committee on human rights added that while the provision aims to "regulate the procedure and not the substantive grounds for expulsion", "its purpose is clearly to prevent arbitrary expulsion."[668] It also added that no collective or mass expulsion could satisfy the requirements of Article 13.[669] The danger is to disguise collective expulsion through individual expulsion permitted under international law.

The international law of expulsion does not protect all individuals equally and may disempower the most vulnerable persons.[670] The level of protection depends largely on the

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[664] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976) at Art 26.
[665] "This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions." UN Committe on Human Rights, *General Comment 15: The Position of Aliens under the Covenant*, UNHRC, 27th Sess (1986) at para 9.
[666] The only exception is perhaps migrant workers, who irrespective of the lawfulness of their stay should not be expelled without due process. See Walter Kälin, "Aliens, Expulsion and Deportation", Max Planck Encyclopedia (Oxford University Press, 2010) at para 6, Online: http://www.mpepil.com/
[667] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976) at Art 13.
[668] UN Committe on Human Rights, *General Comment 15: The Position of Aliens under the Covenant*, UNHRC, 27th Sess (1986) at para 10.
[669] UN Committe on Human Rights, *General Comment 15: The Position of Aliens under the Covenant, ibid.*
[670] On the marginalization of indigenous people by law, the legal status of indigenous and minorities and the protection of their rights by courts. Doris Farget, *Le droit au respect des modes de vie minoritaires et autochtones dans les contentieux internationaux des droits de l'homme* (PhD Thesis), Université de Montréal, 2010) [Unpublished] at 2, 183-200, 290-292, 295-298. With regards to Roma, she concludes "Ainsi, une des

number of persons affected and on their legal status. Much emphasis is put on whether it is an individual or a group expulsion and on whether the expelled person is a national, a lawful or unlawful alien. As Patrick McFadden highlighted "nationals are more likely to be protected than aliens and groups are more likely to be protected than individuals."[671] McFadden makes the valid point that "it is untenable to suggest that the disprution to one's life is made worse because others' lives are similarly dispruted."[672] It also seems untenable that unlawfully present aliens such as irregular migrants, which may include some of the most vulnerable people on earth, are the least protected. At best, they can hope the provision on *non-refoulement* will be respected if they risk serious violations of human rights at home.[673] But hierarchical protection based on share numbers and status provides for a protection of human rights that may fall short of preserving human dignity.

Expulsion	**Nationals**	**Foreigners with legal status** (refugees, stateless, migrant workers)	**Foreigners without legal status**
Groups/mass	Unlawful	Unlawful	Unlawful
Individuals	Unlawful	Lawful subject to Art.13 of ICCPR	Lawful, subject to Art.3 of CAT

The prohibition of mass expulsion is also found at the regional level. The 1963 Protocol 4 of the *European Convention on Human Rights* reads as follow: “no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.”[674] Prohibition of expulsion of aliens was added in the *European Convention*

limites principales à l*’obligation positive de permettre aux Tsiganes de suivre leur mode de vie* réside dans l’absence de remise en cause, d’une part, des lois déjà existantes, notamment en matière d’urbanisme, et, d’autre part, de
l’absence d’autonomie conférée aux membres du peuple Rom.» and "De fait, la consécration d’une protection des modes de vie roms et autochtones en Europe est plus symbolique que concrète. En pratique, elle n’étend pas le libre choixidentitaire des communautés roms ou samies au-delà de ce qu’elles pouvaient d’ores et déjà faire par elles-mêmes." [Emphasis in original] (*Ibid*, at 199 and 295 respectively).

[671] Patrick M McFadden, "The Right to Stay" (1996) 29 Vanderbilt Journal of Transnational Law 1 at 32.

[672] Patrick M McFadden, *ibid* at p 33.

[673] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, at Art 3(1); See Walter Kälin, “Aliens, Expulsion and Deportation”, Max Planck Encyclopedia (Oxford University Press, 2010) at para 12, Online: http://www.mpepil.com/

[674] *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46 (entered into force 2 May 1968) at Art 3(1).

on Human Rights in Protocol 7 of 1984, which affirms that "an alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law."[675] The 1969 *American Convention of Human Rights* similarly stipulates that "no one can be expelled from the territory of the state which he is a national or be deprived of the right to enter it" and, banning collective expulsion of aliens, it allows for the expulsion of a lawful alien "only pursuant to a decision reached in accordance with law."[676] The 1981 *African Charter on Human Rights* provides that "the mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."[677] Henckaerts concludes that, "a mass expulsion judged to be illegal under one of the regional human rights conventions, would also violate the other two conventions" and that "there is a universal prohibition of mass expulsions of aliens aimed at a national, ethnic, racial or religious group because of their discriminatory nature."[678] But this, again, leaves short the treatment of unlawfully present aliens which, with the closing of borders and the increasingly restricted access to justice, has left millions without a legal status.

1.3.4 The Non-crime: 'Ethnic cleansing' is the fine line between transfer and genocide

Not only an unfortunate effect of armed conflicts, population transfer is often its aim. Ethnic cleansing is a policy which aims at transferring people out of their home. Ethnic cleansing is a relatively new expression[679] for an old racist project of racial homogeneity.[680] The contemporary idea of ethnic purity probably originates from the Nazi programme of "racial hygiene", which aimed to 'cleanse' Germany of its Jewish population.[681] In 1946, the General Assembly of the United Nations unanimously declared the need to put an end to "religious and

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[675] *Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984, ETS 117 (entered into force 1 November 1988) at Art 1(1).
[676] *American Convention on Human Rights (Pact of San Jose, Costa Rica)*, 22 November 1969 (entered into force 18 July 1978) at Art 22(5)(6)(9).
[677] *African Charter on Human Rights and People's Rights*, 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5 (entered into force 21 October 1986) at Arts 12(4) and (5).
[678] Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 19, 28.
[679] Citing the first interim report (S/25274) in *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN Doc S/1994/675 (1994) at 33.
[680] On ethnic cleansing as an 'old crime' see Alfred de Zayas, "The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia (1995) 6 Criminal Law Forum 2 at 293-294.
[681] William A Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (2003-2004) 3 European Yearbook of Minority Issues 109 at 113, 122.

so-called racial persecution and discrimination".[682] Accordingly, the rational underpinning racist ideologies such as ethnic cleansing is not a new or recent problem.

Ethnic cleansing resurfaced to international audiences at the beginning of the 1990s with the political doctrine of Greater Serbia in Bosnia and Herzegovina and Croatia.[683] Example of this doctrine can be found in the 1992 *Decision on the Strategic Goals of the Serbian People in Bosnia and Herzegovina*, which articulates the aspiration of the Serbian people in Bosnia and Herzegovina as "the separation as a state from the two other ethnic communities."[684]

There is no consensual definition of ethnic cleansing in international law simply because it is not a legal concept. The International Court of Justice found that "the term 'ethnic cleansing' has no legal significance of its own."[685] According to William Schabas, 'ethnic cleansing' is probably better described as a popular or journalistic expression, with no recognized legal meaning in a technical sense."[686] While this is true, I would argue that ethnic cleansing is first and foremost a racist political policy and practice of separation based on constructed national identities overtly advocating intolerance and exclusion of the 'other'. Ethnic cleansing is everything but national, political and religious pluralism.[687] In other words, advocating or implementing ethnic cleansing violates, among other things, the principle of equality, human dignity and public order. It entails not only deportation and population transfer, but also acts of murder, rape and sexual violence.[688]

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[682] *Persecution and Discrimination*, GA Res 103(I), UNGAOR, 1st Sess, UN Doc A/RES/103(I) (1946).
[683] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN Doc S/1994/675 (1994) at 33; "The 'clinical' expression 'ethnic cleansing' was apparently used for the first time in 1981 in the Yugoslav media, referring to the establishment of 'ethnically pure territories' in Kosovo, and it was initially journalistic and military vocabulary without any precise legal definition." *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Dissenting opinion of Judge *Ad Hoc* Mahiou, [2007] ICJ Rep 381 at para 83.
[684] Decision on Strategic Goals of the Serbian People in Bosnia and Herzegovina, published in the Official Gazette of the Republika Srpska, 12 May 1992 cited in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, *ibid* at para 371.
[685] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), ibid* at para 190.
[686] Discussing the definition, see William A Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (2003-2004) 3 European Yearbook of Minority Issues 109.
[687] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN Doc S/1994/675 (1994) at 34.
[688] See Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law,* Vol 1: Rules (Cambridge: Cambridge University Press, 2005), Rule 129 - The Act of Displacement (also Online: ww.icrc.org).

Much of the legal work around the concept of ethnic cleansing grew out of the tactics employed by the parties in the conflicts in the Former Yugoslavia. The Commission of Experts during the dissolution of the Former Yugoslavia provided a good definition of ethnic cleaning in the following terms: “ethnic cleansing' means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area."[689] The purpose of ethnic cleansing "appears to be the occupation of territory to the exclusion of the purged group or groups."[690] As a violent method of demographic manipulation, ethnic cleansing consists in at least (1) the expulsion of a group through deportation or transfer; and, (2) the settlement or colonization of the territory by another group. The pursuance of a policy to ethnically cleanse a territory of its population is contrary to international law,[691] because it cannot happen without violating international human rights law. It also may amount to war crimes, crimes against humanity and in some cases, genocide.

Indissociable from the practice of ethnic cleansing is the crime of deportation and population transfer. In fact, when one speaks of ethnic cleansing one speaks also of deportation and transfer; the two being somewhat interchangeable. This is particularly the case when deportation and transfer take place with persecution, which is based on a discriminatory ground.[692] The main difference, however, is that ethnic cleansing is a policy that entails criminal acts necessary to its realization, whereas deportation and transfer are clearly defined crimes in international humanitarian and criminal laws. In the context of the Yugoslav wars, the Security Council affirmed that "any practice of ‘ethnic cleansing’ is unlawful".[693] The Commission of Experts in the context of the Yugoslav wars considered acts of ethnic cleansing to include arbitrary arrest and detention, confinement of civilian populations in ghetto areas,

[689] Citing the first interim report (S/25274) in *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN Doc S/1994/675 (1994) at 33.
[690] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), ibid*.
[691] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), ibid*.
[692] See generally Guido Acquaviva, *Forced Displacement and International Crimes*, UNHCR, Legal and Protection Policy Research Series, Division of International Protection, PPLA/2011/05 (2011) at 4.
[693] *Bosnia and Herzegovina*, SC Res 787, UNSCOR, UN Doc S/RES/787 (1992), at para 2; *International Criminal Tribunal for the former Yugoslavia (ICTY)*, SC Res 827, UNSCOR, UN Doc S/RES/827 (1993) at preamble.

forcible removal, displacement and deportation of civilian populations.[694] These acts, in addition to indiscriminate killings, torture, rape and the destruction of villages have one goal, namely to push people out of their homes and lands in order to engineer a demographic remaking. The International Tribunal for the Ex-Yugoslavia considered ethnic cleansing as equivalent to "deportation", "ethnic separation by force" or "forcible transfer".[695] The implementation of a policy of ethnic cleansing can encompass all three forms of population transfer, namely the displacement of the civilian population, confinement in order to effect transfer and settler implantation. Hence, the crime of population transfer takes place whenever ethnic cleansing occurs. Less obvious, however, is the extent to which ethnic cleansing is tantamount to genocide.

Debated is the equation between ethnic cleansing and genocide. Common to the crime of genocide and the practice of ethnic cleansing in time of war is their occurrence in identity-based conflict. The UN General Assembly had a more ambivalent, not to say contradictory understanding of the relation between ethnic cleansing and genocide. The General Assembly first used ethnic cleansing as a synonym for genocide. In resolutions whose language was subsequently repeated, the Assembly expressed its grave concern at the

> deterioration of the situation in the Republic of Bosnia and Herzegovina owing to intensified aggressive acts by the Serbian and Montenegrin forces to acquire more territories by force, characterized by a consistent pattern of gross and systematic violations of human rights, a burgeoning refugee population resulting from mass expulsions of defenceless civilians from their homes and the existence in Serbian and Montenegrin controlled areas of concentration camps and detention centres, in pursuit of the abhorrent policy of "ethnic cleansing", which is a form of genocide.[696]

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[694] Citing the first interim report (S/25274) in *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN Doc S/1994/675 (1994) at 33

[695] William A Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (2003-2004) 3 European Yearbook of Minority Issues 109 at 117.

[696] *The Situation in Bosnia and Herzegovina*, GA Res 47/121, UNGAOR, 47th sess, UN doc A/RES/47/121 (1992); For a discussion of the position of the General Assembly, see William A Schabas, *ibid* at 111; See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 381 at para 190.

However, in other resolutions, the Assembly considered ethnic cleansing as a serious violation of international humanitarian law.[697] Denouncing the reluctance of the international community to use the term genocide, especially following his unheard warning in Rwanda, the Special Rapporteur on extrajudicial, summary or arbitrary executions warned (following his visit to the Former Yugoslavia) that "the description of atrocities committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as 'ethnic cleansing' particularly seems to be a euphemism."[698] Based on the above, the nexus between ethnic cleansing and genocide may vary on the circumstances and the interlocutor; in other words, it has no fixed intersect. What is clear though, is that genocide is defined in international law whereas ethnic cleansing is not.

Genocide is clearly defined under international law. The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* stipulates that "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group", such as:

> (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.[699]

Prima facie, ethnic cleansing is not genocide. The problem, as Schabas correctly points out, is that ethnic cleansing aims not primarily at the destruction of the group as much as its expulsion.[700] As he clarifies, "in a sense, both genocide and ethnic cleansing may share the same goal, which is to eliminate the persecuted group from a given area, although ethnic

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[697] *The Situation in Bosnia and Herzegovina*, GA Res 46/242, UNGAOR, 46th sess, UN Doc A/RES/46/242 (1992); *Ethnic Cleansing and Racial Hatred*, GA Res 47/80, UNGAOR, 47th sess, UN Doc A/RES/47/80 (1992).
[698] Bacre Waly Ndiaye, *Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, UNGAOR, 51st Sess, UN Doc A/51/457 (1996) at para 69.
[699] *Convention for the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 1951) at Art II.
[700] William Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (2003-2004) 3 European Yearbook of Minority Issues 109 at 122.

cleansing tolerates the existence of the group elsewhere whereas genocide may not."[701] This logic led Schabas to suggest that the practice of ethnic cleansing was not historically meant to be included in the crime of genocide.[702] The drafting Secretariat of the *Genocide Convention* affirmed that "mass displacement of populations from one region to another also does not constitute genocide."[703] In *Eichmann*, the Israeli court determined that prior to August 1941, the main goal of the Nazis was emigration of the Jews; in other words, fleeing was still possible. After mid-1941, the Nazi adopted the Final Solution: emigration of the Jews was no longer an option, extermination was the goal. As a result, the Israeli court found Eichmann guilty of crimes against humanity prior to 1941 and of genocide as of mid-1941.[704] Similarly, although the ICTY found "obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing" it concluded that a "clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide."[705] Further clarifying the issue, the International Court of Justice found no genocide in the Former Yugoslavia, except in Srebrenica, and concluded that the creation of an ethnically Serb state "did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion."[706] The exception is when expulsing people from their homeland is no longer the only goal.

Ethnic cleansing may lead to genocide if the acts committed in pursuance of this policy are listed in the definition of the crime of genocide and if there is the required intent to destroy the group in whole or in part.[707] In relation to ethnic cleansing, all acts listed in the definition of the crime could theoretically be invoked, although it is more likely to be under Article II,

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[701] William Schabas, *Genocide in International Law, The Crime of Crimes*, 2nd ed (Cambridge: Cambridge University Press, 2009) at 234.
[702] William Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (2003-2004) 3 European Yearbook of Minority Issues 109 at 118.
[703] UN Doc. E/447/23 cited in William Schabas, *ibid* at 119.
[704] "The implementation of the "Final Solution," in the sense of total extermination, is to a certain extent connected with the stoppage of emigration of Jews from territorities under German influence." *The Attorney General of Israel v Eichmann* (1968) 36 ILR 5, Case No 40/61 (District Court, Jerusalem) at paras 80, 186-187.
[705] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 381 at para 190.
[706] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, *ibid* at para 372.
[707] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, *ibid* at para 190; Office of the UN Special Adviser on the Prevention of Genocide (OSAPG), *Analysis Framework*, at 3, Online: http://www.un.org/en/preventgenocide/adviser/

paragraphs a), b) and c) of the *Genocide Convention*, namely (i) killing; (ii) serious bodily or mental harm; (iii) conditions of life calculated to bring about its physical destruction in whole or in part. As for the genocidal intent to destroy a group in relation to a policy of ethnic cleansing, the collation of violations or unlawful acts should be considered.[708] It has been advanced that "certain forms of forced removal, in particular in the context of 'ethnic cleansing' or extreme suppression of ethnic or indigenous peoples (e.g. in the case of Apartheid) may amount to genocide."[709] Briefly, genocide protects the right of peoples to physical existence and "population transfer may threathen the physical existence of a people,"[710] as will be discussed in Chapter III.

Despite its fuzziness, ethnic cleansing continues to gain ground at the international level. For instance, ethnic cleansing has entered emerging legal concepts such as the responsibility to protect (R2P). Under the R2P, ethnic cleansing is related to crimes against humanity − and not genocide, as one of the three pillars for triggering international protection under Chapter VI, VII and VIII of the *UN Charter*.[711] However, it is not clear whether ethnic cleansing needs to take place alongside crimes against humanity to trigger a response. Nevertheless, the acts entailed by ethnic cleansing are considered a breach of the sovereign responsibility of states to protect its civilian population. The General Assembly affirmed that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such *crimes,* including their incitement, through appropriate and necessary means."[712]

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[708] [Emphasis added] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN Doc S/1994/675 (1994) at 25.
[709] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc. E/CN.4/1998/53/Add.1 (1998) at Part II (F)(1); See also Alfred de Zayas, "The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia (1995) 6 Criminal Law Forum 2 at 266-267.
[710] A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at para 212.
[711] Report of the Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, UNGAOR and UNSCOR, 66th Sess, UN Doc A/66/874, UN Doc S/2012/578 (2012) at paras 1, 3.
[712] [Emphasis added] *World Summit Outcome*, GA Res 60/1, UNGAOR, 60th Sess, UN Doc A/RES/60/1 (2005) at para 138.

The legacy of Srebrenica probably explains why ethnic cleansing is part of the R2P.[713] The fact that it is less legally and politically charged than genocide may also have contributed to its inclusion in the R2P. It is, indeed, easier to speak of ethnic cleansing than genocide, because genocide requires a duty to act whereas ethnic cleansing does not entail clear binding obligations.[714] Despite its political nature, a characterization of ethnic cleansing could ensure the international community does not stay idle. But there might come a time when responding to ethnic cleansing will be contested in the absence of an agreed definition of the practice and of the 'crime'.

This is what brings the conclusion that ethnic cleansing is not a useful legal concept because it is unclear and is an umbrella term describing crimes already defined in international law. Instead of speaking of 'the crime of ethnic cleansing' it would be more useful to identify the specific crimes being committed, be them crimes against humanity, war crimes and, when applicable, genocide. As Judge Wolfgang Schomburg concluded "the crime of ethnic cleansing by uprooting specific parts of a population needs to be called by the name it deserves: Deportation." [715] Employing defined legal concepts involving clear responsibilities and obligations would ensure greater clarity when describing, evaluating and responding to situations involving violations of human rights. In addition, using existing legal concepts would ensure greater consistency and facilitate the work of tribunals mandated to hold perpetrators to account. To sum up, ethnic cleansing brings nothing new from a legal perspective because it entails existing international crimes.

In essence, ethnic cleansing is not genocide in the same way that ethnic cleansing is, *ipso facto*, deportation or transfer. Put differently, ethnic cleansing cannot occur without the crime of deportation or transfer whereas ethnic cleansing can occur without genocide. In any event, it

[713] Report of the Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, UNGAOR and UNSCOR, 66th Sess, UN Doc A/66/874, UN Doc S/2012/578 (2012) at para 4.
[714] *Convention for the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 1951) at Art IV, V.
[715] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para 1 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

is a racist policy and practice of 'ethnic purification' that should raise a red flag that genocide is looming.[716]

In conclusion, much confusion remains over the signification of and interaction between population transfer, arbitrary or forced displacement, forced eviction, mass expulsion and ethnic cleansing. It is imperative that the international human rights law regime clarifies what is currently a semantic mess, attributable in part to the lack of binding and clear definitions and blurry exceptions. A similar position was taken by Jean-Marie Henckaerts when he wrote

> mass exoduses are usually attacked in quite general and vague terms but it would make sense to start employing a standardized language alleging a country's violation of the prohibition of mass expulsion. Not only would such phrase provide a correct basis for illegality of the forced exodus, it would state that charge in terms of existing human rights law. This is to be preferred rather than the variety of terms which are now interchangeably, and without clear definition, used in political fora and in the press as well as in legal fora, such as mass exodus of refugees, displaced persons, or uprooted persons, forced departure, mass deportation, massive displacement, mass eviction, mass flight, mass exit, mass emigration.[717]

To protect rights more effectively, international human rights law needs to define and distinguish between relevant terms and concepts as well as exceptions.

1.4 Freedom from population transfer needs to be asserted through a right to stay in one's home and homeland

International human rights law has no specific binding provision on a right to be protected against transfer or arbitrary displacement or a right to stay in one's home and homeland. The central question has already been posed, namely "whether there is a right, enjoyed by individuals and groups, not to be subjected to passive or induced population transfer, either as

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[716] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Dissenting opinion of Judge *Ad Hoc* Mahiou, [2007] ICJ Rep 381 at paras 84-85.

[717] Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 113.

participants or as recipients."[718] In other words, is there a right to stay in one's home and in one's homeland in international human rights law? Michèle Morel, Maria Stavropoulou and Jean-François Durieux think that "the right not to be displaced has on various occasions been recognised as a universally applicable human right, and can therefore be considered as an emerging right in international law."[719] The right to be free from population transfer is latent and underlying much of the reflection in the field of human rights law. That is because human rights law lays the foundational value to the right to stay in peace in one's home and homeland.[720]

However, doctrine is unsure when it comes to asserting a right to a home and homeland under human rights law. 'Home' in this context includes all forms of residential property "regardless of legal title or nature of use."[721] A homeland, for its part, is a precise territorial location where people reside within a state and is governed under human rights law by the right to a nationality.[722] Lorna Fox O'Mahony and James Sweeney maintain that, "the idea of home is both present and absent in law,"[723] whereas Susan Breau notes "a lacuna with respect to rights to an individual home or homeland."[724] Through a similar transcutting analysis of international and regional laws, Patrick McFadden expresses the view that "the right to stay is founded on a

[718] The human rights dimensions of population transfers: preliminary working paper submitted by Ms Claire Palley (E/CN.4/Sub.2/1992/WP.1) cited in Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc. E/CN.4/1998/53/Add.1 (1998) at part IV, para. 2.
[719] Michèle Morel, Maria Stavropoulou & Jean-François Durieux, "The History and Status of the Right Not to be Displaced" (2012) 41 Forced Migration Review at 5, 7.
[720] Concerning the positive right to "live in peace in one's own home", see Grant Dawson and Sonia Farber, *Forcible Displacement Throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 56.
[721] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc E/CN.4/1998/53/Add.1 (1998) at Part II (B), para 1.
[722] Francis Deng, *ibid* at para 13. "The underlying idea here is the importance of belonging to a community, and that a stable community relates to a particular territorial zone. Thus, a population has a local, "territorial" status, and State sovereignty implies responsibilities toward the people(s) (communities) related to the place coinciding with the State. Hence, the principle of local status related to the right of nationality, consistent with other human rights instruments, would preclude the transfer of persons or communities as a violation of that basic right guaranteed by the Racism Convention [CERD]." A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at paras 196, 221.
[723] Lorna Fox O'Mahony and James Sweeney, "The Idea of Home in Law: Displacement and Dispossession" in Lorna Fox O'Mahony and James Sweeney, eds, *The Idea of Home in Law, Displacement and Dispossession*, (Burlington: Ashgate e-Book, 2011) at 1.
[724] Susan Breau,"The International Law Rights to Home and Homeland" in *ibid* at 166, 171, 173-174.

series of disparate provisions, which collectively, though inelegantly, secure the right."[725] Alfred de Zayas considers the right to a homeland a fundamental right, although not expressly recognized in an international convention.[726] He maintains that the right to one's homeland is a "prerequisite to the enjoyment of most other human rights," notably the right to self-determination. It can be inferred from many human rights conventions and established "*a contrario*; that is, the prohibition of compulsory population transfers is the negative expression of the right to one's homeland."[727]

At this point, international human rights law reaches out to international humanitarian law. The report of the Special Rapporteur on population transfer and human rights draws the conclusion that the "right to remain (right to one's homeland)" is found in the norm enshrined in international humanitarian law, namely Article 49 of the Fourth Geneva Convention and Article 17 of Additional Protocol II.[728] I doubt these IHL provisions lead to a positive right to remain in human rights law, although the argument is certainly an interesting one: IHL does imply that people are entitled and actually, should stay where they are during an armed conflict unless their evacuation is required for security or military reasons. A transversal reading of the law would perhaps permit international humanitarian law to inform the right to stay in human rights law, but human rights law needs to translate its own values into positive − that is, 'hard' binding law to respect the rule of law and provide effective protection.

Thus far, it has been argued that under international human rights law, the prohibition of population transfer is implicit because the right to stay is implicit. When pieced together, it might be said that there is a right to stay in one's home and homeland in international law, but this is admittedly arguable since such a right is largely undefined and unenforcable at the moment.

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[725] In discussing the relation between the right to stay and the right to private property, he conlcudes that "the right to stay is promoted, but far from guaranteed, by an international right to private property." He rather identifies the right not to be expelled from one's country, the right to choose one's residence and the right to be protected against arbitrary interference with one's home as "primary guarantees against forced movement." Patrick M McFadden, "The Right to Stay" (1996) 29 Vanderbilt Journal of Transnational Law 1 at 4-5, 30-31.
[726] Alfred de Zayas, "The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia" (1995) 6 Criminal Law Forum 2 at 257-258.
[727] Alfred de Zayas, *ibid* at 258-259, 270-282.
[728] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc E/CN.4/Sub.2/1997/23 (1997), Annex I, at 138.

Nonetheless, in the 1990s, human rights bodies and soft law instruments have rapidly drawn from human rights law a right to stay in one's home and a right to a homeland. The 1994 *UN Resolution on the right to freedom of movement* affirmed "the *right* of persons *to remain* in peace in their *own homes*, on their *own lands* and in their *own countries*."[729] The 1997 *Draft Declaration on Population Transfer and the Implantation of Settlers* similarly stipulates that "every person has the right to remain in peace, security and dignity in one's home, or on one's land and in one's country."[730] Likewise, the 1998 *UN Guiding Principles on Internal Displacement* reiterated the right of "every human being [...] to be protected against being arbitrarily displaced from his or her home or place of habitual residence."[731] The UN Committee for Human Rights in its 1999 General Comment on the right to freedom of movement affirmed that "the right to reside in a place of one's choice within the territory includes the protection against all forms of forced internal displacement."[732] Similarly, the General Comment of the UN Human Rights Committee on freedom of movement maintains that the right to freedom of movement includes a "prohibition of enforced population transfers or mass expulsions to other countries."[733] In this perspective, Eckart Klein maintains the counterpart to the right to freedom of movement is the right not to move or be moved.[734]

The informal recognition of a right to stay may explain why population transfer is still not clearly defined in international human rights law. The question then becomes: Is recognition of a right to stay necessary to the prohibition of population transfer in human rights law or is

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[729] [Emphasis added] United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (SUBCOM), *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 46th Sess, UN Doc E/CN.4/Sub.2/1994/56 (1994) at UN Res 1994/24, *The Right to Freedom of Movement*, preamble.

[730] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc. E/CN.4/Sub.2/1997/23 (1997) at para 12 and Annex II, Art 4(1): "Affirms the right of persons to be protected from forcible displacement and to remain in peace in their own homes, on their own lands and in their own countries."; UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (SUBCOM), *Freedom of movement and population transfer*, SUBCOM Res 1997/29, 49th Sess, UN Doc E/CN.4/SUB.2/RES/1997/29 (1997) at para 3.

[731] Francis Deng, *Report of the Representative of the Secretary-General, submitted pursuant to Commission resolution 1997/39, Addendum: Guiding Principles on Internal Displacement*, UNHRC, E/CN.4/1998/53/Add.2 (1998) at Principle 6(1).

[732] Human Rights Committee, *General Comment No. 27: Freedom of movement (Art 12)*, UNHRC, UN Doc CCPR/C/21/Rev.1/Add.9 (1999) at para 2.

[733] Human Rights Committee, *ibid* at para 19.

[734] Eckart Klein, "Movement, Freedom of, International Protection", Max Planck Encyclopedia (Oxford University Press, 2007) at para 9, Online: http://www.mpepil.com/

it not sufficient for it to remain an implicit right that protects people's home? I am persuaded human rights law needs to be more assertive of a right to stay or to remain. Until then, the concept of population transfer in human rights law will remain unclear, unapplicable and largely ineffective. As the Special Rapporteur on human rights and population transfer pointed out:

> Legal effect concerning population transfer has been so far inadequate in the light of the current reality of human suffering. States frequently lack the political will to conform even with obligations *jus cogens*, *erga omnes*, or of customary law. Exception clauses leave States with a large margin of discretion to use "public purpose", "national security", "development", or "military necessity" as justifications for transfer processes. Particularly where protection against practices of population transfer has to be inferred from general human rights and other international legal norms pertinent to the practice, violations occur.[735]

Although the current state of the law does not prevent courts from ruling on the effects of population transfer, it does prevent them from directly addressing the lawfulness of the transfer or of the arbitrary displacement *per se*. Indetermination reduces the level of protection to which victims are entitled, because they are protected against the effects of population transfer, not the act itself. So the legal response is neither preventive nor proactive. The ambivalence also prevents people from positively asserting 'I have the right not to be arbitrarily displaced or transferred' or 'I have a right to stay in my home, on my land and in my homeland'. Indeed, the "naming effect", with its symbolic value, will: (1) send a clear message to state and non-state actors that such practice is banned; (2) allow greater prevention work; and, (3) give victims more power through a stronger legal basis to hold accountable states and other actors, avoiding the "detour through other human rights."[736]

Freedom from population transfer requires formal recognition of a right to stay in one's home and to remain in one's homeland. The need for a binding convention on population transfer was flagged by Alfred de Zayas in a detailed article already in 1975.[737] Some twenty five years

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[735] A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc. E/CN.4/Sub.2/1993/17 (1993) at para 371.

[736] Michèle Morel, Maria Stavropoulou & Jean-François Durieux, "The History and Status of the Right Not to be Displaced" (2012) 41 Forced Migration Review at 7.

[737] Alfred M de Zayas, "International Law and Mass Population Transfers" (1975) 16 Harvard International Law Journal at 209.

ago Ian Brownlie also explained that “the practices [population transfer and demographic manipulation] involved should be recognized as having a character of their own and deserving a clearer profile as a wrong to international public order” because "where law is tacit, the politics of crude power flourish."[738] In 1998, Francis Deng concluded that, until there is a binding provision, “the lack of a comprehensive *de lege lata* rule in international human rights law on the forced movement of persons” will continue to contribute to an “unclear understanding as to its status in international law.”[739] He then recommended "to define explicitly what is at present inherent in international law − a right to be protected against arbitrary displacement."[740] Maria Stavropoulou attempted the experience and proposed a definition of a right not to be displaced in these terms:

> No one shall be forced to leave his or her home and no one shall be forcibly relocated or expelled from his or her country of nationality or area of habitual residence; unless under such conditions as provided by law solely for compelling reasons of national security or specific and demonstrated needs of their welfare or in a state of emergency as in cases of natural or man-made disasters. In such cases all possible measures shall be taken in order to guarantee the safe departure and resettlement of the people elsewhere.[741]

I propose to formulate the right positively − that is, not a right not to be arbitrarily displaced, but a right to stay or to remain in one's home and homeland. Therefore, the definition could be formulated along these lines: *Everyone has the right to stay in their home, land and homeland or place of habitual residence, including persons whose status or title is traditionally held. Displacement must be conducted in a dignified and safe manner in accordance with exceptions identified in the law. Displaced persons must be informed of their departure as soon as possible, depart safely and have access to durable solutions and reparations.* One of the remaining challenges with such a definition is to idenfity permissible restrictions or

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[738] Ian Brownlie, Paper delivered at human rights conference on "The Problem of Demographic Manipulation in International Law", Nicosia, 21 May 1990 at 8 cited in A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at para 373.
[739] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc E/CN.4/1998/53/Add.1 (1998) at Part IV (2).
[740] Francis Deng, *ibid* at Part IV(5); Council of Europe, PA, Committee of Legal Affairs and Human Rights, 1st Part Sess, *Enforced population transfer as a human rights violation*, Report, Doc 12819 (2012) at para 7.4.
[741] Maria Stavropoulou, “The Right not to be Displaced” (1993-1994) 9 American University Journal of International Law and Policy 3 at 741.

derogations to the right. Needless to say that such exceptions should be detailed and construed restrictively.

My main contention therefore rests in locating the right to stay or *le droit à la terre*[742] with population transfer in the following manner: violations of the right to stay may entail one or more of the following: (i) the arbitrary displacement of individuals or communities; (ii) the transfer of settlers; and, (iii) the confinement in one's home and land. Confinement, as I understand, is to force someone exposed to danger to stay in one's home or in a camp or ghetto, often in humiliating conditions; it is a violation of the right to leave or of freedom of movement.[743]

In the same endeavor, Grant Dawson and Sonia Farber proposed an "International Convention on the Prevention and Punishment of the Crime of Forcible Displacement" affirming the right of "every person [...] to remain undisturbed in one's home and community" and defining forcible displacement as "the removal of one or more persons to another location by expulsion or other coercive acts, from an area in which that person or those persons is/are lawfully present, without grounds permitted under international law."[744] Their draft international instrument is a welcomed initiative as it provides a unified legal regime on forcible displacement and a specific enforcement regime.[745]

Amidst these initiatives, strong criticisms have been raised that "the right to remain is an 'umbrella' term that covers the entire range of human rights, and indeed of values inherent in a dignified and secure life, so 'staggering in their breadth' as to defy effective realization at present."[746] In a metaphor, Hathaway compared the right to remain and the role and mandate of the UNHCR to the plight of women victim of domestic violence, who would have to stay in

[742] Robert RedSlob, "Le principe des nationalités" (1931) 37 Recueil des cours 1 at 45-46.
[743] See for instance the description of the camps and ghettos in *The Attorney General of Israel v Eichmann* (1968) 36 ILR 5, Case No 40/61 (District Court, Jerusalem) at para 199.
[744] Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 175, 178.
[745] Grant Dawson and Sonia Farber, *ibid* at 171-173.
[746] Maria Stavropoulou, "The Question of a Right Not to be Displaced" (1996) 90 American Society of International Law Proceedings at 553.

their home with their abusive partner.[747] Hathaway's criticism is directed at the limited resources of an ever expanding UNHCR mandate and the fact that addressing root causes is not part of their essentially palliative mission.[748] Highlithing challenges to in-country protection, Hathaway writes:

> And in the face of all of this, do we find the High Commissioner for Refugees challenging the exclusionist aims of developed states? Do we find UNHCR championing the right of needy people to disengage from abusive societies, and demanding the recognition of their moral right to protection? No, UNHCR has instead embraced 'the right to remain'. UNHCR's new mantra is that people should be assisted and increasingly, as in the cases of both the Kurdish 'safe zone' and the 'safe havens' of former Yugoslavia, forced, to stay where they are. In insecurity. And in the middle of conflict. Because they have a 'right to remain'.[749]

Hathaway has an excellent argument that protection of the right to remain may strain the mandate of UNHCR and, in some circumstances, may be wholly inappropriate. I would argued that women told to remain in their violent homes are not exercicing their right to remain but are rather victim of confinement. It is a violation of the right to stay to force women to remain in their dangerous homes without any other options for her to choose from. Similarly, people in the safe havens of Yugoslavia were not, for the most part, exercicing a right to remain but were actually 'stuck', 'trapped' or under siege. I would thus nuance his point.

First, the safe havens over Kurdistan and Bosnia were not justified under a right to remain, but rather under the rationale of protecting neutral civilian zones. Neutral and demilitarized zones are IHL concepts,[750] which do have value, although it requires the *political* will to enfore it,

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[747] "Adapting to this changed environment, the head of the agency decided to put on a brave face, and declared boldly that abused women now had a right to stay in their abusive homes while the agency was doing whatever it could to stop the violence. […] That, after all, was critical to realization of the 'right to remain'." James C Hathaway, "New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection" (1995) 8 Journal of Refugee Studies 3 at 290.

[748] "UNHCR, like my hypothetical agency, was established to facilitate palliative protection for desperate people until and unless they are able to go home in dignity. It has now been forced by circumstances to carry out the
interventionist role that was supposed to have been played by the human rights infrastructure of the UN." James C Hathaway, *ibid* at 290-292

[749] James C Hathaway, *ibid* at 293

[750] They include hospital and safety zones, neutralized zones and demilitarized zones. See ICRC, *Rule 35: Hospitals and Safety Zones and Neutralized Zones* and *Rule 36: Demilitarized zones*, *Customary IHL Database*, Online: https://www.icrc.org/customary-ihl/eng/docs/home; See also Éric David, *Principes de droit des conflits armés*, 4e ed (Bruxelles: Bruylant, 2008) at 317-321; Sayeman Bula-Bula, *Droit international humanitaire* (Louvain-la-Neuve: Bruylant-Academia, 2010) at 126-127.

which in the case of the Security Council security zone of Srebrenica was a complete failure. Second, there can be a right to remain without UNHCR being mandated to enforce it. In fact, it should be the role of UN High Commissioner for Human Rights, but its limited presence on the ground may not permit such levels of protection. There is therefore a need to better allocate responsibility and roles, but it does not mean that nothing should be done, or that there is no right to remain. Admitedly, the challenge is to develop an enforcement mechanism to ensure effectivity, as is the case with international criminal law for instance. Thirdly**,** people are not always forced to stay, as Hathaway seems to assert. Sometimes, despite conditions I would argue are barely tenable, they want to remain because their stay is an act of resistance against the enfolding population transfer. Palestine is a case in point, where NGOs and UN agencies, as well as other international and local actors teamed up to help communities resist population transfer, albeit with mitigated success. If people decide they want to stay put, in the midst of home demolition, water cuts and the deliberate imposition of harsh living conditions, we must help them to resist because it is their choice − that is, their way to exert control over their own life, preserve dignity and ensure their own protection. As Josep Zapater explains, "affected populations may choose to stay because of lack of social and economic alternatives elsewhere, because they have developed some coping mechanisms, or because of deeply ingrained motivations related to their political project and their identity."[751] Any action must therefore be sensitive to the motive of people and the reality on the ground.

Many people who have already experienced displacement know what is coming next once they move: further dispossession and the search for durable solutions, which for many is to return home. They do not want to reach this point, because for many it is 'over' − lost is their home, their land and their way of life. They do not want to be told: 'move and we will help you' or 'become a refugee, an IDP or a victim and we will protect you'. The result would be wholly unsatisfactory because it does nothing to support people in their own choices. To use the metaphor of Hathaway, a battered woman may choose to take control of her own life by resisting her abuser. Leaving the house and starting a new life is an act of resistance, of empowerment. She may also decide to stay in her home and get her husband out of the house

[751] Josep Zapater, *Prevention of Forced Displacement: The Inconsistencies of a Concept*, New Issues in Refugee Research, Research Paper No 186 (Geneva: UNHCR, 2010) at 11.

through the help of the police and a court order for instance, because afterall, she has a right to her home as much, if not more, than her abusing spouse. The point is that the means of resistance and empowerment may vary and the response to such situation must accept and respect that people do choose how they want to cope with violations of their rights, including population transfer.

For some people faced with imminent and unsustainable pressure to leave their home and land, staying put is their act of resistance to preserve their dignity – a form of empowerment through the maintenance of control over one's life.[752] If they want to remain, law and the international community must empower them to do so by implementing the right to remain. From a litigation perspective, it may mean that people could access courts while struggling against population transfer, not only after the *fait accompli*. On the ground, this may mean actions that counter pressure to move or displace, such as rebuilding demolished houses and schools, bringing water tanks and generators, maintaining a foreign physical presence on the ground, as well as diplomatic visits and media coverage to fund projects and put pressure through mainstream media. Basically, it means working with people affected to help resist population transfer. Here, NGOs can play a crucial role.

However, such actions are not always practicable or feasible, because protection activities are actually quite restrained in the midst of armed conflict.[753] Yet, protection activities remain valid, as Zapater explains,

> Contributing to peaceful conflict resolution; advocating for the incorporation of IHL into national law, including the prohibition of arbitrary displacement, and for the respect of human rights and humanitarian law principles; early warning and contingency planning; and proximity-based protective strategies, such as protection by-presence, all belong to the toolbox from which, according to the particular situation, humanitarian agencies may draw for their protective strategies in armed conflict. [754]

[752] See Maria Stavropoulou, "The right not to be Displaced" (1993-1994) 9 American University Journal of International Law and Policy 3 at 745.
[753] Josep Zapater, *Prevention of Forced Displacement: The Inconsistencies of a Concept*, New Issues in Refugee Research, Research Paper No 186 (Geneva: UNHCR, 2010) at 14.
[754] [Emphasis added] Josep Zapater, *ibid* at 18.

The right to remain has been branded as "ridiculous as it is evil."[755] Hathaway pretends the right to remain is meaningless because it is already covered by other human rights provisions.[756] He maintains that if other rights were respected, such as freedom from cruel and inhuman treatment, the right would be redundant. That is a given. If all human rights were respected, there would be no need for refugee rights either. The human rights law system is built on the indivisibility and interdependence of rights; it is, therefore, no surprise that when one right is not respected, others are also affected. Violation of one right creates a spill or a resonance effect on the gamut of human rights. As Stavropoulou wrote, "ensuring full respect for certain rights should not preclude respect for other rights. Consequently, providing the legal tools to challenge an unlawful forced movement may be equally important in upholding the norms and principles of refugee law." [757]

Back to evilness, Hathaway remarks that the right to remain focuses attention to the 'movement' and neglects the root causes of displacement.[758] Well, that is already the case. As shown, cases from the American and European courts of human rights focus on the effects of ongoing human rights violations and not on the lawfulness of displacement *per se*. Precisely, this is because of the lack of a binding right to stay and a clear definition of population transfer.

Hathaway cites the example of Germany who used the right to remain to turn away asylum-seekers and justify a policy of *non-entrée*.[759] Germany's example is indeed a clear bad-faith or ill-conceived use of the right to remain because it puts in opposition the right to remain with the right to seek asylum. Despite this example of distortion, the argument of evilness remains unconvincing. If evil there is, it lies not in the right, but in the state's abuse and misuse of it. That is because the right to remain and the right to seek asylum are not in conflict; they are complementary. Or as Stavropoulou puts it, "for the protection to be comprehensive, the law

[755] James C Hathaway, "New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection" (1995) 8 Journal of Refugee Studies 3 at 293
[756] "There is no need whatsoever to articulate as a right something which is merely a consequentialist concern flowing from the inadequate enforcement of matters already clearly within the ambit of human rights law." James C Hathaway, *ibid* at 293.
[757] Maria Stavropoulou, "The Question of a Right Not to be Displaced" (1996) 90 American Society of International Law Proceedings at 553.
[758] James C Hathaway, "New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection" (1995) 8 Journal of Refugee Studies 3 at 293.
[759] James C Hathaway, *ibid* at 293, 294.

must be complete and consistent."[760] We ought to respect the right to remain just as the right to seek asylum. The UNHCR note on international protection similarly stated:

> The objective of prevention is not to obstruct escape from danger or from an intolerable situation, but to make flight unnecessary by removing or alleviating the conditions that force people to flee. Defending the right to remain does not in any way negate the right to seek and to enjoy asylum. UNHCR has always insisted that its activities in countries of origin are not incompatible with and must not in any way undermine the institutions of asylum or the individual's access to safety.[761]

In other terms, the state cannot substitute the individual and decide in their place whether they should remain or seek asylum. To stay or to leave is an individual decision. Whatever people choose to do, to stay or to leave, the human rights regime and the international community should recognize their right and protect them through physical presence or, minimally, protective forms of assistance. Hathaway rightfully pointed out that, "whatever movement is made toward more effectively ending or attenuating human rights abuse in-country should never be at the expense of the human being's one truly autonomous remedy: flight when circumstances become unbearable."[762] And this can only be guaranteed by respect for the right to leave and to seek asylum in countries that respect refugee law, in particular the customary principle of *non-refoulement*.

The right to stay may not be relevant to all or even most cases of population transfer due to the conditions under which population transfer takes place. Josep Zapater made a number of constructive criticisms in relation to the prevention from arbitrary displacement.[763] Studying forced displacement during armed conflicts, he argues that, "despite the inherent value of these efforts in injecting both an adequate rights focus and practical meaning to *prevention,* the

[760] Maria Stavropoulou, "The Question of a Right Not to be Displaced" (1996) 90 American Society of International Law Proceedings at 553.
[761] Executive Committee of the High Commissioner´s Programme, *Note on International Protection,* 44th Sess, A/AC.96/815 (1993) at para 37 and *UNHCR's Role in the Prevention of Refugee-Producing Situations,* UNHCR, Geneva, 1999 cited in Josep Zapater, *Prevention of Forced Displacement: The Inconsistencies of a Concept*, New Issues in Refugee Research, Research Paper No 186 (Geneva: UNHCR, 2010) at 6-7.
[762] James C Hathaway, "New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection" (1995) 8 Journal of Refugee Studies 3 at 293.
[763] Only one of the main criticisms is addressed here.

potential of the concept to generate sound humanitarian policies remains very limited."[764] Through his field experience in Colombia, he realized that fleeing was also a coping mechanism for people, who did not view prevention from displacement as necessary since it was for them a temporary measure to ensure their safety during hostilities.[765] This being a case of evacuation more than population transfer. He argues that

> Rather than preventing it, flight and displacement need to be *managed* so that communities can have maximum control over it and its consequences, for instance through the establishment of assembly centres with stockpiles of food and non-food items as near as possible the places of origin, the drafting of community based contingency plans, and training at national and international protection principles of IDPs so that they can successfully negotiate with authorities protection, assistance and durable solutions. [766]

I fully agree. But management of evacuations is protection of the right to stay through prevention since it allows people to cope with pressures to displace. People may indeed be briefly displaced, but if they are well organized and conditions allow, they may soon return home. Displacement, as Zapater points out, becomes a coping mechanism, including temporary flight.[767] That displacement is both a threat and a coping mechanism is indisputable. This aspect should be part of a carefull assessment to devise the most adequate protection strategy to the situation on the ground.

To briefly conclude at this stage, a right to stay in one's home and homeland should be positively asserted and population transfer internationally defined, understood and enforced. To bonify protection, the legal instrument or provisions should be applicable, or at least, consistent in all relevant branches of law: international human rights law, international humanitarian law and international criminal law.

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[764] Josep Zapater, *Prevention of Forced Displacement: The Inconsistencies of a Concept*, New Issues in Refugee Research, Research Paper No 186 (Geneva: UNHCR, 2010) at 1.
[765] Josep Zapater, *ibid* at 3.
[766] Josep Zapater, *ibid* at 3.
[767] Josep Zapater, *ibid* at 9-10.

CHAPTER TWO– INTERNATIONAL HUMANITARIAN LAW PROVIDES A SOLID FOUNDATION TO UNDERSTANDING DEPORTATION AND POPULATION TRANSFER

In contradistinction to the international human rights law on population transfer, international humanitarian law employs consistent terminology and definitions. The two main terms employed in a clear, coherent and consistent fashion since at least 1949 are deportation and population transfer. The *Geneva Conventions* are internationally binding upon all states.[768] In addition, the prohibition of forcible transfer of civilians is considered customary international law in the context of both international and non international wars.[769] This led Susan Breau to suggest that IHL "is probably the most comprehensive regime of protection for home and homeland."[770]

This chapter presents the law of war on deportation and population transfer as it relates to the displacement of the civilian population from their homes. First will be considered the law prohibiting deportation and transfer in international and non international armed conflicts. Although provisions relevant to both international and non international armed conflicts are presented, the underlying argument is that the type of conflict is no longer relevant to the protection of civilians. Thus, regardless conflict classification or the stage of conflict, the protection of civilians against population transfer is the same. Secondly, I address the issue of voluntary population transfer in international humanitarian law under the *Fourth Geneva Convention*. This second part will be followed by a discussion of evacuation, which is not strictly speaking a derogation from or an exception to the prohibition of transfer, but rather a

[768] There are for instance 196 state parties to the *IV Geneva Convention*, ICRC Database, Treaties, States Parties and Commentaries, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocumen; See Christopher Greenwood, "Historical Development and Legal Basis" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 27.

[769] The prohibition of deportation and population transfer is incorporated in numerous national legislations, many with some form of universal jurisdiction over the crime. For a detailed list, see Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) at 457, 2917-2928; Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 69-71.

[770] Susan Breau,"The International Law Rights to Home and Homeland" in Lorna Fox O'Mahony and James Sweeney, eds, *The Idea of Home in Law, Displacement and Dispossession* (Burlington: Ashgate e-Book, 2011) at 177.

form of temporary displacement that ought to be taken to protect the civilian population against the effects of war.

2.1 The law of war protects civilians against population transfer at all times during armed conflict

The prohibition of deportation and population transfer in international humanitarian law is comprehensive because it applies to all armed conflicts, to individuals and groups as well as to situations of internal and cross-border displacements.[771] This position is grounded in an evolutive interpretation of IHL based on the rule of law and the core principle of human dignity. The following table sums up the prohibition of population transfer in Geneva Law.

Situations covered by the prohibition of deportation and population transfer in IHL	**Classification of armed conflict**	**Relevant treaty provisions**	**Violations**	**Evacuation**
Invasion/military operations	International armed conflict Non international armed conflict	Art. 49 GCIV Common Art. 3 to the GC and Art. 17 Add. Prot. II	Grave Breach/war crime Serious violations of the laws and customs of war/war crime	Security of the civilian population and imperative military reasons
Occupation	International armed conflict	Art. 49 GCIV and Art. 85 Add. Prot. I	Grave breach/war crime	Security of the civilian population and imperative military reasons
Wars of national liberation in the exercise of the right to self-determination	International armed conflict	Art. 85 Add. Prot. I	Grave Breach/war crime	Security of the civilian population and imperative military reasons

[771] See *Prosecutor v Krstic*, IT-98-33-T, Judgement (2 August 2001) at para 522 (International Criminal for the former Yugoslavia, Trial Chamber).

The first codified reference in Western law to a prohibition of transfer is found in the 1863 *Lieber Code*, which was developed during the American Civil War to remedy a shortcoming in the field of warfare.[772] The *Code* provides that "military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult" and that "private citizens are no longer murdered, enslaved, or carried off to distant parts."[773] It however admits that with "barbarous armies", "the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties," therefore affirming that with "uncivilised people" protection is the exception.[774] Legal writings and texts pertaining to the treatment of civilians maintained until quite recently the traditional dichotomy found in international law between 'civilised' and 'uncivilised' peoples.[775] Later conventions make no distinction between 'civilised' and 'uncivilised' peoples, although the concept may still have influenced legal thinking and political discourse.[776] Inspired by the *Lieber Code* are the *Hague Conventions*.

2.1.1 Population transfer is prohibited in international armed conflicts

When the *Hague Conventions* were drafted, there was no specific reference to deportation or transfer because, "the practice of deporting persons was regarded at the beginning of this century as having fallen into abeyance."[777] The Martens Clause found in the 1899 *Hague*

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[772] Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983) at 1-2, 5.
[773] *Lieber Code of 1863, General Orders No. 100*, Instructions for the Government of Armies of the U.S. in the Field, prepared by Francis Lieber, 24 April 1863 at principles 16, 23 in Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983).
[774] *Lieber Code of 1863, General Orders No. 100*, *ibid* at principle 24.
[775] For instance, Vitoria conceived the right to travel and sojourn in a way that would inevitably be violated by "Indians". Antony Anghie argues, "Vitoria asserts that to 'keep certain people out of the city or province as being enemies, or to expels them when already there, are acts of war'. Thus any Indian attempt to resist Spanish penetration would amount to an act of war, which would justify Spanish retaliation." Moreover, since Indians cannot wage a just war, the rule of war that prohibits enslaving women and children does not therefore apply. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 3-4, 21-22, 26.
[776] In a speach by George W Bush regarding Iraq, he said "Let us never forget, beyond Europe's borders, in a world where oppression and violence are very real, liberation is still a moral goal, and freedom and security still need defenders." *The Times*, London (15 October 2003) cited in Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester: Manchester University Press, 2008) at 2-3.
[777] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49, Commentary of 1958, at para 1, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407

Conventions on the Laws and Customs of War on Land is nevertheless viewed at prohibiting deportation and population transfer.[778] The 1907 *Hague Convention on the Laws and Customs of War on Land Regulations* can equally be construed to prohibit deportation since it provides that, "family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."[779] Deportation and transfer would most likely contravene family and property rights.[780] In fact, regarding the implicit prohibition of deportation and transfer, it has been said that "this is one of the rare cases when complete silence on a subject in the preparatory material of the Hague Peace Conferences can be confidently adduced as evidence of a self-understood rule."[781] Even in the absence of express positive law, deportation and transfer was nonetheless unlawful at the beginning of the 20th century. Reviewing the case law of Nuremberg, Theodor Meron also concluded that deportation from occupied territory was prohibited under customary international law prior to the *Geneva Conventions*.[782] Clear mention of deportation and population transfer in international humanitarian law was only inserted after the Second World War, when it became necessary to further define crimes committed against civilian populations.[783] Hence the *Geneva Conventions* of 1949.

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[778] Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 153-154.

[779] *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, Second International Peace Conference, The Hague (entered into force 26 January 1910) at Art 46; See also Alfred de Zayas, "The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia (1995) 6 Criminal Law Forum 2 at 265; Alfred M de Zayas, "International Law and Mass Population Transfers" (1975) 16 Harvard International Law Journal at 211-212.

[780] For a discussion on the prohibition of deportation in The *Hague Regulations*, see Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 151; See also Jean-Marie Henckaerts, "Deportation and Transfer of Civilians in Time of War" (1993-1994) 26 Vanderbilt Journal of Transnational Law 468 at 481; Also, on the effect of Article 46 and others (Articles 47 to 53) see Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 23.

[781] Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict*, Vol II (1968) at 227 cited in Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice*, *ibid* at 152; Jean-Marie Henckaerts, "Deportation and Transfer of Civilians in Time of War" *ibid* at 482.

[782] Theodor Meron, "Deportation of Civilians as a War Crime under Customary Law" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjorn Eide* (Oslo: Scandinavian University Press, 1993) at 201.

[783] Following the war, it was felt that more detailed provisions were needed to define the crime and practice. ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49, Commentary of 1958, at fn 5, Online:

The cornerstone of the international humanitarian law on deportation and population transfer is Article 49 of the *IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*. Applying to the status and treatment of protected persons in occupied territories, Article 49 prohibits the "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 [...] regardless of their motive."[784] In other words, "individual or mass deportations, as well as displacement of protected persons from occupied areas to territories of the occupying power or elsewhere, is [sic] forbidden, whatever the reasons underlying such displacement."[785] In addition to Article 49 of the *GC IV*, Article 85(4)(a) of the 1977 *Additional Protocol I to the Geneva Conventions and applicable to international armed conflicts* − including situations of national liberations, occupation and racist or colonial regimes − regards as grave breach "the deportation or transfer of all or parts of the population of the occupied territory *within or outside* this territory" when committed wilfully and in violation of Article 49 of the *IV Geneva Convention*.[786] The destination of the displaced is irrelevant to a finding of population transfer.[787] In addition, the prohibition of deportation and transfer is applied equally to individuals and groups,[788] which differs from the proposed definition of population transfer in international human rights law as a collective act.[789] Related to Article 49 is Article 51, which provides that under occupation requisitioned

https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407

[784] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid* at Art 49.

[785] RüdigerWolfrum and Dieter Fleck, "Enforcement of International Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 698.

[786] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) at Art 85(4)(a); Both articles in the Additional Protocols were adopted by consensus. See Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) at 2909-2910.

[787] Jean-Marie Henckaerts, "Deportation and Transfer of Civilians in Time of War" (1993-1994) 26 Vanderbilt Journal of Transnational Law 468 at 472; Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 26.

[788] Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 372-373, fn 428.

[789] See Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 144; See also Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 27-28.

labour[790] may not be displaced outside the occupied territory and should maintain their employment.[791] Displacing labour outside the occupied territory cannot be undertaken as it could constitute population transfer.

The prohibition of population transfer extends throughout the international armed conflict, not only during formal occupation. The constraints of Article 49, if interpreted in a restrictive manner, are that it applies only to protected persons in time of occupation and not to civilians throughout the international conflict. Article 49 is logically most concerned with protected persons under occupation, because it is usually when civilians are under occupation that transfer can and is effectuated. However, 'in the hands of' does not exclusively entail a formal situation of occupation.[792] This is because a belligerent may have sufficient control over a person or over a territory to conduct a transfer without the situation qualifying as 'occupation', at least in the formal sense. The reason for the contentious argument here advanced is that many population transfers have been carried out in situations which do not *stricto sensus* amount to occupation, or are indeed disputed occupations, such as in the Former Yugoslavia.

In addition, the application of the concept of occupation is imprecise. Occupation is a form of international armed conflict since it involves the effective control of a territory by a State having no sovereign title to the territory.[793] The ICRC considers that "there is occupation when a State exercises an unconsented-to effective control over a territory on which it has no

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[790] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 51; See also Jean-Marie Henckaerts, *ibid* at 149 and Jean-Marie Henckaerts, "Deportation and Transfer of Civilians in Time of War" (1993-1994) 26 Vanderbilt Journal of Transnational Law 468 at 478.

[791] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid* at Art 51.

[792] On the dictintion between occupation under the Hague and Geneva Law and its broader scope under the IVGC, read Éric David, *Principes de droit des conflits armés*, 4th ed (Bruxelles: Bruylant, 2008) at 561.

[793] Article 42 of the IV Hague Convention of 1907 states that "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Similarly, Article 2 of the Geneva Convention affirms that "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." See ICRC, *Contemporary Challenges to IHL− Occupation: Overview*, 11 June 2012 Online: www.icrc.org; Tristan Ferraro, ed, *ICRC project on occupation: Occupation and Other Forms of Administration of Foreign Territory*, Expert meeting report (Geneva: ICRC, 2012) at 4; Lindsay Moir, "Displacement of Civilians as a War Crime Other than a Violation of Common Article 3 in Internal Armed Conflicts" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden, Martinus Nijhoff, 2009) at 639.

sovereign title." [794] However, the concept of occupation is reconsidered following contemporary armed conflicts involving, for instance, UN administration of territory, indirect effective control (such as the occupation of Nagorno-Karabakh by Armenia), transformative occupation, prolonged occupation and multinational occupation.[795] As was pointed out during the ICRC expert meetings on occupation law:

> IHL instruments do not provide a clear standard for determining whether a state of occupation exists. In fact, the criteria for occupation are described in very general terms; and ICRC experience shows that it is quite difficult to identify with precision the beginning and the end of an occupation. Definition is made more complicated by the differing characteristics of recent foreign military presence as well as by the means used by States in order to implement effective control of territories not their own.[796]

Thus blurry can be the contours of effective control.[797] An illustration of this challenge is the International Court of Justice decision in *Armed Activities on the Territory of the Congo.* The Court explained occupation in these terms:

> In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were <u>not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government</u>.[798]

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[794] ICRC, *Contemporary Challenge to IHL− Occupation: Overview*, *ibid*.

[795] "These new forms of military presence have – to a certain extent – revived occupation law. Further, they have raised various legal questions, particularly in these four areas: determining the beginning and end of occupation; delimiting the rights and duties incumbent upon an occupying power; identifying precisely the legal framework governing the use of force in occupied territory; and assessing the relevance of the concept of occupation for the United Nations' administration of territory." Tristan Ferraro, *ibid* at 7-8, 12-13, 23, 67, 72, 78; See also ICRC, *Contemporary Challenge to IHL− Occupation: Overview*, *ibid*.

[796] Tristan Ferraro, *ibid* at 16.

[797] Tristan Ferraro, *ibid*.

[798][Emphasis added] "The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory." *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, [2005] ICJ Rep 168 at paras 172-173, 220.

The threshold of control established by the Court to determine occupation is not only physical presence on the ground, but also substitution of authority for that of the local government. The position of the ICJ was criticized by the expert meetings on occupation because it advances the notion of substitution of authority instead of the test of potential control or ability of the belligerent to exert authority over an area. For most of the experts, "the test for an occupation should not be which of the belligerents had the military capability to impose their will, but rather which of them had the military capability by virtue of their presence in a given area to impose their authority and prevent their opponent from doing so, and eventually to be in effective control of that area."[799] Hence, crucial to the occupation test is that the invader be in a position to exercise authority, not merely whether he is willing to do so.[800] The ICJ approach was also criticised by Judge Kooijmans, who argued in a Separate Opinion that Uganda was an occupying power in more regions than Ituri, as held by the Court. He noted the difficulty of establishing facts because "the situation on the ground is often confused"; "parties involved may present conflicting pictures"; and, the parties may disagree over the level of authority excercised by a party.[801] This was the case in Congo, where Uganda denied it was occupying parts of the Congo, arguing "its troops were too thinly spread to exercise authority" and that authority was actually in the hands of the Congolese rebel movements.[802]

Kooijmans disapproved the application of the test of substitution in light of the role played by the rebels and their ability to exercice authority over an area of the territory, which was made possible by the occupation of Uganda.[803] As he reasonned,

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[799] "In others words, the ICJ decided that foreign troops should substantiate their authority in order to qualify as an occupying power. The experts unanimously expressed their disagreement with the test proposed by the ICJ, stating that such an interpretation would be too narrow and would not reflect *lex lata*. For the experts, the ICJ's judgment, by emphasizing actual over potential control, represented a significant change of course with regard to the interpretation and application of the test laid down in Article 42 of the Hague Regulations." Tristan Ferraro, ed, *ICRC project on occupation: Occupation and Other Forms of Administration of Foreign Territory*, Expert meeting report (Geneva: ICRC, 2012) at 18-19.

[800] Marten Zwanenburg, Michael Bother and Marco Sassòli, "Is the law of occupation applicable to the invasion phase?" (2012) 96:885 International Review of the Red Cross at 40.

[801] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Separate Opinion of Judge Kooijmans [2005] ICJ Rep 168 at 306, paras 37, 39.

[802] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Separate Opinion of Judge Kooijmans, *ibid* at para 42.

[803] "It is in particular this element of 'substitution of the occupant's authority for that of the territorial power' which leads in my opinion to an unwarranted narrowing of the criteria of the law of belligerent occupation as

> The Court in my view did not give sufficient consideration to the fact that it was the Ugandan armed invasion which enabled the Congolese rebel movements to bring the north-eastern provinces under their control. Had there been no invasion, the central Government would have been in a far better position to resist these rebel movements. Uganda's invasion was therefore crucial for the situation as it developed after the outbreak of the civil war. As the decisive factor in the elimination of the DRC's authority in the invaded area, Uganda actually replaced it with its own authority. I am, therefore, of the opinion that it is irrelevant from a legal point of view whether it exercised this authority directly or left much of it to local forces or local authorities. As long as it effectively occupied the locations which the DRC Government would have needed to re-establish its authority, Uganda had effective, and thus factual, authority. Its argument that it cannot be considered to have been an effective occupying Power, in view of the limited number of its troops, cannot therefore be upheld.[804]

The case of *Armed Activities on the Territory of the Congo* highlights the difficulty of determining occupation in contemporary armed conflicts, which often involves components of both international and civil wars, state armed forces and non-state armed groups as well as weak governance.

In cases where the facts are unclear as to whether a situation qualifies as occupation, I submit that the civilian population is nevertheless protected against population transfer. Consequently, a finding of occupation would no longer be central to a determination of whether civilians are protected against population transfer.

Protected are all civilians in international conflicts as soon as they are in the hands of a party capable of effecting population transfer. Marten Zwanenburg, Michael Bother and Marco Sassòli summed it up quite well:

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these have been interpreted in customary law since 1907." *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Separate Opinion of Judge Kooijmans, *ibid* at para 44.

[804] [Emphasis added] "In the present case the first criterion is certainly met; even if the actual authority of the DRC Government in the north-eastern part of the country was already decidedly weak before the invasion by the UPDF, that Government indisputably was rendered incapable of exercising the authority it still had as a result of that invasion. By occupying the nerve centres of governmental authority — which in the specific geographical circumstances were the airports and military bases — the UPDF effectively barred the DRC from exercising its authority over the territories concerned." *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Separate Opinion of Judge Kooijmans, *ibid* at paras 46, 48-49.

> Under such a functional understanding of occupation, an invaded territory could at a certain point in time already be occupied for the purpose of the applicability of Article 49 (prohibiting deportations), but not yet occupied for the purpose of the applicability of Article 50 (on education). On such a sliding scale of obligations according to the degree of control, obligations to abstain would be applicable as soon as the conduct they prohibit becomes materially possible (the person benefiting from the prohibition is in the hands of the invading forces), while obligations to provide and to guarantee would apply only at a later stage.[805]

The degree of control, therefore, determines the applicable rules.

That said, a number, if not the majority, of commentators seem to adopt a formalistic interpretation arguing that Article 49 covers only protected persons in time of occupation. Jean-Marie Henckaets writes: "deportation refers to the removal of civilians, during an international war, from an occupied territory to the national territory of the occupant or other foreign territory."[806] Mélanie Jacques notes that "international humanitarian law does not regulate the forced displacement of civilians in unoccupied territory during an international armed conflict." [807] However, she does recognize the implicit protection of civilians against population transfer in the *Hague Regulations*.[808] Also relevant to the discussion is the position of Guido Acquaviva, expressed in the following excerpt:

> More concretely, deportation and forcible transfer as war crimes may only be committed during a military occupation by an occupying power (in an international armed conflict) or when a party to a non-international conflict *controls* a portion of territory and displaces protected persons living there. A mass exodus caused by the threat of advancing enemy forces and by the bombing of cities and dwellings might therefore not constitute a war crime, because civilians and other persons not taking active part in the hostilities might not enjoy the status of protected persons under humanitarian law for the purpose of deportation. In

[805] Marten Zwanenburg, Michael Bother and Marco Sassòli, "Is the law of occupation applicable to the invasion phase?" (2012) 96:885 International Review of the Red Cross 29 at 49.
[806] Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 6; "Whether an occupation is belligerent or peaceful, the Geneva Convention requires that the territory be under some form of occupation. It is true that Protocol I, also addressing transfers, generally applies beyond cases of military occupation, but the language in Protocol I prohibiting transfers still refers strictly to transfers into or out of areas under occupation. These two instruments also refer to removals that, therefore, are somewhat constrained by the need for occupation." Christopher M Goebel, "A Unified Concept of Population Transfer (Revised)" (1993) 22 Denver Journal of International Law and Policy 15.
[807] Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 22.
[808] Mélanie Jacques, *ibid* at 23.

> relation to the war crimes of deportation and forcible transfer, only persons in occupied territories receive such protection, and therefore persons fleeing beyond the (moving) border created by an advancing army appear to be beyond the scope of the protection. In other words, under the laws of war, the crime of deportation applies to civilians or other protected persons in the hands of a party to the conflict and not to displacement of civilians during the conduct of hostilities but prior to occupation.[809]

Taking this analysis as a starting point, a number of issues may be flagged. First, this explanation highlights the discrepency resulting from the concept of control in IHL and the consequent capacity to conduct population transfer. In international armed conflict, a classical conception of occupation considers only 'effective control' for occupation to be declared and the prohibition against population transfer to be triggered whereas in non international armed conflict, population transfer is prohibited as soon as a conflict meets the definition of Common Article 3 or of armed conflict under Article 1 of *Additional Protocol II*. The latter however involves the exercise of control by dissident armed forces or other organized armed groups over a part of territory to "enable them to carry out sustained and concerted military operations and to implement this Protocol."[810] Control over the territory by an insurgent must involve "some degree of stability."[811] In this sense, the application of *Additional Protocol II* does take place in a situation that resembles occupation.[812] Once the threshold of armed conflict is met, *Additional Protocol II* applies and forced displacement is expressly prohibited during military operations, that is, during hostilities between insurgent and government armed forces. As the ICRC Commentary on Article 17 of *Additional Protocol II* explains with regard to displacement in conflict not of an international character,

> such displacements are all too often considered as measures falling within the range of military operations, and all too often civilians are uprooted from their

[809] Guido Acquaviva, *Forced Displacement and International Crimes*, UNHCR, Legal and Protection Policy Research Series, Division of International Protection, PPLA/2011/05 (2011) at 20.
[810] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) at Art 1(1).
[811] ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at Art 1 at para 4467, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15781C741BA1D4DCC12563CD00439E89
[812] Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 64.

> homes [....] The prohibition covers measures taken against civilians, either individually or in groups. An example would be expulsion of groups of civilians across the boundaries by armed forces or armed groups because of military operations.[813]

In non international armed conflict, transfer is prohibited throughout the duration of the conflict, not only in time of occupation. The central issue to the treatment of population transfer in international and non international armed conflicts is coherence in the application of the norm prohibiting population transfer and the equal treatment of civilians in like situations. Consequently, the rule of law requires IHL to treat population transfer in a consistent manner in both international and non international armed conflicts, because civilians deserve equal protection against population transfer in both categories. Accordingly, the prohibition of population transfer applies irrespective the type of conflict and the stage of hostilities, as long as the situation on the ground allows for population transfer to be carried out.

In international armed conflicts, the prohibition of population transfer applies as soon as a belligerent has control over a person. During the invasion phase or in cases where occupation is not formally established or recognized, protection must be extended to civilians who find themselves 'in the hands' of the other party.[814] Otherwise, persons who find themselves in the hands of a party during the invasion are subject to less protection than those in the hands of the occupying power.[815] The ICRC supports this broad interpretation, which can be found in the interpretation promoted by Jean Pictet, also known as the 'Pictet theory' (given his work on the Commentaries to the *Geneva Conventions*), whereby certain provisions of the *Fourth Geneva Convention* are applicable during the invasion phase to ensure the maximum protection to civilian.[816] Although no consensus could be obtained on the applicability of the

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[813] ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 at Art 17, Commentary of 1987 at paras 4847, 4860-4861, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=00FA1ECE76C58523C12563CD0043AD54

[814] For a discussion on the debate as to whether occupation law applies to the invasion phase, read: Marten Zwanenburg, Michael Bother and Marco Sassòli, "Is the law of occupation applicable to the invasion phase?" (2012) 96:885 International Review of the Red Cross 29 at 29.

[815] Marten Zwanenburg, Michael Bother and Marco Sassòli, *ibid* at 33.

[816] Tristan Ferraro, ed, *ICRC project on occupation: Occupation and Other Forms of Administration of Foreign Territory*, Expert meeting report (Geneva: ICRC, 2012) at 16; Marten Zwanenburg, Michael Bother and Marco Sassòli, *ibid* at 29.

interpretation advanced by Pictet during the expert meetings on occupation, the principle was well explained in the report:

> As far as individuals are concerned, the applicability of the Fourth Geneva Convention would not depend on the existence of a state of occupation within the meaning of the Hague Regulations, the latter being based on a territorial approach to occupation; it would begin as soon as the foreign forces came into contact with the civilian population of the territory being invaded. Therefore, relations between the advancing foreign troops and the civilian population would be governed by the Fourth Geneva Convention, including the protective provisions set out in its Part III, Section III on occupied territories. [....] In other words, the applicability of the Fourth Geneva Convention during the invasion phase would be based on effective control over persons rather than on effective control over foreign territory (or parts of it).[817]

Arguing for the Pictect theory, Marco Sassòli endossed an example given by Jean Pictet to describe what would result from the non application of the theory in the context of transfer:

> it seems absurd that the deportation of civilians would not be prohibited in the invasion phase by any rule of Convention IV but would be absolutely prohibited once the invasion has turned into an occupation. There seems to be no possible justification for this arbitrary difference. Control over a person in a territory that is not the invader's own must therefore be sufficient to trigger the application to that person of Convention IV's provisions applicable to occupied territories.[818]

Even if the Pictet theory is rejected, population transfer would still be unlawful during situations other than occupation. That is because international human rights law is applicable during the invasion phase[819] and does prohibit arbitrary displacement and mass expulsion. Second, human dignity must be protected at all times and to the greatest extent possible, a central tenet of IHL also enshrined in the Martens Clause. Core is the equal protection of the person rather than the status of the territory or the stage of war. Article 27 of the *GC IV*, which applies both in the territories of the party and during occupation is described in the Commentary

[817] [Emphasis added] Tristan Ferraro, *ibid* at 24-25.
[818] Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC,1958) at 60 referred to in Marten Zwanenburg, Michael Bother and Marco Sassòli, "Is the law of occupation applicable to the invasion phase?" (2012) 96:885 International Review of the Red Cross 29 at 45.
[819] Tristan Ferraro, ed, *ICRC project on occupation: Occupation and Other Forms of Administration of Foreign Territory*, Expert meeting report (Geneva: ICRC, 2012) at 26; see Marten Zwanenburg, Michael Bother and Marco Sassòli, *ibid* at 37.

as the "basis of the Convention" since "it proclaims the *principle of respect for the human person* and the inviolable character of the basic rights of individual men and women."[820] In other words, it invokes human dignity as the basis of the principle of humanity. Article 27 guarantees protected persons:

> respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.[821]

Population transfer interferes with family rights and humane treatment among the other acts of violence and interference it entails.[822] Article 75 of *Protocol I* is equally relevant because it guarantees humane treatment and non discrimination to non protected persons.[823] The prohibition of population transfer should thus be extended to a broadly conceived concept of control that goes beyond formal occupation; in other words, situations where control is sufficient to effect a transfer of population. Hence, as soon as a belligerent is in the power to exert population transfer, the prohibition applies, closing any protection gap.

Thirdly, and in line with the previous idea, no population transfer should ensue from respect for the basic principles of IHL. These principles are crucial to the prevention of population transfer in armed conflict. Violations of these rules are often at the root of the transfer and deportation of civilian populations. Particularly relevant to protection from displacement in

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[820] [Emphasis added] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 27, Commentary of 1958 at General Remark - Historical background, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=25179A620578AD49C12563CD0042B949; Tristan Ferraro, *ibid* at 10.

[821] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 27.

[822] See Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 52; On familiy unity, see Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 147-148.

[823] Article 75 (1) provides that "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons." *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) at Art 75(1).

time of war is, therefore, (1) the prohibition of attacks against civilian and civilian property, as well as indiscriminate attacks; (2) the duty of precaution to spare the civilian population; (3) the prohibition of starvation as a method of warfare and of the destruction of objects indispensable to its survival; (4) the prohibition of reprisals against civilians and their properties.[824] It is clearly unlawful to deport or transfer protected persons in time of war, including as a form of reprisal for the illegal actions of another party.[825] Reprisals through collective punishment, especially in the form of home demolition, is known to have caused displacement. In other words, respect of the principles of distinction, proportionality and precaution ensure that civilians are not directly targeted in the armed conflict, reducing vulnerability to population transfer.

2.1.1.1 Who is protected against population transfer in international armed conflicts?

The traditional interpretation of protected persons in occupation law would exclude a states' own nationals from the protection against population transfer. Indeed, Article 49 "is not applicable to state's own nationals."[826] Mélanie Jacques argues that nationals of a state are protected by other provisions of Geneva Law, notably by the principle of civilian immunity and Article 75 of *Protocol I*.[827] Yet, she concludes that "in terms of forced displacement, this protection is insufficient." [828] She recommends the following:

> In addition to the fundamental guarantees of humane treatment and due process, international humanitarian law should explicitly prohibit the arbitrary forced displacement of all civilians on the territory of a party to an international armed

[824] ICRC, "Humanitarian Law, Human Rights and Refugee Law – Three Pillars", *Statement*, 23 April 2005, Online: http://www.icrc.org/eng/resources/documents/misc/6t7g86.htm; "One of the main causes of forced displacement in armed conflict remains, undoubtedly, violations of international humanitarian law. Attacks that are directed against civilians or indiscriminate in nature – prohibited by humanitarian law – are particularly to blame for civilians fleeing their homes." Toni Pfanner, *Editorial* (2009) 875 International Review of the Red Cross at 2.
[825] Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester: Manchester University Press, 2008) at 70-72, 186; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 51(6) provides: "Attacks against the civilian population or civilians by way of reprisals are prohibited."; See also *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) at Art 60(5).
[826] Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 39.
[827] Mélanie Jacques, *ibid* at 39-40.
[828] Mélanie Jacques, *ibid* at 41-42.

> conflict, particularly when motivated by reasons of ethnicity and origins. [...] The reference, in Article 75, to persons 'affected by a situation referred to in Article 1', combined with an explicit prohibition of forced displacement 'for reasons connected with the conflict' would effectively protect affected persons, such as nationals of enemy origin, from arbitrary deportation.[829]

While this is a worthy suggestion that strengthens and clarifies the scope of applicable law, the interpretation of international humanitarian law by international criminal courts has already broadened the concept of protected persons beyond nationality to include allegiance and diplomatic protection. This broad conception of nationality means that citizens of a state who attempts to transfer or deport them in time of war are protected against population transfer. Acknowledging the progressive development of the concept of protected persons in international criminal law, Jacques nevertheless raises an interesting question when she asks if this broad interpretation of protected persons is "strictly limited to inter-ethnic conflicts or does it extend to all types of international conflicts, including traditional interstate armed conflicts?" [830] Jacques argues that states may be reluctant to recognize protection based on allegiance to a party in the conflict, because it would mean that "individuals considered by most states as traitors would be entitled to the protection of the Convention."[831] While it is certainly true that states will resist attempts to broaden protection based on allegiance, the question is whether the gains achieved in international criminal law can be erased by reluctant states.

In addition, the prohibition of transfer does not entirely apply to foreigners (aliens) who are in a party to the conflict because they can be deported to a third state on an individual basis. Alien protected persons in the hands of a belligerent may be transferred to a third state that is a party to the Convention. Although Article 45 permits the transfer of protected foreigners, this transfer will be unlawful if the receiving state or territory is unwilling or unable to respect the *Fourth Geneva Convention* or if there is a risk of persecution on the grounds of "political opinions or religious beliefs" or, more generally, discriminatory treatment.[832] In this sense,

[829] Mélanie Jacques, *ibid* at 41-42.
[830] Mélanie Jacques, *ibid* at 45.
[831] Mélanie Jacques, *ibid*.
[832] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 45. "Since one of the fundamental principles proclaimed by the Convention is the prohibition of discrimination (Article 27, para.3), it follows that the Detaining Power cannot transfer protected persons unless it is absolutely certain that they will not be subject to discriminatory treatment

Article 45 is qualified as "a very early expression of the principle of non-refoulement in refugee law."[833] As Hans-Peter Gasser explains,

> if these conditions are met, civilian nationals of the opposing party to the conflict [this includes refugees, stateless persons, and members of a third states with which there are no normal diplomatic relations] may be transferred to a third power, even against their own will, with the consequence that that state becomes responsible for fulfilling its obligations under GC IV, including the obligation to permit such persons to leave the country at any time.[834]

In the context of Article 45, transfer is "*any movement* of protected persons to another State, carried out by the Detaining Power on an individual or collective basis."[835] In this respect, the concept of transfer under Article 45 is broad and encompasses "internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition."[836] Having said this, transfer does not include deportation. As the ICRC Commentary explains,

> there is no provision concerning deportation (in French ' expulsion '), the measure taken by a State to remove an undesirable foreigner from its territory. In the absence of any clause stating that deportation is to be regarded as a form of transfer, this Article would not appear to raise any obstacle to the right of Parties to the conflict to deport aliens in individual cases when State security demands such action. However, practice and theory both make this right a limited one: the mass deportation, at the beginning of a war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted. Moreover, expulsion, if it does take place, must be carried out under humane conditions, the persons concerned being treated with due respect and without brutality. Persons threatened with deportation must be able to present their defence without any difficulty being placed in their

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or, worse still, persecution." *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135, ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Commentary of 1958 at 268, para 4; See also RüdigerWolfrum and Dieter Fleck, "Enforcement of International Humanitarian Law" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 698.

[833] ICRC "Humanitarian Law, Human Rights and Refugee Law – Three Pillars", *Statement*, 23 April 2005, Online: http://www.icrc.org/eng/resources/documents/misc/6t7g86.htm

[834] Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 318.

[835] [Emphasis added] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Commentary of 1958 at 266 (General), Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=23363510D674996DC12563CD0042C251

[836] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid*, Commentary of 1958.

> way and must be granted a reasonable time limit before the deportation order is carried out, if it is confirmed; in such cases the Protecting Power must be notified.[837]

As a result, foreigners can be deported on an individual basis when state security demands it, but there is a limit: mass deportation of foreigners would not be permitted. That said, it is not clear whether the example provided by the ICRC Commentary covers all mass expulsions or only those carried out at the beginning of the conflict.[838] Mass transfers are prohibited if international human rights law is taken into consideration whereas the individual transfer of foreigners is also subject to procedural guarantees provided by IHL and human rights law, in particular the core principle of *non-refoulement*.

2.1.2 Population transfer is prohibited in non international armed conflicts

In armed conflicts not of an international character such as civil wars, Article 3 common to the *Geneva Conventions* lays down the minimum humane treatment accorded to civilians and combatants who have laid down their arms or who are *hors de combat*. Article 3(1) provides that civilians and combatants no longer taking part in hostilities must "in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."[839] Common Article 3 can be considered a mini-convention in the *Geneva Conventions*[840] which ensures "non-discrimination for all persons *hors de combat*, civilians and noncombatants in any non-international conflict" and the human treatmant of these persons.[841] More specifically, Articles 3(a) and 3(c) prohibit

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[837] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid*, Commentary of 1958.
[838] Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 318; See on peacetime treatment, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid* at Art 38.
[839] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid* at Art 3(1).
[840] See ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 3, Commentary of 1958, at 34 (General), Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE12C9954AC2AEC2C12563CD0042A25C; For a critique of Article 3, see Sayeman Bula-Bula, *Droit international humanitaire* (Louvain-la-Neuve: Bruylant-Academia, 2010) at 170-172.
[841] Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester: Manchester University Press, 2008) at 73.

respectively "violence to life and person" or "outrages upon personal dignity."[842] The principle of humane treatment covers "acts which world public opinion finds particularly revolting – acts which were committed frequently during the Second World War." [843] Even though Article 3 is silent on deportation and population transfer,[844] these acts are undoubtedly incompatible with the principle of humane treatment fundamental to human dignity and the principle of humanity, as attested by the prohibition of deportation and population transfer in international customary law, decisions of Nuremberg and of the ICTY, as well as the position of human rights bodies.[845] In fact, it is submitted that common Article 3 is "pure human rights law,"[846] which provides "at a minimum its non-derogable core."[847] Applying general principles of IHL in this context, the UN General Assembly affirmed that "forced displacement caused by a violation of the principles of immunity and distinction of civilians is thus illegal."[848] In agreement, Grant Dawson and Sonia Farber write that "it can be inferred that the prohibition contained in Article 3 of "violence to life and person' and 'outrages upon personal dignity', in particular 'humiliating and degrading treatment' would also act as a blanket prohibition of forcible

[842] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 3(a) and (c).
[843] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 3, Commentary of 1958, at 38 (A, Sub-para 1), Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE12C9954AC2AEC2C12563CD0042A25; "The actual meaning of 'humane treatment' is not spelled out, although some texts refer to respect for the "dignity" of a person or the prohibition of "ill-treatment" in this context. The requirement of humane treatment is an overarching concept. It is generally understood that the detailed rules found in international humanitarian law and human rights law give expression to the meaning of 'humane treatment'." Jean-Marie Henckaerts & Louise Doswald-Beck, eds., *Customary International Humanitarian Law,* Vol 1: Rules (Cambridge: Cambridge University Press, 2005), Rule 87 - Humane Treatment - Civilians and persons hors de combat must be treated humanely (also Online: www.icrc.org).
[844] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), Art 17, Commentary of 1987 17 at General remarks, para 4849, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=00FA1ECE76C58523C12563CD0043AD54
[845] Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 53.
[846] "This is because Article 3 basically requires the state to do, in large measure, what it is already legally obliged to do under the American Convention." *Abella et al v Argentina* (1997), Inter-Am Comm HR, No 11.137, OEA/Ser/L/V.97Doc38 at fn 19.
[847] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 47.
[848] Referrence is to: *Respect for Human Rights in Armed Conflict*, UN GA 2444 (XXIII), UNGAOR, 23rd Sess, UN Doc 2444 (XXIII)(1968); Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc E/CN.4/1998/53/Add.1 (1998) at Part II (D)(4).

displacement."[849] As a result, common Article 3 prohibits deportation and population transfer based on international customary law. In the same way, but in a different perspective, Dieter Fleck proposes to apply provisions applicable in situation of occupation to non international conflict,

> As the rules of occupation law have been developed in situations of foreign occupation as a result of a clear and lasting victory, important preconditions for their application are absent in a non-international armed conflict. Yet essential standards for the protection of civilians and persons hors de combat are essentially the same in internal armed conflict. Hence it would not be correct to deny the applicability of rules of occupational law in non-internal armed conflicts altogether.[850]

However, according to the ICRC Commentary, such protection gap existed and was only filled by *Additional Protocol II* in 1977, albeit partially because of its restricted concept of armed conflict.[851] Jan Willms explains, "prior to the entry into force of Additional Protocol II, it was not conventionally prohibited for States to displace the civilian population in non-international armed conflict."[852] Similarly, Susan Beau affirms "it is evident that this provision [Article 3] does not include massive deportations of peoples as was specified in Article 49 in the Fourth Convention."[853] If the interpretation is indeed correct, it is a highly problematic gap in

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[849] Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 52-53; On deportation under Article 3, see also Alfred de Zayas, "The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia (1995) 6 Criminal Law Forum 2 at 269; Alfred M de Zayas, "International Law and Mass Population Transfers" (1975) 16 Harvard International Law Journal at 220-221; A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at para 168.

[850] Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 628.

[851] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), Art 17, Commentary of 1987 at General remarks, para 4850, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=00FA1ECE76C58523C12563CD0043AD54; See also William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 202, 221; Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 53.

[852] Jan Willms, "Without order, anything goes? The prohibition of forced displacement in non-international armed conflict" (2009) 91:875 International Review of the Red Cross 547 at 551.

[853] "The reason for this is that those states' representatives viewed internal armed conflict as the sole purview of state authority and not a matter for international supervision." Susan Breau,"The International Law Rights to

protection that challenges the heart of IHL's mission that is the protection of civilians and humane treatment. Indeed, what happens in conflicts were only common Article 3 applies? Does this mean that IHL does not prohibit the deportation and transfer of civilians in a non international armed conflict covered by common Article 3 to the *Geneva Conventions*? An affirmative answer would be illogical and create a gap in the protection of civilians since deportation and population transfer is clearly prohibited during international armed conflicts and in non international conflicts defined under *Additional Protocol II*. But it is a legitimate question given that some states still refuse to recognize *Additional Protocol II* as customary international law[854] and few conflicts meet the threshold for *Additional Protocol II* to apply.[855] Hence, to ensure a minimum continuum of protection, common Article 3 must be construed to prohibit population transfer. Here, the general observation of the ICTY in *Tadic* highlights the need for a transversal and coherent application of humanity: "what is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."[856]

Attempts to bonify Article are found in *Additional Protocol II to the Geneva Conventions* which "develops and supplements"[857] Article 3 by specifying provisions applicable in non international armed conflicts. Article 4 of the *Protocol* reaffirms the principle of humane treatment without discrimination for all civilians not taking part in hostilities.[858] More specific to deportation and population transfer is Article 17 of *Protocol II* which draws on Article 49 and clearly prohibits the 'forced movement' of civilians as individuals or as groups in and

Home and Homeland" in Lorna Fox O'Mahony and James Sweeney, eds, *The Idea of Home in Law, Displacement and Dispossession* (Burlington: Ashgate e-Book, 2011) at 176.

[854] William Schabas speaks of a "controversial treaty" during the drafting of the war crimes provisions of the Rome Statute in the mid-1990s. Wiliam Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 196-197.

[855] See also Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 65.

[856] *Prosecutor v Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 119 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[857] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) at Art 1(1).

[858] *Additional Protocol II*, *ibid* at Art 4.

outside the territory of a party to the conflict.[859] Article 17(1) prohibits the *ordering* of the displacement of the civilian population for reasons related to the conflict in the national territory, whereas Article 17 (2) covers cross boundary movements by stipulating that "civilians shall not be compelled to leave their own territory for reasons connected with the conflict."[860] In this context, 'own territory' may signify displacement from the country itself, as well as from the territory under the control of insurgents, stressing the responsibility of both the government armed forces and dissident armed groups.[861] Displacement of civilians unrelated to the conflict would not be considered under Article 17.[862] Presumably, international human rights law would apply.

Article 17(1) seems distinct from Article 49 since it prohibits the 'ordering' of displacement. **'**Order' is understood as either an official governmental order given to the civilian population or an order given by a superior within a chain of command to soldiers or insurgents, covering for instance acts to induce the displacement of the population.[863] However, based on an analysis of the *Protocol*, of ICRC rule 129 of customary international law and of national practice, Jan Willms shows that forced displacement is prohibited regardless of whether it is ordered or not.[864] This is so for a number of reasons, chiefly, the aim of the Protocol and of international humanitarian law in general to "ensure a better protection for the victims of [...] armed conflicts."[865] As Willms states, "the protection of civilians would be seriously

[859] *Additional Protocol II*, *ibid*, at Art 17, Commentary of 1987, General remarks, para 4852, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=00FA1ECE76C58523C12563CD0043AD54
[860] *Additional Protocol II*, *ibid* at Art 17 and Commentary of 1987 at para 4860.
[861] *Additional Protocol II*, *ibid*, Commentary at para 4859; Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 63.
[862] *Additional Protocol II*, *ibid*, Commentary of 1987 at para 4865.
[863] Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 59.
[864] For a discussion of the three possible interpretations of Article 17(1) with regards to the notion of 'ordering', read Jan Willms, "Without order, anything goes? The prohibition of forced displacement in non-international armed conflict" (2009) 91:875 International Review of the Red Cross 547 at 547; For a discussion of 'order' see also Mélanie Jacques, *ibid* at 59-62.
[865] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) at preamble.

compromised if forced displacement were only illegal pursuant to an order."[866] He further adds,

> The substance of Article 17(1) is to prohibit the displacement itself, not merely the order; therefore, if it is to be effective, displacement needs to be prohibited regardless of the means used to accomplish this, be it through an order or through indirect means (such as indiscriminate attacks) which create a situation that forces civilians to leave.[867]

In fact, the 'order' requirement would discriminate between victims displaced in an international armed conflict and a non international armed conflict. Why should a person displaced without an order be victim of the crime of population transfer in an international armed conflict and not in an internal armed conflict? The type of conflict should not guide application of the crime.

2.2 The rationale for 'voluntary' deportation and transfer frustrates human rights

Blunt as it may sound, the rationale justifying 'voluntary' deportation and transfer in international armed conflict is nonsensical. A problem with the conceptualization of population transfer in international law is that voluntary transfer are lawful, hence the expression 'forcible population transfer' in Article 49. The distinction between ‘forcible’ and ‘non-forcible’ deportation or transfer is thus not insignificant. The term ‘forcible’ connotes unlawfulness and underlines the decision of the Diplomatic Conference not to prohibit all deportations and transfers, “as some might be carried out with the consent of those being transferred.”[868] But when discussing Article 45, which was to become Article 49 at the Diplomatic Conference, the delegation of the Soviet Union proposed to remove the wording 'against their will' arguing that "in occupied territory, no one had the right to express an opinion."[869] The wording was thus removed. Justifying its position, the Conference explained that ‘voluntary transfers’ are

[866] Jan Willms, "Without order, anything goes? The prohibition of forced displacement in non-international armed conflict" (2009) 91:875 International Review of the Red Cross 547 at 553.
[867] Jan Willms, *ibid* at 554-555.
[868] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49, Commentary of 1958, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407; Tristan Ferraro, ed, *ICRC project on occupation: Occupation and Other Forms of Administration of Foreign Territory*, Expert meeting report (Geneva: ICRC, 2012) at 10.
[869] *Final Record of the Diplomatic Conference of Geneva* (1949) Vol II-A at 664, 759, Online: https://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-2-A.pdf

for "ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country."[870] Of course victims of persecution may wish to leave. But does persecutionary acts make their departure/transfer voluntary and lawful? Clearly, no.

Population transfer must therefore be framed squarely within the realm of illegality. States have tried to leave the door open for themselves to carry out exchange of populations, a relic of the interwar period. But if the regime of protection is to be consistent with the conception I proposed under international human rights law, this door must now be closed. Thus I submit an evolutive interpretation in tune with the reality of conflicts − not state interests − needs to seriously reconsider the notion of voluntariness and exclude lawful transfer.

First, the freedom of choice of civilians is already severily curtailed during armed conflict. The idea of freedom has only a limited place in IHL, because in the field where it is applied, "l'homme se trouve privé, partiellement ou totalement, de son pouvoir de décision."[871] Along the same line of thought, Catherine Le Bris wrote: "face aux nécessités de la guerre, de la blessure ou de la captivité, l'individu est placé dans un état ou l'exercice de la liberté ou est entravé ou aboli."[872] In other words, war substantially reduces the capacity of civilians to live a dignified empowered life, entitling the exercice and assessment of free will.

Furthermore, voluntary transfer in wartime may frustrate Article 8 of the *IV Geneva Convention* on the non-renunciation of rights, which takes the view that "in wartime protected persons in the hands of the enemy are not really in a sufficiently independent and objective state of mind to realize fully the implications of a renunciation of their rights under the Convention. 'Liberty' in such a connection would be a misnomer." [873] As the 1958 Commentary on the Article explains,

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[870] [Emphasis added], *Ibid*.
[871] A Durand, "La notion de droits de l'homme chez les fondateurs de la Croix-Rouge" (1988) 773 Revue internationale de la Croix-Rouge 460.
[872] See Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 119.
[873] See ICRC, *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Commentary of 1958 at Art 8(A), Online:

> When a State offers persons in its hands the choice of another status, such a step is usually dictated by its own interest. Experience has proved that such persons may be subjected to pressure in order to influence their choice. The pressure may vary in its intensity and be more or less open, but it nevertheless constitutes a violation of their moral and sometimes even of their physical integrity. […] The text might, however, have been interpreted as implying that protected persons could renounce the benefits of the Convention, provided that their choice was made completely freely and without any pressure. The Diplomatic Conference, like the XVIIth International Red Cross Conference, wished to avoid that interpretation and accordingly adopted the more categorical wording of the present Article 8, thus intimating to States party to the Convention that they could not release themselves from their obligations towards protected persons, even if the latter showed expressly and of their own free will that that was what they desired. [874]

Second, 'voluntary' transferees are more likely to be victims and refugees under the *1951 Convention relating to the Status of Refugees* or internally displaced persons according to the working definition of the *Guiding Principles on Internal Displacement* since the cause of their displacement is persecution. Basically, they are persons in need of international protection. That is because the alleged grounds identified by the Diplomatic Conference for 'voluntary' transfer are discrimination and persecution and, as such, cannot be considered to indicate 'free consent'. The presumptions of the drafters as to what constitutes a 'lawful transfer' raise a number of unaddressed questions regarding the principle of voluntariness.[875] That is because the element of coercion, which theoretically serves to distinguish between voluntary and involuntary movements is present at diverse degrees in most migrations, especially in situations of armed conflicts.[876] How then can the voluntariness of transferred persons be assessed?[877] Claire Palley maintains that the requirement of voluntariness opens "endless disputes as to the presence of consent and more easily avoid imputing state responsibility."[878]

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https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=89C89870954BA3D1C12563CD0042A897

[874] See ICRC, *ibid* at Art 8(B).

[875] A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at 82.

[876] Jack Mangala, "Prévention des déplacements forcés de population - possibilités et limites" (2001) 83 Revue Internationale de la Croix-Rouge, Online : <http://www.icrc.org/Web/Fre/sitefre0.nsf/htmlall/5FZJAF/$File/irrc_844_001_Mangala.pdf>.

[877] This question has been raised by Christa Meindersma, "Population Exchanges: International Law and State Practice - Part 2" (1997) 9:4 International Journal of Refugee Law 613 at 653.

[878] Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjorn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 225.

The jurisprudence of the International Tribunal for the Former Yugoslavia attests to the risky business of evaluating 'voluntariness' in war, as will be discussed in Chapter three.

For these reasons, population transfer should be unlawful; there should be no legal population transfer based on a malleable conception of voluntariness and state interests to craft nation-states during conflict. To sum up, population transfer only refers to an act that is unlawful.

2.3 Evacuation is permissible for the protection of the civilian population

In some circumstances, the law pertaining to population transfer may entail a short-term evacuation of the civilian population. In this sense, evacuations are not an exception or derogation. As Mélanie Jacques argues, "evacuation is a separate rule and the prohibition of deportation remains non-derogable."[879] The concept of evacuation is practically the same in international and non international armed conflicts and is essentially carried out to protect civilians against insecurity and the effect of military operations.[880] An occupying power can undertake the total or partial evacuation of an occupied area under Article 49 of the *IV GC,* "if the security of the population or imperative military reasons so demand."[881] Similarly, Article 58 of *Protocol I* provides that as a precaution against the effects of attacks, the parties to the conflict must "without prejudice to Article 49 of the *Fourth Convention*, endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives."[882] For instance, if a neighbourhood is to be subject to a military

[879] For a very good discussion of evacuation, read Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 29.

[880] "The statement that the prohibition against deportation and transfer allows for no exceptions other than those stipulated in Article 49 para. 2 GC IV may be of a customary character as regards displacements *outside* the occupied territory." Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 375; Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 240.

[881] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49.

[882] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) at Art 58(1). "It is clear that authorities with a sense of duty will endeavour to remove the civilian population from areas where the risk of attack is greatest. [...] In this field Occupying Powers only have limited freedom and must comply with the provisions of Article 4 of the fourth Convention: imperative military reasons, security of the population, proper accommodation to receive the persons concerned, satisfactory conditions of transfer (hygiene, health, safety, nutrition, members of the same family not separated, the Protecting Power be kept

operation involving heavy bombardments, the occupying power has the right, and in some occasions the duty, to evacuate the inhabitants or the most vulnerable ones. In other words, respect for the principle of distinction between military and civilian objects and the prohibition of human shields require the removal of civilians from areas that are military objectives.[883] With regard to the movement of the civilian population for the commonly known purpose of 'human shield', Article 51(7) of *Protocol I* is abundantly clear that "the Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."[884] Hence, never could military necessity justify moving civilians to render an area immune to military operation. The aim is to protect the population from an operation that "overriding military considerations make [...] imperative."[885] In this context, a decision to evacuate a civilian population is taken because the military advantage is proportional or greater than the arm caused to the displaced population. Conversely, the security of the population and military reasons may prevent the evacuation of the civilian population in some instances.[886] However, doubts has been expressed because "the breadth with which 'imperative military reasons' could be interpreted leaves doubt as to the *de facto* protection this article might provide."[887] The Special Rapporteur on Human Rights and Population Transfer argues for the exclusion of

informed)." ICRC, Commentary of 1987, Precautions against the effects of attacks at paras 2247-2248, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D37F727128E875D4C12563CD0043518B; Also relevant is Article 78(1): "No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require." *Additional Protocol I*, *ibid* at Art 78(1).

[883] Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law,* Vol 1: Rules (Cambridge: Cambridge University Press, 2005) at Rule 24, Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives (available online).

[884] "The presence or movements of the civilian population or invidual civilians shall not be used to render certain points or areas imune from military operations." *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) at Art 51(7).

[885] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49, Commentary of 1958, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407

[886] See Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Leiden: Martinus Nijhoff, 1995) at 146.

[887] A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc. E/CN.4/Sub.2/1993/17 (1993) at para 164; "What constitutes a legitimate military reason, however, may be difficult to determine." Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 31.

'imperative military reasons' as a ground for evacuation because "the balance should be weighed in favour of humanity and not necessity.[888]

Evacuations are stricly regulated. As a general rule, evacuees should be moved to reception centres in occupied territory ensuring minimum humanitarian safeguards. But if this proves physically impossible, they might be evacuated to a place outside the occupied territory.[889] In addition, the evacuation will only be lawful if "*to the greatest practical extent*, […] proper accommodation is provided to receive the protected persons [and] the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated."[890] The mention of 'to the greatest practical extent' may seem to 'water down' the obligation to ensure basic conditions, but the ICRC appeals to 'common sense' in its application.[891] It is important to stress that evacuations are temporary measures. Indeed, evacuees must return "as soon as hostilities in the area in question have ceased."[892] An evacuation not followed by a return is highly suspicious because it may indicate a permanent

[888] "It stands to reason therefore that forcible population transfers and the implantation of settlers under article 49 of the Fourth Geneva Convention of 1949, as well as the expulsion of civilians under article 17 of Additional Protocol II, should not be justified by military necessity or imperative military reasons."Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc E/CN.4/Sub.2/1997/23 (1997) at para 40.

[889] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49, ICRC, Commentary of 1958, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407

[890] [Emphasis added] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid* at Art 49; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) at Art 78: "(1) No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. […] (2) "Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity." See also Knut Dörman in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 317; Article 49(3) "together with Articles 25, 26, 27 and 82 of the Fourth Geneva Convention and Article 74 of Protocol 1, is an expression of a general concern embodied in the Geneva law of war to preserve or restore family unity to the greatest extent possible." Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff, 1995) at 147-148.

[891] See Jean-Marie Henckaerts, *ibid* at 147.

[892] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49.

removal, which would certainly be a red flag for the crime of deportation and transfer.[893] The ICRC Commentary to Article 49 of the *IV GC* explains, "unlike deportation and forcible transfers, evacuation is a provisional measure entirely negative in character, and is, moreover, often taken in the interests of the protected persons themselves"[894] Vulnerable persons such as elderly, the sicks, children and pregnant women should be evacuated from besieged or encircled area or the relevant personnel should have access to them.[895] Lastly, the protecting power must be informed as soon as an evacuation takes place.[896] In sum, an evacuation ideally takes place within the occupied territory, is temporary, ensures the protection of protected persons, is carried out in a manner that meets their basic needs, both during their evacuation and upon their return to their homes, and is communicated to the protecting power.[897]

Article 17 to *Protocol II* applicable to non international armed conflicts similarly allows for the evacuation of the civilian population for security or imperative military reasons, but only within the national territory.[898] The Commentary to Article 17 also makes clear that "imperative military reasons cannot be justified by political motives"; more specifically, it is prohibited to move a dissident population in order to exercise greater control over the group.[899]

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[893] See for a discussion of permanent removal: Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 99-100.

[894] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49, Commentary of 1958, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407.

[895] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid* at Art 17.

[896] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, *ibid* at Art 49(4).

[897] See generally Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 374; see Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 34.

[898] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) at Art 17(1); See also Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law,* Vol 1: Rules (Cambridge: Cambridge University Press, 2005), Rule 129 - The Act of Displacement (also Online: ww.icrc.org).

[899] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), Art 17, Commentary of 1987 17 at para 4854, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=00FA1ECE76C58523C12563CD0043AD54

If displacement takes place, "all possible measures"[900] must be taken to ensure that the population has satisfactory conditions of shelter, hygiene, health, safety and nutrition.[901] Hence, displacement is permissible only to protect the civilian population against grave danger. In brief, evacuations are possible in both international and non international armed conflicts as long as they serve to protect civilians.

To conclude this chapter, the law of war provides a stable definition of deportation and population transfer. At all times, the laws of war have developed towards providing greater protection to civilians victims in armed conflicts. IHL prohibits deportation and population transfer in all types of armed conflicts during hostilities, occupation or in wars against colonialism or racism unless the security of the civilian population or imperative military reason require a temporary evacuation under satisfactory conditions. Violating the prohibition constitutes a grave breach in international armed conflict and a serious violation of the laws and customs of war in non international armed conflict. In either case, they would also amount to war crimes as will be seen in next Chapter.

[900] "The reference to "all possible measures" takes into account the fact that there might be practical difficulties, but even so it should not serve to reduce the effect of the obligation in any way. It is essentially concerned with cases where evacuation may have to be improvized on short notice and where urgency is essential in order to protect the population against imminent and unforeseen dangers." *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, *ibid*, Art 17, Commentary of 1987 17 at para 4857.

[901] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), at Art 17(1). "The reference to "all possible measures" takes into account the fact that there might be practical difficulties, but even so it should not serve to reduce the effect of the obligation in any way. It is essentially concerned with cases where evacuation may have to be improvized on short notice and where urgency is essential in order to protect the population against imminent and unforeseen dangers." Ibid, Commentary of 1987 at para 4857.

CHAPTER THREE– A COMPLEX CONSTRUCTION: INTERNATIONAL CRIMINAL LAW COVERS ALL SERIOUS MANIFESTATIONS OF THE CRIME OF DEPORTATION AND POPULATION TRANSFER

The three following sections analyze the crime of deportation and population transfer as a crime against humanity, a war crime and as genocide in international criminal law. As will be shown, international criminal law builds on customary international law, humanitarian law and human rights law to define and interpret the crime of deportation and population transfer as a crime against humanity, a war crime and, under particular circumstances, genocide. In addition, it will become apparent that the definitions and interpretations of deportation and population transfer are multiple because they vary from one tribunal to another, as well as within tribunals' own case law. This plurality of definitions and interpretations may be attributable to (1) different understandings of the legacy of Nuremberg and Tokyo; (2) to divergent interpretative approaches; and, (3) to the rapid and somewhat heteroclite development of international and hybrid criminal tribunals following the end of the Cold War. Despite its swift development, international criminal law is attempting to formally enforce customary international law as well as international human rights and humanitarian law on the international plane, which was traditionally left to the voluntary compliance of states and diplomatic pressure.[902]

The most recent attempt at universal conceptualisation and enforcement of the crime of deportation and population transfer is the *Rome Statute of the International Criminal Court* (ICC). Relying heavily on the *Rome Statute*, the three following sections review the evolution of the definitions and interpretations of the crime of deportation and population transfer as a crime against humanity, a war crime and a form of genocide under international criminal law. However, most examples are drawn from the ICTY which, due to the nature of the conflict in the Former Yugoslavia has greatly contributed to the development of the law on deportation, population transfer and forcible displacement.[903]

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[902] See Jackson Maogoto, "Early efforts to Establish an International Criminal Court" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 8.

[903] See Grant Dawson and Sonia Farber, *Forcible Displacement Throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 73 and Chapt four.

3.1 Deportation and forcible transfer is a crime against humanity

Crimes against humanity fundamentally appeal to moral law, to values common to mankind, to something akin to a universally intrinsic belief in human dignity. An ordinary crime or violation of human rights law such as torture, rape or enslavement[904] may become a crime against humanity if the act: (1) is part of a widespread or systematic attack; (2) is directed against a civilian population; and (3) is carried out with knowledge of the attack.

Prior to the contemporary formulation of 'crimes against humanity' existed notions such as "crimes against mankind", "crimes against the human family", and "duties of humanities".[905] Following the First World War, the massacres committed by Turkey against its Armenian population prompted the 1919 Commission on Responsibility of the Authors of the War and on Enforcement of Penalties (hereinafter 1919 Commission) to include the concept of the 'laws of humanity', which comprised the deportation of civilians.[906] Among the thirty-two listed crimes violating the laws and customs of war, the 1919 Commission listed the "deportation of civilians" and "attempts to denationalize the inhabitants of the occupied territory".[907] The 1934 *Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent* affirms that "deportations outside the territory of the occupied State are forbidden, unless they are evacuations intended, on account of the extension of military operations, to ensure the security

[904] See for instance Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 150.
[905] See *Comparative Analysis of International and National Tribunals*, *Fifth Annual Ernst C. Stiefel Symposium - 1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability - Panel II* (1994-1995) 12 New York Law School Journal of Human Rights at 549.
[906] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1920) 14:1/2 American Journal of International Law 95 at 113-114, 115-118, 121; see also Hisakazu Fujita, "The Tokyo Trial Revisited" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 41; Jackson Maogoto, "Early efforts to Establish an International Criminal Court" in *ibid* at 12-13; On the role of the Armenian genocide on the development of crime against humanity, see See Jean-Baptiste Racine, *Le génocide des Arméniens, Origine et permanence du crime contre l'humanité* (Paris: Dalloz, 2006) at 3-22. "A partir de l'extermination des Arméniens, on passe des "lois d'humanité" au "crime contre l'humanité". C'est l'humanité qui devient alors victime." (at 22)
[907] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities, *ibid* at 114.

of the inhabitants."[908] For nearly a century now deportation is prohibited; its relation to denationalization known.

The modern expression 'crimes against humanity' appeared in the 1945 *Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals* (hereinafter IMT Charter), in the *Allied Control Council Law No.10* (hereinafter Council Law No.10) and in the *International Military Tribunal for the Far East Charter* (hereinafter Tokyo Charter).[909] The expression 'crimes against humanity' was unanimously accepted by the UN General Assembly in 1946.[910] The specificity of the concept of crimes against humanity was that the perpetrator could commit a crime against its own population: basically every civilians could be a victim and not only enemy civilians or belligerents.[911]

That deportation and transfer are crimes against humanity is not a matter of contention. The tribunals of Nuremberg and Tokyo recognized the crime of deportation as part of existing international law.[912] In 1945, the *IMT Charter* and the *Tokyo Charter,* defined as crimes against humanity the,

> murder, extermination, enslavement, 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.[913]

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[908] *Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent*, Tokyo, 1934 at Art 19, Online: www.icrc.org.
[909] The United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: Published for the United Nations War Crimes Commission by His Majesty's Stationery Office, 1948) at 174.
[910] *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnburg Tribunal*, GA Res 95(1), UNGAOR, 1st Sess, UN Doc A/RES/95(1) (1946).
[911] On the inclusion of citizens of the perpetrator, see for instance Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 95.
[912] *International Military Tribunal for the Far East* (IMTFE), Judgement, 1948 (English translation), Chapter II, The Law (a) jurisdiction of the Tribunal at 25, Online: http://www.ibiblio.org/hyperwar/PTO/IMTFE/
[913] [Emphasis added] *Trials of War Criminals before the Nuremberg Military*, *Charter of the International Military Tribunal*, Vol 1, October 1946-April 1949 (Washington: US Government Printing Office) at xi-xii, principle II, Art 6 (c); *International Military Tribunal for the Far East Charter*, established by a special proclamation of General MacArthur as the Supreme Commander in the Far East for the Allied Powers, 1946 at Art 5(c).

Accordingly, the charters devised two 'categories' of crimes against humanity: (1) inhuman acts against civilians, including deportation, which could happen in peace or war time; and, (2) persecution on discriminatory grounds, which could only take place with an other crime such as a war crime or genocide, which were understood to take place during an armed conflict.[914]

The definitions of the crime against humanity (hereinafter CAH) of persecution differed regarding the requirement of a nexus with an armed conflict. As seen, the definition of persecution as a crime against humanity in the *IMT* and *Tokyo Charters* requires a nexus with armed conflict by declaring that persecution must be executed or connected "with any crime within the jurisdiction of the Tribunal."[915] In contradistinction, the *Allied Control Council Law No. 10* did not require that the crime against humanity of persecution be "in execution of or in connection with any crime within the jurisdiction of the Tribunal."[916] Indeed, the *Control Council Law No. 10* defined crimes against humanity in a slightly different manner, namely as:

> atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other *inhumane acts committed against any civilian population*, or *persecutions* on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.[917]

By rapidly removing the requirement of a connection to another crime from the definition of persecution, crimes against humanity were further distinguished from war crimes. Although the criminal tribunals' definitions of crimes against humanity differed as to whether or not a nexus between the act of persecution and an armed conflict was necessary, it soon became clear that no nexus with an armed conflict was necessary for a crime against humanity to be

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[914] Comparative Analysis of International and National Tribunals *Fifth Annual Ernst C. Stiefel Symposium - 1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability - Panel II* (1994-1995) 12 New York Law School Journal of Human Rights at 551-552.

[915] See William Schabas, "Customary Law or "Judge-Made" Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 96; *History of the United Nations War Crimes Commission and the Development of the Laws of War*, compiled by the United Nations War Crimes Commission (London: His Majesty's Stationery Office, 1948) at 219.

[916] *The United States v Flick Case* (1950) 6 Trials of War Criminals before the Nuernberg Military Tribunal under *Control Council Law No. 10*, 1212-1213 cited in Jackson Maogoto, "The Work of National Tribunals under Control Council Law 10" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *ibid* at 52.

[917] [Emphasis added] Telford Taylor, *Final report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council law No 10* (Washington, DC: Government Printing Office, 1949) at Art II (c).

committed.[918] As a result, the crime against humanity of deportation could occur both in time of peace or war and WWII trials did cover pre-1939 crimes.[919] For instance, indictments at Nuremberg for the crime against humanity of deportation encompassed acts committed in Germany and against German nationals perceived to be hostile to the Nazi regime, including German Jews, before and once the war had begun.[920]

The crime against humanity of deportation in Second World War Tribunals' Charters and Jurisprudence

WWII definitions of CAH	Categories of crimes against humanity	Crimes against humanity and war crimes	Deportation
Council Law No.10	1) Inhuman acts and 2) persecution	No nexus with armed conflict	Deportation as an inhuman act
IMT Charter	1) Inhuman acts and 2) Persecution	1) No nexus - 'acts committed before or during the war'. 2) Nexus with armed conflict - 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'.	Deportation as an inhuman act Jurisprudence: both within and across borders or frontlines.
Tokyo Charter	1) Inhuman acts and 2) Persecution	1) No nexus - 'acts committed before or during the war'. 2) Nexus with armed conflict - 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'.	Deportation as an inhuman act. Jurisprudence: mainly in relation to slave/forced labour in occupied territories. Indictments conflate CAH and war crimes in third group, but no CAH in judgment.

In fact, Nuremberg interpreted the concept of deportation expansively. As Judge Philips explained in *Milch*, the crime of deportation under *Council Law No.10* means that "deportation

[918] For a discussion on nexus, see Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 97-98.
[919] See Jackson Maogoto, "The Work of National Tribunals under Control Council Law 10" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 43, 58.
[920] *Trial of the Major War Criminals before the International Military Tribunal*, Vol 1, 14 November 1945-1 October 1946 (Nuremberg: Germany, 1947), Count 4(A) at 65-67, 234, 254.

of the population is criminal whenever there is no title in the deporting authority, whenever the purpose of the displacement is illegal or whenever the deportation is characterized by inhumane or illegal methods."[921] Although population transfer was not included as a crime against humanity, other terms relating to displacement were used interchangeably. For instance, Judge Philips affirmed that "the *deportation*, the *transportation*, the retention, the unlawful use, and the inhumane treatment of civilian populations by an occupying power are crimes against humanity."[922] In another case, the Nuremberg judgment found that the population of Alsace was the victim of a German "expulsion action" whereby following an evaluation of their 'racial value', "Alsatians were either deported from their homes [to France or Germany] or prevented from returning to them."[923] Deportation was therefore not a "strict *terminus technicus*."[924] And while most cases of deportation at Nuremberg were considered together with slave labour, since deportation to slave labour or to concentration camps was interlinked, it was clear that, "for deportation to become a war crime or a crime against humanity it need not have enslavement as its object."[925]

The CAH of deportation in the case law of the Military Tribunals did encompass forcible displacements within and across a state as well as in and from areas annexed or occupied. In other words, the Tribunal of Nuremberg did not accord much importance to the destination of the displaced, nor to the legal status of the territory.[926] For instance, in *Milch* and *Rusha*, indictments for crimes against humanity included the deportation of German civilians and

[921] *Trials of War Criminals before the Nuernberg Military*, Vol II, *Milch Case*, Concurring Opinion by Judge D Phillips, October 1946-April 1949 (Washington: US Government Printing Office), Sec VII (C) at 865-866.
[922] [Emphasis added] *Trials of War Criminals before the Nuernberg Military*, Vol II, *Milch Case*, Concurring Opinion by Judge D Phillips, *ibid*, Sec VII (C) at 865-866; Nevertheless, there was an observable tendency to speak interchangeably of "deportation", "transfer", "evacuation" and "expulsion". See *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen (22 March 2006) at para 29 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[923] *Trial of the Major War Criminals before the International Military Tribunal*, Vol 1, 14 November 1945-1 October 1946 (Nuremberg: Germany) 1947 at 238.
[924] Common usage applies the term "deportation" to a broad range of displacement phenomena. *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at paras 11, 14 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[925] *The United Nations War Crimes Commission, Law Reports of Trials of War Criminals*, Vol XV, Digest of Law and Cases (London: His Majesty Stationary Office, 1949) at 119; See also, *Trials of War Criminals before the Nuernberg Military*, Vol II, *Milch Case*, Concurring Opinion by Judge Michael A Musmanno, October 1946-April 1949 (Washington: US Government Printing Office) Sec VII (B), at 849.
[926] Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 48.

others within the borders of Germany or in areas annexed to or occupied by Germany.[927] The Tribunal spoke of the CAH of 'deportation' without assesing whether a border was crossed and without analysing the legal status of the territory where deportation occurred.[928] Therefore, the question of destination was not a central element in determining deportation by the IMT. Although the words "forcible transfer" were not expressly mentioned in the *IMT Charter* or *Law No.10*, it remains that displacements within an occupied or annexed territory or within Germany itself were considered to fall under the crime of deportation. At the time, the concept of deportation encompassed population transfer.

Overall, Nuremberg's jurisprudence showed flexibility, covering pre-war and war deportations, as well as internal and cross-border deportations. Nearly fifty years later, the 1993 *Statute of the International Criminal Tribunal for the Former Yugoslavia* (ICTY) followed the legacy of Nuremberg and included deportation (not population transfer) in its definition of crime against humanity. However, the *ICTY Statute* strayed in a number of ways from the concept of crime against humanity as developed by the IMT.

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[927] *Trial of the Major War Criminals before the International Military Tribunal*, Vol 1, 14 November 1945-1 October 1946 (Nuremberg: Germany, 1947), Count 4(A) crime against humanity at 66; *Trials of War Criminals before the Nuernberg Military*, Vol IV, *Rusha Case*, October 1946-April 1949 (Washington: US Government Printing Office), Count One under Crime against Humanity at 609; See also *Rusha* Case where "the court treated forcible transfer of persons from that part of Poland incorporated into Germany across the *de facto* (and unrecognized) boundary to occupied Poland as deportation." *US v Greifelt* (RUSHA Case) 13 LRTWC 20 (London: HMSO, 1949) in Commentary by Christopher K Hall in Otto Triffterer ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 196; "In the *RuSHA* Case, repeated mention is made of 'deportation' of persons from that part of Poland which had been incorporated into Germany in 1939 to the remainder of Poland (the so-called General Government), which was then under Nazi occupation. Transfers from the incorporated part of Poland to "Germany proper" were also considered to be 'deportation'. Similarly, the Supreme National Tribunal of Poland tried *Artur Greiser* (former Gauleiter of the incorporated part of Poland) for, *inter alia*, imprisoning Polish Jewish citizens under his authority in the Łódż ghetto and finally deporting them to the Chełmno extermination camp (both located in Poland). Greiser was also convicted for deporting Polish civilians to the General Government and to forced labour camps in 'Germany proper'. The Supreme National Tribunal considered both acts to be 'deportation.' *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at paras 11-12, 14 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[928] See *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg, *ibid* at para 12.

3.1.1 The ICTY's intricates conceptualisation of deportation and population transfer as a crime against humanity

The *ICTY Statute* requires that a crime against humanity be conducted during an armed conflict, straying from customary international law. Indeed, Article 5 of the *ICTY Statute* defines crimes against humanity as "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds or other inhuman acts [....] *when committed in armed conflict*, whether international or internal in character, and *directed* against any civilian population"[929] Hence construed, crimes against humanity occur only during armed conflicts, thus blurring the line between war crime and crime against humanity.[930] However, in contrast to war crimes, the type of armed conflict is irrelevant to crimes against humanity. As long as there is an armed conflict, there can be a crime against humanity. The concept of CAH in the *Statute* may result from the intention to follow the *Nuremberg* and *Tokyo* charters instead of *Council Law No.10* and case law. However, as the ICTY eventually observed, "it is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."[931] In addition, the definition of crimes against humanity in the *ICTY Statute* merged the two types of CAH by adding persecution as a form of inhuman act, not as a separate category. Consequently, the conceptualisation of crimes against humanity under the *ICTY Statute* diverged from the *Nuremberg* and *Tokyo* charters.

The *ICTY Statute* and case law create three categories to define the same crime, namely, (1) the crime against humanity of deportation (external displacement); (2) the crime against humanity of inhuman act by way of forcible transfer (internal displacement); and, (3) the crime

[929] [Emphasis added] *Statute of the International Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993, SC Res 827 at Art 5 [*ICTY Statute*].
[930] See Hisakazu Fujita, "The Tokyo Trial Revisited" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 42; See *ICTY Statute, ibid*. It is worth mentioning that in the French version of the Statute, the crime is not "deportation" but "expulsion".
[931] *Prosecutor c Tadic*, IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 141 (International Criminal Tribunal for the former Yugoslavia); William Schabas, "Customary Law or "Judge-Made" Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *ibid* at 82, 97.

against humanity of persecution of forcible displacement (both internal and external) on discriminatory ground.[932] The following sections will elaborate on each category.

3.1.1.1 The crime against humanity of deportation

The ICTY has adopted a formalistic interpretation of deportation as a CAH. The Tribunal rejected the idea that the destination of the displaced is accessory to the definition of the crime of deportation. According to the Tribunal, the main difference between deportation and forcible transfer is that the latter takes place within national boundaries, namely *de jure* or *de facto* borders.[933] Hence, destination became central to the crime of deportation despite precedents to the contrary.[934] This interpretation of deportation was first adopted in *Krstić*, where the Trial Chamber explained its decision in the following terms:

> Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, *the two are not synonymous in customary international law*. Deportation presumes transfer beyond a State borders, whereas forcible transfer relates to displacements within a State.[935]

This interpretation may be an attempt to respect the perceived precedent set by WWII case law or customary international law. However, this position fails to account for the flexible posture adopted by WWII judges. Faced with the realities of displacement that went beyond their conception of deportation, the Tribunal had to create two additional categories of crimes

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[932] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para 7 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[933] See for instance, *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1613 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II). "Traditionally, the distinction between the actus reus of 'deportation' and 'forcible transfer' is identified with the destination to which individuals are displaced." *Prosecutor v Brdanin*, IT-99-36-T, Judgement (1 September 2004) at para 540 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II); See also Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 194.
[934] "First, a question has been lingering amongst scholars about the distinction, if any, between the notion of deportation and that of forcible transfer. From the early developments of war crimes law, conventional instruments and judicial rulings have often conflated these two concepts. As the two acts are often mentioned together, doubts abound as to whether they should not be treated as a single crime." Guido Acquaviva, *Forced Displacement and International Crimes*, UNHCR, Legal and Protection Policy Research Series, Division of International Protection, PPLA/2011/05 (2011) at 18.
[935] [Emphasis added] *Prosecutor v Krstic*, IT-98-33-T, Judgement (2 August 2001) at para 521 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

against humanity to cover instances of population transfer. The first category is the inhuman act of forcible transfer, and the second, persecution through either deportation or forcible transfer.

3.1.1.2 The crime against humanity of inhuman act by way of forcible transfer

To circumvent their restrictive conceptualization of deportation, the Tribunal developed a second category: the crime against humanity of inhuman act by way of forcible transfer. Whereas deportation is officially a crime against humanity in the *ICTY Statute*, forcible transfer was belatedly introduced in *Stakić* in the residual category of 'other inhuman acts'.[936] The approach taken by the ICTY chambers to break down deportation and population transfer into two distinct crimes against humanity is incorrect because both transfer and deportation essentially refer to the same crime, namely the forced displacement of persons from an area in which they are lawfully present without grounds permitted under international law.[937] In a separate and partly dissenting opinion in *Krnojelac*, Judge Schomburg concluded the "the *actus reus* of deportation is forcibly removing or uprooting individuals from the territory and the environment in which they are lawfully present. A fixed destination is not required."[938] In *Simic*, the Court considered how far internally displaced persons had to move within a state for their displacement to amount to forcible transfer. It determined that if displacement prevents victims from exercising the right to stay in their home and community and the right to their property, it may amount to forcible transfer.[939] In sum, this second category exists because the ICTY has accorded too much importance to the destination of displaced persons, instead of the

[936] *Prosecutor v Stakić*, IT-97-24-T, Judgement (31 July 2003) at paras 671-724 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[937] See for instance *Prosecutor v Popović*, IT-05-88-T, Judgement (10 June 2010) at para 891 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[938] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg (17 September 2003) at paras 13, 15 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); "The protected interests behind the prohibition of deportation are the right and expectation of individuals to be able to remain in their homes and communities without interference by an aggressor, whether from the same or another State. The Trial Chamber is therefore of the view that it is the *actus reus* of forcibly removing, essentially uprooting, individuals from the territory and the environment in which they have been lawfully present, in many cases for decades and generations, which is the rationale for imposing criminal responsibility and not the destination resulting from such a removal." *Prosecutor v Stakić*, IT-97-24-T, Judgement (31 July 2003) at paras 677 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[939] *Prosecutor v Simić et al*, 2003, IT-95-9-T, Judgement (17 October 2003) at para 130 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

values protected by the prohibition of deportation and transfer, namely the rights of displaced persons to stay in their home, to live and socialize in their community and to receive protection.[940] In addition to forcible transfer as inhuman act, the Tribunal found that both deportation and transfer could amount to the crime of persecution of forcible displacement.

3.1.1.3 The crime against humanity of persecution as forcible displacement

The emphasis of the ICTY to the destination of displaced persons has been detrimental to victims and has led to judge-made law. The Court's interpretation of the crime of deportation and population transfer affects victims' right to justice as well as the coherence, consistency and effectivity of international criminal law. *Krajisnik* is a good illustration. The Appeals Chamber, finding that the prosecution had made no appeal for 'forcible transfer', quashed the convictions of deportation because the Trial Chamber had failed to prove that some displacements in Bosnia and Herzegovina had involved the crossing of a *de jure* or *de facto* border.[941] As a result, despite the Court's acknowledgment that forced displacement had occurred – i.e., that there was a crime – there was no conviction. This conclusion is the result of a technicality, namely failure to prove that the displaced persons had crossed a formal border or an informal boundary and failure by the prosecution to use the expression "population transfer" to refer to internal displacement. Faced with an incorrectly worded indictment or no proof of border crossing, other chambers have been more imaginative to circumvent what is an otherwise unjust result for the victims. Similarly to *Krajisnik*, the Trial Chamber in *Krnojelac* found that "the majority of incidents alleged by the prosecution to constitute deportation and expulsion did take place." Yet, it held that deportation did not occur because the detainees taken out of the prison for exchange did not cross a border, whereas the whereabouts of others was unknown, and that the prosecution had failed to include forcible transfer in the indictment.[942] It also added that 'expulsion', which was included in the indictment along deportation was not a technical term, although it did form part of the concept

[940] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at paras 19, 26 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[941] *Prosecutor v Krajišnik*, IT-00-39-A, Judgement (12 March 2009) at paras 317, 321 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[942] *Prosecutor v Krnojelac,* IT-97-25-A, Judgement (17 September 2003) at para 213 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

of deportation and cross-border displacement.[943] Fortunately, the Appeals Chamber, who recognized that the prosecution had not chosen the most appropriate term, concluded that the charges were of the CAH of persecution, not of the crime of deportation or inhuman act by way of forcible transfer. The Court held:

> The Appeals Chamber holds that the Trial Chamber disregarded the fact that the crime alleged here was persecution by way of deportation and expulsion and not the separate crimes of expulsion or forcible transfer. The Appeals Chamber considers that, in this case, the Prosecution used the terms "deportation" and "expulsion" in the Indictment as *general terms in order to cover acts of forcible displacement* through which the Prosecution alleges the crime of persecution was committed.[944]

Although the prosecution had not indicted Krnojelac of persecution by way of forcible transfer, the Appeals Chamber circumvented this technicality by determining that Krnojelac was charged with "the crime of persecution by way of forcible displacements both within and outside the borders of Bosnia and Herzegovina."[945] The Appeals Chamber in *Krnojelac* determined that for the crime of persecution, 'forcible displacement' encompassed deportation and forcible transfer. Somewhat surprisingly, this position was taken because the Appeals Chamber found the issue of border irrelevant to the crime of persecution.[946] But how can the issue of border be so crucial to the crime of deportation and forcible transfer and not to the crime of persecution by way of forcible displacement? The Appeals Chamber explained that:

> The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.[947]

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[943] *Prosecutor v Krnojelac*, IT-97-25-T, Judgement (15 March 2002) at paras 476-485 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II). "The Trial Chamber noted that the Prosecution had made no effort "to define the act of expulsion or to differentiate it from the act of deportation" and that expulsion was not a technical term. Moreover, the Trial Chamber stated that "[w]hile there is no clear definition of expulsion within the context of international criminal law, the concept does form part of the definition of deportation, which suggests that it requires displacement across national boundaries." *Prosecutor v Krnojelac*, IT-97-25-A, *ibid* at para 213.

[944] [Emphasis added] *Prosecutor v Krnojelac*, IT-97-25-A, *ibid* at paras 214, 218-221.

[945] *Prosecutor v Krnojelac*, IT-97-25-A, *ibid* at para 215.

[946] *Prosecutor v Krnojelac*, IT-97-25-A, *ibid*.

[947] *Prosecutor v Krnojelac*, IT-97-25-A, *ibid* at para 218; See also *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal (16 June 2004) at para 68 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

Emphasis was thus given to the protection of the right to stay and not the destination of the displaced, an interpretation more attuned to the spirit of the law and the protection of dignity. The same approach − which would seem to contradict the emphasis previously accorded to the destination of the displaced − was adopted by the Appeals Chamber in *Simic* and in *Naletilic*, where it was determined that for the crime of persecution, the distinction between deportation and forcible transfer was irrelevant "because the criminal responsibility of the accused is sufficiently captured by the general concept of forcible displacement."[948] This reasoning led to a third category of the crime against humanity of deportation and population transfer, namely the crime against humanity of persecution by way of forcible displacement. In this context, deportation and forcible transfer are the acts through which the crime of persecution is carried out.[949] Through its case law, the ICTY determined that deportation and forcible transfer can amount to the crime of persecution if carried out with discriminatory intent, which is encompassed by the umbrella term 'forcible displacement'. The perpetrator's association of a person or group to a religion, race or political opinion motivates the deportation or transfer and the crime of persecution by forcible displacement.[950] Introducing the concept of 'forcible displacement' as an umbrella term may have the advantage of erasing the distinction between deportation and transfer, but this is problematic since it is without a clear legal definition under international law.[951]

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[948] "The Appeals Chamber recalls that for the purposes of a persecution conviction, it is not necessary to distinguish between the underlying acts of "deportation" and "forcible transfer" because the criminal responsibility of the accused is sufficiently captured by the general concept of forcible displacement." *Prosecutor v Simić*, IT-95-9-A, Judgement (28 November 2006) at paras 172, 174,189 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); *Prosecutor v Naletilić*, IT-98-34-A, Judgement (3 May 2006) at para 154 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber). This approach was denounced by Judge Schomburg: "The *actus reus* of the crime of persecutions necessitates proof of all the elements of the underlying offence, which in the case of deportation would include examination of the "cross-border" transfer requirement." *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at *ibid* para 9.

[949] See for instance *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Shahabuddeen (17 September 2003) at para 6 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[950] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, *ibid* at para 221. In cases of persecution, it is the perpetrator that defines and decides who is a victim regardless of the victim's own identity which may also extend to people who are not strictly speaking part of the targeted group, but who are perceived to be affiliated with or sympathizing with the victim group. "The Chamber finds that in such cases, a factual discrimination is given as the victims are *discriminated in fact* for who or what they are on the basis of the perception of the perpetrator." *Prosecutor v Naletilic*, IT-98-34-T, Judgement (31 March 2003) at para 636 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

[951] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg (17 September 2003) at para 10 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); In another

Unfortunately, the Court's differentiated approach to the crime of deportation and population transfer emphasises state sovereignty to the detriment of individual human rights.[952] In the context of the Former Yugoslavia, the objective of the UN Security Council was to stop 'ethnic cleansing' and prosecute perpetrators with "equal efficiency and in accordance to the same machinery", which can only be guaranteed if displacements across a border or across a frontline are covered under the same provision, namely, the crime against humanity of deportation.[953] This requirement will become even more obvious following an analysis of the elements of the crime of deportation and forcible transfer under ICTY jurisprudence.

In sum, semantic distinctions can remain to indicate whether displacement is internal or external and whether displaced persons are internally displaced persons or refugees, but destination should not be the main factor in assessing the lawfulness of a displacement. In a sense, the exact destination of displaced persons is more relevant to a humanitarian and political response than to an assessment of the lawfulness of displacement. From a legal viewpoint, indeed, both deportation and forcible transfer are essentially the same crime and should be treated accordingly. If the concept of forced displacement erases the conceptual borders, then it should be defined and enshrined in a binding treaty.

3.1.2 Criminal statutes' differing conceptualisations of crimes against humanity and of deportation and population transfer

The *ICTY Statute* and the 1994 *Statute of the International Criminal Tribunal for Rwanda* (ICTR) statutes define the crime against humanity of deportation differently. Contrasting with the *ICTY Statute*, CAH under the *ICTR Statute* can occur in either peace or war times, which is more consequent with the legacy of WWII case law. However, the *ICTR Statute* is the only

opinion, however, Judge Schomburg held that forced displacement constitutes a crime under international law. *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para 17 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[952] Judge Schomburg defined deportation as: "the forced displacement of an individual from the area in which this individual is lawfully present across a *de jure* border between two States, a *de facto* border, or across a demarcation line from an area under the actual control of one belligerent party to an area under the actual control of another *de jure* or *de facto* authority, without grounds permitted by internationally accepted law." *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006), *ibid* at paras 22.

[953] *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen, (22 March 2006) at para 56 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

one requiring that the crime of deportation be conducted on discriminatory grounds, akin to the crime against humanity of persecution under the ICTY. More precisely, the *ICTR Statute* considers deportation – and not population transfer – as a crime against humanity when carried out as "part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"[954] The emphasis on persecution may be explained by the fact that most violations that took place in Rwanda were ethnically or racially motivated, amounting to genocide. Yet, the requirement of discrimination clearly limits the definition of the CAH of deportation, because it requires proof that displacement took place on discriminatory grounds. Population transfer is not included in the *ICTR Statute*, nor has the prosecution ever indicted someone on the count of deportation. It is therefore unclear whether the Tribunal would have considered deportation inclusive of population transfer or whether it would have integrated the concept of 'forced displacement' as persecution. As Grant and Sonia Farber explain,

> the lack of convictions for forcible displacement at the International Criminal Tribunal for Rwanda should not be viewed as an indication that this crime was not committed during the conflict there in 1994, nor should it be interpreted as an indication that the crimes are unimportant in the Rwandan context. Rather, when the criminal activity is viewed in the broader context of the genocide that was perpetrated there, the displacement of the Tutsi population understandably takes on a secondary significance to that population's subsequent extermination.[955]

Hence, population transfer did occur in Rwanda but, as part of the genocide. Perpetrators were indicted of genocide or of the crimes against humanity of murder and extermination. Excerpts taken from *Rutaganda* are telling:

> The men, women and children who survived the ETO school attack were <u>forcibly transferred</u> by Georges Rutaganda, members of the *Interahamwe* and soldiers to a gravel pit near the primary school of Nyanza. Presidential Guard members awaited their arrival. [....]On or about April 12, 1994, the survivors who were able to show that they were Hutu were permitted to leave the gravel pit. Tutsis who

[954] [Emphasis added] *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994 (last amended 13 October 2006 by UN SC Res 1717), SC Res 955 at Art 3(d).
[955] Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 108-111.

> presented altered identity cards were immediately killed. Most of the remainder of the group were attacked and killed by grenades or shot to death [....] Survivors of the attack attempted to go to Amahoro Stadium but were interrupted: Flanked on both sides by *Interahamwe*, approximately 4,000 refugees were then forcibly marched to Nyanza. [There, another massacre occurred.] The Chamber finds beyond a reasonable doubt that the Accused was present and participated in the forced diversion of refugees to Nyanza and that he directed and participated in the attack at Nyanza.[956]

People were transferred not within or outside their territory, but to their death. The inconsistencies between the ICTY and ICTR's definitions of CAH indicate that deportation was until the beginning of 2000, unclear and inconsistent; and may attest to a multiplicity of meanings of crimes against humanity, including deportation.

3.1.2.1 Rome: the new Nuremberg

The 1998 *Rome Statute of the International Criminal Court* provides an authoritative definition of crime against humanity. The *ICC Statute* criminalizes serious violations of international humanitarian law and international human rights law. As Theodor Meron explains, "the offenses included in the *ICC Statute* under crimes against humanity and under common Article 3 are virtually indistinguishable from major human rights violations."[957] The *Rome Statute* defines CAH as "acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[958] CAH can occur in both peace or war times, a nexus with an armed conflict is not required. Acts that amount to a CAH include "deportation or forcible transfer of population."[959] The term 'forcible transfer' officially entered the definition of crimes against humanity in the *Rome Statute*.[960] Article 7(2)(d) defines deportation and transfer as the "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted

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[956] [Emphasis added] *Prosecutor v Rutaganda*, ICTR-96-3-T, Judgement and Sentence (6 December 1999) at paras 15-16, 299-302, 304 (International Criminal Tribunal for Rwanda, Trial Chamber I).
[957] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 99.
[958] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 7.
[959] *Rome Statute*, *ibid* at Art 7(1)(h).
[960] Forcible population transfer was also included in Article 18(g) of the 1996 Draft Code of Crimes against the Peace and Security of Mankind. See International Law Commission (ILC), *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries* (1996) II:2 Yearbook of the International Law Commission, UN Doc A/CN.4/SER.A/1996/Add.l at Art 18(g).

under international law."[961] Of obvious noteworthiness is the inclusion of deportation and forcible transfer in the same category of crimes against humanity.

The *Rome Statute* of the ICC attempts to reconcile deportation and population transfer by adding for the first time 'forcible transfer of population' to its definition of crimes against humanity. The insertion of forcible transfer makes clear that displacement can occur within a country or territory and constitute a crime against humanity on the same level as deportation. The incorporation of the crime of forcible transfer may have come as a gap filling to ensure coherence between international humanitarian law and international criminal law. According to Christopher Hall, the drafters of the *Rome Statute* intended to preserve the distinction between deportation and forcible transfer.[962] Yet he opined that, "apart from the geographical specificity, the two crimes are the same."[963] The inclusion of 'forcible transfer' may also serve to address the case law of the ICTY. Indeed, such addition indirectly 'settles' the issue of border by erasing the importance given to the destination of the displaced.[964] On this welcomed addition, William Schabas commented that, "the provision reflects an important expansion in its coverage not only of actual deportation beyond a State's borders but also 'forcible transfer' within those borders."[965] The provision is now "crystal clear,"[966] to put it in Schabas terms; yet, it is by no means a new or expansive coverage since deportation in the decisions of the IMT and customary international law already encompassed internal and external displacement. It has, and to some extent still does, cause significant confusion. Nevertheless, the insertion of 'forcible transfer' next to 'deportation' is indeed a much welcome clarification of the customary international law on deportation and population transfer.

To deportation and population transfer as a crime against humanity was added the category of the crime against humanity of persecution via deportation or population transfer. The elements

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[961] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at 7(2)(d).
[962] Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 195, ft 159.
[963] Otto Triffterer, *ibid* at 194-195, ft 195.
[964] See William Schabas, *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006) at 203.
[965] William Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2010) at 163-164.
[966] William Schabas, *ibid* at 164.

of crimes and a review of the work of the ICC indicate that deportation and population transfer are also construed as the crime of persecution. Elements of the crime confirm that persecution involves "any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisprudence of the Court,"[967] which does encompass deportation and population transfer. Persecution is an act "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds that are universally recognized as impermissible."[968] It is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." [969] In other words, it is an identity-based crime.

Jurisprudence tends to support this conceptualisation of deportation and transfer as persecution. In Darfur for instance, the prosecution charged Ahmad Harun and Omar Al Bashir of persecuting the Fur, Masalit and Zaghawa populations from 2003 to 2008 by way of forcible transfer.[970] The charges against Omar Al Bashir confirm the persecutory nature of the acts when it describes how governmental forces and the Janjaweed selected Fur, Masalit and Zaghawa towns and villages to attack, by-passing towns and villages inhabited by other tribes and rebels.[971] There was, therefore, a clear 'ethnic' dimension in the attacks carried out against the civilian population.

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[967] International Criminal Court (ICC), *Elements of Crimes,* UN Doc PCNICC/2000/1/Add.2 (2000) at Art 7(1)(h), element 4.

[968] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 7(1)(h).

[969] *Rome Statute*, *ibid* at Art 7(2)(g).

[970] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 7(1)(h); *Prosecutor v Ahmad Muhammad Harun*, ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (27 April 2007) at Counts 1, 39 and 51, pp 6, 13, 15 (International Criminal Court); *Prosecutor v Omar Al Bashir*, ICC-02/05-01/09, Second Warrant of Arrest (12 July 2010) at 5 (International Criminal Court).

[971] *Prosecutor v Omar Al Bashir*, ICC-02/05-01/09, *ibid* at 5; See also *Report of the International Commission of Inquiry on Darfur to the Secretary-General pursuant to Security Council resolution 1564 (2004) of 18 September 2004*, 25 January 2005 at paras 513-517, in particular para 515: "The populations surviving attacks on villages are not killed outright in an effort to eradicate the group; rather, they are forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Government of the Sudan may be held to be in breach of international legal standards on human rights and rules of international criminal law, it is not indicative of any intent to annihilate the group. This is all the more true because the living conditions in those camps, although open to strong criticism on many grounds, do not seem to be calculated to bring about the extinction of the ethnic group to which the internally displaced persons belong." *Contra*: *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Second Arrest of Warrant for Omar Hassan Ahmad Al Bashir (12 July 2010) at 8/9 (International Criminal Court, Pre-Trial Chamber I) for, *inter alia*, three counts of genocide (genocide by killing, genocide by causing serious bodily or mental harm, and genocide by

Briefly put, the *Rome Statute* creates two categories for the crime against humanity of deportation and population transfer.

CAH - ICC	Article in Statute	Jurisprudence
Deportation and population transfer	Art. 7(1)(d) and 7(2)(d)	*Prosecutor v Ahmad Harun*, Arrest Warrant; *Prosecutor v Omar Al Bashir*, Arrest Warrant; *Prosecutor v William Sameoi Ruto and Joshua Arap Sang*; *Prosecutor v Henry Kiprono Kosgey.*
Persecution by way of deportation or transfer	Art. 7(1)(g) and 7(2)(g)	*Prosecutor v Ahmad Harun*, Arrest Warrant.

Post-Rome statutes continue to conceptualize the crime against humanity of deportation and forcible transfer inconsistently. The 2000 *Statute of the Special Court for Sierra Leone*, a hybrid international tribunal, defines CAH as crimes "part of a widespread or systematic attack against any civilian population", such as deportation, but does not include population transfer.[972] The Extraordinary Chambers in the Courts of Cambodia has jurisdiction over war crimes as defined in the *Rome Statute* and over grave breaches of the *Geneva Conventions*.[973] However, the 2004 *Law on the Establishment of the Extraordinary Chamber* defines a crime against humanity on discriminatory grounds and only includes deportation. Article 5 defines CAH as: "acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds", such as "deportation". [974] The 2000 UN *Transitional Administration in East Timor Regulation* establishing the Special Panels within the District Court of Dili in East Timor includes

deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction).

[972] No mention of population transfer. The tribunal has not indicted anyone on the count of deportation. *Statute of the Special Court for Sierra Leone*, 14 August 2000, UN SC Res 1315 (2000) at Art 2(d).

[973] *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, 6 June 2003, GA Res 57/228(B), 2329 UNTS 117 (entered into force 29 April 2005) at Art 9.

[974] *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004*, NS/RKM/1004/006 at Art 5.

deportation and forcible transfer in its definition of crime against humanity.[975] Hence, the definitions of the crime against humanity of deportation and forcible transfer in international and hybrid international criminal tribunals are inconsistent, despite the *Rome Statute* of the International Criminal Court.

To conclude this section, the expressions 'deportation' or 'forcible transfer' are only indicative of the destination of the displaced and should be interpreted flexibly, especially when only one of the term is used in statutes or indictments. Situations where the same practice is classified differently only because of the destination of the displaced is confusing and detracts from the essential elements, namely that civilians were forcibly uprooted from their homes and property and are entitled to protection and justice.

Despite their contradictions, the statutes of international and hybrid international criminal tribunals are important because they further develop deportation and forcible transfer as a crime against humanity. However, as will be demonstrated below, elements of the crime of deportation and population transfer suffer from the same problems as statutory definitions.

3.2 A Work in progress: Deciphering the Elements of the Crime against humanity of deportation and forcible transfer under the ICTY and ICC

Just as the definitions of deportation and transfer differ among statutes, elements of the crime of deportation and forcible transfer as a crime against humanity also vary from one tribunal to another, as well as within tribunals' jurisprudence. Apart for the International Criminal Court, which has non-binding written elements of crimes, *ad hoc* international and hybrid international criminal tribunals rely on customary international law and have inconsistent, and at times contradictory, interpretations of the elements of the crime of deportation and forcible transfer.

[975] Section 5.1: "For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack: d) deportation or forcible transfer of population." UN Transitional Administration in East Timor (UNTAET), *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTEAT/REG/2000/15, 6 June 2000 at section 5.

In the following two sub-sections, elements of the crime of deportation and forcible transfer will first be analysed through the lens of ICTY case law and then through the elements of crimes of the International Criminal Court. However, references to other criminal tribunals, as well as ICTY decisions will be made to illustrate the elements of the crimes as enumerated in the elements of crime of the ICC.

3.2.1 In search of the definitive elements of deportation, forcible transfer and forcible displacement under the case law of the ICTY

The three categories of the crime against humanity of deportation and population transfer in ICTY jurisprudence each have different elements. The following table provides a brief overview of how the crimes were conceptualised in ICTY jurisprudence.

Classification	**Common elements of crimes against humanity**	**Crime**	***Actus reus***	***Mens rea***
Deportation	1. there was an attack; 2. the attack was widespread or systematic; 3. the attack was directed against a civilian population; 4. the acts of the perpetrator were part of the attack; 5. the perpetrator knew that there was, at the time of his or her acts, a widespread or systematic attack directed against a civilian population and that his or her acts were part of that attack.[976]	Deportation, Article 5(d)	Elements of deportation	"The *mens rea* for the crime of deportation is the intent to displace the population across a de jure or de facto border."[977]
Population transfer		Inhumane act of forcible transfer, Article 5(i)	Elements of inhuman act + elements of population transfer.	The *mens rea* of "inhuman act" is satisfied where the perpetrator performed with the *intent to inflict serious physical or mental suffering or to commit a serious attack on the victim's human dignity*, or with the knowledge that his conduct would probably cause serious physical or mental harm to the victim or constitute a serious attack upon human dignity.[978] + "the *mens rea* [...] for the crime of forcible transfer is the intent to

[976] *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1701 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I); See also *Prosecutor v Krnojelac*, IT-97-25-T, Judgement (15 March 2002) at para 49 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[977] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 801 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[978] See *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1612 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

				forcibly displace the population within a national border."[979]
Forcible displace-ment		Persecution of forced displacement, Article 5(h)	Elements of persecution+ Elements of deportation or transfer - destination excluded.	"The crime of persecution entails a specific *mens rea*: the intent to discriminate on political, racial, or religious grounds."[980]

Before dwelling upon the specific elements of deportation, population transfer and forcible displacement, it is worth identifying the common elements of the crime against humanity. The *mens rea* common to crimes against humanity in ICTY decisions is that "the accused must have the requisite intent to commit the underlying crime and have the knowledge that there was an attack against the civilian population and his acts comprised part of that attack."[981] More precisely, it must be demonstrated that:

1) there was an **attack**;
2) the attack was **widespread or systematic**;
3) the attack was directed **against a civilian population**;
4) **the acts of the perpetrator were part of the attack**;
5) the perpetrator **knew** that there was, at the time of his or her acts, a widespread or systematic attack directed against a civilian population and that his or her acts were part of that attack.[982]

A widespread attack is an attack that is massive in nature and is directed against a large number of individuals, while a systematic attack is an attack that constitutes or is part of a plan or policy or repeated practice.[983] In other words, widespread refers to the large-scale nature of the attack, while systematic connotes a certain level of organisation in the attack, often through a

[979] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 801 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[980] *Prosecutor v Tolimir*, IT-05-88/2-T, *ibid* at para 849.
[981] *Prosecutor v Tolimir*, IT-05-88/2-T, *ibid* at para 700.
[982] [Emphasis added] *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1701 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I); See also *Prosecutor v Krnojelac*, IT-97-25-T, Judgement (15 March 2002) at paras 53-59 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II); *Prosecutor v Martić*, IT-95-11-T, Judgement (12 June 2007) at para 49 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I).
[983] Cherif Bassiouni, *The Legislative History of the International Criminal: Introduction, Analysis and Integrated Text* (New York: Transnational, 2005) at 53.

plan or policy, which "makes improbable its random occurrence."[984] A number of factors can help determine whether an attack is widespread or systematic, namely: "(i) the consequences of the attack upon the targeted population, (ii) the number of victims, (iii) the nature of the acts, and (iv) the possible participation of officials or authorities or any identifiable patterns of crimes."[985] For instance, in *Popovic* the attack was systematic because there was plan to create a Serbian state and a clear directive was issued to Serb forces to create, "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Zepa."[986] The directive further spelled out how to make life unbearable by limiting the logistical capacity of the UN force and restricting humanitarian aid to the population.[987] The goal of a 'pure' Serbian state was carried out through a plan or policy that actively "encouraged or promoted,"[988] instilling fear among the civilian population and those mandated to protect them. In *Tolimir*, however, the ICTY affirmed that "proof of the existence of a plan or policy behind the attack may serve as evidence that the attack was directed against a civilian population or that it was widespread or systematic, but does not constitute a legal element of Article 5."[989] Hence a plan or a policy need not be proven for an attack to be.

An attack directed against the civilian population is not the same as an armed attack. An attack against civilians includes the use of force and the mistreatment of the civilian population through murder, enslavement, deportation, torture or rape for instance.[990] In addition, "the attack need not be part of the armed conflict; rather, it may precede, outlast, or continue during the armed conflict."[991] An attack directed against the civilian population means that civilians

[984] A plan or policy may serve as evidence of a systematic attack but is not an element of the crime. *Prosecutor v Naletilic*, IT-98-34-T, Judgement (31 March 2003) at paras 234 and 236 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).
[985] *Prosecutor v Brdanin*, IT-99-36-T, Judgement (1 September 2004) at para 136 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[986] *Prosecutor v Popović*, IT-05-88-T, Judgement (10 June 2010) at para 762 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II); See also *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at VII(f) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[987] *Prosecutor v Popović*, IT-05-88-T, *ibid* at para 766.
[988] See terms employed in: International Criminal Court (ICC), *Elements of Crimes,* UN Doc PCNICC/2000/1/Add.2 (2000) at Art 7, intro, para 3.
[989] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 698 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[990] *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1702 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I); *Prosecutor v Tolimir*, IT-05-88/2-T, *ibid* at para 693.
[991] *Prosecutor v Tolimir*, IT-05-88/2-T, *ibid*.

must be the primary target of the attack.[992] While the attack must be directed towards civilians, the individual affected by the act need not necessarily be a civilian.[993] Indeed, the concept of 'civilian population' must be interpreted broadly. For instance, a population will be deemed 'civilian' even if non-civilians are present in the area and this is the case as long as civilians are predominant.[994] Furthermore, not the entire civilian population of an area needs to be targeted for an attack to be 'directed against civilians'.[995] In *Martić*, following military operations by Serb forces, a pattern emerged whereby Serb forces would enter the village to expel the remaining civilian non-Serb population to areas under Croatian control or to detention centres where they would be detained and sent to the Croatian side. In this particular case, the Chamber found that the expulsion of the remaining non-Serb population was the primary objective of military action and accordingly constituted an attack against civilians.[996]

3.2.1.1 Discriminatory result? The effects of the categorization of deportation and population transfer on the elements of the crime

[992] *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1703-1704 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I). "Factors relevant to the consideration whether an attack was directed against a civilian population include, inter alia, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war." *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1592 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II). Some factors to consider to determine if attack is widespread or systematic: number of criminal acts, existence of criminal patterns, logistics and resources involved, number of victims, existence of public statements or a plan targeting civilians, means and methods used in the attack, alteration of demographic composition, etc. International Criminal Law & Practice Training Materials, "Crimes against Humanity" Module 7, International Criminal Law Services 11-12 (available online).

[993] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at paras 697, 794 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[994] "Under customary international law, persons hors de combat can also be victims of crimes against humanity, provided that all other necessary conditions are met. The civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population, however, are factors relevant to the determination of whether the chapeau requirement of Article 5 that an attack be directed against a "civilian population" is met." *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at paras 1591, 1593 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[995] *Prosecutor v Djordjević*, IT-05-87/1, *ibid* at para 1591.

[996] *Prosecutor v Martić*, IT-95-11-T, Judgement (12 June 2007) at para 427 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I).

Contrary to what has been alleged,[997] the three categories of the CAH of deportation and forcible transfer in the jurisprudence of the ICTY have different elements. These elements have evolved through the tribunal's case law in somewhat a confusing way. The crime of deportation has undergone a number of changes, but by 2011, the Trial Chamber identified in *Djordjevic* the following elements of the crime of deportation as a crime against humanity:

1) There is a forced displacement of individuals;
2) Those individuals are lawfully present in the area from which they are displaced;
3) There is an absence of grounds under international law permitting the displacement;
4) There is displacement of individuals across a *de jure* state border or, in certain circumstances, which must be examined on a case-by-case basis and in light of customary international law, a *de facto* border; and
5) The forcible displacement must be carried out intentionally by the accused or persons for whom the accused bears criminal responsibility. There is no requirement that the intention to deport is an intention to do so on a permanent basis.[998]

3.2.1.2 The divisive question: what is a border for the purpose of deportation? Or, the overemphasis on the destination of the displaced instead of the act of displacement

This question has divided ICTY judges to the detriment of the protection and rights of victims, the principle of human dignity and the rule of law. Faced with many situations of deportation across different types of boundaries, it soon became necessary to define what entailed a 'border' in the context of deportation. Some chambers interpreted 'border' as *de jure* borders whereas others included *de facto* borders, but disagreed as to whether a frontline constituted a *de facto* border. In *Krnojelac* and *Krstic*, the Trial Chambers considered that a *de jure*, that is a 'national' or 'state' border, had to be crossed.[999] In *Stakic,* however, the Trial Chamber considered

[997] See also *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal (16 June 2004) at para 79 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber)."The crimes of deportation and forcible transfer have the same elements, except in relation to destination." *Milosevic*, IT-02-54-T, *ibid* at para 46. "The Trial Chamber is of the opinion that in relation to forcible transfer or deportation there must be evidence of an intent to transfer the victim from his home or community; it must be established that the perpetrator either directly intended that the victim would leave or that it was reasonably foreseeable that this would occur as a consequence of his action. If, as a matter of fact, the result of the removal of the victim is the crossing of a national border then the crime of deportation is committed; if there is no such crossing, the crime is forcible transfer." *Ibid* at para 78

[998] [Emphasis added] *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1604 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[999] Cited in See also *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal (16 June 2004) at para 60 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber);

deportation to encompass displacement across *de facto* borders, including "constantly changing frontlines, which are not internationally recognised."[1000] The focus of the crime of deportation was not on 'border', but on the change of protective power; in other words, that a person lawfully present had been expelled to "an area under the control of another party."[1001] The Chamber in *Stakic* referred to the *Rome Statute*, which utilises a single category, "deportation or forcible transfer of population," to justify that "what has in the jurisprudence been considered two separate crimes is in reality one and the same crime."[1002] Hence, the notion of 'border' is not essential to a determination of the crime and has to be interpreted broadly based on which party had control of the territory on the ground. In what could be considered a response to *Stakic* or at least an attempt to settle the debate created by inconsistent case law,[1003] the Trial Chamber in *Milosevic* affirmed that, "deportation relates to involuntary transfer across national borders, while forcible transfer relates to involuntary transfers within a state."[1004] The Trial Chamber further determined that if the *Rome Statute* conflates the two crimes, "it does not reflect customary international law."[1005] The Chamber concluded that "there is no detriment to a victim," because his or her displacement will either fall under deportation or forcible transfer, both of which are prohibited.[1006] Unsurprisingly, soon after, the *Stakic* Trial judgment was reversed by the Appeals Chamber, which held that the Trial Chamber "had expanded criminal responsibility by giving greater scope to the crime of deportation than existed under customary international law and thus violated the principle of *nullum crimen sine lege*."[1007] More specifically, the Appeals Chamber held that deportation

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Prosecutor v Krstic, IT-98-33-T, Judgement (2 August 2001) at para 521 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

[1000] *Prosecutor v Stakić*, IT-97-24-T, Judgement (31 July 2003) at paras 679-680 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1001] Cited in See also *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal (16 June 2004) at para 61 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

[1002] *Prosecutor v Stakić*, IT-97-24-T, Judgement (31 July 2003) at paras 679-680 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1003] See also *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal (16 June 2004) at para 58 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

[1004] *Prosecutor v Slobodan Milosevic*, IT-02-54-T, *ibid* at para 67. "Having examined the foregoing strands of jurisprudence, the Trial Chamber concludes that the distinction between deportation and forcible transfer is recognised in customary international law." *Ibid* at para 68.

[1005] *Prosecutor v Slobodan Milosevic*, IT-02-54-T, *ibid* at para 67; For a discussion of the relation between international courts, see Shane Darcy, *Judges, Law and War, The Judicial Development of International Humanitarian Law* (Cambridge: Cambridge University Press, 2014) at 31-34.

[1006] *Prosecutor v Slobodan Milosevic*, IT-02-54-T, *ibid* at para 67.

[1007] *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at paras 302-303 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

requires displacement across a border or a *de facto* border, but not across "constantly changing frontlines."[1008] The Appeals Chamber defined the *actus reus* of deportation as "the force displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law" but fell short of defining a "*facto border*."[1009]

Deportation requiring displacement across a *de facto* or *de jure* border was reaffirmed by the Appeals Chamber in *Tolimir* in 2015.[1010]As the Appeals Chamber held, "displacement of civilian populations across constantly changing frontlines does not constitute the crime of deportation under customary international law, but may still amount to forcible transfer."[1011] Further, the Appeals Chamber in *Dorđević* held the Trial Chamber erred when it found the displacement of the population of Kosovo to Montenegro constituted a *de facto* border for the purpose of deportation, since the movement occurred between an autonomous region and a republic within the borders of the Republic of Serbia and Montenegro.[1012] The gist of the argument laid in defining a *de facto* border under international customary law. The Trial Chamber found there existed a *de facto* border between Montenegro and Kosovo based on the following elements:

(i) the degree of autonomy enjoyed by Kosovo;
(ii) Montenegro's status as a republic within the FRY; and,
(iii) the existence of an armed conflict between forces of the FRY and Serbia on one hand and the KLA on the other.[1013]

In addition, the Trial Chamber considered the displacement of Kosovo Albanians from Kosovo to Montenegro to effect "serious hardship" just as displacement across a state border and as a means for FRY and Serbian authorities to control Kosovo.[1014] In what it deemed an error of law, the Appeals Chamber maintained that "in finding that a *de facto*

[1008] *Prosecutor v Stakić*, IT-97-24-A, *ibid* at para 303.
[1009] *Prosecutor v Stakić*, IT-97-24-A, *ibid* at para 278.
[1010] *Prosecutor v Tolimir*, IT-05-88/2-A, Judgement (8 April 2015) at para 171 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1011] *Prosecutor v Tolimir*, IT-05-88/2-A, *ibid* at para 173.
[1012] *Prosecutor v Dorđević*, IT-05-87/1-A, Judgement (27 January 2014) at para 529 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1013] *Prosecutor v Dorđević*, IT-05-87/1-A, *ibid* at para 533.
[1014] *Prosecutor v Dorđević*, IT-05-87/1-A, *ibid*.

border existed between Montenegro and Kosovo, the Trial Chamber failed to articulate the basis in customary international law upon which it found that a *de facto* border could be established in these circumstances."[1015] The Appeals Chamber assessed whether the displacement of persons from autonomous region within a federal state to another republic in the same federal state can be considered displacement across a *de facto* border for the purpose of deportation in international customary law.[1016] The Appeals Chamber found

> no support in customary international law for the proposition that a *de facto* border can be found within the confines of a sovereign state even where a certain degree of autonomy is exercised by portions of that state. Accordingly, the Trial Chamber's finding that a *de facto* border existed based on the degree of autonomy enjoyed by Kosovo's or Montenegro's status as a republic within the state of the FRY finds no support in customary international law.[1017]

As a result, the Appeals Chamber overturned the conviction of *Dorđević* for the crime of deportation and of persecution through deportation.[1018] The Chamber also refused to consider the crime of inhumane act through forcible transfer and the crime of persecution through forced displacement because it had not been pleaded in the indictments. [1019]

In light of this, it could reasonably be asked: what is a '*de facto* border' if the neither the boundary of an autonomous region, a frontline or a constantly changing one is not in the context of armed conflict? The Court requires a case-by-case analysis, based on customary international law, to determine whether a crossing constitutes a *de facto* border, which seems to provide much discretion to judges who are left with little guidance.[1020] As Judge Schomburg

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[1015] *Prosecutor v Dorđević*, IT-05-87/1-A, *ibid* at para 534.
[1016] *Prosecutor v Dorđević*, IT-05-87/1-A, *ibid* at para 535.
[1017] *Prosecutor v Dorđević*, IT-05-87/1-A, *ibid* at para 535-536.
[1018] *Prosecutor v Dorđević*, IT-05-87/1-A, *ibid* at para 537.
[1019] *Prosecutor v Dorđević*, IT-05-87/1-A, *ibid* at para 539, 541.
[1020] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para 7 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber). In *Stakic*, the Appeals Chamber mentions that "in certain circumstances" deportation can include displacement across a *de facto* border, but does not explain or define what these circumstances are. "The Appeals Chamber also accepts that under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation. In general, the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law." *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3

wrote in a Separate and partly dissenting opinion in *Naletilić* with regard to the assertion that 'under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation' gives no guidance for other chambers and parties as these circumstances are not defined at all. Seen together, all this unnecessarily creates legal uncertainty."[1021] In *Dorđević*, the Appeals Chamber found no basis under international customary law to determine the presence of a *de facto* border between Kosovo and Montenegro within the federal state.[1022] As a result, victims of this displacement fell in between the cracks as deportation was not pleaded according to the Chamber's interpretation of international customary law and forcible transfer not clearly pleaded by the prosecution. But can the legal status of what is crossed in the midst of conflict ever be determined with certitude in each and every case? I believe not.

To justify its definition of deportation, the Tribunal relied on customary international law without ever mentioning its source.[1023] It did however rely on the International Law Commission, which wrote: "whereas deportation implies expulsion from the national territory, the forcible transfer of population *could occur* wholly within the frontiers of one and the same State."[1024] Judge Shahabudeen argues that "the Commission itself cites no supporting authority for the distinction which it makes between what, for the sake of simplicity, may be called internal forcible displacement and what may be called external forcible displacement."[1025] As a result, one may wonder whether the reliance on customary international law is not 'judge-

May 2006) at para 22 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at paras 278, 300 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1021] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg, *ibid* at para 7.

[1022] *Prosecutor v Dorđević*, IT-05-87/1-A, Judgement (27 January 2014) at para 536 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1023] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at paras 5-7, 10-16 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); "The Secretary-General's report on the ICTY Statute has resulted in an interpretative presumption by which the Security Council is deemed to have intended to mandate the ICTY with the enforcement of customary international law as it existed when the Tribunal was established." William Schabas, "Customary Law or 'Judge-Made' Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 87, 94.

[1024] [Emphasis added] International Law Commission (ILC), *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries* (1996) II:2 Yearbook of the International Law Commission, UN Doc A/CN.4/SER.A/1996/Add.l at Art 18(g), para 13 at p 49.

[1025] *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen (22 March 2006) at para 24 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

made' law. William Schabas, who analysed the jurisprudence of international criminal tribunals, more particularly the ICTY, found that "overall, customary international law mainly seems to provide a convenient license for judicial law-making, a process similar in many respects to the creation of judge-made rules of the English common law."[1026] Yet, international courts may contribute to judicial development.[1027] As Shane Darcy concluded with regard to the role of customary international law in international criminal courts,

> The scope of the judicial function has been subject to much debate, and it cannot be said to encompass only the application of existing law. It is clear, and judges will acknowledge this, that courts and tribunals have an important role to play in filling gaps in the law and for lawmaking proper to occur, this requires both a creative element and its acceptance, by States, courts or other bodies. […] While judicial development amounting to the creation of new law may have formally been rejected or denied, this has frequently been enabled or even required at times by the absence of clear precedent, limited statutory guidance, and the perceived flexibility of customary international law.[1028]

Supporting this contention, Judge Shahabuddeen pointed out that the application of the rule of law is interpretation in action.[1029] It is fair to conclude that the ICTY adopted an unnecessarily restrictive definition of 'border', straying from the *ouverture* showned by Nuremberg and other WWII military tribunals, the principle of humanity as well as the intricacies of contemporary armed conflict.

[1026] William Schabas further concluded that "it might be better if it was simply acknowledged that customary international law in the context of international criminal law means something different than customary international law in the context of traditional public international law." William Schabas, "Customary Law or "Judge-Made" Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni,eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 99-100.

[1027] "Judicial development can include the identification of the content of international law, the clarification or elaboration of existing rules and principles, and the application of abstract rules to concrete circumstances. Judicial development might also push the boundaries of the existing law to new circumstances. […] It is a challenge of course to draw fine lines between the judicial application, development and making of international law." Shane Darcy, *Judges, Law and War, The Judicial Development of International Humanitarian Law* (Cambridge: Cambridge University Press, 2014) at 40-42, on the role of customary international law, see 67-81.

[1028] Shane Darcy, *ibid* at 81.

[1029] *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen (22 March 2006) at para 35 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

It could convincingly be argued that customary law does not support the conception of 'border' adopted by the ICTY in relation to deportation.[1030] Judge Schomburg, who investigated the origins of deportation, reached the following conclusion:

> under Roman law, the term *deportatio* referred to instances where persons were dislocated from one area to another area also under the control of the Roman Empire. A cross-border requirement was consequently not envisaged. Expressed in these terms, the concept of deportation seems to mean (1) the removal of someone from the territory over which the person removing others exercises (sovereign) authority or, (2) to remove someone from the territory where the person being removed could receive the "protection" of the authority of that territory. The core aspect of deportation is twofold: *(1) to take someone out of the place where he or she was lawfully staying, and (2) to remove that person from the protection of the authority concerned*.[1031]

It would follow that the concept of border is more fluid and may be more about a change of authority or a change of protection than an internationally recognised border.[1032] It means that, "the question of whether a border is internationally recognised or merely *de facto* is immaterial."[1033] If a conception of border based on which belligerent has control over the

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[1030] "The question of whether a border is internationally recognised or merely *de facto* is immaterial. This was also the approach taken by the International Military Tribunal at Nuremberg and the District Court of Jerusalem in the case of *Attorney General v. Adolf Eichmann.*" *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg (17 September 2003) at paras 13, 15 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para14 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1031] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg, *ibid* at paras 13, 15. "An attempt to define deportation must start with an analysis of the literal meaning of the word. Its linguistic roots derive from the Latin *deportare*: to carry off, to take away. Understood in this way, the term does not primarily aim to describe to which place the victims are brought. Rather, the emphasis lies on the removal, *i.e.*, uprooting, of the victims from a particular place and the intention that this be permanent. In this sense, deportation in ancient times included the dislocation of people from one area to another area under the control of the Roman Empire." *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg, *ibid* at paras 24; See also Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 76-78.

[1032] "In light of the realities of modern armed conflicts as exemplified by the armed conflicts in the former Yugoslavia and, in particular, by the events underlying the charges for deportation in the instant case, an "area affording protection" to persons cannot be restricted to a "State". Rather what is essential is whether there exists a stable authority over a certain territory which provides protection to persons living within that area." *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg, *ibid* at para 26.

[1033] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg (17 September 2003) at paras 13, 15 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

territory and the civilian person would be adopted, it would certainly make deportation a more easily applicable concept. As Judge Schomburg concluded,

> when adjudicating the Nazi policy of "driving out" all persons (believed to be) of "non-Aryan race" from territories under German rule as well as the "gathering" of Europe's Jewish population and other "undesirable" groups in concentration and extermination camps, Nuremberg concentrated not so much on where the victims had been taken, but on their having been forced to leave their homes and prevented from ever returning.[1034]

Similarly, in an elaborate dissenting opinion in *Stakic*, Judge Shahabuddeen found that, "customary international law includes no rule which precludes the use of 'deportation' in relation to the crossing of a front line even if it has not become a border."[1035] Actually, Judge Shahabudeen considered that deportation encompassed "constantly changing front lines."[1036] The evolutive interpretations articulated by Judge Shahabuddeen and Judge Schomburg are consistent with the decisions of the International Military Tribunal and more importantly, with the protection of the right to stay in one's home and land.

Perhaps more importantly than the definition of deportation under customary international law, is its disconnect with the reality of displacement in contemporary armed conflicts. The definition of deportation adopted by the ICTY cannot accommodate the nature of forced displacement, which is such that people are often forced to move more than once, going back and forth across international borders, frontlines and *de facto* borders**.** Adopting a victim's perspective, Judge Shahabuddeen wrote in his dissenting opinion in the appeal judgement in *Stakić* that "to the victim, the consequences of either act [displacement across a border or across a front line] are not distinguishable. To him, the legally recognized lines on a map mean no

[1034] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para 11 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1035] *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen (22 March 2006) at paras 32, 46, 65 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1036] "in any event the question is how the Security Council used the term "deportation" in article 5(d) of the Statute; (iv) that there can be a deportation even across a constantly changing front line" *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen (22 March 2006) at para 21 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber). "The forcible crossing of a border is a deportation but only in the sense that the border represents such a demarcation line or barrier; deportation is exemplified by the case of a crossing of a border, but it is not restricted to that case. It can include the crossing of a coercive demarcation line within the territory of a single state." *Ibid* at para 46.

more than a front line enforced at the point of a gun."[1037] In addition, boundaries, especially during armed conflict shift, rendering difficult any assessment of whether an international border, a *de facto* border or a frontline was crossed. Judge Schomburg recognized in *Naletilic* that "sticking to a formal definition of a 'crossborder' transfer requirement for deportation does not mirror the events that took place in the former Yugoslavia."[1038] This is even more given that the parties to the conflict may have different conceptions of where a border lies, rendering any analysis of the legal status of a boundary even more indeterminate. In *Krstić*, for instance, the Trial Chamber considered that the displacement of Bosnian Muslims occurred within the internationally recognised borders of Bosnia-Herzegovina although Srebrenica was under Serb control at the time and was part of the territory of Serbia in the mind of the perpetrators.[1039] Overall, it is not uncommon for the final destination of displaced persons to be unpredictable, for the location of the border to be challenged by the parties and for its status to be unrecognized by the international community.

Equally important to interpreting deportation is an evolutive approach taking into consideration human rights protected by the prohibition of displacement. In his dissenting opinion in *Naletilic and Martinovic*, Judge Schomburg perfectly captured the essence of an evolutive approach centered on human dignity instead of state sovereignty. In a passage worth quoting at lenght, he exposed the role of law in protecting people's right to stay:

> A definition of deportation to be employed by the Tribunal has therefore to take into account social developments in a globalized world and should not be based on a formalistic-historical understanding of jurisprudence, conventions, studies or the like, which have themselves not taken the stance that deportation requires transfer of persons across State borders to the exclusion of transfer within the territory of a State. Instead, at stake are the legal values protected by the crime of deportation: the right of every person to stay in his or her home place, to live and socialize in his or her community, and to receive protection. In modern

[1037] [Emphasis added] *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen, *ibid* at para 70.
[1038] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at paras 18, 25-26 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1039] The Trial Chamber reasoned that "since the Srebrenica civilians were displaced within the borders of Bosnia-Herzegovina, the forcible displacement may not be characterised as deportation in customary international law." Hence, the Court ruled that the civilians were subjected to forcible transfer and not deportation. *Prosecutor v Krstic*, IT-98-33-T, Judgement (2 August 2001) at paras 531-532 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

> times, such protection may be guaranteed and granted in return for duties which an individual has as being "part" not only of a "State", but also of another entity exercising authority over a certain territory.[1040]

Judge Schomburg concludes by taking note of the changing international legal order whereby, "the growing importance of human rights militates against an unjustifiably narrow interpretation of the crime of deportation in the sense of covering displacement across *de jure* borders only."[1041] Along the same line of reasoning, Judge Shahabudeen concludes the aim of the Security Council in establishing the ICTY was to stop ethnic cleansing, of which forcible displacement is a central feature, and this, regardless the type of crossing involved.[1042] He adds that "even more than domestic law, international law is concerned with substance; it is not willing to be mesmerised by sacramental words."[1043] To sum it up at this point, Judge Schomburg and Judge Shahabudeen strongly, and quite rightfully, advocate for deportation to minimally cover the crossing of *de facto* borders, frontlines and demarcation lines; the assessment being based not so much on the legal status of the crossing as on the fundamental rights of individuals.[1044]

The question as to whether customary international law has defined a *de facto* border indeed is a very interesting legal question deserving further investigation. But it creates a false problem when legal reasoning is based on an inconclusive research as to the state of customary international law regarding the definition of *de facto* border within a federation for instance. The question therefore is whether the lack of clarity as to what constitutes a *de facto* border in

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[1040] [Emphasis added] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para 19 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1041] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg, *ibid* at para 29.

[1042] *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen (22 March 2006) at paras 51-52 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1043] *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen, *ibid* at para 59.

[1044] "The *actus reus* of deportation, both as a crime pursuant to Article 5(d) of the Statute and as an underlying act of persecutions pursuant to Article 5(h) of the Statute, is the forced displacement of an individual from the area in which this individual is lawfully present across a *de jure* border between two States, a *de facto* border, or across a demarcation line from an area under the actual control of one belligerent party to an area under the actual control of another *de jure* or *de facto* authority, without grounds permitted by internationally accepted law." *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para 22 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

the context of a federation warrants the exclusion of deportation or persecution by way of forcible transfer and the removal of charges? My short answer is no, because a different reading of customary international law is possible, the principle of humanity dictates protection of human dignity and because judges can clarify gaps in international law without this amounting to legislating, or can, at least, make efforts at mapping out how the law might develop.[1045] In short, I cannot but adhere to the readings of the law of deportation advocated by Judge Schomburg and Judge Shahabudeen. A narrow reading of the law of deportation is overly formalistic, at countercurrent with a purposive approach and detrimental to the protection of the rule of law on population transfer and deportation, the dignity of victims and the interests of humanity.

Despite the contention of the Appeals Chamber at the ICTY, the status of the border crossed is not an incremental element of the crime of deportation. Besides, an evolutive interpretation would conclude that Albanians Kosovars were in the 'hands of' an enemy belligerent based not on the status of the territory but on the nationality or allegiance of the parties; the line crossed between Kosovo and Montenegro was real, but had more of a psychological, national or political import than a legal one. Considering the controversial status of Kosovo at the time of events, in both the minds of the perpetrators, the victims, and the international community it is fair to assume the 'line' crossed did symbolize the *de facto* border of Kosovo as a state in *statu nascendi*. I therefore submit the uncertain international status of Kosovo combined to the uncertain final destination of the displaced justified a more flexible interpretation of the law in tune with the reality on the ground which would serve to clarify and develop existing law rather than a search for the perfect answer in customary international law; an answer it cannot offer because never so much emphasis was put on the status of the border crossed as is today by the Appeals Chamber at ICTY.

Consequently, removing charges of deportation and of persecution by way of forcible transfer because customary international law does not plainly and clearly defines a *de facto* border in the context of displacement between an autonomous region and a republic part of the same

[1045] On the role of international judges, the principle of *non liquet*, and judicial lawmaking, see the very interesting discussion in Shane Darcy, *Judges, Law and War, The Judicial Development of International Humanitarian Law* (Cambridge: Cambridge University Press, 2014) at 42-54.

federation puts too much weight on what is ultimately a technical issue unrelated to the spirit of the law and leads to disproportionate results. Disproportionate, because victims are denied access to justice since the tribunal is unable or unwilling to apply the law to the reality of contemporary armed conflicts. This rigid and overly formalistic application of the law has led to a disequilibrium between the need to provide a fair result that protects the dignity of victim, the interests of humanity and respects the values protected by the law on the one hand and the right to a fair trial of the accused on the other hand. This disequilibrium is compounded by the mandate of the ICTY as defined by the UN Security Council, which is to "effectively redress" violations of international humanitarian law, including the practice of "ethnic cleansing".[1046]

The goal of the rule of law is to be effective which in the case of the crime of deportation and population translates into the protection of the right to stay of persons. The Appeals Chamber missed the goal of the legal regime of international law pertaining to the law of deportation and population transfer and is therefore partly ineffective in its protection of the human rights of displaced persons and victims of the crime.

3.2.1.3 Intention to deport need not be to displace permanently

The *mens rea* of deportation is another controversial topic among judges. As a result, ICTY jurisprudence is also inconsistent with regard to the requisite *mens rea* to prove deportation as a crime against humanity.[1047] The contentious issue is the notion of "intent to deport permanently". It was first required to demonstrate the perpetrator's intent to deport people permanently, but it was overruled on the ground that intent to deport need not be permanent.[1048]

[1046] *Tribunal (Former Yugoslavia)*, SC Res 827, UNSCOR, UN Doc S/RES/827 (1993) at preamble and para 2; For a discussion of the ICTY mandate and of international criminal courts in general, see Shane Darcy, *Judges, Law and War, The Judicial Development of International Humanitarian Law* (Cambridge: Cambridge University Press, 2014) at 60-69; "The Trial Chamber emphasises that a judicial term must be understood and defined in the context it is used. Bearing in mind both the protected interests underlying the prohibition against deportation and the mandate of this Tribunal, it would make little or no sense to prohibit acts of deportation, in the words of the Security Council 'regardless of whether they are committed in an armed conflict, international or internal in character' and at the same time to limit the possibility of punishment to cases involving transfers across internationally recognised borders only." *Prosecutor v Stakić*, IT-97-24-T, Judgement (31 July 2003) at para 679 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1047] See for instance, *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at para 304 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1048] No finding on intent to deport permanently: *Milošević* Rule 98*bis* Decision, para 78 (referring to deportation and forcible transfers of civilians); *Prosecutor v Krnojelac*, IT-97-25-A, Judgement (17 September 2003) at paras

In 2000, for instance, the Trial Chamber in *Kuprekic* found that the "ultimate goal" of a massacre followed by the expulsion of the Muslims from the village of Ahamji in Bosnia and Herzegovina was to "deter the member of that particular ethnic group from ever returning to their homes."[1049] In the 2003 case of *Simic*, the Trial Chamber accepted that deportation or forcible transfer required "an element of permanency to the intention of the accused."[1050] Similarly, in *Naletilic* and *Brdanin*, the Trial Chamber determined that "the Prosecutor must establish the intent to have the person removed, which implies the aim that the person is not returning."[1051] However, in 2006, the Appeals Chamber in *Stakic* found that "the *mens rea* of the offence does not require that the perpetrator intend to displace the individual across the border on a permanent basis."[1052] This was reaffirmed in *Gotovina*, in 2007, when the Trial Chamber held that, "the perpetrator of deportation or forcible transfer must intend to forcibly

209-255 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) (referring to persecutions by way of deportation and expulsion); *Krstić* Trial Judgement, paras 519-532 (referring to deportation and forcible transfers of civilians). "Conversely, the *Blagojević and Jokić, Brđanin, Simić et al.*, and *Naletilić and Martinović* Trial Chambers, as well as the Trial Chamber in this case, all required that the perpetrator act with the intent that the removal of the persons be permanent." *Prosecutor v Stakić*, IT-97-24-A, *ibid* at para 304, fns 635-636; *See* also *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg (17 September 2003) at para 16 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber)."The Trial Chamber further stated that the requisite *means rea* for both deporation and forcible transfer was the intent that the removal of the victims be permanent." *Prosecutor v Brdanin*, IT-99-36-T, Judgement (1 September 2004) at para 545 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II); See also Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 82;
It should also be noted that both William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 221 and Knut Dörman in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 318 mention that the intent of the perpetrator must be that the victims do not return. While this was true at a certain time, ICTY jurisprudence has evolved and removed this pre-condition.

[1050] *Prosecutor v Simić et al*, 2003, IT-95-9-T, Judgement (17 October 2003) at para 134 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1051] *Prosecutor v Naletilic*, IT-98-34-T, Judgement (31 March 2003) at paras 519-521 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); See *Prosecutor v Blagojević*, IT-02-60-T, Judgement (17 January 2005) at para 601 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I) (intention that victims should not return and no measure to secure the return of the displaced); *Prosecutor v Simić et al*, IT-95-9-T, Judgement (17 October 2003) at para 134 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II) (requiring element of permanency in relation to the intention of the perpetrator); *Prosecutor v Naletilic*, IT-98-34-T, Judgement (31 March 2003) at paras 520, 687 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) (intent to remove the person with no return); *Prosecutor v Brdanin*, IT-99-36-T, Judgement (1 September 2004) at para 540 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1052] *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at paras 278, 307 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

displace the persons, however, the intent need not be to displace on a permanent basis."[1053] In *Milosevic*, the Trial Chamber concluded that

> in relation to forcible transfer or deportation there must be evidence of an intent to transfer the victim from his home or community; it must be established that the perpetrator either directly intended that the victim would leave or that it was reasonably foreseeable that this would occur as a consequence of his action.[1054]

Hence, since 2006 at least, intent to displace must be present, but need not be permanent. The elements of the crime against humanity of deportation have indeed evolved through time.

The reason for this jurisprudential confusion steams from a different reading of evacuation under Article 49 of *Geneva Convention IV*. Advocates of intent to 'deport permanently' rely on their reading of ICRC Commentary to Article 49, which mentions that unlike deportation and transfer, evacuation is a provisional measure.[1055] Thus, if evacuation is provisional, deportation and transfer would be permanent. In *Stakic*, the Appeals Chamber chose to rely on the text of Article 49, instead of the Commentary, to conclude that no intent to deport permanently was mentioned in the Article.[1056] While it is true that evacuation is a provisional measure, it does not mean that deportation and transfer require a permanent intent to displace. It would be more accurate to say that the distinction between evacuation and transfer lies in the solution to the displacement rather than in the intention of the perpetrator. The solution to evacuation is clear: it is return. The solution to deportation and transfer may include local integration, resettlement or return. In other words, humanitarian law does not prescribe a precise solution to deportation and transfer as it does for evacuation.

[1053] *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1741 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I); *Prosecutor v Martić*, IT-95-11-T, Judgement (12 June 2007) at para 111 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I); See also *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 801 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1054] See also *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal (16 June 2004) at para 78 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).
[1055] *Prosecutor v Naletilić*, IT-98-34-A, Judgement, Separate and partly dissenting opinion of Judge Schomburg (3 May 2006) at para 33 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1056] *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at paras 305-307 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

The most problematic issue with regard to deportation lies not in its unstable elements, but in the effect it has on the crime of inhuman act by way of forcible transfer, which has different, in fact, additional elements than transfer.

3.2.1.4 An unnecessary and additional layer of elements to the crime of forcible transfer as an inhuman act

By classifying forcible transfer under the residual category of 'inhuman act', the ICTY has heightened, or at least, differentiated the required level of proof for a finding of forcible transfer of population. In other words, elements necessary to demonstrate the crime against humanity of inhuman act by forcible transfer differ from the ones of deportation. After the common elements of crimes against humanity mentioned above, alleged acts of forcible transfer must also satisfy the elements of inhuman act, and then, the elements of forcible transfer. Accordingly, before assessing the elements of forcible transfer, the following elements of inhuman act must be fulfilled:

(1) There must be an act or omission of *similar seriousness to the other crimes* enumerated under Article 5; [general requirements for a crime against humanity]
(2) The act or omission caused *serious mental or physical suffering or injury*, or constituted a *serious attack on human dignity*; and,
(3) The act or omission was *carried out intentionally* by the accused or by persons for whom the accused bears criminal responsibility.[1057]

[1057] [Emphasis added] *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1610 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II). In *Tolimir*, a slightly different wording of the elements was given: "For an act or omission to fall under this residual category, the Prosecution must prove that:

> (1) there was an act or omission of similar seriousness to the other enumerated crimes under Article 5;
> (2) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
> (3) the accused or the perpetrator committed the act or omission with the intention of inflicting serious physical or mental suffering on the victim(s) or to commit a serious attack on the human dignity of the victim(s), or with the knowledge that his act or omission was likely to cause such suffering or an attack upon human dignity.

Prosecutor v Tolimir, IT-05-88/2-T, Judgement (12 December 2012) at para 802 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

Each case of forcible transfer must be assessed individually to determine whether they are sufficiently serious to amount to 'other inhuman acts'.[1058] No such 'seriousness' requirement exist for deportation. In *Tolimir*, the Trial Chamber said that chambers "must examine whether the specific instances of forcible transfer in the case before it are sufficiently serious to amount to 'other inhumane acts' under Article 5(i)."[1059] In so doing, all factual circumstances must be considered, including "the nature of the act or omission, the context within which it occurred, the circumstances of the victim, as well as the physical and mental effects on the victim."[1060] In *Djordjevic*, the Trial Chamber established that the acts of forcible transfer were of similar gravity than the acts of deportation, because they "involved a forced departure from the people's homes and communities, often grave physical and emotional disruption and uncertain prospects for their return."[1061] In *Krajišnik*, however, the Appeals Chamber found that the Trial Chamber erred, because it failed to prove that the case was sufficiently serious.[1062] Hence, it is crucial to prove on a case-by-case basis that the crime of inhuman act through the act of forcible transfer is as serious as other crimes against humanity. As Grant Dawson and Sonia Farber sum up, "relegating intra-state transfer to the residual crime against humanity of 'other inhumane acts' is based upon the premise that the seriousness of cross-border transfer is inherent (and therefore does not have to be independently proved), but that intra-state transfer is not so inherently serious (and therefore has to be proved)."[1063]

[1058] *Prosecutor v Popović*, IT-05-88-T, Judgement (10 June 2010) at para 889 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1059] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 803 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1060] See *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1613 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1061] *Prosecutor v Djordjević*, IT-05-87/1, *ibid* at para 1703.
[1062] "When finding that specific acts of forcible transfer amount to "other inhumane acts" under Article 5(i) of the Statute, a Trial Chamber has to be convinced that the forcible transfer is of a similar seriousness to other enumerated crimes against humanity. This condition is satisfied in the present case. The acts of forcible transfer were of similar seriousness to the instances of deportation, as they involved a forced departure from the residence and the community, without guarantees concerning the possibility to return in the future, with the victims of such forced transfers invariably suffering serious mental harm." paras 330- 331. Prosecutor v *Krajišnik,* ICTY*, Appeals Chamber,* Judgement IT-00-39-A (2009).
[1063] Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 101

In addition, forcible transfer requires proof of 'serious mental or physical suffering or injury or serious attack on human dignity, whereas no such requirement exist for the crime of deportation.[1064] As the Chamber explained in *Djordjevic*,

> the *mens rea* of "other inhumane acts" is satisfied where the perpetrator performed with the *intent to inflict serious physical or mental suffering or to commit a serious attack on the victim's human dignity*, or with the knowledge that his conduct would probably cause serious physical or mental harm to the victim or constitute a serious attack upon human dignity.[1065]

More precisely, this means that the *mens rea* considered under deportation is the forcible 'movement' of people, whereas the *mens rea* under inhuman act is the 'inhumanity' of the forcible movement, not the unlawfulness of the movement *per se*.[1066] It follows from this categorization that victims of forcible transfer are not subject to the same burden of proof as victims of deportation because they need to prove serious physical or mental harm or a serious attack on human dignity. While population transfer is a serious attack on human dignity which involves serious physical or mental harm, this element does not need to be proven for a finding of deportation. Therefore, deportation and transfer do not have the same elements since in addition to elements common to Article 5, elements of 'inhuman act' must also be met in the case of transfer.

These two elements peculiar to the crime of forcible transfer are problematic, because they heighten the burden of proof for people who are displaced within national borders. As Judge Shahabudeen concluded in his dissenting opinion in the *Stakic*'s appeal,

> there being an observable disequilibrium in available remedies for what in substance is the same thing, namely, forcible displacement of civilians in pursuit of ethnic cleansing, the consequence is a partial nullification of the presumed

[1064] *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at para 362 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber). Mental harm may be family separation and not knowing when or if the family will be reunited; See *Prosecutor v Popović*, IT-05-88-T, Judgement (10 June 2010) at para 937 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1065] [Emphasis added] See *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1612 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1066] For a further discussion see *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen, (22 March 2006) at paras 56-58 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

> intention of the Security Council to provide an equal remedial regime for an act which was of obvious concern to the Council in whichever way it was done.[1067]

Therefore, victims of the same crime are treated differently based on their destination, which leads to inconsistencies in the application of the law.

Once elements common to the crime of inhuman act are met, elements specific to forcible transfer must then be assessed. In addition to the elements of inhuman act just mentioned, to prove a forcible transfer, it is also necessary to demonstrate elements similar to deportation. These are:

> (1) There is a forcible displacement of individuals;
> (2) Those individuals are lawfully present in the area from which they are displaced;
> (3) As in respect of the offence of deportation, there is an absence of grounds under international law permitting the displacement;
> (4) The forcible displacement takes place within national boundaries; and,
> (5) The forcible displacement must be carried out intentionally by the accused or persons for whom the accused bears criminal responsibility. There is no requirement that this intent be to forcibly displace permanently.[1068]

Apart from the internal displacement requirement, these elements are virtually the same as deportation. The problem is therefore with 'inhuman acts' which adds elements to the crime of forcible transfer in comparison to deportation. What is essentially the same crime is treated differently resulting in distinguished remedies. Interestingly, however, for the crime of persecution, deportation and forcible transfer are considered together, under the same concept.

3.2.1.5 Borderless is the crime of persecution of forcible displacement

The third category of crimes against humanity involving deportation or forcible transfer under ICTY jurisprudence is the crime of persecution through forcible displacement. In 2010, the Trial Chamber established that persecution requires an act or omission that:

[1067] *Prosecutor v Stakić*, IT-97-24-A, Judgement, partly dissenting opinion of Judge Shahabuddeen, (22 March 2006) at para 60 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1068] *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1611 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

1) *Discriminates in fact* and which denies or infringes upon a fundamental right laid down in international customary or treaty law; and,
2) Was carried out deliberately with the *intention to discriminate* on one of the listed grounds, specifically race, religion or politics.[1069]

Importantly in the case of persecution, deportation or forcible transfer is not the crime *per se*, persecution is. In fact, a non-crime can be a persecutory act, such as denying bank accounts or employment opportunities.[1070] The level of persecution needs to equate the level of gravity of other enumerated crimes against humanity, not the act or omission, such as deportation and transfer.[1071] All in all, persecution means that "an act or omission discriminates in fact and that the act or omission was committed with specific intent to discriminate."[1072] The person is targeted because of its belonging to a group discriminated against.[1073] In contradistinction with genocide, persecution means that the act is intended to discriminate against the group whereas genocide is an act intended to destroy the group.[1074] In *Tolimir*, it was specified that discriminatory intent may only be inferred from circumstances such as "the systematic nature of crimes committed against the targeted group, as well as the general attitude of an accused,

[1069] [Emphasis added] *Prosecutor v Popović*, IT-05-88-T, Judgement (10 June 2010) at para 964 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II). In *Naletilic*, the Trial Chamber identified the following elements to establish persecution as a crime against humanity:
1) The perpetrator commits a discriminatory act or omission;
2) The act or omission denies or infringes upon a fundamental right laid down in international customary or treaty law;
3) The perpetrator carries out the act or omission with the intent to discriminate on racial, religious or political grounds;
4) The general requirements for a crime against humanity pursuant to Article 5 of the Statute are met.

Prosecutor v Naletilic, IT-98-34-T, Judgement (31 March 2003) at para 634 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).
[1070] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Shahabuddeen (17 September 2003) at paras 6-7 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber)
[1071] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate opinion of Judge Shahabuddeen, *ibid* at para 7. "A Chamber must analyse the seriousness of the harm or injury on a case-by-case basis, bearing in mind factors including, but not limited to, "the severity of the alleged conduct, the nature of the act or omission, the context in which the conduct occurred, its duration and/or repetition, its physical and mental effects on the victim and, in some instances, the personal circumstances of the victim, including age, gender and health." *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 854 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1072] *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at para 360 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1073] *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1758 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1074] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 849 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

as demonstrated by his behaviour."[1075] *Krnojelac* is an interesting case on discrimination, where the Trial Chamber determined that there was no "direct evidence" to prove that the displacement was carried out on a discriminatory ground.[1076] However, following a reading of the same description of events involving a Serb attack against non-Serb civilians, the Appeals Chamber found it was possible to infer a discriminatory intent "based on the circumstances surrounding the commission of the acts."[1077] It held that:

> The expulsion, exchange or deportation of non-Serbs, both detainees at the KP Dom and those who had not been detained, was the final stage of the Serb attack upon the non-Serb civilian population in Foča municipality […] In late 1994, the last remaining Muslim detainees at the KP Dom were exchanged, marking the end of the attack upon those civilians and the achievement of a Serbian region ethnically cleansed of Muslims. By the end of the war in 1995, Foča had become an almost purely Serb town. [....] Given these conclusions, as well as the discriminatory character of unlawful detention and the imposition of the living conditions described above on non-Serb KP Dom detainees, the Appeals Chamber considers that it was not reasonable for the Trial Chamber to conclude that there was no evidence that the 35 detainees had been transferred to Montenegro on the requisite discriminatory grounds.[1078]

Judges thus have some discretion in assessing whether the circumstances point to a discriminatory intent. The fine line that distinguishes persecution from genocide − that is, the assessment of the circumstances from which are inferred intent to discriminate or to destroy a group − is likely subject to a certain amount of discretion as well.

[1075] *Prosecutor v Tolimir*, IT-05-88/2-T, *ibid* at para 850. "There is no requirement, however, that a discriminatory policy exist. In the event that such a policy is shown to have existed, there is no requirement that the accused has taken part in the formulation of such a discriminatory policy." *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1759 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1076] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement (17 September 2003) at para 235 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1077] *Prosecutor v Krnojelac*, IT-97-25-A, *ibid* at paras 235-237. "The Appeals Chamber has held that discriminatory intent may not be inferred directly from the general discriminatory nature of an attack against a civilian population. However, discriminatory intent may be inferred from such a context as long as, in the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent." *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1760 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1078] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Schomburg, *ibid* at paras 235-237.

3.2.2 Attempting clarity: Elements of the crime in the *Rome Statute*

This section uses as analytical framework the elements of the crime of deportation and forcible transfer developed by the ICC because, for the first time, a tribunal attempted to set out the elements of the crime instead of relying on customary international law. The ICC has yet, as of December 2015, to rule at the trial level on a case of deportation or transfer as a crime against humanity. The following section is therefore limited to a review of the arrest warrants involving indictments for the crime against humanity of deportation and transfer in Sudan, Kenya and the Democratic Republic of the Congo. This material is wholly insufficient to discern an interpretative pattern or tendency, but is nevertheless instructive. Reference is made to the case law of other tribunals to construe possible interpretations of the elements, notably the ICTY.

The elements of the crime against humanity of deportation and forcible transfer in the *Rome Statute* reaffirm much of the jurisprudential precedents of the ICTY. They require that:

(1) The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts;
(2) such person or persons were lawfully present in the area from which they were so deported or transferred;
(3) the perpetrator was aware of the factual circumstances that established the lawfulness of such presence;
(4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population;
(5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread and systematic attack directed against a civilian population.[1079]

Element one and two are present in the ICTY elements for the crime. Element three however is a novelty and it remains to be seen how it will be interpreted, whereas element four and five are common to CAH.

[1079] [Emphasis added] International Criminal Court (ICC), *Elements of Crimes,* UN Doc PCNICC/2000/1/Add.2 (2000) at Art 7(1)(d).

3.2.2.1 Forcible displacement could replace deportation and forcible transfer

Based on the elements of the crime of the ICC, deportation and forcible transfer can be used interchangeably with forcibly displaced in the context of persecution as established in the case law of the ICTY.[1080] This position reaffirms and expands ICTY jurisprudence, whereby forcible displacement can be used as an umbrella term for deportation and forcible transfer in the context of persecution. Over time, and especially if less attention is given to the destination of the displaced, the unitary concept of 'forcible displacement' may well take precedence over the terms 'deportation and forcible transfer', thus blurring the distinction between the two. An international human rights law treaty defining forcible displacement or arbitray displacement would confirm a semantical shift.

3.2.2.2 Deportation and forcible transfer is unlawful unless it is for the security of civilians or imperative military reasons

A finding of the crime of deportation and transfer means that the displacement cannot be justified under international law. In time of war, IHL makes clear that displacement will be unlawful unless it is for the security of the civilian population or for imperative military reasons, whereas in time of peace, displacement will also be unlawful under international human rights law, unless it is for legitimate reasons such as public health or well being.[1081] In *Ntaganda*, the ICC Pre-Trial Chamber found the displacement not justified by the security of the civilians or by military necessity "as there is no indication of any precautionary measures having been taken before these acts of displacement were carried out or any reasons linked to

[1080] ICC, *Elements of Crimes*, *ibid* at Art 7 (1)(d), fn 13; "In its findings on counts 12 and 13, the Chamber retains the discretion to use the expressions "forcible transfer" or "displacement" interchangeably, in order to refer to the same conduct put in place by the UPC/FPLC to drive civilians out of certain areas. This does not affect the legal characterization of this conduct as either the crime against humanity of forcible transfer or the war crime of displacement of civilians or both, should all respective elements of crimes be met." *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) at fn 53 (International Criminal Court, Pre-Trial Chamber II).

[1081] International Law Commission (ILC), *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries* (1996) II:2 Yearbook of the International Law Commission, UN Doc A/CN.4/SER.A/1996/Add.l at Art 18(g), para 13 at p 49.

the conduct of military operations." [1082] The absence of measures to protect civilians indicates a displacement undertaken for reasons other than the security of civilians.

Displacement cannot be carried out for reasons related to the conflict. A good illustration is *Sarmento* in the Serious Crimes Unit of the Dili District Court in East Timor. The Court assessed whether the displacement of inhabitants of villages in East Timor to other areas in East Timor and to West Timor (Indonesia) constituted forcible transfer and deportation. The Court held the motive of displacement to be neither the protection of the civilian population, nor imperative military reasons, but rather the displacement of civilians perceived to be supporters of the pro-independence movement. [1083] Transfer was carried out for political reasons related to the conflict, namely to prevent the external self-determination of East Timorese.[1084] Displacing people to prevent the exercise of their right to self-determination or other fundamental rights is contrary to international law.

Similarly, in *Krstic*, the Trial Chamber of the ICTY rejected the argument that Bosnian Muslims from Srebrenica were evacuated for the security of the population or imperative military reasons. The Trial Chamber concluded that the evacuation of civilians took place while there was neither active hostility in or near Srebrenica nor a military threat following the occupation of Srebrenica by Serb forces. In fact, considering the 'atmosphere of terror' in which the evacuations took place, the Chamber found that there was a well organised policy to expel the Bosnian population and that "the evacuation was itself the goal and neither the protection of the civilians nor imperative military necessity justified the action." [1085] In *Popovic*, the Trial Chamber similarly affirmed, that "it is unlawful to use evacuation measures based on imperative military reasons as a pretext to remove the population and effectuate control over a desired territory."[1086] Further proving unlawfulness is that residents were not

[1082] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) at para 68 (International Criminal Court, Pre-Trial Chamber II).
[1083] *The Prosecutor v Joao Sarmento*, 18a/2001, Judgement (12 August 2003) at paras 48, 53, 61 (Special Panels for Serious Crimes (District Court of Dili), East Timor).
[1084] See Part III, chapter on East Timor.
[1085] *Prosecutor v Krstic*, IT-98-33-T, Judgement (2 August 2001) at para 527 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).
[1086] *Prosecutor v Popović*, IT-05-88-T, Judgement (10 June 2010) at para 901 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

allowed to return to their homes, although this is a right being guaranteed under international humanitarian law.[1087]

3.2.2.3 Displacement that involves physical or psychological force is coerced

The act undertaken to deport or transfer people matters, because forcible displacement can be carried out through violent or other coercive means.[1088] To assess whether a displacement is coerced or not, it is necessary to understand what is meant by a 'forcible' displacement. The Preparatory Commission for the International Criminal Court clarified the meaning of 'forcible' as follows:

> the term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.[1089]

This interpretation of forcible displacement was adopted by the ICTY and other courts such as the Dili District Court in East Timor, who took into consideration the "circumstances surrounding the person's displacement."[1090] Forcible displacement may result from the imposition of a 'coercive atmosphere'[1091] or 'severe living conditions', making it impossible for people to remain in their home and community.[1092] Hence, acts that have the intention of

[1087] *Prosecutor v Popović*, IT-05-88-T, *ibid*; *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) at paras 65-66 (International Criminal Court, Pre-Trial Chamber II).
[1088] *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1605 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1089] International Criminal Court (ICC), *Elements of Crimes,* UN Doc PCNICC/2000/1/Add.2 (2000) at p 6, fn 12; The ILC Commentary on article 18 (g) of the *1996 Draft Code* used the term arbitrary instead of forcible. See International Law Commission (ILC), *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries* (1996) II:2 Yearbook of the International Law Commission, UN Doc A/CN.4/SER.A/1996/Add.l at Art 18(g), para 13 at p 49.
[1090] *Prosecutor v Simić et al*, 2003, IT-95-9-T, Judgement (17 October 2003) at para 126 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1091] *Prosecutor v Martić*, IT-95-11-T, Judgement (12 June 2007) at paraa 428, 430 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I). "The Trial Chamber notes, in particular, that during this time period there was a continuation of incidents of killings, beatings, robbery and theft, harassment, and extensive destruction of houses and Catholic churches carried out against the non-Serb population. These acts created a coercive […] atmosphere which had the effect of forcing out the non-Serb population from the territory." On the concept of 'forced' see also *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 700 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1092] *Prosecutor v Krajišnik*, IT-00-39-A, Judgement (12 March 2009) at paras 319 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber). "It is alleged that to facilitate these expulsions and displacements, forces of the FRY and Serbia deliberately created an atmosphere of fear and oppression through

instilling fear or to coerce people to leave their homes may constitute the *actus reus* of deportation.[1093] For instance, fear of violence, intimidation and harassment, detention or psychological oppression may create an environment where there is no choice but to leave.[1094] In Kosovo, displacements frequently resulted from the murder of men, the burning of houses and the killing of livestock.[1095] And even though other events took place that might have instilled fear among the population − such as the NATO bombing and infighting between Serbian forces and the Kosovo Liberation Army − the Trial Chamber found that the "dominant and compelling" factor that caused departure was "the campaign conducted against Kosovo Albanian civilians by Serbian forces."[1096] The Appeals Chamber in *Dorđević* reaffirmed that forced displacement requires that the victim has no 'genuine choice' which includes physical force, threat of force or coercion, caused by "fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment."[1097]In *Tolimir*, the Trial Chamber took note of the coercive environment in Srebrenica in finding unlawful displacement when it concluded that,

> in the case of the Srebrenica enclave, by 12 July 1995, any necessity to move the population was the direct result of conditions created by the Bosnian Serb Forces− namely restriction of goods to the enclave that created a dire humanitarian situation and ongoing attacks with further threats to bring harm to the civilian population.[1098]

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the use of force, threats of force and acts of violence. It is alleged in particular that forces of the FRY and Serbia systematically shelled towns and villages, burned homes and farms, damaged and destroyed Kosovo Albanian cultural and religious institutions, murdered Kosovo Albanian civilians and sexually assaulted Kosovo Albanian women." *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1615 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1093] *Prosecutor v Djordjević*, IT-05-87/1, *ibid* at para 1605.

[1094] *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1738 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I); *Prosecutor v Simić et al*, 2003, IT-95-9-T, Judgement (17 October 2003) at para 125-126 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II); *Prosecutor v Martić*, IT-95-11-T, Judgement (12 June 2007) at paras 297-299 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I).

[1095] See for instance *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1692 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1096] *Prosecutor v Djordjević*, IT-05-87/1-T, *ibid* at para 1697.

[1097] *Prosecutor v Dorđević*, IT-05-87/1-A, Judgement (27 January 2014) at paras 539, 727 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1098] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 811 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

The Appeals Chamber confirmed there was a clear directive as of March 1995 to "create an unberable situation with no hope of further survival or life for the inhabitants of Srebrenica and Žepa."[1099] In *Sarmento*, the Dili District Court found that the inhabitants of villages in East Timor had been forcibly displaced because they were told that if they did not go to West Timor (Indonesia), they would be killed. This threat was sufficient to convince the Court that the population was obliged to move.[1100] Assessing the overall context of the conflict is therefore crucial to understanding what caused the displacement.

3.2.2.4 There is no consent when there is coercion

Inherent to an assessment of the context surrounding displacement is whether the person displaced genuinely consented to depart, in which case displacement would be a lawful movement of person or voluntary migration. Evaluating genuine consent in time of war is walking a tighthrope, because a 'voluntary displacement' must be the result of an individual's free will taking into consideration the context and environment, on a case by case basis.[1101] Accordingly, it should be asked whether people would have moved absent the coercive environment.

An interesting case on the issue of consent in the context of a coercive environment is *Krnojelac*. M Krnojelac was charged with the crime of persecution for the 'deportation and expulsion' of non-Serb detainees in Bosnia and Herzegovina. The Trial Chamber found that although detained men were exchanged across the border to Montenegro, "there is general evidence that detainees wanted to be exchanged, and that those selected for so-called

[1099] *Prosecutor v Tolimir*, IT-05-88/2-A, Judgement (8 April 2015) at paras 313, 317 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1100] *The Prosecutor v Joao Sarmento*, 18a/2001, Judgement (12 August 2003) at paras 74, 76, 83, 105 (Special Panels for Serious Crimes (District Court of Dili), East Timor).
[1101] See for instance *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1605 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I); *Prosecutor v Naletilic*, IT-98-34-T, Judgement (31 March 2003) at para 519 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); See also *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal (16 June 2004) at paras 75-76 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

exchanges freely exercised their choice to go and did not have to be forced."[1102] The Appeals Chamber then considered the overall situation: the atmosphere in the jail during the unlawful detention; detainees' vulnerability; the 'brutal and deplorable' living conditions that included beatings and torture; overcrowding and solitary confinement; and, insufficient food and inadequate clothing.[1103] As Judge Shahabuddeen summed it up, "the atmosphere was one of violence and fear; the climate was oppressive; detainees were vulnerable; the situation was inhuman."[1104] In light of this climate, the Appeals Chamber found it was "impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value."[1105] Again, and despite the existence of a signed document affirming voluntary transfer, the Trial Chamber in *Tolimir* concluded that "even if leaving was a collective wish, it was based on an absence of any other genuine choice; the contents of the declaration indicate no more than the desire of the Bosnian Muslim population to escape the intolerable living conditions imposed upon them."[1106] As a result, even written consent, should be assessed against the context within which it was given. The finding in *Tolimir* was upheld in Appeal, under the IHL principle that "forced displacement is not justified in circumstances where the humanitarian crisis that caused the displacement is itself the result of the accused's unlawful activity."[1107]

However, in a separate opinion strongly dissenting against this finding in *Tolimir,* Judge Antonetti found the displacements in Srebrenica, Potočari and Žepa to be an evacuation by

[1102] "The Trial Chamber is not satisfied that the displacement of these individuals from Foca necessarily involved in the choice they made was involuntary." *Prosecutor v Krnojelac*, IT-97-25-T, Judgement (15 March 2002) at para 483 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1103] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement (17 September 2003) at paras 193, 202, 229-230 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber). In *Krstic*, the Trial Chamber ruled that the situation in the enclave of Srebrenica, such as the shelling and burning of Bosnian Muslim homes, "was calculated to terrorize the population and make them flee the area with no hope of return" in addition to orders by Serb troops to leave. *Prosecutor v Krstic*, IT-98-33-T, Judgement (2 August 2001) at paras 147-148 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).
[1104] *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, Separate Opinion of Judge Shahabuddeen (17 September 2003) at para 9 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1105] [Emphasis added] *Prosecutor v Krnojelac*, IT-97-25-A, *ibid* at para 229. "This leads the Appeals Chamber to conclude that the 35 detainees were under duress and that the Trial Chamber erred in finding that they had freely chosen to be exchanged." (Para 233).
[1106] [Emphasis added] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at paras 816, 827, 829 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1107] *Prosecutor v Tolimir*, IT-05-88/2-A, Judgement (8 April 2015) at paras 158, 169 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

those responsible at the UN, in Bosnia and Herzegovina as well as the DutchBat and the FORPRONU and thus a voluntary and lawful evacuation.[1108] For instance, he argued the population of Žepa wanted to leave because of the constant combats between Serb and Bosnian forces and the siege imposing very difficult living conditions.[1109] With regard to Žepa he concluded:

> l'évacuation de la population civile avait été programmée par les dirigeants politiques de l'ABiH avant même que la dernière attaque militaire ne soit lancée contre Žepa. Sur cette base, l'argument selon lequel "le déplacement forcé ne peut se justifier lorsque la crise humanitaire à l'origine du déplacement est elle-même due aux activités illicites de l'accusé" n'est pas d'application dans le cas d'espèce. A partir de cette démonstration, aucun élément ne permet pas de conclure, au delà de tout doute raisonnable, que le scénario d'évacuation de la population musulmane de Bosnie était le résultat direct des restrictions et des activités armées de la VRS. Il s'agissait, en réalité, d'une mesure d'évacuation entreprise à l'initiative de l'ABiH dont le but était préventif : celui de protéger la population civile.[1110]

In what would otherwise be a clear-cut textbook case of coercion considering the siege and the unsustainable living conditions in the enclaves, this conclusion is surprising, to say the least. A different reading of facts is certainly possible: Bosnian leaders, the UN and other actors organized the evacuation to alleviate suffering in reaction to the untenable situation on the ground. This decision is not a preventive measure, but a palliative one in order to fulfill the duty to protect civilians, reduce suffering and save lives. The interpretation advanced by Judge Antonetti highlights the difficulty of assessing voluntary consent in the context of displacement, and this, even when the situation on the ground is coercive and detrimental to the exercice of the free will of individuals.

[1108] *Prosecutor v Tolimir*, IT-05-88/2-A, Judgement, Opinion séparée et partiellement dissidente du Juge Claude Antonetti (8 April 2015) at paras 51, 56 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1109] *Prosecutor v Tolimir*, IT-05-88/2-A, Judgement, Opinion séparée et partiellement dissidente du Juge Claude Antonetti, *ibid* at paras 54, 56-57. With regard to Potočari he finds voluntariness in what clearly appears to be a coerced environment: "Les affrontements entre les parties et la présence de 30 000 à 50 000 réfugiés vivant dans des conditions de vie périlleuses ne pouvaient avoir d'autre conséquence, que celle du souhait de la population civile de partir et d'être évacuée. Il convient de citer également la pièce D00324 où Leendert Van Duijn (officier du bataillon néerlandais), vient conforter cette affirmation en se référant devant le Parlement néerlandais aux conditions de vie à Potočari comme étant insupportables et ne permettant pas de rester plus longtemps à cet endroit.» [Emphasis added]

[1110] [Emphasis added] *Prosecutor v Tolimir*, IT-05-88/2-A, Judgement, Opinion séparée et partiellement dissidente du Juge Claude Antonetti (8 April 2015) at para 57 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

Besides, the choice to move is an individual decision. In *Naletilic*, the Trial Chamber found that "an agreement between two military commanders or other representatives of the parties in a conflict does not have any implications on the circumstances under which a transfer is lawful" and concluded that "military commanders or political leaders cannot consent on behalf of the individual."[1111] In *Stakic*, it was argued that an involuntary displacement conducted by a humanitarian organization was lawful because it was part of the humanitarian effort to evacuate civilians. But the Appeals Chamber in *Stakic* specified that "the participation of an NGO in facilitating displacements does not in and of itself render an otherwise unlawful transfer lawful."[1112] In fact, the Trial Chamber in *Simic* and the Appeals Chamber in *Stakic* found that agreements concluded by international organisations, such as the International Committee of the Red Cross, as well as the presence of international organisations such as the UN, had no impact on the voluntariness of the displacement.[1113] To be clear, an agreement between warring factions, political leaders or international organisations cannot make transfer or deportation lawful.[1114] The central element in assessing lawfulness of transfer is "the personal wish or consent of an individual, as opposed to collective consent as a group, or a consent expressed by official authorities, in relation to an individual person, or a group of persons."[1115] And I would add, this personal consent must be free from coercion. According to the case law of the

[1111] *Prosecutor v Naletilic*, IT-98-34-T, Judgement (31 March 2003) at para 523 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber). "It is the consent of the individual and not of a collective group or official authorities deciding on behalf of a group that determines whether a displacement is voluntary. An agreement among military commanders or other representatives of the parties in a conflict cannot make a displacement lawful. Furthermore, assistance by humanitarian agencies, such as UNPROFOR, ICRC, and NGOs, in facilitating transfers or exchanges, does not render an otherwise unlawful transfer lawful." *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 796 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1112] *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at paras 267, 286 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1113] *Prosecutor v Stakić*, IT-97-24-A, *ibid* at para 286; *Prosecutor v Simić et al*, 2003, IT-95-9-T, Judgement (17 October 2003) at paras 126-127 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II); *Prosecutor v Simić*, IT-95-9-A, Judgement (28 November 2006) at para 180, 174,189 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).

[1114] See generally ICRC, *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Commentary of 1958 at Art 8, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=89C89870954BA3D1C12563CD0042A897; Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 141.

[1115] *Prosecutor v Blagoje Simic et al*, IT-95-9-T, Judgement (17 October 2003) at para 128 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

ICTY, no agreement between warring parties including a transfer clause overseen by humanitarian organisations could legalize a displacement carried against a person's wish.

3.2.2.5 The lawful presence of the person in the area from which it was deported or transferred is presumed

This element of the crime requires that persons be lawfully present under national and international law in the area from which they are displaced. Commenting on the *ICC Statute*, Christopher Hall explained that "mass expulsions of persons claiming a right to remain present without a fair judicial determination that their presence was unlawful under both national and international law would constitute a forcible transfer of population."[1116] The ICTY adopted a broad conception of 'lawfully present'. In *Popovic*, the Trial Chamber held that 'lawfully present' is not equivalent to lawful residence and, in *Tolimir,* determined "that the words should be given their common meaning and should not be equated with the legal concept of lawful residence."[1117] This is because "the clear intention of the prohibition against forcible transfer and deportation is to prevent civilians from being uprooted from their homes and to guard against the wholesale destruction of communities."[1118] In other words, "the requirement of lawful presence is intended to exclude only those situations where the individuals are occupying houses or premises unlawfully or illegally and not to impose a requirement for 'residency' to be demonstrated as a legal standard."[1119] From this perspective, the priority is the protection of the individual in the community; the residency or immigration status of the person is irrelevant.[1120] Similarly, in *Djodjevic*, it was considered that "inhabitants or residents of an area can be accepted readily as lawfully present in it."[1121] Also included as lawfully present

[1116] Christopher Hall, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, Otto Triffterer, ed, 2nd ed (Munich: CH Beck, 2008) at 248.
[1117] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 797 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1118] *Prosecutor v Popović*, IT-05-88-T, Judgement (10 June 2010) at para 900 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1119] *Prosecutor v Popović*, IT-05-88-T, *ibid*.
[1120] *Prosecutor v Popović*, IT-05-88-T, *ibid*. "The issue is not so much that of ensuring compliance with local (domestic) immigration laws, residence permits or registration duties but rather not to hinder expulsions that would be legitimate under international and domestic laws." Guido Acquaviva, *Forced Displacement and International Crimes*, UNHCR, Legal and Protection Policy Research Series, Division of International Protection, PPLA/2011/05 (2011) at 23.
[1121] *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1616 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I).

are people who have established temporary homes, such as internally displaced persons sheltering in another town or village, after being forcibly displaced from their original place, and people seeking safety in an isolated location.[1122] In fact, the ICTY deems most persons to be lawfully present. The ICC Pre-Trial Chamber concurs in *Ntaganda* that "absent any indication to the contrary in the evidence, the Chamber considers that the civilians displaced […] were lawfully residing in the locations identified."[1123] Lawful presence would exclude only persons occupying houses or premises unlawfully or illegally, such as settlers for instance.[1124]

3.2.2.6 The perpetrator should be aware of the lawfulness of people's presence

The third element is closely interconnected with the second one, but it is not clear how tribunals will determine how the perpetrator should have been aware of a lawful presence. The requirement that the perpetrator knew that people were lawfully present is not an element of the crime in the jurisprudence of the ICTY nor in any other international or hybrid criminal tribunals. It remains to be seen how the ICC will interpret and apply this element to specific cases.

3.2.2.7 The attack must be widespread or systematic and aim at a civilian population

[1122] "In some alleged cases, persons from one village, town or locality were temporarily sheltering in another, having been forced from them in fear. Some others were merely seeking safety in an isolated location. In the Chamber's finding in each case they were, for relevant purposes, lawfully in the area where they were sheltering." *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1616 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II); "With regard to the requirement of lawful presence, the Trial Chamber, as previously indicated, is satisfied that the population of Srebrenica was lawfully present and recalls that in mid-1995, the population in Srebrenica was approximately 42,000, 85 per cent of whom were internally displaced persons." *Prosecutor v Popović*, IT-05-88-T, Judgement (10 June 2010) at paras 900, 923 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II); See also, *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1616 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I).

[1123] "The evidence shows that these locations were regularly inhabited by persons of different ethnicities and there is no indication in the evidence that their presence was unlawful." *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) at paras 68, 125 (International Criminal Court, Pre-Trial Chamber II).

[1124] *Prosecutor v Popović*, IT-05-88-T, Judgement (10 June 2010) at para 900 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

The fourth and fifth element describe the overall environment in which the act takes place and are common to a finding of crimes against humanity.[1125] To constitute a CAH, the attack must be widespread or systematic and it must aim at a civilian population. The nexus is between the act and the attack against a civilian population. A single act, therefore, has to be part of the overall context of the attack.[1126] The *Rome Statute* defines 'attack' as "a course of conduct involving the multiple commission of acts [such as deportation or population transfer] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[1127] The ICC elements of crimes specify that the acts are not necessarily military attacks;[1128] they are acts of violence.[1129]

Distinctive from ICTY definition of crime against humanity is the requirement of a state or organizational policy. Indeed, the elements of crimes consider that the attack must take place in the implementation of a state or organizational policy, which seems to request, albeit indirectly, that an attack be necessarily systematic. For instance, in the arrest warrant against Ahmad Harun in the case of Darfur, the prosecution described "a State or organizational policy consisting in attacking the civilian population" in particular the Fur, Zaghawa and Masalit populations.[1130] The question is whether non-state actors that behave like a state, for instance, an armed group that controls part of a territory, are 'state-like' actor and hence, posses 'state-like' policies. For Cherif Bassiouni, the policy has to be directly linked to a state, excluding non-state actors.[1131] William Schabas is more nuanced when he submits that, "the reference to

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[1125] International Criminal Court (ICC), *Elements of Crimes,* UN Doc PCNICC/2000/1/Add.2 (2000) at Art 7, intro, para 2.
[1126] William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 155.
[1127] International Criminal Court (ICC), *Elements of Crimes,* UN Doc PCNICC/2000/1/Add.2 (2000) at Art 7(2)(a).
[1128] ICC, *Elements of Crimes*, *ibid* at Art 7, intro, para 3.
[1129] *Prosecutor v Naletilic*, IT-98-34-T, Judgement (31 March 2003) at para 233 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); See also William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 153.
[1130] *Prosecutor v Ahmad Muhammad Harun*, ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (27 April 2007) at 5.
[1131] "The text [of Article 7(2)] clearly refers to state policy, and the words 'organizational policy' do not refer to the policy of an organization, but the policy of a state." Cherif Bassiouni, *The Legislative History of the International Criminal: Introduction, Analysis and Integrated Text* (New York: Transnational, 2005) at 151-152 cited in William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 152.

'State or organizational policy plan or policy' in article 7(2) should probably be construed broadly enough to encompass entities that act like States, even if they are not formally recognized as such."[1132] Theodor Meron also understands that crimes against humanity "can be committed not only by States, but also in furtherance of the policy of non-State entities."[1133] This appears to be the position of the ICC thus far. In *Ntaganda*, for instance, the ICC Pre-Trial Chamber confirmed evidence of the policy of the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (UPC/FPLC), a non-state politico-military organization, to "attack civilians perceived to be non-Hema" [1134] through the eviction from Ituri of ethnic groups perceived to be "*non-originaires*", particularly the Lendu.[1135] This policy translated into a series of assault between August 2002 and May 2003. [1136] The broader interpretations of 'organization' proposed by Schabas and Meron, it would seem, are more attuned to the reality of armed conflict and the use of proxies to further statal interests.

3.2.2.8 The perpetrator must know the conduct was part of or intended the conduct to be part of a widespread and systematic attack directed against a civilian population

As the Elements of the Crime of the ICC explain, this last element is combined with the fourth one because they both serve to "clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population."[1137] However, it should not be interpreted to mean that the perpetrator knew all the details about the attack or about "the plan or policy of the State or organization."[1138] In fact, "this mental element is satisfied if the perpetrator intended to further such an attack."[1139] Indeed, "the perpetrator does not need to

[1132] William Schabas, *ibid* at 152.
[1133] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 33, 150. "The definition of attack further recognizes that crimes against humanity can be committed not only by States but also by various organizations [...] This provision may be an important addition to the arsenal of criminal law norms to be applied to individuals acting for non-State entities, and especially terrorist organizations." (*ibid*, at 150)
[1134] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) at paras 15-19 (International Criminal Court, Pre-Trial Chamber II).
[1135] [Italic in original] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, *ibid* at paras 19-20.
[1136] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, ibid at para 22.
[1137] International Criminal Court (ICC), *Elements of Crimes,* UN Doc PCNICC/2000/1/Add.2 (2000) at Art 7, intro, para 2.
[1138] ICC, *Elements of Crimes, ibid.*
[1139] ICC, *Elements of Crimes, ibid.*

have detailed knowledge of the attack or share the purpose of it."[1140] Knowledge can be inferred from the circumstances, including for instance the political context, the position of the accused in the political or military and the nature of the crimes.[1141] Personnel motives may also come into play. In addition, the perpetrator's act does not need to take place in the midst of the attack; the act may have taken place before or after the attack, as long as it is sufficiently connected to the attack and is not an isolated act.[1142] In short, there must be a nexus between the act and the attack against a civilian population.[1143] The perpetrator must know that his act is part of a widespread or systematic attack, "or at least have taken the risk that his or her acts were part of the attack."[1144] In *Ntaganda*, the ICC Pre-Trial Chamber held the attack against the civilian population (non-Hema) in Congo to be both widespread because of the number of civilian victims, the broad geographical area, and the period of time (over a year) and systematic, involving the target of non-Hema civilian population and a recurrent *modus operandi* (roadblocks, land mines, and coordinated unlawful act such as arbitrary arrests, rape, expulsion from homes and property destruction).[1145]

3.3 Deportation and population transfer is a grave breach and a war crime

[1140] *Prosecutor v Gotovina*, IT-06-90-T, Judgement (15 April 2011) at para 1701 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I).
[1141] See William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 156.
[1142] *Prosecutor v Martić*, IT-95-11-T, Judgement (12 June 2007) at para 49 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I). "The Chamber recalls that according to article 7(2)(a) of the Statute, an "attack" denotes a course of conduct involving the multiple commission of acts referred to in paragraph (1) of the same provision. As the charged crimes must take place within an "attack", the Prosecutor is free to present further additional acts to the ones charged, with a view to demonstrating that an "attack" within the meaning of articles 7(1) and 7(2)(a) of the Statute took place." *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) at para 23 (International Criminal Court, Pre-Trial Chamber II).
[1143] *Prosecutor v Djordjević*, IT-05-87/1-T, Public Judgement with Confidential Annex (23 February 2011) at para 1594 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1144] *Prosecutor v Martić*, IT-95-11-T, Judgement (12 June 2007) at para 49 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I); *Prosecutor v Stakić*, IT-97-24-A, Judgement (22 March 2006) at para 328 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[1145] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) at paras 24-25 (International Criminal Court, Pre-Trial Chamber II).

In 1945, war crimes were officially recognised under international law.[1146] They included deportation from and within an occupied territory not justified for the security of the population or imperative military reasons. Whereas *Control Council Law No.10* recognized as a war crime the "deportation to slave labour or for any other purpose, of civilian population *from* occupied territory,"[1147] the *IMT Charter* recognized as a war crime the "deportation to slave labor for any other purpose of civilian population *of or in* occupied territory."[1148] Other military commissions mandated to try war criminals also included the war crime of "deportation to slave labour or for any other purposes, of civilians *of, or in,* occupied territory."[1149] Following it's punitive occupation of China in WWII, Japan was accused of "deportation and enslavement of the inhabitants thereof."[1150] The Judgment of the International Military Trial for the Far East describes how the civilian population of China was deportated, interned and enslaved:

> Having decided upon a policy of employing prisoner of war and civilian internees on work directly contributing to the prosecution of the war, and having established a system to carry that policy into execution, the Japanese went further and supplemented this source of manpower by recruiting laborers from the native population of the occupied territories. This recruiting of laborers was accomplished by false promises, and by force. After being recruited, the laborers were transported to and confined in camps. Little or no distinction appears to have been made between these conscripted laborers on the one hand, and prisoners of war and civilian internees on the other hand. They were all regarded as slave laborers to be used to the limit of their endurance. For this reason, we have included these conscripted laborers in the term "civilian internees" whenever that term is used in this chapter.[1151]

[1146] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, compiled by the United Nations War Crimes Commission (London: His Majesty's Stationery Office, 1948), p. 220.
[1147] [Emphasis added] *Trials of War Criminals before the Nuernberg Military, Tribunals under Control Council Law No. 10*, Vol 1, October 1946-April 1949 (Washington: US Government Printing Office) at xi-xii, Art. 2(b).
[1148] [Emphasis added] *Ibid* at xi-xii, principle II, Art 6(b).
[1149] [Emphasis added] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals, Selected and prepared by the United Nations War Crimes Commission*, Vol 1 (London: Majesty's Stationery Office, 1947), Annex II at 115.
[1150] "Large numbers of the inhabitants of such territories were murdered, tortured, raped and otherwise ill-treated, arrested and interned without justification, sent to forced labour, and their property destroyed or confiscated." *International Military Tribunal for the Far East* (IMTFE), Judgement, 1948 (English translation), Annex 6, Appendix D, Incorporated in Group Three, section twelve at 116-117, Online: http://www.ibiblio.org/hyperwar/PTO/IMTFE/
[1151] IMTFE Judgement, *ibid* at 1083.

Deportation as a war crime included the unlawful displacement of civilians within or outside occupied territory. Cofinement took place as part of the displacement to maintain control over the civilian population.

In later criminal law statutes, the type of conflict and the source of law determined the categories of war crimes. The 1993 *Statute of the ICTY* does not have an article specifically labelled 'war crimes'; rather, violations of IHL are divided under two articles, namely: Article 2 entitled 'grave breaches of the Geneva Conventions of 1949' applicable to international armed conflicts; and, Article 3 entitled 'violations of the laws or customs of war' and applicable in both international and non international armed conflict. Article 2 is restricted to Geneva Law − that is, grave breaches as defined under the *Geneva Conventions*. Grave breaches under Article 2(g) include "unlawful deportation or transfer or unlawful confinement of a civilian,"[1152] in the context of an international armed conflict, whereas deportation and population transfer are considered violations of the customs of war under Article 3, applicable to both international and non-international armed conflicts (although they are not listed).[1153] Considered the 'war crime' article, Article 3 is broader than Article 2 because it does not require a demonstration of the type of conflict and of the protected status of displaced persons, unless the violation is specific to international conflicts, which is not the case with population transfer.[1154] Noteworthy is the distinction in the conception of deportation and transfer as a war crime and as a crime against humanity. Indeed, both internal (population transfer) and external (deportation) displacements are equally prohibited under Article 2 and 3.[1155]

The jurisprudence of the ICTY has however most often considered deportation and transfer as a crime against humanity, which may be attributable to the difficulty of proving whether the conflict was international or non-international at the time of the alleged crime. In a few cases,

[1152] ICTY Statute, article 2(g).
[1153] ICTY Statute, article 3.
[1154] *Prosecutor v Brdanin*, IT-99-36-T, Judgement (1 September 2004) at para 127 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1155] "It can be seen that transfer within and without occupied territory are treated the same by Geneva Convention IV and Article 2(g) of the ICTY Statute; in other words, one is not treated as more serious than the other." Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 106.

transfer was considered a war crime. In *Naletilic,* for instance, the Trial Chamber identified the common elements to the application of Article 2 as: (i) an international armed conflict; (ii) a nexus between the alleged crime and the armed conflict; and, (iii) victims that are protected persons under the *Geneva Convention IV*.[1156] Once these common elements are met, deportation or transfer must fulfil elements specific to the crime under Article 2(g), which were identified for the first time in *Naletilic* as:

> 1) the occurrence of an act or omission, not motivated by the security of the population or imperative military reasons, leading to the transfer of a person from occupied territory or within occupied territory;
> 2) the intent of the perpetrator to transfer a person.[1157]

In *Naletilic*, the Trial Chamber found the transfer of the Muslim civilian population from the Eastern to the Western part of Mostar in Bosnia and Herzegovina to be a grave breach of the *Geneva Convention IV* under the *ICTY Statute*.[1158] In sum, the elements of the crime of deportation and transfer as a grave breach under Article 2(g) in ICTY decisions draw from Article 49 of the *Geneva Convention IV*. A review of ICTY jurisprudence seems to indicate that deportation and transfer as a violation of the laws or customs of war was never considered by the ICTY.[1159]

[1156] "It is settled in the jurisprudence of this Tribunal that an armed conflict exists "whenever there is resort to armed forces between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." *Prosecutor v Brdanin*, IT-99-36-T, Judgement (1 September 2004) at paras 121-122 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1157] *Prosecutor v Mladen Naletic and Vinko Martinovic*, Trial Judgement, Case No IT-98-34-T, 31 March 2003, para 521.

[1158] *Prosecutor v Naletilic*, IT-98-34-T, Judgement (31 March 2003) at paras 549-551 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

[1159] If a case had to be considered under Article 3, it would have to meet the following definition of a violation of the laws or customs of war established by the jurisprudence of the ICTY, namely:

> (a) the existence of a state of internal or international armed conflict;
> (b) the existence of a nexus between the acts of the physical perpetrator and the armed conflict;
> (c) the conduct of the physical perpetrator infringes a rule of international humanitarian law, whether conventional or customary in nature;
> (d) the violation of the relevant rule must entail the individual criminal responsibility of the person in breach of the rule; and
> (e) the violation must be "serious".

Prosecutor v Milan Milutinović, Trial Chamber II ICTY, Case No IT-05-87-T, 26 February 2009, para 124.

Essentially, most statutes covering war crimes separate the crime depending on the type of conflict. The *Statute of the International Criminal Tribunal for Rwanda* has no article entitled 'war crimes', but covers "violations of Article 3 common to the Geneva Conventions and Additional Protocol II," committed in non international armed conflict.[1160] It does not include 'the law and customs of war' because there was no external participation in that conflict.[1161] The Rwandan Statute encompasses the unlawful deportation or transfer of civilians. The great contribution of the *ICTR Statute* is perhaps not so much its definition of crimes in non international conflicts, but the extension of criminal liability to non international armed conflict.[1162] Indeed, until the mid-1990s, individual criminal responsibility did not incur for perpetrators of war crimes in non international armed conflicts.[1163] Similarly to the *ICTR Statute*, the *Statute of the Special Court for Sierra Leone* does not include 'war crimes', but 'violations of Article 3 of the *Geneva Conventions* and *Additional Protocol II* and a separate section entitled 'other serious violations of humanitarian law' which would also permit prosecution for the crime of deportation and population transfer.[1164] The 2004 *Law of the Extraordinary Chambers in the Courts of Cambodia* includes grave breaches of the 1949 *Geneva Conventions*, including the "unlawful deportation or transfer or unlawful confinement of a civilian"[1165] A clear distinction between international and non international armed conflicts was also maintained in the *Rome Statute*, despite increasing acceptance that the separation between the two is often impracticable and that the same level of protection should be accorded to civilians in both types of conflicts.

3.3.1 Rome's definition of war crime shaped by political compromise, not legal reasoning

[1160] *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994 (last amended 13 October 2006 by UN SC Res 1717), SC Res 955 at Art 4.
[1161] See Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester: Manchester University Press, 2008) at 74.
[1162] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 100.
[1163] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 286.
[1164] *Statute of the Special Court for Sierra Leone*, 14 August 2000, UN SC Res 1315 (2000) at Art 3 and 4.
[1165] *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004*, NS/RKM/1004/006 at Art 6.

The 1998 *Rome Statute* is the first statute to have an article entitled 'war crimes' for both international and non international armed conflicts and to confirm the codification of war crimes to non international armed conflict.[1166] In this regard, it has been argued that grave breaches will gradually lose its appeal to the more flexible and adaptable concept of war crimes.[1167] The ICC will have jurisdiction over war crimes, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[1168] The Court can still exercise jurisdiction if a plan, policy, or large-scale commission is absent since these are not a prerequisite to the exercise of jurisdiction, but merely a "practical guide".[1169]

The *Rome Statute* is a compromise between states in regard to war crimes under customary international law. Political compromise because "treaties and custom come about as a result of conflicting motives and objectives − they are “bargains” and “package-deals” and often result from spontaneous reactions to events in the environment."[1170] Unsurprisingly, this compromise did not erase the distinction between international and non international armed conflicts.[1171] And the result is a divided, and somewhat complex concept of war crimes.

3.3.2 There are four categories for the war crime of deportation and population transfer in the Rome Statute that apply to three different types of international and non international armed conflicts

War crimes are divided into four categories based on their legal source and on the type of conflict. In international armed conflicts they include (1) 'grave breaches' under Geneva law

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[1166] Although mentioned under different *ad hoc* Statutes, until the mid-1990s, it remained uncertain whether war crimes committed during non-international armed conflicts were punishable. See William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 195-196.

[1167] Marko Divac Öberg, "The absorption of grave breaches into war crimes law" (2009) 91:873 International Review of the Red Cross 163 at 182-183.

[1168] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 8(1).

[1169] For a discussion on the subject, see William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 200-202, 208; Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 299-300.

[1170] Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GA, UN Doc A/CN.4/L.682 (2006) at 23.

[1171] See William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 196.

and (2) 'other serious violations of the laws or customs of war' inspired by Hague law, *IMT Charter*, *Additional Protocol I* and customary international law. In non international armed conflicts they cover (3) 'serious violations' of common Article 3 in Geneva law; and, (4) 'serious violations of the laws and customs' also in Geneva Law, notably *Additional Protocol II* and customary international law.[1172]

I argue that the prohibition of deportation and population transfer is covered in all four categories of war crimes defined in the *Rome Statute*. Prior to discussing each category, the following table provides an overview.

War crimes of deportation and population transfer in the Rome Statute (Article 8)		
Type of armed conflict	**Type of violation & legal basis**	**Definition**
International conflict	**Grave breaches under GC, 'purely' IHL**: Grave breaches of the 1949 Geneva Conventions. (Art. 8(2)(a)(vii)).	Unlawful deportation or transfer or unlawful confinement. (Art. 8(2)(a)(vii)).
International conflict	**Hague law, IMT Charter, Add. Protocol I, and customary international law**: Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.(Art. 8(2)(b)(viii)).	The transfer, **directly or indirectly**, **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 (Art.8(2)(b) (viii)).
Non international conflict under Article 3	**Geneva Conventions, 'purely' IHL**: In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949. (Art. 8(2)(c)).	No explicit mention of deportation or population transfer although inferred from 'violence to life and person' and 'outrages upon personal dignity' and more generally from the concept of 'human treatment' and 'human dignity'.
Non international conflict:	**Additional Protocol II and customary international law**:	Ordering the **displacement of the civilian population for**

[1172] See for instance William Schabas, *ibid* at 196, 202. "For the purpose of Article 8 of the Statute of the International Criminal Court the definition of 'war crimes' virtually wipes out the distinction between grave breaches and 'lesser' war crimes, since it defines 'war crimes' as embracing both grave breaches and other 'serious violations of the laws and customs applicable to international armed conflict." Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester University Press, Manchester, 2008) at 327.

"armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups" (Article 8(2)(f))	Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. (Art 8(2)(e)(viii)).	**reasons related to the conflict**, unless the security of the civilians involved or imperative military reasons so demand. Art 8(2)(e)(viii)).

In relation to the displacement of protected persons in international armed conflict, grave breaches of the *Geneva Convention IV* (Article 8(2)(a)(vii)) concern deportation and transfer, whereas other serious violations under Article 8(2)(b)(viii) cover 'the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.' In other words, Article 8(2)(a)(vii) criminalizes all unlawful manifestations of deportation and transfer taking place during international armed conflicts, if an expansive conception of transfer under the *GC IV* is adopted, whereas Article 8(2)(b)(viii) covers only deportation and transfer during occupation.[1173] From a conceptual viewpoint, Article 8(2)(a)(vii) encompasses Article 8(2)(b)(viii). If a formal conception of Article 49 of the *GC IV* is adopted, then there is hardly any difference between the two articles, apart from their sources. Some differences can indeed be found in the elements of crimes as a result of their different legal sources, which are mainly the *GC IV* for Article 8(2)(a)(vii) and *Additional Protocol I* for Article 8(2)(b)(viii). But essentially, the two articles criminalize the deportation and transfer of protected persons in international armed conflicts, including by an occupying power and its agents.[1174]

The two definitions of the war crime of deportation and population transfer in international armed conflicts overlap. It is not clear why the two definitions of deportation and population transfer in Article 8(2)(a)(vii) and Article 8(2)(b)(viii) are not harmonised[1175] in situations of

[1173] Theodor Meron makes the argument that "criminalization of transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupied (which, except for the addition of the words "directly or indirectly," is a grave breach of Protocol I, but not the Fourth Geneva Convention)." See Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 151.
[1174] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 370.
[1175] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2003) at 209.

international armed conflict since both encompass transfers during occupation. This overlap is probably the result of the compromise that is the *Rome Statute*; some states wanting to preserve the distinction between 1949 grave breaches and other sources of law, especially *Additional Protocol I*, which is deemed as less authoritative. Marko Divac Öberg suggested the following explanation: "the Rome Conference thus showed that the grave breaches provisions of the 1949 generation, those of the 1977 generation, and provisions relating to other war crimes enjoyed quite different levels of acceptance among states."[1176] It has also been argued that constrained by a lack of time, the Rome Conference took the "easy route" and kept already agreed language to ensure maximum acceptance.[1177] The overlap between the two definitions of deportation and population transfer is more a 'political' compromise to prevent reopening the debate on thorny issues than a thorough legal analysis of the crime of deportation and population transfer.[1178] As William Schabas affirmed "there is inevitably some overlap because the drafters of the *Rome Statute* made no serious effort to effect a new and internally coherent codification of war crimes."[1179] Consequently, states maintained their perceived distinctions between types of grave breaches , albeit at the expense of clarity and coherence.

When a non international armed conflict does not meet the threshold of a non international armed conflict under *Additional Protocol II* (Article 8(2)(f)), the conflict is automatically covered under common Article 3 GCIV (Article 8(2)(c)). It applies common Article 3 of the *Geneva Conventions* to "armed conflicts not of an international character.[1180] Basically, Article 8(2)(c) applies to all non international armed conflicts, which is not the case of Article 8(2)(e)(viii). The latter applies to conflict defined in Article 8(2)(f) which draw from *Additional Protocol II* and are defined as "armed conflicts that take place in the territory of a

[1176] Marko Divac Öberg, "The absorption of grave breaches into war crimes law" (2009) 91:873 International Review of the Red Cross 163 at 168-169.
[1177] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 296.
[1178] "Moreover, due to the different origins of the grave breaches provisions in Article 8(2)(a) and the war crimes provisions in the rest of Article 8, there is plenty of overlap between Articles 8(2)(a) and 8(2)(b). Yet there is no logical or legal reason to separate the crimes in these articles, since the same rules in the ICC Statute apply to both types of crimes." Marko Divac Öberg, "The absorption of grave breaches into war crimes law" (2009) 91:873 International Review of the Red Cross 163 at 169.
[1179] William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 213.
[1180] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 8(2)(d).

State when there is *protracted* armed conflict between governmental authorities and organized armed groups or between such groups."[1181] The addition of 'protracted' to the definition of non international armed conflict has been the subject of controversy as to whether it clarifies the definition of non international armed conflict under *Additional Protocol II* or is a new separate category of non international armed conflict.[1182] Dieter Fleck believes that the drafters were unable to agree on the state of customary law with regard to non international armed conflicts and "to settle the matter in clear treaty language."[1183] The reference to protracted was thus inserted to satisfy delegations that advocated for a higher threshold in line with Article 1 of *Additional Protocol II*.[1184]

As a result, the definition of a non international armed armed conflict under Article 8(2)(f) is unclear. Although it may be argued that the reference to a "time criteria" creates a new, third definition of non international armed conflict, it is more likely a reflection of the evolution of the definition of non international armed conflict than a new category.[1185] This latter position insists on the unity of humanitarian law and criminal law in the conception of armed conflict not of an international character, instead of emphasising legal technicalities, conflict and fragmentation. Theodor Meron writes that, "attempts to consider protracted armed conflict as recognizing an additional high threshold of applicability should be resisted." [1186] For his part, Sylvain Vité argues that Article 8(2)(f) does not constitute a new category but that, "the category of conflict targeted here is [...] half way between the categories referred to in common

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[1181] [Emphasis added] *Rome Statute*, *ibid* at Art 8(2)(f).
[1182] Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91:873 International Review of the Red Cross 69 at 81.
[1183] Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nded (Oxford: Oxford University Press, 2008) at 610.
[1184] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 153.
[1185] For a discussion of the definition of non international armed conflict, see Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91:873 International Review of the Red Cross 69 at 82; See also William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 205-206; "Under contemporary international humanitarian law, we can distinguish three different minimum thresholds of non-international armed conflicts: non-international armed conflicts according to common article 3 (lowest threshold), as applicable to article 8 para. 2(c) Rome Statute; non-international armed conflicts according to article 8 para. 2(f) Rome Statute (slightly higher threshold); and, non-international armed conflicts according to article 1 Add. Prot. II (highest threshold, but may have been altered by customary international law....)." Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 291.
[1186] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 153.

Article 3 and in Additional Protocol II."[1187] As Theodor Meron pointed out, while it does not create a new category, "it may well exarcebate the previous lack of clarity."[1188] In other words, the definition is not really a new type of non international armed conflict, but a watered down definition of *Additional Protocol II* more attuned to the realities of contemporary conflicts and the sensibilities of some delegations. This is well explained by Michael Cottier, who writes that,

> delegations at the Rome Conference were of the opinion that, under contemporary humanitarian law, the territorial control requirement and the condition that one of the parties to the conflict be governmental were inappropriate and even irrelevant in view of modern, far-reaching weaponry and the reality of today's conflicts, besides, of course, that victims should be protected in any type of armed conflict. [...] Therefore, the Rome Conference deliberately lowered the threshold for the war crimes under article 8 para. 2(e) primarily drawn from Additional Protocol II and replaced the three additional prerequisites by the requirement that the conflict is "protracted".[1189]

Protractedness was therefore added to 'merge' the definitions of non international armed conflict under common Article 3 and Article 1 of *Additional Protocol II*. That said, protractedness is already implied in both definitions of non international armed conflicts. As noted by Dieter Fleck,

> with the use of the term 'protracted' an element is stressed which is already inherent in the term 'armed conflict' itself, i.e. an armed violence which is sufficiently intense. If this understanding can be accepted, the level of application of Article 8, para 2, lit. c and e, ICC Statute is substantially the same as in Article 3 common to the Geneva Conventions.[1190]

Accordingly, the only difference between the definition of a non international armed conflict under Article 8(2)(c) and 8(2)(f) is the 'protractedness' of the conflict, which should not be

[1187] Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91:873 International Review of the Red Cross 69 at 82.
[1188] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 31.
[1189] [Emphasis added] Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 292.
[1190] Dieter Fleck, "The Law of Non-International Armed Conflicts" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 611.

construed as an additional threshold of applicability and may not even be a new or different element to the definition of non international armed conflict, as Dieter Fleck pointed out.

Here lies the challenge of the ICC: how to transform through interpretation something inherently political into something that makes legal sense and respects the rule of law? Decisions from the Pre-Trial Chamber I of the ICC referred to *Additional Protocol II* and required control over the territory by the armed group to assess their ability to carry military operations over time, but this interpretation is open to discussion.[1191] It remains to be seen how the interpretation will evolve at the ICC.[1192] In *Ntaganda*, for instance, the Pre-Trial Chamber of the ICC found the conflict in the Ituri Province in the DRC to be, in addition to occupation, a non international armed conflict between various organised armed groups for the pourpose of article 8(2)(f), because among other elements, the armed group retained control of certain areas of Ituri.[1193] The relevancy of Article 8(2)(c) to deportation and population transfer will depend on the chosen interpretation of an armed conflict not of an international character under Article 8(2)(f). Nevertheless, the war crime of deportation and population transfer is covered under Article 8(2)(c) based on customary international law and common Article 3.

In non international armed conflict, the crime of deportation and population transfer could fall under Article 8(2)(c) as cruel treatment or an outrage upon personal dignity, because it contravenes the fundamental value of human dignity inherent to common Article 3 to the *Geneva Conventions*. Although Article 8(2)(c) does not refer explicitly to the crime of

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[1191] *Prosecutor v Omar Al Bashir*, ICC-02/05-01/09, Second Warrant of Arrest (12 July 2010) at para 60 (International Criminal Court); For a discussion on the definition of non international armed conflict, see William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 206.

[1192] "In the Lubanga Dyilo case, the ICC Pre-Trial Chamber referred to Additional Protocol II in order to interpret paragraph (2)(f) of the Statute. It thus apparently wanted to confer a distinct meaning on this provision, defining a specific threshold of applicability. The Chamber made it clear that this threshold is characterized by two conditions: (a) the violence must achieve a certain intensity and be protracted; (b) an armed group with a degree of organization, particularly the 'ability to plan and carry out military operations for a prolonged period of time' must be involved. Worded like that, this definition therefore seems to define a field of application that is stricter than that of common Article 3, as it requires the fighting to take place over a certain period of time. It is, however, broader than that of Additional Protocol II as it does not require the armed group(s) concerned to exercise territorial control." Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations" (2009) 91:873 International Review of the Red Cross 69 at 82.

[1193] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) at paras 31, 33-34 (International Criminal Court, Pre-Trial Chamber II).

deportation and population transfer, it nevertheless covers deportation and population transfer because the crime falls under common Article 3 to the *Geneva Conventions* and can constitute "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."[1194] The basic idea is that Article 8(2)(c) protects the fundamental concept of human dignity through a human treatment, which deportation and population transfer trample. More specifically, deportation and population transfer may constitute a cruel treatment under Article 8(2)(c)(i)-3 through the infliction of physical and mental pain or suffering. Hence, although it is not specifically mentioned, Article 8(2)(c) would criminalise deportation and population transfer in non international conflicts not covered under Article 8(2)(e)(viii). This reading of Article 8(2)(c) may be considered expansive, but has the crucial advantage of preventing a gap in the protection of victims of non international armed conflicts.

In non international armed conflict, Article 8(2)(e)(viii) uses the concept of "displacement" to define deportation and population transfer, which has the advantage of encompassing both internal and external forms of displacement. It is the first time that the term 'displacement' is explicitly used in constituting instrument of a criminal tribunal. The inclusion of displacement borrows from Article 17 of *Additional Protocol II* to the *Geneva Convention* and the ICTY jurisprudence of persecution by way of forcible displacement. Article 8(2)(e)(viii) of the *Rome Statute* defines the war crime of displacing civilians as "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians or imperative military reasons so demand."[1195] A war crime is committed in non international armed conflict when civilians are forced to leave their homes for reasons connected to the conflict that cannot be justified by security or imperative military reasons.[1196]

The definitions of the war crime of deportation and transfer under the *ICC Statute* covers the spectrum of instances entailing the unlawful movement of persons. The *Statute* therefore encompasses deportation and population transfer that are direct or indirect, within and outside

[1194] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 8(2)(c)(i).
[1195] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2003) at 473.
[1196] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 8(2)(e)(viii).

national borders and in international and non international armed conflicts. But this situation might come at a highly 'technical price' if an evolutive interpretation, at the forefront of which is the principle of humanity and human dignity, is not adopted.

3.4 Elements of the war crime of deportation and population transfer in the ICC

Stressing once more the interdependence between IHL and ICL, the ICC elements of the crimes stipulate that the interpretation of war crimes in the *Rome Statute* is to be done "within the framework of the international law of armed conflict."[1197] As Micheal Cottier suggests, "to correctly understand and interpret war crimes under article 8, we must take into consideration the international humanitarian law each individual offense is based on."[1198] Although elements of the crimes are important to interpretation, they are not legally binding; in fact, they are meant to 'assist' the Court in interpreting and applying the crimes under its jurisdiction.[1199]

The following section analyses the elements of the crime of deportation and population transfer in the *ICC Statute*. However, the ICC seems to be following the approach taken by the prosecutors of the ICTY, who overwhelmingly chose to indict alleged perpetrators of deportation or transfer of crime against humanity.[1200] This may be a prosecutorial strategy, because for a CAH no demonstration of a nexus to an armed conflict or of the type of conflict is required. It may also be explained by contemporary armed conflicts, where attacks against civilians are often carried out on discriminatory grounds. In addition, for a war crime charge, the victim must be a protected person, whereas for crimes against humanity, civilian status suffices. Elements of the *Rome Statute* will thus be analysed considering jurisprudential precedents set forth mainly by other international criminal tribunals.

[1197] International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 8, intro, para 2.
[1198] Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 295.
[1199] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 9; See Michael Cottier, *ibid* at 289-290.
[1200] See generally Guido Acquaviva, *Forced Displacement and International Crimes*, UNHCR, Legal and Protection Policy Research Series, Division of International Protection, PPLA/2011/05 (2011) at 20.

There are some 'joint elements' to all four categories of the war crime of deportation and population transfer. Common elements to all instances of deportation, population transfer or displacement are that: (1) "the conduct took place in the context of and was associated with an armed conflict"; and, (2) that "the perpetrator was aware of factual circumstances that established the existence of an armed conflict."[1201] The required nexus with an armed conflict and the knowledge of an armed conflict is well-known and serves to distinguish war crimes from ordinary crimes.[1202] A nexus exists when the armed conflict "play[s] a substantial role in the perpetrator's decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed."[1203] In addition, the criminal act does not need to occur during battle nor is the perpetrator necessarily a public official or agent; in other words, civilians can also commit a war crime. [1204] The second common element is 'knowledge of armed conflict'. The elements on war crimes 'temper' this requirement by adding that the perpetrator:

> (a) need not to carry out a legal evaluation to determine the existence of an armed conflict or whether it is international or non international;
> (b) need not to be aware of the facts that determine the type of conflict (international or non international);
> (c) only need to be aware "of the factual circumstances that establish the existence of an armed conflict."[1205]

3.4.1 War crime of deportation and population transfer in international armed conflicts as a grave breach of the *Geneva Convention IV*

[1201] See International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 8(2)(a)(vii)-1, paras 4-5 and Art 8(2)(b)(viii), paras 2-3.
[1202] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 303.
[1203] "In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account ...the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties." *Prosecutor v Kunarac et al,* IT-96-23/1-A, Judgement (12 June 2002) at paras 58-59 cited in William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 207; See also Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 294.
[1204] See William Schabas, *ibid* at 208-209
[1205] International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 8, intro, para 3; See also William Schabas, *ibid* at 209.

The first category of the grave breach of unlawful deportation and population transfer in international armed conflicts under the *Geneva Convention* (Article 8(2)(a)(vii)) of the *Rome Statute* includes the following elements:

> 1. The perpetrator deported or transferred one or more persons to another State or to another location.
> 2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
> 3. The perpetrator was aware of the factual circumstances that established that protected status.
> 4. The conduct took place in the context of and was associated with an international armed conflict.
> 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[1206]

3.4.1.1 The deportation or transfer of even one person may constitute a war crime

Article 8(2)(a)(vii) is based on Articles 49 and 147 of the *GC IV*, which criminalize the transfer of an individual or a group. The deportation or transfer of one person can be a war crime under Article 8(2)(a)(vii), which is not the case under Article 8(2)(b)(viii).

3.4.1.2 A person's protected status results from being 'in the hands' of an adverse party

It is unclear how a party to a conflict is expected to assess the protected status of a person, but it can be said that when a civilian is 'in the hands' of an adverse party, this person is *ipso facto* a protected person.

3.4.1.3 The perpetrator will be aware of the protected status based on the nationality or the allegiance of the person

It is not necessary to prove that the perpetrator knew that the victim was protected, which means that the perpetrator does not need to have carried out an evaluation of the application of the concept of protected persons under the *Geneva Conventions*.[1207] In short, even if the perpetrator makes the wrong legal assessment of a victim's status, it would not constitute a

[1206] ICC, *Elements of Crimes*, *ibid* at Art 8(2)(a)(vii)-1.
[1207] See William Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 211.

mistake of law defence.[1208] Usually, a protected status is determined by the nationality of the person, which differs from that of the party under control. A literal reading of Article 4 could lead to people being denied the status of protected person.[1209] As Theodor Meron explains, "in many contemporary conflicts, the disintegration of States and the quest to establish new ones make nationality too impractical a concept on which to base the application of international humanitarian law."[1210] In *Tadic*, the victim was of the same nationality as the perpetrator, i.e., Bosnian, and the ICTY Appeals Chamber adopted a "creative approach" to Article 4 of the *IV Geneva Convention* and found that the concept of 'nationality' to determine protected status was inadequate opting instead for the broader concept of allegiance to a party to the conflict and control by the party of this person.[1211] As was well argued by the Chamber in *Tadic*:

> While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become grounds for allegiance[...] Under these conditions, the requirement of nationality is even less adequate to define protected persons [...] Allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[1212]

Mélanie Jacques commented on this evolutive approach:

> the acknowledgement, by the ICTY, that the protection afforded to civilians by the Fourth Convention is ill-adapted to the nature of modern armed conflicts is a significant step in the right direction of change. This decision by the ICTY to adopt a broad interpretation of 'protected persons' reflects a progressive move in all spheres of international humanitarian law towards a more comprehensive protection of victims of armed conflicts.[1213]

[1208] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 305.
[1209] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) p 34.
[1210] Theodor Meron, *ibid*.
[1211] *Prosecutor v Tadic*, IT-94-1-A, Judgment (15 July 1999) at paras 166-169 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber); See also Michael Cottier in Otto Triffterer, ed *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (München: CH Beck, 2008) at 302.
[1212] *Prosecutor v Tadic*, IT-94-1-A, *ibid* at para 166; For a discussion of protected persons and nationality in inter-ethnic armed conflicts, see Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 10.
[1213] Mélanie Jacques, *ibid* at 45.

The elements of the crime seem to accept this interpretation when it affirms that "with respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict."[1214] Indeed, ICC case law seems to confirm that nationality "is no longer the definitive test".[1215]

3.4.2 War crime of deportation and population transfer under occupation

The second category of war crimes in international armed conflict is defined under Article 8(2)(b)(viii), which applies to situations of occupation and covers the transfer of the occupying power's civilian population or the displacement of the protected population in or outside the occupied territory. The elements are as follows:

1. The perpetrator:

> (a) Transferred, *directly or indirectly*, parts of its own population into the territory it occupies; or
> (b) Deported or transferred *all or parts* of the population of the occupied territory within or outside this territory.

2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[1216]

3.4.2.1 The perpetrator deported or transferred all or parts of the population of the occupied territory within or outside this territory

Under element 1(a) of Article 8(2)(a)(vii), the perpetrator has to be the occupying power or its agents, but under element 1(b), the perpetrator can be the occupying power, an armed group or a civilian. Transfer or deportation means that the protected population is displaced to another

[1214] International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 8(2)(a), fn 33.
[1215] *Prosecutor v Katanga*, ICC-01/04-01/07, Decision on the Confirmaiton of Charges (30 September 2008) at para 291 (International Criminal Court, Trial Chamber I). “Therefore, in the view of the Chamber, as the attacking forces of a party to the conflict gradually gain control of a targeted village, individual civilians in these successive areas automatically become protected persons within the meaning og Article 4 GC IV, provided they do not claim allegiance to the party in question.” (*Ibid* at para 293).
[1216] [Emphasis added] International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 8(2)(b)(viii).

location, either in or outside the occupied territory − the final destination need not be known for the prohibition to apply.[1217] The displacement has to be forcible, a concept that includes physical force as well as other forms of coercion.[1218]

It might be easier to prove deportation and population transfer as a war crime under Article 8(2)(b)(viii) than a grave breach under Article 8(2)(a)(vii) because the burden of proof is less stringent. Indeed, the evidendiary hurdle for deportation and population transfer as a grave breach (Article 8(2)(a)(vii)) is stricter because it requires an additional mental element, namely that the perpetrator is aware of the factual circumstances that established the victim's protected status.[1219] In addition, grave breaches, including those under Article 8(2)(a)(vii), require proof that the victim is protected under one of the *Geneva Conventions*.[1220] It is probably not included in the elements of Article 8(2)(b)(viii) because deportation and population transfer occur under occupation, which implies that the occupied population is protected under the *Geneva Convention* and such a protected status is presumed to be known to the occupying power and others.

3.4.3 War crime of deportation and population transfer in non international conflict

The third type of population transfer and deportation occur in conflicts not of an international character and are prohibited based on customary international law. The elements of the crime under Article 8(2)(c) could be said to prohibit deportation and population transfer in all types of armed conflicts, including those covered by Article 8(2)(d). Elements of cruel treatment are:

> 1.The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
> 2. Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.
> 3. The perpetrator was aware of the factual circumstances that established this status.
> 4. The conduct took place in the context of and was associated with an armed conflict

[1217] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 373.
[1218] See Michael Cottier in Otto Triffterer, ed, *ibid* at 372.
[1219] Marko Divac Öberg, "The absorption of grave breaches into war crimes law" (2009) 91:873 International Review of the Red Cross 163 at 174.
[1220] See Marko Divac Öberg, *ibid* 174-175.

not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[1221]

The jurisprudence of the ICTY considers cruel treatment synonymous to inhuman treatment as conceived in the grave breaches provisions. In *Delalic*, it specified that "cruel treatment is treatment which causes serious mental or physical suffering or constitutes a serious attack upon human dignity."[1222] Deportation and population transfer is a serious attack upon human dignity and may cause serious mental or physical suffering. In the context of genocide, the ICTY has concluded that transfer can amount to 'serious mental harm'.[1223]

3.4.4 War crime of deportation and transfer in a non international armed conflict as defined by the Rome Statute

The fourth category of war crimes is the displacement of civilians in internal armed conflict, as defined under Article 8(2)(e)(viii). The elements of crimes are the following:

1. The perpetrator *ordered* a displacement of a civilian population.
2. Such order was not justified by the security of the civilians involved or by military necessity.
3. The perpetrator was in *a position to effect such displacement by giving such order*.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[1224]

3.4.4.1 The notion of 'order' to displace needs to follow IHL

Just as Article 17(1) in *Additional Protocol II*, Article 8(2)(e)(viii) in the *Rome Statute* explicite the mention of an order to displace. For Lindsay Moir, "it is evident that the crime is committed

[1221] International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 8(2)(c)(i)-3).
[1222] *Prosecutor v Delalic*, IT-96-21-T, Judgement (16 November 1998) at para 551 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).
[1223] See *Prosecutor v Blagojević*, IT-02-60-T, Judgement (17 January 2005) at paras 652, 654 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I).
[1224] [Emphasis added] International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 8(2)(e)(viii).

by the individual *ordering* the displacement rather than those carrying out the displacement."[1225] Knüt Dorman supports the contention that this formulation was chosen by the Preparatory Commission to implicate the person who ordered the displacement and not the person who carried it out (who could nevertheless be held individually responsible for participation in the commission of the crime).[1226] While recognizing the elements of the crime of displacement in non international armed conflicts, Jan Willms expressed the view that the interpretation chosen by the ICC will follow international humanitarian law, according to which an 'order' is no longer necessary for a finding of a violation of the laws and customs of war.[1227] Indeed, an 'order' should not be conceived restrictively and, in fact, is not required to a finding of the crime under international humanitarian law. More specifically, Willms posites that, "at any rate, even if Article 8(2)(e)(viii) ICC Statute requires an order, this does not limit or prejudice the scope of Article 17(1) AP II and Rule 129(B) of the ICRC Customary Law Study." [1228]

For the sake of clarity and coherence, the concept of 'order' should be interpreted similarly under Article 8(2)(e)(viii) and Article 17 of *Additional Protocol II*. In what appears to be just that, the Pre-Trial Chamber of the ICC in *Ntaganda* held that "for the purposes of the war crime of displacing civilians, the conduct by which the perpetrator(s) force(s) civilians to leave a certain area is not limited to an order, as referred to in element 1 of the relevant Elements of Crimes. The Chamber considers that, should this not be the case, the actual circumstances of

[1225] Lindsay Moir, "Displacement of Civilians as a War Crime Other than a Violation of Common Article 3 in Internal Armed Conflicts" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at 640.
[1226] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2003) at 472; See also Andreas Zimmerman in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 497.
[1227] Jan Willms, "Without order, anything goes? The prohibition of forced displacement in non-international armed conflict" (2009) 91:875 International Review of the Red Cross 547 at 562.
[1228] See Jan Willms, *ibid* at 562. As Jan Willms further explains, "the Elements of Crimes for Article 8(2)(e)(viii) of the ICC Statute require an order by a person with authority as a means of establishing individual criminal responsibility at the top of the hierarchy. Thus the Elements of Crimes do not require that an order of displacement is addressed to the civilian population publicly; an order within the chain of command is also sufficient." (para 562).

civilian displacement in the course of an armed conflict would be unduly restricted."[1229] Hence, there does not seem to be a need for an express order to displace for the situation to fall within the elements of the crime.

Likewise, an order to indirectly displace is as much a crime as an order to directly displace. However, this reading is controversial since some contend that an indirect displacement does not constitute the crime of forced displacement in an internal armed conflict under Article 8(2)(e)(viii). [1230] Lindsay Moir, for instance, writes that "orders which may lead to displacement only indirectly are not, accordingly, covered by this particular provision."[1231] As a result, starving a population in order to cause its displacement would not constitute displacement under Article 8(2)(e)(viii), although of course it would be criminal.[1232] Andreas Zimmerman writes:

> The use of the term "ordering" makes it clear that only acts which are directly aimed at removing the respective civilian population from a given area are prohibited. Thus, other acts which do not possess such a character but which lead to the same result, such as the intentional starvation of the civilian population in order to force them to leave a certain area, are not prohibited by article 8 para.2 (e)(viii).

Such restrictive reading is baffling. It loses sights of the essential, namely the protection of the human dignity of civilians and of their right to stay. The required distinction between a 'direct' and an 'indirect' order and means to carry out displacement is overly formalistic and technical. How exactly can we determine whether the displacement carried out is 'direct' or 'indirect'? Isn't it starving a population quite a direct mean to achieve its departure? What about shelling

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[1229] *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) at para 64 (International Criminal Court, Pre-Trial Chamber II).

[1230] See Andreas Zimmerman in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 497.

[1231] Lindsay Moir, "Displacement of Civilians as a War Crime Other than a Violation of Common Article 3 in Internal Armed Conflicts" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Leiden: Martinus Nijhoff, 2009) at p.640.

[1232]"Such acts might, however, be covered by article 8 para.2 (e) (iii) or (xii) of the Statute." Andreas Zimmerman in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 497; Lindsay Moir, *ibid* at 640, fn 7.

civilian areas and burning homes and other indispensable objects? Are people displaced by these acts victims of direct or indirect displacement? Is this distinction even relevant?

The exclusion of 'indirect' displacement from the war crime of forced movement contradicts the very concept of 'forcible' in IHL, the position of the international Preparatory Commission on the International Criminal Court in relation to the concept of 'forcible' as a crime against humanity and the definition of deportation and population transfer as a war crime in international armed conflict.[1233] Such restrictive interpretation also seems to add an additional element to the crime: that the order must be to displace a civilian population in a 'direct' manner, whatever a direct manner means. Such condition is nowhere to be found in the actual elements of the crime.

To sum up this point, if the perpetrator intends to displace a civilian population without a permissible ground under international law, the crime of forced displacement has been committed whether civilians are displaced as a result of the direct or indirect means employed to carry out this order. This is what matters: it is this order or authorisation and the means taken to intentionally displace a civilian population without a permissible ground that is criminal, be it carried out directly or indirectly.

Finally, the concept of 'a civilian population' in element one contrasts from Article 17 of *Additional Protocol II* and Article 8(2)(a)(vii)-1, where both individual and groups of civilians are comprised under 'civilian population'. Under Article 8(2)(e)(viii), the concept of civilian population does not include an individual, a group part of the civilian population.[1234]

3.4.4.2 The perpetrator can give an order to displace when he is in effective control

[1233] See for instance International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at fn 12; See also terminology used in International Law Commission (ILC), *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries* (1996) II:2 Yearbook of the International Law Commission, UN Doc A/CN.4/SER.A/1996/Add.l at Art 18(g), para 13 at p 49.
[1234] Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2003) at 472-473.

As Knüt Dorman explains, a perpetrator may be in a position to effect a displacement if he has *de jure* or *de facto* authority to carry out the displacement, therefore covering "the individual who, for example, has effective control of a situation by sheer strength of force."[1235] This reading of control, based on an evolutive interpretation of 'in the hands' off, is in accordance with the interpretation advocated by Jean Pictet.

3.4.5 International criminal law must be interpreted in accordance with values and rights protected

In concluding this section, international criminal law is inconsistant in its treatment of the crime of deportation and population transfer although it will likely consolidate as the International Criminal Court produces its first decisions. It is crucial that judges do not get stuck in technical details to the detriment of the restoration and preservation of victims' dignity and rights. Until then, the effectivity of accountability will be sketchy. As was well explained in a Symposim on the fifty years of Nuremberg, "the prohibition of crimes against humanity is in danger of being whittled away by newly invented and restrictive definitions, textwriter rhetoric or preferences, and far too limited applications by tribunals."[1236] Thus the need for an evolutive interpretation transcending international human rights, humanitarian and criminal law, in contradistinction to a formalistic and technical one.

3.5 Deportation and transfer can evidence or constitute genocide

In time of peace or war, deportation and transfer can constitute genocide when the required mental element of genocidal intent is met. In comparison to crimes against humanity and war crimes, the definition of genocide is uncontroversial and quite settled in international law. The 1946 United Nations Resolution defined genocide as "the denial of the right of existence of entire human groups."[1237] Reiterating the *Genocide Convention*, Article 6 of the *Rome Statute* reaffirm that genocide can occur if there is a *dolus specialis*, which is an "intent to destroy, in

[1235] Knut Dörmann, *ibid* at 473; See also Jan Willms, "Without order, anything goes? The prohibition of forced displacement in non-international armed conflict" (2009) 91:875 International Review of the Red Cross 547 at 562.
[1236] Comparative Analysis of International and National Tribunals *Fifth Annual Ernst C. Stiefel Symposium - 1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability - Panel II,* (1994-1995) 12 New York Law School Journal of Human Rights at 547.
[1237] *The Crime of Genocide*, GA Res 96(1), UNGAOR, 1st Sess, UN Doc A/96 (I) (1946).

whole or in part, a national, ethnical, racial or religious."[1238] Intent to destroy can aim at the destruction of a very large number of members of the group or at the destruction of a selected number of persons whose disappearance will affect the survival of the group.[1239] Article 6 of the *Rome Statute* thus makes the same list of genocidal acts as the *Genocide Convention*:

> (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.[1240]

The relation between deportation and population transfer is twofold; it can: (1) evidence intent to destroy a group; (2) or, amount to genocide if displacement aims at the physical destruction of the group. The following sections will be divided accordingly.

3.5.1 Deportation and transfer as evidence of genocide

The first intersect rests on deportation and population transfer as showing genocidal intent when the perpetrator causes the death of one or more persons.[1241] Deportation and transfer as proof of intent to physically destroy a group is determined on a case-by-case basis, taking into

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[1238] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 6 (chapeau). Article II of the *Genocide Convention* stipulates:
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:
> (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.

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).
[1239] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 777 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1240] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 6(c); see also *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) at Art II(c).
[1241] See International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 6 (a)(1).

consideration the overall context.[1242] The Commission of Experts as well as the ICTY underlined the need to consider the gamut of violations in assessing genocide, such as the murder of members of the group and the fate of the rest of the group.[1243] In the words of the Commission, a hypothetical case of genocide could look like this:

> If a group has its leadership exterminated, and at the same time or in the wake of that, has a relatively large number of the members of the group killed or subjected to other heinous acts, *for example deported on a large scale or forced to flee, the cluster of violations ought to be considered in its entirety in order to interpret the provisions of the [Genocide] Convention in a spirit consistent with its purpose*.[1244]

Srebrenica is the hypothetical case that became reality. In 2001, for the first time, the ICTY found the situation in Bosnia and Herzegovina to be a genocide.[1245] Until then, acts of 'ethnic cleansing' were considered crimes against humanity, such as the crime of persecution.[1246] The International Court of Justice also found that with regard to the Bosnia and Herzegovina conflict, only in Srebrenica did a genocide occur.[1247] This is the case because transfer took place with the genocidal murder of between seven to eight thousands men.[1248] Although the

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[1242] ICC, *Elements of Crimes*, ibid at Art 6, intro, para c.

[1243] "The Chamber takes guidance from the Stakić Appeals Chamber which held that rather than considering separately whether there was an intent to destroy the group through each of the enumerated acts in Article 4 of the Statute, consideration should be given to all of the evidence, taken together. In the view of the Chamber, this approach is in line with the fluid concept of intent." *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 772 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II)

[1244] [Emphasis added] *Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992)*, UNSCOR, UN SC Doc S/1994/675 (1994) at 25.

[1245] *Prosecutor v Krstic*, IT-98-33-T, Judgement (2 August 2001) at para 598 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

[1246] See William Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (2003-2004) 3 European Yearbook of Minority Issues 109 at 109-111, 124.

[1247] "The Court concludes that the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995"[....] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment [2007] ICJ Rep 43 at paras 297, 370.

[1248] "The Majority finds that the combined effect of these operations had a devastating effect on the physical survival of the Bosnian Muslim population of Eastern BiH, and is satisfied that the goal of these operations was not merely the "dissolution" of the Bosnian Muslims of Eastern BiH; these operations were aimed at destroying this Bosnian Muslim community and preventing reconstitution of the group in this area.[....] The Majority therefore finds that the conditions resulting from the acts of Bosnian Serb Forces, as part of the combined effect of the forcible transfer and killing operations were deliberately inflicted, and calculated to lead to the physical destruction of the Bosnian Muslim population of Eastern BiH." *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 766 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

majority of women, children and elderly were sparred, part of the group was physically destroyed because of their national, 'ethnic' and religious identity. As the Court explained in *Krstic*, at some point during the Serb takeover in Srebrenica, the deportation and transfer of the population was no longer sufficient to ensure 'ethnic cleansing' and it was decided to kill the men to eradicate Bosnian Muslims from Srebrenica. In *Krstic*, the Chamber considered the physical demise of the Bosnian Muslim community in Srebrenica as the "inevitable result" of the killings.[1249] The transfer of the remaining population of Srebrenica evidenced the genocidal intent in committing the killings. The ICTY Appeals Chamber inferred a specific intent from the transfer of population in these terms:

> The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff. The genocidal intent may be inferred, among other facts, from evidence of "other culpable acts systematically directed against the same group"[...] In this case, the factual circumstances, as found by the Trial Chamber, permit the inference that the killing of the Bosnian Muslim men was done with genocidal intent. As already explained, the scale of the killing, combined with the VRS Main Staff's awareness of the detrimental consequences it would have for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that community's physical demise, is a sufficient factual basis for the finding of specific intent.[1250]

In this context, the Court relied on transfer to determine that the killing of the men was done with genocidal intent. Hence, deportation and transfer can contribute to proving intent to physically destroy a group.

[1249] "The killing of the military aged men was, assuredly, a physical destruction, and given the scope of the killings the Trial Chamber could legitimately draw the inference that their extermination was motivated by a genocidal intent." *Prosecutor v Krstic*, IT-98-33-T, Judgement (2 August 2001) at paras 27-28 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber); "Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group." *Prosecutor v Krstic*, IT-98-33-T, *ibid* at para 580.

[1250] *Prosecutor v Krstic*, Appeals Chamber, IT-98-33-A, Judgement (19 April 2004) at para 33, see also para 35. "While evidence of intent to forcibly remove is not necessarily indicative of an intent to destroy a group, it may nevertheless constitute evidence of the latter when considered in connection with "other culpable acts systematically directed against the same group" *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 748 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

The concept of 'physical destruction' encompasses acts of deportation and transfer.[1251] In *Blagojević,* the Trial Chamber held that:

> The physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members. In such cases the Trial Chamber finds that the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was.[1252]

This interpretation of 'destruction of the group' emphasises the long-term impacts of the deportation and transfer on the existence of the group. Thus construed, deportation and transfer can be carried out with intent to physically destroy a group when part of the group is killed and another is dissolved and unable to reconstitute and reproduce.[1253]

3.5.2 Deportation and transfer as genocide

Deportation and transfer can constitute genocide in at least three situations, namely when: (1) causing serious bodily or mental harm; (2) imposing physical destruction through untenable living conditions; or, (3) forcibly transferring children to another group.

Deportation and transfer that cause serious bodily or mental harm amounts to genocide if displacement is intended to physically destroy a national, ethnical, racial or religious group. 'Serious bodily or mental harm' must "contribute or tend to contribute to the destruction of all or part of the group"; although it need not be permanent or irreversible, it must go "beyond

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[1251] The Trial Chamber took the position that "physical or biological genocide could extend beyond killings of the members of the group." *Prosecutor v Blagojević*, IT-02-60-T, Judgement (17 January 2005) at para 658 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I).

[1252] "The Trial Chamber emphasises that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical or biological destruction." *Prosecutor v Blagojević*, IT-02-60-T, *ibid* at para 666. For instance, Judge Elihu Lauterpacht in a separate opinion concerning the application of the Genocide Convention in the International Court of Justice, concluded that "the forced migration of civilians...is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina. Such being the case, it is difficult to regard the Serbian acts as other than acts of genocide." [Emphasis added] *Application of the Convention of the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*, Order on further Requests for the Indication of Provisional Measures, ICJ Rep 1993, Separate opinion of Judge Lauterpacht at para 69.

[1253] See for instance, Larissa van den Herik, "The Meaning of the Word "Destroy" and its Implications for the Wider Understanding of the Concept of Genocide" in H.G. van der Wilt *et al*, eds, *The Genocide Convention, The Legacy of 60 Years* (Leiden: Martinus Nijhoff, 2012) at 54.

temporary unhappiness, embarrassment or humiliation" and conflict "grave and long-term disadvantage to a person's ability to lead a normal and constructive life."[1254] Both the ICTY and the ICTR have construed 'serious bodily or mental harm' to include deportation.[1255] For instance, in *Tolimir*, the Trial Chamber affirmed that forcible transfer can "be an underlying act causing serious bodily or mental harm − in particular if the forcible transfer operation was conducted under such circumstances as to lead to the death of all or part of the displaced population."[1256] In the case of Srebrenica, the ICTY found that transfer not only evidenced the genocidal intent behind the killing, but itself amounted to genocide. Indeed, the Trial Chamber held that the transfer of the women, children and elderly constituted genocide because it inflicted serious mental harm with genocidal intent. In *Blagojević,* the Trial Chamber:

> has no doubt that the suffering of the women, children and elderly people who were cruelly separated from their loved ones and forcibly transferred, and the terrible consequences that this had on their life, reaches the threshold of serious mental harm under Article 4(2)(b) of the Statute. The Trial Chamber also finds that the level of mental anguish suffered by the women, children and elderly people who were forcibly displaced from their homes − in such a manner as to traumatise them and prevent them from ever returning − obliged to abandon their property and their belongings as well as their traditions and more in general their relationship with the territory they were living on, does constitute serious mental harm. [....] The Trial Chamber therefore finds that there is sufficient evidence to establish beyond reasonable doubt that in the circumstances of this case forcible transfer constituted 'serious mental harm' within the meaning of Article 4(2)(b). The Trial Chamber also finds that the perpetrators intended that the forcible transfer, and the way it was carried out, would cause serious mental harm to the victims.[1257]

The second way in which deportation and transfer can amount to genocide, again if genocidal intent is present, is through the imposition of untenable living conditions on a group or part

[1254] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 738 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1255] *Prosecutor v Blagojević*, IT-02-60-T, Judgement (17 January 2005) at para 646 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I).
[1256] *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 739 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).
[1257] *Prosecutor v Blagojević*, IT-02-60-T, Judgement (17 January 2005) at para 652, 654 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I); *Prosecutor v Tolimir*, IT-05-88/2-T, *ibid* at para 759.

thereof. The elements of crimes of the ICC specify that imposing physical destruction through untenable living conditions require the following:

> 1. The perpetrator inflicted certain conditions of life upon one or more persons.
> 2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
> 3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
> 4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
> 5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[1258]

Although one may argue that this provision does not clearly refer to deportation or transfer, a little digging into the elements of crimes reveals otherwise. A footnote makes clear that 'conditions of life' may be the "deliberate deprivation of resources indispensable for survival, such as food or medical services, or *systematic expulsion from homes*."[1259] Jurisprudence from the ICTY and the ITCR confirm this interpretation.[1260] Discussing the meaning of the expression "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," the Trial Chamber of the International Criminal Tribunal for Rwanda in *Akayesu* held that it "should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction."[1261] More specifically, the Chamber added that such methods include, "*inter alia*, subjecting a group of people to a subsistence diet, *systematic*

[1258] [Emphasis added] International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 6(c)

[1259] [Emphasis added] ICC*, Elements of Crimes*, *ibid* at Art 6(c), fn 4. The use of the term expulsion suggests that the destination of the displaced is irrelevant.

[1260] "The underlying acts covered by Article 4(2)(c) are methods of destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction. Examples of such acts punishable under Article 4(2) (c) include, inter alia, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion." *Prosecutor v Tolimir*, IT-05-88/2-T, Judgement (12 December 2012) at para 740 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1261] *Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para 505. "Unlike Articles 4(2)(a) and (b), Article 4(2)(c) does not require proof of a result such as the ultimate physical destruction of the group in whole or in part. However, Article 4(2)(c) applies only to acts calculated to cause a group's physical or biological destruction deliberately and, as such, these acts must be clearly distinguished from those acts designed to bring about the mere dissolution of the group. For example, the forcible transfer of a group or part of a group does not, by itself, constitute a genocidal act, although it can be an additional means by which to ensure the physical destruction of a group." *Prosecutor v Tolimir*, IT-05-88/2-T, *ibid* at para 741.

expulsion from homes and the reduction of essential medical services below minimum requirement."[1262] In other words, deportations and transfers that aim to destroy a national, ethnical, racial or religious group can be tantamount to a 'slow death' if carried out with genocidal intent and if resulting in unsustainable conditions for the survival of the group. Providing further clarity on the conditions of life that can cause the physical destruction of a group, the analytical framework developed by the Office of the Special Adviser on the Prevention of Genocide specify that "deprivation of the means to sustain life can be imposed through confiscation of harvests, *blockade of foodstuffs*, *detention in camps*, *forcible relocation or expulsion to inhospitable environments*."[1263] These measures must intent to cause the destruction of the whole or a significant part of the group.[1264]

Following this framework, genocide could occur in at least three situations of deportation and transfer carried with the intention to destroy a national, ethnical, racial or religious group. The first type is confinement of a group to an area with no sufficient access to food. Deliberately imposing a blockade, or a siege, on a national, ethnical, racial or religious group with the intent to cause starvation and chronic malnutrition imperils the survival of the group through death, diseases and development problems among children. The second form of confinement that could amount to genocide is if a group detained in a camp is subject to conditions detrimental to human survival, as a means to destroy this group. A concentration camp where is intentionally inflicted against a particular group killing, torture, rape, forced labour, starvation rations or inadequate medical care and sanitary facilities could constitute genocide.[1265] Lastly,

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[1262] [Emphasis added] *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para 506; See also Grant Dawson and Sonia Farber, *Forcible Displacement throughout the Ages, Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (Leiden: Martinus Nijhoff, 2012) at 106; Citing *Akayesu*, the Trial Chamber in *Stakic* wrote: "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" under sub-paragraph (c) does not require proof of a result. The acts envisaged by this sub-paragraph include, but are not limited to, methods of destruction apart from direct killings such as subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services." *Prosecutor v Milomir Stakic*, IT-97-24-T, Judgement (31 July 2003) at para 517 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II).

[1263] Office of the UN Special Adviser on the Prevention of Genocide (OSAPG), *Analysis Framework*, at 3, fn 6, Online: http://www.un.org/en/preventgenocide/adviser/

[1264] See more generally: Office of the UN Special Adviser on the Prevention of Genocide (OSAPG), *ibid at* 1, fn 1.

[1265] Under these circumstances, genocide could also occur under Article II a) and b) of the Genocide Convention.

genocide could also occur if the deported or transferred population is intentionally sent to an area unfit for humans, that is a displacement that aims at their imminent death.[1266] Illustrating this latter hypothesis, the drafting Secretariat of the *Genocide Convention* concluded that there could be genocide,

> if the occupation were attended by such circumstances as to lead to the death of the whole or part of the displaced population (if, for example, people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, heat, cold and epidemics).[1267]

Instances of genocide in this context could be to voluntarily expel people from their homes knowingly directing their flight across a desert, where there is no water, no shelter or food and no humanitarian aid available, with the intention that this group of people will not survive. The deportation and massacres commited by the Ottoman Empire against Armenians is one, still controversial, example as to whether the death of 1 200 000 millions Armenians − of which between 700 000 to 800 000 died during the massacres and between 300 000 to 500 000 following deportation − is a crime against humanity or genocide.[1268]

In sum, deportation and transfer carried out with intent that a group, in whole or in part, perish or in combination with other crimes, may amount to genocide. Therefore common to all these three situations mentioned is the intent to annihilate a group because of who he is nationally, ethnically, racially or religiously.

[1266] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, [2007] ICJ Rep 43 at para 190.
[1267] UN Doc E/447 at 23 cited in William A Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (2003-2004) 3 European Yearbook of Minority Issues 109 at 119.
[1268] "Mais la déportation est synonyme de mort. Mort par épuisement, faim, soif, maladie, mauvais traitements et bien sûr exécutions. Les rares survivants des déportations sont amenés dans des camps de concentration où la plupart meurent rapidement. […] L'extermination reposait donc sur deux instruments fondamentaux : les massacres de masse et la déportation de masse.» (at XIV) See Jean-Baptiste Racine, *Le génocide des Arméniens, Origine et permanence du crime contre l'humanité* (Paris: Dalloz, 2006) at XIV-XV, 51-66; See also Varoujan Attarian, *Le génocide des Arméniens devant l'ONU* (Bruxelles: Éditions Complexe, 1997) at 21; See also William Schabas, *Genocide in International Law, The Crime of Crimes*, 2nd ed (Cambridge : Cambridge University Press, 2009) at 192-193, 228.

The last form of transfer as genocide is the forcible transfer of children from one group to another.[1269] More precisely, the elements of the crime in the ICC include:

> 1. The perpetrator forcibly transferred one or more persons.
> 2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
> 3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
> 4. The transfer was from that group to another group.
> 5. The person or persons were under the age of 18 years.
> 6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
> 7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction. [1270]

The forcible transfer of children, as envisaged in the *Convention on the Prevention and Punishment of the Crime of Genocide* and the *Rome Statute* is the only form of 'cultural' genocide in the definition of the crime of genocide since it does not entail intent to kill the children.[1271] That is because the only form of genocide that does not require an intention to physically destroy the group. [1272] The UN Committee on the Elimination of Racial Discrimination considers as a key indicator of genocide "policies of forced removal of children belonging to ethnic minorities with the purpose of complete assimilation."[1273] An enlightening footnote in the elements of crimes also informs that 'forcibly' includes threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person or by taking advantage of a coercive environment."[1274]

[1269] See *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) at Art II(e).
[1270] International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 6(e).
[1271] See William Schabas, *Genocide in International Law, The Crime of Crimes*, 2nd ed (Cambridge: Cambridge University Press, 2009) at 201-205.
[1272] UN Doc A/C.6/SR.82 (Vallindas, Greece) cited in William A Schabas, 'Ethnic Cleansing' and Genocide: Similarities and Distinctions" (2003-2004) 3 European Yearbook of Minority Issues 109 at 123, fn 83.
[1273] UNCERD, *Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, Committee on the Elimination of Racial Discrimination*, UN Doc CERD/C/67/1 (2005) at para 6.
[1274] International Criminal Court (ICC), *Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000) at Art 6(e), fn 5.

Although this point cannot be further developed here, it should be highlighted that the transfer of indigenous children in Australia and Canada could amount to genocide.[1275] As the Report entitled *Honoring the Truth, Reconciling for the Future* concerning the transfer of Canada's aboriginal children to residential schooling confirms, "these residential schools were created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture – the culture of the legally dominant Euro-Christian Canadian society."[1276] Not only were children separated from their families, they were also physically and sexually abused and many died in schools as a result of the conditions. As the Truth and Reconciliation Commission concludes:

> For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide." […]Cultural genocide is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next. [1277]

The treatment of indigenous childen is a legacy Canada still has to come to term with, but the case for genocide exists.

[1275] With reference to Australia, see William Schabas, *Genocide in International Law, The Crime of Crimes*, 2nd ed (Cambridge: Cambridge University Press, 2009) at 205.

[1276] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at V, Online: http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf

[1277] Truth and Reconciliation Commission of Canada, *ibid* at 1 "These measures were part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will. Deputy Minister of Indian Affairs Duncan Campbell Scott outlined the goals of that policy in 1920, when he told a parliamentary committee that "our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic." (at 3)

In a nutshell, the interaction between population transfer and genocide can be summarized as follows:

The intersect between deportation and transfer and genocide

Acts of Genocide defined in Genocide Convention	Relation to genocide	Selected jurisprudence
Killing (Article 4(a))	Evidence of genocidal intent	*Krstic* IT-98-33-T
Serious bodily or mental harm (Article 4 (b))	Act of genocide	*Krstic* IT-98-33-T, para 513; *Zdravko Tolimir*, IT-05-88/2-T, para 759. *Rutaganda* Trial Judgement, para 51; *Musema* Trial Judgement, para. 156; *Bagilishema* Trial Judgement, para. 59; *Gacumbitsi* Trial Judgement, para. 291; *Kajelijeli* Trial Judgement, para. 815; *The Israeli Government Prosecutor General v. Adolph Eichmann*, Jerusalem District Court, 12 December 1961, in International Law Reports (ILR), vol. 36 (1968) p. 340.
Conditions of life calculated to bring about its physical destruction (Article 4 (c))	Act of genocide	*The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T. *Prosecutor v Milomir Stakic*, Case No. IT-97-24-T.
Forcibly transferring children (Article 4 (e))	Act of genocide	

What emerges from this review of population transfer in international human rights, humanitarian and criminal law is the need for greater conceptual coherence, both within and across specialties, as well as semantical clarity, especially in the field of international human rights law. A constant throughout this second part is the need to get rid of the notion of lawful population transfer, which is anachronical, detrimental to individual choice, as it overemphasizes the importance of voluntary consent in contexts known for their coercitive nature and geared towards statal interests. That is why population transfer needs to be clearly defined and prohibited through a right to stay. For its part, international criminal law, which

brings much to IHL and the development of the crime of population transfer, must refrain from overly technical and formal interpretations which do little to facilitate the application of the law to today's conflict and protect the human dignity of victims. The numerous categories for deportation and population transfer as crimes against humanity and war crimes attest to the complexity of this fast evolving branch of law. In contrast, both international humanitarian law and international criminal need to embrace a purposive and evolutive (i.e. dynamic) interpretation that maximizes the protection of individuals and communities at risk or victim of population transfer.

PART III

INTRODUCTION – THE TRANSFER OF SETTLERS IS AN ACT OF CONQUEST

One of the most serious forms of displacement is settler implantation since it detrimentally affects core constituents of the UN Chartered legal order, especially the maintenance of peace and security, the prohibition of the use of force, the principle of equality of states and peoples and the right of self-determination.[1278] In situations of armed conflicts, it is not rare for occupying powers to be involved in the demographic remaking of the people living in the territory under their control to either dissolve opposition to their rule or assert a political and territorial claim over the land.[1279]

Settler transfer complexifies the search for a rights-based solution, especially when combined to displacement of the receiving population. Eric Kolodner defines as "one prong of a broad discriminatory policy" the transfer of settlers by governments of "their own citizens into the territories primarily inhabited by a different and distinct group of individuals."[1280] It may not appear so at first, but it truly is a violent act; insidious, gradual, and detrimental to people's collective and individual selves.[1281] As Kolodner's puts it, "settler infusion takes one or two generations to accomplish what a military invasion against the host population could accomplish in weeks or months."[1282] It is thus correctly considered an "effective tool of aggression and destruction" in armed conflicts.[1283]

[1278] See Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc E/CN.4/1998/53/Add.1 (1998) at part1(C), paras 1 and 2.
[1279] Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 363.
[1280] Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 159, 166, 194.
[1281] See A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at para 368.
[1282] Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 167.
[1283] Eric Kolodner, *ibid* at 194.

There are two potential victims in the context of settler implantation: the receiving population and the settler population.[1284] Non negligible to the analysis of settler transfer is whether settlers agree to move to an occupied territory. Are settlers moving voluntarily into the territory or are they coerced and 'dumped' by a state? In other words, if settlers are victims of persecution in their state of origin, their implantation elsewhere could even be conceived as refuge.[1285] Furthermore, the receiving population may be victim of population transfer even if it is not displaced, because settler transfer is carried out against their will. The *Draft Declaration on Population Transfer and the Implementation of Settlers* defined transfer by insisting on the "free and informed consent of the transferred population *and* any receiving population."[1286] This definition emphasizes that both the settler and the local populations need to acquiesce, in which case the movement of persons constitutes ordinary immigration rather than population transfer. The rule is thus that if one of the two populations does not consent in a 'free and informed' manner, the likelihood of population transfer increases. Consequently, both settling and receiving populations can be victims of the crime of population transfer; a careful analysis of the context is therefore necessary.

This third part is divided into five chapters. The first part is based on international human rights law, public international law as well as international humanitarian law to demonstrate that population transfer violates peremptory norms of international law. The second part is a case study of the international response, principally UN, to settler transfer in Tibet, Western Sahara, East Timor and Palestine. The third part discusses the crime in international humanitarian and criminal law and the need for obedience to the rule by domestic courts. Finally, chapter four examines the conflicting rights of settlers and victims and proposes a rights-based model to resolve *ex post facto* settler transfer in post-conflict situations.

[1284] See generally Eric Kolodner, *ibid* at159-160.
[1285] See Jörn Axel Kämmerer, "Colonialism", Max Planck Encyclopedia of Public International Law, March 2008 at para 7, Online: http://www.mpepil.com/
[1286] [Emphasis added] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc E/CN.4/Sub.2/1997/23 (1997) at 141 and 135, para 66.

CHAPTER ONE – SETTLER TRANSFER CONTRAVENES PEREMPTORY NORMS OF INTERNATIONAL LAW

The transfer of settlers is not expressly addressed by international human rights law although it contravenes core values protected by human rights law and the UN Chartered international legal order, in particular equality, the prohibition of the use of force and self-determination. Whereas international humanitarian and criminal laws contain explicit provisions on the transfer of settlers, it remains "inadequately regulated"[1287] in international human rights law. There is therefore no explicit provision prohibiting settler implantation in human rights law hence the epistemological gap similar to that of the displacement of civilians. This gap "allow[s] the transferring agent (the State) to assert plausible deniability before charges of unlawful action."[1288] That is because the implantation of settlers is frequently justified by alleged historic claims or entitlements, as a remedy to overpopulation, on national security grounds or as a philanthropic gesture towards underdeveloped societies.[1289] In the context of armed conflicts, it is part of an overt or covert demographic remaking of the permanent population and ultimately, the people. Because of a lack of a clear and binding provision on settler transfer, potentially legitimate grounds in contexts of peace, and lack of efficient response mechanism, international human rights law is unequipped to deal with the transfer while it takes place. Yet, peremptory norms and the principle of indivisible rights lay the ground for an analysis of settler transfer in the context of human rights law and more broadly, under public international law. Peremptory norms inform the reading of and response to settler transfer. To be clear, the study of settler transfer requires a comprehension of its relation to colonialism, self-determination and conquest.

Absent clear references to settler implantation in human rights law, the practice is addressed by peremptory norms of the UN Chartered international legal order. That is because the treatment of settlers in international law follows the legal development of the three peremptory

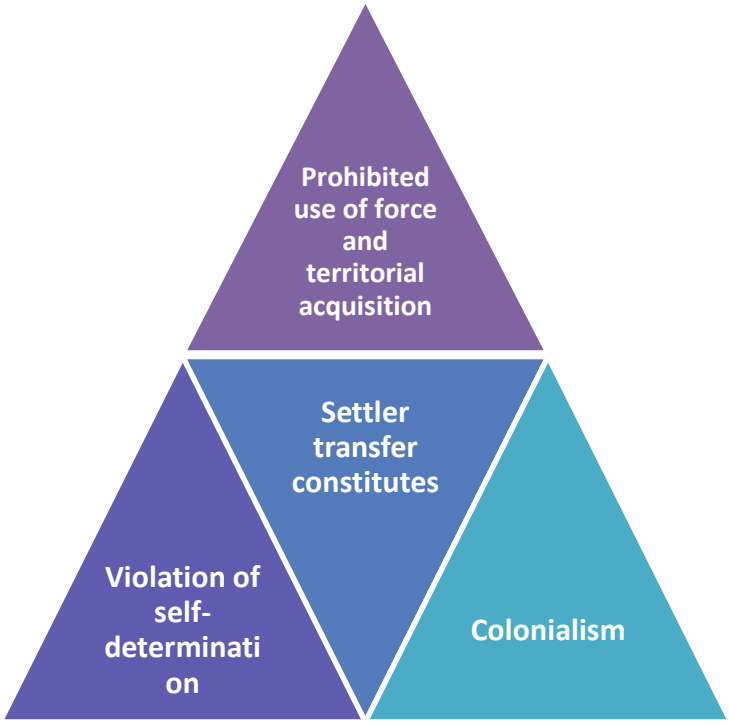
[1287] A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at para 368.
[1288] A S Al-Khasawneh & R Hatano, *ibid* at para 368.
[1289] Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 192-193.

or *jus cogens*[1290] norms of international law that are (1) non-discrimination; (2) self-determination; and, (3) the prohibition of the use of force (or aggression).[1291] The transfer of settlers breaches these peremptory norms of international law entailing obligations *erga omnes*.[1292] The proposed study assesses the effect of settler transfer on the pillars of modern international law because, it is argued, settler transfer contravenes at least one peremptory norm affecting the gamut of human rights. The following schema encapsulates this idea.

[1290] Peremptory norms of international law are defined under Article 53 of the Vienna Convention as norms"accepted and recognized by the international community of States as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Article 53.

[1291] On examples of peremptory norms inclusive of the three above mentioned norms see, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UNGAOR, 53rd Sess, UN Doc A/56/10 (2001), II:2 Yearbook of the International Law Commission, Art 40 at paras 4-5; On the relationship between IHL and *jus cogens*, see Éric David, *Principes de droit des conflits armés*, 4e ed (Bruxelles: Bruylant, 2008) at 107-110.

[1292] The resolution of the Institut de droit international on *Obligations and Rights Erga Omnes in International Law* was adopted in 2005 and defines an obligation *erga omnes* as: (a) An obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or (b) An obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that *a breach of that obligation enables all these States to take action*. [Emphasis added] Institut de droit international, *Obligations and Rights* Erga Omnes *in International Law* (2005) Krakow Sess, Annuaire de l'Institut de droit international, Article 1 at 119; see Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 134-140.



More to the point, this analysis contends international human rights law is concerned with settler transfer because it changes the nature of an otherwise lawful regime of occupation. Occupation becomes driven by discrimination, colonialism and conquest – essentially an act of aggression entailing a forceful acquisition of territory. The layering of lawful and unlawful regimes undermines both internal and external self-determination, statehood, particularly for states in *statu nascendi* and amounts to the prohibition of conquest through colonial means. It is submitted that, while settler transfer is not explicitly covered under international human rights law, it nevetheless entails a regime change violative of peremptory norms of international law.

This first chapter is divided in four parts. The first three sections discuss settler transfer from the perspectives of (1) colonialism and discrimination; (2) self-determination; (3) statehood and recognition whereas the last section defines settler transfer in IHL and international criminal law. International humanitarian and criminal law are unequivocal, uncontroversial and as clear as it gets when it comes to the prohibition of settler transfer in the field of international law.

1.1 Settler transfer is a colonial endeavour

Originally exclusive and Eurocentric – that is, among "civilized" Christian nations[1293] – international law allowed for a right to colonialism[1294] and colonialism[1295] to endure until the 1960s. Humanity was divided into a tripartite hierarchy: the civilised, the barbaric (or semi-civilised) and the savage, rendering the idea that the same law could apply equally to all of humanity illusionary.[1296] Noteworthy was the conception held by some of the rights of the indigenous population in the 19th century, in particular property rights. As Vittoria argued, the discovery of new territories by Europeans did not generally carry legal consequences, such as a sovereign title, if the territory was already occupied by local populations.[1297] The main exceptions being the right of European powers to occupy the territory to Christianize local (indigenous) populations and trade.[1298] In effect, however, in the name of evangelization and of the *Requirimiento*, which recognized direct titles to the Pope and the King as well as vassalage, local chiefs were quickly dispossessed of their lands.[1299]

Despite the pretention of forward-looking thinkers, such as Bartolomé de las Casas,[1300] international law only began to democratize and humanize all of mankind in the past fifty years or so, although much remains to be done to make justice universally accessible and tangible.[1301] By the beginning of the 1900s, therefore, international law "was characterized by unlimited State voluntarism, which was reflected in the permissiveness of recourse to war, of the

[1293] On international law as being between civilized and Christian nations: See James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 14.
[1294] Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 51.
[1295] Jörn Axel Kämmerer, "Colonialism", Max Planck Encyclopedia of Public International Law, March 2008, at para 10, Online: http://www.mpepil.com/
[1296] For an interesting discussion on the rights of 'barbaric peoples' for the purpose of sovereignty, occupation, and territorial acquisition, read Gaston Jèze, *Étude théorique et pratique sur l'occupation comme mode d'acquérir les Territoires en Droit International* (Paris: V Girard & E Brière, 1896) at 87-121. In his study Jèze concludes that : «Après mûre réflexion, c'est en faveur du droit absolu des indigènes que nous nous décidons. La théorie contraire, croyons-nous, ne fait que consacrer, sous prétexte de civilisation, la maxime "la Force prime le Droit", et violer, sous des apparences juridiques, la règle fondamentale de l'égalité des races." *Ibid* at 112-113; Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris : Lextenso éditions, 2012) at 50.
[1297] Dominique Gaurier, *Histoire du droit international, de l'Antiquité à la création de l'ONU* (Rennes: Presses universitaires de Rennes, 2014) at 272-273.
[1298] Dominique Gaurier, *ibid* at 273.
[1299] Dominique Gaurier, *ibid* at 273-277.
[1300] Dominique Gaurier, *ibid* at 277.
[1301] See for instance, Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 158-159.

celebration of unequal treaties, of secret diplomacy, of the maintenance of colonies and protectorates and of zones of influence."[1302] Only when recourse to war to annex sovereign territory became prohibited and peaceful means of conflict resolution and self-determination emerged did change begun.[1303]

The transfer of settlers in armed conflicts is a legacy of colonialism. The argument is that settler transfer is inherent to colonialism, because settlers do not generally come in a territory as equals nor in a peaceful manner. The *Declaration on the Granting of Independence to Colonial Countries and Peoples* defines colonialism as the "subjection of peoples to alien subjugation, domination and exploitation."[1304] The entry of the *Max Planck Encyclopaedia of International Public Law* describes colonialism as "a form of conquest involving alien dominance and subjugation."[1305] The relation between colonialism and population transfer was established in the resolution on the *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* in which the General Assembly called upon colonial powers to end violating the rights of peoples "through the promotion of the systematic influx of foreign immigrants and the dislocation, deportation and transfer of the indigenous inhabitants."[1306] Unsurprisingly, a settler population that conquers through subjugation, domination, and exploitation is colonial, whether it transferred to the territory voluntarily or not. Essential to determining colonialism is the relation between settlers and the receiving population.

Settler colonialism removes indigenous peoples or local inhabitants to establish settlers' ideal conception of society. In the process, laws are created to acquire land, which require "the deracination of the native populace so that it might be relocated to best serve the interests of colonial capital or security."[1307] As a result,"indigenous law is thus scripted as essentially a-

[1302] Antônio Augusto Cançado Trindade, *ibid* at 156.
[1303] See Report by the UN Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, Hector Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN4/Sub2/405/Rev1 (1980) at para 50.
[1304] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGAOR, 15th Sess, GA Res 1514 (XV), UN Doc A/RES/1514 (1960) at para. 1.
[1305] Jörn Axel Kämmerer, "Colonialism," Max Planck Encyclopedia of Public International Law, March 2008 at para 1, Online: http://www.mpepil.com/
[1306] *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGAOR, 1405th Plen Mtg, UN Doc 2105 (XX) (1965) at preamble and para 5.
[1307] Grant Farred, "The Unsettler" (2008) 107:4 The South Atlantic Quarterly at 797-798.

legal; it is then legislatively deemed to be illegal and thus suppressed."[1308] Noteworthy, law retains some of this anachronism and *ex post facto* reasoning in the field of treaty and treaty-making thus perpetuating discrimination.[1309] In a nutshell, settler colonialism is the erasure of a people and its replacement by another, alledgedly more 'advanced.' Lorenzo Veracini distinguishes colonialism and settler colonialism in these terms: "while the suppression of indigenous and exogenous alterities characterises both colonial and settler colonial formations, the former can be summarised as domination for the purpose of exploitation, the latter as domination for the purpose of transfer."[1310] In this regard, the primary objective of colonial settlers is territory, not the labour reservoir that is the local population.[1311] However, the distinction between them may be more subtle as settlers may want part of the land for their exclusive use as well as part of the local population for economic purposes. What is clear though is that a settler transferred in the context of armed conflict may become a colonial settler.

Settler implantation is discriminatory when settlers receive a preferential treatment to the detriment of the local population.[1312] The unequal relationship between settlers and receiving populations is often shaped by parallel legal regimes.[1313] When this occurs, settlers' implantation epitomizes the *summum* of discrimination[1314] because its rationale essentially entails unequal individual/group entitlements to land, resources and governance. The

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[1308] Joseph Pugliese, "Rationalized Violence and Legal Colonialism: Nietzsche "contra" Nietsche" (1996) 8:2 Cardozo Study in Law and Literature 277 at 279, 280.

[1309] Miguel Alfonso Martinez, Special Rapporteur, Human Rights of Indigenous Peoples, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UNCHR, SUBCOM, 51st Sess, UN Doc E/CN.4/Sub.2/1999/20 (1999) at paras 101, 112.

[1310] Lorenzo Veracini, *Settler Colonialism, A Theoretical Overview* (New York: Palgrave Mac Millan, 2010) at 34; Caroline Elkins & Susan Pedersen "Settler Colonialism: A concept and Its Uses" in Caroline Elkins & Susan Pedersen, eds, *Settler Colonialism in the Twentieth Century, Projects, Practices, Legacies* (New York: Routledge, 2005) at 2.

[1311] Lorenzo Veracini, *Settler Colonialism, A Theoretical Overview* (New York: Palgrave Mac Millan, 2010) at 3 & 8.

[1312] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc E/CN.4/1998/53/Add.1 (1998) at part 1(C), paras 1 & 2.

[1313] See Jörn Axel Kämmerer, "Colonialism", Max Planck Encyclopedia of Public International Law, March 2008 at para 6, Online: http://www.mpepil.com/

[1314] The *Convention on the Elimination of Racial Discrimination* defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) at Art 1.

discriminatory regime flowing from settler transfer contravenes the tenets of self-determination.[1315]

In its most severe form, discrimination may entail apartheid. Apartheid is an Afrikaans term for "apartness", which means to separate, to put apart, to segregate.[1316] It originates from Nazism and the South African National Party ideology of "complete separation of races and ethnic groups" to achieve and maintain white domination.[1317] Apartheid is the racial exclusion of a human group based on a hierarchization of races and its institutionally entrenched domination, usually in the form of laws, policies and a geography of separation carried out by the regime in power. The *Rome Statute* defines apartheid as inhumane acts "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[1318] Similarly defined by John Dugard and John Reynolds, the essence of apartheid is

> the systematic, institutionalized, and oppressive character of the discrimination involved, and the purpose of domination that is entailed. It is this institutionalized element, involving a state-sanctioned regime of law, policy, and institutions, that distinguishes the practice of apartheid from other forms of prohibited discrimination.[1319]

Central to understanding apartheid is the *Convention on the Suppression and Punishment of the Crime of Apartheid* which defines apartheid as "*similar* policies and practices of *racial*

[1315] Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 184.
[1316] See John Dugard, *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978).
[1317] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16 at paras 128, 130 and pp 49, 62; for a historical overview of the roots of Apartheid inspired by Nazism and the works of Gobineau and Vacher, see Sayeman Bula-Bula, *Droit international humanitaire* (Louvain-la-Neuve: Bruylant-Academia, 2010) at 270-271.
[1318] *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 7(j); Under international humanitarian law, the first Additional Protocol to the Geneva Conventions includes as grave breaches "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination." *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art Art 85(4).
[1319] John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 881; Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 272-273.

segregation and *discrimination* as practised in southern Africa" which have "the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."[1320] While the Convention is based on the South African experience, it is not limited to it.[1321] The crime of apartheid includes (1) denial of the right to life and liberty, such as murder, infringement of freedom or dignity, torture or cruel, inhuman or degrading treatment or punishment and (2) genocidal acts through "the deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part."[1322] It also includes any legislative measures or other measures meant to (3) *prevent the participation* of a racial group in the life of the country by denying basic human rights and freedoms; (4) *divide the population* along racial lines in separate reserves or ghettos or to expropriate the landed property of one racial group for instance; (5) *exploite the labour* of one racial group; and, (6) *persecute organizations and persons* who oppose apartheid.[1323] Because it fundamentally contraves the prohibition of racial discrimination and denies self-determination among other violations of human rights, the rule against apartheid is a norm of *jus cogens* giving rise to obligations *erga omnes*.[1324]

Obviously, not all instances of settler transfer amounting to colonialism constitute apartheid. But apartheid is closer than we think when an occupier-settler regime entrenches laws and policies that systematically discriminate against a racial group, usually the receiving population. In this sense, colonialism is not a thing of the past. Settlers are still being transferred during armed conflicts to forcefully remove and govern local populations in order to control and acquire their territory and destiny.

[1320] *Convention on the Suppression of the Crime of Apartheid*, 30 November 1973, UNGAOR, UN Doc A/RES/3068(XXVIII) (1973) (entered into force 18 July 1976) at Art 2.
[1321] UNCERD General Recommendation No 19, *Racial segregation and Apartheid*, UNOHCHR, UN Doc A/15/18 (1995) at Art 3; Roger S Clark, "Apartheid" in Cherif Bassiouni, ed, *International Criminal Law*, 2nd ed (Ardsley: Transnational Publishers, 1999) at 643, 644; John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 884.
[1322] *Convention on the Suppression of the Crime of Apartheid*, 30 November 1973, UNGAOR, UN Doc A/RES/3068(XXVIII) (1973) (entered into force 18 July 1976) at Art 2(a) and (b).
[1323] [Emphasis added] *ibid,* at Art 2(c), (d), (e), (f).
[1324] See John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 883; Ronald C Slye, "Apartheid as a Crime against Humanity: A Submission to the South African Truth and Reconciliation Commission" (1998-1999) 20 Michigan Journal of International Law 267 at 288-289.

1.2 The core of settler transfer is self-determination

The following sections attempt to grasp with self-determination as the main solution to put an end to settler transfer. However, self-determination has as much to do with politics than law.[1325] And the heavy-handed role of politics in the determination of a people or in applying remedial secession for instance makes self-determination a largely unreliable, unpredictable and inconsistent legal solution for people who seek this path. Yet, it remains the preferable solution. But for self-determination to be a solution, it must first and foremost be implemented to protect victims' right to self-determine. In practice, this means settlers have no right of self-determination until victims have exercised theirs. That is because self-determination is in a reflective relationship with settler transfer; indeed, settlers both affect and effect self-determination.

1.2.1 An evolutive politico-legal concept

A political construct tainted by ideology and state interest, self-determination has not ceased to develop since its inception into the realm of international law in 1945.[1326] As a political ideal, it emerged during the American Revolution (1776) and the French Revolution (1789) according to which power was to be transferred from the Monarch to a government responsible to the people.[1327] Sovereignty is no longer vested in the Kingdom state, but in the national state – that is, with popular sovereignty.[1328] The shift of power occurred with the principle of nationality which entailed the right of each nations, united by subjective and objective

[1325] See Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 3; James Summers, "The Status of Self-determination in International Law" (2003) 14 Finnish Yearbook of International Law 271 at 292-293; Morton H Halperin, David J Scheffer & Patricia L Small, *Self-Determination in the New World Order* (Washington: Canergie Endowment for International Peace, 1992) at 20-25.
[1326] See Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 65; Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public* (Paris: Dalloz, 2010) at 47-48.
[1327] See Antonio Cassese, *ibid* at 11-1; Micheal Reisman, *L'école du New Haven de droit international* (Paris: Éditions Pedone, 2010) at 244.
[1328] See Micheal Reisman, *ibid* at 254-255.

elements, to form a nation-state.[1329] Accordingly, a multinational state could be subject to dismemberment or partition.[1330]

The emergence of self-determination also helped clarify the distinction between occupation, as a temporary situation that does not confer to the occupant a right to annex territory under its control, and acquisition of territory, effectuated through a plebiscite agreed by a majority of the population to be annexed. Historically, this latter form of consultation was applied unevenly and only if in France's interests.[1331] Yet, the occupying power's rights were limited by "the principle of the inalienability of sovereignty" belonging to the people and the "conservationist principle" aimed at the maintenance of the legitimate occupied government to ensure reinstatement of power at the end of the occupation.[1332] Occupation was no longer to acquire sovereignty over *terra nullius*, but came to complement, and eventually, replace conquest. This fundamental conceptual shift began at a time when war was increasingly conceived as a short-term situation whose ultimate goal was the re-establishment of peace and the maintenance of the balance of power.[1333]

Recasted during WWI, self-determination became a central tenet of Woodrow Wilson's Fourteen Points and of Vladimir Lenin's declarations. For Lenin, self-determination could be

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[1329] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 71; Claude Emanuelli, *Droit international public: contribution à l'étude du droit international selon une perspective canadienne* (Montreal: Wilson & Lafleur, 2010) at para 608; From a more historical perspective, see elements of the definition of nationality : the region or territorial unit, the language, the race, the history or a common past, laws, religion and the unity of moral conscience. Nationality, was understood as "la conscience d'un certain groupe d'hommes qu'il a un génie commun, c'est-à-dire un même idéal de civilisation et des qualités spirituelles concordantes pour le réaliser." Robert RedSlob, "Le principe des nationalités" (1931) 37 Recueil des cours 1 at 12, 16.

[1330] Patrick Daillier, Mathias Forteau and Alain Pellet, *ibid* at 71.

[1331] On the origins of self-determination as either Westphalian or the result of the French Revolution, Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 11-12; Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics 159 at 172-173; Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester: Manchester University Press, 2008) at 284. Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983) at 49, principles 1, 2, 6, 7; For a critical analysis that Westphalia created a new order for and by states, see Stéphane Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?" (2000) Journal of the History of International Law 148 at 151; On the relationship between the right of option for minorities in the peace treaties of Westphalia, see Robert RedSlob, "Le principe des nationalités" (1931) 37 Recueil des cours 1 at 3, fn 3.

[1332] For a very interesting discussion on the evolution of the concept of occupation, read Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 25-31.

[1333] Eyal Benvenisti, *ibid* at 28.

invoked by ethnic/national groups to resolve territorial claims following armed conflict and against colonial regimes.[1334] It was essentielly meant to liberate the masses and fight oppression in pursuance of the Socialist Revolution.[1335] In contradistinction, Wilson conceived self-determination in Western democratic terms, namely, a government elected by the people.[1336] Wilson's principles informed the peace treaties of the First World War, but remained contingent on the Great Power, as the Mandate system attest.[1337]

The UN Charter marks the entry of self-determination into the legal sphere. Available exclusively to non-colonial peoples at first, it preserved a two-tier world order and remained limited to achieving self-government.[1338] The 1960s witnessed the democratization of self-determination as a multifaceted concept involving legal, political, economic, social and cultural aspects[1339] based on equal rights of states and peoples and individual human rights.[1340] The principle was invoked by peoples previously excluded from its ambit to resist power and accede to the international membership of states.[1341] Evolutive, and at times belatedly reactive, the law of self-determination continues to undergo conceptual changes to accord with practice.

[1334] See Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 14-16.
[1335] V I Lenin, *Questions of National Policy and Proletarian Internationalism* (Moscow: Foreign Languages Publishing House, nd) at 78-83, 203-205 cited in Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 32.
[1336] Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 19.
[1337] *President Woodrow Wilson's Fourteen Points* (1918), Online, Yale Law School, Avalon Project: http://avalon.law.yale.edu/20th_century/wilson14.asp; Antonio Cassese, *ibid* at 21.
[1338] Antonio Cassese, *ibid* at 37, 42-43.
[1339] Hector Gros Espiell, UN Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN4/Sub2/405/Rev1 (1980) at para 46.
[1340] See Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minoritie, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, UN Doc E/CN4/Sub2/404/Rev1 (New York: United Nations Publication, 1981) at para 233; For the argument that the UN Charter does not provide for self-determination, see Rosalyn Higgins, *Problemms & Process, International Law and How we Use it* (Oxford: Clarendon Press, 1994) at 112-113.
[1341] Noteworthy, internal self-determination was not applied to peoples from former colonies. See Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 44, 65, 71-74.

Modern self-determination is found in the "Magna Carta of Decolonization"[1342] that is the *Declaration on the Granting of Independence* in the following terms: "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[1343] UN General Assembly resolutions have adapted self-determination to decolonization[1344] and shaped the right to decolonization.[1345] Self-determination is also enshrined in the international Bill of Rights, notably in common Article 1 of the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* which recognize that

> (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.[1346]

Self-determination is construed as a process that assures the attainment, maintenance and enhancement of self-realisation and freedom through legitimate political institutions.[1347]

1.2.2 External to law?

The classic exercise of external self-determination takes the form of independence through the expression of sovereign attributes.[1348] In fact, self-determination and the principle of equal rights are components of one and the same norm expressed through the "free and genuine

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[1342] Hector Gros Espiell, UN Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN4/Sub2/405/Rev1 (1980) at para 48.
[1343] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGAOR, 15th Sess, UN Res 1514 (XV) UN Doc A/RES/1514 (1960) at para 2.
[1344] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public* (Paris: Dalloz, 2010) at 49.
[1345] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 492-493, 577-578.
[1346] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) at Art 1.
[1347] James Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, vol 8 (Leiden: Martinus Nijhoff, 2007) at 44.
[1348] See James Summers, *ibid* at 32.

expression of the will of the people" to "choose their own political, economic and social system and their own international status."[1349] The choice of international status can take the form of "a sovereign and independent state, free association or integration with an independent state or the emergence into any other political status freely determined by a people."[1350] It is often framed as a 'one time' shot to choose one's international status. But much within the law of self-determination is outside the law, such as the concept of 'people' and the application of remedial secession. Yet, the right of external self-determination as construed during the colonial era is transforming into a right to democracy and continued internal self-determination, especially for peoples aleardy within a state.[1351]

From this perspective, internal self-determination is essentially an inclusive project based on the idea that the state can, and in fact, has the responsibility to protect, accomodate and represent diverse national groups within its territory.[1352] Hurst Hannum well describes how pluralism works out to create the space for internal self-determination:

> Self-determination does not give the resulting majority the right to impose its will in such a way that the rights of others are violated – and this is true whether that majority is a modern, secular, pluralistic society which forces the assimilation of its minorities and the incorporation of indigenous peoples, or whether it is a traditional, homogeneous society which seeks to exclude dissenting or different minorities under the guise of national, ethnic, or religious purity. Individuals and minorities will continue to exist no matter how carefully borders are drawn, and forcing the individual to conform to any majority's conception of the perfect

[1349] Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minoritie, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, UN Doc E/CN4/Sub2/404/Rev1 (New York: United Nations Publication, 1981) at paras 19-20, 228, 268, 289.

[1350] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UNGAOR, 25th Sess, UN Doc A/RES/25/2625 (1970).

[1351] Thomas Franck, "The Emerging Right to Democratic Governance" (1992) 86 American Journal of International Law 46; Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 44; for a similar position on the greater importance accorded to internal self-determination and the downgrading of self-determination trough *uti possidetis*, see Philip Alston, "Peoples' Rights: Their Rise and Fall" in Philip Alston, ed, *People's Rights* (Oxford: Oxford University Press, 2001) at 270-273; Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 579.

[1352] James Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, vol 8 (Leiden: Martinus Nijhoff, 2007) at 32; For a different conception of internal self-determination, conceived as a state and its people to be free from foreign domination, see Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 48-49.

society is as inadmissible as destruction of so-called "backward" societies by dominant invaders.[1353]

Obviously, there is a reflective relationship between self-determination and other human rights. Hector Gros Espiel, *UN Special Rapporteur on the right to self-determination*, makes it clear when he writes that "human rights and fundamental freedoms can only exist truly and fully when self-determination also exists."[1354] Sharing a similar view, Aureliu Cristescu, *Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, stresses the interplay between recognition of a right to self-determination and recognition of human dignity.[1355] Indeed self-determination is largely based on the idea that the political and constitutional processes ensure "the effective guarantee and observance of individual human rights."[1356]

In addition, people have a right to elect their representative government – that is, a right to democratic governance – which, it has been argued, has shaped the criterion of "democratic legitimation" of states,[1357] the only worthy criteria in the recognition of governments.[1358] Democratic governance could be defined as a right to "representative self-determination."[1359]

[1353] [Emphasis added] Hurst Hannum, *ibid* at 455.
[1354] [Emphasis added] Hector Gros Espiell, UN Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN4/Sub2/405/Rev1 (1980) at para 59.
[1355] Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, UN Doc E/CN4/Sub2/404/Rev1 (New York, United Nations Publication, 1981) at paras 220-222.
[1356] UN Human Rights Committee, *General Comment No. 12: Article 1 (Self-Determination)*, 21st sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (1984) at paras 1, 4; see also in terms of democracy as the only system of governance the CSCE, *Charter of Paris for a New Europe* (1990) at 3.
[1357] On a right to democracy, see for instance, *Inter-American Democratic Charter*, 11 September 2011, OAS Doc, at Art 1; *Asian Human Rights Charter*, Asian Human Rights Commission, 17 May 1998 at Arts 5.1, 5.2; *United Nations World Conference on Human Rights: Vienna Declaration and Program of Action* (1993) 32 ILM 1661 at 1666; Inter-Parliamentary Union, *Universal Declaration on Democracy*, 16 September 1997; Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 12, 54; for a discussion of a right to democracy and democratic governance, see Steven Wheathley, "Democracy in International Law: A European Perspective" (2002) 51:2 International and Comparative Law Quarterly 225.
[1358] Citing the *Déclaration of Québec* and *L'Acte constitutif de l'Union Africaine* as indicators of recent developments confirming this international practice, J Maurice Arbour & Geneviève Parent, *Droit international public*, 6th ed (Cowansville: Éditions Yvon Blais, 2012) at 257-261.
[1359] Morton H Halperin, David J Scheffer & Patricia L Small, *Self-Determination in the New World Order* (Washington: Canergie Endowment for International Peace, 1992) at 52.

In other words, peoples have a "right to be free from authoritarian regimes" through an ongoing democratic decision-making process.[1360] Democracy is believed to best resolve competing interests and prevent escalation into armed conflict.[1361] The assumption, as Antonio Cassesse puts it, is that "there is no self-determination without democratic decision-making."[1362] In this regard, the *Universal Declaration for Human Rights* is instructive: "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."[1363] The Security Council authorization for a multilateral military intervention in Haïti to bring back the democratically elected government of Aristide in 1994 illustrates the international recognition of the relationship between self-determination and democracy.[1364] Henceforth, it can be argued that internal self-determination is tied to democracy because it permits the *ongoing* free expression of the choice of the people to a representative government (or minimally, representatives accepted by the people).[1365] It could further be advanced that the criterion of access to government/participation in governance is actually about democratic participation, although this remains controversial.[1366]

[1360] See Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 60, 64-66; James Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, vol 8 (Leiden: Martinus Nijhoff, 2007) at 33; Thomas M Franck, "The Emerging Right to Democratic Governance" in Robert McCorquodale, ed, *Self-Determination in International Law* (Dartmouth: Ashgate, 2000) at 509; for a discussion as to whether democratic governance is a clearly defined concept and a right, see Jackson Maogoto, "Democratic Governance: An Emerging Customary Norm?" (2003) 5 University of Notre Dame Law Review 55.

[1361] See Steven Wheathley, "Democracy in International Law: A European Perspective" (2002) 51:2 International and Comparative Law Quarterly 225 at 226.

[1362] Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 54.

[1363] *Universal Declaration of Human Rights*, UNGAOR, UN Res 217A (III) (1948) at Art 21(3); See also *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) at Art 25. It does not link governmental authority to the will of the people, but only to periodic elections; See also Jackson Maogoto, "Democratic Governance: An Emerging Customary Norm?" (2003) 5 University of Notre Dame Law Review 55 at 62-63.

[1364] See UNSCOR, Res 940, 48th Sess, UN Doc S/RES/940 (1994); see also Micheal Reisman, *L'école du New Haven de droit international* (Paris: Éditions Pedone, 2010) at 253-254.

[1365] See Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minoritie, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, UN Doc E/CN4/Sub2/404/Rev1 (New York, United Nations Publication, 1981) at para 209; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 30; See also Rosalyn Higgins, *Problemms & Process, International Law and How we Use it* (Oxford: Clarendon Press, 1994) at 120.

[1366] On democratic participation, see Francis Deng, "From 'Sovereignty as Responsibility' to the 'Responsibility to Protect' (2010) 2 Global Responsibility to Protect 353 at 358, 360; Contra, arguing there is no obligation under international law for states to establish democratic governments, Steven Wheathley, "Democracy in

Despite an 'irreversible movement' towards democratic governments, other systems of governance could theoretically still respect internal self-determination.[1367] Besides, a democratic regime is not a guarantee that internal self-determination will be respected. In fact, linking internal self-determination to democracy raises a number of questions. For instance, do undemocratic governments *ipso facto* contravene internal self-determination, as is believed in Europe?[1368] If so, it should be noted that the international system is unable to effectively address undemocratic regimes, which accounts for around one third of states,[1369] and concomittant breaches to internal self-determination.[1370] Or does a breach to internal self-determination depends on an undemocratic government excluding certain groups from participating in governance and seriously contravening human rights law? In which case, whether the state is democratic or not is irrelevant (or less relevant), because the question is one of genuine access to governance and violation of rights; not of the political regime *per se*. In other words, an undemocratic regime that respects human rights and accords access to governance to all groups could be (or is) complying with internal self-determination. Yet, their undemocratic nature or tendency towards orderism is attributable to greater disrespect for human rights, in particular freedom of association and expression, and to the exclusion of certain groups from meaningful participation to quell dissent and assert power.

The central element to internal self-determination is perhaps not democracy as such, although it certainly is the most preferable political system, but respect for human rights and effective participation of the whole population of the state.[1371] In short, internal self-determination means governments are (1) based on the consent of the governed through fair and periodic

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International Law: A European Perspective" (2002) 51:2 International and Comparative Law Quarterly 225 at 226-228.

[1367] See Steven Wheathley, *ibid* at 233-234.

[1368] See Steven Wheathley, *ibid* at 225.

[1369] Steven Wheathley, *ibid* at 233.

[1370] Jackson Maogoto, "Democratic Governance: An Emerging Customary Norm?" (2003) 5 University of Notre Dame Law Review 55 at 74.

[1371] Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minoritie, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, UN Doc E/CN4/Sub2/404/Rev1 (New York, United Nations Publication, 1981) at paras 19, 180, 228; James Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, vol. 8 (Leiden: Martinus Nijhoff, 2007) at 32-33; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accomodation of Conflicting Rights*, 2nd ed (Philadelphia: Uniersity of Pennsylvania Press, 1996) at 13.

elections and popular participation in the political process; (2) representative of all groups and peoples; and, (3) respectful of human rights.[1372]

1.2.3 People as alegal

The recurrent questions are not so much about what is external self-determination as to who is entitled to exercise it and under what circumstances. The *UN Special Rapporteur on the right to self-determination* came to the following conclusion with regard to who is entitled to external self-determination:

> Self-determination of peoples is a right of peoples, in other words of a specific type of human community sharing a common desire to establish an entity capable of functioning to ensure a common future. It is Peoples as such which are entitled to the right to self-determination.[1373]

To be clear, external self-determination is for 'People'; not minorities, indigenous peoples or nations. But the distinction between them "has often necessitated extraordinary theoretical and geopolitical manipulation."[1374] Indeed, who holds the right to external self-determination is problematic since the concept of people is "famously undefined in international law"[1375] and "defying international legal doctrine to date"[1376] making it as much a legal as a political construct. It has been argued that this "mystery" is better than a definition that could be excessively excluding.[1377] The opposite could also be true; this ambiguity allows States to exclude those who do not fit their construct of people or national interest. That said, a positivist reading of international law identifies five categories of people: (1) colonial people; (2) people

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[1372] Cécile Vandewoude, "The Rise of Self-Determination Versus the Rise of Democracy" (2010) 2:3 Goettingen Journal of International Law 981 at 995; Steven Wheathley, "Democracy in International Law: A European Perspective" (2002) 51:2 International and Comparative Law Quarterly 225 at 230.
[1373] Hector Gros Espiell, UN Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN4/Sub2/405/Rev1 (1980) at para 56.
[1374] Hector Gros Espiell, *ibid*.
[1375] Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minoritie, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, UN Doc E/CN4/Sub2/404/Rev1 (New York, United Nations Publication, 1981) at paras 260, 268-269, 276; James Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, vol. 8 (Leiden: Martinus Nijhoff, 2007) at 1, 25, 47.
[1376] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, Separate Opinion of Judge Cançado Trindade [2010] ICJ Rep 523 at para 228.
[1377] J Maurice Arbour & Geneviève Parent, *Droit international public*, 6th ed (Cowansville: Éditions Yvon Blais, 2012) at 278.

under foreign domination (including occupation); (3) peoples already part of a state; (4) a people separated by two states; (5) and, maybe, a people victim of systematic discrimination.[1378]

The ECOSOC Group of Experts on the rights of peoples identified the following *characteristics* of people, which they insisted, is not a definition of people. The subjective and objective characteristics identified are the following:

> (a) A group of individual human beings who enjoy some or all the following common features: (i) a common historical tradition; (ii) *racial or ethnic identity*; (iii) *cultural homogeneity*; (iv) *linguistic unity*; (v) religious or ideological affinity; (vi) territorial connection; (viii) common economic life;
> (b) The group must be of a certain number who need not be large (e.g., the people of mico-states) but must be more than mere association of individuals within a state;
> (c) The group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness.
> (d) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.[1379]

Although the above qualities are not prerequisites, they convey a semantic overlap with nations, ethnic/racial groups, minorities and indigenous people. This could be a legacy of the principle of nationality, which linked the nation to the state.[1380] Arguably, the legally ill-defined concept of people situates elements of the law of self-determination outside the rule of law.

[1378] Referring to the work of G Abi-Saab, see Robert Kolb and Sylvain Vité, *Le droit de l'occupation militaire, perspectives historiques et enjeux juridiques actuels* (Bruxelles: Bruylant, 2009) at 275-276.
[1379] [Emphasis added] *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations*, Paris, UNESCO, SHS-89/CONF.602/7 (1990) at para 22; For a discussion of people and critique of the concepts of internal and external self-determination see Morton H Halperin, David J Scheffer & Patricia L Small, *Self-Determination in the New World Order* (Washington: Canergie Endowment for International Peace, 1992) at 47-49; For a similar proposal, see J Maurice Arbour & Geneviève Parent, *Droit international public*, 6th ed (Cowansville: Éditions Yvon Blais, 2012) at 27; Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public* (Paris: Dalloz, 2010) at 54.
[1380] See for instance the terminological overlap between nation and people, Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 452-453.

The internal and international legal and political context, perhaps more than a legal classification of collectives determines the extent - both internally and externally – to which a group can self-determine.[1381] The best explanation of the functionning of self-determination is offered by Cherif Bassiouni:

> "Self-determination" is a catch-all concept which exists as a principle, develops into a right under certain circumstances, unfolds as a process and results in a remedy. As an abstract principle it can be enunciated without reference to a specific context; as a right it is operative only in a relative context, and as a remedy, its equitable application is limited by the rights of others and the potential injuries it may inflict as weighed against the potential benefits it may generate.[1382]

The indeterminacy of the right means that there is no right to separation or cession for all peoples.[1383] Some are considered peoples for the purpose of external self-determination, such as the South Sudanese, the Armenians and the Kosovars whereas others have not been so recognized, such as the Kurds, the Tuareg, the Tibetans and the Chechens. What exactly distinguishes these peoples, who could allegedly all be considered peoples entitled to external self-determination and arguably, to remedial secession? In truth, recognition by a UN organ, especially the General Assembly, and by Great Powers appears to weight heavily on the determination of who is 'a people'.[1384] In contentious cases, it is perhaps the United Nations, more than self-identification or objective criteria, which will legitimize the claim to peoplehood.

The extent to which a group can self-determine therefore varies, although international law has tended to regroup the rights of those who do not qualify as 'People'. Yet, in principle, minorities' rights[1385] are construed more narrowly than the rights of indigenous peoples, in

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[1381] See Snezana Trifunnovska, "One Theme in Two Variations - Self-Determination for Minorities and Indigenous Peoples" (1997) 5 International Journal on Minority and Group Rights 175 at 181, 183.
[1382] [Emphasis addeed] Cherif Bassiouni, "Self-Determination and the Palestinians" (1971) 65 American Society of International Law Proceedings 31 at 33.
[1383] J Maurice Arbour & Geneviève Parent, Droit international public, 6th ed (Cowansville: Éditions Yvon Blais, 2012) at 274.
[1384] See Pierre-Marie Dupuy and Yann Kerbrat, Droit international public (Paris: Dalloz, 2010) at 54.
[1385] See Gudmundur Alfredsson, "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law" in Nazila Ghanea and Alrexandra Xanthaki, eds, *Minorities, Peoples and Self-*

particular when minorities have no territorial basis,[1386] because indigenous peoples are entitled to autonomy, political control,[1387] self-government and protection of their traditional way of life on the land they originally inhabit, at least conceptually.[1388] As Asbjørn Eide summed up, "the principal legal distinction between the rights of minorities and indigenous peoples in contemporary international law is with internal self-determination: the right of a group to govern itself within a recognized geographical area, without State interference (albeit in some cooperative relationship with State authorities, as in any federal system of national government."[1389] In addition, the rights of minorties appear less effective than that of indigenous peoples.[1390]

This differentiation may be attributable to the facts that minority rights were conceived for religious minorities[1391] and that there is no international definition of minority (although this is also true of indigenous people).[1392] More to the point, minority rights apply mainly to

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Determination, Essays in Honour of Patrick Thornberry (Leiden: Martinus Nijhoff Publishers, 2005) at 165-168.

[1386] Patrick Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments" (1989) International and Comparative Law Quarterly 867 at 872-873.

[1387] Patrick Thornberry, *ibid* at 880.

[1388] "Autonomy or self-government, not least with reference to language on the management of land and resources in ILO Convention No. 169, sometimes referred to as internal self-determination, may also be more readily available to indigenous peoples than minorities." Gudmundur Alfredsson, "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law" in Nazila Ghanea and Alrexandra Xanthaki, eds, *Minorities, Peoples and Self-Determination, Essays in Honour of Patrick Thornberry* (Leiden: Martinus Nijhoff Publishers, 2005) at 169; Joshua Castellino and Jérémie Gilbert, "Self-Determination, Indigenous Peoples and Minorities" (2003) 3 Macquarie Law Journal 155 at 172; Snezana Trifunnovska, "One Theme in Two Variations - Self-Determination for Minorities and Indigenous Peoples" (1997) 5 International Journal on Minority and Group Rights 175 at 189-190.

[1389] "The difference can probably best be formulated as follows: whereas the Minority Declaration and other instruments concerning persons belonging to minorities aim at ensuring a space for pluralism in togetherness, the instruments concerning indigenous peoples are intended to allow for a high degree of autonomous development. (para 8)" For a comparison of minority and indigenous rights, see Asbjørn Eide, Sub-Commission on the Promotion and Protection of Human Rights (SUBCOM), *Prevention of Discrimination against and the Protection of Minorities, Working Paper on the Relationship between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, UNCHR, 52nd Sess, UN Doc E/CN.4/Sub.2/2000/10 (2000) at paras 8-9, 43.

[1390] "Jusqu'à présent, il ressort de notre analyse que l'étendue et l'efficacité de la norme étudiée varient selon le statut des requérants, celui de minorité apparaissant comme moins favorable." Doris Farget, *Le droit au respect des modes de vie minoritaires et autochtones dans les contentieux internationaux des droits de l'homme* (PhD Thesis), Université de Montréal, 2010) [Unpublished] at 223.

[1391] See Robert RedSlob, "Le principe des nationalités" (1931) 37 Recueil des cours 1 at 58-61.

[1392] "From a purposive perspective, then, the ideal type of 'minority' focuses on the group's experience of discrimination, against the groups as a whole as well as its individual members, and to provide for them the opportunity to integrate themselves freely into national life to the degree they choose. Likewise, the ideal type of 'indigenous peoples' focuses on aboriginality, territoriality, and the desire to remain collectively distinct, all

individuals recognized as a minority by their state through the principle of non-discrimination, equality and dignity,[1393] although they have implications for minority groups;[1394] and, exclude the right to autonomy.[1395] The individual rights of persons belonging to a minority are limited to "enjoy their own culture, to profess and practise their own religion, or to use their own language."[1396] Basically, it is a 'defensive' provision against assimilationist pressures that recognizes and protects minorities' identity and diversity.[1397] Furthermore, the classification of

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elements which are tied logically to the exercise of the right to internal self-determination, self-government, or autonomy." (para 49) Asbjørn Eide, Sub-Commission on the Promotion and Protection of Human Rights (SUBCOM), *Prevention of Discrimination against and the Protection of Minorities, Working Paper on the Relationship between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, UNCHR, 52nd Sess, UN Doc E/CN.4/Sub.2/2000/10 (2000) at paras 28-41, 48-49; Arguing minority rights are a specifically European affair, see Nicolas Levrat, "Protection des minorités" in *Introduction aux droits de l'homme*, Maya Hertig Randall and Michel Hottelier, eds (Cowansville: Éditions Yvon Blais, 2014) at 187-188, 195, 200; Gudmundur Alfredsson, "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law" in Nazila Ghanea and Alrexandra Xanthaki, eds, *Minorities, Peoples and Self-Determination, Essays in Honour of Patrick Thornberry*, (Leiden: Martinus Nijhoff Publishers, 2005) at 165; For a discussion of indigenous people, see Doris Farget, who discusses and submits the definition of José R Martinez Cobo in the following terms: "Un peuple autochtone détient une continuité historique avec les sociétés antérieures à l'invasion. Il forme une communauté qui se juge distincte. Celle-ci dispose d'une position non dominante et est déterminée à conserver, développer ou transmettre son territoire et son identité." [Emphasis removed from original] Doris Farget, *Le droit au respect des modes de vie minoritaires et autochtones dans les contentieux internationaux des droits de l'homme* (PhD Thesis), Université de Montréal, 2010) [Unpublished] at 97 and more generally 97-106. And on the definition of minorities, see proposes the following criteria: "Il s'agit de la position non dominante au sein de la société globale et du sentiment de solidarité ou d'appartenance à un groupe minoritaire. Un troisième critère est retenu, cité par la plupart des auteurs et des documents officiels sous la notion de "diversité culturelle" ou de "caractère distinct". Nous préférons nous y référer sous le concept de "diversité profonde", signalant qu'un groupe est porteur d'une identité collective propre et comparable à celle d'une nation." *Ibid*, at 114-115.

[1393] Nicolas Levrat, *ibid* at 188, 193-194, 196-197; Gudmundur Alfredsson, *ibid* at 163.

[1394] On the right to exercice rights in community, see *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UNGAOR, UN Doc A/RES/47/135 (1992), Art 3; Henry J Steiner, "Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities" (1990-1991) 66 Notre Dame Law Review 1539 at 1548; Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 14th ed (Paris: Dalloz, 2014) at 250-251; Nicolas Levrat, *ibid* at 188, 192.

[1395] On the position that no right to autonomy exists for minority groups, see Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 61; see also Joshua Castellino and Jérémie Gilbert, "Self-Determination, Indigenous Peoples and Minorities" (2003) 3 Macquarie Law Journal 155 at 164-166; Gudmundur Alfredsson, "Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law" in Nazila Ghanea and Alrexandra Xanthaki, eds, *Minorities, Peoples and Self-Determination, Essays in Honour of Patrick Thornberry*, (Leiden: Martinus Nijhoff Publishers, 2005) at 164.

[1396] *International Covenant on Civil and Political Rights*, 16 December 1966, UNGAOR, UN Doc 2200A (XXI), UNTS (entered into force 23 March 1976) at Art 27; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UNGAOR, UN Doc 47/135 (1992) at Arts 1-3; Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 61; Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 69-70.

[1397] *Opinions of the Arbitration Committee*, Opinion No 2 in Alain Pellet, "The Opinions of the Badinter Arbitration Committee, Second Breath for the Self-Determination of Peoples" (1992) 3 European Journal of International Law 178 at 184; Patrick Thornberry, "Self-Determination, Minorities, Human Rights: A Review

minority rights as *jus cogens* by the Arbitary Commission for the Peace Conference in Yugoslavia has influenced international law.[1398]

At the same time, international human rights law increasingly recognizes the collective rights of indigenous peoples, in addition to the gamut of minority rights applicable to them.[1399] Hence indigenous peoples are entitled to "freely determine their political status and freely pursue their economic, social and cultural development" in the form of autonomy or self-government in "matters relating to their internal and local affairs."[1400] The *Convention concerning Indigenous and Tribal Peoples in Independent Countries* stipulates that indigenous and tribal "peoples should not be removed from the land they occupy."[1401] Similarly, the *UN Declaration on the Rights of Indigenous Peoples* affirms that "indigenous peoples shall not be forcibly removed from their lands or territories."[1402] This is perhaps because indigenous people are also

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of International Instruments" (1989) International and Comparative Law Quarterly 867 at 880; Arguing minority rights receded following World War II and shifted towards protection of individuals belonging to minorities through assimilation, see Morton H Halperin, David J Scheffer & Patricia L Small, *Self-Determination in the New World Order* (Washington: Canergie Endowment for International Peace, 1992) at 56-60.

[1398] *Opinions of the Arbitration Committee*, Opinions No 1 and No 2 in Alain Pellet, "The Opinions of the Badinter Arbitration Committee, A Second Breath for the Self-Determination of Peoples" (1992) 3 European Journal of International Law 178 at 182-184; See also Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 14th ed (Paris: Dalloz, 2014) at 250.

[1399] See Snezana Trifunnovska, "One Theme in Two Variations - Self-Determination for Minorities and Indigenous Peoples" (1997) 5 International Journal on Minority and Group Rights 175 at 186; Patrick Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments" (1989) International and Comparative Law Quarterly 867 at 882, 884.

[1400] For examples, see Miguel Alfonso Martinez, Special Rapporteur, Human Rights of Indigenous Peoples, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UNCHR, SUBCOM, 51st Sess, UN Doc E/CN.4/Sub.2/1999/20 (1999); *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007), Arts 3, 4; On implementation and integration in internal laws and policies of the rights of indigenous peoples, see *Report of the Expert Mechanism on the Rights of Indigenous Peoples, Final summary of responses to the questionnaire seeking the views of States and indigenous peoples on best practices regarding possible appropriate measures and implementation strategies to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples*, UNHRC, UNGAOR, UN Doc A/HRC/24/51 (2013) at 7-9.

[1401] It should be noted that 20 states ratified the Convention. *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, ILO, C169 (entered into force 5 September 1991) at Art 16(1).

[1402] Article 10 adds: "No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." Although a formal reading seems to mean that no relocation can take place without the consent of the people concerned, this is unlikely to be correct. Rather, the provision stresses the importance of reaching consent.
United Nations Declaration on the Rights of Indigenous Peoples, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007) at Arts 8(2), 10.

considered conquered and colonised people.[1403] Yet, these normative developments have still to translate into more constructive arrangements between states and indigenous peoples.[1404]

That said, it has been argued that when a conflict between the majority and the minority exists, both minorities and indigenous peoples may have a right to autonomy within the state. This is especially "in situations where regional, ethnic, or economic disparities are shown to exist; where there is discrimination against minority groups as such; or where the marginalization of certain groups prevents their effective participation in society."[1405] Thus conceived, autonomy is a remedy; the best solution to preserve territorial integrity and diversity and counter the multiplication of nation-states.[1406] From this perspective, internal self-determination is a mechanism of conflict resolution that protects diversity, not a right *per se*.[1407]

Beyond internal self-determination as a solution are hybrid solutions that dislocate power, redefine the state and disggragate power. Indeed, increasingly, peace agreements provide what Christine Bell defines as hybrid self-determination through 'constructive ambiguity', which unables parties to come to an agreement.[1408] She argues that the "the language of many peace agreements points to a deliberate incorporation of internal and external self-determination language and mechanisms. This language aims to reconcile the twin pillars of self-determination law, of representative government and existing territorial boundaries."[1409] This is relevant, because in the context of population transfer, minority rights are "almost always

[1403] See Snezana Trifunnovska, "One Theme in Two Variations - Self-Determination for Minorities and Indigenous Peoples" (1997) 5 International Journal on Minority and Group Rights 175 at 188.
[1404] For a discussion of constructive arrangements and autonomy regimes as well as a critical assessment, see Miguel Alfonso Martinez, Special Rapporteur, Human Rights of Indigenous Peoples, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UNCHR, SUBCOM, 51st Sess, UN Doc E/CN.4/Sub.2/1999/20 (1999) at paras 105, 125 and 135.
[1405] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 474 and 468-477; See Snezana Trifunnovska, *ibid* at 181-182.
[1406] See Morton H Halperin, David J Scheffer & Patricia L Small, *Self-Determination in the New World Order* (Washington: Canergie Endowment for International Peace, 1992) at 19; Snezana Trifunnovska, *ibid* at 187; Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 53.
[1407] For a discussion of autonomy regimes, read Henry J Steiner, "Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities" (1990-1991) 66 Notre Dame Law Review 1539 at 1557.
[1408] For an excellent analysis, see Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008) at 107-115, 205-207, 216-217.
[1409] Christine Bell, *ibid* at 107-115, 206.

violated,"[1410] which may explain the tendency to demand full fledged self-determination or greater autonomy.[1411] Hence the nedd for creative solutions.[1412] As Hurst Hannum explains:

> even guarantees of equality and non-discrimination may be insufficient, as freedom of movement and residence may allow dilution of minority strength through immigration of majority group members into minority's traditional homeland; equal access to public administration may be insufficient to guarantee an effective minority voice.[1413]

The question is whether autonomy is sufficient to preserve the identity of minorities and their rights in contexts of population transfer, and if not, what other creative solutions can establish a new constitutional order that will address the needs and concerns of all parties.

Context - in truth, violence - is an additional marker of people for the purpose of external self-determination.[1414] Who is considered a people is influenced by circumstances that can weight heavily on who and how self-determination will be exercised. For instance, whereas the current stance is that international law does not grant the right to external self-determination to "discrete minorities" within a state; it may nevertheless allow remedial secession in cases of "extreme oppression." [1415] Obviously, what constitutes 'extreme oppression' is subjective, undefined and controversial. Relevant to our discussion is whether population transfer is comprised in extreme oppression. I argue it is, especially when changes to the demographic composition imperils self-determination and statehood, as will be illustrated in the case studies.

Hence, under 'extreme oppression', a minority *could* become a people prior to or following successful secession. Trindade remarks that "States transformed into machines of oppression and destruction ceased to be States in the eyes of their victimized population."[1416] Granted. But

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[1410] Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) at 230.
[1411] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 72.
[1412] On early creative solutions, such as decentralization, autonomy for ethnic groups spread throughout the territory, and the protection of minorities see Robert RedSlob, "Le principe des nationalités" (1931) 37 Recueil des cours 1 at 48-55.
[1413] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accomodation of Conflicting Rights*, 2nd ed (Philadelphia: Uniersity of Pennsylvania Press, 1996) at 6.
[1414] Hurst Hannum, *ibid* at 45.
[1415] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 111, 119; Hurst Hannum, *ibid* at 471-472.
[1416] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, Separate Opinion of Judge Cançado Trindade [2010] ICJ Rep 523 at para 240.

the gaze of victims does not always match the eyes of beholders. Hence the uneven application of remedial secession and the consequent challenge to the rule of law. That said, suffering does bring individuals to consciously unite to free themselves and regain control over their individual and collective selves. And I argue, it is an important marker of people in contexts of remedial secession. Therefore, to the *ethnos* and *demos* approaches to defining and identifying who is a people can be added violence as a marker of peoples.[1417]

1.2.4 Remedial secession as protection against population transfer

It is not without controversy that external self-determination has been broadened to collectives in situations akin to colonialism or involving serious breaches of human rights law, otherwise termed 'extreme oppression'.[1418] It is settled that peoples living in trust territories and non-self-governing territories or under colonialism are entitled to self-determination, including independence, and to achieve it through national liberation and force.[1419] To be considered a

[1417] For a discussion of people as *ethnos* and *demos* and other perspectives, such as the role of violence and struggle on the making of people, see Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 52-65, more precisely 56, 59-60 ; "common suffering creates a strong sense of identity" *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, Separate Opinion of Judge Cançado Trindade [2010] ICJ Rep 523 at para 229.

[1418] See League of Nations, *Report Presented to the Council of the League by the Commission of Rapporteurs*, Council Doc B7/21/68/106 (1921) at 28 cited in Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 31; On the argument that secession for oppressed groups is 'a political and moral idea' see Snezana Trifunnovska, "One Theme in Two Variations - Self-Determination for Minorities and Indigenous Peoples" (1997) 5 International Journal on Minority and Group Rights 175 at 184; A passage from the Advisory Opinion on the unilateral declaration of independence of Kosovo is instructive as to the extent of disaccord on the right to remedial secession: "Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances." *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosoco* (2010), Advisory Opinion [2010] ICJ Rep 403 at para 82.

[1419] See *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGAOR, 63rd Sess, UN Doc A/RES/63/110 (2008) at paras 1, 4; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, Separate Opinion of Judge Cançado Trindade [2010] ICJ Rep 523 at para 79; See also Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minoritie, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, UN Doc E/CN4/Sub2/404/Rev1 (New York, United Nations Publication, 1981) at para 25; Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public* (Paris: Dalloz, 2010) at 50-51; Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 582.

colonial people there should be a political, legal or cultural discriminatory system that impedes autonomy.[1420] The *Declaration on Friendly Relations* broadens the applicability of self-determination to situations involving the "subjection of peoples to alien subjugation, domination and exploitation."[1421] This provision entails peoples' right to external and internal self-determination in situations such as domination by a minority regime, e.g., Apartheid South Africa, as well as military occupation.[1422] Yet, divergences remain as to what exactly constitutes 'subjugation, domination and exploitation', although it does entail military occupation.[1423]

In addition to external self-determination for people subject to subjugation, domination and exploitation, there is a right to remedial secession.[1424] This is particularly relevant when a situation is not characterized as occupation or conflictual. In his study of the historical and current development of the right to self-determination, Special Rapporteur Aureliu Cristescu was unequivocal when it came to discussing the limits to the principle of territorial integrity:

> The right of secession unquestionably exists, however, in a special, but very important case: that of peoples, territories and entities subjugated in violation of international law. In such cases, the peoples concerned have the right to regain their freedom and constitute themselves independent sovereign States.[1425]

[1420] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 579.

[1421] *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, UNGAOR, 25th Sess, UN Res 2625 (XXV), UN Doc A/RES/25/2625 (1970).

[1422] Rosalyn Higgins, *Problems & Process, International Law and How we Use it* (Oxford: Clarendon Press, 1994) at 116, 124.

[1423] Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 91-92.

[1424] Thomas Franck argues there is no right to secession but a right to cultural autonomy and democracy. Thomas Franck, "Fairness in the International Legal and Institutional System" (1993-III) 240 Recueil des cours at 149.

[1425] [Emphasis added] He further explains that "the right of peoples to self-determination, is simply the transposition of the concept of human rights to the collective level, and the international community has generally accepted the idea that the principle of non-intervention does not apply in a case of violation of those rights." Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minoritie, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, UN Doc E/CN4/Sub2/404/Rev1 (New York, United Nations Publication, 1981) at paras 173, 180; Agreeing that the right to remedial secession exists: Marc Weller, *Escaping the Self-Determination Trap* (Leiden: Martinus Nijhoff Publishers, 2008) at 59.

Thus the proposition that severe deprivations of human rights involving denial of internal self-determination and discrimination influence regime change and the creation of new states.[1426] The conditional approach to territorial integrity is also found, albeit more narrowly construed, in the *The Declaration on Principles of Law concerning Friendly Relations and Co-operation among States,* which recognized

> the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples [...] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.[1427]

Thus construed, territorial integrity is the prevalent but not the absolute consideration. It is contingent on a state's respect for the principles of non-discrimination and the right to internal self-determination.[1428] The Supreme Court of Canada also considered that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession."[1429] This trigger to external self-determination is switched on when "a *definable group* is *denied meaningful access to government* to pursue their political, economic, social and cultural development a group." [1430] Noteworthy, remedial secession may be invoked by any 'people' or 'group' and not only by religious or racial groups when access to governance is denied because such access has to be genuine, sincere and significant. However, there is more to it than participation and access to governance. Cassese

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[1426] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 197; James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 118-119.

[1427] *The Declaration on Principles of Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* Res 2625 (XXV), UNGAOR, UN Doc A/RES/25/2625 (1970).

[1428] For a cautious note: The entire people under authoritarian rule as well as 'ethnic, linguistic or cultural groups' do not possess a right to self-determination that could challenge territorial integrity. This only applies to religious and racial groups. Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 111-114, 131; for a dicussion of the right of minorities to break away, see Joshua Castellino and Jérémie Gilbert, "Self-Determination, Indigenous Peoples and Minorities" (2003) 3 Macquarie Law Journal 155 at 166-167; see also Patrick Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments" (1989) International and Comparative Law Quarterly 867 at 876.

[1429] *Reference re Secession of Quebec*, 1998 SCC 793, [1998] 2 SCR 217 at 132-134, 138.

[1430] [Emphasis added] "In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination." *Reference re Secession of Quebec*, 1998 SCC 793, [1998] 2 SCR 217 at 132-134, 138.

contends secession will be justified when (1) the racial or religious group is excluded from participating in governance; (2) when there are gross violations of fundemental rights; and, (3) when there is no peaceful resolution mechanism within the state (arguably, when autonomy fails).[1431] Of course, the challenge is for states to define and agree these three criteria have been met. Otherwise said, the answer to defining 'extreme oppression' entailing remedial secession is the failure of the state to ensure ongoing internal self-determination.[1432] In this way, internal self-determination is tied to the idea of sovereignty as responsibility.[1433]

So when there is participation in governmental decision-making and insufficiant human rights violations to shake *uti possidetis*, the territorial integrity of the state will prevail and secession will be denied. The African Commission on Human and Peoples' Rights made it clear in the case of *Katanga*:

> In the absence of concrete evidence of violations of human rights to the point that territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.[1434]

The question that remains unanswered is: at what point do violations of human rights take precedence over territorial integrity? Or, when does suffering trumps sovereignty? There are no clear guidelines on how to balance human rights violations against territorial integrity.

The fear of secession as a spiral to endless break-up into nation-states and an unmanageable world community is well-known. Rosemary Higgins rejects the right to secede because

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[1431] Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 119.
[1432] See Rosalyn Higgins, *Problems & Process, International Law and How we Use it* (Oxford: Clarendon Press, 1994) at 116-117.
[1433] On the concept of responsibility as sovereignty, see Francis Deng, "From 'Sovereignty as Responsibility' to the 'Responsibility to Protect' (2010) 2 Global Responsibility to Protect 353 at 354, 357.
[1434] *Katangese Peoples' Congress v Zaire*, African Commission on Human Rights and Peoples' Rights, Comm No 75/92 (1995) at para 6.

"virtually every minority has its own minority, and the fear of oppression gets pushed down the pyramid."[1435] Yet, she recognizes that

> even if, contrary to contemporary political assumptions, self-determination is not an authorization of secession by minorities, there is nothing in international law that prohibits secession or the formation of new states. The principle of *uti possidetis* provides that states accept their inherited colonial boundaries. It places no obligation upon minority groups to stay a part of a unit that maltreats them or in which they feel unrepresented. If they do in fact establish an independent state, or join with an existing state, then that new reality is one which, when its permanence can be shown, will in due course be recognized by the international community.[1436]

Similarly, James Crawford considers secession as neither legal nor illegal, but as a neutral act whose consequences are the subject of international law. [1437] As the argument goes, international law does not recognize a right to secede *per se*, but the *fact* (consequence) flowing from secession.[1438] In other words, international law is reactive *vis-à-vis* remedial secession although it may belatedly recognize the legal consequences of such occurrences, but that is, and only if, they succeed. The standback 'wait and see' approach of international law with regards to remedial secession is unhelpful because neither proactive nor protective of human rights as the burden to protect and free oneself from oppression is relinquished to victimized populations.

The law of remedial secession is largely considered alegal, "a legal myth"[1439], a fiction, that follows practice. It is passive and leaves victims of violence with violence as the main recourse to remedy.[1440] By putting victims of serious breaches to peremptory norms of international law, including victims of population transfer, at the forefront of their own protection through measures of self-help and armed resistance, which makes them secessionist rebels, and not

[1435] Rosalyn Higgins, *Problems & Process, International Law and How we Use it* (Oxford: Clarendon Press, 1994) at 125.
[1436] Rosalyn Higgins, *ibid* at 125.
[1437] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 390.
[1438] See Thomas Franck, "Fairness in the International Legal and Institutional System" (1993-III) 240 Recueil des cours at 135, 145-146.
[1439] Arguing remedial secession is not a remedy in international law: Katherine Del Mar, "The Myth of Remedial Secession" in Duncan French, ed, *Statehood and Self-Determination, Reconciling Tradition and Modernity in International Law* (Cambridge Books Online: Cambridge University Press, 2014) 79 at 81.
[1440] See Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 169.

uncommonly, terrorists,[1441] remedial secession offers little of a remedy. Self-determination becomes unhelpful to victims of population transfer who cannot rely on their right of self-determination for *effective international protection* – that is, to prevent, stop and undo transfer and other serious violations of international law. In fact, people can only invoke a controversial right or 'licence' to recourse to armed struggle to attain self-determination.[1442] Concretely, what should a people do with the legal advice: you do not have a right but a licence to armed struggle? Better admit that armed struggle in this context is beyond law.

This also means the international response is uncertain, constantly struggling between non-interference and respect for territorial integrity and the alternate concepts of humanitarian intervention[1443] and the obligation to protect humanity.[1444] However, the principle of non-interference is irrelevant in cases of occupation, colonialism and oppression of a racial group entitled to internal self-determination,[1445] because it does not prevent a state from assisting and aiding oppressed people. Yet beyond aid and assistance, the situation is sketchy. Besides,

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[1441] Marc Weller, *Escaping the Self-Determination Trap* (Leiden: Martinus Nijhoff Publishers, 2008) at 17.
[1442] In what I consider a confusing legal construction, Cassese maintains that: "only general international law grants peoples a licence (but clearly not a right) to vindicate their substantive rights by recourse to force in extreme cases of the forcible denial of their right to self-determination." Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 160, 198. "There is no support for the right to use force to attain self-determination outside the context of decolonization or illegal occupation. Still less is there any support by states for the right of ethnic groups to use force to secede from existing states." Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2008) at 59-64.
[1443] Arguing for humanitarian intervention based on the rule of reasonableness, Thomas Franck, "Fairness in the International Legal and Institutional System" (1993-III) 240 Recueil des cours at 256-257.
[1444] The R2P aims to protect populations from genocide, war crimes, population transfer and crimes against humanity. It is based on three interrelated pillars: These pillars are drawn from paragraphs 138 and 139 of the World Summit Outcome (see General Assembly resolution 60/1), in which the Heads of State and Government unanimously agreed that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity." They also affirmed the role of the international community in assisting States to protect their populations from these crimes, including by "assisting those which are under stress, before crises and conflicts break out." Thirdly, Member States agreed to "take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter of the United Nations, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity." Report of the UN Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, UNSCOR, UN Doc S/2012/578 (2012) at para 2; For the distinction between humanitarian intervention and the responsibility to protect, see Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris: Lextenso éditions, 2012) at 468-469.
[1445] Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 176.

humanitarian intervention and R2P are known for their selective application resulting in a "humanité à la carte" away from the principle of humanity.[1446]

To sum up, recognition of secession as a 'remedy' is largely *ad hoc* and *ex post facto* and undermines the protective, predictable and consistent response that people in distress so much need and that the rule of law strives to provide. The result is the following: people who are not recognised as such for the sake of external self-determination can exercice this right in situations of egregious human rights violations, exclusion from governance, or denial of autonomy, but only if they have a capacity to fight back and if there is a good dose of international support and political will. In this context, what can be more accurately termed 'self-help' secession translates into self-determination. It goes without saying the present situation is unsatisfactory as protection of human rights relies on violence and power relations (realpolitik).

What is needed is a right to protection against serious war crimes, crimes against humanity and genocide that entails a clear right to remedial secession. In other words, self-determination needs some teeth. States will be more incline to respect internal self-determination and autonomy as a resolution mechanism if remedial secession is lawful and recognized. Basically, states need greater incentive to behave. Arguably, the peremptory norms of international law breached by population transfer combined to an ineffectual international response favor a repositioning of the law of self-determination towards a more human-protective framework in conformity with the principle of humanity and perhaps, the responsibility to protect.[1447] To be clear, the law of remedial secession must become a tool of international protection, at least until the law of state responsibility is applied. Secession has to be conceived as a protective measure to remedy violations of fundamental human rights through the distantiation of the victim from its perpetrator and its empowerment as a collective. Further work must be conducted so that remedial secession becomes an effective tool of protective secession to defuse the Pandora's box. Settler transfer in armed conflicts and peace time can, and should,

[1446] Catherine Le Bris, *L'humanité saisie par le droit international public* (Paris : Lextenso éditions, 2012) at 476-479.
[1447] Proposing a symbiotic model between self-determination and the responsibility to protect: Ryan Liss, "Responsibility Determined: Assesssing the Relationship between the Doctrine of the Responsibility to Protect and the Right of Self-Determination" (2011) 4 University College London Human Rights Review at 65-66.

be resisted within the law of self-determination, at first internally through autonomy and when necessary, externally, including through remedial secession. Developing norms as to the applicability and enforcement of protective secession is core to making clear and tangible the right of self-determination and the accountability-driven concept of sovereignty as responsibility.[1448]

1.3 The reflective relation between settler transfer and self-determination

Occupation amounts to domination and is *per se* a violation of self-determination unless prescribed under Article 51 of the *UN Charter* for a limited period.[1449] Population transfer, especially when the implantation of settlers is combined with the displacement of the local population is clearly anathema to the receiving population's right of self-determination, although not necessarily to an accrued participation in acts of self-determination by settlers. The following section discusses the reflective relationship between the self-determination of settlers with that the receiving and protected population and cautiously concludes on the need to be careful on the use of self-determination as a solution to population transfer.

There is an inherent paradox between population transfer and self-determination because population transfer is the hidden face of self-determination.[1450] On the role of population transfer as an element of the law of self-determination, Catriona Drew is adamant: "population transfer/exchange is viewed both as a means to implement the principle of nationality in the form of ethnically homogenous states, and as a realists' alternative to the catastrophic failures of the international system to protect human rights."[1451] Population transfers have made possible the establishment of nation-states by pushing out 'undesirable' groups whereas nation-states have been created to remedy population transfers. So far, the international community

[1448] See Francis Deng, "From 'Sovereignty as Responsibility' to the 'Responsibility to Protect' (2010) 2 Global Responsibility to Protect 353 at 370.
[1449] Hector Gros Espiell, UN Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN4/Sub2/405/Rev1 (1980) at para 45; Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 55, 93, 98-99.
[1450] Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 269.
[1451] Catriona Janet Drew, *ibid* at 225, 267.

has struggled to stop population transfer, hence the reflective, perhaps constructive, relation between self-determination and population transfer.

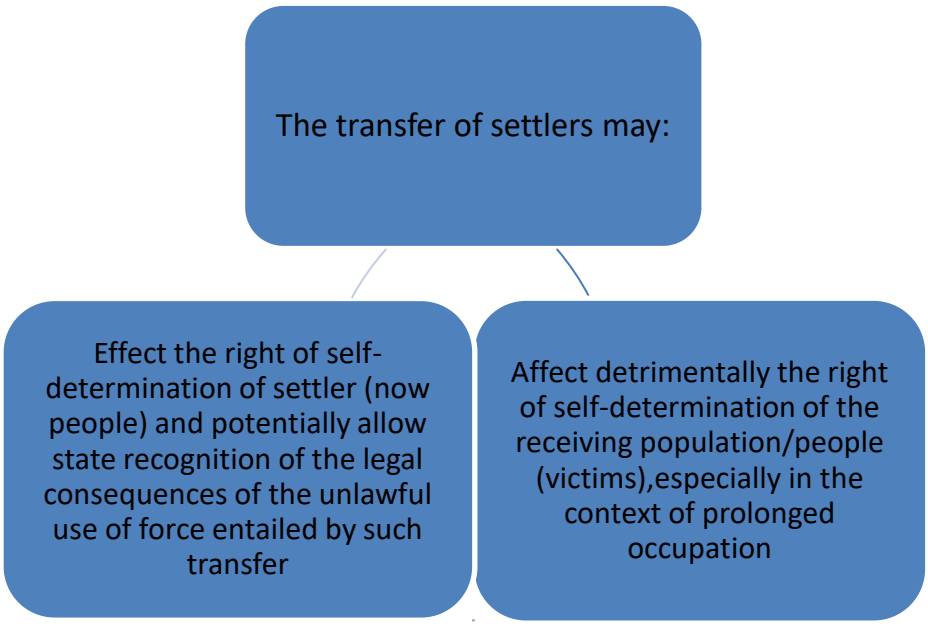
On the one hand, settler transfer is detrimental to the receiving's population right to external self-determination by blurring their status as a people. *The Declaration on Principles of Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* prohibits "the use of force to deprive peoples of their national identity [which constitutes] a violation of their inalienable rights and of the principle of non-intervention."[1452] From this perspective, the transfer of settlers is not only detrimental to the right of self-determination of receiving populations, but ultimately to peace. [1453] Disempowerment of peoples through population transfer is an incremental process; "as the number of settlers increase, the host population becomes increasingly marginalized by its gradually diminished capacity to exercise control over the economic, political, social, and cultural aspects of the territory."[1454] Uprootdeness takes away people's sense of control over their destiny. As the core component of the right to external self-determination is the right of a people to freely determine its status, a population uprooted from its homeland and/or seriously diluted by the presence of settlers would be impeded in the exercise of these rights.[1455] That is because state practice has recognized the legal consequences of *faits accomplis*; consequences detrimental to external self-determination.

On the other hand, settlers may acquire a right to self-determine when treated as a *de facto* or *de jure* minority or majority by the occupying power and/or the international community (e.g. UN). Insidiuously, settlers may become part of the people, as the case of Cyprus illustrates, or become part of the population entitled to partake in exercices of both internal and external self-determination, such as in Western Sahara. I therefore suggest that population transfer in the form of settler transfer effects the self-determination of persons transferred while affecting the

[1452] *The Declaration on Principles of Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* UNGAOR, UN Doc A/5217 (1970) at art 1.
[1453] See Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UN ECOSOC, 49th Sess, UN Doc E/CN4/Sub2/1997/23 (1997) at paras 50, 202.
[1454] Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics 159 at 200.
[1455] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UN ECOSOC, 49th Sess, UN Doc E/CN4/Sub2/1997/23 (1997) at para 203.

right to self-determination of the receiving – protected and/or displaced – population. In this sense, settler transfer remains one of the most efficient use of force against peoples's right to self-determination in today's international relations; a strategy against which the international community has proved quite powerless as evidenced in the following case studies.

The graph below attempts to capture my thinking with regard to the two apparently opposite expressions of self-determination in relation to the transfer of settlers:



1.4 On the need to be careful with the implementation of self-determination as a solution to conflict

External self-determination is a solution to resolve territorial claims in the context of armed conflict, including occupation. This occurs when parties to an armed conflict, but not necessarily all parties, agree that the solution to the conflict reside in the self-determination of people. [1456] In theory, self-determination will be exercised when the occupying power withdraws from (1) a state possessing a democratic/representative regime; (2) when the

[1456] Hector Gros Espiell, UN Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN4/Sub2/405/Rev1 (1980) at para 45.

peoples of a failed, undemocratic state are able to exercise both internal self-determination ; or, (3) when the peoples of a territory that is not a state are able to exercise external self-determination.[1457]

The problem in cases of occupation involving population transfer is that the occupying power has no intention to withdraw, effectively stalemating self-determination as a solution. Self-determination has been the preferred solution of the international community in the cases of Palestine, East Timor and Western Sahara for instance.[1458] However, the results are mixed, because when a territory is not a state, it may be prevented from exercising external self-determination by the unlawful use of force that constitutes occupation[1459] and settler transfer.

What's more, settlers' exercise of self-determination may legitimize - albeit indirectly - recognition of an otherwise unlawful title. Ian Brownlie explains how self-determination can truncate the legal consequences normally entailing the unlawful use of force, which encompasses cases of settler transfer.

> The use of force to change the legal status of territory is excluded by a peremptory norm of general international law, and applies to *all* uses of force in international relations (including in self-defense) - *a fortiori* where the use of force is of doubtful legality. Apparent exceptions, when the right of the loser is precluded, occur when there is a disposition of territory by the principal powers or some other international procedure valid as against states generally. Such dispositions may result in an aggressor keeping territory he seized: but the title thenceforth is not based upon the illegal seizure. Suppose that, objectively speaking, the result of the transfer were in accordance with the principle of self-determination: would this circumstance supersede the illegality of seizure? It is probable that, at the very least, recognition of the title of the transference by third states would then be justifiable and would consolidate the rights of the holder.[1460]

[1457] For a detailed categorization, see Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 130, 147-150.

[1458] ICRC project on occupation: *Occupation and Other Forms of Administration of Foreign Territory*, Expert meeting report, Tristan Ferraro, ed (Geneva: ICRC, March 2012) at 45.

[1459] On occupation as possibly unlawful use of force, see Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 130.

[1460] "However, at present there is insufficient practice to warrant the view that transfer is invalid simply because there is no sufficient provision for expression of opinion by the inhabitants. The position would change if more states refused to recognize cessions precisely because the principle had been ignored. At present most claims are made in terms which do not include a condition as to due consultation of the population concerned." It seems that third state recognition is what matters. As Ian Brownlie also writes "the modern law prohibits conquest and regards a treaty of cession imposed by force as a nullity. Even if - and this is open to considerable doubt - the vice in title can be cured by recognition by third states, it is clear that the loser is not precluded thus

With its demographic remaking, the transfer of settlers can be an efficient civilo-military means to ensure recognition of the consequences of aggression under the guise of self-determination. And this is why, for self-determination not to become a double sword, settlers transferred in the post-colonial era and/or during military occupation should not have a right to self-determination, at least until the receiving population has exercised theirs.

The self-determination of inhabitants under occupation or living in the occupied territory is not the solution to all military occupations, because the demographic composition of the population may have been significantly altered by settler transfer. Basically, when the bond between a people and its territory is broken due to massive population transfer of the local population and settler infusion, exercising self-determination through referendum or plebiscite becomes irrelevant as the territory lost much of the original inhabitants entitled to self-determine.[1461] The *Special Raporteur on Population Transfer* was acutely aware of the problem:

> The exercise of the right of people to self-determination presupposes the free and genuine expression of their will, such as by means of elections or a plebiscite. However, in a situation where a settler population has become a majority in a certain territory through policies of induced settlement in combination with displacement of the original population, exercise of democratic rights by that majority determines the outcome of the election and renders the concept of "genuine expression of their will" an empty promise for the original inhabitants.[1462]

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from challenging any title based upon a transfer from the aggressor. It is the force of a powerful prohibition, the stamp of illegality, which operates here rather than the principle *nemo dat quod non habet*." [Emphasis added] Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 161-162; *Contrario*, "In the case of such transfer [changes of territory] the States involved are duty-bound to ascertain the wishes of the population concerned, by means of a referendum or plebbiscite, or by any other appropriate means that ensure a free and genuine expression of will." Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 190.

[1461] On the difficulty of consulting the population of the Falklands/Malvinas and Gilbraltar through referendum or plesbiscites as a result of the presence of British people on the territories, see Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 88.

[1462] A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN4/Sub2/1993/17 (1993) at para 206.

Settler infusion may thus nullify the validity of self-determination. This is what happened with the referendum foreseen and yet to be held in occupied Western Sahara, because the settler population is believed to outnumber the indigenous Sahrawi population. In a nutshell, population transfer impedes the self-determination of the receiving population while it remains the solution to seal the fate of the receiving population, and ultimately, of transferrees.

1.5 Settlers are conquest's last bastion

So far, it has been argued that settler transfer is essentially a colonial endeavour contrary to the right of self-determination; a right affected and effected by population transfer, but also a right that holds the solution to remedy settler transfer, *if* carefully implemented. The following sections argue that settler transfer is an incremental part of the aged-old act of conquest. The Permanent Court of International Justice in the *Legal Status of Eastern Greenland* in 1933 considered that conquest "operates as a cause of loss of sovereignty when there is a war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State."[1463] Conquest is an act of aggression that can destroy the claim to statehood of states in *statu nascendi* and weaken the sovereignty of states, because law leaves too much room for recognition of the consequences of settler transfer. There is thus, in the law of recognition, a window to legitimize population transfer. From this angle, international law remains a tool of international politics which serves to formalize sovereign will and the national intests of the strongest.[1464]

Conquest, in the sense of aggression and *de jure* or *de facto* annexation[1465] of territory through forceful population transfer, is the intent and consequence of the transfer of settlers. Historically, settler transfer surreptiously allowed sovereign title to accrue because

[1463] *Legal Status of Eastern Greenland* (1933), Judgement, PCIJ (Ser A/B), No 53 at 47.
[1464] See for instance Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 14th ed (Paris: Dalloz, 2014) at 10-11.
[1465] "Annexation is in contrast to acquisition *a)* of *terra nullius* by means of effective occupation accompanied by the intent to appropriate the territory (Occupation, Pacific); *b)* by cession as a result of a treaty concluded between the States concerned (Treaties), or an act of adjudication, both followed by the effective peaceful transfer of territory; *c)* by means of prescription defined as the legitimization of a doubtful title to territory by passage of time and presumed acquiesence of the former sovereign; *d)* by accretion constituting the physical process by which new land is formed close to, or becomes attached to, existing land." Rainer Hofmann, "Annexation", Max Planck Encyclopedia of International Law (MPEPIL), last update February 2013, para 1, Online: http://www.mpepil.com/

international law considered war a normal expression of sovereignty.[1466] Until the nineteen century, conception of sovereignty allowed title to accrue through occupation of territory considered *terra nullius* whereas sovereignty could be transferred by the following means: prescription through time; cession by treaty; accession through natural changes to the land; and conquest, also termed subjugation.[1467] Revolt, known as secession, could also lead to statehood.[1468] The UN Special Rapporteur on Population Transfer explained the historical link between conquest and settler transfer,

> Throughout history and until the present day, the seizure and long-term occupation of territory has depended largely on the transfer of populations. The acquisition of territory by military force is generally a preliminary step towards achieving the objective of control of a given territory. When the occupied or annexed population is ethnically different from that of the occupying Power, that Power assures its hold on the seized land by replacing its population with a more compliant group.[1469]

Occupation presumed title to territory would be transferred following formal defeat and a declaration of annexation or a treaty signed under compulsion.[1470] These means of territorial acquisition were considered perfectly legitimate and lawful. And this thinking subsists in the practice of settler transfer, albeit at the confines of international law and relations.

The formal reversal of international law's position on the acquisition of territory by force is relatively recent and still lacks effectivity.[1471] Until war was restricted in the *Hague*

[1466] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 1032.

[1467] See R Y Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 6-7, 20; Brownlie lists: cession and transfer; title of successor states in accordance with the principle of *uti possidetis*; disposition in the name of the international community; renunciation or relinquishment; adjudication; effective occupation; acquisitive prescription; acquiesence and recognition. Ian Brownlie, "Title to Territory (Acquisition and Loss of Territory)" (1995) 255 Recueil des cours 154 at 156-158; Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 121; J. Maurice Arbour & Geneviève Parent, *Droit international public*, 6th ed (Cowansville: Éditions Yvon Blais, 2012) at 271.

[1468] See R Y Jennings, *ibid* at 7.

[1469] A S Al-Khasawneh & R Hatano, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, *Preliminary report*, UNECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/17 (1993) at para 65.

[1470] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 167; Rainer Hofmann, "Annexation", Max Planck Encyclopedia of International Law (MPEPIL), last updated February 2013, paras 2-3, Online: http://www.mpepil.com/

[1471] On effectiveness of the prohibition of the use of force see Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2008) at 25*;* John Curie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 448.

Convention and Regulations of 1907,[1472] the *Convenant of the League of Nations* of 1919[1473] and became a prohibited means to achieve political aims in the 1928 *General Treaty for the Renunciation of War* (Kellogg-Briand Pact)[1474] and the 1932 *Stimson Note* adopted in a resolution of the League of Nations,[1475] the select few law-makers considered there was an unrestricted right to war and to annex territory in public international law.[1476] Consultation of the population on the fate of the territory through a plesbiscite was not a prerequisite as self-determination had yet to mature.[1477] Because conquest conferred title to territory and with it the right to transfer settlers, implantation of settlers prior to 1928 are considered legal and remain valid.[1478] For instance, British settlers who were installed in the Falkland-Malvinas following the expulsion of the inhabitants in 1833 are entitled to stay in the territory although the forceful and colonial nature of the occupation does not grant settlers the status of people entitled to external self-determination, which would allow self-determination to resolve the conflict between Britain and Argentina.[1479] This historical line could even be pushed to the Second World War with the advent of the *UN Charter*.[1480] Because until at least 1933, the Permanent Court of International Justice considered that "conquest only operates as a cause of

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[1472] *Hague Convention (IV) respecting the Laws and Customs of War on Land its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907 at Art 1.
[1473] "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." *Convenant of the League of Nations*, 28 April 1919 (including amendments, 1924), Articles 10, 12-14.
[1474] "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." *General Treaty for the Renunciation of War (Kellogg-Briand Pact)*, 27 August 1928 at Art 1.
[1475] "The Stimson Note of January 7 1932" (1932) 26:2 The American Journal of International Law 342 at 342.
[1476] On the evolution of the rule, see Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public* (Paris: Dalloz, 2010) at 613, 657; Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris : Lextenso éditions, 2009) at 1032-1037; John Curie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 452-453; for a discussion of the demise of the right to conquest, see Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 180.
[1477] See Rainer Hofmann, "Annexation", Max Planck Encyclopedia of International Law (MPEPIL), February 2013 at para 9, Online: http://www.mpepil.com/
[1478] Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) at 240.
[1479] See Sonia A M Viejobueono, "Self-Determination v Territorial Integrity: The Falkland/Malvinas Dispute with Reference to Recent Cases in the United Nation" (1990-1991) 16 African Year Book of International Law 1 at 12-13 and 22-24, 30.
[1480] See for instance, J Maurice Arbour & Geneviève Parent, *Droit international public*, 6th ed (Cowansville: Éditions Yvon Blais, 2012) at 273.

loss of sovereignty when there is a war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State."[1481] It is only by the end of World War II that prohibition of the use of force and non-recognition of occupied and annexed territory (conquest) became a rule of international law. Although law and practice did not always follow through, attempts to constrain war and conquest nevertheless predate the post-WWII legal order.[1482]

With the abolition of the right to annex sovereign territory came the abolition of the right to transfer settlers; the two being intimately intertwined. The prohibition of forcible acquisition of territory is entrenched in the UN Charter and subsequent instruments and prohibits recognition of situations created by the used of force.[1483] The message is essentially reiterated in Article 2(4) of the *UN Charter* which provides that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[1484] An armed attack that has for object or result the annexation of territory would fall under Article 2(4).[1485] In this regard, the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* is most pertinent when it affirms that "the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal."[1486] Accordingly, the International Commission of Jurists took the stance that "with the right to

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[1481] *Legal Status of Eastern Greenland* (1933), Judgement, PCIJ (Ser A/B), No 53 at 47.
[1482] Arguing the obligation not to recognize came prior to 1945: Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 418-419; Ian Brownlie, "The Use of Force by States" (1995) 255 Recueil des cours 195 at 197; John Curie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 457; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v Unites States of America)*, Judgment [1986] ICJ Rep 14 at para 186; See Sharon Korman, *The Right of Conquest:The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996).
[1483] Pierre-Marie Dupuy and Yan Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 41.
[1484] *Charter of the United Nations*, 26 June 1945, Can TS No 7 at Art 2(4).
[1485] Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 733. As Crawford explains, "the protection accorded to States by Article 2 paragraph 4 extends to continuity of legal personality in the face of illegal invasion and annexation: there is a substantial body of practice protecting the legal personality of the State against extinction, despite prolonged lack of effectiveness." James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 132.
[1486] *The Declaration on Principles of Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* UNGAOR, UN Doc A/5217 (1970), art 1 (12).

conquest, the right to create settlements has also disappeared, and what is left is the bare right of temporary military occupation where necessary in lawful self-defense."[1487] The protection of a territory's legal status is also found in *Additional Protocol I* to the GCIV, which stipulates that "neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question."[1488] In theory, war should not change the territorial status of a state.

While armed conflict does not necessarily breach the prohibition on the use of force as war may result from self-defense or a mandate of the Security Council, when settlers are transferred into the territory of a party, the occupant carries out in bad faith a prohibited forcible use of force in contravention of Articles 2(4) and 51 of the *UN Charter*.[1489] The denial of self-determination entailed by occupation, especially when prolonged, combined to the colonial nature of settler transfer amount to an international crime.[1490] Accordingly, the transfer of settlers renders occupation unlawful, even if the initial use of force prompting occupation was lawful, because settlers are not a legitimate means of self-defense against an aggressor nor permitted of an occupying power, but in fact an indication the occupation is not a temporary state of affair.[1491] As Eyal Benvenisti submits, "the subjection of the right to self-defense to the necessity requirement, to the extent that it is in fact justified, could imply that the occupation becomes an act of aggression when it no longer serves the initial purpose of defending against the aggressor who has been defeated."[1492] The transfer of settlers can never be a legitimate defense against an aggressor state or a self-determination entity.[1493]

[1487] International Commission of Jurists, "Israeli Settlements in the Occupied Territories" (1977) 19 Review of the International Commission of Jurists 27 at 35.
[1488] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 4.
[1489] On good faith as a metajuridical principle of international law, see Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 78-79.
[1490] See discussion by Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 181.
[1491] For a discussion see Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley Journal of International Law 551.
[1492] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 17.
[1493] "The plea of necessity likewise cannot excuse the breach of a peremptory norm." *Report of the International Law Commission,* UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) para 4 at 208.

Such transfer effectively changes the legal situation from a lawful military situation, i.e., occupation, to an unlawful use of force, i.e., aggression. A controversial legal concept, aggression is understood as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."[1494] Aggression being a war against peace, "no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful."[1495] This conforms to the *Montevideo Convention*, which stipulates that states "establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force."[1496] Consequently, the transfer of settlers into an occupied territory or in the course of war constitutes, among others, a use of force preempting recognition of sovereign entitlements.

But is the annexation of the territory of an aggressor state an exception to the prohibition on the use of force? Annexation of an aggressor's territory is prohibited since it renders title dependent upon identification of the aggressor, a highly contentious issue; exceeds the limit of self-defense, which is to respond to an immediate threat whose goal is restoration to the *statu quo ante*; contravenes the principle of peaceful resolution of disputes, as enshrined in Article 2(3) of the UN Charter; and defies the law of occupation, which entails respect for sovereignty and peoples' right to self-determination.[1497] There is therefore no exception such as the punishment of an aggressor through capture of its territory. Yet, it has been argued that *debellatio* combined to self-determination following occupation of an aggressor state may result in the lawful acquisition of territory by conquest. Sharon Korman argues that "the only exception to this prohibition would seem to be the case where an aggressor state, as a result of its total defeat in war, has ceased in fact to exist, and the inhabitants of the conquered territory

[1494]The UN General Assembly includes in its definition of aggression "the invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof." *Definition of Aggression*, UNGAOR, 29th Sess, UN Doc 3314 (XXIX) (1974) at Arts 1, 3(a) and (c).
[1495] *Definition of Aggression*, UNGAOR, 29th Sess, UN Doc 3314 (XXIX) (1974) at Art 5(3).
[1496] *Montevideo Convention on the Rights and Duties of States*, 26 December 1933 (entered into force 26 December 1934) at Art 11.
[1497] See R Y Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 55-56; For a discussion, see Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 200-229, 257; Also Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley Journal of International Law 551 at 570-574.

actually wish to be brought under the jurisdiction of the occupying state in the exercise of their right to self-determination."[1498] When the losing state is completely annexed and subjugated, unable to resist, not even through a government in exile or a movement of resistance, when then speak of *debellatio*.[1499] Hence, *debellatio* combined to self-determination.

1.5.1 Settler transfer takes place in states in *statu nascendi* and blurs statehood

The relationship between settler infusion and the commencement, continuity and extinction of people recognized "as having an entitlement to statehood, and thus a state in *statu nascendi"*[1500] has been little studied. Yet, population transfer does intent and may erase such entitlements, in particular in armed conflict. The following section argues that settler transfer often takes place when the territory occupied is in *statu nascendi* in order to preempt the birth of the state. In *nascendi*, the state is particularly fragile to demographic manipulations, particularly settler transfer. Although there is a presumption of continuity during occupation for established states, this is less evident for emerging entities, because when criteria of statehood weaken or disappear, so may the state in *statu nascendi* and its chance of being recognized.

Entities in *statu nascendi* are deemed states to be and arguably meet, or soon will, the criteria of statehood. Statehood presumes the independence of the state, but such independence may be partially or permanently alienated.[1501] In that sense, "the legal concept of statehood provides a measure for determining whether in a given case rights have been acquired or lost."[1502] Statehood thus serves as benchmark to evaluate the candidature of states in *statu nascendi*. This is especially true in contentious cases. As Malcom Shaw pointed out:

> There is also an integral relationship between recognition and the criteria for statehood in the sense that the more overwhelming the scale of international recognition is in any given situation, the less may be demanded in terms of the

[1498] Sharon Korman, *ibid* at 302.
[1499] Robert Kolb and Sylvain Vité, *Le droit de l'occupation militaire, perspectives historiques et enjeux juridiques actuels* (Bruxelles: Bruylant, 2009) at 93-94.
[1500] Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 77; See Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 35.
[1501] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 45.
[1502] James Crawford, *ibid*.

> objective demonstration of adherence to the criteria. Conversely, the more sparse international recognition is, the more attention will be focused upon proof of actual adherence to the criteria concerned.[1503]

The negative repercussions of population transfer on *statu nascendi* can be attributed to the criteria employed by the international community to assess statehood; a *people* in a set *territory* capable of *self-governance*. These criteria disfavour states in *statu nascendi* subject to settler transfer because dwindling elements of statehood, a stalled expression of external self-determination and stringent opposition from the occupying and transferring state make less likely the emergence of a sovereign state.[1504] This is particularly true since there is no centralized body taking binding decisions on the status of a new state.[1505] With the exception of non-recognition imposed by a binding resolution of the United Nations and perhaps at the European level, recognition remains largely a unilateral affair left to the discretion of governments.[1506] The consequence is unequivocal: "in the early stages of settler infusion, strategic settlements and infrastructure undermine the host population's claim to a distinct geographical region; over time, sheer numbers can permanently destroy this claim."[1507] In fact, Eric Kolodner is correct to conclude that "the criteria by which the international community judges the legitimacy of a people's external right to self-determination ironically presents incentives for the aggressor country to maintain and increase its settler infusion policies."[1508]

The dominant definition of statehood relies on effectiveness and is found in the 1933 *Montevideo Convention on the Rights and Duties of States*, which defines the state as a person possessing a: (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other states.[1509] But this conceptualisation is no longer sufficient

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[1503] Malcom Shaw, *International Law*, 7th ed (Cambridge, Cambridge University Press, 2014) at 150-151.
[1504] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 107.
[1505] Stefan Talmon, *La non reconnaissance collective des États illégaux* (Paris : A. Pedone, 2007) at 9.
[1506] Éric Wyler, *Théorie et pratique de la reconnaissance d'État, une approche épistémologique du droit international* (Bruxelles : Bruylant, 2013) at 20-26, 76.
[1507] Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics 159 at 199.
[1508] Eric Kolodner, *ibid* at 204.
[1509] *Montevideo Convention on the Rights and Duties of States*, 26 December 1933 (entered into force 26 December 1934) at Art 1; Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 70.

and somewhat artificial.[1510] Amid insatisfactory and competing definitions of statehood, James Crawford proposes the following criteria of statehood: (1) a defined territory; (2) a permanent population; (3) a government; (4) a capacity to enter into relations with others; (5) independence; (6) permanence; (7) willingness to observe international law; (8) a certain degree of civilization; (9) recognition; and, (10) legal order.[1511]

Both declaratory and constitutive approaches to statehood are true and interact depending on the path to statehood.[1512] Insufficient is a declaratory theory according to which a state exists as a matter of facts whose international recognition only certifies its existence as an independent state.[1513] Its underpinning rationale is well summed up in these words: "an entity is not a State because it is recognized; it is recognized because it is a State."[1514] Law follows facts because recognition attests to the existence of a state.[1515] As the logic goes, non-recognition of the legal status of a state presuposes that the entity is already a state; otherwise, calls for non-recognition would not be necessary.[1516] Yet, the status of the state changes *prior to* and *after* recognition as relations are normalized.[1517] The main sanction is therefore non-recognition, which constrains the bilateral relations of the new state.[1518] Hence the state exists as a fact, but may not be treated as such. As a sanction, the state is considered a *de facto* local

[1510] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 622.
[1511] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 37, 44. On willingness to observe international law, it is not often mentioned as a criterion and is subject to criticism. In addition, the criterion of 'civilization' is "usually omitted from enumerations of criteria and is redolent of the period when non-European states were not accorded equal treatment by the European Concert and the United States. In modern law it is impossible to regard a tribal society which refuses to conduct diplomatic relations with other societies as *res nullius*." Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 75; for a critique of some of these criteria, see Éric Wyler, *Théorie et pratique de la reconnaissance d'État, une approche épistémologique du droit international* (Bruxelles: Bruylant, 2013) at 34.
[1512] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 14th ed (Paris: Dalloz, 2014) at 34-35.
[1513] See Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 86-88; For a discussion of the declaratory and constitutive theories of recognition, see Gerald Fitzmaurice, "The General Principles of International Law, Considered from the Standpoint of the Rule of Law" (1957) 92 Recueil des cours 1 at 19-26.
[1514] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 93.
[1515] See J Maurice Arbour & Geneviève Parent, *Droit international public*, 6th ed (Cowansville: Éditions Yvon Blais, 2012) at 297; See Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 36.
[1516] Stefan Talmon, *La non reconnaissance collective des États illégaux* (Paris: A Pedone, 2007) at 20, 24.
[1517] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 622-623.
[1518] Éric Wyler, *Théorie et pratique de la reconnaissance d'État, une approche épistémologique du droit international* (Bruxelles: Bruylant, 2013) at 187; Patrick Daillier, Mathias Forteau and Alain Pellet, *ibid* at 623.

entity, government or administration to be replaced by the *statu quo ante*.[1519] The state has an international legal personality, but only possesses the basic rights of a state, such as territorial integrity, political independence and the right to self-defense.[1520] It is an unconfortable, alledgedly temporary situation. But it is practically impossible to challenge the existence of the state[1521] and recognition over time of the factual situation can redefine relations that should otherwise be dictated by the *statu quo ante.*

Equally insufficient is a constitutive theory according to which a state exists as a result of recognition by states, leaving much discretionary power to states.[1522] This construct posites that the international legal order depends on the consent of states, which determines the rights and obligations of new states.[1523] In some cases, recognition of entities not meeting the criteria of statehood may also contribute to consolidate an uncertain legal status (e.g., Bosnia and Herzegovina, Kosovo).[1524] In this sense, it can have a useful protective function beyond the mere recognition of a factual situation. However, it may be considered a prematured recognition, because, arguably, even a state that is widely recognised is not a state if he does not possess the basic criteria (population, government and territory).[1525]

For Crawford, government is "the most single important criterion of statehood."[1526] Aside from government, and quite confusingly, he asserts that "independence is the central criterion of statehood."[1527] Independence is understood to mean "[1] the existence of an organized

[1519] Stefan Talmon, *La non reconnaissance collective des États illégaux* (Paris: A Pedone, 2007) at 42, 44.
[1520] Stefan Talmon, *ibid* at 46; Éric Wyler, *Théorie et pratique de la reconnaissance d'État, une approche épistémologique du droit international* (Bruxelles: Bruylant, 2013) at 161-162.
[1521] See Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 10th ed (Paris: Dalloz, 2010) at 39.
[1522] On the declaratory and constitutive theories, see James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 4-5, 16, 19-26.
[1523] Stefan Talmon, *La non reconnaissance collective des États illégaux* (Paris: A Pedone, 2007) at 6.
[1524] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 93; for a discussion on the effects of recognition of Kosovo, arguing that such recognition is illegal: Alexander Orakhelashvili, "Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo" (2008) 12 Max Planck Year Book of United Nations Law 1 at 29-31; "Thus it seems that Kosovo is an independent dependent state-an entity that is officially recognized as a state, but that cannot in reality function as a state absent strong international support." Milena Sterio, "The Case of Kosovo: Self-Determination and Statehood Under International Law" (2010) American Society of International Law Proceedings 361 at 364.
[1525] Pierre-Marie Dupuy and Yan Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 39-41.
[1526] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 56.
[1527] James Crawford, *ibid* at 62, 65-66; For Brownlie, independence is "the capacity to enter into relations with other states." For a similar stance on independence, see Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 71.

community on a particular territory, exclusively or substantially exercising self-governing power, and [2] the absence of the exercise by another State, and of the right of another State to exercise, self-governing powers over that territory."[1528] As the main governing power in the territory, a government is internally and externally independent. It may therefore be concluded that an *independent government* is central to statehood. And once statehood is achieved, it is sovereignty that protects independence.[1529] Yet independence, as condition and criterion of sovereignty,[1530] is a polysemic construct.[1531] Worth noting are the different and somewhat confusing conceptions of sovereignty, but for the sake of clarity, sovereignty is here understood as an attribute of statehood, not a criterion; the criterion being independence.[1532]

On statehood, Crawford seems to concur with Ian Brownlie's proposition:

> the definition of a state for present purposes is perhaps a *stable political community*, supporting a legal order, in a *certain area*. The existence of *effective government*, with centralized administrative and legislative organs, is the best evidence of a *stable* political community. However, the existence of effective government is in certain cases either unnecessary or insufficient to support statehood. [...] The *principle of self-determination* will today be set against the concept of effective government, more particularly when the latter is used in arguments for continuation of colonial rule.[1533]

Hence, a state is not only a question of effectiveness; other principles come into play and may affect statehood, such as self-determination, non-annexation or the unlawful use of force and

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[1528] James Crawford, *ibid* at 437.
[1529] See Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 10th ed (Paris: Dalloz, 2010) at 31.
[1530] See Pierre-Marie Dupuy and Yann Kerbrat, *ibid* at 31.
[1531] See for instance Éric Wyler, *Théorie et pratique de la reconnaissance d'État, une approche épistémologique du droit international* (Bruxelles: Bruylant, 2013) at 33-34.
[1532] Although Crawford lists sovereignty as a criterion, he later explains in discussing the relation between independence and sovereignty that "Since the two meanings are distinct, it is better to use the term 'independence' to denote the prerequisite for statehood and 'sovereignty' the legal incident." James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 32, 89. For Brownlie, independence is synonymous with sovereignty, Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 73, 76; See *also Island of Palmas case* (1928), Permanent Court of Arbitration, II UN Rep Arbitration Awards 829 at 838; Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 10th ed (Paris: Dalloz, 2010) at 31-32; For a smilar opinion, see Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 449, 467; See Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 14-26.
[1533] [Emphasis added] Ian Brownlies, *ibid* at 70-71, 90.

human rights.[1534] As Crawford explains, "norms that are non-derogable and peremptory cannot be violated by State-creation any more than they can by treaty-making."[1535] There is thus an obligation of non-recognition in certain situations involving peremptory norms, also known as the Stimson doctrine.[1536] This conception of recognition evolves with peremptory norms and is of a Hartian *open texture*.[1537] Accordingly, a state can be effective or a state *de facto* yet not be recognized as a state because it fails to respect peremptory norms. States that would recognize such state would themselves be acting contrary to international law because they would condone a serious violation.[1538] As Crawford explains, "the question must be whether the illegality is so central to the existence or extinction of the entity in question that international law may justifiably treat an effective entity as not a state (or a non-effective entity as continuing to be a state)."[1539]

In contrasdistinction, it has been proposed that these additional criteria are the domain of recognition of governements rather than criteria of statehood.[1540] It is further asserted that *jus cogens* is not a criterion applicable to the creation of states since existing states in violation of *jus cogens* do not stop being states.[1541] Thus, *jus cogens* should not apply to determine statehood, because it does not apply to the status of existing states. While it may not apply to the status of existing states, it does trigger state responsibility, and some would argue, a responsibility to protect that weakens the sovereignty of the culprit state.

An evolutive stance appears to grant greater weight to the obligation of non-recognition than the classic positivist doctrine. Whereas positivists will recognize statehood based on the

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[1534] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at v-vi, 97-98, 106-107; Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 41-47.

[1535] In relation to the Bantustans, he cites non-discrimination or equality as a peremptory norm, James Crawford, *ibid* at 345.

[1536] See Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 44; Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 626.

[1537] Éric Wyler, *Théorie et pratique de la reconnaissance d'État, une approche épistémologique du droit international* (Bruxelles : Bruylant, 2013) at 40.

[1538] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 626-627.

[1539] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 105.

[1540] Stefan Talmon, *La non reconnaissance collective des États illégaux* (Paris: A Pedone, 2007) at 11-12, 25.

[1541] Stefan Talmon, *ibid* at 33.

presence of a population, a government, and a territory, the construct put forward by Brownlie and Crawford, among others, blocks statehood when these classic criteria are undermined by violations to peremptory norms of international law. The main effect of these constructs is that a classic-positivist stance will recognize statehood as *de facto*, but may withold recognition for diplomatic and other purposes, whereas an evolutive stance will attempt to pre-empt any form of recognition of the state by devising stricter criteria founded on peremptory norms, and this, despite effectivity.[1542]

That said, the independence of government over a territory is most seriously affected by population transfer. Depending on the extent and nature of settler infusion, the host population of the state in *statu nascendi* may no longer constitute a stable political community operating an effective government over its territory.[1543] A state to be must have a defined territory, though not necessarily defined borders, for the government to maintain law and order and functionning institutions.[1544] As Brownlie explains, "evidently it [territory] is important, since in the absence of the physical basis for an organized community, it will be difficult to establish the existence of a State."[1545] Depending on the nature of settlers' regime in the territory, the community may cease to "exercise *exclusive* control over *some* territory" therefore undermining its ability to govern.[1546] Settlers may alter the capacity of the community to govern over swathes of territory or over the entire territory when they take political control through a puppet government or when the host population is displaced and enclaved.[1547] So when the population of the state in *statu nascendi* is no longer able to effectively govern its territory because of its dislocation, chances to see an independent state emerge are slim.

That is why, in the context of settler transfer, the most important criterion to preserve the state in *statu nascendi* is not effective governance, but a permanent population; that is, the physical presence in the territory of a majority of the people entitled to self-determination. However,

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[1542] For a discussion of *de facto* and *de jure*, see for instance Éric Wyler, *Théorie et pratique de la reconnaissance d'État, une approche épistémologique du droit international* (Bruxelles: Bruylant, 2013) at 84-87, 194.
[1543] See James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 55.
[1544] James Crawford, *ibid* at 46, 50-51, 56, 59.
[1545] Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 71.
[1546] [Emphasis added for the word exclusive only]. James Crawford, *ibid* at 48.
[1547] For a definition of puppet regime, see James Crawford, *ibid* at 80-81, see also 46-47, 336.

and apart perhaps from government, international law is generally indifferent when it comes to defining the criteria of statehood,[1548] more particularly population. Trindade correctly underlines the lack of attention accorded to the fate of the population in the litterature, which, he contends, is the most important constitutive element of statehood.[1549] Afterall, there can be no effective and independent governing of territory if individuals part of an otherwise permanent population are no longer physically present or forced into exile, especially in the long run.[1550] As was written nearly 90 years ago, "le peuple sans la terre n'est plus qu'une partie de lui-même. Détaché des traditions qui ont poussé leurs raciness dans le pays sillonné par l'histoire, il est diminué dans son individualité et ne pourra donc réaliser qu'imparfaitement sa légitime ambition nationale, qui est dans le plein épanouissement de sa personnalité."[1551] And this is precisely what settler transfer does; it reconfigures the demographic composition of the permanent population in order to dilute their capacity to govern and ultimately, to exercice their independence.

There is no clear or consensual definition of population or permanent population in the international law of statehood. Often population will be understood in terms of nation or people.[1552] The criterion of population does not require a specific or homogenous population[1553] nor a specific number of individuals.[1554] A definition of population could include all individuals who have a stable legal relation to the state in the form of nationality.[1555] Thus excluded are individuals who do have personal allegiance to the national state, that is, when nationality is not the basis of the relation between the individual and the state.[1556]

[1548] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 33.
[1549] Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 480-481.
[1550] See on the relation between local or self-government and concentration of the population: Morton H Halperin, David J Scheffer & Patricia L Small, *Self-Determination in the New World Order* (Washington: Canergie Endowment for International Peace, 1992) at 51; See on the extinction of state because of displacement, Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 451.
[1551] Robert RedSlob, "Le principe des nationalités" (1931) 37 Recueil des cours 1 at 40.
[1552] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 452.
[1553] Éric Wyler, *Théorie et pratique de la reconnaissance d'État, une approche épistémologique du droit international* (Bruxelles: Bruylant, 2013) at 33, 53.
[1554] See Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 33.
[1555] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 451.
[1556] Patrick Daillier, Mathias Forteau and Alain Pellet, *ibid* at 451; On the evolution of nationality, see Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 14th ed (Paris: Dalloz, 2014) at 98.

Nationality may require factual ties as well as factors such as habitual residence, centre of interest, family ties, "a social fact of attachment" and "a genuine connection of existence, interests and sentiments" to a certain country.[1557]

In addition, an assessment of *permanent population* should be cognizant of the *status ante* of indigenous peoples, minorities and the local population and of their allegiance to the state in *statu nascendi*. Emphasized is on the notion of *permanency* of the population in relation to *statu nascendi*, and not primarily on allegiance to the state in effective control of the territory. This is especially true in context of armed conflict, annexation and occupation where demographic manipulations can affect the allegiance of the population to the government and the state in profound ways. Thus excluded from an assessment of permanent population for the sake of statehood is the transferred settler population and its allegiance to the puppet or new government in power and the annexing state. Such careful evaluation of the permanent population is required to avoid the risk that, over time, a people entitled to external self-determination becomes a minority or an indigenous people because settlers are a majority in the territory.[1558] This would weaken, if not destroy, the quest to external self-determination of the original permanent population.

However, for the purpose of statehood, it seems that the concept of permanent population will be more affected than the concept of people. That is because a people may still exist even if no longer permanently in its homeland. As Cristescu argues, a people "implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population." [1559] However, a state cannot emerge if its permanent population is no longer present. In fact, neither law nor practice are clear as to how the concepts

[1557] On the notion of 'real and effective nationality' see *Nottebohm Case (Liechtenstein v Guatemala)*, Judgment, [1955] ICJ Rep 4 at 22-23; Arguing effective nationality applies mainly in the case of plurinationalities, Claude Emanuelli, *Droit international public: contribution à l'étude du droit international selon une perspective canadienne* (Montreal: Wilson & Lafleur, 2010) at paras 579-585.
[1558] See Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 223.
[1559] Aureliu Cristescu, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minoritie, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, UN Doc E/CN4/Sub2/404/Rev1 (New York, United Nations Publication, 1981) at para 279; James Summers considers that the element of territory "except perhaps for the Gypsies, does not add much." James Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, vol. 8 (Leiden: Martinus Nijhoff, 2007) at 26.

of *permanent population* for the purpose of statehood and the concomitant status of *people* for the purpose of external self-determination are affected by settler transfer.

Kosovo, although not a case of settler transfer, is nonetheless informative since it was deemed by some not to possess the attributes of a permanent population "because of the heavy flows of both Serbian and Albanian refugees that have moved in and out of Kosovo" and because the government was dependent on an international force.[1560] Yet, the mainstream position was to recognize Kosovo as possessing a permanent population, notwithstanding temporary displacement. In situations of long term displacement, the position could differ. In the case of Palestine, for instance, the *permanent population* of a state of Palestine in *statu nascendi* are the residents of the occupied Palestinian territory (OPT) and not the Palestinian people as a whole, most of which are outside the occupied territory, but are nonetheless entitled to external self-determination. Although in theory, the whole Palestinian people is entitled to external self-determination and to live in the OPT, the fact is that only those in the occupied territory will be considered the *permanent population* of the state of Palestine for statehood. In other words, over time, displaced persons outside the state in *statu nascendi* may remain part of a people, but not necessarily of the permanent population.

The following discussion begs questions beyond the scope of this study: Should the statehood of states in *statu nascendi* embroiled in an armed conflict be assessed before the end of the armed conflict? Should there be a form of "protective recognition" akin to "protective secession"? Should there be a centralized process of state recognition following a clear definition of statehood? Although a major reshuffling of international relations is unlikely, giving more weight to violations of peremptory norms of international law instead of government could bring statehood closer to the rule of law.[1561] In other words, the solution to protect states in *statu nascendi* when norms of *jus cogens* are transgressed is to lessen the

[1560] Milena Sterio, "The Case of Kosovo: Self-Determination and Statehood Under International Law" (2010) American Society of International Law Proceedings 361 at 364; on lack of government as a criterion, see also Zohar Nevo and Tamar Megiddo, "Lessons from Kosovo: The Law of Statehood and Palestinian Unilateral Independence" (2009) 5 Journal of International Law and International Relations 89 at 100.

[1561] An indication of a shift toward greater emphasis on the rule of law, democracy and human rights are the 1991 European Union Guidelines on the Recognition of New States. See European Union, "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" (1993) 4:1 European Journal of International Law 72.

degree of effectiveness required for recognition (this may arguably have already been done in the cases of Bosnia and Herzegovina and Kosovo).[1562] As Crawford optimistically remarked,

> There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious default of one party and if the consequence of its not being done is serious prejudice to another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications, and circumstances can be imagined where the international community would be entitled to treat new State as existing on a given territory, notwithstanding the facts.[1563]

Considering the fragility of states in *statu nascendi* to population transfer, it is safe to assume a protective response is one that will speed up a constitutive or 'protective' recognition of statehood. The controversial question is whether there exists a duty to recognize states in *statu nascendi* amid wide discretion.[1564] As will be discussed next, the status of state as an international person provides greater guarantees against the effects of settler transfer than that of *statu nascendi*.

1.5.2 The international law of recognition may legitimize settler conquest

A situation of military occupation involving population transfer does not affect the sovereignty of a state, even if the government is in exile or unable to carry its responsibilities.[1565] A change in a state's situation such as the occupation and annexation of Kuwait by Iraq in 1991 did not affect statehood, despite some level of recognition[1566] and a policy of population transfer. Perhaps the most telling example is that of the the Baltic States, whose statehood was restored in 1991 following long-standing occupation, annexation and settler transfer by the Soviet

[1562] Crawford has made a similar argument in the context of secession of a self-determination unit prevented by the metropolitan state. James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 128.
[1563] James Crawford, *ibid* at 448.
[1564] Gerald Fitzmaurice, "The General Principles of International Law, Considered from the Standpoint of the Rule of Law" (1957) 92 Recueil des cours 1 at 33-34.
[1565] Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 78; That is because occupation is not anannexation; the laws of the occupied state continue to apply and the government in exile continues to represent the occupied state. See Éric David, *Principes de droit des conflits armés*, 4th ed (Bruxelles: Bruylant, 2008) at 562-564.
[1566] See Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 243.

Union.[1567] More recently, the occupation and annexation (or re-incorporation) of Crimea by Russia following a referendum unauthorized by Ukraine and decried internationally has been rejected by members of the General Assembly of the United Nations, which called for non-recognition.[1568]

However, exceptions do exist and the acquisition of territories has been recognized without the exercice of self-determination. Exceptions to the prohibition of the use of force (conquest) are the produce of multilateral recognition, not prescription.[1569] For instance, the international community recognized the title of the Soviet Union over parts of Poland at Yalta and the possession of Vilnius by Lithuania.[1570] The cases of Goa, where India gained international support when it 'reincorporated' part of its territory in the context of decolonization, and West Irian in the 1960s are also oft cited.[1571] Arguably, and albeit for a time, the exception also applied to East Timor, as even the International Court of Justice appeared to accept the tacit consent of states to the annexation and therefore to the right of the occupier to make treaties in the name of East Timor.[1572] As the International Court of Justice wrote:

> The court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. The Court, notes, furthermore, that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory.[1573]

Contexts such as decolonization and *realpolitk,* may twist the application of the norm of non-recognition. Although annexation of a state or part thereof by an occupier weakens elements

[1567] Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 34.
[1568] See *Territorial Integrity of Ukraine*, GA Res, UNGAOR, 68th sess, UN Doc A/RES/68/262 (2014).
[1569] Ian Brownlie, "The Use of Force by States" (1995) 255 Recueil des cours 195 at 198.
[1570] Ian Brownlie, *ibid*.
[1571] Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 188; for an interesting analysis of Goa, see Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 270-273.
[1572] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 61.
[1573] *Case Concerning East Timor (Portugal v Australia)*, Judgment [1995] ICJ Rep 90 at para 32;

of statehood, in general, it does not suffice to extinguish it. The same cannot be said for states in *statu nascendi*.

The creation of new states by an occupying power is not recognized because presumed not to be independent[1574] and in breach of peremptory norms, notably self-determination. When the Turkish Cypriot Legislative Assembly declared the Turkish Republic of Northern Cyprus (TRNC) as an expression of the right to self-determination of Turkish Cypriots in 1983,[1575] it was not recognized because, among other reasons, it is an occupied territory dependent on Turkey[1576] and part of an existing state (Cyprus) whose entire population is entitled to self-determine in a single sovereign territory.[1577] While the declaration may have represented the will of part of the occupied Turkish Cypriot population, including Turkish settlers,[1578] it failed to represent the will of the entire Cypriot population. The solution to the occupation resides in the self-determination of the whole people of Cyprus as opposed to the sole inhabitants of the occupied territory of northern Cyprus.[1579]

[1574] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 74, 76, 132; Ian Brownlie, "The Use of Force by States" (1995) 255 Recueil des cours 195 at 197.

[1575] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 192.

[1576] See James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 133.

[1577] The TRNC was only recognized by Turkey and remains dependent on Turkey both militarily and economically. C Meindersma and A Arakelian, *Human Rights Concerns in Situations of Population Transfers and Population Exchanges: Case Studies and Recommendations* (Geneva: UNHCR, 1994) at 55, ft 199; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 193-194. The Security Council called "upon all States not to recognize the purported States of the 'Turkish Republic of Northern Cyprus' set up by secessionist acts." SC Res 550, UNSCOR, 2539th Mtg, UN Doc S/RES/550 (1984) at para 3; See also SC Res 1217, UNSCOR, 3959th Mtg, UN Doc S/RES/1217 (1998); SC Res 541, UNSCOR, 2500th Mtg, UN Doc S/RES/541 (1983) ; the SC called for a federation that will be bi-communal and bi-zonal in SC Res 649, UNSCOR, 2909th Mtg, UN Doc S/RES/649 (1990) and for a state of Cyprus with a single sovereignty and legal personality and a single citizenship in for instance SC Res 774, UNSCOR, 3109th Mtg, UN Doc S/RES/774 (1992).

[1578] The main waves of Turkish settlers came in 1975 and 1977 and since continued encompassing peasants from Anatolia, military personnel and civil servants. By 1992, there was an estimated 69,000 to 87,000 Turkish settlers. C Meindersma and A Arakelian, *ibdi* at 57; See for instance SC Res 550, UNSCOR, 2539th Mtg, UN Doc S/RES/550 (1984) at para 5; The UN General Assembly has similarly deplored "all unilateral actions that change the demographic structure of Cyprus or promote faits accomplis" and considered that the "*de facto* situation created by the force of arms should not be allowed to influence or in any way affect the solution to the problem of Cyprus." *Question of Cyprus*, GA Res 3212 (XXIX), UNGAOR, 29th Sess, UN Doc A/RES/3212 (XXIX) (1974).

[1579] "Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded [...] and that such a settlement must exclude union in whole or in part with any other country or any form of partition or secession." SC Res 1251, UNSCOR, UN Doc S/RES/1251 (1999) at para 11.

Yet, recognition of new states in situation of occupation during the Second World War took place.[1580] Based on this precedent, it has been argued that "ces exemples de la pratique étatique montrent que même les "États fantoches", dépendants politiquement, économiquement ou militairement d'un État étranger ou bien constitués dans un territoire occupé, sont en principe des États au sens du droit international; il ne devrait pas en être autrement pour la RTNC [République turque de Chypre du Nord]."[1581] This position may sound convincing because it considers a state based on the following basic criteria: a population, a territory, and a government. It is however reductive, because the criteria are applied uncritically: they exclude considerations of demographic changes to the population, violations of *jus cogens* norms, and swiftly brushes aside the notion of independence as 'way too imprecise'.[1582] Evading the legal context, peremptory norms and the criteria of permanent population and independence is a legal opinion that objectivizes conquest.

The prohibition of conquest is undermined by settler transfer, particularly as a result of cession, recognition and a certain dose of acquisitive prescription. The underlying question is the following: Can annexation during occupation become a lawful cession following a peace treaty or prescription acquiesced by states and the governement concerned and/or following third state recognition?[1583] The bottom line question is whether acquisition of territory involving population transfer can incur a change of sovereignty and succeed to conquer all or part of a state or a state in *statu nascendi*?[1584] More simply put, can effectivity trump illegality? The short answer is yes. But it is a timid, indirect and reluctant yes, because as the law stands it is not the forceful annexation and/or transfer that will confer title (in such case the answer would be a clear no) but a treaty of cession between the parties, acquisitive prescription or multilateral recognition of the situation,[1585] which must respect the right to self-determination of the

[1580] See Stefan Talmon, *La non reconnaissance collective des États illégaux* (Paris: A Pedone, 2007) at 16-17.
[1581] Stefan Talmon, *ibid* at 24.
[1582] Stefan Talmon, *ibid* at 19.
[1583] For a very good and succint discussion of these problems, read Rainer Hofmann, "Annexation", Max Planck Encyclopedia of International Law (MPEPIL), last update February 2013 at para 22, Online: http://www.mpepil.com/; on the problem of prescription, see Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 422.
[1584] Is it worth noting that Jennings posed a similar question in his book, R Y Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 53-54.
[1585] Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947) at 429-430.

receiving population. But between state recognition and self-determination, international law, or at least, state practice, still appears to grant more weight to the consent of other states than the consent of peoples.[1586]

A peace treaty in which cession is agreed following *unlawful* use or threat of force is void[1587] although a treaty of cession freely consented by the state to be annexed is considered valid[1588] as well as the acquisition of title by prescription.[1589] As Article 52 of the *Vienna Convention on the Law of Treaties* makes clear, "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[1590] This extends to peace treaties. The tricky part is to assess the validity of consent given by an occupied government in a context where duress is inherent. Concerns over consent explains the rationale underlying the *Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties*.[1591] Ideally, consent should be granted in a peaceful context and once occupation is over. But as Jennings pointed out, treaties of cession are "in effect, a conquest, under the guise of an ostensibly pacific mode

[1586] See Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 10th ed (Paris: Dalloz, 2010) at 61.
[1587] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), at Art 52; Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 231-233; Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963) at 410-413.
[1588] "Acquiescence and recognition are not essential to title in the normal case, but they give significance to actual control of territory and acts of state authority in circumstances when these do not of themselves provide a complete foundation for title in the holder, for example where there are competing acts of possession." Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 152 ; "It is generally recognized that treaties declaring, creating, or regulating a permanent regime or status, or related permanent rights, are not suspended or terminated in case of an armed conflict. The types of agreements involved include cessions of territory, treaties of union, treaties neutralizing part of the territory of a State, treaties creating or modifying boundaries, and the creation of exceptional rights of use of or access to the territory of a State." International Law Commission, "Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries" (2011) II: 2 Yearbook of the International Law Commission at Art 3 and commentary as well as Annex and para (8) of commentary.
[1589] "It is by a settled and uninterrupted course of such illegal activity, acquiesced in, or not effectively or sufficiently countered in the manner, or to the extent, prescribed by international law for the upkeep of title, that a title by prescriptive means is acquired. [....] The illegality of the aggression or breach of the peace is in no way modified or diminished, but in the present state of the international society, lacking any central authority or sufficiently certain means of enforcement, the fundamental purposes of the rule of law are better served by recognizing and regulating the consequences of certain situations of fact, however brought about, than by attempting to deny them their objective status." Gerald Fitzmaurice, "The General Principles of International Law, Considered from the Standpoint of the Rule of Law" (1957) 92 Recueil des cours 1 at 121, 123.
[1590] *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS 331 (entry into force 27 January 1980) at Art 52.
[1591] UN Conference on the Law of Treaties, *Final Act of the United Nations Conference on the Law of Treatie,* UN Doc A/CONF.39/26 (1969), Annex at 285.

of acquisition."[1592] Such peace agreements legitimize *ex post facto* serious breaches of international law.

Besides cession or prescription, and as previously mentioned, third states may recognize the consequence flowing from population transfer and annexation. Citing Jennings once more, "the traditional procedure by which the law is adjusted to the fact - by which indeed, the law when occasion requires may seem to embrace illegality - is the procedure of recognition."[1593] What Hersch Lauterpacth wrote in 1947 with regard to the state of the law of recognition and its relation to non-recognition may still hold true:

> There is no question here of legalizing the illegal act; the question is one of disregarding the effects of the illegality. The results of an illegal act are a legal nullity; they are legally non-existent. The wrongdoer acquires no right under it. But there is no logical objection to the community acquiescing, through collective or individual acts of its members acting in the general interest, in the assertion of a right which did not previously exist. To rule out that possibility altogether would mean to postulate for the law a degree of rigidity which may not be compatible with international peace and progress. Occasions may arise when the continuation of the policy or the obligation of non-recognition may not be conducive to the general good. When that happens, non-recognition may be adjusted to the requirements of peace and stability.[1594]

Here again, peace and stability outweight the rights of people. And as Hersch Lauterpatch correctly maintained, at this stage, recognition "is no longer an act of administration of international law; it is a political function. While not intended to do away with the moral or legal opprobrium attaching to the original illegality, it validates its consequences."[1595] Similarly, Pierre Dupuy and Yann Kerbrat wrote in 2014 that "encore aujourd'hui, cependant, il n'est pas exclu que, sous la pression des faits, des États condamnant initialement une annexion déclarée illégale n'en viennent au bout d'un certain temps à reconnaître l'effectivité de l'occupation exercée par l'État annexant."[1596] They believe the principle of *uti possidetis*

[1592] For an interesting discussion on conquest and cession, see R Y Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 56-57.
[1593] R Y Jennings, *ibid* at 62.
[1594] [Emphasis added] Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947) at 429-430.
[1595] Hersch Lauterpacht, *ibid* at 412.
[1596] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 10th ed (Paris: Dalloz, 2010) at 64-65; Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 14th ed (Paris: Dalloz, 2014) at 65.

juris, initially conceived for colonial frontiers, to extend to the transfer of sovereign title.[1597] Simply put, *uti possidetis de facto* (effectivity) could outweight *uti possidetis juris* (legal title).[1598] James Crawford explains the mechanisms of recognition in this manner:

> recognition of an unlawful situation is not necessarily forbidden by international law. A State directly affected may waive its rights in a particular matter, or other State may waive any interest they may have in the observance of the rule in question. Recognition is one form of waiver. Secondly, one may refuse to recognize the validity or the legality of a particular act and yet be bound to recognize or accept all or some of the consequences. [....] It must also be noted that we are here discussing two different concepts - nullity and illegality. An act which is void will, presumably, produce no immediate or direct legal consequences. An act which, while illegal, is still an 'act in law' may have direct legal effects. The relevance and extent of non-recognition in such cases may be different.[1599]

If correctly encapsulated, recognition may waive the duty of states to observe the rule of law. Recognition may still outweight the peremptory and *erga omnes* norms prohibiting the use of force and the right to self-determination. In this regard, Crawford appears to imply two things: (1) there can be annexation of territory and settler transfer, if consented in a peace treaty with the affected government or if recognised by third states;[1600] (2) whereas the forceful annexation of an occupied territory or part thereof is considered *null and void* and will not be recognized, the legal consequences of settler transfer are illegal and may be recognized.

To be clear, while annexation of an occupied territory is considered *null and void*, the transfer of settlers into the same territory is *illegal* and may therefore carry legal consequences that counter nullity.[1601] As the law stands, it seems to create a false dichotomy between an illegal act and its legal consequences, as if the two were completely distinct and unrelated legal

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[1597] Pierre-Marie Dupuy and Yann Kerbrat, *ibid,* 14th ed, at 65.
[1598] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 10th ed (Paris: Dalloz, 2010) at 69.
[1599] "As has been pointed our already, an obligation not to recognize the legality of an act does not necessarily involve an obligation not to recognize its effects. The extent of any further obligation depends upon the seriousness of the breach and all the circumstances." James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 158, 160; On the limitations of non-recognition, see Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 245.
[1600] Leslie Green, *The Contemporary Law of Armed Conflict*, 3rd ed (Manchester University Press, Manchester, 2008) at 266; John Curie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 553.
[1601] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 158, 160.

matters. This is clearly a legal construct that protects states. Law thus seems to contradict the principle of *ex injuria jus non oritur* (from an illegal act no legal result may arise) in the context of state creation, [1602] making it much closer to *ex factis jus oritur*[1603](law arises out of facts). The result is that the illegality of the violation of a peremptory and *erga omnes* norm becomes meaningless when the consequences are legal and recognised as such.

The questions are therefore: do the legal consequences of settler transfer affect the nullity of annexation (conquest)? Is the grand status inherent to peremptory norms unable to prevent the rules regarding the legal consequences of their breach? Possibly, since recognition of the legal consequences of illegality may weaken the non-recognition of nullity. This occurs, for instance, when settlers become part of the *permanent population* of the occupied state and entitled to self-determine on par with the victim and protected population.

However, recognition of legal consequences may be more difficult in cases of peremptory norms. As Article 53 of the *Vienna Convention on the Law of Treaties* stipulates, "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." [1604] Indeed, as the International Law Commission explained, "since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement." [1605] Arguably, what would make a settlement 'just and appropriate' is the consent of the people affected although this is not cleary articulated by the ILC. In addition, Crawford carefully notes that "by virtue of their primacy, then, peremptory norms *may* invalidate not just treaties but other inconsistent legal acts, as well as affecting the legal consequences which would otherwise flow from factual situations

[1602] Stefan Talmon, *La non reconnaissance collective des États illégaux* (Paris: A. Pedone, 2007) at 28; "The main application of the principle *ex injuria jus non oritur* has lain in the non-recognition of conquest and other territorial changes accomplished by recourse to force contrary to such instruments as the Covenant of the League of Nations and the General Treaty for the Renunciation of War." Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947) at 425.
[1603] See Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 234, 246.
[1604] *Vienna Convention on the Law of Treaties* (1969), 1155 UNTS 331 (entry into force 27 January 1980) at Art 53.
[1605] ILC, *Report of the International Law Commission,* UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) at 289-290 para (9).

inconsistent with them."[1606] Hence, the legal consequences created by settler transfer *could be* invalidated because inconsistent with peremptory norms. Ian Brownlie similarly cautions that "when elements of certain strong norms (the *jus cogens*) are involved, it is *less likely* that recognition and acquiescence will offset the original illegality."[1607] Exactly how 'may' and 'less likely' work out in practice is unclear, in particular in relation to peace treaties. The careful approach adopted by Brownlie and Crawford is indicative of a trend. More forcefully argued is that the practice of states does not follow suit when it comes to *jus cogens*. Talmon holds that: "la thèse selon laquelle la formation d'un État, l'acquisition d'un territoire ou d'autres situations violant une norme de *jus cogens* sont contraires au droit et donc nulles, c'est-à-dire dépourvues de tout effet juridique, ne trouvent pas de confirmation dans la pratique des États." [1608] As law and litterature stand unclear, it is impossible to know with certainty when or how a treaty or other acts will be invalidated by a peremptory norm. That said, this stance leaves room to place the legal consequences of settler transfer as part of a policy of colonial conquest that should be invalidated because inconsistent with at least one peremptory norm of international.

For greater certainty in line with the rule of law and a more predictable and dignifying response towards victims, the legal response to the crime of population transfer during occupation and armed conflict is nullity, not illegality. That is because settler transfer breaches peremptory norms which should carry no legal consequence in order to maintain the prohibition on the use of force, protect statehood and the right to self-determination of the receiving and permanent population. However, this proposition may sound like wishful thinking because state practice has not followed suit. The transfers of settlers in Western Sahara, Palestine and Northern Cyprus have all carried legal consequences despite breaching peremptory norms. For instance, settlers were allowed to partake in exercises of external self-determination (Western Sahara and Cyprus) whereas changes to the demographic composition of the territory have influenced negotiations in relation to territorial status and boundaries (Western Sahara and

[1606] [Emphasis added] Crawford also writes: "if a norm of general international law is non-derogable, third States must have an interest in compliance with it, whether non-compliance manifests itself in the conclusions of a treaty or otherwise." James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 102, 104-105.
[1607][Emphasis added] Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 78.
[1608] Stefan Talmon, *La non reconnaissance collective des États illégaux* (Paris: A Pedone, 2007) at 36.

Israel/Palestine). In this way, elements of conquest, even if tacitly, are recognized. Jennings goes a step further when he states that "there seems little point in denying the validity of the title when the legal consequences that flow from title [recognition by a state of the law in force in the territory and of the nationality granted to inhabitants of the settling and annexing state] have been granted."[1609] Although this statement may be too categorical, as *de facto* recognition of *certain* elements may be necessary, it is clear that recognition of the legal consequences of settler transfer before a peace treaty is accepted by the receiving and permanent population contravenes the nullity entailed by violations of peremptory norms.[1610] More broadly, recognition of legal consequences blurs the distinction between nullity and illegality.

To counter the effect of recognition, the receiving people must assent by exercising freely their right to self-determination because they are the bearer of sovereignty.[1611] In other terms, recognition should not be a state (governmental) prerogative, but a people's prerogative when peremptory norms are involved. A peace treaty or any other tacit *entente* the result of which contravenes the will of peoples legitimizes violations to peremptory norms – that is, discrimination/colonialism, self-determination and the use of force/annexation – entailed by settler transfer.[1612] The evolving law of state responsibility considers state consent insufficient to legitimize a violation of *jus cogens*.[1613] As Cassese makes plainly clear: "any serious breach of the right to self-determination cannot be validated by the consent of the State concerned; it remains a 'crime of State'.[1614] That is because the exercise of self-determination by peoples trumps recognition by governments and third states. Explaining ILC's comment on Article 19(3) of the *Draft Treaty on State Responsibility*, Cassese

> points out that in the provision describing crimes of States as serious breaches of 'an international obligation of essential importance for safeguarding the right of

[1609] R Y Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 63, ft 1 and 67-68.
[1610] ILC, *Report of the International Law Commission,* UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) at Art 41 at 286.
[1611] See Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 227-228.
[1612] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) at Art 53.
[1613] See International Law Commission, *Draft Treaty on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) II:2 Yearbook of the International Law Commission at Art 29; Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 179.
[1614] Antonio Cassese, *ibid* 179-180.

> self-determination of peoples, such as that prohibiting the establishment or maintenance by force of a colonial domination', the expression 'by force' 'should be understood as meaning against the will of the subject population, even if that will is not manifested, or has not yet been manifested, by armed opposition.[1615]

Digging into Cassese's footnote is further elucidating:

> whilst State's consent can never legitimate a breach of a peremptory norm of international law, in a way the population subjected to colonial domination is entitled to determine whether or not force has been illegally used against it, that is, to establish whether or not there has been a breach of a peremptory norm. Thus the will of a 'subjected population' is granted greater legal weight than State's consent.[1616]

Never is a strong term and only appears to apply to populations subjected to colonial domination. But as argued, the transfer of settlers during armed conflict is a continuum of colonial domination and thus falls within this ambit.

That said, and as alluded with regard to the criteria of statehood, more importance needs to be given to the "obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches"[1617] and to the principle of *ex injuria jus non oritur*. As propounded, settlers contradict at least one of three peremptory and *erga omnes* norms of international law: the prohibition of the use of force, self-determination, non-discrimination and one could also argue the protection of civilians in wartime.[1618] The transfer of settlers incurs states' duty to end the illegal situation and, minimally, not to recognize as lawful the consequences of transfer until there is a treaty agreed by the affected government and people.[1619] The *UN Draft Declaration on Population Transfer and the Implantation of Settlers* instructs that:

[1615] ILC, (1976) II:2 Yearbook of the International Law Commission at 121 cited in Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 182.
[1616] [Emphasis added] Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 182, ff 35.
[1617] This obligation applies to situations created by "attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples." ILC, *Report of the International Law Commission,* UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) at paras 5-6 at 287.
[1618] For categories of peremptory norms, read James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 101-102.
[1619] In a situation where the wrongful act continues, especially when the act is a serious breach of international law, other states "shall cooperate to bring to an end through lawful means any serious breach" and should not "recognize as lawful the situation created by a serious breach." International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001) 53rd Sess, UNGAOR, UN Doc A/56/10, II:2 Yearbook of the International Law Commission at Art 41 at 113; ILC, *Report of the*

> the international community as a whole and individual States, are under an obligation: (a) *not to recognize* as legal the situation created by such acts; (b) in ongoing situations, to *ensure the immediate cessation* of the act and the reversal of the harmful consequences; (c) *not to render aid, assistance or support*, financial or otherwise, to the State which has committed or is committing such act in the maintaining or strengthening of the situation created by such act.[1620]

Currently, the UN and state response to annexation or the unlawful creation of states is largely limited to non-recognition, whereas settler transfer is considered illegal or ignored and its consequences recognized as carrying legal weight. This is highly problematic in the long run, as Jennings noted 50 years ago:

> Experience hitherto amply demonstrates that non-recognition alone is an attitude which in any case is often maintainable only for a limited period. And it is obviously true that the effectiveness of this law against force will depend in the long run not upon the denial of title to an aggressor but upon the effectiveness of procedures for stopping the aggression before it produces its fruits.[1621]

In fact, for non-recognition to be more than "a substitute for more forthright means of upholding the law"[1622] or a "pious fiction,"[1623] it must entail cessation, reversal, and non-

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International Law Commission, UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) at para 5 at 287; States have an obligation towards their citizens, other states and the international community as a whole and must "respect, ensure respect for and implement international human rights law and international humanitarian law." *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGAOR, 60th Sess, UN Doc A/RES/60/147 (2006) at Art 1; The ICJ ruled on the legal consequences for states of the continued presence of South Africa in Namibia that: "A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is face with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at para 117.

[1620] [Emphasis added] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc E/CN4/Sub2/1997/23 (1997), Annex II at Art 10; See also Alfred De Zayas, "Forced Population Transfers", Max Planck Encyclopedia (Oxford University Press, 2013) at para 39, Online: http://opil.ouplaw.com/home/EPIL

[1621] [Emphasis added] R Y Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 63, ft 1 and 67-68.

[1622] Referring to the position of Lauterpacht: Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 420.

[1623] Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 247.

forcible counter-measures, all key to an effective international response.[1624] Sharon Korman perfectly captures this idea when she writes that "the refusal to 'validate' a conquest, adopted as an alternative to more effective action to reverse the conquest, cannot be said to demonstrate a serious intention to ensure that the results of an illegal conquest remain a legal nullity, since this requires more effective action to bring the facts into line with the law."[1625] Law reacts to facts, unable to assert itself over them.

To sum up at this stage, *ex post facto* recognition of conquest and settler transfer in a peace accord mutually agreed by the parties or via third state recognition without the free and informed consent of the peoples concerned is in breach of the duty of states not to recognize violations of *jus cogens* and *erga omnes* norms. Unless the victim population freely expresses the wish to be part of the annexing state or of the new state created under occupation and that respect for fundamental human rights is upheld, including a satisfactory arrangement concerning settlers, there is little chance the agreeement can be validated and bring peace. Peoples' consent is *sine qua non*, hence the stalemated situations in Western Sahara, Palestine and Tibet; the subject of the next chapter.

[1624] See Institut de droit international, "Obligations and Rights *Erga Omnes* in International Law" (2005), Res, 5th Commission, Krakow Sess at Art 5.
[1625] Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 246.

1.6. The transfer of settlers is never a lawful practice in war

International humanitarian law is the *lex specialis* with regard to population transfer and is the main source of interpretation to determine the lawfulness of the presence of settlers.[1626] Although the 1907 *Hague Regulations concerning the Laws and Customs of War on Land* do not directly address the issue of settler transfer, it can nevertheless be inferred from the mandate of the occupying power that settlements established on public land or in public buildings contravene the duty of the occupying power as administrator and usufructuary of the public property of the occupied government.[1627] In addition, the occupying power must ensure public order and safety and keep the law in force in the territory "unless absolutely prevented."[1628] Settlements may also impede the right to private and family lives and private property which the occupying power must respect.[1629] New laws or changes to local laws that facilitate the establishment of the civilian population of the occupying power onto public or private property contravene the rules of usufruct and the duty of the occupier to preserve public order and respect privacy and family live. Therefore, the *Hague Regulations* prohibit the transfer of civilians of the occupying power into the territory it occupies because of misuse of (public and private) property, changes to the laws and detrimental effects on public order and the right to privacy, family live and private property rights to the detriment of the occupied government and individuals.

[1626] See Guy Harpaz & Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (2010) 43 Israel Law Review 514 at 548.

[1627] "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907 at Art 55; "Establishment of a settlement, which changes the nature of land use, is inconsistent with the notion of usufruct." David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 77.

[1628] "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907 at Art 43; David Kretzmer, *ibid*.

[1629] "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907 at Art 46.

Belligerent occupation is a sort of temporary trusteeship[1630] through a mandate of *de facto* administration requiring the occupying power to protect the welfare of the population and ensure the normal development of the territory by respecting the social and economic structures in place and ensuring governance until effective control is returned to the sovereign power.[1631] This means, "the political and public life and the occupied territory itself, including its demographic composition, should be changed as little as possible and without effecting the situation after the end of the armed conflict."[1632] Under the Geneva regime, the duty of the occupying power is encapsulated in Article 47 of *Geneva Convention IV* which requires the occupying power to preserve the status of protected persons so that they:

> 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.[1633]

Settler transfer clearly breaks this trusteeship and the duty of good governance by introducing changes in the occupied territory that violate the rights of protected persons under *Geneva Convention IV*. The argument has been made that the duration of the regime of occupation affects its legality.[1634] Legal Experts discussing problems relating to the implementation of the *Fourth Geneva Convention* agreed: "the result [of settler transfer] has been a change in the character of these territories, which runs counter to the very essence of the law governing

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[1630] Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: C.H. Beck, 2008) at 363.
[1631] ICRC, *General Problems in Implementing the Fourth Geneva Convention*, Meeting of Experts, Geneva, 27-29 October 1998, Report by the International Committee of the Red Cross, Ref LG 1998-081-ENG (1998) at 5 (a).
[1632] Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: C.H. Beck, 2008) at 364.
[1633] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 47; Susan C Breau, "Consequences of the Wall in the Occupied Palestinian Territory" in Susan C Breau & Agnieszka Jachec-Neale, eds, *Testing the Boundaries of International Humanitarian Law* (London: British Institute of International and Comparative Law, 2006) 191 at 202.
[1634] For an excellent discussion on the need to introduce the notion of 'resonable time' based on the nature, purpose and circumstances of actions to define the legality of the occupation, see Orna Ben-Naftali, 'A la Recherche du Temps Perdu': Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion" (2005) 38 Israel Law Review 211 at 213, 221-226.

occupation."[1635] In sum, the transfer of settlers challenges the *raison d'être* of the law of occupation.

The pillar of the prohibition of settler transfer is Article 49(6) of *Geneva Convention IV*, which commands the Occupying Power "not [to] deport or transfer parts of its own civilian population into the territory it occupies."[1636] Unlike other provisions of Article 49, the International Court of Justice and the International Committee of the Red Cross are adamant when they maintain this clause is not subject to any exception, including the security of the population or imperative military reasons.[1637] Additionally, the transfer of settlers can never be made lawful by arguing a voluntary movement on the part of settlers. The prohibition of settler transfer during military occupation is non-derogable.

Article 49(6) is intent on preventing the transfer by the occupying power of its own population into the occupied territory "for political and racial reasons or in order [...] to colonize those territories."[1638] It was considered that "such transfers worsened the economic situation of the native population and endangered their separate existence as a race."[1639] The goal of the provision is to protect the territorial integrity of states, including state in *statu nascendi,* and to discourage aggression and annexation through the transfer of settlers. That is because the intended permanency to the transfer of settlers contradicts the spirit of occupation by making what should be temporary, indefinite, thereby defying the principles of temporariness,

[1635] ICRC, *General Problems in Implementing the Fourth Geneva Convention*, Meeting of Experts, Geneva, 27-29 October 1998, Report by the International Committee of the Red Cross, Ref LG 1998-081-ENG (1998) at 5 (b)(iii).
[1636] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 49
[1637] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 135; "In order to avert colonization or creeping annexation such as that which occurred during the Second World War, the international community prohibited the transfer (whether voluntary or forcible) by the Occupying Power of its own nationals into the territory it occupies (Art. 49, para. 6)"; ICRC, *General Problems in Implementing the Fourth Geneva Convention*, Meeting of Experts, Geneva, 27-29 October 1998, Report by the International Committee of the Red Cross, Ref LG 1998-081-ENG (1998) at 5 (b)(iii).
[1638] ICRC, *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art 49(6), Commentary of 1958, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=523BA38706C71588C12563CD0042C407
[1639] ICRC, 1958 Commentary, *ibid*, art 49(6).

sovereignty and trust underlying the regime of the law of occupation.[1640] It can safely be argued the transfer of settlers renders unlawful an otherwise lawful regime of belligerent occupation.

Awareness to colonial and annexationist motives was known to the International Military Tribunal of Nuremberg, which considered for indictment as a war crime the "Germanization of Occupied Territories", a process described as follow:

> In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavored to assimilate those territories politically, culturally, socially, and economically into the German Reich. The defendants endeavored to obliterate the former national character of these territories. In pursuance of these plans and endeavors, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonist. [...] This plan included economic domination, physical conquest, installation of puppet governments, purported *de jure* annexation and enforced conscription into the German Armed Forces.[1641]

The indictments of the Military Tribunals under crimes against humanity include 'forced evacuation and resettlement of populations' whereby enemy populations were transferred to other occupied territories or to Germany for slave labor and replaced by Germans and "ethnic Germans."[1642] The indictments for war crimes of the Military Tribunals accused the defendants of "the deportation to slave labor and other purposes of civilians there resident, and the resettlement of such regions by peoples asserted by the Nazis to be Aryans."[1643] In *Rusha*, the court indicted the accused for the crime against humanity of Germanization which was done by "evacuating enemy populations from their native lands by force and resettling so-called "ethnic Germans" (Volksdeutsche) on such lands" [1644] This process of 'Germanization'

[1640]See Orna Ben-Naftali, 'A la Recherche du Temps Perdu': Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion" (2005) 38 Israel Law Review 211 at 213, 221-226.

[1641] *Trial of the Major War Criminals before the International Military Tribunal*, Vol 1, 14 November 1945 – 1 October 1946 (Nuremberg: Germany, 1947) Count 3(J) at 63, Online: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf

[1642] Nurnberg Military Tribunals, Indictments, Case No 8, Count 1 at para 16, Online: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf

[1643] Nurnberg Military Tribunals, Indictments, Case No 4, Count 2 at para 19, Online: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Indictments.pdf

[1644] Nurnberg Military Tribunals*, Rusha Case*, Vol. IV, Count One, crimes against humanity, at 610, para. 2(f), Online: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf

"Forced evacuation and resettlement of populations. In occupied territories enemy populations were forcibly evacuated from their homes and transferred either to other occupied territories, particularly to the General

occurred not only in Poland and the Soviet Union, but also in the West of Europe, such as in Alsace-Lorraine and Luxembourg.[1645] Noteworthy, the transfer of Germans to occupied territories was not always voluntary and measures were taken by the *Reich* to force Germans to move while others who refused to move were sent to concentration camps.[1646]

The discriminatory nature of settlements may explain why the ICRC found them to be incompatible with article 27 of *Geneva Convention IV*.[1647] Settlers are not protected persons under IHL and are in fact excluded from the scope of protection afforded under the law of occupation.[1648] Yet their unlawful presence in an occupied territory may violate the right to equality of protected persons due to the differential treatment they often receive. Article 27 is concerned with the protection of the fundamental rights of protected persons, in particular the right to non-discrimination. This is made explicit when it requires that "all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."[1649] Nationality is the only ground not explicitly covered under Article 27, but is found under Article 13, which, in addition to other prohibited grounds, includes discrimination on the

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Government, or to Germany for slave labor. They were replaced by Germans and "ethnic Germans". The latter were systematically collected in foreign countries, either occupied or under German domination, brought to camps, and then transferred to occupied areas from which the native population had been removed. Before resettlers were transferred to their final destination they were racially and politically examined by the staff of the Immigration Center at Lodz (Einwandererzentrale Lodz)." Nurnberg Military Tribunals*, Rusha Case*, *ibid* at 613-614, para 16.

[1645] "In the West the population of Alsace were the victims of a German "expulsion action." Between July and December 1940, 105,000 Alsatians were either deported from their homes or prevented from returning to them." *Trial of the Major War Criminals before the International Military Tribunal*, Vol 1, 14 November 1945 – 1 October 1946 (Nuremberg: Germany, 1947) at 237-238, Online: Online: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf; and, *The Rusha Case*, *ibid* at 773, para 5(a).

[1646] See for instance, Nurnberg Military Tribunals*,*Vol IV, "Letter from the Gauleiter of Upper Silesia to Greifelt, 19 January 1943, Concerning the Resettlement of Ethnic Germans in Upper Silesia", Prosecution Exhibit 790 at 818-819, Online: http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf The XXIV[th] International Conference of the Red Cross, *Resolution III* (1981) 225 International Review of the Red Cross at 321, para 5.

[1648]Knut Dörman in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2[nd] ed (Munich: C.H. Beck, 2008) at 317; Guy Harpaz & Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (2010) 43 Israel Law Review 514 at 521, 526.

[1649] See *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 135 at Art 27(3). This list of discriminatory grounds is only indicative; other conditions such as language, colour, social position or financial situation may be added. *See* Commentary of 1958 at Art 27, Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=25179A620578AD49C12563CD0042B949

basis of nationality, irrespective a persons' legal status.[1650] From a human rights and IHL perspective, settler implantation violates the principle of non-discrimination when settlers receive a preferential treatment to the detriment of the protected and victim population.[1651]

Recognition of the consequences of settler transfer may further explain why the gravity of the crime has accrued with the development of international humanitarian law and international criminal law. The transfer of settlers is a breach of the *Geneva Convention IV* and a grave breach under *Additional Protocol (I) to the GCIV* which the faulty party must cease by repatriating its citizens and repair by facilitating return and restitution.[1652] Additionally, the transfer of settlers into an occupied territory is prohibited in most national legislations and military manuals.[1653] In drafting the *Draft Code of Offenses against the Peace and Security of Mankind*, the International Law Commission regarded the establishment of settlers as constituting "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."[1654] The act of settler transfer was thus included in the *Draft Code* because it is an "exceptionally serious" violation of the laws of war.[1655]

[1650] *Geneva Convention relative to the Protection of Civilian Persons in Time of War at* Art 13; See also *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Commentary of 1958 at Art 13(1)(B), Online: https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=059D4B2824813FACC12563CD0042AEA8

[1651] Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, UNECOSOC, 54th Sess, UN Doc E/CN 4/1998/53/Add.1 (1998) at part 1(C), paras 1 & 2; *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2105(XX), UNGAOR, 20th Sess, UN Doc 2105 (XX) (1965) at preamble and para 5.

[1652] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 611 at art 85(4)(a) and commentary of ICRC, Art 91, Online; Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds, *Commentary on the Additional Protocol I to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987) at para 3502.

[1653] See Jean-Marie Henckaerts & Louis Doswald-Beck, *Customary International Humanitarian Law*, Vol 1 (Rules) and Vol II (Practice) (Cambridge University Press: ICRC, 2005) at 462 (Vol I) and 2958-2963 (Vol II).

[1654] *Report of the Commission to the General Assembly on the Word of its Forty-Third Session*, II:2 Yearbook of the International Law Commission, UN Doc A/CN.4/SER.A/1991/Add.1 (1991) at Art 22(2)(a) and (b) and Commentary at 105 at para 7; See also *Report of the Commission to the General Assembly on the Word of its Forty-Eight Session*, II:2 Yearbook of the International Law Commission, UN Doc A/CN/SER/A/1996/Add.1 (1996) at Art 20(c)(i).

[1655] *Report of the Commission to the General Assembly on the Word of its Forty-Third Session*, *ibid* at 105 para 3.

In the 1998 *Rome Statute*, the war crime of transferring a population into an occupied territory is clearly defined under Article 8(2)(b)(viii) and also encompassed under Article 8(2)(a)(vii), the latter being directly drawn from Article 49(6) of the Geneva Convention while the former draws from Article 85(4)(a) of Additional Protocol I. Noteworthy, the transfer of settler is a war crime, but not a crime against humanity in the Statute.[1656] The novelty in the *Rome Statute* is that the war crime of settler transfer is defined under Article 8(2)(b)(viii) as "the transfer, *directly or indirectly*, by the Occupying Power of *parts* of its own civilian population into the territory it occupies."[1657] Settlers are civilians, but if soldiers move with their families to the occupied territory, they become settlers and subject to Article 8(2)(b)(viii).[1658] The three elements of the war crime of settler transfer reiterates that the perpetrator: "(1(a)) transferred, *directly or indirectly*, *parts* of its own population into the territory it occupies; (2) The conduct took place in the context of and was associated with an international armed conflict; (3) The perpetrator was aware of factual circumstances that established the existence of an armed conflict."[1659] In the context of settlers, the most important element is element 1(a), as arguably, when settler transfer occurs, there is occupation, thus an international armed conflict, and logically, awareness of effective control by the occupying power. For the war crime of transfer to be committed, the intent required is the movement of the occupier's civilian population into the occupied territory.[1660] The settler population is moved for a certain period of time and not for a short visit in the occupied territory.[1661] The word *parts* infers that a finding of war crime requires more than one settlers, most likely a few.[1662] A literal reading of element 1(a), in particular reference to '*by* the occupying power', '*its* own population' and '*it* occupies' seems to infer that the perpetrator is the occupying power since an individual cannot have an 'own population.'[1663] However, one has to dwell into the meaning of *indirect and direct* to better

[1656] See *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 7(2)(d).
[1657] [Emphasis added] *Rome Statute of the International Criminal Court*, *ibid* at Art 8(1)(2)(b).
[1658] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: C.H.Beck, 2008) at 368.
[1659] [Emphasis added] International Criminal Court (ICC), *Elements of Crimes,* UN Doc PCNICC/2000/1/Add.2 (2000) at Art 8(2)(b)(viii).
[1660] See Michael Cottier in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: C.H. Beck, 2008) at 369.
[1661] Michael Cottier, *ibid* at 368.
[1662] See Michael Cottier, *ibid*.
[1663] Michael Cottier, *ibid* at 367.

understand the political compromise that informs this provision.[1664] In this regard, Israel is the only state that voted against the *Rome Statute* because of opposition to this provision.[1665] The government of Israel explained its vote in these terms:

> Israel has reluctantly cast a negative vote. It fails to comprehend why it has been considered necessary to insert into the list of the most heinous and grievous war crimes the action of transferring population into occupied territory. The exigencies of lack of time and intense political and public pressure have obliged the Conference to by-pass very basic sovereign prerogatives to which we are entitled in drafting international conventions, in favour of finishing the work and achieving a Statute on a come-what-may basis.[1666]

In any case, the terms indirect *and direct* include the occupying power *and/or* its agents involvement in either directly moving settlers, for instance, by developing settlement plans or confiscating private property belonging to the protected population and allowing settlers to settle in these properties; or, indirectly, by inducing transfer through subsidies, tax exemptions, military protection of settlements, or the issuance of building permits in favour of settlers.[1667] This change of wording was considered "not a modification of the scope of the prohibition under the *Additional Protocol* and customary law, but rather an explicit expression, or at most

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[1664] The wording of Article 8.2 (b)(viii) may be confusing because it results from a political bargain between Israel (with the support of the US) and Arab states. See Michael Cottier, *ibid* at 367.

[1665] See William A Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010) at 23; "The definition under the Rome Statute of the war crime of transfer by an occupying power of parts of its own civilian population into the territory it occupies was controversial. Israel opposed the inclusion of any war crime based on article 85(4) Add. Prot. I, supported, to a limited extent, only by the United States. The overwhelming majority of the delegations in Rome however rejected the argument of Israel that this grave breach would not be part of customary international law." Micheal Cottier, *ibid* at 365.

[1666] "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court", Israel, Explanation of vote, *UN Press Release* L/2889, 20 July 1998 at paras 4-5, Online: http://www.un.org/press/en/1998/19980720.l2889.html; In its comment, the delegation of Israel (Mr Nathan) said "His delegation reserved its position on section B, subparagraph (f), relating to the transfer of population. In particular, references to "transfer, directly or indirectly" and the "population of the occupied territory within or outside this territory" should be deleted." *Summary Records of the Meetings of the Committee of the Whole*, 27th Mtg, A/CONF.183/C.1/SR.27 at 284-285, para 32; The delegation of Israel (Mr Nathan) reiterated its position: "His delegation reserved its position regarding section B, subparagraph (f), concerning the transfer of a civilian population, and particularly opposed the words "directly or indirectly", which had no basis in customary international law." *Summary Records of the Meetings of the Committee of the Whole*, 35th Mtg, A/CONF.183/C.1/SR.35 at 336, para 25, Online: http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf

[1667] Michael Cottier, "Article 8 − War Crimes" in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (Munich: CH Beck, 2008) at 365-366, 369.

a clarification, of its content."[1668] Hence criminalised is not only the direct action of the occupying power, but also its indirect actions and the actions of its agents.[1669]

Yet some commentators have attempted to challenge the precise scope of the prohibition, although this remains marginal within academia.[1670] The controversy is essentially about the legal implications of voluntary versus involuntary transfer of settlers. Proponents of the lawfulness of transfer argue that when settlers move voluntarily to the occupied territory, the transfer is not forced; hence, not unlawful.[1671] Among states, this position is articulated only by the Government of Israel according to which only the forcible transfer of settlers is prohibited, thus excluding from the purview of Article 49(6) settlers who move voluntarily.[1672] This argument misses the purpose of international humanitarian law which is respect for the inviolable character of the basic rights of a person[1673] and forgets the victim: the receiving and protected population. Indeed, the transfer may perhaps not be forced on settlers, but it is forced upon the receiving and protected population. That is essentially because the prohibition of settler transfer aims to shield the protected population under occupation, not the settlers,[1674] who are not protected persons under international humanitarian law. The point is that civilians are not a humane means of war, even if they consent. Of course, when the transfer is forced on settlers and contravene their basic rights, they also become victim in need of protection of their human rights. This situation affects neither the lawfulness of the transfer, which remains unlawful regardless of the (in)voluntariness of settlers, nor the responsibility of the transferring state and/or agents.

[1668] Michael Cottier, *ibid* at 366.
[1669] Michael Cottier, *ibid* at 365.
[1670] See for instance Julius Stone, Israel and Palestine: Assault on the Law of Nations (Baltimore: Johns Hopkins University Press, 1981) at 177-181.
[1671] Discussing the issue: Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 230; John Guigley, "Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory" (1998) 10:1 International Law Review 1 at 14-15.
[1672] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 231; "Except for Israel, the entire international community supports the applicability of the Fourth Geneva Convention and Article 49 thereof to the occupied territories." Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff: the Hague, 1995) at 171.
[1673] *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, Commentary 1958 at Art 27.
[1674] Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff: the Hague, 1995) at 149.

CHAPTER TWO – A WEAK INTERNATIONAL RESPONSE TO SETTLER TRANSFER

This section reviews cases of settler transfer in the context of armed conflict, namely the Chinese occupation of Tibet, the Morrocan occupation of Western Sahara, the Indonesian occupation of East Timor and Israel's occupation of Palestine. In all instances, the territories are (or were) states in *statu nascendi*. In all these instances of settler transfer, elements of colonialism and discrimination, denial of self-determination and conquest are evident. In all instances, however, conflicting conceptions of the legal and geopolitical status of the territories compete, resulting in constructs that inform equally conflicting perceptions and actions. The according result is for occupying states to favour integration/annexation by granting some form of autonomy or enforcing the assimilation of occupied populations whereas the will of the local population is either for independence or remains to be freely expressed in a plebiscite or referendum.

A number of additional observations can be drawn from the case studies: 1) semantically, settlers are rarely called settlers; rather returnees, transmigrants, or migrant workers whereas advocates of independence are labelled separatists, secessionists, counter-revolutionaries or terrorists; everything but a people entitled to self-determination; 2) in most cases, the movement of settlers is voluntary and motivated by economic or ideological incentives supported by the State, its agents or para-statal institutions; 3) the majority of settlers are not integrated or mixed within the local indigenous population of the occupied territory and receive a distinctive, preferential status resulting in discriminatory treatments between settlers and locals, at times amounting to apartheid; 4) civilian settlers are used by occupiers as a civilo-military means of asserting control over a population, its territory and government; 5) long-term occupation is an euphemism for conquest; 6) settler transfer does preempt internal and external self-determination, in particular independence for states in *statu nascendi*; 7) in most cases, relevant human rights law and humanitarian law provisions are absent from the international response, particularly Article 49(6) of the *Fourth Geneva Convention*; 8) a legal framework blocked by the occupier and the national interests of powerful states leads to an absent, ambivalent or divided UN response, which at best declares transfers illegal and calls for non-recognition of the annexation; 9) state responsibility and the individual criminal

responsibility of settlers is all but absent from the international response; 10) over time, an absent or constrained international legal framework combined to impunity supports the realist, relativist and pragmatic contention according to which the solution is to be found in *de facto* recognition of the situation on the ground or in accommodation between competing claims.[1675] As Catriona Drew noted, there is "an unacknowledged trend *within* contemporary practice, which (selectively) favours pragmatic negotiation over formal legal entitlement – the all-important *peace process* over self-determination as process."[1676] Cassese similarly noted in contexts of occupation and self-determination, such as the Israeli occupation of Palestine, the Turkish occupation of Northern Cyprus, the Indonesian occupation of East Timor, the Soviet occupation of Afghanistan, and the Iraqi occupation of Kuwait that

> UN action was limited to the adoption of resolutions demanding that the right to self-determination be respected. Most of the time the occupying States in question did not heed the UN appeals. It should, however, be added that in some of these cases the UN called upon Member States to *refrain from recognizing*, that is *legitimizing* the situation brought about by the denial of self-determination.[1677]

The initial principled UN response is often coopted by the politics of national interests. The United Nations, whose mandate it is to act in the interest of the international community as a whole, has lost authority and efficiency as a result of the hegemonic power and privileges held by the five permanent members.[1678] The denial of self-determination that is occupation is maintained by the two tiered international legal order according to which Great Power politics in the Security Council determine the presence or absence of response and willingness to see it enforced.[1679] As Richard Falk put it, "geopolitics conditions the fulfillment of rights vested under international law." [1680] Consequently, the international response offers arbitrary,

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[1675] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 506.
[1676] [Emphasis in original] Catriona Drew, "The East Timor Story: International Law on Trial" (2001) 12:4 European Journal of International Law 651 at 682.
[1677] Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 96.
[1678] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public,* 10th ed (Paris: Dalloz, 2010) at 677-678.
[1679] See Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 98.
[1680] Richard Falk, "The Right to Self-Determination and International Law" in *The Question of Self-Determination The Cases of East Timor, Tibet and Western Sahara*, Conference Report (Geneva: Unrepresented Nations and Peoples Organization, 1996) 1 at 2.

differentiated and discriminatory levels of protection of human rights. This makes the rule of law an uninviting and ineffective means of conflict resolution. Uncertainty and arbitrariness aside, under the umbrella of the UN, international law does make a non negligent contribution to resolving conflicts involving population transfer because it provides a framework, when it is applied, which allows rights violations to remain on the international agenda for decades. The danger through time is a gradual recognition of the legal consequences of population transfer and of breaches to peremptory norms of international law; a recognition that impacts the parameters of conflict resolution and shapes the contours of peace treaties.

A final (11) observation: rights-based results and solutions to population transfer and violations of peremptory norms are not so much the product of political will as much as the product of peoples' sustained determination based on internal unity, non-violent campaigns and popular resistance movements.[1681] Noteworthy in this regard are the attempts by Palestinian and Tibetan civil society to seek justice in foreign national courts[1682] and of East Timorese in a Truth Commission. But stars rarely align to shift *realpolitik* towards a rights-based solution, because the scrutiny of public opinion is short lived and the space for political change is slim. In fact, the context in Asia and the Middle East and North Africa (MENA), particularly with the growing power of China, 9/11 (2001), the 2008 economic crisis and the Arab Spring, has tended to cristallyze the *statu quo* in contentious cases.

[1681] See for instance: Maria J Stephen, "Fighting for Statehood: The Role of Civilian-Based Resistance in the East Timorese, Paletinian, and Kosovo Albanian Self-Determination Movements" (2006) 30:2 Fletcher Forum of World Affairs 57 at 76.

[1682] See for instance, *Bil'in (Village Council) v Green Park International Inc*, 2009 QCCS 4151, [2009] RJQ 2579; *Bil'in (Village Council) v Green Park International Inc*, 2009 QCCA 2470 (CanLII); *The Queen on the Application of Al-Haq and Secretary of State for Foreign and Commonwealth Affairs*, 2009 High Court of Justice Divisional Court, Case No. C0/1739/2009 [2009] 27 July 2009; *Juzgado Central de Instrucción nº 2, Audiencia Nacional, Seccion 4ª de la Sala de lo Penal*, decision, 2006, *Rollo de Apelación nº 196/05 (Spain)*; Christine Bakker, "Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?" (2006) 4:3 Journal of International Criminal Justice 595.

2.1 What kind of self-determination for the Tibetan people?

In 1950, China invaded Tibet, whose controversial status varies from a full fledge independent state[1683] occupied by a belligerent and colonial power to a province of China inhabited by an ethnic minority population. The legal status of Tibet will be discussed further, but a recapitulation of events and of relevant elements are important to ground two diametrically opposed viewpoints that have become highly polemical and stalemated.

The Chinese invasion and occupation of Tibet in October 1950 resulted in the 1951 *Seventeen Point Agreement,* essentially conceeding Tibetan sovereignty to the Chinese government.[1684] From a Chinese perspective, the Agreement, also known as the *Agreement on the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet* liberates Tibet as part of the "founding of new China in October 1949" and "is an important and legally-binding document [...] to settle its domestic ethnic question."[1685] The *Seventeen Point Agreement* included respect for the political system of Tibet and the functions of the Dalai Lama, the protection of monasteries and freedom of religion and no forced "democratic reforms" of Tibetan leadership and society.[1686] The Agreement formalized the annexation of Tibet in exchange for guarantees of autonomy. Other commentators argued the Agreement is not legally binding, because it was signed under duress, imposed by the occupying power on Tibetan authorities.[1687] Informative of Chinese perception of Tibet, the 2013 Chinese White Paper still describes Tibet prior to 1949 as uncivilized, "dark and as

[1683] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 1.

[1684] Tibet justice Center, *ibid* at 5; Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 185.

[1685] *Reply of the Permanent Representative of China to the United Nations Office at Geneva*, UN Doc E/CN4/1992/37 at 2 cited in Tibet justice Center, *ibid* at 15-16.

[1686] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 47-52 and Annex 2, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/

[1687] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 1, 16-18; Kasur Lodi G Gyari, "Tibet: The Right to Self-Determination" in *The Question of Self-Determination The Cases of East Timor, Tibet and estern Sahara*, Conference Report (Geneva: Unrepresented Nations and Peoples Organization, 1996) 27 at 31; Robert D Sloane, "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review 107 at 152.

backward as medieval Europe."[1688] It perhaps shows that autonomy was not granted in a spirit of equality.

More important perhaps is China's non-conformity to the *Seventeen Points Agreement*. A careful assessment of China's conduct with regard to its undertakings of the *Seventeen Point Agreement* led the International Commission of Jurists to conclude it would be difficult to "recall a case in which ruthless suppression of man's essential dignity has been more systematically and efficiently carried out." [1689] In fact, among numerous violations, the Commission found acts contrary to the *Genocide Convention,* notably the forcible transfer of Tibetan children to China in order to separate them from Buddhism.[1690] Because China did not respect its commitments and actually pursued a policy of assimilation, at least from 1957 to 1976,[1691] Tibet repudiated the *Seventeen Points Agreement* in 1959 and the Tibetan revolt engulfed Tibet.

Tibetan resentment to Chinese rule culminated in the 1959 revolt whose main requests were China's withdrawal and full Tibetan independence. The uprising and the Chinese repression that followed led to the departure of the Dalai Lama and the establishment of a Tibetan government-in-exile in India, considered "the continuation of the legitimate and recognized Government of Tibet in Lhasa."[1692] The Dalai Lama was accompanied by approximately 80,000 Tibetans, to be followed between 1959 and 1965 by an additional 50-70,000 persons and a constant flow since.[1693] The Government of Tibet in exile promulgated the Constitution of Tibet in 1963 and the Charter of the Tibetans in Exile in 1991 based on international law

[1688] Information Office of the State Council of the People's Republic of China, "Full Text: Development and Progress of Tibet" *Xinhua* (22 October 2013), foreword, Online: http://news.xinhuanet.com/english/china/2013-10/22/c_132819442.htm
[1689] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 54-56, 64-65, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/
[1690] International Commission of Jurists, *ibid* at 56-57, 62-77.
[1691] See Xiaohui Wu, "From Assimilation to Autonomy: Realizing Ethnic Minority Rights in China's National Autonomous Regions" (2014) 13 Chinese Journal of International Law 55 at 67-68.
[1692] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 44, 40-41.
[1693]International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 49, 72. Available at: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/

and Buddhist principles.[1694] In the 1963 preamble to the Constitution, mention is made of the establishment by China of the "worst form of colonial regime."[1695] Hence, from the onset, China's rule and actions in Tibet were considered colonial by the Tibetan government. Since the mid-1950s, Tibetans have not ceased to resist against what they perceive as occupation and colonial rule.[1696] However, the international response was muted by the geopolitics of the Cold War, in particular the Korean War[1697] and the preservation of Sino-Indian relations, Tibet's isolation and lack of alliance with a Great Power.[1698] The 'Question of Tibet' rapidly faded from the UN agenda.

The first UN General Assembly Resolution on Tibet was voted nine years after the Chinese invasion – that is, following the Tibetan revolt and the forced departure of the Dalai Lama. In 1959, the General Assembly called "for respect for the fundamental human rights of the Tibetan people and for their distinctive cultural and religious life."[1699] In 1961, the General Assembly clearly called on the cessation of practices undertaken by China because they violated the fundamental human rights of the Tibetan people, including their right of self-determination.[1700] The debate in the UN was thus first framed as one of self-determination of the Tibetan people and not as one of minority or indigenous rights.[1701] However, UN General

[1694] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 43-44.
[1695] *Constitution of Tibet*, proclaimed by the Dalai Lama (10 March 1963), Online: http://www.tibetjustice.org/materials/tibet/tibet2.html; See also the *Charter of the Tibetan-in-Exile* (1991), Online: http://www.tibetjustice.org/materials/tibet/tibet6.html
[1696] For an historical overview of Tibetan armed resistance and non-violent resistance from 1950 to 1959, see Tseten Samdup Chhoekyapa, "History Leading Up to March 10, 1959" International Campaign for Tibet, Online: http://www.savetibet.org/policy-center/history-leading-up-to-march-10-1959/
[1697] China invaded North Korea the day (7 October 1950) it invaded Tibet. David M Crowe, "The Tibet Question": Tibetan, Chinese and Westerna Perspective" (2013) 41:6 Nationalities Papers: The Journal of Nationalism and Ethnicity 1100 at 1108.
[1698] Kasur Lodi G Gyari, "Tibet: The Right to Self-Determination" in *The Question of Self-Determination The Cases of East Timor, Tibet and Western Sahara*, Conference Report (Geneva: Unrepresented Nations and Peoples Organization, 1996) 27 at 31; Robert D Sloane, "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review 107 at 136-139.
[1699] *Question of Tibet*, GA Res 1353 (XIV), UNGAOR, 834th Plen Mtg, UN Doc A/4354 (1959) at para 2.
[1700] *Question of Tibet*, GA Res 1723 (XVI), UNGAOR, 1085th Plen Mtg, UN Doc A/5100 (1961) at para 2; The same position was reiterated in *Question of Tibet*, GA Res 2079 (XX), UNGAOR, UN Doc A/6014 (1965).
[1701] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 424.

Assembly resolutions had no effect on China.[1702] For the past sixty years, the UN Security Council has been silent on the matter; not once has Tibet made it into a resolution of the Council. However some Security Council members have expressed their position, at times quite confusingly. For instance, the Congress of the United States defines Tibet as an occupied territory whereas the US State Department considers it part of China.[1703] European states recognize Tibet as part of China, yet the European Parliament considers Tibet an occupied country.[1704] Hence, national and international houses are divided.

The Tibetan autonomy foreseen in the *Seventeen Points Agreement* never materialized although the redrawned map of Tibet is considered autonomous territory. The status of autonomous region for some parts of Tibet is what remains of the *Seventeen Points Agreement*. In 1965, China created the Tibetan Autonomous Region (TAR) over a little more than fifty percent of historical Tibet and divided the remaining Tibetan territory among Chinese provinces. The 1960s saw the Cultural Revolution and violent repression against Tibetan Buddhism and culture.[1705] The revised 2001 *Regional Autonomy Law of the People's Republic of China* defines regional autonomy in the following manner:

> Regional ethnic autonomy means that the ethnic minorities, under unified state leadership, practice regional autonomy in areas where they live in concentrated

[1702] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 8, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/

[1703] The US Congress's *Foreign Relations Authorization Act*, Fiscal Years 1992-1993 (October 1991) clearly stipulates that: "(1) Tibet, including those areas incorporated into the Chinese provinces of Sichuan, Yunnan, Gansu, and Quinghai, is an occupied country under the established principles of international law; (2) Tibet's true representatives are the Dalai Lama and the Tibetan Government in exile as recognized by the Tibetan people; (3) numerous United States declarations since the Chinese invasion have recognized Tibet's right to self-determination and the illegality of China's occupation of Tibet." US Congress, *Foreign Relations Authorization Act*, *Fiscal Years 1992 and 1993*, HR 1415 (October 1991) at Sec 355, paras 1-2, 7. In addition, US law regarding project in Tibet is clear when it comes to population transfer; accordingly, projects should: "(8) neither provide incentive for, nor facilitate the migration and settlement of, non-Tibetans into Tibet; and (9) neither provide incentive for, nor facilitate the transfer of ownership of, Tibetan land or natural resources to non-Tibetans." US Congress, *Tibetan Policy Act (TPA), Foreign Relations Authorizations Act, Fiscal Year 2003*, 107th Congress, HR 1646 (September 2002) at Sec 616 (d) paras 8-9; Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 187.

[1704] European Parliament, *Resolution on the Western China Poverty Reduction Project and the Future of Tibet*, B5-0608, 0610, 0617, 0621 and 0641/2000 (2000) at para F.

[1705] The Cultural Revolution, with the goal of eradicating "old ideas, old cultures, old traditions and old customs"; in other words, all that Tibetan culture epitomized, possibly killed tens of thousands of Tibetans while numerous died of famine during the Great Leap Forward. International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 8, 72, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/; Enze Han and Christopher Paik, "Dynamics of Political Resistance in Tibet: Religious Repression and Controversies of Demographic Change" (2014) 217 The China Quarterly 69 at 75.

> communities and set up autonomous agencies for the exercise of the power of autonomy. Regional ethnic autonomy reflects the state's full respect for and guarantee of ethnic minorities' right to administer their internal affairs and its adherence to the principle of equality, unity and common prosperity for all nationalities.[1706]

The position of the Chinese government is that "the Tibet Autonomous Region enjoys extensive rights of autonomy, including legislative power, flexible enforcement of relevant state laws, right to use the spoken and written languages of the ethnic minorities, right of personnel management, right of fiscal management, and right to independently develop culture and education."[1707] The autonomy provided by law however fails to translate in practice. For instance, Tibetans do not enjoy control over the movement of persons in and out of their territory despite article 43 of the *Autonomy Law* which stipulates that "in accordance with the law, autonomous agencies in ethnic autonomous areas work out measures for control of the transient population."[1708] Notwithstanding the *Autonomy Law*, Tibetans have no control over the settler and migrant worker populations.

Lack of control over population movements in the automous area is problematic considering that China began transfering Han Chinese into Tibet in the 1950s and has since continued, except for a brief period at the beginning of the 1980s.[1709] Most of the population transfer

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[1706] Article 7 of the same law is however clear: "Institutions of self-government in ethnic autonomous areas shall place the interests of the state as a whole above all else and actively fulfill all tasks assigned by state institutions at higher levels." *Regional Ethnic Autonomy Law of the People's Republic of China*, translation prepared by the Congressional-Executive Commission on China of the "People's Republic of China Regional Ethnic Autonomy Law," issued by the Second Session of the Sixth National People's Congress on 31 May 1984 (effective October 1, 1984) and amended in accordance with the "Decision on Revising the People's Republic of China Regional Ethnic Autonomy Law", 12th Mtg of the Standing Committee of the Ninth National People's Congress on 28 February 2001 at preamble and Art 7, Online: http://www.cecc.gov/resources/legal-provisions/regional-ethnic-autonomy-law-of-the-peoples-republic-of-china-amended; For an analysis of autonomy under the various constitutions and autonomy laws, see Xiaohui Wu, "From Assimilation to Autonomy: Realizing Ethnic Minority Rights in China's National Autonomous Regions" (2014) 13 Chinese Journal of International Law 55.

[1707] Information Office of the State Council of the People's Republic of China, "Full Text: Development and Progress of Tibet" *Xinhua* (22 October 2013) at 4, Online: http://news.xinhuanet.com/english/china/2013-10/22/c_132819442.htm

[1708] *Regional Ethnic Autonomy Law of the People's Republic of China*, translation prepared by the Congressional-Executive Commission on China of the "People's Republic of China Regional Ethnic Autonomy Law," issued by the Second Session of the Sixth National People's Congress on 31 May 1984 (effective October 1, 1984) and amended in accordance with the "Decision on Revising the People's Republic of China Regional Ethnic Autonomy Law" made at the 12th Mtg of the Standing Committee of the Ninth National People's Congress on 28 February 2001 at Art 43, Online: http://www.cecc.gov/resources/legal-provisions/regional-ethnic-autonomy-law-of-the-peoples-republic-of-china-amended

[1709] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 105, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/

between 1950 and 1980 was centrally planned and coordinated and consisted mainly of soldiers and their families as well as farmers.[1710] Michael van Walt van Praag maintains that the government of China is "actively encouraging the transfer of Chinese settlements throughout the country, while simultaneously advocating a policy of segregation of Tibetan communities from the more affluent Chinese communities and assimilation of the young Tibetans with the Chinese."[1711] Post-1980s transfers of civilian and military workers were carried out as part of programs of modernization and remodelling of Tibetan society, which involved the transfer of Han Chinese settlers and the sedentarization of Tibetan normads. First coerced through assignments from the central government, the transfer was eventually induced through economic and other benefits.[1712] The 1990s saw renewed government policies and programs to encourage the transfer of Han Chinese and minorities into Tibet through the declaration of Lhasa as a "special economic zone."[1713] In 1994, China publicly endorsed its policy to move Han Chinese into Tibetan territory.[1714] Economic incentives such as higher salaries, pensions, longer vacations and lower taxes contributed to an influx of voluntary settlers westward, including Tibet, although some cadres were assigned to Tibet and cannot be said to have moved voluntarily, at least not entirely.[1715] The result is that gradually "a mobile workforce has arisen who are willing and able to relocate wherever the state provides sufficient incentives and

[1710] Kasur Lodi G Gyari, "Tibet: The Right to Self-Determination" in *The Question of Self-Determination The Cases of East Timor, Tibet and Western Sahara*, Conference Report (Geneva: Unrepresented Nations and Peoples Organization, 1996) 27 at 30.
[1711] Michael C van Walt van Praag, *Population Transfer and the Survival of the Tibetan Identity* (New York: The US Tibet Committee, 1986) at 1, 4.
[1712] Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 194; International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 113; *Tibet: The Position in International Law, Report of the Conference of International Lawyers on Issues Relating to Self-determination and Independence for Tibet* (Stuttgart: Editions Hansjörg Mayer, 1994) at 184.
[1713] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 107-108, 119, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/; Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 71, fn 270.
[1714] For a detailed account of China's transfer policy, read: International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 80-81, 109-113.
[1715] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 71; Kasur Lodi G Gyari, "Tibet: The Right to Self-Determination" in *The Question of Self-Determination The Cases of East Timor, Tibet and Western Sahara*, Conference Report (Geneva: Unrepresented Nations and Peoples Organization, 1996) 27 at 30.

bonuses."[1716] Soldiers posted in Tibet are also encouraged to settle with their families and retire there.[1717] At first involuntary, Han Chinese have increasingly moved voluntarily into Tibet and the majority can be said to remain there voluntarily.

At the turn of the millennium, China embarked upon a series of mega projects notably the "Great Development of the West" in 2000; the "New Socialist Countryside and Comfortable Housing Campaign" in 2005; and, the "Leapfrog Development Strategy" in 2010.[1718] These programs control the movement, way of life, place of residence and housing of the Tibetan population, both nomadic and sedentary – such as the 'Comfortable Housing' policy which massively rehoused and/or relocated a majority of the rural population of Tibet Autonomous Region (TAR) into concentrated settlements.[1719] Between 2006 and 2012, the Comfortable Housing program has moved 2 million Tibetans – that is more than two-thirds of the entire Tibetan population of TAR.[1720] Tibetans also have to assume the majority of the new housing cost as a result of minimum or poor compensation and loans,[1721] placing an important burden on the household. This re-engineering of the way of life of the Tibetan people has meant, notably, lost of farm and grazing lands for Tibetans.[1722] These rapidly imposed changes on a mainly nomadic and rural people have brewed discontent. Human Rights Watch gathered from field interviews that "Tibetans living in China are in any case politically disenfranchised, that local residents are ill-equipped to deal with an unresponsive or hostile bureaucracy, and that

[1716] Kasur Lodi G Gyari, *ibid* at 29.
[1717] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 72.
[1718] See *Reports Submitted by States Parties under Article 9 of the Convention, China*, UNCERD, UN Doc CERD/C/CHN/10-13 (2009) at para 40; Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 39-40, 42, Online: http://www.hrw.org/reports/2013/06/27/they-say-we-should-be-grateful-0
[1719] Olivier de Schutter, *Report of the Special Rapporteur on the Right to Food*, UNHRC, 19th Sess, UN Doc A/HRC/19/59/Add.1 (2012) at para 34; Human Rights Watch, *ibid* at 4, 19.
[1720] "It was reported in 2010 that between 50 and 80 per cent of the 2.25 million nomads on the Tibetan plateau were being progressively relocated." Olivier de Schutter, *ibid* at paras 34-35; In fact, since the mid-1980s and even more since the beginning of 2000, nomadic Tibetan herders have been massively relocated and sedentarized as part of the 'Environmental Migration' plan, without much consultation and possibility to refuse. Human Rights Watch, *ibid* at 4, 19, 22, 41, 62-63.
[1721] Human Rights Watch, *ibid* at 8-9, 87-88.
[1722] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 73.

there are no avenues for ordinary Tibetans to make their voices heard."[1723] The sense among the local population is that Tibetans are not the main beneficiaries of development projects; Han Chinese are.[1724]

The increased Chinese-speaking population and the rising economic inequalities have created tensions amidst the population.[1725] Discontent culminated in the 2008 'Olympic' uprising, attributed to political and socio-economic insatisfaction and increased exclusion, fears of Chinese domination and repression of Tibetan culture (Buddhism) and resulted in a larger Chinese military presence and increased monitoring of Tibetan villages by communist representatives. [1726] Self-immolation by monks and nuns have also increased, with approximately 130 Tibetans setting themselves on fire since 2009 in protest against Chinese domination and as an expression of commitment to their cause.[1727] Moreover, China conducts "patriotic and legal campaign" to denounce the Dalai Lama and monks continue to be expelled from monasteries for refusing to submit and sign loyalty pledges to the Chinese state.[1728] It is in this context that the 2010 Leapfrog Strategy was elaborated, once more, to pacify by way of economic growth, modernization and reorganization of Tibetan society via further relocation.[1729] As China's White Paper confirmed in 2013, "all farmers and herdsmen will have

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[1723] Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 72.

[1724] Amnesty International, *The State of the World's Human Rights*, AI Report 2013 (London: Peter Benenson House, 2013) at 63; Department of Information and International Relations, Tibetan Government-in-Exile, "Violations by the People's Republic of China Against the People of Tibet," *Report submitted to the United Nations Committee on the Elimination of Racial Discrimination* (2001) at 7.

[1725] Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 45. The transfer of Han Chinese settlers was behind the demonstrations in 1987, 1988 and 1989 and still causes tensions. International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 106, 118-119, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/

[1726] Enze Han and Christopher Paik, "Dynamics of Political Resistance in Tibet: Religious Repression and Controversies of Demographic Change" (2014) 217 The China Quarterly 69 at 70, 74; Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 24, 35-36.

[1727] "Taming the West", *The Economist* (21 June 2014), Online; http://www.economist.com/news/china/21604594-communist-party-deepens-tibets-integration-rest-country-taming-west; for a discussion of self-immolation, see Margaret Gouin, "Self-immolation and Martyrdom in Tibet" (2014) 19:2 Mortality 176 at 179-180.

[1728] *The State of the World's Human Rights*, Amnesty International Report 2013 (London: Peter Benenson House, 2013) at 63; International Commission of Jurists, *Tibet: Human Rights and the Rule of Law, Summary of the Report* (1997) at 3; Enze Han and Christopher Paik, "Dynamics of Political Resistance in Tibet: Religious Repression and Controversies of Demographic Change" (2014) 217 The China Quarterly 69 at 76.

[1729] Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 40-41.

moved into safe modern houses by the end of 2013."[1730] The problem is that not all farmers or heardsmen wanted to move. The policy of relocation is presented by government representatives as a component of a policy of homogenization of Chinese society to prevent national sentiment among Tibetans and enforce "long term peace and stability."[1731] This accords with China's 1997 declaration of Buddhism as a "foreign culture" contrary to its development goals and an expression of Tibetan nationalism.[1732] As Human Rights Watch concludes, China has embarked upon suppression and economic modernization to "remodel Tibetan society in a way that guarantees China's long term cultural security."[1733] Decision-making is aligned with the interests of Beijing; not the Tibetan people. There is therefore no effective Tibetan governance in sight on the territory of Tibet, a criterion of statehood and no mechanism to preserve the way of life and culture of an indigenous people and minority group, criteria essential to autonomy.

There is also discrimination against Tibetans, particularly in the field of language and education,[1734] which is under "intense surveillance"[1735] and where Mandarin dominates.[1736] The 2001 submission of the Tibetan Government-in-exile to the UN Committee on the

[1730] Information Office of the State Council of the People's Republic of China, "Full Text: Development and Progress of Tibet" *Xinhua* (22 October 2013) at 3, Online: http://news.xinhuanet.com/english/china/2013-10/22/c_132819442.htm

[1731] Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 23-24, 39-40.

[1732] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 81, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/

[1733] Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 23.

[1734] On the problems of education in Tibet and growing illiteracy, see David M Crowe, "The "Tibet Question": Tibetan, Chinese and Westerna Perspective" (2013) 41:6 Nationalities Papers: The Journal of Nationalism and Ethnicity 1100 at 1116-1117.

[1735] "Taming the West", *The Economist* (21 June 2014), Online: http://www.economist.com/news/china/21604594-communist-party-deepens-tibets-integration-rest-country-taming-west

[1736] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 73; For instance, Tibetan children are not allowed to learn in the Tibetan language and they are not allowed to study their history and culture, Department of Information and International Relations, Tibetan Government-in-Exile, "Violations by the People's Republic of China Against the People of Tibet," *Report submitted to the United Nations Committee on the Elimination of Racial Discrimination*, 2001 at 3, 7-18; International Commission of Jurists, *Tibet: Human Rights and the Rule of Law, Summary of the Report* (1997) at 6.

Elimination of Racial Discrimination is adamant with regard to the discrimination faced by Tibetans under Chinese occupation:

> discrimination by the Chinese government and people against the Tibetan people is both a cause and a consequence of: the occupation of Tibet by a foreign power; the continuing population transfer of Chinese settlers into Tibet; efforts to exploit Tibet's natural resources for the benefit of China; and the perceived need to assimilate Tibetans culturally in order to control them politically.[1737]

The Tibetan government denounced the lack of attention to discrimination by the international community[1738] although some UN human rights committees have begun to address the issue.[1739]

In addition, Tibetans opposing centralized decisions or advocating independence are prosecuted as "inciting national disunity", "ethnic separatism" and "disrupting public order."[1740] Prosecution in this context raises concerns as to respect for the rule of law. Despite numerous positive reforms, the Chinese judiciary is not independent as the government frequently interferes with the judicial process. This is particularly true with regard to Tibet. In 1997, the International Commission of Jurists affirmed "the primary state goal of the justice system in the TAR is the repression of Tibetan opposition to Chinese rule."[1741] Approximately ten years later, the Commission of Jurists highlighted that "lack of fair trial, due process, and equality of arms are of concern and administrative detention without judicial process is still common."[1742] In its 2013 report, Human Rights Watch similarly highlighted the lack of a strong rule of law, notably an independent judiciary, which meant for Tibetans that "in practice the law is little other than what officials say it is."[1743]

[1737] Department of Information and International Relations, Tibetan Government-in-Exile, "Violations by the People's Republic of China Against the People of Tibet," *Report submitted to the United Nations Committee on the Elimination of Racial Discrimination*, 2001 at 2.
[1738] Department of Information and International Relations, *ibid* at 5.
[1739] See for instance, UNCERD, *Concluding Observations on the Committee on the Elimination of Racial Discrimination*,75th Sess, UNCERD, UN Doc CERD/C/CHN/CO/10-13 (2009) at para 22.
[1740] Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 25.
[1741] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law, Summary of the Report* (1997) at 6-7.
[1742] International Commission of Jurists, *Attacks on Justice - People's Republic of China* (PRC) (2008).
[1743] Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 23, 71.

The government of China denies that forced relocation or population transfer takes place[1744] although it does consent to the migration of Chinese workers into Tibet.[1745] From the viewpoint of China, the movement of Han Chinese is a movement of migrant workers, not forced displacement and even less the transfer of settlers into an occupied territory. As China's 2013 White Paper on Tibet's development recounts,

> Driven by the growing socialist market economy, population movements have become more and more frequent between Tibet and the rest of China, between the Tibetan group and other ethnic groups, and within Tibet; mutual exchanges, tolerance and fusion between ethnic groups has become the mainstream of the ethnic relationship.[1746]

Echoing this position is the explanation of Barry Sautman: "the population flow to Tibet is not sharply different from that to other PRC regions: most migrants enter urban areas, while the countryside remains populated mainly by local people."[1747] He further sustains that "there is thus no evidence of special repression of Tibetans, let alone "demographic annihilation," but only of a harsh state response to any political challenge to CCP-rule in any part of China."[1748] Yet, the security, ideological and economic motivations of the state-controlled and sponsored massive influx of Han Chinese and other nationalities into Tibet profoundly affects the demographic composition of the Tibetan territory and its autonomy. It also demonstrates that

> a problem arises in connection with the clash between the right to free internal movement within the borders of a state and its misuse to cloak transfers of population. Commonly justified in terms of freedom of movement, settlers may appear to move voluntarily into an inhabited area, whereas the movement is

[1744] Human Rights Watch, *ibid* at 48.
[1745] This has been acknowledged in 1994. Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 70; Michael C van Walt van Praag, *Population Transfer and the Survival of the Tibetan Identity* (New York: The US Tibet Committee, 1986) at 16-20.
[1746] Information Office of the State Council of the People's Republic of China, "Full Text: Development and Progress of Tibet" *Xinhua* (22 October 2013) at 4, Online: http://news.xinhuanet.com/english/china/2013-10/22/c_132819442.htm
[1747] Barry Sautman, "Comment: Is Tibet China's Colony?: The Claim of Demographic Catastrophe" (2001) 15 Columbia Journal of Asian Law 81 at 109.
[1748] Barry Sautman, *ibid* at 102.

> planned or induced by a government as part of a larger political operation aimed at disenfranchising a distinct people.[1749]

Admitting the possibility that some Chinese in Tibet are migrant workers does not absolve the fact that others are settlers because they were moved into Tibet as part of a security-military rationale detrimental to the right of self-determination of the local, receiving population and to Tibetan statehood.

Allegedly, modernization and development policies and programs in Tibet are benevolent and have increased the living standards of rural Tibetans while alleviating poverty.[1750] As submitted by the Chinese government to the UN Committee on the Elimination of Racial Discrimination, "the nationwide support and assistance to the development of Tibet have brought about earth-shaking changes to the snow-capped plateau."[1751] The policies of China have indeed contributed to rapid economic growth in the TAR, although concerns were expressed that growth is artificially maintained by Beijing to the benefit of settlers.[1752] However, Tibetans feel largely excluded from the benefits of economic development since the labour market is dominated by Han Chinese, though some do benefit.[1753] Assuming the Chinese government's attempts to develop and modernize Tibet are legitimate and intended for the good of the Tibetan people, they nevertheless suffer from inherent lacuneas, namely a colonial, repressive and condescendant onlook unto Tibetan people; lack of participation,

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[1749] Unrepresented Nations and Peoples Organization (UNPO), *Human Rights Dimensions of Population Transfer,* Conference Report, Tallinn, Estonia (1992) at 9.

[1750] *Reports Submitted by States Parties under Article 9 of the Convention, China*, UNCERD, UN Doc CERD/C/CHN/10-13 (2009) at para 37; Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 4; For a detailed description of the economic and development situation in Tibet from the perspective of the Chinese government, read: Information Office of the State Council of the People's Republic of China, "Full Text: Development and Progress of Tibet" *Xinhua* (22 October 2013), Online: http://news.xinhuanet.com/english/china/2013-10/22/c_132819442.htm

[1751] *Reports Submitted by States Parties under Article 9 of the Convention, China*, UNCERD, UN Doc CERD/C/CHN/10-13 (2009) at para 39.

[1752] Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 44.

[1753] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 73; "Taming the West", *The Economist* (21 June 2014), Online: http://www.economist.com/news/china/21604594-communist-party-deepens-tibets-integration-rest-country-taming-west

acceptance and control over programs by Tibetans; and, massive demographic remaking in the form of forced relocation of Tibetans and transfer of ethnic-Han nationals and Hui Muslims.[1754]

The result today is that Tibetans are an "insignificant minority" in most Tibetan areas and population transfer is perceived by Tibetans, including the Dalai Lama, as "the most serious threat to the survival of Tibet's culture and national identity."[1755] By the 1990s, Chinese were believed to be a majority in Tibet whereas Tibetans had become a minority.[1756] The exact number of settlers in Tibet is unknown and highly controversial as statistics vary enormously between the Chinese government and the Tibetan government-in-exile, because, notably, data reflect the difference of opinion as to where lie the boundaries of Tibet – that is, TAR or historical Tibet.[1757] Yet, by 1997, the International Commission of Jurists concluded that following the transfer of cadres and professionals, government sponsored voluntary migration and market-driven migration, "Tibetan urban centres have been sinicised." [1758] The

[1754] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 9; Enze Han and Christopher Paik, "Dynamics of Political Resistance in Tibet: Religious Repression and Controversies of Demographic Change" (2014) 217 The China Quarterly 69 at 78.

[1755] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 88, 101; By 2010, there was an estimated 6.2 million ethnic Tibetans in China, of which 2.7 live in the Tibet Autonomous Region. Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 34; By 1986, there was 6.2 million of Chinese civilians in Tibet and around 500,000 troops. Michael C van Walt van Praag, *Population Transfer and the Survival of the Tibetan Identity* (New York: The US Tibet Committee, 1986) at 11.

[1756] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 70; Data speaks of 7 million Han-Chinese for a Tibetan population of 6 million by the end of the 1990s. J M Mukhi, "The Right to Self-Determination and International Reponsibility" in *The Question of Self-Determination The Cases of East Timor, Tibet and Western Sahara*, Conference Report (Geneva: Unrepresented Nations and Peoples Organization, 1996) 6 at 8.

[1757] In 1984 for instance, the Tibetan government-in-exile estimated the number of Tibetans to have perished at 1,207,387 persons whereas the number of Han settlers numbered around 7 millions by the end of the 1980s, in addition to around 400 000 troops on the ground. International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 53, 115-116; for an extensive discussion of statistics, see Barry Sautman, "Comment: Is Tibet China's Colony?: The Claim of Demographic Catastrophe" (2001) 15 Columbia Journal of Asian Law 81; Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 188; Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 38; Whereas there were no Chinese in TAR in 1950, by 1982, official census show there were 92,000 and throughout Tibet, 1,541,000. Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 70.

[1758] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law, Summary of the Report* (1997) at 5; International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 102; For an excellent comparison of Chinese, Tibetan and other statistical sources, see: Robert McCorquodale &

Commission further wrote that "China's attempt to alter the demographic composition of traditionally Tibetan areas through its population transfer policy is incompatible with any meaningful exercise of autonomy by Tibetans in the PRC." [1759] Despite admittedly contradictory statistics, there is a sure influx of Han Chinese and other minorities into Tibet without this movement of population being the voluntary choice of the receiving population. As Enze Han and Christopher Paik conclude, "this fear of demograhic takeover is not groundless" as Han presence in Tibetan areas is correlated to reduced Tibetan political activity.[1760] Tibetans view the policy of transfer of the civilian population of the occupying power into Tibet is an attempt to deny their right to self-determination by "supplant[ing] the Tibetan society with that of another people."[1761] It is the replacement of the permanent population of the territory by another, a criterion of statehood.

UN Human Rights committees and special rapporteurs concur: the forced displacement of Tibetans and the transfer of Han Chinese are altering the demographic composition of Tibet. In his latest report in 2012, the UN Special Rapporteur on the Right to Food, Olivier de Schutter, urged the Chinese government to "immediately halt non-voluntary resettlement of nomadic herders from their traditional lands and non-voluntary relocation or rehousing programmes of other rural residents."[1762] Along the same lines, the UN Committee on the Elimination of Racial Discrimination did express concern at the transfer of Han Chinese into the autonomous areas of Tibet, leading to "substantial changes in the demographic composition and in the character of the local society of those areas."[1763] Although the UN human rights

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Nicholas Orosz, eds, *Tibet: The Position in International Law, Report of the Conference of International Lawyers on Issues Relating to Self-determination and Independence for Tibet* (Stuttgart: Editions Hansjörg Mayer, 1994) at 180-184.

[1759] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 120.

[1760] Enze Han and Christopher Paik, "Dynamics of Political Resistance in Tibet: Religious Repression and Controversies of Demographic Change" (2014) 217 The China Quarterly 69 at 77, 88.

[1761] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 69; Department of Information and International Relations, Tibetan Government-in-Exile, "Violations by the People's Republic of China Against the People of Tibet," *Report submitted to the United Nations Committee on the Elimination of Racial Discrimination*, 2001 at 6; Kasur Lodi G Gyari, "Tibet: The Right to Self-Determination" in *The Question of Self-Determination The Cases of East Timor, Tibet and Western Sahara*, Conference Report (Geneva: Unrepresented Nations and Peoples Organization, 1996) 27 at 29.

[1762] Olivier de Schutter, *Report of the Special Rapporteur on the Right to Food*, UNHRC, 19th Sess, UN Doc A/HRC/19/59/Add.1 (2012) at paras 37, 46(a).

[1763] *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, *China*, UNCERD, UN Doc CERD/C/304/Add15 (1996) at paras 21-36; *Concluding Observations of the Committee on the*

community is increasingly concerned with the effects of 'involuntary relocation and housing' on Tibetans and lack of respect for religious and minority rights, there is no denounciation of its effect on the right of self-determination of the Tibetan people nor denounciation of a violation of the right to stay or of population transfer.[1764] Consequently, the terms 'self-determination', 'population transfer' and 'Tibetan people' are conspicuously absent from the post-1965 United Nations' treatment of the question of Tibet. Absent are references to international humanitarian law and international criminal law in relation to population transfer.

The crux of the matter with regard to the question of Tibet is its stalemated legal status and the concomittant stymied response of the international community. An underlying rift reminiscent of the Cold War precludes the resolution of the question of Tibet because the applicable legal framework is disputed.[1765] The questions are therefore: (1) is Tibet an occupied state in *statu nascendi* unlawfully occupied and annexed by China?; (2) if Tibetan peole are not entitled to external self-determination, are violations of their fundamental rights such to trigger remedial self-determination?; or, (3) are Tibetans an indigenous people and minority group part of China with a right to internal self-determination – autonomy? In other terms, is Tibet a case of full fledged self-determination and statehood or minority-indigenous rights subject to the principles of non interference in internal affairs and territorial integrity? There is no easy answer to these questions although either as a people entitled to external self-determination or as an indigenous people/minority group entitled to internal self-determination, the exercised of self-determination by Tibetans is the heart of any international response to the conflict in Tibet.

For some commentators and Tibetan representatives in exile, the question of Tibet is essentially one of external self-determination and not of minority or indigenous rights.[1766] Framing their situation in colonial terms, the Tibetan government-in-exile, wrote in 2001 that "Tibet is a de facto colony of China and the Tibetan people are continually denied their right

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Elimination of Racial Discrimination, China, UNCERD, UN Doc CERD/C/CHN/CO/10-13 (2009) at paras 13 and 17.

[1764] See for instance the questions made to China at the Universal Periodical Review on 22 October 2013 during which 11 states raised issues pertaining to UN access, religious and minority rights in Tibet. International Campaign for Tibet, "China on the Defensive as 11 Countries Challenges its Policies in Tibet" Report from the International Campaign for Tibet, 22 October 2013, Online: http://www.savetibet.org/

[1765] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 70, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/

[1766] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 424.

to self-determination by the Chinese authorities."[1767] Tibetan representatives maintain the occupation, annexation and discriminatory treatment of Tibetans by the Chinese government is a violation of their right of self-determination; a situation justifying the application of humanitarian law.[1768] The International Commission of Jurists found the Tibetan people to be a "people under alien subjugation" entitled to self-determination.[1769] And it is precisely "to colonize unwilling subjects that China has encouraged and facilitated the movement of Chinese into Tibet, where they dominate politics, security and the economy."[1770] Accordingly, the root cause of the conflict is the denial of the right of self-determination of the Tibetan people taking place through, notably, the transfer of Han Chinese and other minority settlers.[1771]

At a minimum, the diplomatic position expressed by the Dalai Lama is to regain internal self-determination through autonomy within the perimeters of the Constitution of China, also known as the "middle-way approach."[1772] In the 1988 *Strasbourg Proposal*, the Dalai Lama proposed to recognized Chinese sovereignty over Tibet in exchange for genuine autonomy or "political association" akin to the status of Hong Kong and Taiwan, but this was rejected by China.[1773] More recently, in 2008, the Dalai Lama proposed a *Memorandum on Genuine Autonomy for the Tibetan People* in which he reaffirms his government is not committed to achieve independence, but mainly the "protection and development of the unique Tibetan identity."[1774] On the specific question of population transfer, the Tibetan government writes:

[1767] Department of Information and International Relations, Tibetan Government-in-Exile, "Violations by the People's Republic of China Against the People of Tibet," *Report submitted to the United Nations Committee on the Elimination of Racial Discrimination*, 2001 at 19.
[1768] Department of Information and International Relations, *ibid* at 4-6.
[1769] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law, Summary of the Report* (1997) at 11.
[1770] International Commission of Jurists, *ibid* at 4.
[1771] International Commission of Jurists, *ibid*.
[1772] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 50-51; Department of Information and International Relations, Tibetan Government-in-Exile, "Violations by the People's Republic of China Against the People of Tibet," *Report submitted to the United Nations Committee on the Elimination of Racial Discrimination*, 2001 at 18-19; on recognition at the UN and *realpolitik*, see Robert D Sloane, "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review 107 at 133-135
[1773] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 78-80, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/
[1774]Central Tibetan Administration, *Memorandum on Genuine Autonomy for the Tibetan People,* 16 November 2008, Online: http://tibet.net/important-issues/sino-tibetan-dialogue/memorandum-on-geniune-autonomy-for-the-tibetan-people/

> When applied to a particular territory in which the minority nationality lives in a concentrated community or communities, the very principle and purpose of national regional autonomy is disregarded if large scale migration and settlement of the majority Han nationality and other nationalities is encouraged and allowed. Major demographic changes that result from such migration will have the effect of assimilating rather than integrating the Tibetan nationality into the Han nationality and gradually extinguishing the distinct culture and identity of the Tibetan nationality. Also, the influx of large numbers of Han and other nationalities into Tibetan areas will fundamentally change the conditions necessary for the exercise of regional autonomy since the constitutional criteria for the exercise of autonomy, namely that the minority nationality "live in compact communities" in a particular territory is changed and undermined by the population movements and transfers. If such migrations and settlements continue uncontrolled, Tibetans will no longer live in a compact community or communities and will consequently no longer be entitled, under the Constitution, to national regional autonomy. This would effectively violate the very principles of the Constitution in its approach to the nationalities issue….It is not our intention to expel the non-Tibetans who have permanently settled in Tibet and have lived there and grown up there for a considerable time. Our concern is the induced massive movement of primarily Han but also some other nationalities into many areas of Tibet, upsetting existing communities, marginalising the Tibetan population there and threatening the fragile natural environment.[1775]

Aligning with the proposition of the Dalai Lama, the UN and most civil society organizations adopted minority and/or indigenous rights as the legal framework applicable to Tibet, but shy from demanding respect for self-determination.[1776] The UN human rights community considers Tibetans as an ethnic minority in China, not a people entitled to the spectrum of choices of full fledge self-determination.[1777] A similar stance is also adopted by Human Rights

[1775][Emphasis added] *Ibid* at section 10.

[1776] Human Rights Watch, "*c" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013), Online: http://www.hrw.org/reports/2013/06/27/they-say-we-should-be-grateful-0; Arguing Tibetans is a group concentrated in a particular geographic area and attempting to either break off or achieve autonomy as a form of 'sub-state self-determination' see Morton H Halperin, David J Scheffer & Patricia L Small, *Self-Determination in the New World Order* (Washington: Canergie Endowment for International Peace, 1992) at 49.

[1777] UN Human Rights Council, *Compilation prepared by the Office of the High Commisser for Human Rights in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21, China (including Hong Kong, China and Macao, China)*, Working Group on the Universal Periodic Review, 17th Sess, UN Doc A/HRC/WG.6/17/CHN/2 (2013) at para 63;Statement by Navi Pillay, "Pillay: China Must Urgently Address Deeprooted Frustratrions with Human Tights in Tibetan Areas" Geneva, 2 November 2012; See also Report of the Secretary-General, *Situation in Tibet*, UNCHR, UN Doc E/CN./4/1992/37 (1992) at 14. The report of the UN Secretary-General in 1992 expressed "concerned at the continuing reports of violations of fundamental human rights and freedoms which threaten the distinct cultural, religious and national identity of the Tibetan people" and called "upon the Government of the People's Republic of China fully to respect the fundamental human rights and freedoms of the Tibetan people."

Watch whose treatment of the question of Tibet identifies violations of the rights of minorities and indigenous people, not of the right to self-determination.[1778] Amnesty International also speaks of the "Tibetan minority."[1779] However, the Unrepresented Nations and People's Organization (UNPO) takes the position that Tibet is a state under occupation.[1780] Despite the adoption of an indigenous/minority rights framework, the notion of internal self-determination is practically inexistent from most analysis. Equally absent are effective international measures to guarantee the minority/indigenous rights of Tibetans.

China defines itself as a "unitary multi-national state" and does not regard its minorities, including Tibetans, as an indigenous people, but as "ethnic minority."[1781] It considers claims for the independence of Tibet as an affront to its territorial integrity and the unity of the Chinese population.[1782] China rejects criticisms of its human rights record in Tibet and frames them as an attempt to question its sovereignty over Tibet and support a secessionist movement.[1783] For

[1778] Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 50-56.
[1779] See for instance: Amnesty International, "Tibet off the Human Rights Council's Agenda" *Amnesty International News* (26 March 2008).
[1780] Unrepresented Nations and People's Organization (UNPO), 'China's Tibet': The World's Largest Remaining Colony: Report of a Fact-Finding Mission and Analysis of Colonialism and Chinese Rule in Tibet" (1997) at 40-48.
[1781] See *Reports Submitted by States Parties under Article 9 of the Convention, China*, UNCERD, UN Doc CERD/C/CHN/10-13 (2009) at paras 37, 40; *Constitution of the People's Republic of China*, adopted 4 December 4, 1982, last amendment 14 March 2004 at preamble and Art 4: "All nationalities in the People's Republic of China are equal. The State protects the lawful rights and interests of the minority nationalities and upholds and develops a relationship of equality, unity and mutual assistance among all of China's nationalities. Discrimination against and oppression of any nationality are prohibited; any act which undermines the unity of the nationalities or instigates division is prohibited. The State assists areas inhabited by minority nationalities in accelerating their economic and cultural development according to the characteristics and needs of the various minority nationalities. Regional autonomy is practised in areas where people of minority nationalities live in concentrated communities; in these areas organs of self-government are established to exercise the power of autonomy. All national autonomous areas are integral parts of the People's Republic of China. All nationalities have the freedom to use and develop their own spoken and written languages and to preserve or reform their own folkways and customs."
[1782] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 3
[1783] China asserts it invested in the protection of the Tibetan language, press and the "renovation of ethnic cultural relics" in Tibet as well as the passing in 2002 of the *Detailed Regulations for the Implementation of the Rules of Tibet Autonomous Region on Learning, Using and Developing the Tibetan Language* reintroducing the Tibetan language at school. It also has passed in 2007 *Measures for the Administration of the Reincarnation of Living Buddhas in Traditional Tibetan Buddhism*. See *Reports Submitted by States Parties under Article 9 of the Convention, China*, UNCERD, UN Doc CERD/C/CHN/10-13 (2009) at paras 60-61, 91, 93, 113. Human Rights Watch, "*They Say We Should Be Grateful" Mass Rehousing and Relocation Programs in Tibetan Areas of China* (2013) at 33, Online: http://www.hrw.org/reports/2013/06/27/they-say-we-should-be-grateful-0

instance, China's latest White Paper entitled *Development and Progress in Tibet* denounces the Dalai Lama and his "clique" for attempting to "overthrow the socialist system and the system of regional ethnic autonomy that is practiced in Tibet."[1784] The consequent rationale, as articulated by Barry Sautman, is that "there is no occupation of Tibet arising from international conflict because it was not a state during the period of "independence" claimed by émigrés." [1785] Accordingly, "absent occupation or a clear illegitimate aim, settler implantation does not violate international law no matter how objectionable the host population finds it to be."[1786] Arguing Tibet was never a state, James Cawford also contends that:

> Tibet was not in 1914 regarded as independent, even though at least part of the country possessed substantial autonomy. This has always been the British view, and it was also the Chinese view in 1951. The invasion of Tibet was thus not a case of invasion of an independent State, although Chinesese actions in Tibet after 1951 may be criticized on other grounds.[1787]

Strikingly missing from this state-centric analysis is the absence of consideration to the position of the Tibetan people and their representative government between 1911 and 1950.

China does not need to recognize Tibet as sovereign for its military presence to amount to occupation[1788] and for the forcible changes to the demographic composition of Tibet to amount to the crime of population transfer. Reacting to accusations of colonialism, Sautman notes that the UN Committee on Decolonization has not recognized Tibet as a colony.[1789] This however does not constitute proof that Tibet is not colonized or subject to a colonial regime nor that settler implantation and associated repression is any more lawful.[1790] Even a timid UN

[1784] "Dalai Lama Aims to Rock Tibet's Foundation: White Paper*" Xinhua News* (22 October 2013). Online: http://news.xinhuanet.com/english/china/2013-10/22/c_132819691.htm

[1785] Barry Sautman, "Comment: Is Tibet China's Colony?: The Claim of Demographic Catastrophe" (2001) 15 Columbia Journal of Asian Law 81 at 106.

[1786] Barry Sautman, *ibid*.

[1787] James Crawford, *The Creation of States in International Law,* 2nd ed (Oxford: Calendron Press, 2008) at 325.

[1788] "The idea that in order to apply the law of the belligerent occupation it is necessary for the belligerent to recognize the displaced government's title to the territory finds no support in either the text of the Convention or its negotiating history. […] China's recognition or rejection of Tibetan claims to sovereignty are consequently irrelevant to the application of the [IV Geneva] Convention or the rules of law codified therein." Michael C van Walt van Praag, *Population Transfer and the Survival of the Tibetan Identity* (New York: The US Tibet Committee, 1986) at 32.

[1789] Barry Sautman, "Comment: Is Tibet China's Colony?: The Claim of Demographic Catastrophe" (2001) 15 Columbia Journal of Asian Law 81 at 108.

[1790] On the position that Tibet is under a colonial regime: Robert D Sloane, "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review 107 at 133.

response does not provide a *carte banche* to governments, especially considering the UN has recognized the righ to self-determination of the Tibetan people.

The question of Tibet is one of self-determination and in this regard, the people of Tibet are entitled under international law to choose among the gamut of options including external self-determination. Tibet is an occupied state whose occupation will end when its people will be able to exercice their right of self-determination, whichever form the people choose to give it.[1791] Until then, the state of Tibet continues to exist as a sovereign territory and is not a part of China.[1792] Already in 1911, the Manchu Qing Emperor had been deposed and the new Kuomintang Government invited Tibet to join the Nationalist Republic, which Tibet refused to do.[1793] The British foreign minister, Anthony Eden, recognized the *de facto* independence of Tibet in the 1943 Eden Memorandum, where it is written that "since the Chinese Revolution of 1911, when Chinese forces were withdrawn from Tibet, Tibet has enjoyed de facto independence. She has ever since regarded herself as in practice completely autonomous and has opposed Chinese attempts to reassert control."[1794] Attempts by the Chinese Government to belligerently exercise control over Tibet in 1918 and in 1931 also failed and there were no Chinese representatives in Tibet following Mao Dzedong's takeover in 1949.[1795]

[1791] See for a similar position Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 187; Robert D Sloane, "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review 107 at 131-132.

[1792]For an historical overview of Tibet's alliances, domination and statuses throughout history, see International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 31; For another thourough assessment of historical claims, see Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 18-46; Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 253, ff 11.

[1793] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *ibid* at 3, 35-36.

[1794] *Memorandum of British Foreign Secretary to Chinese Foreign Minister* (Eden Memorandum), 5 August 1943 cited in Goldstein, Melvyn, A *History of Modern Tibet, 1913-1951* (Berkeley: University of California Press, 1989) at 400-2, Online: https://sites.google.com/site/legalmaterialsontibet/home/eden-memorandum

[1795] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 3, 36-37.

By 1949, Tibet saught recognition at the UN and the support of the United Kingdom and United States, albeit too late because of imminent Russian and Chinese vetoes.[1796] A cable sent by the Tibetan government to the UN in 1949 requested UN assistance, because

> the armed invasion of Tibet for the incorporation of Tibet in Communist China through sheer physical force is a clear case of aggression... The problem is simple. The Chinese claim Tibet as a part of China. Tibetans feel that racially, culturally, and geographically they are far apart from the Chinese. If the Chinese find the reactions of the Tibetans to their unnatural claim not acceptable, there are other civilized methods by which they could ascertain the views of the people of Tibet; or, should the issue be surely juridical, they are open to seek redress in an international court of law.[1797]

Hence, by the time China invaded Tibet in 1950, Tibet, at least the central part, was ruled from Lhasa and was therefore a "de facto independent state" because it met the constitutive elements of statehood and was forced into relinquishing sovereignty.[1798] Tibet under the Lhasa government met the main criteria of statehood, namely, a population, a territory, a government exercising effective control over its population and territory and the capacity to enter into international relations.[1799] It had its own government, its own army, albeit small, its own flag, its own passports, its own treaty relation and policy of neutrality.[1800] It was a state in *statu nascendi* although it did not attempt to achieve recognition as a modern state prior to 1949

[1796] Robert D Sloane, "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review 107 at 137-138; David M Crowe, "The "Tibet Question": Tibetan, Chinese and Western Perspective" (2013) 41:6 Nationalities Papers: The Journal of Nationalism and Ethnicity 1100 at 1108.

[1797] *Cablegram from the Kashag and the National Assembly of Tibet to the United Nations*, UN Doc A/1549 (1950) cited in Robert D Sloane, *ibid* at 141.

[1798] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 43-44, 319, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/; "Some national minorities, such as the Mongols, Manchus or Tibetans, once established States quite independent of the Chinese empire." Xiaohui Wu, "From Assimilation to Autonomy: Realizing Ethnic Minority Rights in China's National Autonomous Regions" (2014) 13 Chinese Journal of International Law 55 at 58; Robert D Sloane, *ibid* at 133, 146-147.

[1799] For a discussion of Tibet meeting the criteria of statehood, see Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 4-15; Robert D Sloane, *ibid* at 147-148; David M Crowe, "The 'Tibet Question': Tibetan, Chinese and Western Perspective" (2013) 41:6 Nationalities Papers: The Journal of Nationalism and Ethnicity 1100 at 1106.

[1800] J M Mukhi, "The Right to Self-Determination and International Reponsibility" in *The Question of Self-Determination The Cases of East Timor, Tibet and Western Sahara*, Conference Report (Geneva: Unrepresented Nations and Peoples Organization, 1996) 6 at 7.

because of it isolationist policy.[1801] In different words, Tibet's chosen isolation made it miss the boat of statehood.

However, the perceived level of independence and sovereignty exercised by Tibet at the time of the invasion varies among states and commentators, because there was a relationship of suzerainity with China, which may explain the divergent opinions as to whether Tibet was/is a state or a state in *statu nascendi* and thus occupied.[1802] Tibet was a state in *statu nascendi* or as some argue, a protected independent state; a state that "has delegated certain of its powers by treaty to a protecting or guardian state, but retains full domestic autonomy and its general right of control over foreign relations."[1803] Tibet was therefore a state at the time of the invasion, which triggers the prohibition of the acquisition of territory by force and the prohibition against aggression [1804] and the concomitant application of international humanitarian law.

Besides, the Tibetan people have a right to external self-determination, because Chinese rule is imposed by force and continues to be in violation of their fundemantal human rights.[1805] Otherwise said, Tibet is a strong case for remedial secession because Tibetans are not legitimately represented within nor effectively protected by the Chinese government, are unable to control the economic, social, and cultural development of their territory and to stop their forced displacement and the transfer of settlers.[1806] Based on the balancing test between self-determination and territorial integrity according to which "neither is absolute,

[1801] Robert D Sloane, "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review 107 at 136, 149-150.
[1802] For a review of different positions adopted by states, see International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 59-61, Online: http://www.icj.org/tibet-tibet-human-rights-and-the-rule-of-law/; On the history of the relation of patron-priest, see David M Crowe, "The 'Tibet Question': Tibetan, Chinese and Westerna Perspective" (2013) 41:6 Nationalities Papers: The Journal of Nationalism and Ethnicity 1100 at 1104-1105.
[1803] Before 1911, Hannum defines Tibet as a vassal state. Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 16-17.
[1804] Richard Falk, "The Right to Self-Determination and International Law" in *The Question of Self-Determination The Cases of East Timor, Tibet and Western Sahara*, Conference Report (Geneva: Unrepresented Nations and Peoples Organization, 1996) 1 at 3.
[1805] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 3-4, 60.
[1806] See International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 338-339.

consequently neither should be dogmatically applied: rather, they should be seen as a pair of complementary opposites subservient to the concern for human rights and dignity," Tibetans have a right to external self-determination.[1807] As remarked by Tibetan advocates, "a government's claim to territorial integrity is not a claim in opposition to a people's right of self-determination, but a claim to be the authentic manifestation of the people's continuing exercise of that right."[1808] The ongoing impossibility for Tibetans to exercise their right to internal self-determination through autonomy combined to the prolonged and systemic violations of human rights law and humanitarian law justify remedial secession as an option to resolve the conflict. As Hurst Hannum similarly advanced,

> where these two basic concerns – denial of democracy and human rights and legitimate fears about the destruction of religious, cultural, or ethnic identity – are present at the same time, a strong case can be made that international law should recognize a right to self-determination which could lead to secession. At present, for example, Iraqi (and perhaps Turkish) Kurds and Tibetans have suffered massive and discriminatory human rights violations, and independence would probably be supported by an overwhelming proportion of the population if it were a politically feasible option.[1809]

However, the reality on the ground may – if it not already has – rendered Tibetan self-determination, both internal and external, illusionary.

The fragmentation of Tibet's territory, limited Tibetan governance, mass displacement of Tibetans both inside and outside Tibet combined to the massive transfer of settlers and migrant workers has changed the demographic composition of Tibet's permanent population to a juncture where the attributes of statehood – a permanent population with an effective government over a territory – may no longer be found and where any meaningful exercise of autonomy is doubtful.[1810] Increasingly, the question is no longer whether Tibetans should

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[1807] Michael C van Walt van Praag, *Population Transfer and the Survival of the Tibetan Identity* (New York: The US Tibet Committee, 1986) at 46.

[1808] Tibet justice Center (Andrew G Dulaney and Dennis M Cusack) and Unrepresented Nations and Peoples Organization (Dr Michael van Walt van Praag), *The Case Concerning Tibet, Tibet's Sovereignty and the Tibetan People's Right of Self-Determination* (The Tibetan Parliamentary and Policy Research Centre, 1998) at 57

[1809] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination, The Accommodation of Conflicting Rights*, 2nd ed (Philadelphia: University of Pennsylvania Press, 1996) at 504.

[1810] Proposing a reform of the system of autonomy: Xiaohui Wu, "From Assimilation to Autonomy: Realizing Ethnic Minority Rights in China's National Autonomous Regions" (2014) 13 Chinese Journal of International Law 55 at 85.

exercise internal or external self-determination or whether they have a right to, but whether changes effectuated in Tibet permit the meaningful exercise of external and/or internal self-determination by Tibetans at all. Is Tibetan statehood still a possibility or are the constitutive elements of statehood broken beyond repair? Has population transfer and other oppressive measures succeeded to erase the internal and external feasibility of the right to self-determination of the Tibetan people? And can a solution to Sino-Tibetan relations be found outside self-determination? I doubt it. Perhaps, the solution begins with recognition of the applicability of international humanitarian law to Tibet and of the right to external self-determination of the Tibetan people? This is also proposed by Robert Sloane:

> States could similarly recognize China's de facto effective control over Tibet without, as they do today, indulging the fiction of its de jure sovereignty and legitimacy. Such a shift in policy toward China's claim to "ownership" of Tibet—i.e., to recognize it as an occupying power rather than a legitimate sovereign—may in time enable Tibetans to reassert their equally, if not more, valid claim to self-determination and national sovereignty.[1811]

A rights-based international response begins with a renewed affirmation by the UN General Assembly of the relevant human rights and humanitarian framework and the acknowledgment the situation is one of occupation with colonial features to be resolved through the exercice of external self-determination by Tibetans, both in Tibet and in exile.

[1811] Robert D Sloane, "The Changing Face of Recognition in International Law: A Case Study of Tibet" (2002) 16 Emory International Law Review 107 at 186.

2.2 Decolonization gone wrong: Blurring the Sahrawi people

The case of Western Sahara is one of failed decolonization and of occupation, annexation, and population transfer to the detriment of the exercise by the Sahrawi people of their right to self-determination. Since the first UN General Assembly Resolution in 1966, over 100 UN resolutions from the General Assembly and the Security Council recognized the right to external self-determination of the people of Western Sahara and called for a referendum to resolve the future of the territory and end Spanish colonization.[1812] In 1966, Resolution 2229 invited Spain:

> to determine at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the Governments of Mauritania and Morocco and any other interested party, the procedures for the holding of a referendum under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self determination and to this end: (a) To create a favorable climate for the referendum to be conducted on an entirely free, democratic and impartial basis by permitting, *inter alia,* the return of exiles to the Territory.[1813]

The indigenous Sahrawi people were considered the 'self' entitled to freely determine the future of their territory through referendum.[1814] From the onset, the General Assembly made clear the need to take steps to ensure that "only the indigenous people of the Territory participate in the referendum."[1815] More than forty years later, the indigenous Sahrawi self is eroded by the presence of Morrocan settlers in occupied Western Sahara.

As Spain planned to decolonize Western Sahara by means of referendum, the process became subject to a conflict between the principle of self-determination and the principle of territorial integrity. Following the colonization by Spain of Western Sahara between 1884 and 1975, dissensions emerged between Spain, Algeria, Morroco and Mauritania over the legal status of Western Sahara prior to colonization and on whether this status affected the process of

[1812] *Question of Ifni and Spanish Sahara*, GA Res 2229 (XXI), UNGAOR, UN Doc A/RES/2229 (1966) at paras 1-4; Francesco Bastagli, "Can Law Make a Difference? Lessons Learned From a U.N. Experience" in *Western Sahara, Which Legal Remedies for Peoples Under Foreign Domination*, Vincent Chapaux, ed (Bruxelles: Bruylant, 2010) at 137.
[1813] *Question of Ifni and Spanish Sahara*, GA Res 2229 (XXI), *ibid* at para 4(a).
[1814] Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 119.
[1815] *Question of Ifni and Spanish Sahara*, GA Res 2229 (XXI), UNGAOR, UN Doc A/RES/2229 (1966) at para 4(b).

decolonization and thereby the applicabilty of the principle of self-determination. The crux was about how decolonization should enfold. More precisely, which of the two principles – self-determination or territorial integrity – should determine how decolonization should proceed. The planned 1975 referendum never took place and Morroco and Mauritania used their right to be consulted by Spain, as granted by the UN General Assembly, to prevent the establishment of an effective Sahrawi government and a plebscite, despite clear support for independence.[1816] What followed next is a classic example of decolonization through self-determination gone wrong.

Faced with competing claims, the UN General Assembly at the request of Morocco inquired to the ICJ in 1974 as to the best policy to follow to accelerate decolonization.[1817] In the proceeedings before the Court, Morocco considered Western Sahara part of the Sherifian state and Mauritania part of Bilad Shinguitti.[1818] Morocco objected to a referendum in Western Sahara arguing it was part of its territory prior to colonization. Arguably, the principle of territorial integrity resolved the matter of decolonization; the solution being for Western Sahara to be reunited with pre-colonial Moroccan territory.[1819] Unnecessary was independence as reintegration with Morocco was the logical solution following the end of Spanish colonization. Morocco was confident the Court would concur it entertained sovereign legal ties with Western Sahara. The opposite view, argued by Spain and Algeria among others, asserted Sahrawi people had a right to self-determination throug a referendum and emphasised the protection of the territorial integrity of Western Sahara, not Morocco. As Malcom Shaw remarked on the two conflicting principles brought by the parties, "the continuation or re-emergence of historic rights, therefore, had to be judged in the light of the right to self-determination, which posited the supremacy of the will of the inhabitants of the colonially defined territory."[1820] The test

[1816] Thomas M Franck, "The Stealing of the Sahara" (1976) 70 American Journal of International Law 694 at 703, 705-708.
[1817] The UNGA asked the Court two questions: "I. Was Western Sahara [...] at the time of colonization by Spain a territory belongng to no one (*terra nullius*)? If the answer to the first question is in the negative, II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?" *Question of Spanish Sahara*, GA Res 3292 (XXIX), UNGAOR, 2318th Plen Mtg, UN Doc A/RES/3292 (1974) at para 1; *Western Sahara*, Advisory Opinion [1975] ICJ Rep 12 at paras 40, 43, 51.
[1818] *Western Sahara*, *ibid* at para 85.
[1819] *Western Sahara*, *ibid* at paras 35, 37-38, 49-50, 161; Malcolm Shaw, "The Western Sahara Case" (1978) 49: 1 British Yearbook of International Law 119 at 124.
[1820] Malcolm Shaw, *ibid* at 153.

posed to the Court was therefore whether the historical legal ties were sufficient to amount to Moroccan sovereignty over Western Sahara.

The Court examined whether the alleged legal ties of Western Sahara to Morocco and Mauritania were sufficient to affect the right to self-determination of the people of Western Sahara. The Court rejected Moroccan and Mauritanian claims of sovereignty over Western Sahara although it recognized the existence of some legal ties.[1821] However, the ties were considered insufficient to constitute an exercise of sovereignty by Morocco or Mauritania. As explained,

> [T]he Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.[1822]

Legal ties of allegiance with part of the population are insufficiant to amount to ties of sovereignty; only the later could tilt the scale in favour of territorial integrity and become the driving principle in the process of decolonization.[1823] But the tilting factor remained unidentified by the Court.[1824] Yet, what clearly emerged at this stage is that all UN instances – the ICJ, the UN General Assembly and the Security Council – opted for a process of decolonization through the principle of self-determination by way of referendum.[1825]

In defiance of the chosen path to decolonization, Morocco swiftly rebelled against the decision by using force to occupy Western Sahara and prevent the exercise of self-determination. On the day the ICJ rendered its opinion, King Hassan II of Morocco called for the Green March

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[1821] *Western Sahara*, Advisory Opinion [1975] ICJ Rep 12 at paras 103-105, 107, 118, 126, 129, 149-150.
[1822] *Western Sahara*, *ibid* at para 162; For a critique of the Court's position that legal ties did exist between Morocco and Mauritania, see Malcolm Shaw, "The Western Sahara Case" (1978) 49: 1 British Yearbook of International Law 119 at 140-144.
[1823] For a discussion of sovereignty and legality in the treatment of legal ties as a European international law construct applied to a pre-colonial and non-European context, see Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 133-150, 158-167.
[1824] See generally Malcolm Shaw, "The Western Sahara Case" (1978) 49: 1 British Yearbook of International Law 119 at 119.
[1825] See for instance *Question of Western Sahara*, GA Res 40/50, UNGAOR, UN Doc A/RES/40/50 (1985); see also Pamela Epstein, "Behind Closed Doors: 'Autonomous Colonization' in Post United Nations Era − The Case for Western Sahara" (2009) 15 Annual Survey of International and Comparative Law 107 at 108.

or *al Massira* which took place on 6 November 1975.[1826] In the name of a united land, the invasion of Western Sahara involved 40 000 government officials and approximately 350 000 Moroccan civilians as a show of strength aimed to assert Moroccan territorial integrity.[1827] The UN Security Council "deplored" the March and called upon Morocco to withdraw its forces and marchers from the territory.[1828] No further actions were taken to pressure Morocco to abide by the ICJ ruling, as stronger wording was prevented by France and the United States.[1829] The marchers eventually returned to Morocco after Spain agreed to negotiate a plan transferring authority over Western Sahara to Morocco and Mauritania. The plan, a tripartite agreement known as the Madrid Accord, was signed in November 1975 between Spain, Morocco and Mauritania, effectively partitioning Western Sahara and transferring administrative power to Morocco and Mauritania.[1830] Accordingly, Morroco and Mauritania became the administering authorities of a non-self-governing territory under Chapter XI of the *UN Charter*. The transfer of authority to countries opposed to the referendum and to one who had already demonstrated intent to annex Western Sahara cannot but have begun the erosion of the right to self-determination of the people under their authority.

The stymied UN reactions that followed the Madrid Accord may have given a green light to Morocco to reoccupy and annex Western Sahara.[1831] On 10 December 1975, the UN General Assembly passed two conflicting resolutions; one calling for a referendum, the other recognizing the *fait accompli*. In the first resolution, it called on Spain "to take immediately necessary measures" so that all Saharans "may exercise fully and freely" their right to self-determination.[1832] In the second, it recognized the Madrid Accord and the takeover of the administration of Western Sahara by Morocco and Mauritania and requested them to hold free

[1826] For a detailed description of the Green March, see Akbarali Thobani, *Western Sahara since 1975 Under Moroccan Administration* (Lewiston: The Edwin Mellen Press, 2002 at 55-59.
[1827] Akbarali Thobani, *ibid* at 55, 57; Thomas M Franck, "The Stealing of the Sahara" (1976) 70 American Journal of International Law 694 at 712.
[1828] *Western Sahara*, SC Res 379, UNSCOR, UN Doc S/RES/379 (1975); SC Res 380, UNSCOR, UN Doc S/RES/380 (1975) at para 2.
[1829] Thomas M Franck, "The Stealing of the Sahara" (1976) 70 American Journal of International Law 694 at 713-714.
[1830] Thomas M Franck, *ibid* at 715; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 171.
[1831] See Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 21, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805.
[1832] *Question of Spanish Sahara*, GA Res 3458A (XXX), 30th Sess, UN Doc 3458(XXX)A (1975) at para 7.

consultations with the people in the exercise of their right to self-determination and as required under Article 73(b) of the UN Charter.[1833] It is troubling because that recognition of the Madrid Accord came after Morocco had occupied the majority of Western Sahara in October 1975 during the March.[1834] Already in 1976, Thomas Franck qualified the UN response to the case as "monumentally mishandled" as it stands opposed to the position expressed for over a decade.[1835] The UN bowed to the politics of *faits accomplis* instead of upholding the decision of the International Court of Justice.

The transfer of authority sealed under the Madrid Accord became an umbrella for the unlawful use of force.[1836] As soon as Spanish forces definitively withdrew from the territory of Western Sahara in February 1976, Morocco officially annexed Western Sahara,[1837] a military operation that caused the displacement of around 100 000 Sahrawis[1838] who sought refuge in Algeria for the most part. Algeria is also where the Saharan guerrilla movement, the Liberation of the Saguia al-Hamra and Rio de Oro (hereinafter POLISARIO) established itself in 1973 to combat Spanish colonization and where it established a government in exile. The POLISARIO declared the independence of the Saharan Arab Democratic Republic (hereinafter, SADR) on

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[1833] *Question of Spanish Sahara*, GA Res 3458B (XXX), 30th Sess, UN Doc 3458(XXX)B (1975) at paras 1,4; "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote [...] b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement" *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 at Art 73(b); Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 14; Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 21, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805.

[1834] Pamela Epstein, "Behind Closed Doors: "Autonomous Colonization" in Post United Nations Era - The Case for Western Sahara" (2009) 15 Annual Survey of International and Comparative Law 107 at 115-116; Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 14.

[1835] Thomas M Franck, "The Stealing of the Sahara" (1976) 70 American Journal of International Law 694 at 694.

[1836] See Christopher M. Goebel, "A Unified Concept of Population Transfer (Revised)" (1993) 22 Denver Journal of International Law and Policy at 13.

[1837] Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 22, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805.

[1838] The majority of the displacements took place in 1975 and 1976. Human Rights Watch, *Western Sahara, Keeping it Secret, The United Nations Operation in the Western Sahara*, Summary, Vol 7, No 7, October 1995, Online: http://www.hrw.org/reports/1995/Wsahara.htm; Dana Brusca, *ibid* at 25.

27 February 1976.[1839] Fighting began between the POLISARIO and Moroccan forces. Mauritania relinquished all claims in 1979 in an agreement with the POLISARIO, which it recognized as the legitimate representative of the people of Western Sahara.[1840] Morroco then occupied the territory left by Mauritanian troops.

Morocco was eventually recognized as the occupying power in Western Sahara, although international humanitarian law was applied neither by Morocco,[1841] nor by the UN. In 1979 and with a deteriorating situation, the UN General Assembly recognized the POLISARIO as the representative of the people of Western Sahara, reiterated the right to self-determination of the Sahrawi people and designated Morocco as the occupying power and called upon Morocco to end its occupation of Western Sahara.[1842] Following this resolution, "international pressure on Morocco was limited."[1843]

Morroco applies Morrocan law on the occupied territory, not international humanitarian law, and has divided Western Sahara into four Moroccan provinces where it holds municipal and parliamentary elections.[1844] It also passed a law penalizing attacks on Morocco's territorial

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[1839] Christopher M. Goebel, "A Unified Concept of Population Transfer (Revised)" (1993) 22 Denver Journal of International Law and Policy at 13; Charles Dunbar, "Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict" (2000) 54:4 Middle East Journal 522 at 527; Pamela Epstein, "Behind Closed Doors: "Autonomous Colonization" in Post United Nations Era - The Case for Western Sahara" (2009) 15 Annual Survey of International and Comparative Law 107 at 111; Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 14.

[1840] Gino Naldi, *ibid* at 15; Letter from the Permanent Representative of Mauritania to the UN Secretary-General (18 August 1979), UN Doc A/34/427 (1979); The portion of the Western Sahara relinquished by Mauritania was promptly annexed by Morocco. *Question of Western Sahara*, GA Res 35/19, UNGAOR, 35th Sess, UN Doc A/RES/35/19 (1980); Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies Under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 22, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805

[1841] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 167- 168.

[1842] *Question of Western Sahara*, GA Res 34/37, 34th Sess, UN Doc A/RES/34/37 (1979) at paras 1, 5-7; See also Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 22, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805

[1843] Thomas M Franck, "The Stealing of the Sahara" (1976) 70 American Journal of International Law 694 at 695-696; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 167- 172.

[1844] See Human Rights Watch, *Human Rights in Western Sahara and in the Tindouf Refugee Camps* (2008), Online: http://www.hrw.org/reports/2008/12/19/human-rights-western-sahara-and-tindouf-refugee-camps-0; Eyal Benvenisti, *ibid* at 171; Yahia H Zoubir and Anthony G Pazzanita, "The United Nations' Failure in Resolving the Western Sahara Conflict" (1995) 49:4 Middle East Journal 614 at 621; Human Rights Watch, *Western Sahara, Keeping it Secret, The United Nations Operation in the Western Sahara* (1995) Vol 7, No 7, Summary, Online: http://www.hrw.org/reports/1995/Wsahara.htm

integrity; attacks that include the advocacy of the independance of Western Sahara.[1845] Consequently, Sahrawis under Moroccan occupation are not free to express the opinion that they have a right to vote on their collective future, including that Western Sahara is not part of Morocco.[1846]

The UN continued to pursue the idea of a referendum in the Settlement Plan envisaged by the UN Secretary-General. In 1988, Morocco officially agreed to hold a referendum, which had also been proposed by the Organization of African Unity (OAU) in 1981.[1847] The Settlement Plan was accepted by the parties and endorsed by the Security Council in 1990 and 1991. The Plan calls for a ceasefire and a referendum to be held in 1992. The Council established for this purpose the UN Mission for the Referendum in Western Sahara (hereinafter MINURSO) under Chapter VI of the UN Charter.[1848] MINURSO's mandate, apart from monitoring the ceasefire, was to hold a referendum, including identifying and registering voters, supervise the withdrawal of Morrocan forces, and ensure the repatriation of Sahrawi refugees.[1849] The basis of the electoral list was to be the 1974 Spanish census of Western Sahara, which accounted for nearly 74 000 Sahrawis.[1850] MINURSO had the mandate to update the list, including Sahrawi

[1845] The Moroccan law on the right to association stipulates in article 3 that: "Toute association fondée sur une cause ou en vue d'un objet illicite, contraire aux lois, aux bonnes moeurs ou qui a pour but de porter atteinte à la religion islamique, à l'intégrité du territoire national, au regime monachique ou de faire appel à la discrimination est nulle." Maroc, Droit d'association, Dahir n 1-58-376 du 3 Joumada I 1378 (1958) réglementant le droit d'association at Art 3; Human Rights Watch, *Human Rights in Western Sahara and in the Tindouf Refugee Camps* (2008), *ibid*.

[1846] Human Rights Watch, *ibid.*

[1847] Charles Dunbar, "Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict" (2000) 54:4 Middle East Journal 522 at 534. The first acceptance of a referendum by Morocco was in July 1985, see Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 23, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805. The refusal of Morroco to hold a referendum discouraged the OAU, now the African Union, and led to the recognition of the SADR as a member of the Organization in 1984. It also meant that the UN became officially charged with the dossier in 1984. See Gino Naldi, "Western Sahara: Suspended Statehood ot Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 18.

[1848] *The Situation Concerning Western Sahara*, SC Res 690, UNSCOR, UN Doc S/RES/690 (1991) at para 2; *The Situation Concerning Western Sahara* , SC Res 658, UNSCOR, UN Doc S/RES/658 (1990); Yahia H Zoubir and Anthony G Pazzanita, 'The United Nations' Failure in Resolving the Western Sahara Conflict" (1995) 49:4 Middle East Journal 614 at 617.

[1849] Francesco Bastagli, "Can Law Make a Difference? Lessons Learned From a U.N. Experience" in *Western Sahara, Which Legal Remedies for Peoples Under Foreign Domination*, Vincent Chapaux, ed (Bruxelles: Bruylant, 2010) at 132; Charles Dunbar, "Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict" (2000) 54:4 Middle East Journal 522 at 537; Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 19.

[1850] Malcolm Shaw, "The Western Sahara Case" (1978) 49: 1 British Yearbook of International Law 119 at 121.

refugees who would be allowed to return to vote in the referendum.[1851] Depending on the result of the referendum, Morroco would withdraw from the territory, putting an end to the occupation, or if integration was preferred, the POLISARIO would be disbanded.[1852] Basically, MINURSO was to overview the referendum and the end of the occupation. But for self-determination to be exercised, the people entitiled to self-determined must be able to express their will in a free and genuine manner.[1853] And this is precisely what makes the exercise of self-determination so complicated in the Sahrawan context.

The transfer of settlers by Morocco is the stumbling block to the decolonization and the free and genuine exercise of the right to self-determination of the Saharawi people. Prior to the ceasefire, which was set to begin on 6 September 1991, the Morrocan government called for the "return" of 170 000 Sahrawis to Western Sahara, which became known as the "Second Green March."[1854] The transfer of settlers was Morocco's latest attempt to control the voters' pool and the result of the referendum. Human Rights Watch characterised the movement of settlers from Morocco to Western Sahara as an "orchestrated effort" to which the UN responded with muted silence:

> In 1991, neither MINURSO nor the Security Council took steps to halt Morocco's transfer of 40,000 individuals, who it claimed were Sahrawis, into the territory. This transfer violated paragraphs 71 and 72 of the Settlement Plan, which permit Western Saharans resident outside of the territory to return to the Western Sahara only after their eligibility to vote has been established by the Identification Commission. Access to "tent cities" housing this population, which lives under twenty-four hour guard and

[1851] B G Ramcharan, "Recourse to the Law in the Settlement of International Disputes: Western Sahara" (1997) 5 African Yearbook of International Law 205 at 212.
[1852] Yahia H Zoubir and Anthony G Pazzanita, “The United Nations’ Failure in Resolving the Western Sahara Conflict” (1995) 49:4 Middle East Journal 614 at 617.
[1853] See Hector Gros Espiell, UN Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN4/Sub2/405/Rev1 (1980) at para 65.
[1854] Charles Dunbar, "Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict" (2000) 54:4 Middle East Journal 522 at 535; Human Rights Watch, *Western Sahara, Keeping it Secret, The United Nations Operation in the Western Sahara* (1995) Vol 7, No 7, Summary, Online: http://www.hrw.org/reports/1995/Wsahara.htm; Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 25, Online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805; Morrocan military forces also attacked Sahrawi settlements from the air to strenghten their control of the area. Yahia H Zoubir and Anthony G Pazzanita, "The United Nations' Failure in Resolving the Western Sahara Conflict" (1995) 49:4 Middle East Journal 614 at 617.

> receives food and other benefits from the Moroccan government, is tightly restricted by Moroccan police and secret service agents.[1855]

This campaign of 'return' by Morocco is a policy of population transfer in violation of international human rights and humanitarian laws.[1856] Morroco used the transfer of settlers, which it calls *dakhils*,[1857] in contravention of its obligations as an administrative power and an occupying power. It thus blurred the identity of the people entitled to self-determine, prevented the tenure of a referendum and created a *fait accompli* resulting in *de facto* recognition of its sovereignty.

An important obstacle to the expression of Sahrawi self-determination through referendum is the determination of who are the individuals who are part of the people entitled to vote.[1858] Identifying who is a member of the Sahrawi people became the thorniest issue and is encapsulated in this question: "who is a Western Sahrawi?"[1859] Difficult to tell with certitude as "the new arrivals in the Western Sahara may or may not have been Sahrawis, displaced and forced to live elsewhere by earlier armed conflicts (including a French-Spanish campaign in 1958)." [1860] Distinguishing who belongs is further complicated by the lack of consensus over the definition of people in the law of external self-determination. Needless to say, dicephering a person's identity for the purpose of determining whether he or she is part of a people is a loaded endeavour.

The presence of Morrocan settlers prevents a free and representative referendum under UN auspices because it blurs the identification of individuals entitled to vote. After numerous

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[1855] Human Rights Watch, *Western Sahara, Keeping it Secret,ibid*; On tax breaks and higher salaries given to settlers and other incentives such as food and low-cost housing, see Akbarali Thobani, *Western Sahara since 1975 Under Moroccan Administration* (Lewiston: The Edwin Mellen Press, 2002) at 105.
[1856] Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 26, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805.
[1857] Akbarali Thobani, *Western Sahara since 1975 under Moroccan Administration* (Lewiston: The Edwin Mellen Press, 2002 at 103.
[1858] James Summers, *Peoples and International Law, How Nationalism and Self-Determination Shape a Contemporary Law of Nations*, vol. 8 (Leiden: Martinus Nijhoff, 2007) at 42; Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 19.
[1859] Thomas M Franck, "The Stealing of the Sahara" (1976) 70 American Journal of International Law 694 at 697; Charles Dunbar, "Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict" (2000) 54:4 Middle East Journal 522 at 527.
[1860] Yahia H Zoubir and Anthony G Pazzanita, "The United Nations' Failure in Resolving the Western Sahara Conflict" (1995) 49:4 Middle East Journal 614 at 618.

disagreements between the parties over which tribes should be eligible to vote, the MINURSO Identification Commission began the identification of voters in 1994 which continued intermittently until the late 1990s as further divisions arose.[1861] The Morrocan government argues that "returnees" are entitled to vote because they are Sahrawis who had fled Western Sahara prior to 1974 to areas of southern Morocco.[1862] Following this logic, Morocco sponsored in October 1994 the applications of approximately 120 000 additional individuals from southern Morocco and whose residency in and connection to Western Sahara are uncertain.[1863] These new applications constituted a substantial amount of additional alledged Sahrawis. What became increasingly clear is that Morroco attempted to alter the demographic composition of the voters' list by asking the Identification Commission of the MINURSO to assess the eligibility of a transferred population.[1864] The POLISARIO rejected these new Moroccan applications seeing in them an attempt to demographically highjack the referendum whereas the UN Secretary-General recognized the problems posed by the applications of "persons not resident in the Territory," but nevertheless held that the Identification Commission had to review all applications correctly submitted, including the ones of settlers.[1865]

[1861] For a review of hurdles faced in the 1990s, see Charles Dunbar, "Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict" (2000) 54:4 Middle East Journal 522; Yahia H Zoubir and Anthony G Pazzanita, *ibid* at 625; B G Ramcharan, "Recourse to the Law in the Settlement of International Disputes: Western Sahara" (1997) 5 African Yearbook of International Law 205 at 212, 218-221.

[1862] *Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN Doc S/2001/613 (2001) at para 23.

[1863] Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 19; Morroco was accused by POLISARIO of wanting to submit 135 000 applicants without any link to Western Sahara. See B G Ramcharan, "Recourse to the Law in the Settlement of International Disputes: Western Sahara" (1997) 5 African Yearbook of International Law 205 at 221; According to HRW: "Out of a total of 180,000 voter applications submitted by Morocco, 100,000 are on behalf of individuals who reside outside of the territory." Human Rights Watch, *Western Sahara, Keeping it Secret, The United Nations Operation in the Western Sahara* (1995) Vol 7, No 7, Summary, Online: http://www.hrw.org/reports/1995/Wsahara.htm.

[1864] Yahia H Zoubir and Anthony G Pazzanita, "The United Nations' Failure in Resolving the Western Sahara Conflict" (1995) 49:4 Middle East Journal 614 at 618; "[P]ending the referendum, Morocco seems to be entrenching itself more firmly in the Western Sahara with each passing day, taking steps that have dramatically altered the demography and other aspects of the territory." Human Rights Watch, *Western Sahara, Keeping it Secret, The United Nations Operation in the Western Sahara*, *ibid*.

[1865] Report of the UN Secretary-General, *The Situation Concerning Western Sahara*, UNSCOR, UN Doc S/1995/986 (1995) at paras 2-3; B G Ramcharan, "Recourse to the Law in the Settlement of International Disputes: Western Sahara" (1997) 5 African Yearbook of International Law 205 at 219.

By the end of the 1990s, MINURSO had established a list of 86,381 individuals entitled to vote out of 233,487 applications, resulting in more than 131,000 appeals.[1866] Most sponsored Morrocan applications were rejected because they lacked clear ties to Western Sahara according to the MINURSO's Identification Commission.[1867] As a result of disagreements over the identification and appeal processes, the registration of voters which lasted nearly six years is stalemated.[1868] According to Charles Dunbar, *Former UN Secretary-General Special Representative in charge of the United Nations Mission for the Referendum in Western Sahara*, "the two sides are as far apart as ever on the question of who should vote in the referendum, and the chance that the voting can take place is therefore remote."[1869] This fear is shared by the Secretary-General and the Security Council.[1870]

The exact number of settlers currently in the territory of Western Sahara is unclear, but the transfer of settlers is considered a success as the population has grown by 300% from 1975 to 2000.[1871] As Akbarali Thobani writes, "as a consequence of this growth, the population that lived in Western Sahara at the time of Spanish departure has become a minority population."[1872] By 2007, Sahrawis living in occupied Western Sahara were believed to be "outnumbered by Moroccan settlers by at least two to one."[1873] Estimated population and military presence vary greatly, but at the beginning of the millennium, there was over 230 000 persons in Western Sahara and approximately 60 000 Morrocan troops having effective

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[1866] *Report of the Secretary-General on the Situation concering Western Sahara to the Security Council*, UNSCOR, UN Doc S/2003/565 (2003) at para 26.
[1867] Charles Dunbar, "Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict" (2000) 54:4 Middle East Journal 522 at 531.
[1868] For a detailed account, see: Human Rights Watch, *Western Sahara, Keeping it Secret, The United Nations Operation in the Western Sahara* (1995) Vol 7, No 7, Summary, Online: http://www.hrw.org/reports/1995/Wsahara.htm; *Report of the Secretary-General on the Situation concering Western Sahara to the Security Council*, UNSCOR, UN Doc S/2003/565 (2003) at para 26; For a summary of the problems faced by MINURSO with regard to the implementation of the Settlement Plan, especially the identification process, see: *Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN Doc S/2001/613 (2001) at paras 20-42.
[1869] Charles Dunbar, "Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict" (2000) 54:4 Middle East Journal 522 at 534.
[1870] Charles Dunbar, *ibid* at 536.
[1871] Akbarali Thobani, *Western Sahara since 1975 under Moroccan Administration* (Lewiston: The Edwin Mellen Press, 2002) at 104; Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 25, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805.
[1872] Akbarali Thobani, *ibid* at 104.
[1873] "Deadlock in the Desert, Morocco's latest initiative is unlikely to end one's of Africa's oldest conflict" *The Economist* (8 March 2007), Online: http://www.economist.com/node/8825903

control.[1874] What is clear is that the size of the population, its composition and the sociocultural changes in the form of "intense Moroccanization" are substantial.[1875] In other words, by *faits accomplis*, Moroccan settlers have, slowly but surely, acquired a right to self-determine the future of Western Sahara on an equal footing as the Sahrawi people.

Faced with the failure of the referendum envisioned in the Settlement Plan, the UN and its special envoy, James Baker, proposed negotiated solutions in the form of a Framework Agreement and a Peace Plan in 2001 and 2003 respectively.[1876] The most recent initiative, the Peace Plan entailed a shared government for a transitional period and a referendum in which *all inhabitants*, including settlers installed in Western Sahara prior to 1999, would be entitled to vote.[1877] This latest UN revised definition of eligible voters gives credence to Morocco's program of population transfer and to its alleged sovereignty over Western Sahara. Despite the accommodating UN offer, Morroco refused that independence remains an option on the ballot, arguing instead for autonomy or integration as the only agreeable outcomes.[1878] Consequently and since 2003, there has been a complete suspension of all referendum related activities in Western Sahara. In 2007, the Moroccan government proposed a plan for autonomy, which was

[1874] Charles Dunbar, "Saharan Stasis: Status and Future Prospects of the Western Sahara Conflict" (2000) 54:4 Middle East Journal 522 at 526. Another account mentions 160,000 troops in the 1980s, see Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 23 and 26, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805; Other estimates of the total population in 2013 put the number much higher at 538,000, see CIA, The World Factbook, *Western Sahara* (last updated 22 August 2013), Online: https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html.

[1875] Akbarali Thobani, *Western Sahara since 1975 under Moroccan Administration* (Lewiston: The Edwin Mellen Press, 2002 at 103, 107.

[1876] For a discussion of the framework agreement and Peace Plan proposed by Baker until his resignation in 2004, see for Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 18-26; For a list of the proposed solutions, read *Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN Doc S/2004/325 (2004) at paras 9-12; For the full Framework Agreement on the Status of Western Sahara, see *Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN Doc S/2001/613 (2001), Annex 1 at p 11; For the Peace Plan for the Self-Determination of the People of Western Sahara, *Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN Doc S/2003/565 (2003) at paras 42, 44-51 and Annex II at 14.

[1877] *Report of the Secretary-General on the situation concerning Western Sahara* (2003) *ibid*.

[1878] Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 23-24.

considered a "serious and credible effort" by the Security Council.[1879] The parameters of conflict resolution appear to move from self-determination to autonomy.

As the Secretary-General wrote, the aim is "a lasting, and mutually acceptable *political* solution, which will provide for the self-determination of the people of Western Sahara" in which "neither will obtain the totality of its demands" but in which the process will be one of "give and take" in the spirit of realism.[1880] How much can you give and take when you negotiate independence? Or has the UN dispensed independent statehood as a possible option? A state of Western Sahara is clearly out of the way in the eyes of Morocco whose government advocates for "autonomy within the framework of Moroccan sovereignty" or integration.[1881] In this politically driven context, can there be exercise of external self-determination by a people in a free and genuine manner if not all options are available to them, especially independence? If a plesbicite is no longer feasible, how is the choice of the people to be ascertained?[1882] Have the Sahrawi become an indigenous minority in their homeland? In other words, are the possible solutions to the conflict limited to the internal self-determination of Sahrawi people, i.e., autonomy?

Has time passed, population transfer effectly shrunk self-determination as a rights-based solution. Today, some commentators argue that Saharans should settle for self-government

[1879] See the "Moroccan Initiative for Negotiating an Autonomy Status for the Sahara Region" and the POLISARIO "Proposal for a Mutually Acceptable Political Solution that Provides for the Self-Determination of the People of Western Sahara" in *Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN Doc S/2007/202 (2007); *Western Sahara*, SC Res 1871, UNSCOR, UN Doc S/RES/1871 (2009); *Western Sahara*, SC Res 2099, UNSCOR, UN Doc S/RES/2099 (2013).

[1880][Emphasis added] *Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN ·
Doc S/2013/220 (2012) at paras 109, 111; UN Doc S/RES/1871 (2009) *ibid* at para 2.

[1881] "The most significant objection of the Kingdom of Morocco to the plan seemed to be that in the referendum to determine the final status of Western Sahara, one of the two ballot choices, which reflected those previously agreed to by the parties in the settlement plan (S/21360), was independence." *Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN Doc S/2003/1016 (2013) at para 26; *Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN Doc S/2004/325 (2004) at paras 5, 36.

[1882] See Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 42.

through free association in accordance with international law.[1883] But to accord with the law of self-determination, the solution must offer, not impose, a pre-negotiated solution.

Looking back at the response to the conflict, one could arguably make the point that UN plans for the referendum have treated Morocco and Moroccan settlers "kindly."[1884] Such position is informed by the fact that as the eligibility criteria for voting in the referendum evolved, so did the UN position on the 'self' entitled to determine the future of Western Sahara. As a result, the self is no longer considered the indigenous people of Western Sahara, as was originally conceived by the UN in 1966, but the Saharawi people and the Moroccan settlers who arrived in the 1990s. In retrospect, therefore, the UN has granted settlers the right to vote and to decide the legal status of the territory on par with the local and protected population.

This begs the question: does international law recognize a right of self-determination to settlers transferred in violation of international law into an occupied non-self-governing territory? Although Morocco cannot acquire valid title to Western Sahara without the consent of the Sahrawi people, [1885] it is clear that Morocco has successfully manipulated the construct that is the people for the purpose of the exercise of the right to self-determination. It is also clear the UN has quietly acquiesced to this unfolding reality.

Moreover, Morocco was never found in violation of relevant provisions of international human rights and humanitarian laws for its transfers of settlers, notably Article 49 of the *IV Geneva Convention*.[1886] Nor has it been seriously pressured to hold a referendum. This *état de fait* is attributed to a lack of political will, despite a Moroccan public policy of "Moroccanization" of the Western Sahara.[1887] It is as if the UN has eschewed the human rights and humanitarian law framework applicable to the administration of non-self-governing-territories and military occupation. Also notable is the fact that MINURSO is the only peacekeeping mission without

[1883] Samuel J Spector, "Negotiating Free Association between Western Sahara and Morocco: A Comparative Legal Analysis of Formulas for Self-Determination" (2011) 16 International Negotiation 109.
[1884] Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 27, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805.
[1885] Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 27.
[1886] Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 23-24, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805.
[1887] Dana Brusca, *ibid* at 24-25.

a human rights mandate, a proposal rejected by Morocco and which may explain the quasi absence of international law from the peace process.[1888] As Eyal Benvenisti maintains, "the international community's half-hearted reaction to the other two cases, Morocco's annexation of Western Sahara and Indonesia's annexation of East Timor, were (and in the case of Western Sahara still is) sorry evidence of the shortcomings of international enforcement mechanisms."[1889] To explain this legal vaccum, Human Rights Watch submits that "political considerations that are extraneous to the resolution of the conflict prohibit an impartial and balanced approach. There is a clear tendency in the Council not to antagonize Morocco, which is in a much stronger position [than POLISARIO.]"[1890] The consequence is that the rule of law does not inform the resolution of the conflict in practice, to the benefit of sheer power and economic interests.

The situation has established a legal precedent that legitimizes conquest through settler transfer at the expense of the right to self-determination of a people. In addition, and as Gino Naldi and other commentators have remarked, "the passage of time appears to have weakened, rather than strenghtened, the SADR's claim to statehood."[1891] This is notably because Morroco has strenghtened its control over the territory and since the mid-1990s, support for SADR and SADR's recognition of statehood have regressed as a number of states have withdrawn their recognition in favor of support for Morocco.[1892] Indeed, *de facto* recognition has never translated into *de jure* recognition, hence the regression.[1893] The state in *statu nascendi* that is

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[1888] Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Morocco*, UNHRC, 21st Sess, UN Doc A/HRC/21/3 (2012) at para 132.1.
[1889] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 167- 169.
[1890] Human Rights Watch, *Western Sahara, Keeping it Secret, The United Nations Operation in the Western Sahara* (1995) Vol 7, No 7, Summary, Online: Available online: http://www.hrw.org/reports/1995/Wsahara.htm.
[1891] "Accordingly, grounds exist for believing that the SADR may no longer meet the requirements of statehood, assuming it ever did." Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 33; Akbarali Thobani, *Western Sahara since 1975 under Moroccan Administration* (Lewiston: The Edwin Mellen Press, 2002 at 95-100.
[1892] Gino Naldi, *ibid* at 33, ft 100. In 2004, 70 countries recognized the SADR, see "Deadlock in the Desert, Morocco's latest initiative is unlikely to end one's of Africa's oldest conflict" *The Economist* (8 March 2007), Online: http://www.economist.com/node/8825903; As of June 2001, 21 countries had withdrawn their recognition. Akbarali Thobani, *Western Sahara since 1975 under Moroccan Administration* (Lewiston: The Edwin Mellen Press, 2002) at 96.
[1893] On the removal of *de facto* recognition, see Éric Wyler, *Théorie et pratique de la reconnaissance d'État, une approche épistémologique du droit international* (Bruxelles: Bruylant, 2013) at 86.

(was) Western Sahara is increasingly failing to meet the criteria of statehood and loosing recognition.

Meanwhile, Morocco has portrayed independentists and the POLISARIO has separatists who want to secede. The latest report from the Universal Periodical Review confirms that most states are not overwhelmingly concerned with the right of self-determination of Saharawi since most recommendations on the related matter aimed to improve minority rights, the protection of human rights defenders, and freedom of expression and association.[1894] More specific recommendantions on the registration of civil society organisations advocating for the Saharawi people's right to self-determination and to the introduction of a human rights component into the mandate of MINURSO were rejected by Morocco.[1895] No state however requested that Morrocco respect the right of self-determination of the Saharawi people. Does the current *statu quo* favouring Morroco means it has established sovereignty over Western Sahara as a *fait accompli* thanks in part to the transfer of settlers? More preoccupying perhaps: is the situation an indication that the transfer of settlers is still a means to conquer and assert sovereignty over territory?

[1894] UN Human Rights Council, *Report of the Working Group on the Universal Periodical Review*, UNGAOR, 21st Sess, UN Doc A/HCR/21/3 (2012) at paras 129.83, 130.3, 130.11, 130.12.
[1895] UN Human Rights Council, *ibid* at paras 131.4 and 132.1.

2.3 Neither legal nor political will, but East Timorese people's will

East Timor was a colony of Portugal from 1513 until a new portugese government recognized East Timor's right to self-determination following the 1974 Carnation Revolution. From then on, it took 25 years for East Timor's political status to be sealed in a popular consultation in 1999.[1896] Portugal intended to transfer authority though a shared transitional government and by 1978, to an East Timorese government.[1897] It is in this context of political *ouverture* that Portugal planned to overview the election of a East Timorese population assembly in 1976.[1898] Following the election, three main political parties emerged with agendas varying from immediate independence to gradual independence through a temporary federation with Portugal, and finally, full fledged integration with Indonesia.[1899] Tensions arose among the parties and the population culminating in a short civil war, which Portugal was unable and probably unwilling to stop.[1900] The *de facto* emerging political party and military group, the Revolutionary Front for an Independent East Timor (hereinafter FRETILIN), took control of the territory and proclaimed to represent the people of East Timor.[1901] Meanwhile, members supportive of integration fled to Indonesia and signed proclamations of integration with Indonesia, an indication that two opposing contentions were about to clash.[1902]

[1896] *Question of Territories under Portugese Domination*, GA Res 3294 (XXXIX), UNGAOR, 29th Sess, UN Doc A/RES/3294 (1974); *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at paras 6-7, 8-12; 13 and 32-35, Online: http://www.cavr-timorleste.org/en/chegaReport.htm; For a short summary of the political history of East Timor, see e.g. Roger S Clark, "The 'Decolonisation' of East Timor and the United Nations Norms on Self-Determination and Aggression" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 65 at 67-73.

[1897] Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 8, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805

[1898] *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at para 133, Online: http://www.cavrtimorleste.org/en/chegaReport.htm

[1899] *Chega!, ibid* at paras 46-48; Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 8, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805

[1900] Dana Brusca, *ibid*; *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at paras 140, 144, 158-159; For a similar account of events, see Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law* (Oxford: Oxford University Press, 2009) 194 at 204-206.

[1901] Dana Brusca, *ibid*; *Chega!, ibid* at para 88.

[1902] *Chega!, ibid* at para 161.

With a full scale Indonesian invasion looming, FREITILIN sought to garner international support by declaring the independence of East Timor on 28 November 1975.[1903] However, the much sought recognition from the international community, including Portugal, never materialized.[1904] In the name of a "united Indonesian nation" or "Greater Indonesia" and international geopolitical interests in preempting communist infiltration, Indonesia occupied the entire territory nine days after East Timor's declaration of independence.[1905] It then formed, with supportive local Timorese parties, a provisional governement, officially annexing East Timor in 1976 and holding elections in 1982.[1906] Consequently, East Timor became a non-self-governing territory under Indonesian occupation, both of which, because of their colonial and foreign domination, entail self-determination.[1907] Indonesia breached the right to self-determination of the East Timorese people and the principle of non aggression enshrined in Articles 1(1) and 2(4) of the *UN Charter* by occupying and annexing East Timor.[1908]

As Indonesia strengthened its control over the territory and its population, it carried out transfer of the civilian population, including confinement of civilians living in areas under guerilla control and their internment in camps. In 1977, in order to assert control over the guerilla and the civilian population hiding in the mountains, groups of fighters and civilians were pushed into confined areas of the territory which became subject to intense aerial bombings.[1909] This

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[1903] *Chega!, ibid* at paras 193-195.
[1904] *Chega!, ibid* at paras 204, 218-220.
[1905] *Declaration on the Establishment of A Provisional Government of the Territory of East Timor* (17 December 1975), *annexed to Letter from the Permanent Representative of Indonesia to the UN Secretary-General* (22 December 1975), UN Doc A/31/42 (1975); *Legalization of the Integration of East Timor into the Unitary State of the Republic of Indonesia and the Formation of the Province of East Timor*, Indonesia, Law 7/76 (1976) cited in Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 8, fn 36 and 9, fn 39, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805.
[1906] For an account of events, see Tessa Piper, "East Timor: Prospects for Resolution," *Writenet* (1 June 1995), Online: http://www.refworld.org/docid/3ae6a6c24.html; *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part III at paras 62-66, 69-70, 97, 112-138, 223-229; 257-260; 404; 556, Online: http://www.cavr-timorleste.org/en/chegaReport.html; For a dicussion of the legal status of East Timor, read Daniel Machover, "International Humanitarian Law and the Indonesian Occupation of East Timor" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 205 at 210-213.
[1907] See Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 227.
[1908] Read Roger S Clark, "The 'Decolonisation' of East Timor and the United Nations Norms on Self-Determination and Aggression" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 65 at 73-100.
[1909] John G Taylor, "East Timor: Forced Resettlement" (1999) 5 Forced Migration Review 31 at 31; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 173-174.

military strategem was part of an "encirclement and annihilation" campaign[1910] incremental to the Indonesian policy of eradication of the resistance and separation of the population from the guerilla.[1911] The civilian population, nearly half the entire Timorese population at the time, surrendered and was massively interned into camps, where conditions led to famine and diseases as well as forced labour.[1912] In testifying before the Commission, Costa Magalhães described life in one of these camps:

> We lived in Uma Metan for three months. I saw a large concentration of civilians there, around 8,000 of them. They came from Aileu, Maubisse, Same, Ainaro, Manatuto, Dili, Liquiça and Viqueque. They suffered greatly due to starvation, illness and lack of clothing. For the three months I was there, we weren't allowed to go further than one to two kilometres [from the camp]. [...]We were given food, but only one small can of corn per person per week. We could cook only a handful every two days. Because of that, many couldn't endure the hunger and eventually between five and six people died each day due to hunger. Those who did eat the stale corn got sick with various illnesses [...] Once they fell ill, they would soon die. [...] Only the really lucky survived.The soldiers intentionally punished people day and night, and didn't allow them to go out to look for food, get water or collect firewood. Because the soldiers also did not give food to people or treat the sick, up to 40 people a week died of hunger, thirst and disease.[1913]

A vast part of the camp population was eventually forcibly relocated to new villages established through their own forced labour.[1914] As the *Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste* explained, "across Timor-Leste the Indonesian military developed its territorial structure in tandem with population movements and demographic changes consequent to the major displacements of the period."[1915] In other words, Indonesia used population transfer as a counter-insurgency tactic in the form of unlawful movement of civilians and confinement. As a result of these harsh policies, by the

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[1910] Derrick Silove, "Conflict in East Timor: Genocide or Expansionist Occupation" (2000) Human Rights Review 62 at 68.
[1911] *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 7.3 at para 195, Online: http://www.cavr-timorleste.org/en/chegaReport.htm
[1912] *Chega!, ibid* at part 3 at 83-85.
[1913] *Chega!, ibid* at part 7.3 at 4.
[1914] *Chega!, ibid* at part 7.3 at para 176; John G Taylor, "East Timor: Forced Resettlement" (1999) 5 Forced Migration Review 31 at 32.
[1915] *Chega! ibid at* part 3 at para 360.

1980s, nearly 200 000 persons were believed dead.[1916] In fact, between one third and one quarter of the East Timorese population died during the 24 years of Indonesian occupation.[1917] The living conditions imposed by the Indonesian military against East Timorse coupled with actions undertaken throughout the occupation could constitute genocide because they involved the creation of living conditions causing the destruction of the population, although more would be required to demonstrate that genocidal intent motivated the acts.[1918] Population transfer did not end with the displacement of the population and its confinement.

Once Indonesia effectively subdued the population it embarked upon a program of settler transfer in 1982.[1919] Transmigration was a program of resettlement applied throughout Indonesia and thus not only to East Timor. Its main objectives were (1) to reduce overpopulation in urban areas; (2) to unify and homogenize the country through assimilation and integration; and, (3) to ensure Indonesia's national security.[1920] Although some commentators contend the transfer of Indonesian settlers had an involuntary and voluntary component, others assert the program had "always been entirely voluntary" and was stimulated by governmental economic incentives.[1921] Admittedly, the voluntary and/or involuntary nature

[1916] Geoffrey Robinson, *East Timor 1999, Crimes against Humanity*, Report Commissioned by the United Nations Office of the High Commissioner for Human Rights (2003) at 16, Online: http://www.etan.org/etanpdf/2006/CAVR/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf
[1917]Derrick Silove, "Conflict in East Timor: Genocide or Expansionist Occupation" (2000) Human Rights Review 62 at 67.
[1918] Derrick Silove, *ibid* at 68; For a discussion as to whether genocide applies to the conflict in East Timor, particularly post-referendum violence, see Ben Saul, "Was the Conflict in East Timor 'Genocide' and Why Does it Matter?" (2001) 2 Melbourne Journal of International Law 477.
[1919] *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at para 435; John G Taylor, "East Timor: Forced Resettlement" (1999) 5 Forced Migration Review 31 at 31; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 174.
[1920] John G Taylor, *ibid*; Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 13, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805; Riwanto Tirtosudarmo, "Demography and Security: Tramsmigration Policy in Indonesia" in Myron Weiner & Sharon Stanton Russel, eds, *Demography and National Security* (New York: Berghahn Books, 2001) at 217-218.
[1921] For an explanation of the recruiting process, see Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 14, Online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805

of the transfer of settlers is hard to assess. Less arguable, however, is that Indonesia's policy of population transfer contravened the obligations of an occupying power and was unlawful.[1922]

Settler transfer was one element of a larger Indonesian program of transformation of East Timorese society as described by John Taylor.

> With traditional settlement patterns dramatically altered, the army embarked on a widespread economic and social transformation of East Timorese society. Fundamental social features – the extended family, kinship system, religion and education – were undermined as the army set out to replace them with institutions akin to Javanese norms and culture.[1923]

The advantageous status accorded to Indonesian settlers resulted in two separate classes and two largely segregated populations.[1924] Indonesian settlers were transferred to fertile areas in East Timor whereas East Timorese farmers were moved to infertile lands.[1925] At the beginning of the 1990s, Indonesian traders were introduced and given privileged access to markets.[1926] Consequently, most of the fertile land and economic activities were concentrated in the hands of Indonesian settlers, with the consequent social and economic marginalization of East Timorese.[1927] Education equally suffered from a policy of "Indoneziation."[1928] By 1999, there were an estimated 150 000 to 200 000 settlers among a population of approximately 850 000

[1922] Daniel Machover, "International Humanitarian Law and the Indonesian Occupation of East Timor" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 205 at 205.
[1923] John G Taylor, "East Timor: Forced Resettlement" (1999) 5 Forced Migration Review 31 at 32.
[1924] See Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 14, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805
[1925] John G Taylor, "East Timor: Forced Resettlement" (1999) 5 Forced Migration Review 31 at 32.
[1926] John G Taylor, *ibid*.
[1927] Derrick Silove, "Conflict in East Timor: Genocide or Expansionist Occupation" (2000) Human Rights Review 62 at 69-70.
[1928] Derrick Silove, *ibid*.

persons.[1929] Understandably, the presence of settlers and the discriminatory treatment of East Timorese made for tensed relations between the two communities.[1930]

Although the annexation of East Timor was never recognised *de jure* by the majority of members of the United Nations,[1931] little was done to uphold and enforce respect for the prohibition of the acquisiton of territory by force, the right to self-determination of East Timorese people or the law of occupation. Eyal Benvenisti is more critical when he writes the UN "proved utterly ineffective."[1932]

In 1975, the UN General Assembly reacted to Indonesia's invasion and occupation and requested that Indonesia "desist from further violation of the territorial integrity of Portuguese Timor and to withdraw without delay its armed forces from the territory in order to enable the people of the Territory freely to exercise their right to self-determination and independence."[1933] In 1976, it also rejected the incorporation of East Timor into Indonesia because the people had not been able to exercise their right to self-determination.[1934] For its part, the Security Council unanimously called upon Indonesia to withdraw all its forces in 1975, but in a similarly worded resolution in 1976, the United States and Japan abstained, already indicating a shift in support of Indonesia.[1935] And that was to be the main response of the Security Council for the next twenty years. It is also noteworthy that the UN Security

[1929] John G Taylor, "East Timor: Forced Resettlement" (1999) 5 Forced Migration Review 31 at 32; "The most reliable figures suggest that approximately 15,000 transmigrants arrived in East Timor between 1980 and 1987, but unofficial, non-government sources estimate that the non-Timorese population living in East Timor in 1997 was as high as 160,000-180,000 nearly twenty percent of the population." Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 206.
[1930] See for instance, *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at para 490.
[1931] Somes states did however grant *de jure* recognition to the annexation, such as the United States, New Zealand and Australia, who argued that territory should not be acquired by conquest, but nevertheless recognized the effective situation on the ground and the legal consequences of annexation. For a discussion, see Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 286-290.
[1932] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 175; see also Sharon Korman, *ibid* at 281.
[1933] *Question of Timor*, GA Res 3485 (XXX), UNGAOR, 30th Sess, UN Doc A/RES/3485 (1975) at para 5.
[1934] *Question of Timor*, GA Res 31/53, UNGAOR, 31st Sess, UN Doc A/RES/31/53 (1976) at paras 5-6.
[1935] *East Timor*, SC Res 384, UNSCOR, UN Doc S/Res/384 (1975) at para 2; *East Timor*, SC Res 389, UNSCOR, UN Doc S/Res/389 (1976).

Council did not condemn the invasion of East Timor as aggression in breach of Article 2(4) of the UN Charter.[1936]

Following the initial UN condemnations, and as Indonesia strengthened its hold over the people of East Timor, support at the UN dimished to the quasi recognition of Indonesia's annexation as a *fait accompli*.[1937] For instance, in 1982, a UN General Assembly Resolution affirming the right to self-determination of Timorese people was nearly rejected with 50 votes for, 46 against and 50 abstentions.[1938] In the same resolution, the General Assembly requested the Secretary General to consult all parties concerned. However, when talks began in 1983 between the UN, Indonesia and Portugal, representatives of the Timorese people were absent.[1939] The inclusion of the aggressor and occupying power and of the former colonial power, but not of representatives of East Timor indicates a state-centric conflict resolution process. No further resolution reaffirming the right to self-determination of East Timorese was passed by the General Assembly after 1982 for fear it would be rejected although the question of East Timor remained on the international agenda. Tacit acquiescence of the legal consequences flowing from annexation led commentators to believe the fate of East Timor had been sealed. In 1995, for instance, Antonio Cassesse wrote the situation in East Timor had been "settled with total disregard for UN pronouncements and without UN approval."[1940]

Despite a clear disengagement from the UN in general and what appeared to be a 'done deal', Roger Clark correctly remarks that "in the symbolic world of diplomacy, keeping the matter 'under review' is about the nearest thing to a sanction that can be achieved."[1941] Indeed, the

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[1936] Ben Saul, "Was the Conflict in East Timor 'Genocide' and Why Does it Matter?" (2001) 2 Melbourne Journal of International Law 477 at 499.
[1937] Bill Browing, "Self-determination and the Jurisprudence of the ICJ" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 151 at 155; Roger S Clark, "The 'Decolonisation' of East Timor and the United Nations Norms on Self-Determination and Aggression" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 65 at 72-73; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 174.
[1938] *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at 111, para 452.
[1939] *Chega!, ibid* at part 3 at para 455.
[1940] Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 76, 223.
[1941] Roger S Clark, "The 'Decolonisation' of East Timor and the United Nations Norms on Self-Determination and Aggression" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 65 at 101.

norm prohibiting territorial acquisition by conquest had not been completely defeated by pragmatism and *realpolitik*.[1942] The matter remained under review until a massacre reached Western audiences in 1991 and put East Timor on top of the agenda.

In spite of mediation efforts by the Secretary-General, there was no further Security Council resolution on East Timor until the fall from grace of President Suharto in 1999.[1943] In a short time span, the Security Council felicited Portugal and Indonesia on their Agreement to hold a popular consultation,[1944] established the UN Mission in East Timor (UNAMET) to organize and overview the consultation,[1945] and following post-ballot violence, deplored the "large-scale displacement and relocation of East Timorese civilians", the widespread violations of international humanitarian and human rights law and qualified the situation as a threat to peace and security[1946] justifying the establishment of a multinational force.[1947] Noteworthy, the Security Council only established the multinational and UN mission in East Timor after the occupying power (Indonesia) had agreed to the intervention.[1948] Overall, the Security Council remained silent throughout Indonesia's occupation and only re-engaged in 1999 as events quickly unfolded following Indonesian *ouverture* and a favourable geopolitical climate.

Consequenlty, most of Indonesia's occupation proceeded unchallenged and without strong UN condemnations of violations of human rights and particularly of humanitarian law, including population transfer.[1949] As Dana Brusca remarks, "neither the UN governing bodies nor their European counterparts have ever formally accused Indonesia of violating the prohibition against civilian population transfers."[1950] As she further sustains,

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[1942] Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 289.
[1943] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 685.
[1944] *East Timor*, SC Res 1236, UNSCOR,UN Doc S/Res/1236 (1999) at paras 1-2.
[1945] *East Timor*, SC Res 1246, UNSCOR, UN Doc S/Res/1246 (1999) at paras 1, 4.
[1946] *East Timor*, SC Res 1264, UNSCOR, UN Doc S/Res/1264 (1999) in preamble.
[1947] *East Timor*, SC Res 1264, *ibid* at para 3.
[1948] Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, 10th ed (Paris: Dalloz, 2010) at 686.
[1949] Exceptions being perhaps the resolutions of the then Commission of Human Rights regarding violations of human rights following the 1991 Massacre and the meetings of the Decolonization Committee, see for instance *Situation of Human Rights in East Timor*, UNHRC, UN Doc 1997/63 (1997); Daniel Machover, "International Humanitarian Law and the Indonesian Occupation of East Timor" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 205 at 208.
[1950] Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 13, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805

> Given these numbers, and the unabashed manner in which Indonesia carried out transmigration, it seems odd that neither the U.N. nor Portugal raised the specter of Article 49(6). Politically, however, leveling such criticisms would have been difficult; the Indonesian transmigration program received financial backing from not only the World Bank, but also several Western powers. To condemn Indonesia would have been to criticize these players, which the U.N. was apparently unwilling to do. The U.N.'s inaction implies member states either did not believe Indonesia had violated Article 49(6) or believed the violations were so slight they did not warrant condemnation. The U.N.'s treatment of the Indonesian settlers during and after the 1999 referendum further supports this proposition.[1951]

The healf-hearted response from the UN General Assembly and Security Council illustrates the "limits of international law as a constraining factor in the behaviour of states"[1952] in the face of "widespread indifference" [1953] or "any sense of committment" [1954] attributable to Western national interests, mainly US, to contain communism in South-East Asia via Indonesia. [1955] Recognition of the *fait accompli* could also be imputed to the state in *statu nascendi* that was East Timor and to economic interests. The report of the Commission for Reception, Truth and Reconciliation in Timor-Leste is eloquent when it concludes that "most Western countries failed to strike the right balance between support for the principle of self-determination and their strategic and economic interests in relation to Indonesia."[1956] More critical of the lip-service of the Security Council, the report of the Commission submits that:

> The Security Council recognised the right of the people of Timor-Leste to self-determination in 1975 and 1976, but failed to effectively uphold this right until

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[1951] Dana Brusca, *ibid* at 15.
[1952] Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 281.
[1953] *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at paras 51-52, 58-59, 135, Online: http://www.cavr-timorleste.org/en/chegaReport.htm; Derrick Silove, "Conflict in East Timor: Genocide or Expansionist Occupation" (2000) Human Rights Review 62 at 76.
[1954] Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 284.
[1955] *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at paras 51-52, 58-59, 135, Online: http://www.cavr-timorleste.org/en/chegaReport.htm; Derrick Silove, "Conflict in East Timor: Genocide or Expansionist Occupation" (2000) Human Rights Review 62 at 76; Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 285; For a similar view, see Antonio Cassese, *Self-Determination of People, A legal Reappraisal* (Cambridge: Cambridge University Press, 1996) at 228.
[1956] *Chega!, ibid* at part 6 at para 4; Derrick Silove, *ibid* at 72-73.

> 1999. It did not intervene to halt the Indonesian invasion although at least two of its members knew of Indonesia's intentions; it expressed concern at the loss of life and the need to avoid further bloodshed, but did not provide for emergency humanitarian assistance; it did not sanction Indonesia for non-compliance with its wishes; it did not follow-up Resolution 389 and it shelved the question until 1999. This failure to uphold Timor-Leste's right to self-determination was the responsibility of the Permanent Members of the Security Council each of whom, with the exception of China, was dismissive of the Timor question and chose to shield Indonesia from international reaction at Timor's expense.[1957]

A similar conclusion was reached by Geoffrey Robinson, author of a report commissioned by the Office of the High Commissioner for Human Rights, especially with regard to the United States, Australia and the United Kingdom, whom he writes,

> Through their actions and acquiescence, key states *effectively encouraged the invasion of East Timor* and, together with international agencies and corporations, *facilitated a historical pattern of grave human rights violations* there. More directly, by failing to take effective measures to prevent the widely predicted violence in 1999, key members of the international community *facilitated crimes against humanity* committed by the Indonesian armed forces and the militias. [1958]

No state was held responsible for facilitating occupation and serious violations of international law and failing to protect civilians.

Another UN organ, the International Court of Justice, addressed issues of relevance to the occupation of East Timor. In the *East Timor case*, Portugal asserted the 1989 *Timor Gap treaty* between Indonesia and Australia on the continental shelf of East Timor was a violation of the right to self-determination of East Timorese.[1959] In essence, Portugal denounced Australia's failure to treat East Timor as a non-self-governing territory and Portugal as the administering Power. [1960] Australia argued the Court had to rule on the conduct of Indonesia, who did not consent to its jurisdiction. [1961] Agreeing, the Court found it could not decide the matter because it would indeed require a determination of whether Indonesia had the power to enter into the

[1957] *Chega!, ibid* part 6 at para 7.
[1958] [Emphasis added] Geoffrey Robinson, *East Timor 1999, Crimes against Humanity*, Report Commissioned by the United Nations Office of the High Commissioner for Human Rights (2003) at 269, see also 15-19, 265-266, Online: http://www.etan.org/etanpdf/2006/CAVR/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf
[1959] *Case Concerning East Timor (Portugal v Australia)*, Judgment, [1995] ICJ Rep 90 at para 19.
[1960] *Case Concerning East Timor*, *ibid* at paras 25, 27.
[1961] *Case Concerning East Timor*, *ibid* at para 24.

treaty on behalf of East Timor.[1962] Responding to the Portugese argument that self-determination was *erga omnes* and binding on Australia, regardless of Indonesia's position, the Court balanced the *erga omnes* nature of the rule against consent to its jurisdiction and weighted in favour of the latter.[1963] The Court found that

> whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[1964]

Portugal also argued that UN Security Council and General Assembly resolutions sufficed to conclude that states were obliged not to recognize Indonesia's authority over East Timor. To this, the Court responded it doubted these resolutions went so far as to require states to deal exclusively with Portugal and not to recognize Indonesia's auhtority.[1965] Hence, the obligation of states not to recognize the product of serious violations of international law – conquest of territory – was jeopardized.

The Court never attempted to determine the responsibility of Indonesia, the "absent third" party in this dispute,[1966] in accordance with its status as an occupying power.[1967] In fact, the Court lent credence to the state-centric international system when it weighted the absence and lack of consent given by Indonesia to the detriment of the equally absent East Timorese people's and of their *erga omnes* right to self-determination. This ruling raises the question as to the effect of *erga omnes* if it is insufficient to trump the consent of states, the socle of positivism. Critical of the Court's approach, Antônio Augusto Cançado Trindade commented that "nothing could be more incompatible with the very existence of the *erga omnes* obligations than the positivist-voluntarist conception of International Law and the emphasis on the State consent as

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[1962] *Case Concerning East Timor, ibid* at para 28.
[1963] *Case Concerning East Timor*, *ibid* at para 29.
[1964] *Case Concerning East Timor*, *ibid* at paras 29, 33-34.
[1965] *Case Concerning East Timor, ibid* at paras 31-32.
[1966] On the issue of consent to jurisdiction, the *Monetary gold* doctrine and its implications for Indonesia, read Iain Scobbie, "The Presence of an Absent Third: Porcedural Aspects of the East Timor Case" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 205 at 223,241.
[1967] For a dicussion of Indonesia's violation of IHL with regard to its duty as an occupying power, read Daniel Machover, "International Humanitarian Law and the Indonesian Occupation of East Timor" in Catholic Institute for International Relations, ed, *International Law and the Question of East Timor* (Nottingham: CIIR/IPJET, 1995) 205 at 213-214.

basis of the exercise of international jurisdiction."[1968] Similarly, Catriona Drew flagged the system's lacunea when she opined that "while on a normative level, the right of self-determination has been declared by the International Court of Justice to be an obligation *erga omnes*, and is frequently cited as a candidate for the elusive *jus cogens* status, when it comes to issues of enforcement or procedural rights of access, the law on self-determination remain resolutely impoverished."[1969] Further commenting on the case of East Timor, Drew raises these important questions with regard to people's access to justice.

> Do we muse on the irony that in *this* particular case the rights of an absent *state* (Indonesia) were upheld while those of the absent *people* (the East Timorese) remained *per force* beyond the jurisdictional reach of the Court? Or does it remind us that peoples have perennially been absent from the cases bearing their names – from *South West Africa* to the *Western Sahara*?[1970]

The Court nevertheless noted that all parties recognized East Timor as a non-self-governing territory and its people as holding the right of self-determination.[1971] However, absolutely nothing was done beyond recognition of the right to self-determination of the East Timorese. The 'response-gap' in *East Timor* highlights a weakness of the state-centric international response to respect, uphold and protect the right to self-determination when the state in *statu nascendi* is colonized, occupied and conquered.

Despite weak support at the UN, armed and peaceful Timorese opposition and resistance against Indonesian rule remained strong in occupied East Timor and is certainly not incidental to its full independence today[1972] and to respect for the rule of law. In this regard, the Constitution of East Timor "acknowledges and values the secular resistance of the Maubere People against foreign domination and the contribution of all those who fought for national

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[1968] Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 314.
[1969] Catriona Drew, "The East Timor Story: International Law on Trial" (2001) 12:4 European Journal of International Law 651 at 667-668.
[1970] [Emphasis in original text] Catriona Drew, *ibid* at 668.
[1971] *Case Concerning East Timor (Portugal v Australia)*, Judgment, [1995] ICJ Rep 90 at para 37.
[1972] Tessa Piper, "East Timor: Prospects for Resolution," *Writenet* (1 June 1995), Online: http://www.refworld.org/docid/3ae6a6c24.html; Geoffrey Robinson, *East Timor 1999, Crimes against Humanity*, Report Commissioned by the United Nations Office of the High Commissioner for Human Rights (2003) at 17, Online: http://www.etan.org/etanpdf/2006/CAVR/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf

independence."[1973] Perseverence, coupled with geopolitical changes at the international level opened the door for East Timorese's exercise of their right to self-determination. Everything began to change at the beginning of the 1990s, but change had little to do with the implementation of a rights-based framework by members of the UN.

The end of the Cold War, the diffusion for the first time by a foreign media of the Santa Cruz Massacre perpetrated against the Timorese people in 1991, and, the fall of Suharto in 1998 were a game-changer. These events convinced the new Indonesian government to allow a referendum on the future of the Territory in January 1999, persuaded it had the requisite support of the population.[1974] In 1999, the Security Coucil established the UN Mission in East Timor (UNAMET) under Chapter VII to support the future of East Timor through a popular consultation.[1975] The consultion gave two options: independence or regional autonomy within Indonesia.[1976] Following the announcement of a consultation, some Indonesian settlers began to leave East Timor fearing retribution.[1977] Simultaneously, there was an increased transfer of Indonesians into East Timor to derail the result of the consultation.[1978] Despite this attempted demographic sabotage, the population overwhelmingly expressed the desire for independence

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[1973] *Constitution of the Democratic Republic of East Timor*, 20 May 2002, preamble, Part I, Sec 11(1), Online: http://www.eastimorlawjournal.org/East_Timor_National_Parliament_Laws/

[1974] Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies Under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 8, 11, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805*; Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at para 485, 522, 548.

[1975] UNAMET was the UN authority responsible for organizing the referendum. See SC Res 1246, UNSCOR, UN Doc S/RES/1246 (1999).

[1976] The question put to the vote was as follows: "Do you accept the proposed autonomy for East Timor within the Unitary State of the Republic of Indonesia?" or "Do you reject the proposed autonomy for East Timor, leading to East Timor's separation from Indonesia?" The agreement entitled all persons aged 17 or above who were:

(a) Born in East Timor;
(b) Born outside East Timor, but who had at least one parent born in East Timor; or
(c) Were the spouses of persons falling into either category (a) or (b) to vote in the referendum.

Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, 5 May 1999, 2062 UNTS 8; *Agreement Regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot*, Indonesia, 5 May 1999, 2062 UNTS 40 cited in *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at para 572.

[1977] John G Taylor, "East Timor: Forced Resettlement" (1999) 5 Forced Migration Review 31 at 32.

[1978] Settlers were issued ID as they moved to East Timor allowing them to vote in the referendum. John G Taylor, "East Timor: Forced Resettlement" (1999) 5 Forced Migration Review 31 at 32.

with nearly 80 percent in support of independence.[1979] Violence led by pro-integration militias supported by Indonesia's military and paramilitary forces began during the period leading to the referendum and increased immediately following the announcement of the results on 4 September 1999, causing renewed displacement of the population.[1980]

The conditions under which the consultation took place failed to guarantee a safe environment because violence had begun prior to the vote whereas security was the responsibility of Indonesian forces.[1981] The agreement signed by Portugal and Indonesia on 3 May 1999 provided the popular consultation would take place in a "secure environment devoid of violence or other forms of intimidation" and that "Indonesian authorities have the reponsibility to ensure such an environment as well as for the maintenance of law and order."[1982] It is naive wishful thinking to grant to Indonesia, the country that agressed, occupied and annexed East Timor, the responsibility for security.[1983] In fact, Indonesia had planned for a punitive campaign in the event of independence and this is exactly what happened.[1984]

Indonesia reacted to the referendum by implementing a scorth-earth policy, including further transfer of civilians. Once the results became known, murders, torture, sexual violence and

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[1979] A total of 98.6 percent of eligible voters came to vote on the referendum and 78.5 percent rejected autonomy within Indonesia. Only 21.5 percent of the population wished to remain within Indonesia. *Chega! ibid* at part III at paras 567-568.

[1980] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 205; Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies Under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 11, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805; On Indonesia's involvement in supporting, planning, assisting and organizing pro-integration groups, see Reports of special rapporteurs and representatives, *Situation of Human Rights in East Timor*, UNGAOR, 44th sess, UN Doc A/54/660 (1999) at paras 59-65; *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part III at paras 568, 623.

[1981] The consultation was twice postponed and most likely failed to meet the conditions set by the UN Secretary-General in its report such as bringing armed groups under control, the arrest and prosecution of those who threaten or incite violence, and the laying down of arms by all armed groups. Report of the Secretary-General, *Question of East Timor*, UNSCOR, UN Doc S/1999/513 (1999) at para 4; For reports on violence prior to the consultation, see for instance: Report of the Secretary-General, *Question of East Timor*, UNSCOR, UN Doc S/1999/705 (1999) at paras 12-17.

[1982] Report of the Secretary-General, UN Doc S/1999/513 (1999), *ibid* at para 6.

[1983] For a critique of the popular consultation, read: Catriona Drew, "The East Timor Story: International Law on Trial" (2001) 12:4 European Journal of International Law 651 at 673-680; Geoffrey Robinson, *East Timor 1999, Crimes against Humanity*, Report Commissioned by the United Nations Office of the High Commissioner for Human Rights (2003) at 22, 26.

[1984] Geoffrey Robinson, *ibid* at 79.

population transfer engulfed East Timor.[1985] The International Commission of Inquiry on East Timor, the then UN Human Rights Commission and the report of Geoffrey Robinson commissioned by the UN OHCHR all found a "serious pattern" of deliberate and well-organized violations of human rights and humanitarian law amounting to crimes against humanity in 1999, including forcible displacement, arbitrary exile and population transfer.[1986] Among the many plans envisaged by Indonesia in the case of an eventual defeat, Operation Pull-Out foresaw the evacuation of a quarter of a million people comprised of 70 000 Indonesian civil servants, military and police and their families and around 180 000 East Timorese supportive of Indonesian rule.[1987] The plan was implemented with the resulting displacement of half the population, around 550 000 persons, among which between 250 000 to 280 000 were loaded onto trucks and boats and transferred to 200 refugees camps in West Timor.[1988] Many East Timorese were forced to transfer to West Timor.[1989] Some people, however, moved voluntarily to West Timor because they were supporters of automy within Indonesia and feared retribution, but others were transferred as a result of intimidation and death threat.[1990] Around 20 000 were Indonesian settlers who were reintegrated into other parts of Indonesia.[1991] East Timorese transferred into Indonesia (West Timor) lived in camps under

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[1985] UN Office of the High Commissioner for Human Rights, *Report of the International Commission of Inquiry on East Timor to the Secretary-General,* UNGAOR, UN Doc A/54/726, UNSCOR, S/2000/59 (2000) at para 142.

[1986] UN Office of the High Commissioner for Human Rights, *ibid* at paras 120-122, 131-133, 142; Geoffrey Robinson, *East Timor 1999, Crimes against Humanity*, Report Commissioned by the United Nations Office of the High Commissioner for Human Rights (2003) at 15, 42-43.

[1987] Geoffrey Robinson, *ibid* at 27, 29; According to Brusca, however, prior to and following referendum, settlers were not massively expelled or requested to leave East Timor because Timor's leadership had a policy of reconciliation. Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 15, Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805; There is however controversy on the motive behind the transfers. It is also argued that people were transferred to protect them; *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at paras 651, 654 and part 7.3 at para 8; Gottfried Koefner, "Displacement in East Timor" (2000) 19:2 Refugee Survey Quarterly 77 at 78; UN Office of the High Commissioner for Human Rights, *Report of the International Commission of Inquiry on East Timor to the Secretary-General,* UNGAOR, UN Doc A/54/726, UNSCOR, S/2000/59 (2000) at para 93.

[1988] *Chega!, ibid* at part 3 at para 625 and part 7.3 at para 423.

[1989] UN Office of the High Commissioner for Human Rights, *Report of the International Commission of Inquiry on East Timor to the Secretary-General,* UNGAOR, UN Doc A/54/726, UNSCOR, S/2000/59 (2000) at para 93; Geoffrey Robinson, *East Timor 1999, Crimes against Humanity*, Report Commissioned by the United Nations Office of the High Commissioner for Human Rights (2003) at 43, Online: http://www.cavr-timorleste.org/chegaFiles/finalReportEng/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf

[1990] *Chega!, ibid at* part 7.3 at paras 423, 486.

[1991] Gottfried Koefner, "Displacement in East Timor" (2000) 19:2 Refugee Survey Quarterly 77 at 77.

the control of militias who instilled a climate of insecurity.[1992] Six months after their transfer, around 145 000 persons had voluntarily returned to East Timor, some to face retaliation for being perceived as pro-integrationists.[1993] However, for others, the camps are virtual prisons which they cannot easily leave to return to East Timor. In addition to massive displacement, the result of Indonesia's scorched-earth campaign of transfer was the destruction of property; 70 to 80 percent of buildings and major infrastructure layed in rubble.[1994]

In response to the post-ballot chaos, the Security Council authorized a multinational force (INTERFET)[1995] to fill in the "complete vacuum of administrative authority and of policing and justice," which paved the way for the withdrawal of Indonesian troops.[1996] A few weeks later, the UN again modified the terms of its mandate because the situation was now considered a peace and security threat. The mission became the UN Transitional Administration in East Timor (UNTAET) under Chapter VII, which administered the territory until East Timor's independence in 2002.[1997] Indonesia rescinded its 1976 law annexing East Timor.[1998]

The newly independent country of East Timor defined the period of Indonesian occupation and annexation as a violation of the use of force and of the right to self-determination of the East Timorese people.[1999] In the preamble of its Constitution the first line is:

> Following the liberation of the Timorese People from colonisation and illegal occupation of the Maubere Motherland by foreign powers, the independence of East Timor, proclaimed on the 28th of November 1975 by Frente Revolucionária

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[1992] *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at para 660.
[1993] *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, UNSCOR, UN Doc S/2000/3 (2000) at para 14; Gottfried Koefner, "Displacement in East Timor" (2000) 19:2 Refugee Survey Quarterly 77 at 79.
[1994] *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at para 627 and part 7.3 at para 423; Geoffrey Robinson, *East Timor 1999, Crimes against Humanity*, Report Commissioned by the United Nations Office of the High Commissioner for Human Rights (2003) at 43, Online: http://www.cavr-timorleste.org/chegaFiles/finalReportEng/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf
[1995] *East Timor*, SC Res 1264, UNSCOR, UN Doc S/Res/1264 (1999).
[1996] *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, UNSCOR, UN Doc S/2000/3 (2000) at para 3; *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 7.3 at 142.
[1997] *East Timor*, SC Res 1272, UNSCOR, UN Doc S/Res/1272 (1999) at para 1.
[1998] *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, Advanced Copy (Dili, 2006) part 3 at para 662.
[1999] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 206.

> do Timor-Leste Independente (FRETILIN), is recognised internationally on the 20th of May 2002.[2000]

In East Timor, lack of timely recognition of a state in *statu nascendi* allowed occupation, transfer of population and annexation to proceed for 25 years. Lack of recognition of East Timor by powerful states; tacit acceptance of *de facto* recognition of *fait accompli* by UN bodies; and, complete meltdown of the proper legal framework prevented East Timorese from relying on the rule of law against occupation, population transfer and annexation.

[2000] *Constitution of the Democratic Republic of East Timor*, 20 May 2002, preamble, Online: http://www.eastimorlawjournal.org/East_Timor_National_Parliament_Laws/

2.4 Unfinished partition or the failure of a bad idea: The two-state solution that is not

The story of Palestine is the story of a failed UN Mandate. Britain gave up on its Mandate over Palestine in 1947, but not after having made conflicting engagements. In the 1917 Balfour Declaration to Lord Rothschild, Arthur James Balfour promised a "national home for the Jewish people",[2001] later reaffirmed in the 1922 Mandate for Palestine.[2002] Whereas Palestine was a A-Mandate entitled to provisional independence, with no authority on the part of the Mandatory to cede or lease the territory.[2003] Yet, throughout the Mandate, "British actions oscillated in favor of one community or the other, depending on political expediencies within and outside of Palestine, and on the personal political sympathies of British Mandate officers."[2004] Dual commitment to national self-determination in the same territory has led to much uncertainty and much discontent among Jewish and Palestinian peoples alike. The manner in which self-determination was conceived, and applied by the international community, particularly the British Madatory power, has layed down the conditions of intractability.[2005]

The Zionist Organization had the goal of estalishing a Jewish state in Palestine, as was affirmed in its first meeting in 1897 in the Basel Program.[2006] The idea of transferring Arab inhabitants

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[2001] "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religioius rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country." Arthur James Balfour, *Balfour Declaration*, United Kingdom Foreign Office, 2 November 1917.

[2002] Notably, Article 2: The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrrespective of race and religion." League of Nations, *Mandate for Palestine* (1922), 8 Official Journal 1007, League of Nations Doc C 529 M314 1922 VI at Art 22.

[2003] The Peel Commission Report speaks of "contradictory obligations of the Mandatory" Secretary of State for the Colonies, *Palestine Royal Commission Report*, Cmd 5479 (London: Majesty's Stationary Office,1937) at 363, para 3; League of Nations, *Mandate for Palestine* (1922), 8 Official Journal 1007, League of Nations Doc C 529 M314 1922 VI at Art 5.

[2004] George E Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories" (1994) 43 American University Law Review 467 at 500.

[2005] See Nils A Butenschϕn, "Accommodating Conflicting Claims to National Self-Determination: The Intractable Case of Israel/Palestine" (2006) 13 International Journal on Minority and Group Rights 285 at 288-289.

[2006] Zionism officially emerged at the World Zionist Congress in 1897, where the goal of establishing a Jewish state, as defined by Theodor Herzl in his book *Judenstaat* (literally the State of the Jews or the Jewish State) in 1896, was adopted. Political Zionism was born out of the persecution and general oppression of the Jews

was present in Zionism from its inception as a means to acquire land and establish a majority.[2007] The oft-cited quote from Herlz remains eloquent: "we shall try to spirit the penniless Arab population across the border by procuring employment for it in the transit countries, while denying it employment in our own country."[2008] The state envisaged by Zionism leaves no room for a state of Palestine.

From the beginning of Palestinian revolts in the 1920s, denial of self-determination and fear of Jewish domination were identified as the main causes of animosity towards Jewish immigration. The establishment of a Jewish majority was regarded by Palestinians as the main obstacle to independence.[2009] Assessing the will of the population in 1919, the American-led King-Crane Commission sent to Palestine by President Wilson concluded with regard to self-determination that

> if that principle is to rule, and so the wishes of Palestine's population are to be decisive as to what is to be done with Palestine, then it is to be remembered that the non-Jewish population of Palestine-nearly nine-tenths of the whole are emphatically against the entire Zionist programme. [...] To subject a people so minded to unlimited Jewish immigration, and to steady financial and social pressure to surrender the land, would be a gross violation of the principle just quoted, and of the people's rights, though it kept within the forms of law.[2010]

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throughout history, in particular following the pogroms in Russia in the 1880s. It also emerged within the context of European colonialism. The Jewish state, as articulated by Herlz, necessitated the ideological construction of the Jews as a people/nation and the establishment of a Jewish state – a model/ideal state – through Jewish immigration, hence the idea of 'ingathering the exiles'. Théodore Herzl, *L'état des juifs* (Paris: Éditions la Découverte, 1990) at 28, 31, 42; See also the *Basle Program* and the *Jerusalem Program*, World Zionist Organization, Online: http://www.wzo.org.il/Mission-Statement and http://www.wzo.org.il/The-Jerusalem-Program

[2007] Prior to and soon after the establishment of the state of Israel in 1948, population transfer plans included the Weizman Transfer Scheme (1930); the Soskin Plan of Compulsory Transfer (1937); the Royal (Peel) Commission recommendations (transfer of Arabs to Transjordan) (1937); the Weitz Transfer Plan (1937); the Bonne Scheme (1938); the al-Jazirah Scheme (second transfer committee) (1938); the Norman Transfer Plan to Iraq (1934-38); the Ben-Horin Plan (1943-48); and, the Plan Dalet (1948). Plan Dalet aimed to expand the Jewish areas beyond those allocated by the United Nations in the 1947 Partition Plan (Resolution 181) and remove Arab/Palestinian presence from these areas. See Nur Masalha, *Expulsion of the Palestinians: The Concept of 'Transfer' in Zionist Political Thought 1882-1948* (Washington: Institute for Palestine Studies, 1992); On population transfer and Zionism, see also: Israel Shahak, "A History of the Concept of "Transfer" in Zionism" (1989) 18:3 Journal of Palestine Studies 22; Elia Zureik, "Demography and Transfer: Israel's Road to Nowhere" (2003) 24:4 Third World Quarterly 619 at 619-620; George E Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories" (1994) 43 American University Law Review 467.

[2008] Theodor Herzl, *Diaries* (1895) cited in Benny Morris, *Righteous Victims: A History of the Zionist-Arab Conflict, 1881-1999* (New York: Alfred A Knopf, 1999) at 21.

[2009] Secretary of State for the Colonies, *Palestine Royal Commission Report*, Cmd 5479 (London: Majesty's Stationary Office, 1937) 363 at para 1.

[2010] "In view of all these considerations, and with a deep sense of sympathy for the Jewish cause, the Commissioners feel bound to recommend that only a greatly reduced Zionist programme be attempted by the

Yet, nearly throughout the mandate, the self-determination of the people of Palestine remained subordinated to a Jewish national home as Lord Balfour exemplifies in the following memorandum:

> The contradiction between the letters of the Covenant and the policy of the Allies is even more flagrant in the case of the 'independent nation' of Palestine than in that of the 'independent nation' of Syria. For in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country, though the American Commission has been going through the form of asking what they are. The Four Great Powers are committed to Zionism. And Zionism, be it right or wrong, good or bad, is rooted in age-long traditions, in present needs, in future hopes, of far profounder import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land. In my opinion that is right.[2011]

From its inception, therefore, the international response, particularly the British response, was a contradiction which none of the proposed solutions seemed to reconcile. For instance, the 1937 British Royal (Peel) Commission considered two self-governing cantons in a federative arrangement, but eventually recommended partition including voluntary and if necessary, compulsory population transfer to remedy minority problems.[2012] As the report makes clear, "sooner or later there should be a transfer of land and, as far as possible, an exchange of population." [2013] However, the 1938 Partition (Woodhead) Commission found partition impracticable.[2014] Faced with the main protagonists' refusal and contrary opinions, Britain reversed its position and favored a one-state solution in a 1939 White Paper.

Peace Conference, and even that, only very gradually initiated. This would have to mean that Jewish immigration should be definitely limited, and that the project for making Palestine distinctly a Jewish commonwealth should be given up." Henry C King & Charles R Crane, *Recommendations of the King-Crane Commission with regard to Syria-Palestine and Iraq (1919)* at E (3).

[2011] British Government, Public Record Office, Foreign Office No 371/4183 (1919) cited in *The Right of Self-Determination of the Palestinian People*, prepared for the Committee on the Exercise of the Inalienable Rights of the Palestinian People, UN Doc ST/SG/SER.F/3 (New York: United Nations, 1979) at 17-18.

[2012] Secretary of State for the Colonies, *Palestine Royal Commission Report*, Cmd 5479 (London: Majesty's Stationary Office, 1937) at 376, para 20, at 378, para 5, at 380, paras 1-2, at 390, paras 39-40, at 392, para 44.

[2013] Secretary of State for the Colonies, *ibid* at 389, para 36, 392 at para 42; Transferring the Palestinian population to other Arab states such as Transjordan and Iraq was also advanced by David Ben-Gurion in 1936 and by US President Franklyn Roosevelt in 1939. Donna E Artz & Karen Zughaib, "Return to the Negotiated Lands: The Likelihood and Legality of a Population Transfer between Israel and a Future Palestinian State" (1991-1992) 24 NYU Journal of International Law and Politics 1399 at 1419-1420; Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 173.

[2014] See United Nations Special Committee on Palestine, *Report to the General Assembly*, UNGAOR, Vol I, 2nd Sess, Suppl No11, UN Doc A/364 (1947) at chapt IV, para 4.

> His Majesty's Government therefore now declare unequivocally that it is not part of their policy that Palestine should become a Jewish State. They would indeed regard it as contrary to their obligations to the Arabs under the Mandate, as well as to the assurances which have been given to the Arab people in the past, that the Arab population of Palestine should be made the subjects of a Jewish State against their will [....] It should be a State in which the two in Palestine, Arabs and Jews, share authority in government in such a way that the essential interests of each are secured.[2015]

The White Paper was opposed by the Jewish Agency as a repudiation of the Balfour Declaration.[2016] The Anglo-American Commission then proposed to postpone an independent state of Palestine through the establishment of a trusteeship with the aim of establishing one independent state according to the following principles: (1) no domination by either Jews or Arabs; (2) Palestine should be neither Jewish nor Arab; (3) protection of the interests of the three faiths.[2017] Stalemated by opposition from both parties and exhausted by WWII, Britain transferred what was to become the 'Question of Palestine' to the United Nations in 1947.

The idea of a two state solution was a bad idea from the start because based on the achievement of nation-states through population transfer. Notwithstanding, in 1947, a majority of members of the UN Special Committee on Palestine recommended partition with economic union as the most realist and practicable solution.[2018] The infamous UN Resolution 181 endorsed this proposal, including *voluntary* population transfer through a right of option to achieve national self-determination.[2019] Zionist representatives agreed to the resolution whereas Arab leaders

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[2015] Secretary of State for the Colonies, *Palestine: Statement of Policy*, Cmd 6019 (London: Majesty's Stationary Office, 1939) at paras 4, 8.
[2016] *The Right of Self-Determination of the Palestinian People*, prepared for the Committee on the Exercise of the Inalienable Rights of the Palestinian People, UN Doc ST/SG/SER.F/3 (New York: United Nations, 1979) at 27.
[2017] Other plans were also drawn, such as the 1946 Plan for Provincial Autonomy and the 1947 Cantonization Plan, see United Nations Special Committee on Palestine, *Report to the General Assembly*, UNGAOR, Vol I, 2nd Sess, Suppl No11, UN Doc A/364 (1947) at Chapt IV, paras 5-7.
[2018] See United Nations Special Committee on Palestine, *ibid* at Chapt VI, Part I, para 1.
[2019] "Persons over the age of eighteen years may opt, within one year from the date of recognition of independence of the State in which they reside, for citizenship of the other State, providing that no Arab residing in the area of the proposed Arab State shall have the right to opt for citizenship in the proposed Jewish State and no Jew residing in the proposed Jewish State shall have the right to opt for citizenship in the proposed Arab State." *Future Government of Palestine*, GA Res 181(II), UNGAOR, 2nd Sess, UN Doc A/RES/181(II) (1947) at Chapt 3, para 1; see also Catriona Janet Drew, *Population Transfer: The Untold Story of the*

rejected it. The Declaration of Independence of Israel as a "Jewish State in Eretz-Israel" concurred with British withdrawal on 14th May 1948.[2020] The following day, Arab armies attacked the new state of Israel. By the end of the 1948 War (Independence War for Israelis and *Nakba* or Catastrophe for Palestinians) Israel had captured more territory than allocated in Resolution 181 whereas the remaining land set for a Palestinian state was occupied by Egypt and annexed by Jordan respectively. In fact, Yoram Dinstein is correct when he points out that Israel, or at least its territory, was not born out of the Partition Resolution but carved out by war.[2021]

Between 55 to 66 percent of Arab Palestinians (750 000 to 900 000 persons) located in what was to become the boundaries of the state of Israel were displaced during the war.[2022] The UN General Assembly passed Resolution 194 demanding the return of displaced Palestinians willing to live in peace with their neighbors,[2023] but the state of Israel effectively institutionalised a legal regime preventing return and acquired ownership of the land as *State Lands* for the ingathering of returning Jewish people (*aliyah*).[2024] The United Nations agency

International Law of Self-Determination (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 204.

[2020] *The Declaration of the Establishment of the State of Israel*, 14 May 1948, Online: http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx

[2021] Yoram Dinstein, "The Arab-Israeli Conflict from the Perspective of International Law" (1994) 43 University of New Brunswick Law Journal 301 at 307.

[2022] See *First Interim Report of the United Nations Survey Mission for the Middle East* (1949), Online: http://unispal.un.org/UNISPAL.NSF/0/648C3D9CF58AF0888525753C00746F31; Badil, *Survey of Palestinian Refugees and Internally Displaced Persons*, Nidal al-Azza, ed, Vol VII (Bethlehem: Al-Ayyam Printing Press, 2012) at xxiii.

[2023] *Progress Report of the United Nations Mediator*, GA Res 194,UNGAOR, 3rd Sess, UN Doc A/RES/194 (III) (1948) at para 11.

[2024] The laws include the *Defense (Emergency) Regulations* (1945) and the *Emergency Regulations for the Exploitation of Uncultivated Lands* (1949), the *Emergency Regulations (Security Zones)* (1949), *Emergency Land Requisition Law* (1949), the *Law of the Acquisition of Absentees' Property* (1950), *Development Authority (Transfer of Property) Law* (1950), *Land Acquisition (Validation of Acts and Compensation) Law* (1953), the *Law of Return* (1950) and the *Nationality Law* (1952); See George E Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories" (1994) 43 American University Law Review 467 at 503, 512-521; Donna E Artz & Karen Zughaib, "Return to the Negotiated Lands: The Likelihood and Legality of a Population Transfer between Israel and a Future Palestinian State" (1991-1992) 24 NYU Journal of International Law and Politics 1399 at 1423-1424; for a list of most recent discriminatory land laws: "The Committee notes with concern the enactment of a number of discriminatory laws on land issues which disproportionately affect non-Jewish communities. The Committee is particularly concerned at the enactment of the Israel Land Administration Law of 2009; the 2010 Amendment to the Land (Acquisition for Public Purposes) Ordinance (1943); the 2010 Amendment to the Negev Development Authority Law (1991), and the Admissions Committees Law (2011) (Articles 3 and 5 of the Convention)." UN Commitee on the Elimination of Racial Discrimination, *Concluding*

mandated to find a durable solution to the Palestine refugee problem and the broader conflict, the United Nations Conciliation Commission for Palestine (UNCCP) was unable to achieve its mandate and stopped operating in the 1950s.[2025] Only the UN agency mandated to provide assistance, the United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA) is still operating.[2026] In effect, 1948 Palestine refugees face a protection gap since no UN agency is searching for durable solutions; the solution is admitedly left to politics. As a document produced jointly by UNRWA and the UN High Commissioner for Refugees (UNHCR) makes clear, "the task of finding a comprehensive solution for the Israeli-Palestinian conflict and the Palestine refugee problem, however, is not part of UNRWA's mandate but is rather the responsibility of the parties to the conflict and other political actors."[2027] In other words, there is a right of return in international law, a UN Resolution calling for return of Palestinian refugees and an international refugee law framework for durable solutions, but none are enforced by UN agencies with regard 1948 Palestinian refugees. It can safely be said that law has effectively been marginalized from the search for a solution for this group of displaced Palestinians, which has set a precedent for other waves of Palestinian displacement.

The climate at the time of the establishment of Israel needs to be recalled as it undoubtedly influenced, and continues to do so, actions of the Israeli government and the international community: three years after WWII and the Holocaust, it was felt crucial for the Jewish people to be protected against persecution and to reconstitute itself through *aliya* even if it meant that injustice had to be done to Palestinians.[2028] For many Israelis, a Jewish state was a question of

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Observations of the Committee on the Elimination of Racial Discrimination, Israel, UNCERD, UN Doc CERD/C/ISR/CO/14-16 (2012) at para 15.

[2025] The General Assembly "instructs the Conciliation Commission to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation, and to maintain close relations with the Director of the United Nations Relief for Palestine Refugees." *Progress Report of the United Nations Mediator*, GA Res 194, UNGAOR, 3rd Sess, UN Doc Res A/RES/194 (III) (1948) at para 11.

[2026] UNRWA was established by GA Res 302, UNGAOR, 4th Sess, UN Res 302 (IV) (1949).

[2027] UNRWA & UNHCR, *The United Nations and Palestinian Refugees* (Amman & Geneva: UNRWA & UNHCR, 2007) at 5.

[2028] George E Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories" (1994) 43 American University Law Review 467 at 509; "It is not without significance that only since the rise of nazism to power in Germany, with the resultant mass movement of Jews to Palestine, has the Palestine question become sufficiently acute to require the devising of solutions outside the framework of the normal evolution of an 'A' Mandate. Thus, all of the significant solutions devised for Palestine are of comparatively recent origin." United Nations Special Committee on Palestine, *Report to the General Assembly*, UNGAOR, Vol I, 2nd Sess, Suppl No11, UN Doc A/364 (1947) at Chapt IV, para 15.

survival exemplified by WWII and the 1948 and 1967 wars; hence the idea of Israel as compensation for the suffering of the Jewish people during the Holocaust[2029] and as a safe haven.[2030] As George Bisharat explains, "the sense of embattlement has resulted in an unusual degree of social authority for the military – as well as an inviolability of so-called "security" interests – in a society that in other important respects is democratically oriented." [2031] The fact that Arab states refused to recognize Israel and that the Palestine Liberation Organization (PLO) called for the liberation of the homeland and the end of Zionism in Palestine in its 1968 Charter and the repatriation of Jews who were not original inhabitants of Palestine did not help.[2032] It is however worth distinguising that Palestinian and Arab rejection did not aim to annihilate the Jewish people, but to stop mass Jewish immigration and the establishment of a Jewish state in Palestine.[2033] After debating the fate of Jewish immigrants and the recognition that they had nowhere to return to, *Fatah* passed a resolution in 1968 calling for the establishment of a democratic, progressive, non-sectarian state in which Jews, Christians and Muslims would live together in peace and enjoy the same rights.[2034] The PLO eventually accepted the existence of Israel along the Green Line, notably in its 1988 Declaration of Independence.[2035] While there had been compelling reasons to allow a sanctuary for the Jewish people, this remedy had been carried out at the expense of the self-determination of the

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[2029] See Gary J Bass, "Reparations as a Noble Lie" in Melissa S Williams, Rosemary Nagy & Jon Elster, eds, *Transitional Justice* (New York: New York University Press, 2012) 166 at 168.

[2030] On the conflicting visions of the nature and purpose of the State, see Dan Avnon, "The Israeli Basic Law's (Potentially) Fatal Flaw" (1998) 32 Israel Law Review 535 at 535-537.

[2031] George E Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories" (1994) 43 American University Law Review 467 at 556.

[2032] Article 19: "The Partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time, because they were contrary to the will of the Palestinian people and to their natural right in their homeland, and inconsistent with the principle embodied in the Charter of the United Nations; particularly the right to self-determination." *The Palestnian National Charter*, Resolution of the Palestine National Council (1968) at Arts 6, 15, 19 and 22; For a discussion of the evolution of Palestinian nationalism and conception of a 'liberated Palestine' see Nils A Butenschϕn, "Accommodating Conflicting Claims to National Self-Determination: The Intractable Case of Israel/Palestine" (2006) 13 International Journal on Minority and Group Rights 285 at 300-304.

[2033] See Virginia Tilley, *The One-State Solution: A Breakthrough for Peace in the Israeli-Palestinian Deadlock* (Michigan: University of Michigan Press, 2005) at 164.

[2034] Cited in Alain Gresh, *The PLO, the Struggle Within* (London: Zed Books, 1988) at 52 in Nils A Butenschϕn, "Accommodating Conflicting Claims to National Self-Determination: The Intractable Case of Israel/Palestine" (2006) 13 International Journal on Minority and Group Rights 285 at 302.

[2035] *Question of Palestine*, UNGAOR, 43rd Sess, UN Doc A/43/827 (1988) Annex II, *political communiqué* at Art 2 and Annex III, *Declaration of Independence* at 10; Actually, the two-state model was launched at the Palestine National Council in Cairo in 1974. See Nils A Butenschϕn, "Accommodating Conflicting Claims to National Self-Determination: The Intractable Case of Israel/Palestine" (2006) 13 International Journal on Minority and Group Rights 285 at 300-303.

Palestinian people and return of displaced persons. Hence the constant perception of both peoples that each is *the* victim.

When Israel occupied the West Bank and Gaza Strip in 1967, it pursued a policy of land acquisition and began settler transfer, a practice that has never stopped, not even during the peace process of the 1990s (Oslo Accord).[2036] During the 1967 war, a further 400,000 to 450,000 Palestinians in the West Bank and Gaza Strip were displaced.[2037] The Security Council called on the government of Israel "to facilitate the return of those inhabitants who have fled the areas since the outbreak of hostilities."[2038] This new wave of refugees received assistance on an emergency basis, but was never registered by UNRWA because they did not meet the UNRWA definition of *Palestine* refugee.[2039] Unofficially, they were not registered for political reasons, notably to preserve the Jordanian character of Jordan. In addition, UNHCR considers 1967 refugees and all refugees outside UNRWA's areas of operations to fall within Article 1(d) of the *Refugee Convention*; they are thus excluded from their mandate.[2040] The level of assistance provided and the absence of protection measures have led to a protection gap. No refugee was to return to what had become the Occupied Palestinian Territory (OPT). However, they could return in a future state of Palestine in the West Bank and Gaza Strip. Again, no UN Agency has registered this new wave of refugees, although UNRWA has provided *de facto*

[2036] The laws which allow temporary control of Palestinian lands include for instance: the British era *Defense (Emergency) Regulations* (1945), the Jordanian *Law of Eminent Domain,* Israeli *Absentee Property Orders* and other military orders declaring the land as 'state land', notably *Military Order No 364* (1969). Land was also purchased from individual Palestinians owners. For a dicussion of the laws and the 2,500 military orders that serve to acquire land and control Palestinians in the OPT, see George E Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories" (1994) 43 American University Law Review 467 at 533-544; Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley Journal of International Law 551 at 580; John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 909-910.

[2037] Badil, *Survey of Palestinian Refugees and Internally Displaced Persons*, Nidal al-Azza, ed, Vol VII (Bethlehem: Al-Ayyam Printing Press, 2012) at xxiv.

[2038] SC Res 237, UNSCOR, UN Doc S/RES/237 (1967) at para 1; *Humanitarian Assistance*, SC Res 2252, UNSCOR, UN Doc A/RES/2252 (ES-V) (1967) at para 1.

[2039] According to UNRWA: "Anyone whose normal place of residence was in Mandate Palestine during the period from 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 Arab-Israeli war qualifies as a *Palestine* refugee" and is eligible for UNRWA registration. UNRWA & UNHCR, *The United Nations and Palestinian Refugees* (Amman & Geneva: UNRWA & UNHCR, 2007) at 5-6.

[2040] UNRWA & UNHCR, *ibid* at 10-11.

assistance, or is working to find a durable solution for this group of Palestinian refugees. Their fate seems to depend on whether or not there will ever be a Palestinian state to return to.

The extension of the project envisaged by Zionism to the occupied Palestinian Territory (OPT) since 1967 further denies Palestinians their rights. Many settlers are in the OPT to conquer the territory for their exclusive benefit. In this sense, Israeli colonialism in the OPT is settler colonialism and currently the main driver of conflict.[2041] Indeed, a not insignificant number of settlers, although a number have moved for economical reasons,[2042] see themselves as the spear of conquest based on a Biblical vision of Greater Israel. In Reuveny's words: "Israeli control of the territories is a form of colonialism nourished by a mixture of Jewish nationalism and religion — or Israeli fundamentalism"[2043] As Jeremy Waldron similarly contends, "many of the settlers see themselves as pioneers, spearheads of a movement that is one of conquest (or reconquest), a movement that may well involve the expulsion or ethnic cleansing of Palestinians in their vicinity."[2044] In fact, this ideology is not preached by a group of radicals; it taints the overall position of the Israeli Government in relation to the settlements.

Noteworthy are the conflicting geospatial visions at stake: for the Israeli Government, the West Bank is Judea and Samaria[2045] – part of *Eretz Israel* (Greater Israel)[2046] which belongs to the

[2041] For a discussion of Israeli fundamentalism, see R Reuveny, "Fundamentalist Colonialism: The Geopolitics of Israeli-Palestinian Conflict"(2003) 22 Political Geography 347 at 347, 363; Using the concept of "pure settlement colony", Gershon Shafir and Yoav Peled, *Being Israeli: The Dynamics of Multiple Citizenship* (Cambridge: Cambridge University Press, 2002) at 117.

[2042] The government of Israel provides incentives to Israelis to move to the settlements through tax reductions, cheap morgages, cheaper land, employment, protection by the Israeli army. See for instance: R Reuveny, *ibid* at 359.

[2043] For instance, around 35 percent of settlers are associated with Gush Emunim (Block of the Faithful), the largest fundamentalist group. R Reuveny, *ibid* at 349, 364; for a list of other fundamentalist groups, see Donna E Artz & Karen Zughaib, "Return to the Negotiated Lands: The Likelihood and Legality of a Population Transfer between Israel and a Future Palestinian State" (1991-1992) 24 NYU Journal of International Law and Politics 1399 at1425-1426.

[2044] Jeremy Waldron, "Settlement, Return, and the Supersession Thesis" (2004) 5 Theoretical Inquiries in Law 237 at 254.

[2045] In December 1967," the Israeli government issued an order stating that "the term 'the Judea and Samaria Region' shall be identical in meaning for all purposes [...] to the term 'the West Bank Region'." Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967" (1990) 84 American Journal of International Law 44 at 58-59.

[2046] *Eretz Israel* is a varying geographical construct that extend to parts of Jordan, Syria and Egypt and as far as Iraq – often captured in the phrase 'from the Nile to the Euphrates'.The Israel Ministry of Foreign Affairs writes "the State of Israel is a Jewish state, first and foremost, in view of the right of the Jewish people to a single independent state of their own, and by reason of the historic and biblical connection between the Jewish people

Jewish people and to which they shall return – whereas for Palestinians, the territory is under belligerent occupation, including East Jerusalem. Palestinians consider they have lost 78 percent of Mandate Palestine by accepting the Green Line as the future boundary. The contention over where the frontier of the state of Israel lies extends to the laws and policies of the government of Israel. [2047] Israeli law follows the person, not the boundary that is the Green Line. Under the 1950 *Law of Return*, for instance, any Jewish person in the world has the right of *aliyah*, defined in the Law as the "immigration of Jews", and becomes an Israel national who may return not only to Israel proper, but to *Eretz Israel*.[2048] Therefore, from the onset of settler transfer, a two-tiered legal system was imposed whereby Israeli settlers are subject to Israeli civil law in the occupied Palestinian territory[2049] whereas Palestinians are subject to a mixture of Ottoman, British, Jordanian and Israeli military orders. In addition, the Israeli military legal system has gradually taken over the Palestinian civilian domain; a legal system that is less independent and impartial and lacks safeguards for the rights of the accused

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and the Land of Israel (Eretz Israel)." See Israel Ministry of Foreign Affairs,"Israel, the Conflict and Peace: Answers to frequently asked questions" (2007), Online: http://www.mfa.gov.il/mfa.; Ilan Pappe, *The Ethnic Cleansing of Palestine* (Oxford: Oneworld, 2007) at 10-15; Uri Davis, *Apartheid Israel, Possibilities for the Struggle Within* (London: Zed Books, 2003) at 19; On creating and maintaining a Jewish majority, see Jonathan Cook, *Blood and Religion, The Unmasking of the Jewish and Democratic State* (London: Pluto Press, 2006) at 100.

[2047] See for instance Hans-Peter Gasser, "Protection of the Civilian Population" in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 275; Dan Avnon, "The Israeli Basic Law's (Potentially) Fatal Flaw" (1998) 32 Israel Law Review 535 at 560.

[2048] Israel, *The Law of Return*, Law No 5710 (1950), published in Sefer Ha-Chukkim No 51 of the 21st Tammuz, 5710 (5 July 1950) at 159; In its 2003 review, the Committee on Economic, Social and Cultural Rights also observed with particular concern that "the status of 'Jewish nationality,' which is a ground for exclusive preferential treatment for persons of Jewish nationality under the Israeli Law of Return, granting them automatic citizenship and financial government benefits, thus resulting in practice in discriminatory treatment against non-Jews, in particular Palestinian refugees." *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Israel,* UNECOSOC, UN Doc E/C.12/1/Add.90 (2003) at para 18; This is also explained by Amnesty International in the following manner: "Settlements, which are all built on Palestinian lands, are for Jews only, who are entitled to Israeli nationality and to the protection of Israeli law even if they are migrants from other countries who go to live in settlements in the OPT without ever having resided in the State of Israel." Amnesty International, "Israel Must Halt Construction of West Bank Settlements" *Amnesty International News* (3 December 2012); On the concept of *aliya* in Zionism see: Nils A Butenschøn, "Accommodating Conflicting Claims to National Self-Determination: The Intractable Case of Israel/Palestine" (2006) 13 International Journal on Minority and Group Rights 285 at 296-297.

[2049] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 234.

person.[2050] Palestinians and not Israeli citizens are subject to the jurisdiction of military courts. As Sharon Weils warns, this is judicial domination under the guise of the rule of law.[2051]

To realize *Eretz Israel*, a number of transfer plans were designed to erase the Green Line.[2052] Israeli actions in the OPT are thus informed by the paradigm of *Eretz Israel* as the self-determination unit of the Jewish people.[2053] Miloon Kothari, former UN Special Rapporteur on the right to housing explained that "essentially, the institutions, laws and practices that Israel had developed to dispossess the Palestinians (now Israeli citizens) inside its 1948 border (the Green Line) have been applied with comparable effect in the areas occupied since 1967."[2054] For these reasons, Oren Yiftachel suggests that "the entire area under Israeli control – that is, Israel/Palestine between river and sea – should be analyzed as one political-geographic unit."[2055] Illustrating the relationship between *Eretz Israel* and the settlements is the position of the Israeli Ministry of Foreign Affairs:

> The provisions of the Geneva Convention regarding forced population transfer to occupied sovereign territory cannot be viewed as prohibiting the voluntary return of individuals to the towns and villages from which they, or their ancestors, had been ousted.... It should be emphasised that the movement of individuals to the territory is entirely voluntary, while the settlements themselves are not intended to displace Arabs inhabitants,

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[2050] Sharon Weils,"The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories" (2007) 89: 866 International Review of the Red Cross 395 at 419.
[2051] Sharon Weils, *ibid*.
[2052] These plans, which still inform the policy of the Israeli government in the OPT include the Dayan Plan (1967-1970); the Allon Plan, whose central motto was "maximum security and maximum territory for Israel with the minimum Arabs"; the Drobles plan (1978) declared that "State land and uncultivated land must be seized immediately in order to settle the areas between the concentrations of minority population and around them, with the object of reducing to the minimum the possibility for the development of another Arab state in these regions"; and, the 1998 "Plan for a Greater Jerusalem" planned a ring of Jewish settlements to "Judeaize Jerusalem". See Tobias Kelly, 'Jurisdictional Politics' in the Ocuppied West Bank: Territory, Community, and Economic Dependency in the Formation of Legal Subjects" (2006) 31 *Law and Social Inquiry* 39 at 56; Nur Masalha, *A Land Without a People, Israel, Transfer and the Palestinians 1949-96* (London: Faber and Faber, 1997) at 91, 93; Drobles, *Settlement in Judea and Samaria*, at 3 cited in David Kretzmer, *The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories* (New York: State University of New York Press, 2002) at 75-76, 90;
[2053] Oren Yiftachel, *Ethnocracy, Land and Identity Politics in Israel/Palestine* (Philadelphia: University of Pennsylvania Press, 2006) at 3; Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004).
[2054] Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, UN Doc E/CN4/2003/5/Add1 (2002) at 4; On laws permitting land acquisition since 1967 in the OPT, see Badil, *Israeli Land Grab and Forced Population Transfer of Palestinians: A Handbook for Vulnerable Individuals and Communities* (Bethlehem: Al-Ayyam Printing Press, 2013) at 14-20.
[2055] Oren Yiftachel, *Ethnocracy, Land and Identity Politics in Israel/Palestine*, (Philadelphia: University of Pennsylvania Press, 2006) at 8.

> nor do they do so in practice.... Repeated charges regarding the illegality of Israeli settlements must therefore be regarded as politically motivated, without foundation in international law.[2056]

Israel's explanation does not match international law nor the reality on the ground: whether settlers move voluntarily or not is irrelevant for it to constitute a crime under international humanitarian law or criminal law.[2057] The victims are not the settlers but the receiving population, who is clearly opposed to the presence of settlements and is being displaced from its homeland since the practice began in 1967.[2058]

What's more: settlements have displaced and will continue to displace Palestinians in the West Bank, effectively changing the demographic composition of the OPT. As Jeff Halper of the Israeli Committee Against House Demolitions summed it up, "in the end this process of reoccupation [of the land by the Jewish peole] is one of displacement."[2059] Already in 1979, a Security Council Commission correlated settlements, displacement and the "compartmenting" of the local population.[2060] By 2011, 66 percent (7.4 million) of the total Palestinian population (11.2 million) was displaced either within Israel, the OPT or worldwide.[2061] By 2013, there were over half a million settlers, controlling around 43 percent of the land.[2062] The ongoing transfer of Palestinians was recognized by the International Court of Justice in its 2004

[2056] [Emphasis added] Israeli Ministry of Foreign Affairs, "Israeli Settlements and International Law" (2001), Online: http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Israeli%20Settlements%20and%20International%20Law.aspx

[2057] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 240.

[2058] See UNOCHA, "Lack of Permit" Demolitions and Resultant Displacement in Area C, UNOCHA Special Focus OPT (May 2008), Online: www.ochaopt.org.

[2059] Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 30.

[2060] "The Commission is of the view that a correlation exists between the establishment of Israeli settlements and the displacement of the Arab population. […] For the Arab inhabitants still living in those territories, particularly in Jerusalem and the West Bank, they are subjected to continuous pressure to emigrate in order to make room for new settlers who, by contrast, are encouraged to come to the area." *Report of the Security Council Commission established under Resolution 446*, UNSCOR, UN Doc S/13450 (1979) at paras 226, 229-231; On displacement between 1967-1970 and land confiscation, see "Palestinian Emigration and Israeli Land Expropriation in the Occupied Territories" (1973) 3:1 Journal of Palestine Studies 106.

[2061] See Badil, *Survey of Palestinian Refugees and Internally Displaced Persons*, Nidal al-Azza, ed, Vol VII (Bethlehem: Al-Ayyam Printing Press, 2012) at xv.

[2062] UNOCHA, *The Humanitarian Impact of Israeli Settlement Policies, Update*, UNOCHA OPT (December 2012), Online: http://www.ochaopt.org/documents/ocha_opt_settlements_FactSheet_December_2012_english.pdf

advisory opinion the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

> a significant number of Palestinians have already been compelled by the construction of the wall and its associated regime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements […] is tending to alter the demographic composition of the [occupied Palestinian territory].[2063]

A number of international organizations working in the field, notably the ICRC, the UN Office for the Coordination of Humanitarian Affairs, and Amnesty International attest to the ongoing population transfer of the Palestinian population in the OPT.[2064] As the Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council also concluded, "the severity and persistence of patterns of displacement attest to a policy of forced displacement for the purpose of acquiring land, redefining demographic boundaries, and divesting Palestinians of ownership guaranteed under international law."[2065]

For instance, Palestinian residing in Area C of the West Bank, over 60 percent of the territory, are subject to intense pressure to relocate into Areas A and B.[2066] In 2014, the UN Secretary-General described the situation in Area C in the following terms:

> In Area C of the West Bank, Palestinians are not allowed to build on approximately 70 percent of the land mass and are subject to severe restrictions regarding construction in the remaining 30 percent. Less than 1 percent of Area C has been planned for Palestinian urban development. Palestinians are not represented in the planning process, unlike Israeli settlers. The combination of these factors makes it virtually impossible for Palestinians to obtain a permit to construct homes or infrastructure in Area C. Many Palestinians therefore build

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[2063] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 133.
[2064] UNOCHA, *Communities in the Jerusalem Periphery at Risk of Forced Displacement*, UNOCHA OPT (June 2013), Online: http://www.ochaopt.org/documents/ocha_opt_communities_jerusalem_factsheet_june_2013_english.pdf; Amnesty International, "Israel Must Halt Construction of West Bank Settlements" *Amnesty International News* (3 December 2012); ICRC *Annual report 2004* at 285, Online: http://www.icrc.org/eng/assets/files/annual-report/icrc-annual-report-2004.zip
[2065] IDMC, *OPT: Gaza Offensive Adds to Scale of Displacement*, Internal Displacement Monitoring Centre and Norwegian Refugee Council (2009) at 1, 5-6, Online: www.internal-displacement.org
[2066] UNOCHA, *Displacement and Insecurity in Area C of the West Bank*, UNOCHA OPT, Special Focus (August 2011).

> without building permits, putting them at risk of eviction, demolition of their homes and displacement.[2067]

Although anecdotal, it is nevertheless telling that in 2014, the International Commitee of the Red Cross stopped distributing tents to persons whose houses or shacks were demolished in the Jordan Valley (Area C) because the Israeli Army confiscates or destroys them systematically.[2068] UN and large international organizations are unable to stop the ongoing displacement of Palestinians on the ground, despite a concerted response among relevant UN agencies and non-governmental organizations based on the cluster response to internal displacement. At best, the response can delay or mitigate the consequences of displacement through monitoring, advocacy, self-reliance projects, resilience and community empowerment. In a nutshell, that Palestinians are transferred from 'Greater Jerusalem', Area C and Seam Zones (military areas) and confined into Areas A and B (about 40 percent of the West Bank) and ultimately pushed outside the OPT by settler transfer and other displacement-inducing policies, such as a crippling economy, is undeniable.[2069]

The international community has been unanimous in its reading of the legal status of the West Bank and Gaza Strip as occupied and on the need for Israel to withdraw, but has been less fortright, to say the least, in enforcing its own binding decisions.[2070] UN Security Council passed Resolution 242 requiring the application of two principles: (1) the withdrawal of Israel armed forces from the OPT and (2) "termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political

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[2067] Report of the Secretary-General, *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan*, UNGAOR, UN Doc A/HRC/25/38 (2014) at para 12.
[2068] Editorial, "A Victory for Transfer, By Despairing of Providing Emergency Shelter to Palestnians in the Jordan Valley, the Red Cross is Signaling that Israel's Policy of Dispossession has Gone Too Far" *Haaretz* (5 February 2014), Online: http://www.haaretz.com/opinion/1.572669
[2069] See Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 50; Speaking of the 'ethnic cleansing' of East Jerusalem, Richard Falk, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UNGAOR, UN Doc A/65/331 (2010) at para 14; *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UNGAOR, UN Doc A/HRC/22/63 (2013) at paras 62-71; See World Bank, *Seeing is Believing: Poverty in the Palestinian Territories* (Washington: World Bank, 2014).
[2070] Territory to which IHL, including the Fourth Geneva Convention applies, see for instance: SC Res 1322, UNSCOR, UN Doc S/RES/1322 (2000); SC Res 1544, UNSCOR, UN Doc S/RES/1544 (2004); SC Res 605, UNSCOR, UN Doc S/RES/605 (1987); SC Res 592, UNSCOR, UN Doc S/RES/592 (1986).

independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force."[2071] In short, withdrawal in exchange of recognition and security. With regard to settler transfer, the Security Council could hardly have been clearer when it determined,

> that all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity and that Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.[2072]

However forthright these resolutions were in 1979-1980, further Security Council have not reaffirmed resolution 465 nor the nullity of transfer and demographic change.[2073] In fact, and notwithstanding seemingly clear and abundant UN resolutions − over 200 since 1948 − the Security Council is impotent when it comes to enforcement and holding parties to account for acts detrimental to a comprehensive peace.[2074] It has also been incapacitated by repeated US veto. Beyond the Security Council, the UN is a "house-divided" over the solution to the conflict; the General Assembly is pushing for the gamut of individual and collective rights, such as return, restitution and self-determination, whereas the Security Council is focusing on collective rights, mainly self-determination in the OPT.[2075]

Despite nearly 50 years of Security Council resolutions and 10 years since the advisory opinion of the International Court of Justice, there has been no military withdrawal by Israel from the

[2071] SC Res 242, UNSCOR, UN Doc S/RES/242 (1967) at para 1; SC Res 1397, UNSCOR, UN Doc S/RES/1397 (2002).
[2072] [Emphasis added] SC Res 465, UNSCOR, UN Doc S/RES/465 (1980) at paras 5-6; See also SC Res 471, UNSCOR, UN Doc S/RES/471 (1980); SC Res 452, UNSCOR, UN Doc S/RES/452 (1979); SC Res 446, UNSCOR, UN Doc S/RES/446 (1979) at para 3.
[2073] The only exception is: SC Res 605, UNSCOR, UN Doc S/RES/605 (1987).
[2074] See Virginia Tilley, *The One-State Solution: A Breakthrough for Peace in the Israeli-Palestinian Deadlock* (Michigan: University of Michigan Press, 2005) at 89.
[2075] See for instance, Terry Rempel, 'Known Knowns' and 'Unknown Unknowns': the UN and Israeli-Palestinian Conflict" (2007) 33 Al Majdal (Bethlehem: Badil Resource Centre).

West Bank, no rescinded annexation of East Jerusalem,[2076] no termination of settler transfer, no end to the construction of the Wall and its associated regime, and no return of refugees to their homes; only continued displacement and dispossession of Palestinians. All these actions point in one direction: conquest through population transfer. Conquest progress because international law is incapacitated by ideology. As Mélanie Jacques observed:

> In spite of the evident unlawfulness of population transfers, there is, regarding the Middle East situation in particular, an overbearing ideological component that threatens to render any contrary legal argument devoid of force and meaningfulness. In such cases, population transfers become deeply rooted in the conflict and international humanitarian law gradually loses its relevance.[2077]

This is not to say that Palestinians are absolved of war crimes and crimes against humanity. They are not and should not be. But it is to say that the legal framework devised by the UN Security Council and the main judiciary organ of the United Nations lacks teeth because it is unable to translate humanitarian and human rights law and the vision of a two-state solution into something dignifying and tangible for both peoples.

Lack of resolve to enforce its decisions under Chapter VII has rendered the UN Security Council increasingly irrelevant to address the conflict and has led to an ineffectual response driven not by the rule of law, but by *faits accomplis* built on the despair of an occupied population. Discussing the human rights system under Chapter VII in the Security Council, Ian Brownlie writes:

> On occasion the Security Council may decide to take coercive action under Chapter VII of the United Nations Charter, precisely to deal with the worst cases. This, then, appears to be the solution. But, in practice, such action has been taken on a very selective basis and has been shadowed by ad hoc geopolitical reasons unconnected with human rights. This element of discrimination can best be illustrated by instances of <u>failure to act</u>, and, in particular, the failure of the

[2076] SC Res 478, UNSCOR UN Doc S/RES/478 (1980); "*Reiterates* that all such measures which have altered the geographic, demographic and historical character and status of the Holy City of Jerusalem are null and void and must be rescinded in compliance with the relevant resolutions of the Security Council" SC Res 476, UNSCOR, UN Doc S/RES/476 (1980) at para 4; SC Res 267, UNSCOR, UN Doc S/RES/267 (1969).
[2077] Mélanie Jacques, *Armed Conflict and Displacement, The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge: Cambridge University Press, 2012) at 124.

> Security Council to take any action in face of the gross and persistent measures of discrimination and breaches of humanitarian law on the part of Israel against the Palestinian people and their institutions.[2078]

Clearly, the impression is one of double standard; politicians do not take the rule of law seriously, as the lack of follow-up to the advisory opinion of the ICJ attest.[2079] The Goldstone report similarly concluded, "when the international community does not live up to its own legal standards, the threat to the international rule of law is obvious and potentially far-reaching in its consequences."[2080] To be clear: the biggest challenge to international peace and security is states' discriminatory application of the rule of law at the UN.

Despite UN Security Council resolutions 1515 and 1850, in which is made clear the goal of a democratic state of Israel and a democratic state of Palestine and the need to work towards Palestinian statehood,[2081] the ever growing number of settlers combined to the inaction of the international community and its quiet acquiescence in some powerful circles has effectively destroyed the possibility of a Palestinian state.[2082] In theory, Palestinians have not lost their legal entitlement to an independent state, but facts on the ground and the passage of time does not bode well for the future. Repeated denunciations of settlements, settler transfer and annexation do not suffice to protect statehood. As Jean-Marie Henckaerts wrote in 1995: "The roadblock towards such a state are the Israeli settlements which were illegal to begin with but

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[2078] [Emphasis added] Ian Brownlies, *Principles of Public International Law*, 7th ed (Oxford: Oxford University Press, 2008) at 584.

[2079] Australia, Micronesia, Israel, Marshall Islands, Tuvalu and the United States voted against the UN resolution demanding that "Israel, the occupying Power, comply with its legal obligations." *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, GA Res ES-10/15. UNGAOR, 10th Emer Spec Sess, UN Doc A/RES/ES-10/15 (2004) at para 2; Yves Sandoz, "International Penal Law and International Humanitarian Law" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Martinus Nijhoff: Leiden, 2009) at 1067.

[2080] *Report of the United Nations Mission Fact-Finding Mission on the Gaza Conflict* (the 'Goldstone Report'), UNGAOR, UN Doc A/HRC/12/48 (2009) at para 1918; John Dugard similarly warned that "if the West, which has hitherto led the promotion of human rights throughout the world, cannot demonstrate a real commitment to the human rights of the Palestinian people, the international human rights movement, which can claim to be the greatest achievement of the international community of the past 60 years, will be endangered and placed in jeopardy." *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard*, UNHRC, 4th Sess, UN Doc A/HRC/4/17 (2007) at 24.

[2081] SC Res 1515, UNSCOR, UN Doc S/RES/1515 (2003); SC res 1850, UNSCOR, UN Doc S/RES/1850 (2008) at para 4.

[2082] See e.g., IDMC, "OPT: Gaza Offensive Adds to Scale of Displacement," Internal Displacement Monitoring Centre and Norwegian Refugee Council (December 2009) at 12, Online: www.internal-displacement.org

which cannot be removed anymore either. This really shows the extent of the problems created by population settlement or plantation policies. One day such policies will backfire."[2083] The question is how will it backfire? Will it backfire because there will be no more room for a solution that provides for a Palestinian state – that all that will remain is a solution carved by conquest? In spite of the bleak prospects, the main contribution of the UN, particularly the General Assembly, has been to frame the conflict within the purview of international humanitarian law and human rights law and maintain it on the UN agenda, which has contributed to protec Palestinians' rights so far and should not be underestimated.

But the work of the UN is weakened by the alegal agenda of the United States, the main peacebroker.[2084] In 2004, for instance, the US Bush administration pledged that some of the largest settlements would remain, in a likely exhange for Israel's redeployment from the Gaza Strip. As former President's George Bush wrote:

> In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949, and all previous efforts to negotiate a two-state solution have reached the same conclusion.[2085]

The former President went on to assure that "the United States supports the establishment of a Palestinian state that is viable, contiguous, sovereign, and independent."[2086] As the logic goes, the fate of "major Israeli populations centers" – settlements – is a done deal and the Palestinian

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[2083] Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff: the Hague, 1995) at p177.

[2084] For a discussion of the international response and in particular of how the US could respond to violation of Article 49(6) of Convention IV, see Bianca Watts, "Better than a Thousand Hollow Words Is One Word that Brings Peace: Enforcing Article 49(6) of the Fourth Geneva Convention Against Israeli Settlements in the Occupied Palestinian Territory" (2011) 24 Pacific McGeorge Global Business and Development Law Journal 443 at 455.

[2085] [Emphasis added] "Ariel Sharon and George W Bush's Letters in Full" *Haaretz* (6 June 2009), Online: http://www.haaretz.com/news/ariel-sharon-and-george-w-bush-s-letters-in-full-1.277418; "Sharon used the disengagement to gain vital concessions from the US - including the Bush letter of assurances on retention of settlement blocs and non-return of Palestinian refugees to Israel - while proceeding with the construction of the barrier and the implantation of more settlers in the West Bank." Alvaro de Soto, Under-Secretary-General, United Nations Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General to the Palestine Liberation Organization and the Palestinian Authority, Envoy to the Quartet, *End of Mission Report* (May 2007) (in file with the author) at para 16.

[2086] "Ariel Sharon and George W Bush's Letters in Full," *Haaretz*, *ibid*.

state will have to do with them. Catriona Drew notes the contradictions typical to the Israeli-Palestinian peace process with regard to the right of self-determination of Palestinians:

> it is my contention that the institutional failure to characterize settlements as a violation of the Palestinian right of self-determination belies a general misconception of self-determination as a right to a process devoid of substantive content. Once the right of self-determination has been conceptually stripped of its core entittlements to territory and resources, it becomes possible – for states, institutions and commentators alike – to assert both the *inalienable*, *jus cogens* character of the Palestinian rights to self-determinaton, *and* declare the future of Israeli settlements as a matter for political negotiation; to affirm the primacy of the right of self-determination, including the option of a state, *and* envisage a future for Israeli settlements on the West Bank.[2087]

With the redeployment came the Roadmap, the phased-initiative envisioning an 'independent, democratic and viable' state of Palestine by 2005. Noteworthy, the Map only requires the dismantlement of settlement *outposts* erected since 2001 and the freeze of all new settlement activities.[2088] It also mandates the Quartet, the body comprised of the US, the EU, Russia and the UN, to implement the Roadmap and a comprehensive peace. An informed analysis of the role of the United Nations is the leaked *End of Mission report of the former Under-Secretary-General, United Nations Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General to the Palestine Liberation Organization and Palestinian Authority and Envoy to the Quartet*, Alvaro de Soto, who was a UN official for 25 years in El Salvador, Cyprus and Western Sahara notably. His report on the workings of the Quartet is unequivocal: "there is no getting around the reality that the Quartet – Russia and the UNSG – provides a shield for what the US and the EU do."[2089] Clearly, the UN is loosing ground in framing the legal parameters of the solution to the conflict, protecting Palestinian rights and ultimately, preserving the rule of law.

[2087] [Emphasis in the original text] Catriona Drew, "The East Timor Story: International Law on Trial" (2001) 12:4 European Journal of International Law 651 at 666-667.

[2088] *A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, UNSCOR, UN Doc S/2003/529 (2003) at 4.

[2089] Alvaro de Soto, Under-Secretary-General, United Nations Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General to the Palestine Liberation Organization and the Palestinian Authority, Envoy to the Quartet, *End of Mission Report* (May 2007) (in file with the author) at para 79.

The feasibility, of a two-state solution is dead or in Virginia Tilley's words, has become "a diplomatic fiction."[2090] Already in the Oslo Accords, the external right to self-determination of Palestinians figured nowhere, although the interim accord indirectly provided for internal self-determination in the establishment of the Palestinian Authority as representative of the Palestinian people, but not as leaders of a Palestinian state.[2091] The then Prime Minister Yitzhak Rabin made it clear when Israel ratified the Interim Agreement in 1995:

> We view the permanent solution in the framework of State of Israel [sic] which will include most of the area of the Land of Israel as it was under the rule of the British Mandate and alongside it a Palestinian entity which will be a home to most of the Palestinian residents living in the Gaza Strip and the West Bank. We would like this to be an entity which is less than a State and which will independently run the lives of the Palestinians under its authority. The borders of the State of Israel, during the permanent solution, will be beyond the lines which existed before the Six Day War. We will not return to the 4 June 1967 lines.[2092]

With Oslo, the PLO recognized it is not the government of a state in *statu nascendi*.[2093] As Ilan Pappe remarked in reference to Oslo, "peace, the quid pro quo, meant a stateless Palestinian state robbed of any say in its defense, foreign or economic policies."[2094] An Israeli reservation to the 2002 Roadmap is also telling with regard to the envisioned Palestinian state:

> The character of the provisional Palestinian State will be determined through negotiations between the Palestinian Authority and Israel. The provisional state will have provisional borders and certain aspects of sovereignty, be fully demilitarized with no military forces, but only with police and internal security forces of limited scope and armaments, be without the authority to undertake defense alliances or military cooperation, and Israeli control over the entry and exit

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[2090] Virginia Tilley, "From "Jewish State and Arab State" to "Israel and Palestine"? International Norms, Ethnocracy, and the Two-State Solution" (2005) 8:3 The Arab World Geographer/Le Géographe du monde arabe 140 at 140; Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 68; Ian S Lustick, "Two-State Illusion" *The New York Times* (14 September 2013) Online: http://www.nytimes.com/2013/09/15/opinion/sunday/two-state-illusion.html?pagewanted=all&_r=0

[2091] Antonio Cassese, "The Israel-PLO Agreement and Self-Determination" (1993) 4 European Journal of International Law 564 at 568-569; Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 6.

[2092] [Emphasis added] Yitzhak Rabin, Prime Minister of Israel, *Address to the Knesset on the Israel-Palestinian Interim Agreement*, 5 October 1995, Online: http://mfa.gov.il/MFA/MFA-Archive/1995/Pages/PM%20Rabin%20in%20Knesset-%20Ratification%20of%20Interim%20Agree.aspx

[2093] Patrick Daillier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed (Paris: Lextenso éditions, 2009) at 511.

[2094] Ilan Pappe, "The Post-Territorial Dimensions of a Future Homeland in Israel and Palestine" (2003) 23:1&2 Comparative Studies of South Asia, Africa and the Middle East 224 at 227-228.

> of all persons and cargo, as well as of its air space and electromagnetic spectrum.[2095]

As the peace process unfolds, the right to self-determination of the Palestinian people has been reduced to very little tangible, even in terms of internal self-determination in the circumscribed Area A under the jurisdiction of the Palestinian Authority since 1994 (about 18 percent of the West Bank).[2096] The 2013 UN independent Fact-Finding Mission "considers that the right to self-determination of the Palestinian people, including the right to determine how to implement self-determination, the right to have a demographic and territorial presence in the [OPT] and the right to permanent sovereignty over natural resources, is clearly being violated by Israel through the existence and ongoing expansion of the settlements."[2097] Noteworthy, this formulation underlines a right to stay as corollary to a permanent population in a delimited territory. The chances that Israel will decolonize the West Bank by removing its settler population and that Palestinians will have a sovereign state in the West Bank and Gaza Strip are practically non-existent.[2098]

At best is envisaged not a sovereign Palestinian state but 'restricted sovereignty' on parts of the West Bank and Gaza Strip with little of the traditional attributes of statehood.[2099] As is currently foreseen, about 50 percent of the Palestinian people, most of whom are refugees, are excluded from a future Palestinian state located on the equivalent of around 40 percent of the West Bank in the form of disconnected enclaves, an unconnected Gaza Strip, and no viable

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[2095] "Israel's Response to the Road Map", para 5 (May 25, 2003), Online: http://www.knesset.gov.il/process/docs/roadmap-response-eng.htm (setting forth all 14 reservations) and also cited in Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1465.

[2096] See Oraneet Orevi, "A Holistic Approach to the Conflict of Israel and Palestine: Where we are Now and Where we can Go" (2013) 19 Annual Survey of International & Comparative Law 105 at 116; Victor Kattan, *ibid* at 1464.

[2097] [Emphasis added] *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UNGAOR, UN Doc A/HRC/22/63 (2013) at para 38.

[2098] Yet Reuveny believes Israel will eventually decolonize the West Bank; R Reuveny, "Fundamentalist Colonialism: The Geopolitics of Israeli-Palestinian Conflict"(2003) 22 Political Geography 347 at 368, 375.

[2099] Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 12-14; Aluf Benn, "Analysis: Why Isn't Netanyahu Backing Two-State Solution?" *Haaretz* (1 March 2009), Online: http://www.haaretz.com/print-edition/news/analysis-why-isn-t-netanyahu-backing-two-state-solution-1.271126

economy or control over resources.[2100] Greater Jerusalem would become the capital of Israel whereas large settlement blocs estimated to include around 75 percent of the over half a million settlers [2101] as well as the Jordan Valley would be annexed or remain under Israeli jurisdiction.[2102] Whereas occupation protects the sovereignty of the occupied territory and population,[2103] the two-state solution presented as the answer to the conflict is a pale copy of what sovereignty entails.[2104] Avi Primor, former Director of the Foreign Ministry and vice president of Tel Aviv University wrote in 2002,

> Without anyone taking notice, a process is underway establishing a "Palestinian state" limited to the Palestinian cities, a "state" comprised of a number of separate, sovereign-less enclaves, with no resources for self-sustenance. The territories of the West Bank and Gaza remain in Israeli hands, and its Palestinian residents are being turned into "citizens" of that "foreign country."[2105]

In such circumstances, the current endeavor is to negotiate the fruit of conquest; not the implementation of self-determination of an occupied people. The seemingly perpetual negotiations known as the “peace process” provide a shield to the international community and to a situation that would otherwise require forceful measures of compliance to enforce

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[2100] Jeff Halper, *ibid* at 27, 52, 55; Nils A Butenschϕn, "Accommodating Conflicting Claims to National Self-Determination: The Intractable Case of Israel/Palestine" (2006) 13 International Journal on Minority and Group Rights 285 at 304.

[2101] Anne Gearan, "Peace Plan Would Allow 75 Percent of Jewish Settlers to Remain in West Bank, Envoy Says" *Washington Post* (30 January 2014), Online: http://www.washingtonpost.com/world/national-security/peace-plan-would-allow-75-percent-of-jewish-settlers-to-remain-in-west-bank-envoy-says/2014/01/30/d13cb4e0-89f7-11e3-916e-e01534b1e132_story.html; UNOCHA, *The Humanitarian Impact of Israeli Settlement Policies, Update* UNOCHA OPT (December 2012), Online: http://www.ochaopt.org/documents/ocha_opt_settlements_FactSheet_December_2012_english.pdf

[2102] See Alvaro de Soto, Under-Secretary-General, United Nations Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General to the Palestine Liberation Organization and the Palestinian Authority, Envoy to the Quartet, *End of Mission Report* (May 2007), (in file with the author) at para 23.

[2103] Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley Journal of International Law 551 at 570-571 at 554.

[2104] Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1509.

[2105] Avi Primor, "Sharon's South Africa Strategy" *Haaretz* (18 September 2002), Online: http://www.haaretz.com/print-edition/opinion/sharon-s-south-african-strategy-1.33974; The Wall and its associated regime as well as the settlements and related road infrastructure"leave for the Palestinians, at best, the possibility of a Bantustan-type state in the remaining reserves." John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 900.

international law.[2106] What will be recognised is an entity carved by forceful demographic changes,[2107] or, if all of conquest is rewarded, the annexation of the territory of the West Bank by Israel and the expulsion of most of the Palestinian population, also known as the 'two-state solution' of Israel and Jordan.[2108]

The first option requires the transfer of areas inhabited by Palestinians holding Israeli citizenship in Israel to a future Palestinian 'state' in exchange for the incorporation of Israeli settlements into Israel; the infamous 'land swaps' to achieve the nation-state and avoid minority problems.[2109] Actually, resolving the issue of minorities through land swaps and its unspoken but inevitable population transfer is officially on the agenda of the negotiators.[2110] The second option is the most radical as it entails the annexation of the West Bank to Israel, the transfer of Palestinians in the OPT to Arab states or elsewhere and/or second class status short of citizenship for remaining Palestinians. [2111] In either case, these solutions imply the dismantlement of an occupied state in *statu nascendi*.

[2106] See François Dubuisson, "The Implementation of the ICJ Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" (2004-2005) 13 Palestinian Yearbook of International Law 27 at 53.

[2107] See Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 53-54.

[2108] Conceiving the conflict and solution as between Israel and Jordan is Yoram Dinstein, "The Arab-Israeli Conflict from the Perspective of International Law" (1994) 43 University of New Brunswick Law Journal 301 at 311-316.

[2109] On this proposal, see for instance: Arguing for "lawful, voluntary, smooth, and fair" population transfer in a peace treaty: Donna E Artz & Karen Zughaib, "Return to the Negotiated Lands: The Likelihood and Legality of a Population Transfer between Israel and a Future Palestinian State" (1991-1992) 24 NYU Journal of International Law and Politics 1399 at 1500-1504; Arguing for transfer with a right of option under state succession: Yoram Rabin & Roy Peled, "Transfer of Sovereignty over Populated Territories from Israel to a Palestinian State: The International Law Perspective" (2008) 17:1 Minnesota Journal of International Law 59; Gregg Carlstrom, "Expelling Israel's Arab Population? Israeli Negotiators, Including Tzipi Livni, Proposed 'Swapping' Some of Israel's Arab Vilage Into a Palestinian State" *Al Jazeera* English (24 January 2011), Online: http://www.aljazeera.com/palestinepapers/2011/01/2011124105622779946.html; Barak Ravid, "Lieberman Present Plans for Population Exchange at UN: Controversial Scheme Would See Part of Israel's Arab Population Moved to a Newly Created Palestinian State, in Return for Evacuation of Israeli Settlements in the West Bank" *Haaretz* (28 September 2010), Online: http://www.haaretz.com/news/diplomacy-defense/lieberman-presents-plans-for-population-exchange-at-un-1.316197

[2110] See "Middle East Peace Talks: Where They Stand" *BBC News* (22 July 2013), Online: http://www.bbc.co.uk/news/world-middle-east-11138790; Elia Zureik, "Demography and Transfer: Israel's Road to Nowhere" (2003) 24:4 Third World Quarterly 619 at 620-622.

[2111] Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 17; Richard Falk*, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UNGAOR, UN Doc A/65/331 (2010) at para 9; A study found that 47.5 percent of Jewish-Israeli were favorable to the transfer of Palestinian. Ifat Maoz & Roy J Eidelson, "Psychological Bases of Extreme Policy Preferences, How the Personal Beliefs of Israeli-Jews Predict Their Support for Population Transfer in the

The demise of the two-state solution has led observers and commentators as well as Palestinians and Israelis alike to revive the one-state solution.[2112] This option does bring some hope that the two peoples can live as equals on the same territory in one secular democratic state through some sort of federative arrangement. However, a one-state solution based on equal rights with the current demographic make up is unlikely although it is the most rights-based and democratic solution. That is because Isreal defines itself in the 1992 *Basic Law: Human Dignity and Liberty*[2113]not only as a democratic state, but as a Jewish and democratic state; its Jewish character superseeding its democratic nature or illustrating at least a conflict between its 'ethno' and 'demo' components.[2114] Israel does not have a constitution and the equivalent of Israel's bill of rights, the 1992 *Basic Law: Human Dignity and Liberty*, does not include the right to equality or the principle of non discrimination.[2115]

Israeli-Palestinian Conflict" (2007) 50:1 American Behavioral Scientist 1476 at 1492; Catherine A Rogers, "Proposals to Expel Palestinians from the Occupied Territories as Catalyst for a Civil Adjudication Campaign" (2003) 7 Journal of Gender, Race & Justice 167 at 167, 177; Elia Zureik, "Demography and Transfer: Israel's Road to Nowhere" (2003) 24:4 Third World Quarterly 619 at 623-625.

[2112] The idea of a binational state is not new and was actually advocated by some Zionists, such as Hannah Arendt, during disscussions over the future of Mandate Palestine. Current advocates of a one state solution include Palestinians, Israelis and international commentators: Uri Davis, Oren Ben-Dor, Ilan Pape, Ali Abunimah, Omar Barghouti, George Bisharat, Nur Masalha signed the "The One State Declaration," *The Electronic Intifada* (29 November 2007), Online: http://electronicintifada.net/content/one-state-declaration/793; see also Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 61-69; Virginia Tilley, *The One-State Solution: A Breakthrough for Peace in the Israeli-Palestinian Deadlock* (Michigan: University of Michigan Press, 2005); Ali Abunimah, *One Country: A Bold Proposal to End the Israeli-Palestinian Impasse* (New York: Metropolitan Books, 2006); Antony Loewenstein & Ahmed Moor, eds, *After Zionism, One State for Israeli and Palestine* (London: Saqi Books, 2012).

[2113] Israel, *Basic Law: Human Dignity and Liberty*, passed by the Knesset on the 12th Adar Bet, 5752 (17 March, 1992) and published in Sefer Ha-Chukkim No. 1391 of the 20th Adar Bet, 5752 (25 March, 1992)

[2114] *1992 Basic Laws: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation;* See for instance: Oren Yiftachel, "Democracy or Ethnocracy: Territory and Settler Politics in Israel/Palestine" (1998) 207 *Middle East Report*, Online: http://www.merip.org/mer/mer207/yift.htm; R Reuveny, "Fundamentalist Colonialism: The Geopolitics of Israeli-Palestinian Conflict"(2003) 22 Political Geography 347 at 371; George E Bisharat, "Land, Law, and Legitimacy in Israel and the Occupied Territories" (1994) 43 American University Law Review 467 at 556-559; For an excellent critique of the words "Jewish and democratic " in the *Basic Law* and a comparative analysis with the *Canadian Charter of Rights and Freedoms*, see Dan Avnon, "The Israeli Basic Law's (Potentially) Fatal Flaw" (1998) 32 Israel Law Review 535 at 545-546; On the latest legislative attempt to elevate the Jewish character above the democratic one, see Jodi Rudoren, "Israel Debates Its Religious and Democratic Identity," *The New York Times* (8 December 2014).

[2115] Israel, *Basic Law: Human Dignity and Liberty*, passed by the Knesset on the 12th Adar Bet, 5752 (17 March, 1992) and published in Sefer Ha-Chukkim No. 1391 of the 20th Adar Bet, 5752 (25 March, 1992); the Bill and an Explanatory Note were published in Hatza'ot Chok, No. 2086 of 5752 at 60; See UN Human Rights Committee, *Concluding Observations of the Human Rights Committee, Israel*, UNCCPR, 99th Sess, UN Doc CCPR/C/ISR/CO/3 (2010) at para 6; UN Commitee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Israel*, UNCERD, UN Doc CERD/C/ISR/CO/14-16 (2012) at para 13.

The solution must be found in both parties renouncing core elements of the ideologies that have sustained them for decades. If the Israeli government and Jewish people make the decision the state is first and foremost secular and democratic through perhaps the adoption of cultural Zionism or post-Zionism instead of political Zionism, and if Palestinians also gave up on the nation-state, then there is hope.[2116] The solution resides in democratization.[2117] As Edward Said wrote: "the beginning is to develop something entirely missing from both Israeli and Palestinian realities today: the idea and practice of citizenship, not of ethnic or racial community, as the main vehicle for coexistence."[2118] But the parties are still far from cosmopolitan citizenship.

More likely, then, Palestinians will have to wait to be incorporated as citizens of Israel until they are no longer perceived as posing a threat, militarily and demographically. In other words, when they will be entirely subsumed and most will have left the OPT, driven out by unemployment, lack of access to services, education and basic needs as well as by home demolitions, settler violence and the daily humiliation of occupation.[2119] Remaining Palestinians will be a minority,[2120] an indigenous people trapped in areas akin to reservations who could eventually gain equal status as citizens of Israel if they do not threaten a Jewish majority. The alternative to a Palestinian state may thus be a weakened, dispossessed, disenfranchised minority/indigenous people incorporated into a state where they will strive for equality, effectively confirming the "policy of despair" that is conquest of territory through transfer, submission and denial of self-determination.[2121]

[2116] On cultural Zionism as supportive of bi-nationalism, see Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 66-68; Virginia Tilley, *The One-State Solution: A Breakthrough for Peace in the Israeli-Palestinian Deadlock* (Michigan: University of Michigan Press, 2005) at 132-134.
[2117] See Virginia Tilley, *ibid* at 128.
[2118] Edward Said, "The One-State Solution" *The New York Times* (10 January 1999), Online: http://www.nytimes.com/1999/01/10/magazine/the-one-state-solution.html
[2119] Catherine A Rogers, "Proposals to Expel Palestinians from the Occupied Territories as Catalyst for a Civil Adjudication Campaign" (2003) 7 Journal of Gender, Race & Justice 167 at 172-173.
[2120] UN bodies have already started using the concept of minorities, see for instance: "The State party should also review its housing policy and issuance of construction permits with a view to implementing the principle of non-discrimination regarding minorities, in particular Palestinians, and to increasing construction on a legal basis for minorities of the West Bank and East Jerusalem." UN Human Rights Committee, *Concluding Observations of the Human Rights Committee, Israel*, UNCCPR, 99th Sess, UN Doc CCPR/C/ISR/CO/3 (2010) at para 17.
[2121] The policy of despair was advocated by Ben-Gurion in 1936: "A comprehensive agreement is undoubtedly out of the question now. For only after total despair on the part of the Arabs, despair that will come not only

Until the one-state or the proposal of gradual bi-nationalism[2122] becomes the *de facto* reality, colonialism, occupation and apartheid will all aptly characterise the legal situation and continue to make any form of self-determination illusory for Palestinians. The occupation regime is a fact that stems from effective control, but what is at stake in the OPT is more than belligerent occupation; it is an illegal regime that commits colonialism and apartheid through a "Matrix of Control."[2123] Analysing the prolonged occupation of the territories, Orna Ben-Naftali, Aeyal Gross and Keren Michaeli convincingly argue that the occupation regime is illegal because "it has ceased to be, and to be conceived as, temporary" and therefore a violation of the duties of the occupying power to act as a trustee for the occupied population and a violation of sovereign rights vested in people's right to self-determination – effectively a situation of conquest; not occupation.[2124] As they persuasively conclude:

> Israel has been able to enjoy the credit for applying international humanitarian law while at the same time violating its essential tenets. This occupation/non-occupation indeterminacy is complemented by its twin annexation/non-annexation indeterminacy: Israel acts in the territory as a sovereign insofar as it settles its citizens there and extends to them its laws on a personal and on a mixed personal/territorial bases, yet insofar as the territory has not been formally annexed and insofar as this exercise of sovereignty falls short of giving the Palestinian residents citizenship rights, Israel is not acting as a sovereign. In this manner, Israel enjoys both the powers of an occupant and a sovereign in the

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from failure of the disturbances and the attempt at rebellion, but also as a consequence of our growth in the country, may the Arabs possible acquiesce to a Jewish Eretz Israel." cited in Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 8-10, 30.

[2122] "The scenario calls for a profound transformation of Israel from a Judaising ethnocratic state to a multi-communal democracy, based on the concepts of consociationalism, multiculturalism and social justice; de-colonisation of the entire area of the occupied territories and the establishment of a Palestinian state; a joint bi-national capital for both states in an open undivided Jerusalem; a national minority status for Israel's Palestinian citizens based on equality and autonomy; recognition and facilitation of other cultural minorities in Israel; acceptance of Israel's share of responsibility for the Nakba, and for the right of return, with considerable constraints on the geography of its implementation. In parallel, the scenario calls for establishment of bi-national confederal institutions jointly to manage economic, security, environmental and immigration affairs, leading – within a generation of relative stability – to a new confederation or federal regime to evolve in Israel-Palestine." Oren Yiftachel, Debating Israeli Ethnocacry: II. From Ethnocracy to Peace through Gradual Bi-Nationalism: A Response to Oren Ben-Dor (2007) Holyland Studies 187, Project Muse, Scholarly Journals Online at 188.

[2123] Jeff Halper, *Obstacles to Peace, A Re-Framing of the Palestinian-Israeli Conflict*, Israeli Committee Against House Demolition, 2nd ed (Jerusalem: Al Manar Printing Press, 2004) at 12, 27-29.

[2124] Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley Journal of International Law 551 at 554-556, 604; on the effects of prolonged occupation, see also Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967" (1990) 84 American Journal of International Law 44.

> OPT, while Palestinians enjoy neither the rights of an occupied people nor the rights of citizenship. This indeterminacy allows Israel to avoid accountability in the international community for having illegally annexed the territories, while pursuing the policies of "greater Israel" in the West Bank without jeopardizing its Jewish majority. It is, finally, the blurring of the boundaries between the temporary and the indefinite, and between the rule and the exception, which has donned a mantle of legitimacy on this occupation and has made possible the continuous interplay of occupation/non-occupation and annexation/non-annexation.[2125]

While they convincingly demonstrate the occupation regime is illegal and resembling colonialism and apartheid, they refrain from elaborating on what it is or what it has become.[2126] It is not the occupation *per se* that requires a response from the international community, although ending it has been on the agenda for nearly 50 years, but what has made it illegal. The response must reflect the nature of the armed conflict and the legal interplay at stake. As David Kretzmer concluded that Israel's regime in the OPT is "closer to a colonial regime than one of belligerent occupation."[2127] That is why the armed conflict is a war of national liberation in the sense of *Additional Protocol I* of the IV GC because Palestinians fight in the exercise of their right to self-determination to overthrow an oppressive regime imposing occupation and domination through colonialism and apartheid.[2128] The crimes of colonialism and apartheid are relevant to the OPT, in particular the West Bank, because only they encapsulate the institutionalized legal regime of discrimination and separation in force between the racial groups – i.e., Jewish nationals[2129] and non-Jewish citizens (Palestinians) – and to which the international community must respond. If the international community cannot face the conflict for what it is, its response is bound to continue to fail to protect and ensure the right to self-determination of both peoples.

[2125] Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, *ibid* at 610-612.
[2126] They however argue the occupation regime ressembles colonialism and apartheid and destroys the fabric of life of Palestinians: Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, *ibid* at 588-591, 600-601.
[2127] David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 75.
[2128] Oraneet Orevi, "A Holistic Approach to the Conflict of Israel and Palestine: Where we are Now and Where we can Go" (2013) 19 Annual Survey of International & Comparative Law 105 at 128.
[2129] John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 907-908; In other terms, "Israelis occupy the structural position of whiteness in the racial hierarchy of the Middle East" David Theo Goldberg,"Racial Palestinianization" in Ronit Lentin, ed, *Thinking Palestine* (London: Zed Books, 2008) at 33.

What only ten years ago was on the fringes of legal and political thinking is now mainstream.[2130] In 2010, Ehud Barak, then Israel Defence Minister, warned: "as long as in this territory west of the Jordan river there is only one political entity called Israel it is going to be either non-Jewish, or non-democratic", further arguing: "if this bloc of millions of Palestinians cannot vote, that will be an apartheid state."[2131] Although it does not name it, Justice Richard Goldstone's report on the operation in the Gaza Strip describes the essence of the apartheid regime in place:

> The application of Israeli domestic laws has resulted in institutionalized discrimination against Palestinians in the Occupied Palestinian Territory to the benefit of Jewish settlers, both Israeli citizens and others. Exclusive benefits reserved for Jews derive from the two-tiered civil status under Israel's domestic legal regime based on a 'Jewish nationality,' which entitles 'persons of Jewish race or descendency' to superior rights and privileges.[2132]

Previously uncertain, the UN Special Rapporteur, Richard Falk has recently determined there was sufficient evidence to demonstrate colonialism and apartheid in his 2010 report to the UN General Assembly.[2133] A similar conclusion was reached by the UN Committee for the

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[2130] Probably one of the first to argue the applicability of apartheid is Uri Davis: Uri Davis, *Israel: An Apartheid State* (London: Zed Books, 1987); John Quigly, "Apartheid Outside Africa: The Case of Israel"(1991-1992) 2 International and Comparative Law Review 221; Meron Benvenisti, "Bantustan Plan for an Apartheid Israel, Sharon's Separation Scheme is Doomed to Fail once it Becomes Clear What it Means" *The Guardian* (24 April 2004), Online: http://www.theguardian.com/world/2004/apr/26/comment; Oren Yiftachel, *Ethnocracy, Land and Identity Politics in Israel/Palestine* (Philadelphia: University of Pennsylvania Press, 2006) at 7-8, 82; Jimmy Carter, "Israel, Palestine, Peace and Apartheid" *The Guardian*, 12 December 2006, Online: http://www.theguardian.com/commentisfree/2006/dec/12/israel.politicsphilosophyandsociety; Haaretz Staff, "Video/Prof Avi Shlaim: Settlements Turned Israel into Apartheid State" *Haaretz* (20 November 2008), Online: http://www.haaretz.com/news/video-prof-avi-shlaim-settlements-turned-israel-into-apartheid-state-1.285464; Virginia Tilley, ed, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (London: Pluto Press, 2012).

[2131] Rory McCarthy, "Barak: Make Peace with Palestinians or Face Apartheid" *The Guardian* (3 February 2010), Online: http://www.theguardian.com/world/2010/feb/03/barak-apartheid-palestine-peace

[2132] *Report of the United Nations Mission Fact-Finding Mission on the Gaza Conflict* (the 'Goldstone Report'), UNGAOR, UN Doc A/HRC/12/48 (2009) at para 206; Similar references to the regime of segregation, separation and possible apartheid have been made by Aeyal M Gross, "The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 397, 428; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 238.

[2133] "It is the opinion of the current Special Rapporteur that the nature of the occupation as of 2010 substantiates earlier allegations of colonialism and apartheid in evidence and law to a greater extent than was the case even three years ago. The entrenching of colonialist and apartheid features of the Israeli occupation has been a cumulative process." Richard Falk, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UNGAOR, UN Doc A/65/331 (2010) at paras 3-5.

Elimination of Racial Discrimination when it denounced violation of Article 3 of the Convention pertaining to racial segregation and apartheid based on the following reasoning:

> The Committee is extremely concerned at the consequences of policies and practices which amount to de facto segregation, such as the implementation by the State party in the Occupied Palestinian Territory of two entirely separate legal systems and sets of institutions for Jewish communities grouped in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand. The Committee is particularly appalled at the hermetic character of the separation of two groups, who live on the same territory but do not enjoy either equal use of roads and infrastructure or equal access to basic services and water resources. Such separation is concretized by the implementation of a complex combination of movement restrictions consisting of the Wall, roadblocks, the obligation to use separate roads and a permit regime that only impacts the Palestinian population.[2134]

Again, the 2013 UN-mandated Fact-Finding Mission concluded "the settlements are established for the exclusive benefit of Israeli Jews, and are being maintained and developed through a system of total segregation between the settlers and the rest of the population living in the Occupied Palestinian Territory" and that the dual legal systems in place caused "stark inequality before the law."[2135] Without entering into a detailed demonstration of the applicability of the crime of apartheid, suffice to cite the conclusions of John Dugard and John Reynolds, which have already been highlighted and are supported by a lenghty legal study commissioned by South African's Human Sciences Research Council.[2136] The first pillar of the apartheid regime is the preferential legal status accorded to Jewish persons under the 1950 *Law of Return*, which is the basis of the dual legal system discriminating against Palestinians.[2137]

[2134] [Emphasis added] UN Commitee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Israel,* UNCERD, UN Doc CERD/C/ISR/CO/14-16 (2012) at paras 24, 27.

[2135] *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UNGAOR, UN Doc A/HRC/22/63 (2013) at paras 46, 49, 103; UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Israel,* UN CERD, UN Doc CERD/C/ISR/CO/13 (2007) at para 35.

[2136] "Occupation, Colonialism, Apartheid: A Re-Assement of Israel's Practices in the Occupied Palestinian Territories under International Law" Study coordinated by the Middle East Project of the Democracy and Governance Programme (Cape Town: Human Sciences Research Council, 2009), Online: www.hsrc.ac.za; See also Virginia Tilley, ed, *Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories* (London: Pluto Press, 2012).

[2137] John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 913.

In addition, Israeli constitutional law applies extraterritorially to settlers who are Israeli citizens and Israeli civilian courts have extraterriotrial jurisdiction over civil matters in settlements.[2138] The second pillar is reflected by facts on the ground, namely territorial fragmentation and racial segregation evidenced by the settlements and associated permit regime, a two-tiered road system combined to a closure system (checkpoints) and the enclaving of inhabited Palestinian areas.[2139] As Dugard and Reynolds explain, "these policies serve to subject the Gaza Strip to hermetic closure and isolation, while carving the West Bank into an intricate network of well-connected colonies for Jewish settlers on the one hand, and an archipelago of non-contiguous and poorly connected enclaves for Palestinians on the other." [2140] The third pillar on which rests systematic discrimination are security measures, such as extra-judicial killing, arbitrary detention, and torture, and the application of military law by military courts to suppress dissent against Palestinians.[2141] The preferential treatment accorded to Jewish nationals under the *Law of Return*, physical separation and segregation and the overbearing of security to justify violations of international human rights and humanitarian laws attest to a regime of apartheid.

The needed international response is way passed ensuring the withdrawal of an army from an occupied territory. To end conquest through population transfer – the root cause of the conflict –, states must devise a response to what makes occupation illegal, namely colonialism and apartheid. Members of the international community have so far failed to enforce their own resolutions by letting power politics dictate the pace of pacification, not peace. To achieved peace and security, governments need to take the rule of law seriously.

[2138] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 44-45.
[2139] *Report of the United Nations Mission Fact-Finding Mission on the Gaza Conflict* (the 'Goldstone Report'), UNGAOR, UN Doc A/HRC/12/48 (2009) at paras 203-204.
[2140] John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 913; On the role of the High Court of Justice of Israel in legitimizing the road system, see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 29-30.
[2141] John Dugard & John Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory" (2013) 24:3 European Journal of International Law 867 at 913; See Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 44.

The alternative to the rule of law is *debellatio*,[2142] the complete surrender and extinction of the state in *statu nascendi* is a 'Question of Time' not a 'Question of Palestine'.

The solution to a more effective international response to settler transfer is in the international law of state responsibility and individual criminal responsibility. The current international response fails to deter states to carry population transfer as it remains a rewarding means of conquest of states in *statu nascendi*. Crucial is enforcement of the law of state and individual responsibilities instead of repeated denunciations and calls for non-recognition that are known to fade into *de facto* and *de jure* recognition of the legal consequences of breaches to peremptory norms. As a more cogent international law of responsibility evolves, treating concomitantly[2143] and more systematically international state responsibility and individual criminal responsibility, so will emerge a deterrent and effective response. In short, the law of state responsibility and individual criminal responsibility must trump the law of recognition that allows for far too much discretion and political maneuvering.

[2142] For a discussion of *debellatio*, see Sharon Korman, *The Right of Conquest: The Acquisiton of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996) at 221-225.
[2143] On the need for a concomittant treatment of responsibility, see Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 372-374, 380.

CHAPTER THREE – INTERNATIONAL HUMANITARIAN LAW IS NOT THE SOLE PREROGATIVE OF WARRING PARTIES

This chapter examines the concept of settler transfer in international humanitarian and criminal law and more precisely under Article 49(6) of the *IVGC* in the context of the occupied Palestinian territory (OPT). There are two main reasons why emphasis is given to the Palestinian context; firstly, the Government of Israel and the High Court of Israel have persistently objected to recognize as illegal the transfer of settlers in the OPT and this, against the opinion of the vast majority of states; second, it is the only case where an international and a national court have pronounced themselves on the question of population transfer and related peremptory norms, making a comparative analysis of the legal reasoning all the more interesting.

This section analyses the case law of the High Court of Justice (HCJ) of Israel and the International Court of Justice of the United Nations in relation to settlements and the construction of the Wall in the OPT and discusses the reasons behind their divergent findings. What emerges is a clear, unambiguous legal norm, but a disturbing problem of obedience and compliance, which is largely attributable to different, clashing, societal narratives, which inform opposite purposive interpretations. Resistance by domestic courts to the integration of international law is not surprising; the law of war is vulnerable when applied in the court of a belligerent. That is why the classical dichotomy between national and international legal orders has no place in times of war; the national courts of warring parties ought to be subject to the interpretation of international courts, particularly the International Court of Justice, when it comes to international humanitarian law.

3.1. Problems of obedience: Not a good judge in one's war?

Legal orders may have different legal and factual understandings of the same situation; hence, divergent legal findings. Much has to do with the chosen purpose of parties, judges' perspective on the case and societal audience. The following section discusses one of the most commented cases of conflicting legal orders; namely, the case law on the settlements and the Wall in the OPT by the High Court of Justice of Israel against the decision of the International Court of Justice of the United Nations. It commences by a discussion of the positions of both courts on settler transfer and the Wall and its associated regime and is followed by a discussion that attempts to understand these divergences and their implications for the rule of law.

3.2.1. Legitimization through avoidance is the interpretative strategy of the High Court of Justice of Israel with regard to settler transfer and annexation

Despite strong international and national laws on settler implantation, case-law is practically inexistent.[2144] An exception is the High Court of Justice (HCJ) of Israel, who ruled on cases involving the legality of specific settlements in the Occupied Palestinian Territory, but not on the settlement policy as a whole. As a general rule, the Israeli High Court of Justice examines the legality of requisition of private property for military needs in individual cases and not the settlements as a governmental policy. The following section will demonstrate the HCJ employs a strategy of avoidance informed by a purposive interpretation aimed at legitimating the policy of settler stransfer (or an apologist role, as argued by Sharon Weill).[2145] This stance distorts

[2144] Jean-Marie Henckaerts & Louis Doswald-Beck, *Customary International Humanitarian Law*, Vol 2: Practice, (Cambridge: Cambridge University Press/ICRC, 2005) at 2963.

[2145] "Courts use a variety of 'avoidance doctrines', either doctrines that were specifically devised for such matters, like the act of state doctrines, or general doctrines like standing and justiciability, in way that give their own governments, as well as other governments, an effective shield against judicial review under international law." Note however that Eyal Benvenisti believes the HCJ has rejected avoidance doctrines. Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 European Journal of International Law 159 at 161, 180-181; Avoidance can be defined as: "Courts, motivated by policy considerations, avoid exercising their jurisdiction over a given case." Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 3.

the spirit of the law on population transfer and makes access to justice illusionary for Palestinians.

The Israeli High Court refuses to address the core of the policy of settler transfer, deferring instead to the peace process. In the 1979 precedent-setting case of *Ayub* (*Beth El)*, the Israeli High Court of Justice allowed the establishment of settlements on private land for security reasons while refusing to examine the legality of the settlements under article 49(6) of the *Geneva Convention IV*.[2146] Justice Witkon affirmed "it is indisputable that in occupied areas the existence of settlements – albeit "civilian" – of citizens of the Occupying Power contributes greatly to the security in that area and *assists the army in fulfilling its task*."[2147] These settlements were thus construed as serving the military and security needs of the occupying power.[2148] In addition, the idea of settlements as belligerency frames them as semi-civilian, semi-combatant installations, blurring their civilian status.[2149]

The HCJ found requisition of private land for settlements were permitted under Articles 23, 46 and 52 of the *Hague Regulations* because the military commander has responsibility to ensure security in the OPT and in the territory of the occupying power.[2150] The Court further based its decision on Article 43 of the *Hague Regulations* which allows the occupying power to "restore, and ensure, as far as possible, public order and safety while respecting, unless absolutely

[2146] Israel High Court of Justice, *Ayub et al v Minister of defence et al (Beth El Case),* HCJ 606/78 (1979) 9 Israel Yearbook on Human Rights 337 at 341; David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 82.
[2147] [Emphasis added] Israel High Court of Justice, *Ayub et al v Minister of defence et al (Beit El Case), ibid* at 340.
[2148] The case of Beth El includes the settlement of Beth El and Bekaot. David Kretzmer, The Occupation of Justice, *The Supreme Court of Israel and the Occupied Territories* (New York: State University of New York Press, 2002) at 83, 87.
[2149] See for instance, Michael Galchinsky, "The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence" (2004) 9:3 Israel Studies 115 at 124.
[2150] Israel High Court of Justice, *Ayub et al v Minister of defence et al (Beit El Case),* HCJ 606/78 (1979) 9 Israel Yearbook on Human Rights 337 at 342; David Kretzmer, The Occupation of Justice, *The Supreme Court of Israel and the Occupied Territories* (New York: State University of New York Press, 2002) at 83; Article 23(g) stipulates it is forbidden: "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war"; Article 53 provides: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 at Arts 23(g) and 53.

prevented, the laws in force in the country."[2151] In *Beth El*, the Court considered 'military need' to justify measures aimed at 'order and safety' and therefore the requisition of privately-owned Palestinian land for settlements.[2152] Now, how settlements were construed as a legitimate measure bringing order and safety in the Occupied Palestinian Territory is baffling. The dominant understanding of Article 43 is that it prohibits the requisition of land for settlement. It is a distortion of the intent and purpose of the law to invoke public order and the safety of settlers – and not of the protected persons – as a means to legalize the requisition of land on which settlements are built. It is also hard to see how settlers in the midst of the local Palestinian population contribute to public order and safety; the opposite is more likely.[2153]

When the settlement policy was challenged as contravening the *Hague Regulations*, which the Court recognizes as customary law, it found the matter to be non-justiciable.[2154] In both *Beth El* and *Dweikat* (*Elon Moleh)*, the HCJ also maintained that article 49 *GCIV* did not reflect customary law arguing that considering the political sensitivity, "general arguments relating to the legality of the settlements are not justiciable."[2155] The Israeli system does not automatically incorporate international treaties although international customary law automatically becomes part of Israeli municipal law.[2156] However, the *Knesset* has not incorporated the *Geneva Convention IV* into national legislation. Yet, certain provisions, including Article 49(6) *GCIV*, are *ipso facto* applicable as customary international law. Israeli courts are thus *ipso facto* bound by the prohibition of settler transfer in international customary law. However, the Israeli High

[2151] *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907 at Art 43.
[2152] Michael Galchinsky, "The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence" (2004) 9:3 Israel Studies 115 at 122.
[2153] See Report of the Secretary-General*, Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan*, UNGAOR, UN Doc A/HRC/25/38 (2014) at paras 37-38; Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1442-1443; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 241; for a broader discussion of the use and abuse of Article 43 by the HCJ, see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 25-34.
[2154] David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 78.
[2155] David Kretzmer, *ibid*.
[2156] Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 European Journal of International Law 159 at 177-178; Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1438.

Court of Justice has denied the customary nature of Article 49(6) of Geneva Convention IV by considering it international treaty (conventional) law.[2157] As Justice Witkon explained in *Dweikat*,

> The Geneva Convention must be seen as part of international treaty law and therefore, according to the accepted view in common law countries, and here – a victim cannot turn to the court of the state against which he has claims and claim his rights therein. This standing is granted only to states which are parties to such a treaty and even this litigation cannot be conducted in the courts of the state but only in an international forum.[2158]

This passage may be an illustration the finding of Eyal Benvenisti according to which the method of inquiry to a finding of customary law betrays national affiliation.[2159] Denial of customary status, despite overwhelming international state practice and *opinio juris*, allows courts to avoid ruling on a governmental policy. Similarly, in *Awib*, the High Court of Justice was asked to rule on the legality of the settlement policy, but Vice-President Landau determined that,

> I have very gladly reached the conclusion that this court must refrain from considering this problem of civilian settlement in an area occupied from the viewpoint of international law, in the knowledge that this problem is a matter of controversy between the Government of Israel and other Governments, and that it is likely to be included in fateful international negotiations facing the Government of Israel. ... In other words, although I agree that the petitioners' complaint is generally justiciable, since it involves property rights of the individual, this special aspect of the matter should be deemed non-justiciable, when brought by an individual to this Court.[2160]

[2157] See Israel High Court of Justice, *Dweikat v Government of Israel (Elon Moreh case)*, HCJ 390/79 (1979), (Unofficial translation by Hamoked: Center for the Defence of the Individual); Israel High Court of Justice, *Ayub et al v Minister of defence et al (Beit El Case),* HCJ 606/78 (1979) 9 Israel Yearbook on Human Rights 337 at 341; see also Éric David, *Principes de droit des conflits armés*, 4e ed (Bruxelles : Bruylant, 2008) at 576-577.

[2158] [Emphasis added] Israel High Court of Justice, *Dweikat v Government of Israel (Elon Moreh case)*, HCJ 390/79 (1979), Opinion of Justice Witkon, (Unofficial translation by Hamoked: Center for the Defence of the Individual) at 31.

[2159] Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 European Journal of International Law 159 at 165.

[2160] *Awib v Minister of Defence*, HCJ 606/78 (1979) cited in Israel High Court of Justice, *Bargil v Government of Israel*, HCJ 4481/91 (1993) at para 9.

The HCJ refrained from ruling on the policy of settler transfer, a constant jurisprudential stance of avoidance that led the Court to justify colonization and oppression.[2161] It has also framed the military and security needs of the occupying powers as encompassing civilian settlements.

The High Court has only ruled against a settlement when it was justified for ideological reasons beyond the scope of military necessity. In *Dweikat* (*Elon Moreh)*, the Court ruled the settlement set up by a settler movement (*Gush Emunim* or bloc of the faithful) on private land was not built primarily for military needs, as the military order of seizure came first from the political echelon, and, therefore, that the settlement was established permanently and primarily for political and religious reasons, namely the right of return of Jews to their historic homeland that is the "Zionist perspective of settling the entire land of Israel."[2162] In justifying its decision, the Court explained:

> the decision to establish a permanent settlement intended from the outset to remain in its place forever - even beyond the duration of the military government which was established in Judea and Samaria - encounters a legal obstacle which is insurmountable, because the military needs which are designed *ab initio* to exist even after the end of the military rule in that area, when the fate of the area after the termination of military rule is still unknown.[2163]

The fact that the settlement was avowedly intended to be permanent was clearly an issue for the Court. However, are settlements, which many are suburbs and cities, not *intended* to be permanent structure? Is a town not considered permanent or at least *probably* permanent? The Court's acceptance of the temporariness argument and the lack of judicial measures to circumscribe such temporariness is highly problematic.

[2161] See Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 15.

[2162] Israel, High Court of Justice. *Mustafa Dweikat et al v The Governement of Israel et al (The Elon Moreh Case)* (1979) 9 Israel Yearbook on Human Rights 345; Amnon Reichman, "Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel" (2011) 1 Utah Law Review 63 at 77; Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel,* HCJ 2056/04 (2004), para 27; David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 86-87.

[2163] [Emphasis added] Israel High Court of Justice, *Mustafa Dweikat v The Governement of Israel (The Elon Moreh Case)* (1979) 9 Israel Yearbook on Human Rights 345 at 350.

Instructively, the purpose of settlements as a military necessity for the army of occupation can be found in the Court's description of the Chief of the General Staff explanation:

> Today, regional defense communities [i.e., settlements] are armed, fortified, and properly trained for their mission which is to protect the area in which they live. Their location on the ground is determined with consideration of their contribution to controlling the area and assisting the IDF in its various missions. The chief of the general staff explains the particular importance of civilian communities as opposed to an army base, as, during war, the unit stationed in the base leaves in order to fulfill mobile and combative tasks, while the civilian community remains in place and, being properly armed and equipped, it controls its surroundings for the purpose of missions of observation and guarding nearby traffic routes in order to prevent the enemy from taking them over.[2164]

This admitted link between the military's regional defense and the settlements, based on Article 52 of the *Hague Regulations*[2165] allowing requisition of private property for the "needs of the army of occupation" fails the principle of distinction.[2166] More broadly, the principle of humanity became subservient to military necessity.[2167] Moreover, it brings into question the civilian nature of the settlements and risk making them a legitimate military target.

Following *Elon Moreh* and the victory of the Likud party in 1977, the Government of Israel classified much of the unregistered lands in the West Bank, nearly two-third of the land, as 'state land', part of which was then used for settlements and related infrastructure according to the authority of usufruct under Article 55 of the *Hague Regulations*.[2168] However, state land was not to be preserved until the end of the occupation for the benefit of the occupied

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[2164] [Emphasis added] A similar explanation was given in *Beit El* as mentioned in Israel High Court of Justice, *Dweikat v Government of Israel (Elon Moreh case)*, HCJ 390/79 (1979), (Unofficial translation by Hamoked: Center for the Defence of the Individual) at 5.

[2165] "Military necessities in the sense of Article 52 may thus include the necessities of which the chief of the general staff spoke in his affidavit of response, namely, the necessities of regional defense and of the defense of traffic routes for unhindered deployment of reserve forces in a time of war." Israel High Court of Justice, *Dweikat v Government of Israel (Elon Moreh case)*, *ibid* at 14, 17.

[2166] *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907 at Art 52.

[2167] Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory" (2005) 23 Berkeley Journal of International Law 551 at 561.

[2168] For a discussion of state lands, see David Kretzmer, The Occupation of Justice, *The Supreme Court of Israel and the Occupied Territories* (New York : State University of New York Press, 2002) at 89-92; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 223, fn 129 and 233; Michael Galchinsky, "The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence" (2004) 9:3 Israel Studies 115 at 123.

population, but was to be used for settlements and the interest of the Israeli populations, an improper purpose under the rule of usufruct.[2169] Subsequent to the classification of land, the Court refused to rule on the construction of settlements on public land citing lack of standing to challenge use of public lands, another way to deny access to justice.[2170] As a result, *Elon Moreh* shifted and limited litigation from land requisition for settlements to declaration of land as state land. In effect, this gave the green light to pursue settlement construction uninhibited on public lands as legal challenge was made impossible.

Elon Moreh is the only case were the HCJ ruled against a settlement. Yet it must be stressed that the Court found the settlement unlawful because built first and foremost for ideological reasons and not military or security ones. As Amnon Reichman notes, "*Elon Moreh* is not only about the independence of the Court, but also about its limits: in striking down egregious conduct by the military commander, and only that conduct, the Court has *de facto* allowed the settlement project to proceed."[2171] The position of the HCJ on the question of settlement is indeed "perceived as legitimization by omission"[2172], because by refusing to rule, it has done just that. To sum up, since *Elon Moreh*, the Court has effectively closed the door to lawsuit involving settlements: on 'public land', the Court invoked lack of standing; on private land, the Court rejected Article 49(6) of *Geneva Convention IV* while accepting military necessity and public order for land requisition; and on challenge to the entirety of settler transfer, the Court deemed the issue non-justiciable due to political sensitivity.[2173] Precisely because preserving Israeli Jewish public respect for the Court is a delicate matter.

Yet, the question of settlement resurfaced. In *Bargil* in 1993, the HCJ was once more asked to rule on the legality of the policy of the Government of Israel to allow Israeli citizens and residents to settle in the occupied Palestinian territory. Petitioners argued settlements are an

[2169] David Kretzmer, *ibid* at 93.
[2170] See David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 214.
[2171] Amnon Reichman, "Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel" (2011) 1 Utah Law Review 63 at 78.
[2172] David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 224.
[2173] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 223; David Kretzmer, The Occupation of Justice, *The Supreme Court of Israel and the Occupied Territories* (New York: State University of New York Press, 2002) at 78.

unnecessary defense measure creating a two-tier legal system through the establishment of "separate and unique legal arrangements" for the settler population amounting to *de facto* annexation, because the legal and political climate in the settlements is the same as in Israel.[2174] The Court determined that it should not rule on the settlement policy because it is of a political nature, would interfere with a policy decision of another branch of the government and does not involve a concrete dispute.[2175] Explaining its position, the Court affirmed that "we have not seen fit [...] to consider abstract and general political problems, a matter which, as stated, is within the jurisdiction of a different authority."[2176] Justice Goldberg answered the question as to whether the Court should refrain from considering the matter of settlements in these terms:

> I believe that we must answer this question in the affirmative. This is not because we lack the legal tools to give judgment, but because a judicial determination, which does not concern individual rights, should defer to a political process of great importance and great significance. Such is the issue before us: it stands at the centre of the peace process; it is of unrivalled importance; and any determination by the court is likely to be interpreted as a direct intervention therein. ... The petitioners have the right to place a 'legal mine' on the court's threshold, but the court should not step on a mine that will shake its foundations, which are the public's confidence in it.[2177]

Such reason for judgment is unsatisfactory for a number of reasons. First and foremost, settler implantation affects individual rights, as was conceded by the same Court in *Awib*. But the issue is as much about individual rights as about collective rights, because the treatment of settler transfer in international law cannot escape the law of self-determination. Besides, the position that settlements are not justiciable seems to contradict the Court's own stance that "when the decisions or acts of the military commander impinge upon human rights, they are justiciable."[2178] Secondly, the HCJ defers the entire question of the settlements to *realpolitik*, where the balance of power and not the rule of law prevails over what is predominantly and

[2174] Israel High Court of Justice, *Bargil v Government of Israel*, HCJ 4481/91 (1993) at para 2(a) & (c).
[2175] Israel High Court of Justice, *Bargil v Government of Israel*, *ibid* at para 3.
[2176] Israel High Court of Justice, *Bargil v Government of Israel*, *ibid* at para 4(c).
[2177] [Emphasis added] Israel High Court of Justice, *Bargil v Government of Israel*, HCJ 4481/91 (1993), Opinion of Justice E Goldberg at para 11.
[2178] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at para 31.

ultimately a legal question.[2179] And is it not the role of courts to constrain governmental acts and policies through the rule of law? Thirdly, by arguing Article 49(6) *GCIV* is not applicable, it testifies to the Court's unwillingness to uphold international customary law on the actions of the executive and legislative branches of the Government when it comes to the settlements; leaving Palestinian plaintiff with no access to justice.

The 2013 *Report of the Independent International Fact-finding Mission to Investigate the Implications of Israeli Settlements* clearly highlights the effect of the Court's limited oversight which has "provided a legal space in which the settlements have been developed."[2180] Legal reasoning characterised by avoidance legitimized a two-tiered legal regime contrary to the spirit of international law, the principle of humanity and allowed an abuse of state rights.[2181] Despite legal oversight in cases involving private properties, the High Court of Justice of Israel is not a forum for Palestinians seeking justice for the policy of settler transfer.

Inseparable from the question of settlements are the High Court judgments on the legality of the Wall being built by the Government of Israel on about 80 percent of the occupied Palestinian territory. In the case of *Beit Surik* in June 2004, the Court asked "is the military commander in Judea and Samaria authorized, by the law applying to him, to construct the separation fence in Judea and Samaria?"[2182] The Court found the obstacle is intended to take the place of combat military operations by physically blocking terrorist infiltration into Israeli population centers (in Israel and in the settlements in the occupied West Bank).[2183] It therefore accepted the security rationale of the government and determined the Wall to be a lawful

[2179] The HCJ reiterated the issue of settlements was to be resolved through political negotiations and in a peace treaty. Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, *ibid* at paras 18-20.
[2180] [Emphasis added] *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UNGAOR, UN Doc A/HRC/22/63 (2013) at para 45.
[2181] See for a similar opinion: Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 42-43.
[2182] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel,* HCJ 2056/04 (2004) at para 25.
[2183] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel* at paras 28, 32.

security measure under IHL.[2184] Consequently, and in accordance with its case law on settlements, construction of the Wall allows for seizure of privately owned lands for military needs. As the Court explained, "it is permitted, by the international law applicable to an area under belligerent occupation, to take possession of an individual's land in order to erect the separation fence upon it, on the condition that this is necessitated by military needs. To the extent that construction of the fence is a military necessity, it is permitted, therefore, by international law."[2185] To be clear, the Court, by invoking Article 23(g) and Article 52 of the *Hague Regulations* and Article 53 of the *Geneva Convention IV*, agreed the Wall is "imperatively demanded by the necessities of war" and "absolutely necessary by military operations", exceptions that allow the seizure and destruction of enemy property in IHL.[2186]

The second question put to the Court concerned the route of the Wall.[2187] Analysing the chosen route, the HCJ found security interests to justify erasing or at least blurring the Green Line. As the Court explained in *Mara'abe*, "the only reason for establishing the route beyond the Green Line is a professional reason related to topography, the ability to control the immediate surroundings, and other similar military reasons."[2188] Responding to plaintiffs' claims in *Beit Sourik* that the route of the Wall is dictated by politics, the Court held "it is the security perspective - and not the political one - which must examine a route based on its security merits alone, without regard for the location of the Green Line."[2189] Is disregard for the Green Line not a political act intent on annexation? Or in Aeyal Gross terms: "how can security considerations be severed from political ones, if security is defined in relation to the annexational aspirations and practices of settlers?"[2190] Similarly, Sharon Weill comments that

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[2184] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel,* at para 28; On the Court's presumption that the military is acting in good faith, see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 34.
[2185] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel, ibid* at para 32.
[2186] The Court invoked Articles 23(g) and 52 of the *Hague Regulation* and Article 53 of the *Fourth Geneva Convention*. Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel, ibid* at para 32.
[2187] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel, ibid* at para. 25, 44.
[2188] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at para 70.
[2189] [Emphasis added] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel,* HCJ 2056/04 (2004), para 30;
[2190] Yishai Blank, "Legalizing the Barrier: the Legality and Materiality of the Israel/Palestine Separation Barrier" (2010-2011) 46 Texas International Law Journal 309 at 336; for a detailed and convincing description of the application of Israeli law to the settlements in their integration to Israel, read: Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 233-239, 241.

"fulfilment of the settlers' individual rights in the OPT, a clear political choice, is transformed in the court room into a question of security."[2191] Conveniently, the HCJ found the Wall a lawful military measure not determined by political considerations in which case it would be unlawful.

Necessity for the Wall being established, the test therefore boils down to the proportionality of the route of the Wall. The Court integrated a proportionality test from Israeli administrative law unlike the one found in IHL.[2192] This test decontextualized the political implications of the Wall. [2193] The piecemeal proportional approach means Palestinian claimants have to demonstrate a disproportionate harm for each kilometre of the over 700 km long Wall; a micro analysis of the legality of the route of the Wall based on avoiding the question of settlements and annexation and a flawed proportionality test.[2194] Indeed, to the extent the construction of

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[2191] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 31.

[2192] The principle of proportionality in IHL is found in Article 51(5)(b) of Additional Protocol I, which prohibits attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 51(5)(b); See ICRC, Customary IHL, *Rule 14 - Proportionality in Attacks*, Online: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14; The Statute of the International Criminal Court stipulates that "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects [...] which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" constitutes a war crime in international armed conflict. *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 8(2)(b)(iv); Proportionality in IHL "prohibits attacks that may be expected to cause injury to civilian life or property that is excessive in relation to the anticipated military advantage. [...] The doctrine holds customary law status in both international and non-international armed conflicts. It places a duty on forces to assess the impact of an attack on civilian objects and refrain from attacking if the principle would be violated. [....] Proportionality can never be used to justify a direct attack on civilian persons or objects, even if a case could be made that a proportionate military advantage would thereby be gained. It only applies to attacks directed at military objectives that may impact incidentally on civilians. The legal framework therefore mandates the following procedure for military commanders: first, abide by the principle of distinction by ensuring attacks are directed only at legitimate military targets; second, assess proportionality, making sure that a planned attack on a military objective will not cause unreasonable damage to civilian objects." Jonathan Crowe & Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Cheltenham: Edward Elgar Publisher, 2013) at 55-56; Harvard Program on Humanitarian Policy and Conflict Research (HPCR), "The Separation Barrier and International Humanitarian Law", Policy Brief 6 (2004) at 7.

[2193] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 35-36, 43.

[2194] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel,* HCJ 2056/04 (2004) at paras 80, 84-85; "According to the approach of the Supreme Court, each segment of the route should be examined to clarify whether it impinges upon the rights of the Palestinian residents, and whether the impingement is proportional." Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at para 58; for an excellent critique of proportionality, see: Aeyal M Gross, The Construction of

the Wall is determined a military necessity, the Court held, it is lawful as long as the harm caused by the route is proportionate to the "rights, needs, and interests of the local population."[2195] This a more narrow conception of the proportionality test requires the balancing of two equals: humanitarian protection versus military necessity. The broader conception of the test would consider the rule of humanitarian protection first, and military necessity second.[2196] Yet, even in its narrower form, the test of proportionality does not encompass open-ended military necessity if injury to civilian life is greater than military advantage.

So what exactly is encompassed by military necessity in the application of the test of proportionality? The Court accepted settlers as security interests the occupying power can invoke under military necessity. Simply put, proportionality, as understood by the High Court of Justice, involves balancing the *equal* interests of the protected population against the interests of Israeli settlers, commuters as well as Israelis in Israel.[2197] But balancing settlers' rights against those of the protected population is not foreseen by IHL,[2198] because the test of military necessity precludes its application when it violates an absolute prohibition under IHL.[2199] In addition, military necessity serves to protect the interest of the occupying army

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a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 407-410, 426.

[2195] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel, ibid* at para 34.

[2196] See Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 92.

[2197] For a discussion of the treatment of proportionality by the Israeli High Court of Justice, see David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 228-230; Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005), paras 28-29; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 222.

[2198] Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 418.

[2199] See Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion" (2005) 99 The American Journal of International Law 102 at 111; Military necessity: Test 1 "Does the measure violate an absolute prohibition contained in IHL?; Test 2 "Is the occupying power facing an actual state of necessity?"; Test 3 "Is the measure the most adequate and effective response to the existing threat?"; Test 4 "Does the military advantage gained by the measure outweigh the damage done to the population?"; Test 5 " Was the measure adopted after due consideration of all the interests involved and by the proper authority?" Harvard Program on Humanitarian Policy and Conflict Research (HPCR), "The Separation Barrier and International Humanitarian Law", Policy Brief 6 (2004) at 6-7.

only and only within the occupied territory; therefore excluding the security of the occupying power.[2200] Herein lies the problem and David Kretzmer puts it well when he writes:

> by including the security of Israeli nationals who have either settled in the OT or travel through the area as a protected interest, and at the same time neither giving priority to the duty of the commander under the Fourth Geneva Convention to ensure the interests of protected persons, nor demanding that the welfare of the local population be the dominant aim, the Court has weakened the legal protection afforded under international law to protected persons.[2201]

In fact, proportionality is skewed to settlers and other Israelis in the OPT because (1) the protection of (unlawfully present) settlers is considered a military necessity; and, (2) both populations are considered (theoretically)[2202] equal in terms of status, entitlements and rights; effectively emptying of substance and effect the status of protected persons held by the Palestinian population under occupation.[2203] For the UN Secretary-General, the situation is clear: "Israeli settlement activity, security measures adopted to protect settlers and their movement, and the violence committed by Israeli settlers against Palestinians and their property are behind most of the human rights violations against Palestinians in the West Bank, including East Jerusalem."[2204] In sum, the HCJ adopted a magnifying glass approach, looking so closely at the Wall so as not to see the impact of the route in its entirety. This approach allowed the Court to focus on the proportionality test according to the following logic: settlers as security and military necessity versus certain rights of the protected Palestinian population.

Yet, in both *Beit Surik* and *Mara'abe*, the Court requested a re-routing of sections of the Wall due to disproportionate harm to the fabric of life of Palestinians. Hence, the Court found

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[2200] See Ardi Imseis, *ibid* at 112; see Iain Scobbie, "Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's *Wall* Advisory Opinion" (2006) 5:2 Chinese Journal of International Law 269 at 297.

[2201] David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 226.

[2202] In practice settlers and Palestinians do not have equal rights, see for instance Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 418-419.

[2203] See also Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 32.

[2204] *Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the Occupied Syrian Golan*, Report of the Secretary-General, UNGAOR, UN Doc A/HRC/25/38 (2014) at para 9.

violations of Palestinian rights too significant and agreed an alternate route to the Wall existed providing the same or a similar level of security while lessening the harm caused to Palestinians. But in so doing, the Court "must do what it said it was not doing", namely, reconsider the security and military argument of the army by rejecting segments of the route it chose as military imperative.[2205]As Aeyal Gross points out in his discussion of *Mara'abe*, "an unexplainable gap divides the HCJ's determination that legitimate security considerations motivated the establishment of the barrier from its finding that no security-military explanation justified its 'strange' route." [2206] Through proportionality therefore the Court indirectly questioned the security necessity of certain parts of the route of the Wall; a Wall it had previously accepted as a legitimate security/military measure.

In *Mara'abe*, the HCJ found the military commander entitled to build a Wall for security reasons, such as the protection of Israelis present in the occupied Palestinian territory because the military commander has the responsibility to protect *all* people in the occupied territory. On this, the Court asked: "Does the military commander's authority to construct a separation fence also include his authority to construct a fence in order to protect the lives and safety of Israelis living in Israeli communities in the Judea and Samaria area?"[2207] It answered in the affirmative: "the military commander is authorized to construct a separation fence in the *area* for the purpose of defending the lives and safety of the Israeli settlers in the *area*."[2208] However, by endorsing the security rationale underlying the settlements, the Court "absorbed and implicitly endorsed a primary *raison d'être* of the Israeli settlement project: the establishment of a critical mass of settlers in the occupied territories to justify a sustained military and political presence in order to provide 'security' for the privileged minority."[2209] Considering the Court's acceptance of settlements as a military necessity for the occupying army and the Wall as a military necessity to protect the settlements, there seems to be no end

[2205] For an excellent discussion on this point, see Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 411, 420-421.
[2206] Worth noting, settlement expansion was taken into consideration in the route of the Wall in *Mara'abe*. See Aeyal M Gross, *ibid* at 420-422.
[2207] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at para 18.
[2208] [Emphasis in original] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, *ibid* at para 19.
[2209] Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 91-92.

to the logic of military necessity, and more importantly, no clear safeguard or check against its abuse.

What's more, the HCJ considered irrelevant whether the settlements are in conformity with international law to rule on the legality of the Wall since the duty of the military commander is to protect *all* to preserve 'public order and safety' and the "human dignity of every individual."[2210] In clear terms, it found:

> Even if the military commander acted in a manner that conflicted the law of belligerent occupation at the time he agreed to the establishment of this or that settlement – and that issue is not before us, and we shall express no opinion on it – that does not release him from his duty according to the law of belligerent occupation itself, to preserve the lives, safety, and dignity of every one of the Israeli settlers.[2211]

Accordingly, settlements built in breach of IHL require protection as a *fait accompli* which international law, including IHL, cannot ignore. That is because the HCJ construes Article 43 of the *Geneva Convention IV* as protecting the life of all individuals present in the OPT irrespective the lawfulness of their presence, thus putting on par the rights of settlers and other Israelis temporarily present with that of the protected population.[2212] But that is a stretch. It could be argued the HCJ is interpreting Article 43 *GCIV* out of context and in bad faith. Article 43 cannot be invoked to protect the human rights of settlers through the construction of a Wall further encroaching on the rights of protected persons because the *primary*, if not the sole, intent of Article 43 is to protect the protected population under occupation, not nationals of the occupying power unlawfully in the territory.[2213] Indeed, settlers in an occupied territory are not entitled to the same level of protection as civilians of the occupying power in its sovereign

[2210] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at paras 18-20.
[2211] "In sum, Israelis present in the *area* have the rights to life, dignity and honor, property, privacy, and the rest of the rights which anyone present in Israel enjoys." Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, *ibid*, paras 20-21.
[2212] *Abu Safiya v The Minister of Defense*, HCJ 2150/07 (2009) at paras 20, 24 cited in Guy Harpaz & Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (2010) 43 Israel Law Review 514 at 521, 524, 528; David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 224; Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, *ibid* at paras 18-20.
[2213] Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1442.

territory. In fact, nationals of the occupying power are excluded from the scope of protection afforded under the law of occupation.[2214] This is made clear in Yuval Shany's commentary:

> The *Beit Sourik* judgement evades the issue of legality of the settlements altogether and adopts an 'individual security' premise, which upholds the obligation of the IDF to provide security to all individuals residing in the Occupied Territories – Israelis and non-Israelis alike. This premise is, however, questionable from a legal point of view, as it fails to acknowledge the legal import of Article 4 of the Fourth Geneva Convention, which excludes citizens of the occupying power from the Convention's scope of protection. It also runs contrary to the general principle *ex injuria jus non oritur*, which finds concrete expression in Article 25(2)(b) of the ILC Draft Articles on State Responsibility. This article seems to bar states who have contributed to the situation of illegality from invoking the defence of necessity. Hence, the construction of illegal settlements in the West Bank might bar the invocation of the defence of necessity in order to protect them. [2215]

Victor Kattan reaches a more sweeping conclusion when he suggests "one of the consequences of the illegality of the settlement enterprise is that any measures undertaken to protect settlers must also be considered unlawful."[2216] Accordingly, to protect settlers within the realm of the international rule of law, the government of Israel would have to bring settlers back within its sovereign territory.[2217] Indeed, the less invasive way to ensure the security of settlers is to repatriate them within Israel proper, an option neither the Israeli government nor the HCJ has considered when deciding and ruling on the Wall and its route.[2218] Of course, the military commander must protect the dignity and lives of its citizens who are where they should not, but furthering the protection of unlawfulness through the barrel of a gun cannot bode well for the protection of the dignity and life of persons – Israeli settler or not. Worth citing at length on this sensitive point are also Guy Harpaz and Yuval Shany,

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[2214] Guy Harpaz & Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (2010) 43 Israel Law Review 514 at 521, 526.
[2215] Yuval Shany,"Head against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories" (2004) 7 Yearbook of International Humanitarian Law 352 at 364.
[2216] Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1431, 1435, 1447.
[2217] Victor Kattan, *ibid* at 1471; "If the goal is the protection of human life and not the policy of colonialism, then the settlers could be settled within the border of Israel, where their security is guaranteed." Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 30.
[2218] David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 230.

> As a result, we strongly agree with the principled approach of the Israeli Supreme Court concerning the need to protect the human rights of all individuals situated in the Occupied Territories, including commuters on Route 443. Still, the laws of belligerent occupation constitute the *lex specialis* - suggesting that it should obtain an interpretive dominance and shape the application of the other applicable bodies of law as well. This implies that although the Military Commander is certainly obligated to protect all individuals under his jurisdiction pursuant to international human rights law and Israeli law, the manner of protection should be compatible with the rules and principles of the laws of belligerent occupation. For example, protection of individuals whose presence in the Occupied Territories is unlawful may entail their removal from the area; moreover, in the event of conflict between different sets of individual rights, the rights of those individuals enjoying protection under the *lex specialis* should be accorded preference.[2219]

At a minimum, the protection of settlers cannot violate the rights of Palestinians.[2220] In short, the Court delinks settlers from the overall question of the legality of the settlement. It applies international human rights law and international humanitarian law to settlers, but not to the policy of settler transfer, which has been termed a rhetorical technique of dissociation.[2221] This dissociation distorts the proper legal course that is the end of settler transfer, the removal of settlers from the OPT and reparations to victims.

Also noteworthy, in both *Beit Surik* and *Mara'ade,* the right of self-determination of the Palestinian people is conspicuous by its absence. In fact, the Government of Israel does not apply international human rights law to protected persons (Palestinians), although the Court differs slightly by applying to a limited extent human rights law to Palestinians.[2222]

More worrying perhaps for the rights of Palestinians is the acknowledgement by Israeli leaders of the political nature of the Wall. As early as 2005, Tzipi Livni, then Minister of Justice, stated

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[2219] [Emphasis added] Guy Harpaz & Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (2010) 43 Israel Law Review 514 at 548.
[2220] See Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 418.
[2221] See Iain Scobbie, "Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's *Wall* Advisory Opinion" (2006) 5:2 Chinese Journal of International Law 269 at 287.
[2222] See Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at paras 24-25, 27; See also David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 225-226.

in her address to an Israeli legal conference that the Wall will have implications for "the future border of the state of Israel" and that "the High Court of Justice, in its rulings over the fence, is drawing the country's borders."[2223] Similarly, the lawyer of the Israeli government acknowledged political considerations were taken into consideration in the route of the Wall in Jerusalem because it is considered part of the sovereign territory of Israel, an argument accepted by Justice Barak since Jerusalem is the capital of Israel regardless international law.[2224]

To conclude, the Israeli High Court of Justice has never clearly ruled on the legality of the policy of population transfer; a stance that informs its case law on the Wall, including *Mara'abe*. In its response to the ICJ, the High Court recognized that "the heart of the ICJ ruling is unanswerable."[2225] By refraining from tackling the heart of the matter, the HCJ has legitimized a legal regime of segregation.[2226] Even after responding to the ICJ in *Mara'abe* and stating it will "give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion", which arguably includes Article 49(6) of *Geneva Convention IV*, the case-law of the HCJ still falls short of addressing settler transfer under international law and forcible acquisition of territory.[2227] Self-restraint, or ruling with blinders, puts the HCJ as "a court of regulation of the occupation."[2228] Avoidance and the apologetic role of the HCJ[2229] provides a "seal of legality" lessening reputational costs for acts which would otherwise be scrutinized, including by Israeli society.[2230] In other words, the case

[2223] Yuval Yoaz, "Justice Minister: West Bank Fence is Future Border" *Haaretz* (1 December 2005), Online: http://www.haaretz.com/print-edition/news/justice-minister-west-bank-fence-is-future-border-1.175539
[2224] See Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 101.
[2225] Susan Akram & Michael Lynk, *ibid* at 86-87; David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 99.
[2226] See Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 25.
[2227] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at paras 74, 100.
[2228] Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 430.
[2229] On the role of avoidance and apologist, see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 18-45 and 69-114.
[2230] Amnon Reichman, "Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel" (2011) 1 Utah Law Review 63 at 76; Guy Harpaz & Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (2010) 43 Israel Law Review 514 at 515.

law of the Court has served to accommodate the occupation rather than the other way around, namely, the occupation accommodate to the restraints of the law.[2231] Through its 'hand-off' approach as to the identification and application of international customary law on population transfer and its convenient interpretation of military necessity and security under international customary law, the High Court of Justice has legitimized the policy of settler transfer in the OPT and the Wall, and ultimately, "has embarked on a collision course with international law"[2232] by refusing to consider its regime in the OPT as a "truly international matter."[2233]

3.2.2 The International Court of Justice confronts the policy of settler transfer and annexation

In contradistinction to the High Court of Justice of Israel, the main judicial authority in international law,[2234] the International Court of Justice found illegal settler transfer and the Wall under international law. In the *Advisory Opinion on the Legality of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ recognized the application of *Geneva Convention IV*. The body of fourteen judges unanimously found that "since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49" and international law.[2235] Judge Buergenthal who dissented to hear the case, nevertheless opined that settlements violate Article 49(6) and more precisely that "the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law."[2236] The ICJ therefore applied the *Geneva Convention IV* to the OPT, found settlements to constitute

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[2231] Guy Harpaz & Yuval Shany, *ibid* at 516, 546.
[2232] Michael Galchinsky, "The Jewish Settlements in the West Bank: International Law and Israeli Jurisprudence" (2004) 9:3 Israel Studies 115 at 123; David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 99; Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 86-87.
[2233] Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 European Journal of International Law 159 at 182.
[2234] Noteworthy, the HCJ recognized this when it affirmed that although not binding on Israel, "the opinion of the International Court of Justice is an interpretation of international law, performed by the highest judicial body in international law" Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at para 56; Richard Falk, "The Kosovo Advisory Opinion: Conflict Resolution and Precedent" (2011) 105 American Journal of International Law 50 at 52.
[2235] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 120.
[2236] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid*, Declaration of Judge Buergenthal at para 9.

population transfer and linked the settlements and the annexation of Jerusalem to the route of the Wall.[2237]

The ICJ's linkage of the settlements to the unlawful annexation of Jerusalem informed its finding that the route of the wall, which puts 80 percent of settlers on the 'Israeli side' of the Wall, may well constitute annexation in contradiction of the principle of non-acquisition of territory by force.[2238] Despite reassurance from the Government of Israel that the Wall is temporary and apolitical, the Court found it could not remain indifferent to the fears expressed that settlements could be integrated into Israel. Concerns over permanency led the Court to hold the Wall and its *régime* "create a 'fait accompli' on the ground that could well become permanent in which case [...] it would be tantamount to *de facto* annexation."[2239] Following a finding of possible annexation, the Court addressed the crux of the matter, again through a comprehensive approach, and determined previous unlawful measures combined to the Wall and its associated regime as breach of Israel's obligation to respect the right to self-determination of the Palestinian people, an obligation *erga omnes*.[2240] The unlawfulness of settler transfer and the forceful annexation of Jerusalem informed the Court's analysis of the legal implications of the Wall.

A number of criticisms have been yielded at the ICJ's treatment of the question of settler transfer. The treatment of the right of Israel to protect its settlers has been considered unsatisfactory. The HCJ for instance reproached the Court's lack of consideration of the Oslo Accords between the Government of Israel and the Palestinian Authority, which provides settlements are part of the final status negotiations, and until such time, allows Israel to protect settlers.[2241] As the argument goes, the illegality of the settlements does not prevent Israel from protecting its settler population under the Accords and international human rights law (human dignity, right to life and security for instance).[2242] Similarly, Yuval Shany denounced that

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[2237] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid* at paras 119, 122.
[2238] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ibid* at para 122.
[2239] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid* at paras 116, 121, 134.
[2240] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid* paras 122, 149, 155.
[2241] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at para 91.
[2242] Guy Harpaz & Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (2010) 43 Israel Law Review 514 at 531.

neither the ICJ nor the HCJ provided permissible military measures in the context of the illegality of the settlements on the one hand and the duty of the government to protect the lives of its citizens, including settlers, on the other hand.[2243] Hence, it seems neither courts offered a clear answer as to what an occupying power is entitled to do to protect a settler population unlawfully transferred until the illegality is resolved by the withdrawal of the occupying power and/or a peace agreement. In contrast, it has been proposed the ICJ prohibits Israel from taking any measure to protect its settler population, although the Court has not provided legal justifications for this position.[2244] This is likely based on the ICJ finding that Israel is bound to protect the life of its citizens in conformity with international law and put an end to its wrongful acts.[2245] The question however remains: what exactly is an occupying power entitled to do to protect its settlers in an occupied territory under international human rights and, if applicable at all, international humanitarian law? This is an important question of law that remains unclear. Apart from putting an end to the illegal situation through the repatriation of settlers, there seems little Israel can do to protect its settlers under the purview of international law.

However, most critics have been directed towards the ICJ's treatment of the security-related arguments of the Government of Israel. Responding to the security argument raised by Israel, the ICJ rejected claims of self-defense (UN Charter), military necessity (IHL) and a state of necessity (international customary law and the law of state responsibility) mainly because it was not convinced the route of the Wall could be justified by militarily necessity or national security nor that it was the only way "to safeguard an essential interest against a grave and imminent peril."[2246] In evaluating military necessity, the Court found Article 23 of the *Hague Regulations* inapplicable as relevant to hostilities and construction of the Wall contrary to Articles 46 and 52 of the Hague Regulations and of Article 53 of the *Geneva Convention IV*.[2247]

[2243] Yuval Shany,"Head against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories" (2004) 7 Yearbook of International Humanitarian Law 352 at 366-367.
[2244] Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 79.
[2245] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 136 at para 141.
[2246] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid* at para 137; The Court rejected ILC's Article 25 on the Responsibility of States (para 140); Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 77.
[2247] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid* at paras 132, 135.

By rejecting the relevance of Article 23, the Court affirmed sections II (hostilities) and III (occupation) of the Hague Regulations are distinct and do not intersect.[2248] The findings of violations to Articles 46 and 52 of the *Hague Regulations* and of Article 53 of the *Geneva Convention IV* relate to Article 47 in the context of changes introduced to the OPT that could amount to annexation and prevent protected persons from the benefits of the *Geneva Convention IV*. For some commentators, however, the treatment of military necessity notably under Article 23 of the *Hague Regulations*, which is argued could apply to situations involving a mix of occupation and hostilities, and Article 53 of the *Geneva Convention IV* as well as proportionality has been deemed unsatisfactory.[2249] Yet, the ICJ took into consideration a combination of provisions of international humanitarian law to assess military necessity and find it was not convinced it applied in the context of the Wall; chiefly because the Wall entrenches population transfer and *de facto* annexation in time of war.[2250]

In response to the argument that the state of Israel has an inherent right to self-defense recognized under Article 51 of the *UN Charter*, the ICJ found it irrelevant because the threat did not emanate from a state and came from within a territory under the control of Israel.[2251] The ICJ stance on self-defense was heavily criticized, including by the HCJ[2252] and judges of the ICJ[2253] mainly because insufficiently explained[2254] or perceived not to conform to the

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[2248] Arguing this is an unexceptional position in IHL: Iain Scobbie, "Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's *Wall* Advisory Opinion" (2006) 5:2 Chinese Journal of International Law 269 at 296-297.

[2249] Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 400; Susan C Breau, "Consequences of the Wall in the Occupied Palestinian Territory" in Susan C Breau & Agnieszka Jachec-Neale, eds, *Testing the Boundaries of International Humanitarian Law* (London: British Institute of International and Comparative Law, 2006) 191 at 192; Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 74; For a critique of the Court's reasoning on military necessity: Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion" (2005) 99 The American Journal of International Law 102 at 110-111.

[2250] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 135.

[2251] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid* at para 139.

[2252] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at paras 23, 53.

[2253] See for instance, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, Declaration of Judge Buergenthal at paras 6-8.

[2254] For criticisms, see: "However, the ICJ lost sophistication as a primary organ of the United Nations and as one of the premier interpreters of international law in allowing Palestine to enjoy quasi-recognition as a state without requiring of it the obligations and responsibilities that recognition as a state among the nations of the world entails. The ICJ's dismissal of Israel's self-defense claims ultimately surfaced as shallow and unpersuasive."Alberto De Puy, "Bringing Down the Barrier: A Comparative Analysis of the ICJ Advisory

ordinary meaning of Article 51 of the UN Charter, which does not strictly require an attack to be carried out by a state, or because despite Article 51, there is an inherent right to self-defense (*jus ad bellum*).[2255] The Court seems to have reasoned that the applicable legal framework Israel may employ as the occupying power is in *jus in bello* and not in the right to self-defense under Article 51 of the *UN Charter*, which belongs to the *jus ad bellum* as it regulates the beginning of war. The two regimes would therefore be exclusive. Self-defense is not available to an occupying power, because he is in effective control of the territory and his military commander can invoke military necessity under *jus in bello* to maintain security.[2256] In other words, the freedom to act of the military commander is constrained by the law of occupation which requires him to ensure the security of the occupied territory (*jus in bello*). This power cannot be expanded by self-defense (*jus ad bellum*), which would accord him more power than under the law of occupation.[2257] Accordingly, it could be that the right to self-defense disappears once occupation is established, although IHL does provide for belligerent reprisals, not revenge, against those responsible to put an end to the violation or prevent future ones.[2258]

Ultimately, what emerges from reading the Advisory Opinion is that the ICJ did not trust the main contention of the Israeli Government according to which the Wall is a temporary measure dictated solely by military and security needs. That is because it considered the root-causes of the conflict; ongoing population transfer, *de jure* annexation of Jerusalem and *de facto*

Opinion and the High Court of Justice of Israel's Ruling on Israel's Construction of a Barrier in the Occupied Territories" (2005) 13 Tulane Journal of International and Comparative Law 275 at 298-302; François Dubuisson, "The Implementation of the ICJ Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" (2004-2005) 13 Palestinian Yearbook of International Law 27 at 36.

[2255] Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 400; Sean D Murphy, "Self-Defense and the Israeli *Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ?" (2005) 99 The American Journal of International Law 62 at 64; Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 75; for a discussion favourable to the ICJ's treatment of self-defense, see Iain Scobbie, "Words My Mother Never Thaught Me: "In Defense of the International Court' (2005) 99:1 American Journal of International Law 76.

[2256] For an excellent discussion of the right to self-defense during occupation, see Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1468, 1485-1489; Susan Akram & Michael Lynk, *ibid* at 75-76; Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 400.

[2257] Aeyal M Gross, *ibid* at 401.

[2258] See Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1489.

annexation of parts of the West Bank. From this perspective, the Court made clear situations of belligerencies require a transversal approach bridging international humanitarian law, international human rights law and the law of state responsibility; in other terms, 'the big picture'.

It can therefore be said that "one of the *Advisory Opinion's* major contributions is to bring the conflict squarely back into a rights-based construct."[2259] The solution is no longer to be found in bilateralism nor within the occupier's parameters. Henceforth, the conflict cannot be resolved within the security and military rationale propounded by the stalemated peace process. Peace cannot be conditioned on an occupied population ending violence (resistance) and establishing a full democratic regime of "tolerance and liberty" under what has become a colonial occupation no more than it can be realistically and pragmatically "negotiated" based on the fiction of two equals.[2260] The question of Palestine is an international issue to be resolved in conformity with peremptory rules, which are distinct but upholded by *erga omnes*.[2261] The *erga omnes* and peremptory norms of international – i.e. self-determination, non-discrimination and the prohibition of conquest – are the parameters of conflict resolution. Core therefore is the proposition that the 'question of Palestine' entails the obligations of Israel towards the international community as a whole. Recognizing a Palestinian state along a declaratory approach without a rights-based framework that provides for independence is insufficient to protect the attributes of the state in *statu nascendi* and the justice needed to sustain peace.

3.2.3. The need for coherence and obedience[2262] with international humanitarian law in the courts of belligerents

The question then is how can the positions of the HCJ and the ICJ be reconciled or understood, as both seemingly refer to a common normative foundation. But is this really the case? What

[2259] Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 82.
[2260] See generally "A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" UNSCOR, UN Doc S/2003/529 (2003).
[2261] Gleider Hernandez, "A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community' (2013) 83:1 British Yearbook of International Law 13 at 41.
[2262] For a definition of obedience as internalization of the norm and incorporation into the national system, see Harold Hongju Koh, "1998 Frankel Lecture: Bringing International Law Home" 35 Houston Law Review (1998-1999) 623 at 628.

beyond law could explain the diametrically opposed conclusions of these judicial authorities? And is there one jurisdiction, one interpretation of IHL that supersedes the other or are they all equal? The following section will discuss these questions.

Contradictory interpretations of international humanitarian law, in particular with regard to settler transfer and military needs, raise a number of questions pertaining to the role of courts, the preferable forum to adjudicate disputes in times of armed conflict and compliance with international rulings by governments whose violations of international law are legitimized and legalized by their national order. Questions that underpin the discussion are: is it possible for courts belonging to a state party to an armed conflict to consider equally its audience and the audience of an opposing, enemy, group and still maintain public support? Would it be more equitable for judges in hard cases to be from outside the societies or parties involved in the conflict? And what is the domestic legal effect of the decision of the International Court of Justice?

In the case of the Wall and its associated regime, both courts normatively grounded their decision in IHL and international human rights law, but with differing perceptions, and factual emphasis; and, obviously, consequences. Both courts agreed Israel is the occupying power in the West Bank, that the law of occupation and human rights law applied, and that Palestinian rights are impeded by the construction of the Wall.[2263] The courts' divergent findings are believed to stem from different facts and outlooks, the micro versus macro debate.[2264] Responding to the ICJ advisory opinion in *Mara'abe*, the HCJ determined the Advisory Opinion does not bind the state of Israel, altough it does refer to peremptory norms and *erga omnes* obligations. It argued the ICJ came to a different finding because of different factual

[2263] See Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at paras 57, 73.
[2264] Yuval Shany,"Head against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territories" (2004) 7 Yearbook of International Humanitarian Law 352 at 356.

information, which is "what ultimately led to the contrary legal conclusions."[2265] However, more than factual elements explain these conflicting findings.[2266]

The main points of contention essentially revolve around the transfer of settlers and the concomitant route of the Wall in light of the nature of the occupation regime in the West Bank.[2267] This reading has resulted in opposed assessments of international humanitarian law and more precisely, of security needs, because the ICJ admits what the HCJ is refusing to, namely that settlements are unlawful in international customary law and cannot constitute a legitimate security need or military interest to delimit the route of the Wall.[2268] In balancing security and military needs against the rights of protected persons, the HCJ accorded more weight to the former because it accepted security considerations to encompass settlers in accordance with the prevalent belief of its audience whereas the ICJ accorded more weight to the latter, principally because it rejected security as inclusive of settlers, and more importantly, because it believed more than security and military needs dictated the route of the Wall, namely, *de facto* annexation of most settlements. Simply put, the ICJ said it was “not convinced” the route was necessary for security reasons whereas the HCJ said it was “not persuaded” the Wall was *not* a legitimate security measure.[2269]

The conflicting findings as to the relevant provisions and its application to the facts may be explained by the nature of the judicial organ and the courts' concern to rule within the narrative of their respective audiences. That is because no legal institution can operate outside the narrative that established it.[2270] Courts are not only tied by the legal order to which they

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[2265] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at paras 56, 60-62, 68.
[2266] For a similar viewpoint, see Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 395-396, 429.
[2267] On settlements and annexation, see Aeyal M Gross, *ibid* at 395-396, 429.
[2268] See generally Shane Darcy, *Judges, Law and War, The Judicial Development of International Humanitarian Law* (Cambridge: Cambridge University Press, 2014) at 34-35.
[2269] "We have *no reason to assume* that the objective is political rather than security-based. Indeed, petitioners did not carry the burden and *did not persuade us* that the considerations behind the construction of the separation fence are political rather than security-based." [Emphasis added] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel,* HCJ 2056/04 (2004) at para 32.
[2270] See Daphne Barak-Erez, "Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court" (2001) 16 Canadian Journal of Law & Society 93 at 100; "Perelman claims that techniques of judicial reasoning are oriented by the ideology which guides judicial activity within a specific system − by the way in which judges perceive their role and function, by their understanding of law, and by their conception of the proper relationship between the judiciary and the legislature." For an application of

appertain, but also by their audience's prevalent normative or value-laden framework. The task of courts is thus to maintain (national or international) public trust by bridging the spirit of the law with societal expectations, a task rendered especially difficult in times of protracted armed conflicts. Interpretation of international law is shaped by the judicial organ's "bias towards its own community"[2271] or to put it otherwise, by "the political obligation on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer."[2272] The rule of law includes judicial independence, which comprise public respect for the court and judges.[2273] The legitimacy (authority) of courts depends on its capacity "to command acceptance and support from the community so as to render force unnecessary."[2274]

At the national level, it has been argued that domestic courts contribute to legitimize the government and its acts based on internal law, national interests and policial goals.[2275] At the international level, the ICJ is mandated as the principal judicial organ of the United Nations to preserve international peace and security.[2276] It is quite obvious the two courts interpreted international law based on the legal order to which they belong and the narrative of their respective audience. The ICJ spoke to an international and 'onusian' audience, whose references are embodied in the *International Bill of Rights* and binding UN Security Council resolutions among others, whereas the HCJ referred to a national *internal* consensus based on the prevalent ideology of Zionism, the presumed good faith of the state and armed force,[2277]

Perelman's theory of legal rhetoric to the HCJ, see Iain Scobbie, "Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's *Wall* Advisory Opinion" (2006) 5:2 Chinese Journal of International Law 269 at 278.

[2271] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 32.

[2272] Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UNGAOR, UN Doc A/CN.4/L.682 (2006) at 24; Discussing Chaïm Perelman theory in this context, see Iain Scobbie, "Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's *Wall* Advisory Opinion" (2006) 5:2 Chinese Journal of International Law 269 at 279.

[2273] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006) at 164-165.

[2274] Archibald Cox, *The Role of the Supreme Court in American Government* (Oxford: Clarendon Press, 1976) at 103-104 cited in Laurence Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997-1998) 107 Yale Law Journal 273 at 284.

[2275] See Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 13-14.

[2276] *Charter of the United Nations*, 26 June 1945, Can TS No 7 at Art 92 and Arts 59-60 of the Statute of the ICJ.

[2277] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 34.

and the strong desire for security of Israeli society.[2278] Hence, the ICJ has struck a decision faithful to the international consensus enshrined in UN resolutions and the spirit of international law with regard to population transfer and the non-acquisiton of territory by force whereas the HCJ has struck a decision conforming to Israeli societal and governmental interests in security.

In the context of the occupation, the HCJ is walking a tightrope, because Israeli society is suspicious and critical of the HCJ's review of the actions of the military and interference with security decisions, including the settlements.[2279] As Kretzmer explains, "most of the Jewish public in Israel regard challenges to the authority of the IDF in the territories as acts of war that threaten the very security of the state itself, rather than as expressions of the desires of a people subject to military occupation to be free from the occupying army."[2280] The Israeli High Court of Justice is therefore concerned to maintain legitimacy in the eye of its public.[2281] Ruling on the Wall, Israeli judges recognized their position as member of Israeli society and the influence of their environment and society on their appreciation of facts and interpretation of law:

> Our task is difficult. We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terror. [...] As any other Israelis, we too recognize the need to defend the country and its citizens against the wounds inflicted by terror. [...] When we sit in judgment, we are subject to judgment. We act according to our best conscience and understanding. Regarding the state's struggle against the terror that rises up against it, we are convinced that at the end of the day, a struggle according to the law will strengthen her power and her spirit. There is

[2278] See Daphne Barak-Erez, "Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court" (2001) 16 Canadian Journal of Law & Society 93 at 99-100, 111;
[2279] David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 236.
[2280] David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 194-195.
[2281] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 108.

> no security without law. Satisfying the provisions of the law is an aspect of national security.[2282]

The shared notion of threat of a nation under attack and consequent need for unity is well encapsulated in Amnon Reichman explanation:

> The judiciary, while independent, is still an agency of the same tree and "the enemy" attacks the whole tree. In ordinary times, the judiciary strive to place itself "outside" or "above" the dispute it is set to adjudicate by acting as the "independent neutral umpire." This posture of independent neutrality is difficult to maintain in times of war when the judiciary itself is part of the threatened state.[2283]

Squeezed between international law, governemental and societal interests, the HCJ internalized the dominant narrative when it accepted "that the state is under attack, that the occupation has been largely benign, that the military and government are motivated by security concerns and guided by human values, and that the benefit of any judicial doubt should be given to the military unless the minimal legal restraints on the occupation have been unmistakably ignored."[2284] On the other hand, and as Reichman submits "it would be odd to expect judges to distance themselves from the entity in the name of which they exercise power and independently consider whether to accept the narrative and justifications of the enemy."[2285] David Kretzmer, who has long studied the jurisprudence of the High Court, similarly concluded "it would be naïve to think a domestic court could deal with such an anomalous situation [long term occupation] as if it were an outside, neutral, observer that is oblivious to the political realities of its own country."[2286] In fact, decisions of the HCJ are complied with with mix results and there is a real risk that a ruling against the Wall would be challenged both

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[2282] [Emphasis added] Israel High Court of Justice, *Beit Sourik Village Council v The Government of Israel,* HCJ 2056/04 (2004) at para 86; see also on the settlements: Israel High Court of Justice, *Bargil v Government of Israel*, HCJ 4481/91 (1993), Opinion of Justice E Goldberg at para 11.

[2283] Amnon Reichman, "Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel" (2011) 1 Utah Law Review 63 at 66.

[2284] Susan Akram & Michael Lynk, "The Wall and the Law: A Tale of Two Judgements" (2006) 24:1 Netherlands Quarterly of Human Rights 61 at 87; "Given the perception of the political context, Israeli judges will not be neutral in judging the conflicting claims of the government and Palestinians subject to military rule." David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 196.

[2285] Amnon Reichman, "Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel" (2011) 1 Utah Law Review 63 at 67-68.

[2286] David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 236; David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 194-196.

by the excutive and the legislative.[2287] This is perhaps because the case law of the HCJ in the OPT has stretched public confidence to its limits.[2288] Justices are thus not and *cannot* be impermeable to the environment and society to which they belong and in which they operate. It is therefore not surprising they refuse to address highly sensitive issues to maintain public trust and governmental interests,[2289] and this, particularly in situations of armed conflict involving national security or perceived threats to its existence.

From this perspective, decisions on settlements and the Wall are informed by legal as well as ideological/political considerations intrinsic to the national legal order, Israeli Jewish society and the nature of the occupation.[2290] The question therefore is whether preserving respect of the Israeli public for the High Court of Justice has been done on the altar of international law. It does appear so, since the judiciary invoked non-justiciability with regard to the policy of settler transfer and an uncontextualised reading of its power under Article 43 of *Geneva Convention IV*, among others, to avoid reviewing military decisions concerning settler transfer and other peremptory and customary norms of international law. In a few words, by refusing to examine the legality of settler transfer under article 49 of the *Geneva Convention IV* while championing an uncontextualised interpretation of Article 43 of the same *Convention*, the Israeli High Court has merged the judicial, legislative and executive powers of the state to the detriment of an interpretation of international law that conforms to its spirit.[2291]

[2287] For possible attempts by the government of Israel in *Alfei Menashe* (*Mara'abe* case) to achieve admnistratively through house demolitions its route of the Wall, see Iain Scobbie, "Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's *Wall* Advisory Opinion" (2006) 5:2 Chinese Journal of International Law 269 at 300; Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 108.

[2288] See David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 78.

[2289] Eyal Benvenisti concluded that: "A comparative analysis, however, shows that the jurisprudence of national courts is consistent with protecting short-term governmental interests." Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 European Journal of International Law 159 at 161.

[2290] See Yishai Blank, "Legalizing the Barrier: the Legality and Materiality of the Israel/Palestine Separation Barrier" (2010-2011) 46 Texas International Law Journal 309 at 312, 321-322, 332.

[2291] Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1516; "This rights-minded approach is generally conspicuous by its absence in decisions relating to the Occupied Territories. The jurisprudence of these decisions is blatantly government-minded." David Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002) at 188.

Additionally, one can question whether the HCJ fulfils the duty to consider equally the Israeli society to which it belongs and the Palestinian society to which it has extended its jurisdiction. It is indeed questionnable whether both audiences receive equal consideration under the proportionality test. Sharon Weill's study demonstrates that "in all proportionality balances there is an implicit bias, an implicit principle, according to which the protection of the rights of Israelis is more important; the equilibrium of the balance is initially shifted to prevail over another population."[2292]

The rule of law requires that law is applied to those who develop and apply it, including courts; in other terms, the institution needs to be close to the consequence of its decision. The principle of complementarity[2293] embodies this preference for the national system to investigate and prosecute before an international court hears the case. On the one hand, the High Court of Justice is close to the case since it will bear the consequence of its decision on the Israeli side, but there is little chance an Israeli judge will live the life of Palestinians and the consequence of its decisions on Palestinians. Here lies the anomaly: Israeli judges rule on a society that is not theirs and to which they do not belong. It is doubtful the HCJ is able to assess the perspective of *the other*, as it fails to equally consider the preferences and preoccupations of Palestinian society, such as, self-determination, non-discrimination and prohibition of annexation. On the other hand, the decision of the ICJ may also lack legitimacy because judges are too removed from the consequences of their decision to command obedience by the state of Israel.[2294] In fact, none of the two legal orders possess sufficient legitimacy (authority) to command obedience by both parties, which is why force still dictates facts on the ground.

In the case of breach of international law and state obligations, the interpretation of *jus cogens* and *erga omnes* norms by the International Court of Justice should prevail over that of the national legal order. Although the implementation of IHL is largely the responsibility of

[2292] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 39.
[2293] See for instance, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 38544 (entered into force on 1 July 2002) at Art 17.
[2294] "If judges situated in other jurisdictions are so removed from conflict that it is unlikely they will ever be subject to the real world risks of their decisions, the equal protection of the laws is no longer maintained - there is a law for the judges and another law for those subject to their decisions." Amnon Reichman, "Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel" (2011) 1 Utah Law Review 63 at 88.

national orders, when these orders fail to uphold the rule of law and the state remains in breach of its international obligations in isolation from the international community, rulings of international organs, namely the International Court of Justice and the International Criminal Court, have precedence.[2295] Controversial as it may be, I posit international rulings involving international peremptory law to be directly enforceable in domestic courts.[2296] I therefore agree with David Klein who submits that "*jus cogens* is self-executing, so that its infringement places the offender in violation of domestic law."[2297] Basically, the idea is that primacy is dictated by the peremptory nature of the crime *erga omnes* entailing both horizontal and vertical obligations.[2298] For those skeptics of the concept of *jus cogens*, it could be proposed to expand enforcement to international decisions covering war crimes and crimes against humanity, which also violate peremptory norms, and arguably, are of an *erga omnes* character. In the present case, it means that relevant provisions of IHL and IHRL are justiciable in the Israel High Court of Justice and that settler transfer, institutionalized discrimination and annexation require examination of the prohibition of non-discrimination and conquest and of the right to self-determination of the Palestinian people. Non-justiciability motivated by an internal political context cannot evade that peremptory norms protect the dignity of all. To be sure, the argument is not one of monism or dualism; it is one based on the nature of the crime, or a "crime-specific approach"; thus of compliance with international peremptory norms of fundamental humanitarian interests [2299] or "intrangressible principles of international

[2295] See for a general discussion of the relation between national and international courts, See generally Shane Darcy, *Judges, Law and War, The Judicial Development of International Humanitarian Law* (Cambridge: Cambridge University Press, 2014) at 33-38.

[2296] National courts often refuse to be bound by international judgments. See for instance, Veronika Fikjak, "Domestic Courts Enforcement of Decisions and Opinions of the International Court of Justice" (2014) Legal Studies Research Paper Series, No 32/2014, University of Cambridge; Ezequiel Malarino, "Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights" (2012) 12 International Criminal Law Review 665; Anne Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law" (2009) 3 Vienna Journal on International Constitutional Law 170 at 187.

[2297] David Klein, "A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts" (1988) 13 Yale Journal of International Law 332 at 353.

[2298] On *erga omnes* as simultaneously vertical and horizontal, see Gleider Hernandez, "A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community' (2013) 83:1 British Yearbook of International Law 13 at 42.

[2299] On primacy and the "crime-specific" approach to inherent jurisdiction, see for instance the discussion surrounding the ICTY, ICTR and ICC: Bartram Brown, "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals" (1998) 23 Yale Journal of International Law 383 at 407-411, 423-427; On mentions of 'elementory considerations of humanity' by the ICJ, see *Corfu Channel Case* (*United Kingdom v Albania)*, Judgment, [1949] ICJ Rep 4 at 22; "All States should bear in mind that the injured entity is a people which must look to the international cornmunity for assistance in its progress

customary law."[2300] The idea of preferential jurisdiction over certain core crimes is contrued as an exception to the principle of complementarity, which gives first and foremost jurisdiction to domestic courts.

Presumed is not the absence of state independence or of total supremacy of international law over what is an autonomous domestic order, but of deference, and at times, primacy, of the interpretation of international law by international courts in /situations regulated by international peremptory law. As is forcefully argued by Christian Tomuschat,

> The proclaimed attachment in the United Nations Charter to human rights and the rule of law without any discrimination is now supported by a broad and robust international consensus. The importance of this consensus exceeds largely that of an ordinary rule of customary law. It is clear now that States are just instrumentalities that have to discharge a mandate for the benefit of the human beings under their jurisdiction.[2301]

For instance, during occupation, IHL is not an internal domestic matter of belligerents, but an inter-state matter regulated by international law subject to international and at times, universal, jurisdiction. As is also defended by Sharon Weill, "national courts cannot be the only institution responsible for providing necessary checks and balances over the state's exercise of its power during armed conflict."[2302] A clear mechanism of coordination betwen domestic and international orders, at least when international customary law and peremptory norms are involved, would preserve the coherence of the rule of law and obedience through the internalization of the principle of dignity for all.

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towards the goals for which the sacred trust was instituted." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at para 127; Arguing the ICJ avoids reliance on explicit community norms and is reluctant to give legal effect and to *jus cogens* and *erga omnes* rules, see Gleider Hernandez, "A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community' (2013) 83:1 British Yearbook of International Law 13 at 27-37 and 47; Anne Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law" (2009) 3 Vienna Journal on International Constitutional Law 170 at 185; Christian Tomuschat, "Obligations Arising for States Without or Against Their Will" (1993) 241 Recueil des Cours 195 at 301.

[2300] Also referring to the Martens Clause. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at paras 79, 84.

[2301] Christian Tomuschat, "Obligations Arising for States Without or Against Their Will" (1993) 241 Recueil des Cours 195 at 237.

[2302] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014) at 1.

Furthermore, the domestic court of a belligerent cannot impose its interpretation of IHL over a territory whose state is not sovereign. The HCJ is applying its domestic law and interpretation of international law on a people in a territory where the state of Israel is not sovereign. Its jurisdiction is the result of armed force, not of Palestinian self-determination. Besides, the HCJ's interpretation of international law would have no more weight than that of a Palestinian court since the occupation is between a state and a state in *statu nascendi*. At a minimum, the equality enshrined in the principles of sovereign equality and proportionality fundamental to the rule of law[2303] would provide that *both sovereigns are equal* and that the interpretations of *both* belligerent *courts are equal*. Fitzmaurice argues that "States can only claim rights on the basis of being prepared to concede the same rights to other States and to assume the relevant obligations."[2304] But jurisdictional equality is a fiction under occupation. Following this reasoning, the sovereign state of Israel cannot claim its domestic court has the monopoly over IHL or international law anymore than the people to whom it denies their right to an independent state and their own domestic legal order. More precisely, the extraterritorial application of sovereignty through a domestic legal organ demonstrates that the question of population transfer and interpretation of IHL in general should not be the privilege of a belligerent during occupation, because it is beyond sovereign prerogatives to impose one's legal interpretation of international law on another sovereign entity or state.[2305] It is domination by legal means.

Yet, this (wishful) proposition has little bearing on access to justice for victims of population transfer and obedience with international customary and peremptory law. In fact, the supremacy, even limited, of international courts over national ones is not automatic because domestic courts often resist international rulings, even those involving peremptory norms. The essence of the Advisory Opinion continues to be ignored by the government of Israel who has decided to only recognize judgments from its own court and not to be bound by the ICJ's interpretation of international law.[2306] Even after responding to the ICJ in *Mara'abe* and stating

[2303] David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 172.
[2304] Gerald Fitzmaurice, "The General Principles of International Law, Considered from the Standpoint of the Rule of Law" (1957) 92 Recueil des cours 1 at 49.
[2305] Christian Tomuschat, "Obligations Arising for States Without or Against Their Will" (1993) 241 Recueil des Cours 195 at 237.
[2306] Intervention of Mr Gillerman (Israel), UNGAOR, 10th Emer Spec Sess, UN Doc A/ES-1O/PV.27 (2004) at 7.

it will "give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion", which arguably includes Article 49(6) of *Geneva Convention IV*, the case-law of the HCJ still fails to address settler transfer under international law.[2307] In addition, the main remedy provided by the HCJ is a re-routing of sections of the Wall falling short of what the law of state responsibility entails in cases of breaches to peremptory norms of international law, namely cessation and reparations.[2308] In fact, by requiring a re-routing to be determined by the military authorities, the HCJ further legitimized the ongoing construction of the Wall.[2309] This response seems to confirm the observations of Gustave Moynier, who wrote the commentary on the 1864 Geneva Conventions, and reached the conclusion that belligerents should not determine judicial remedies since no matter how ethical, independent and respected judges were, they would eventually be subject to pressure.[2310] Similarly, Jackson Maogoto who studied national trials following World War I concluded nation-states cannot be expected to indict and convict themselves.[2311]

It has nevertheless been argued the HCJ has not been insensitive to the Advisory Opinion of the ICJ.[2312] Some commentators see this as proof of an intertwined transnational network of influences between different legal orders demonstrating the effect of international law and its observance at the national level, albeit limited.[2313] True, the international system is still largely horizontal and much is the result of interactions between legal orders. This analysis seems to accord with the liberal theory of international law whereby "from Liberal perspective, a – if not the – primary function of public international law is not to create international institutions

[2307] Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at paras 74, 100.
[2308] Cessation and reparation in this context, see *Report of the International Law Commission,* UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001), II:2 Yearbook of the International Law Commission at Arts 30 at 216, 31 at 223 and chapter II -Reparation for injury at 235.
[2309] Iain Scobbie, "Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's *Wall* Advisory Opinion" (2006) 5:2 Chinese Journal of International Law 269 at 286.
[2310] See Jackson Maogoto, "Early efforts to Establish an International Criminal Court" in José Doria, Hans-Peter Gasser & Cherif Bassiouni, eds, *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blischenko* (Martinus Nijhoff: Leiden, 2009) at 6-7.
[2311] Jackson Maogoto, *ibid* at 19.
[2312] Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 430-432.
[2313] Sarah Williams "Has International Law Hit the Wall? An Analysis of International Law in Relation to Israel's Separation Barrier" (2006) 24 Berkeley Journal of International Law 192 at 197.

to perform functions that individual states cannot perform by themselves, but rather *to influence and improve the functioning of domestic institutions.*"[2314] However, the limited impact of the ICJ on the HCJ and on the situation on the ground tends to demonstrate the contrary. The essence of HCJ jurisprudence in the OPT is not much closer to international customary law than it was before. This resistance to the internalization of international peremptory and customary norms prevents state compliance and obedience.[2315]

Despite widespread non-recognition of the Wall and its associated regime by most member states, ensuring compliance and ultimately obedience by Israel with peremptory norms of international law has proven a thorny issue.[2316] Enforcement is the Achille's heel of international law, in particular in the midst of armed conflict. The ICJ required Israel to provide full reparations to victims and to third states to respect the law of state responsibility and IHL when it found that:

> All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[2317]

[2314] Anne-Marie Slaughter, "A Liberal Theory of International Law" (2000) 94 American Society of International Law Proceedings 240 at 246.

[2315] "*Obedience*, occurs when a person or organization adopts rule-induced behavior because the party has *internalized* the norm and incorporated it into its own internal value system." [Emphasis in original] On the notion of obedience and the internalization of international law through some internal process, see Harold Hongju Koh, "1998 Frankel Lecture: Bringing International Law Home" 35 Houston Law Review (1998-1999) 623 at 628, 642-644, 680; discussing theories on compliance with international legal regimes: Laurence Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997-1998) 107 Yale Law Journal 273 at 286-287.

[2316] The UN General Assembly demanded Israel comply with its obligations and called upon states to respect their obligations as stipulated by the Court. *Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, GA Res 10/15, UNGAOR, 10th Emer Spec Sess, UN Doc A/RES/ES-10/15 (2004) at paras 2-3; See François Dubuisson, "The Implementation of the ICJ Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" (2004-2005) 13 Palestinian Yearbook of International Law 27 at 39-41.

[2317] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 163(D).

Accordingly, compliance is required not only of Israel but of all member states. The ICJ invoked the responsibility of states not to recognize the consequences of the Wall and its regime, not to provide assistance or aid, to end impediments to the right of self-determination of the Palestinian people, to ensure compliance by Israel with international law and to consider further actions to put an end to the illegal situation.[2318]

The ICJ did not, however, specify what measures states were entitled to take to ensure respect with common Article 1 of the *Geneva Convention IV* and practice is insufficient to provide guidance.[2319] The 1958 Commentary to Article 1 of *GCIV* states that "the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally." It further details that parties to the Convention must do more than take legislative actions to prevent or repress violations, they must "seek out and prosecute the guilty parties, and cannot evade their responsibility."[2320] Ardi Imseis argues that grave breaches of IHL entail recourse to "economic sanctions, universal jurisdiction, the International Criminal Court, the ICJ, and the creation of *ad hoc* international criminal tribunals."[2321] This position, although in accordance with the Commentary of the *Geneva Convention IV*, has not followed through in

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[2318] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid* at para 159. For relation to the law of state responsibility, see *Report of the International Law Commission,* UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001), II:2 Yearbook of the International Law Commission, compare with Art 28 at 213-214 and Art 31 at 223.

[2319] Article 1 of GCIV stipulates: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 at Art 1; For a critique of the ICJ's treatment, see Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion" (2005) 99 The American Journal of International Law 102 at 115-116; "The consequence is, however, that the United Nations' responsibilities are left abstract and detached: an affirmation of an amorphous obligation which appears to be more an exhortation to action than a delineation of the precise content of that duty." Iain Scobbie, "*Uncharte(er)ed Waters?: Consequences of the Advisory Opinion on* the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory *for the Responsibility of the UN for Palestine*" (2005) 16 European Journal of International Law 941 at 948.

[2320] ICRC, *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, 1958 Commentary to Art 1, Part 1: General Provisions, Online: http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=FD45570C37B1C517C12563CD0051B98B; Also relevant is Art 89, which stipulates: "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter." *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 at Art 89.

[2321] Ardi Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion" (2005) 99 The American Journal of International Law 102 at 115.

the practice of states. Indeed, "although Article 1 throws the doors wide open to action in support of compliance with the law, states have rarely ventured beyond discreet representations behind the scenes."[2322] This raises the question as to what must states do to ensure respect with international humanitarian law, and more broadly, with peremptory norms? The answer to this question is unclear in law and practice.[2323]

The minimum threshold requires states to abstain to recognize the situation and not to aid or assist in the commission of an international wrongful act, as stipulated under Article 16 of the *ILC Draft Articles on State Responsibility for Internationally Wrongful Acts*.[2324] More forcefully and more relevant to the violations of *jus cogens* involved in the construction of the Wall and settler transfer is Article 41, which stipulates that states "shall cooperate to bring down to an end through lawful means" any serious breaches arising under a peremptory norm of international law and not "recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situations."[2325] This entails collective non-recognition of situations flowing from the acquisition of sovereignty over territory through denial of the right to self-determination.[2326] However, the measures to take to end serious violations under these articles are not defined; "they depend on the circumstances of the given situation" and need to be further elaborated.[2327]

[2322] For a discussion, see Toni Pfanner, "Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims" (2009) 91: 874 International Review of the Red Cross 279 at 284, 304.

[2323] François Dubuisson, "The Implementation of the ICJ Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" (2004-2005) 13 Palestinian Yearbook of International Law 27 at 44.

[2324] According to Art 16: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State." This includes providing essential facility or financing for intance. *Report of the International Law Commission,* UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001), II:2 Yearbook of the International Law Commission at Art 16 at 155.

[2325] *Report of the International Law Commission, ibid* at 286-287 paras (3)(5); For a discussion on the import of Art 41 and the relation between *jus cogens* and the implications of obligations *erga omnes* on third states, see Iain Scobbie, "*Uncharte(er)ed Waters?: Consequences of the Advisory Opinion on* the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory *for the Responsibility of the UN for Palestine*" (2005) 16 European Journal of International Law 941 at 951-952.

[2326] *Report of the International Law Commission, ibid* at 286-287 paras (3)(5).

[2327] *Report of the International Law Commission, ibid* at 287, para (3), 294, para (14).

This ambivalence as to what states can and should do may explain why the international response to the Advisory Opinion is unable to trigger a serious process of obedience by Israel with relevant international norms. For the past ten years, states have mainly produced reports, recommendations and resolutions condemning the construction of the Wall and requiring Israel to comply with the peremptory and *erga omnes* norms of international law that inform the ICJ Advisory Opinion and relevant Security Council resolutions. The main tangible measure requested by the UN General Assembly and implemented by the Secretary-General is the *United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory* (UNROD) which was launched in 2008 and collects claims of material damage or loss as a result of the construction of the Wall.[2328] The lack of action to ensure compliance and ideally obedience by Israel is most visible in the peace process where negotiations have taken precedence over the findings of the Advisory Opinion. Denouncing this situation, eight UN Special Procedures mandate holders highlighted the incompatibility of the Road Map with the ICJ decision because the former appears to accept the continued presence of the settlements and consequently, parts of the Wall.[2329] As a result, most efforts towards compliance have been carried out by civil society organizations and victims. However, the state of Israel has yet to internalize the peremptory norms of self-determination, non-discrimination and non-acquisition of territory by force, crucial to the resolution of the conflict. But, as Harold Koh rightly pointed out:

> transnational legal process is not self-activating. Our action influences that process; our inaction ratifies the status quo. By this reasoning, those who favor application of international norm to state behavior cannot afford to be passive observers. To the contrary, they must seek self-consciously to participate in, influence, and ultimately enforce transnational legal process, by promoting the

[2328] By 2013, the Register had received close to 40,000 claims. Claims cover agriculture, commercial, residential and access to services losses. For more information, see the website of the UN Register of Damage, Online: http://www.unrod.org/

[2329] Special Rapporteur on the Situation of Human Rights in the Palestinian Territories occupied since 1967, Prof John Dugard, Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mr Miloon Kothari, Special Rapporteur on Violence against Women, its Causes and Consequences, Ms Yakin Erturk, Special Rapporteur on the Right to Education, Mr Vemor Munoz Villalobos, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest attainable Standard of Physical and Mental Health, Mr Paul Hunt, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr Doudou Diane, Chairperson, Rapporteur, Working Group on Arbitrary Detention, Ms Leila Zerrougui, Special Rapporteur on Trafficking in Persons, especially in Women and Children, Ms Sigma Huda, "UN Experts Mark Anniversary of ICJ "Wall Opinion", Call on Israel to Halt Construction of the Wall," *Press Release*, HR/05/092 (2005).

> interaction, interpretation, and internalization of international norms into domestic law.[2330]

Ending the ongoing violations of the right to self-determination, among others, of the Palestinian people while ensuring the security of the people of Israel depends on the capacity of international and local actors (states, international organizations, NGOs, social movements, etc.) to effect a process of obedience through internalization. That is why international human rights law and international humanitarian law need compulsory jurisdiction and universal jurisdiction based on transnational advocacy[2331] and litigation as well as a clearer definition of what states *must do* to ensure compliance with peremptory norms of international law under the law of state responsibility.

[2330] Harold Hongju Koh, "1998 Frankel Lecture: Bringing International Law Home" 35 Houston Law Review (1998-1999) 623 at 680.

[2331] For a proposition to rethink international law through social movements and argues for a theory of resistance involving the interaction of state and society, of domestic and international, and of law and politics, see Balakrishnan Rajagopal, "International Law and Social Movements: Challenges of Theorizing Resistance, 41 Columbia Journal of Transnational Law" (2002-2003) 397 at 418-421, 432; See also Sarah Williams "Has International Law Hit the Wall? An Analysis of International Law in Relation to Israel's Separation Barrier" (2006) 24 Berkeley Journal of International Law 192 at 211.

CHAPTER FOUR - THE LEGAL CONSEQUENCES OF *FAITS ACCOMPLIS*: RECONCILING VICTIMS' AND SETTLERS' RIGHTS

Settler transfer is not a benign act in times of war; it translates the intention of the occupying power to modify the fabric of society and acquire territory through forceful demographic changes and carries legal consequences conflict resolution cannot remain indifferent to. Commenting on the *Rome Statute* of the International Criminal Court, Michael Cottier makes clear the implications of settler transfer:

> The transfer by an Occupying Power of its own civilian population into territory it occupies usually has substantial long-term consequences. Such transfers not only change the demographic composition within the occupied territory, but experience shows that they often lead to restrictions of the original inhabitants' free movement as well as property and other fundamental rights. In addition, inhabitants of the occupied territory that may have become refugees or been internally displaced during the preceding armed conflict may encounter added difficulties to return because of the transfers. The new settlers may defend, often protected by the Occupying Power, their new housing and settlements and resist the original inhabitants' return and reappropriation of property and housing. Transfers create "*faits accomplis*" that regularly complicate the settlement of the conflict, for instance, by rendering territorial restitution considerably more difficult. [...] Implantations of settlements and settlers can constitute a powerful and difficult-to-reverse means of ethnic cleansing.[2332]

This chapter discusses what to do with settlers transferred into an occupied territory, more precisely the dichotomy between the rights of settlers and the rights of displaced persons, protected persons and victims. To accord with the rule of law, the best protection of settlers' rights is for the occupying power to repatriate them into its sovereign territory.[2333] However, if an occupying power does not repatriate its citizens, settlers may not be expelled *en masse* by the new regime and depending on circumstances, may not be expelled individually.[2334]

[2332]Michael Cottier, "Article 8 - War Crimes" in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed (München: CH Beck, 2008) at 363.
[2333] Victor Kattan, "The Legality of the West Bank Wall: Israel's High Court of Justice v the International Court of Justice" (2007) 40 Vanderbilt Journal of Transnational Law 1425 at 1471; David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel" (2012) 94:885 International Review of the Red Cross 207 at 230; Guy Harpaz & Yuval Shany, "The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law" (2010) 43 Israel Law Review 514 at 548.
[2334] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law* (Oxford: Oxford University Press, 2009) 194 at 249.

In situations where settlers are not repatriated by the occupying power, I argue the international response is largely complaisant of *faits accomplis* resulting in a tilted balance favouring the *status quo* to the not infrequent detriment of the rights of protected persons and victims to return and restitution. A review of case-studies tends to indicate that weak enforcement of remedies undermines the effectiveness of victims' rights.

Clearly missing from the international response are guidelines on how to address the legal consequences of settler transfer, especially in the context of peace negotiations, transitional justice and democratic regime-change. This may be attributable to the practical difficulties of undoing population transfer, concerns for potential victims of reparation, the relative innocence of settlers and a preference for peace and stability.

Moreover, this difficulty may stem from the fact that international criminal law, international human rights law, international humanitarian law and the international law of state responsibility all inform, albeit at different degrees and with varying influences, the response framework to the transfer of settlers in the context of armed conflict. All branches of law favour a return to the *status quo ante* which would require repatriating settlers to the sovereign territory of the (formerly) occupying power, but the protection of individual human rights combined to the realities of conflict resolution tend to tilt the balance towards recognition of the legal consequences of *faits accomplis*. Can peace, assuming that accepting the legal consequences of war crimes contribute to a durable peace, justify recognizing the legal consequences of settler transfer and justify limiting the right to restitution of victims?

At the heart of this chapter is therefore the question of what to do with settlers' presence as a *fait accompli* and consequent conflicting rights with the receiving and protected population in time of war. Claire Palley captures the conundrum:

> questions will arise about what treatment of settlers is appropriate, in particular how such persons can be humanely treated without indirectly legalising the unlawful

> settlement by granting them citizenship and consequential power to legitimise through the ballot box that which could not be acquired by force.[2335]

The balance is indeed a delicate one to strike: should settlers be removed from the territory where they were transferred as a form of reparation to victims for international wrongs or should they be considered to have acquired rights that allows them to stay or at least, not to be expelled following the end of the occupation and resumption of peace? Do settlers have rights and what are they? Do *all* settlers have the *same* rights? There is no consensual answer to these sensitive questions that vary on a spectrum from expulsion of settlers to their unconditional integration. Is there a response framework that ensures maximum dignity and maximum protection of rights? Could balancing rights through the test of proportionality be useful? This chapter aims to shed some light unto these questions.

The main rights in conflict boil down to the individual and collective rights encompassed in the following table:

Conflicting rights	**Settlers**	**Victims (receiving/host people and displaced persons)**
Individual	*De facto* 'right to stay' (or not be expelled) through right to privacy, family and home, dignity and property rights	Right to reparations (e.g., right of return, restitution, in particular of property, compensation and satisfaction)
Collective	Minority rights (including internal self-determination)	Right of self-determination (internal and/or external)

Internationally proposed and implemented solutions to the transfer of settlers entail (1) recognition of settlers as a minority part of the people (Baltic states, Rhodesia and post-Apartheid South Africa); (2) implicit recognition of settlers as the new majority in the occupied territory resulting in denial of self-determination of the local people (Western Sahara, Tibet,

[2335] Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) at 223.

Cyprus and vast swathes of territory of the occupied Palestinian West Bank); and, (3) unilateral repatriation of settlers from the occupied territory where they were unlawfully settled (Kuwait, East Timor and the Gaza Strip).[2336] An amalgam of different approaches is also a fourth plausible outcome.

Approaches	Leading approach	Complementary approach (exceptions)
Unconditional and/or forced integration	*Forced/imposed*: Western Sahara, Cyprus, Tibet, and possibly some settlers in the West Bank. *Unconditional/consensual*: Rhodesia (Zimbabwe) & post-Apartheid South Africa	
Conditional/progressive integration (gradual process)	Baltic states: Latvia, Lithuania and Estonia	
Repatriation, usually with unilateral withdrawal by the settling state	Kuwait, East Timor, Gaza Strip	Baltic states and Cyprus for military personnel

The chapter is a discussion of the treatment of settlers *ex-post-facto*. It is divided in three parts. It begins by a discussion of the rights of settlers and then consider victims' rights in light of the test of proportionality. Part three is a modest contribution to a right-based based and context sensitive approach to juggling the fate of settlers with the rights of victims.

4.1. Are settlers' rights minority rights in human rights law?

Settlers do have rights: they have human rights, like everyone else. But they do not have rights because they are settlers: their situation does not bestow upon them any legal status, because the occupying power or illegal regime cannot grant status to persons in a territory where it is

[2336] Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 236-237.

not sovereign.[2337] Settlers in an occupied territory are not entitled to the same level of protection as citizens of the occupying power in its sovereign territory or as protected persons in the occupied territory. Settlers have rights simply because they are human beings entitled to protection of their dignity and rights, such as the right to life and dignity, freedom from interference with privacy, home and family and minimum procedural guarantees.[2338] The branch of law that most protects settlers' rights is international human rights law and the cross-cutting principle of humanity.[2339]

I suggest international human rights law holds sway when it comes to deciding the fate of settlers following occupation, despite IHL being *lex specialis* throughout the occupation. While no body of law provides for a right to stay of settlers, human rights law can nevertheless act as a shield against their removal from the formerly occupied territory. While there is no such thing as a right to stay of transferred settlers, international human rights law may prevent their expulsion while international law may allow the recognition of the legal consequences arising from their unlawful transfer, such as residency and property rights. Determining the rights and legal status of settlers in the post-conflict, transitional period may fall within a legal grey zone, because while settlers do not possess a right to stay, they may not be expelled for practical and legal reasons. That is essentially because settlers' collective expulsion would contradict human rights law, irrespective their unlawful presence[2340]; because individual expulsion may not be

[2337] See Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 197; Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 231.
[2338] In the Occupied Palestinian Territory, the HCJ granted more rights to settlers, such as freedom of movement, freedom of religion, and safety. See for instance Aeyal Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?" (2007) 18:1 European Journal of International Law 1 at 25; "In sum, Israelis present in the *area* have the rights to life, dignity and honor, property, privacy, and the rest of the rights which anyone present in Israel enjoys." Israel High Court of Justice, *Mara'abe v The Prime Minister of Israel*, HCJ 7957/04 (2005) at paras 20-21.
[2339] For a discussion of universal juridical conscience in treaties, jurisprudence and doctrine as well as human dignity as the ultimate aim of Law, see Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 147-156, 279.
[2340] For a detailed discussion of how human rights law limits the rights of the post-transition regime with regard to its treatment of settlers, read Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 197, 236, 244-245.

permitted under human rights law; and, because international law may recognize the legal effects of unlawful acts.

Clearly, in the majority of cases, settlers cannot be shipped away or kicked out of the territory in the name of undoing population transfer. The "paradoxical" effect of carrying out *restitutio in integrum* as tantamount to a reverse population transfer has been repeatedly noted,[2341] especially for settlers and descendants present in the territory for a long period of time and who have developed a sentiment of belonging and attachment.[2342] Can settlers, in spite of their unlawful presence, acquire residency and property rights that legitimize their stay as permanent residents or citizens following the end of occupation? The answer is unclear, controversial and needs to be subjected to an individual case-by-case analysis. While settlers' unlawful residency status does not bind the new regime as such, it has been argued that the "long-term residence is a fact which carry legal consequences" with regard to the right to privacy, family and home[2343] and private property rights. As Eyal Benvenisti explains, "formally, the law does not recognize the validity of the breach; instead, the law takes into account the factual situation which the breach created. While *ex injuria ius non oritur*, the right may be derived from *the consequences* of the *injuria* and may be recognized and enforced accordingly."[2344] The question is thus whether a settler's factual relation with the unlawfully settled territory, absent valid and formal legal status, suffice to trigger rights or effect legal consequences preventing their repatriation, thus resulting in a *de facto* 'right to stay' or otherwise said, a normalization of their legal status?

[2341] "If settlers are repatriated after years in an area, questions may be asked as to the circumstances in which and the extent to which a restorative transfer is appropriate or lawful." [Emphasis added] *UNPO Conference Report, Human Rights Dimensions of Population Transfer, held in Tallinn, Estonia January 11-13,1992*, (1992) at 10; Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 229.

[2342] Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 202.

[2343] See Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 239-242.

[2344] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 308.

International human rights law is uncertain as how and when a settler is individually protected from expulsion or repatriation in a territory unlawfully settled during occupation.[2345] Yaël Ronen proposes that,

> The criteria for assessing a person's integration within the State were developed mostly with respect to expulsion of criminal convicts, but are applicable *mutatis mutandis* to expulsion on other grounds, including settlement under an illegal territorial regime. The extent of integration is measured through the solidity of social, cultural and family ties with the State of residence and with the State of destination (usually the State of nationality). Those depend on the length of the person's stay in the country from which he or she is to be expelled; the nationalities of other persons affected; the person's family situation; and the seriousness of the difficulties which family members are likely to encounter in the country of origin of the expellee. [2346]

Other criteria blocking individual expulsion include the right to asylum, the principle of *non-refoulement* and the duty to reduce statelessness, although the latter does not bind a state emerging from occupation[2347] but does in cases of state succession, where conventional obligations pertaining to human rights law and humanitarian law continue to apply.[2348] Another important element to consider and which could pre-empt an unlawful stay to become permanent is the personal knowledge and involvement of settlers in the transfer; that is, whether the transferred person was acting in good faith to fulfil minimum existential needs or knowingly in contravention of international law.[2349] Moreover, settlers are entitled at all times to an expulsion decision respecting due process.[2350]

[2345] See Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 248.

[2346] Yaël Ronen, *ibid* at 240. "Thus regard must be had to factors such as family situation, maintenance of family ties, local intermarriage and birth of children entitled to citizenship on *jus soli* principles." Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 246-247.

[2347] Claire Palley, *ibid* at 247.

[2348] See Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 472-476; "In principle, the issue of nationality will depend on the municipal regulations of the predecessor and successor states. […]The general rule would appear to be that nationality will change with sovereignty, although it would be incumbent upon the new sovereign to declare the pertinent rules with regard to people born in the territory or resident there, or born abroad of parents who are nationals of the former regime. Similarly, the ceding state may well provide for its former citizens in the territory in question to retain their nationality, thus creating a situation of dual nationality." Malcom Shaw, *International Law*, 7th ed (Cambridge, Cambridge University Press, 2014) at 727.

[2349] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 314.

[2350] Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 247.

Time is not insignificant in assessing whether settlers have acquired rights that need to be considered in assessing their removal.[2351] It is in fact a key element when assessing the feasibility and the humanness of repatriation. But exactly how much time needs to pass for a presence to accrue in a *de facto* 'right to stay' or for an unlawful presence to be normalized into a lawful status? The Unrepresented Nations People Organization's (UNPO) conference on population transfer came to the conclusion that "on humanitarian grounds, there must come a time when settlers or their descendants are not liable to deportation. Some participants suggested the line should be drawn at the start of World War 2, after which the new world order was established."[2352]

It is also argued that twenty years may suffice for settlers to have acquired residency rights, because settlers may feel their home to be their place of transfer, not their place of origin. Hence, while settlers do not have a right to stay, there might be a time when they can no longer be expelled because they have either acquired rights or their repatriation would be in breach of international human rights law and the principle of humanity.

Yet, can individual settlers who have been unlawfully in the territory acquire property rights by prescription?[2353] This is doubtful as human rights violations would seem to suspend prescription or be null and void because of forceful possession or the impossibility for displaced persons to act on their right as a result of their displacement and the occupation.

More generally, the ICJ's Namibia Principle could make irrelevant legal arrangements pertaining to settlers if the situation created is detrimental to the rights of all or parts of the occupied inhabitants of the territory, in particular if there is a violation of the right to self-

[2351] Eric Kolodner, "Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination" (1994-1995) 27 New York University Journal of International Law and Politics at 202; Claire Palley, *ibid* at 246; Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 314.

[2352] UNPO Conference Report*, Human Rights Dimensions of Population Transfer,* held in Tallinn, Estonia January 11-13 (1992) at 11; Claire Palley, *ibid* at 246.

[2353] Claire Palley mentions that prescription could not apply to recent settlers, such as those who came to the Baltic States in the 1970s "as part of the diversifying the locations of the USSRs military-industrial complexes." Claire Palley, *ibid* at 246.

determination.[2354] As Ronen explains, "the general invalidity of domestic acts carried out under an illegal regime is qualified where it would act to the detriment of the inhabitants of the territory."[2355] Accordingly, the Namibia Principle would require ignoring the consequences of the occupation as it pertains to settlers' acquired residency status and property rights because contrary to the interests and rights of the protected and victim population. But is the Namibia Principle sufficient to pre-empt recognition of the legal consequences of *faits accomplis* established in violations of international law during an occupation?

To briefly sum up at this stage of the discussion, settlers do not possess a right to stay, but human rights considerations prevent their collective expulsion and, in some cases, their individual expulsion. A number of elements, such as the principle of humanity, the right to privacy, family life and home, as well as the passage of time weigh heavily in determining whether individual expulsion must be carried out. These considerations may contribute to recognition of the legal consequences of the crime of settler transfer and result in the normalization of the unlawful status of settlers in the formerly occupied territory.

Settlers are sometimes *ipso facto* equated with minorities and attributed minority rights. The underlying rationale submits "it is doubtful that there is any agreed or meaningful distinction between 'settlers' and 'minorities' in international law."[2356] Consequently, "the illegal status of settlers can be 'cured' and they become lawful 'minorities'."[2357] Accordingly, settlers unlawfully imposed on an indigenous population possess a right to internal self-determination by virtue of

[2354] "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international Co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at para 125.
[2355] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 232-234.

[2356] Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 239.
[2357] Catriona Janet Drew, *ibid* at 204.

their minority status. An example given to illustrate a breach of settlers' rights is the practice of "unmixing peoples" through the repatriation of "minority settler populations" from parts of Africa and Asia during the process of decolonization.[2358] This contention is problematic as the right of settlers do not go as far as encompassing *ipso facto* minority rights.

In addition, the prime motivation to settler transfer in colonial contexts is not to mix with the local population, although this may and does occur, but to acquire land and control over resources by transferring the local population.[2359] In the great majority of settler colonial cases, settlers do not live as a minority *among* the people; they live as the dominant privileged and powerful party to the detriment of the right to self-determination of the indigenous people. Therefore, the repatriation of settlers in a postcolonial context may be attributable to a situation not conducive to reconciliation, such as an absence of common will to live as equals. From the perspective of the crime of population transfer, settlers unlawfully transferred into a territory during a conflictual period are not entitled to minority rights, unless granted in a peaceful transitional process guaranteeing non-discrimination. In sum, recognizing minority rights to settlers is conditional upon a consensual process of transitional justice involving societal reconstruction through criminal justice, institutional reforms, reconciliation and reparations.

That said, granting what could amount to *de facto* and perhaps *de jure* minority rights to settlers prior to embarking upon a process of transitional justice has occurred, leading to their proposed or formal near-unconditional integration in the territory where they had been illegally transferred. An oft-cited precedent is the Annan Plan proposal for the resolution of the conflict in Cyprus, which foresaw neither the removal of Turkish settlers established by Turkey in occupied Cyprus since 1974 and to whom the Northern Republic of Cyprus has granted citizenship on a large scale, nor the return to the south of the 45,000 displaced Turkish Cypriots (half the Turkish Cypriot population) or the return to the north of the 160,000 displaced Greek Cypriots (a third of the Greek Cypriot population).[2360] Claire Palley persuasively demonstrates

[2358] Catriona Janet Drew, *ibid* at 239.
[2359] Lorenzo Veracini, *Settler Colonialism, A Theoretical Overview* (New York: Palgrave Mac Millan, 2010) at 3, 8, 34.
[2360] See C Meindersma and A Arakelian, *Human Rights Concerns in Situations of Population Transfers and Population Exchanges: Case Studies and Recommendations* (Geneva: UNHCR, 1994) at 57-58, 67; Claire

that, from the outset, the common position expressed by the US, the UK and the UN was to permit the stay of Turkish settlers by pressuring Greek Cypriots to accept the Plan in order to prevent the quasi-recognition of the Turkish Republic of Northern Cyprus (TRNC).[2361] Annan's Plan reflects this position when it maintains that no settler would have to leave against their will.[2362] In fact, the Plan does not once use the term 'Turkish settler'.[2363] Under the latest version of the Plan in 2004, approximately 106,000 Turkish settlers[2364] would be eligible for citizenship, permanent residence or lawful residence in the Republic of Cyprus whereas only a limited number of displaced Greek Cypriots[2365] would return and access property restitution. This proposition endorses the partition of the territory on a communal basis.[2366] The concept of bi-zonality proposed by Turkish Cypriot representatives and accepted by the UN encapsulates the logic of partition whereby both Greek Cypriots and Turkish Cypriots would be kept apart and constituent states would have the right to decide to whom they will grant residency.[2367]

In addition, the UN Secretary-General's "unlinking" of residency rights from property restitution meant that settlers were recognized property rights and rights of improvers of property at the expense of the right to restitution of displaced Greeks Cypriot.[2368] Concretely, this meant eligible Greek displacees could return to northern Cyprus without having access to property restitution. The consequence of this thinking is as follow:

Palley, *An International Relations Debacle, The UN Secretary-General's Mission of Good Offices in Cyprus 1999-2004* (Oxford: Hart Publishing, 2005) at 163-164.

[2361] Claire Palley, *ibid* at 67, 216.

[2362] Claire Palley, *ibid* at 70.

[2363] Claire Palley, *ibid* at 243.

[2364] By 2001, there was more settlers than indigenous Turkish Cypriot. Claire Palley, *ibid* at 70-71, 173; See also C Meindersma and A Arakelian, *Human Rights Concerns in Situations of Population Transfers and Population Exchanges: Case Studies and Recommendations* (Geneva: UNHCR, 1994) at 62.

[2365] Estimated at 45,000 persons. Claire Palley, *ibid* at 169.

[2366] Claire Palley, *ibid* at 71, 167; C Meindersma and A Arakelian, *Human Rights Concerns in Situations of Population Transfers and Population Exchanges: Case Studies and Recommendations* (Geneva: UNHCR, 1994) at 54-56; Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 239, fn 94.

[2367] [Emphasis added] *Report of the Secretary-General on his Mission of Good Offices in Cyprus*, UNSCOR, UN Doc S/2003/398 (2003) at para 98.

[2368] Claire Palley, *An International Relations Debacle, The UN Secretary-General's Mission of Good Offices in Cyprus 1999-2004* (Oxford: Hart Publishing, 2005) at 71-72; 165.

> The net effect of the "de-linking" between the right of return and the right to restitution of property was to establish two barriers to return of displaced persons; they were subject to the strict quotas under the residency ceilings [...]; and they were also subject to limitations on restitution to them of their property. In consequence, some persons would be permitted to return, but would not necessarily be reinstated to their homes, there being no congruence between applicability of the two rights.[2369]

The result is a Plan devoid of enforcement provision to ensure compliance with the right of restitution of displaced persons, denial of the right of return to nearly half of the displaced persons, and compensation as the main remedy available to dispossessed persons.[2370]

Potential threats to the sovereignty of Cyprus under the Plan are attributable to the maintenance of Turkey's right of military intervention under the remodelled *1960 Treaty of Guarantees*, which allows intervention to maintain "security and constitutional order", as well as the continued presence of militarily trained Turkish settlers and troops.[2371] Combined to a right to intervene is therefore the stationing in perpetuity of Turkish troops and the continued presence of a Turkish settler population with military training in the Turkish Cypriot constituent state.[2372] This arrangement effectively gives Turkey a "standing army" in Cyprus while assuring settlers' control of the Turkish Cypriot constituent state through sheer number. [2373] That Turkey – the occupying power – would continue to have a say in the future of the territory undermines the independence of a reunited Cypriot state.[2374] This begs the questions: is Annan's Plan a true end to Turkey's occupation? Is the Plan a rights-based solution to the crime of settler transfer?

Although sensitive to humanitarian considerations, Greek Cypriots want the majority of Turkish settlers to leave the occupied territory.[2375] Despite repeated opposition to the presence of settlers and concerns expressed by Greek Cypriots, the UN Secretary-General refused to reconsider his plan arguing the impracticability of repatriating Turkish settlers.[2376] Clearly, in

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[2369] For an excellent discussion, read Claire Palley, *ibid* at 167-171.
[2370] Claire Palley, *ibid* at 226, 228.
[2371] See Claire Palley, *ibid* at 223.
[2372] Claire Palley, *ibid* at 71, 223-224, 227.
[2373] Claire Palley, *ibid* at 71.
[2374] See Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 253.
[2375] Claire Palley, *An International Relations Debacle, The UN Secretary-General's Mission of Good Offices in Cyprus 1999-2004* (Oxford: Hart Publishing, 2005) at 68, 227.
[2376] Claire Palley, *ibid* at 75-76, 239.

negotiating peace, the effectiveness of the rights of victims of the war crime of population transfer is tied to the political willingness to see it enforced. In this case, the mechanism of dispute resolution became subservient to *faits accomplis* to the detriment of the rule of law pertaining to population transfer: settlers were treated as a minority entitled to partake in exercises of self-determination whereas the displaced population was offered only limited reparation and no form of accountability.

Annan's Plan was submitted to the entire population of Cyprus in a referendum in 2004. Not unlike the UN referenda foreseen in Western Sahara and held in East Timor, Turkish settlers were given equal rights to vote and decide on the future of the island. Settlers treated on par with the protected population blurs the expression of the will of people to self-determination, especially when settlers outnumber the local population, such as in Western Sahara. The result of the referendum to Annan's Plan can be seen as a response to the perceived lack of a rights-based and victim sensitive solution. Whereas 54 percent of Turkish Cypriots approved the Plan, including settlers, only 21 percent of Greek Cypriots did so.[2377] Treatment of the crime of population transfer is why Greek Cypriots rejected the Plan. More precisely, Greek Cypriots rejected the Plan because of "the large number of settlers who would be permitted to remain in Cyprus under the Plan; the large number of Turks who would in future be permitted to settle in Cyprus; and the participation by current settlers in the referendum in the Turkish occupied area."[2378] Contrary to its obligation not to endorse peace agreements precluding accountability for war crimes and gross violations of human rights,[2379] the UN in Cyprus incorporated population transfer in the proposed solution to the conflict and failed to provide a sense of justice enabling accountability, national reconciliation, and genuine reparation based on satisfaction.

The case law of the European Court of Human Rights with regard to Cyprus also recognizes the consequences of *faits accomplis* and its effect on the right to reparation of protected and

[2377] Claire Palley, *ibid* at 217.
[2378] Claire Palley, *ibid* at 67, 78; See C Meindersma and A Arakelian, *Human Rights Concerns in Situations of Population Transfers and Population Exchanges: Case Studies and Recommendations* (Geneva: UNHCR, 1994) at 55.
[2379] See Guidance Note of the Secretary-General, *United National Approach to Transitional Justice* (March 2010) at 4, Online: http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf

victim populations. In *Demopoulos v Turkey*, a case in which Greek Cypriots challenged the domestic remedy provided by the TRNC with regard to their property, the ECtHR recognized their analysis of the situation is sensitive to politics, the passage of time and facts on the ground, as the following passage illustrates:

> [T]he Court finds itself faced with cases burdened with a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level. This reality, as well as the passage of time and the continuing evolution of the broader political dispute must inform the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances.[2380]

The Court found the passage of time undermines a displaced persons' entitlement to property, despite the unlawful status of settlers and unlawful use and possession of property during occupation. In other words, over time, use and possession of property by settlers weight more than the rights to property of displaced persons. Consequently, the weakened tie to property caused by displacement and settler transfer affects the form of remedy available to the displaced population. Adopting a dynamic approach informed by facts on the ground and time, the Court explains:

> The issue arises to what extent the notion of legal title, and the expectation of enjoying the full benefits of that title, is realistic in practice. The losses thus claimed become increasingly speculative and hypothetical. There has, it may be recalled, always been a strong legal and factual link between ownership and possession ... and it must be recognised that with the passage of time the holding of a title may be emptied of any practical consequences.
>
> This is not to say that the applicants in these cases have lost their ownership in any formal sense; the Court would eschew any notion that military occupation should be regarded as a form of adverse possession by which title can be legally transferred to the invading power. Yet it would be unrealistic to expect that as a result of these cases the Court should, or could, directly order the Turkish Government to ensure that these applicants obtain access to, and full possession of, their properties, irrespective of who is now living there or whether the property is allegedly in a militarily sensitive zone or used for vital public purposes.
>
> The Court can only conclude that the attenuation over time of the link between the holding of title and the possession and use of the property in question must have

[2380] [Emphasis added] *Demopoulos and Others v Turkey* (2010), ECHR at paras 85, 111-114, 116.

consequences on the nature of the redress that can be regarded as fulfilling the requirements of Article 35 § 1 of the Convention. [2381]

The Court refrains from saying title to property may be lost as a result of occupation, yet by recognizing it may become "emptied of any practical consequences", it does render restitution, the form of redress favoured by victims and the law of state responsibility, [2382] largely ineffective. It also fails to rule of the legal status of persons "living there", settlers transferred in violation of IHL.

The ECtHR also maintains an occupying power has the final say as to the form of reparation it will provide to victims of its occupation regime, as long as it offers all forms of reparations. The Court affirms that "the Contracting Parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach."[2383] The problem in the context of an ongoing occupation and setter transfer is that the occupying power is likely to provide the solution that best suits its interests and the interests of its citizens (settlers) and not those of displaced and/or protected persons (victims).[2384] This freedom to choose the means of compliance may lead to solutions contrary to peremptory norms, such as non-discrimination and self-determination.[2385] This stance also begs the questions: why is the Court letting an occupying state decide the form and the scope of redress it will grant to displaced and/or protected persons victim of its transfer policy? In the context of belligerent occupation, should courts grant the same margin of appreciation to occupying powers as it does to states to decide on the appropriate remedy considering that protected persons are not their nationals? Can there be durable peace when victims know their rights are in the hands of their perpetrator?

[2381] [Emphasis added] *Demopoulos and Others v Turkey*, *ibid* at paras 85, 111-114, 116.
[2382] "Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law." James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 213, 215.
[2383] [Emphasis added] *Demopoulos and Others v Turkey* (2010), ECHR at paras 85, 111-114, 116.
[2384] See Aeyal Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of ccupation?" (2007) 18:1 European Journal of International Law 1 at 17.
[2385] Discussing the test of proportionality in the context of occupation, see Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 407.

The Court seems to discard the unlawful status of settlers in its evaluation of the proper remedy. Although the Court recognizes the presence of persons with different statuses in the TRNC, it nevertheless amalgamates these lawful and unlawful statuses under the facially neutral construct of "third parties", effectively evacuating the war crime of population transfer and the unlawful status of settlers.[2386] This construct and its implications are captured in the following extract:

> The Court must also remark that some thirty-five years after the applicants, or their predecessors in title, left their property, it would risk being arbitrary and injudicious for it to attempt to impose an obligation on the respondent State to effect restitution in all cases, or even in all cases save those in which there is material impossibility, a suggested condition put forward by the applicants and intervening Government which discounts all legal and practical difficulties barring the permanent loss or destruction of the property. It cannot agree that the respondent State should be prohibited from taking into account other considerations, in particular the position of third parties. It cannot be within this Court's task in interpreting and applying the provisions of the Convention to impose an unconditional obligation on a Government to embark on the forcible eviction and rehousing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention.[2387]

Underlying this analysis therefore is a balancing of the rights (i.e., "other considerations) of "third parties", including settlers, with the rights of victims. The proposed outcome is evident: the right to restitution (and arguably return) of victims is insufficient to trump the position of third parties (settlers) who use and possess property and have established themselves on the territory. The Court is unable to assert the right to restitution of victims of settler transfer by requesting a settling and occupying power to repatriate within its sovereign territory or relocate within a formerly occupied territory a settler population (or part thereof) to allow restitution of property and facilitate return of displaced persons. Assuming these conclusions to be correct, one could legitimately ask: but what right to return and restitution do displaced victims of settler transfer under prolonged military occupation actually have in practice?

4.2 Victims' rights bear too little on practice

[2386] The Court recognized 35 years of dynamic population movements in the form of migration of Turkish Cypriot, integration of Turkish Cypriot displaced persons from the South of Cyprus and the implantation of Turkish settlers. [Emphasis added] *Demopoulos and Others v Turkey* (2010) ECHR at para 84.

[2387] [Emphasis added] *Demopoulos and Others v Turkey*, *ibid* at paras 85, 111-114, 116.

Closely linked to the rule of law[2388] and justice is the right to reparation.[2389] Victims of population transfer – possibly including both settlers and protected persons – are entitled to reparation,[2390] including *restitutio in integrum*[2391] entailing reversion to the *status quo ante*.[2392] Restitution is thus the reestablishment of "the situation that existed prior to the occurrence of the wrongful act."[2393] Concretely, restitution entails the voluntary return of refugees and/or internally displaced protected persons under occupation; restoration of housing, land and property; and, repatriation of settlers to the sovereign territory of the occupying power.[2394] The International Law Commission gives the following example relevant to the transfer of settlers:

> Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution. Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.[2395]

However, implementation of restitution is tempered by what is "materially impossible", such as when property is permanently lost or destroyed, and by what constitutes "a burden out of all proportion to the benefit deriving from restitution instead of compensation."[2396] Restitution

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[2388] COHRE, *The Pinheiro Principles, United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (Geneva: Centre on Housing Rights and Evictions) at Principles 18.1, Online: http://2001-2009.state.gov/documents/organization/99774.pdf

[2389] Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 380.

[2390] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), 53rd Sess, UNGAOR, UN Doc A/56/10, II:2 Yearbook of the International Law Commission, Art 34 at 95.

[2391] Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess,UN Doc E/CN4/Sub2/1997/23 (1997) at para 60.

[2392] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), 53rd Sess, UNGAOR, UN Doc A/56/10, II:2 Yearbook of the International Law Commission, Arts 30(1) and 35 at 96; Awn Shawhat Al-Khasawneh, *Freedom of Movement, Human Rights and Population Transfer*, UNECOSOC, 49th Sess, UN Doc E/CN4/Sub.2/1997/23 (1997) at paras 60-63; *Case Concerning The Factory at Chorzôw (Claim for Indemnity)* (1928), PCIJ (Ser A) No 17 at 47.

[2393] International Law Commission, *ibid*, Art 35 at 96; James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 213-214.

[2394] International Law Commission, *ibid* at 97, para 5.

[2395] International Law Commission, *ibid* at 98, para 6.

[2396] For a discussion of material impossibility and proportion, see International Law Commission, *ibid* at Art 35 (a)(b) at 96 and 98 paras 7-8; James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 216.

cannot be carried out if it involves a "grave disproportionality" between the settling and occupying state and the receiving and occupied state and victims of population transfer.[2397]

Here lies the test of proportionality. Gauging 'the oppressed peoples' rights to self-determination and the human rights of settlers" was identified as the main challenge by the UNPO Conference on Population Transfer.[2398] When rights are weighted, the search for a solution to resolve the consequences of population transfer is brought within the realm of proportionality. Proportionality may be construed as a test to ensure maximum human dignity for all by balancing individual and community rights[2399] or public interest.[2400] The process is complex, as both the claims of settlers and victims are grounded on rights and the principle of dignity and humanity.

But proportionality raises a number of concerns. Are attempts to balance the legal consequences of settlers' unlawful presence with the rights of protected and/or displaced and victims of the crime of population transfer creating an imbalance? Probably, since such balancing considers unequal parties – settlers/occupier versus victim/protected persons – equal. This search for equilibrium blurs the protective shield of IHL and lessens the implications flowing from war crimes.[2401] Balancing settlers' rights on those of the protected population is not foreseen by IHL.[2402] Equalizing the unequal may thus eschew the context of occupation and war crime and legitimize and normalize an unlawful situation under the guise of human rights. One could therefore legitimately ask: isn't the outcome of proportionality in contravention of the rights of victims to self-determination, non-discrimination, and

[2397] See James Crawford, *ibid* at 217.
[2398] *UNPO Conference Report, Human Rights Dimensions of Population Transfer, held in Tallinn, Estonia January 11-13, 1992*, (1992) at 10.
[2399] For a discussion on the human dignity, see Luís Roberto Barroso, "Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse" (2012) 35 Boston College International & Comparative Law Review 331 at 338.
[2400] Aeyal Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?" (2007) 18:1 European Journal of International Law 1 at 9.
[2401] In practice settlers and protected persons do not have equal rights, see for instance Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation" (2006) 19:2 Leiden Journal of International Law 393 at 418-419.For an excellent critique of rights' balancing and discussion of proportionality in the context of occupation, see Aeyal Gross, *ibid* at 5 16-18, 33.
[2402] Aeyal M Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limites of Humanitarian Law and the Structure of Occupation", *ibid* at 418.

restitution? Is *restitutio in integrum* in breach of the rights of settlers or simply unrealistic, inapplicable on a massive scale[2403] and therefore largely ineffective in the context of settler transfer? To put it otherwise: is the preferred principle of *restitutio in integrum* the legal fiction of reparation? That being said, proportionality is often an element in the process of determining the fate of settlers. Depending on circumstances, the human rights of settlers and the legal and political consequences of *faits accomplis* may 'weight more' heavily than the rights of victims to restitution. In light of the inherent imbalance, it should be cautioned that proportionality may be inherently skewed in favor of settlers because it tends to consider both parties equal and to thus evade accountability.

As the unlawful manner by which settlers acquired rights and privileges is irrelevant to the proportionality test, which neutrally and equally considers individual and collective rights as they presently stand,[2404] should the injured party, i.e. protected persons, victims and the occupied state, be favoured when balancing rights? Theory would appear supportive[2405], but the same cannot be said of practice. The result, as Dana Brusca correctly points out, is that

> despite the black and white rhetoric of the ICJ's reparation principle, history shows that any remedy provided under Article 49(6) must in practice carefully balance the rights of persons harmed by the occupying power, the comparative innocence of settlers transferred into an occupied territory, and the feasibility of implementation in any particular case before it will be deemed acceptable to the U.N.'s governing bodies and the international community writ large.[2406]

[2403] International law is mainly conceived to resolve individual violations of human rights, such violations being an exception and the victims few, but in cases of violations involving war crimes or crimes against humanity, international law has not devised clear norms or mechanisms to respond to important number of individual victims. See Pablo De Greiff, "Justice and Reparations" in Pablo De Greiff, ed, *The Handbook of Reparations* (Oxford: Oxford University Press, 2008) 451 at 471.
[2404] Equality underlies proportionality, See David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 172.
[2405] See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), 53rd Sess, UNGAOR, UN Doc A/56/10, II:2 Yearbook of the International Law Commission at 98, para 11.
[2406] Dana Brusca, "Unpopular Population Transfer: Defining Violations of and Remedies under Geneva Convention Article 49(6)" Draft available on SSRN, 16 June 2010 at 6-7. Available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865805

She also contends that "history suggests that such settlers often get a voice in deciding the territory's fate and, in most circumstances, have a right to remain in the area after occupation has ended."[2407] Yoël Ronen confirms these findings,

> Although neither the law of occupation nor the law of non-recognition require the post-transition regime to recognize the validity of status granted to individuals by the illegal regime, in most of the cases examined here, the settler population was eventually given the opportunity to remain in the territory, either unreservedly (as in Zimbabwe and South Africa), or with qualifications (in the Baltic States only to the civilian population, in the TRNC on a numerical basis). [2408]

Indeed, the cases of Western Sahara, Cyprus, Bangladesh and, to some extent, East Timor confirm the view that settlers are often granted a right to self-determine on par with protected persons of the occupied territory, and are normalized as a minority or become the new majority before their fate is decided. In Western Sahara, for instance, the settler population outnumbers the protected population and is entitled to partake in the referendum on the future of the territory. In fact, the indigenous population of Western Sahara is now the minority.[2409] The proposed UN Peace Plan entailed a shared government for a transitional period and a referendum in which *all inhabitants*, including settlers installed in Western Sahara prior to 1999, would be entitled to vote.[2410] The UN revised its definition of eligible voters, which gives credence to Morocco's program of population transfer and to its sovereign claims over Western Sahara. Despite the accommodating UN offer, Morocco rejected independence as an option in the referendum, arguing instead for autonomy or integration as the only agreeable outcomes. [2411] Consequently, since 2003, there has been a complete suspension of all referendum related activities in Western Sahara, stalemating Sahrawi statehood. As the case of Western Sahara illustrates, when granted equal rights, settler transfer not only effects the self-

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[2407]Dana Brusca, *ibid* at 6-7.
[2408] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 236.
[2409] Akbarali Thobani, *Western Sahara Since 1975 Under Moroccan Administration* (Lewiston: The Edwin Mellen Press, 2002) at 104; By 2007, Sahrawi living in occupied Western Sahara were believed to be "outnumbered by Moroccan settlers by at least two to one." "Deadlock in the Desert, Morocco's latest initiative is unlikely to end one's of Africa's oldest conflict" *The Economist* (8 March 2007), Online: http://www.economist.com/node/8825903
[2410]*Report of the Secretary-General on the situation concerning Western Sahara*, UNSCOR, UN Doc S/2003/565 (2003) at paras 42, 44-51 and Annex II at 14.
[2411] Gino Naldi, "Western Sahara: Suspended Statehood or Frustrated Self-Determination?" (2005) 13 African Yearbook of International Law 11 at 23-24.

determination of transferees, but also affects the right to self-determination of the receiving population, in particular in non-self-governing territories or state in *statu nascendi*. Thus the reflective relationship between self-determination and settler transfer as both a trigger and an obstacle to self-determination.

It has been argued that settlers are allowed to remain because realization of the rights of victims is conditional upon the prerequisite not to create new human rights violations when repairing an injury.[2412] This is the gist of the principle of humanity and proportionality, whereby the nature and extent of rights to be violated by repatriation may constitute a 'burden out of all proportion' justifying measures other than or complementary to restitution. As Benvenisti explains, "the concern that has always informed both domestic remedial norms and the international one, that it would be unjust to correct one wrong by creating another, also informs the international law relevant to remedies of *jus cogens* violations."[2413] This would be particularly relevant if settlers were not directly involved in the commission of the crime as good faith may preclude restitution.[2414] Consequently, settlers may remain – not because they have a right to – but because their expulsion would contravene international human rights law.

It is not clear when concerns over the feasibility of settler repatriation – that is, part of the 'burden' – are sufficient to preclude restitution and return. Admittedly, the evaluation of what constitutes a 'disproportionate' burden comprises a subjective element not clearly delimitated by law and open to political considerations of peace and security and sensitive to power relations. Noteworthy, the International Law Commission deems insufficient legal and practical difficulties as well as political and administrative hurdles to prevent restitution.[2415] In other words, it is not because it is difficult that restitution cannot be carried out. Arguments concerning the impracticality of return should thus be examined with great care. In this regard,

[2412] Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 249.
[2413] Contemporary international law is yet to reflect a specific regime governing reparations for breaches of peremptory norms." Eyal Benvenisti, *The International Law of Occupation*, 2nd ed (Oxford: Oxford University Press, 2012) at 312-313.
[2414] James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (2002), at 216.
[2415] James Crawford, *ibid*.

the *UN Principles on Housing and Property Restitution for Refugees and Displaced Persons* (hereinafter the *Pinheiro Principles*) explain that:

> States should ensure, as a rule, that restitution is only deemed factually impossible in exceptional circumstances, namely when housing, land and/or property is destroyed or when it no longer exists, as determined by an independent, impartial tribunal. Even under such circumstances the holder of the housing, land and/or property right should have the option to repair or rebuild whenever possible. In some situations, a combination of compensation and restitution may be the most appropriate remedy and form of restorative justice.[2416]

Settlers entitled to remain in the country following the end of occupation may thus have to change their place of residence to allow restitution. The integration of settlers should not serve to prevent the return of displaced persons and property restitution, essential to building a post-conflict multicultural society. The *Pinheiro Principles* address the rights of secondary occupants when displaced persons return to their home:

> States should ensure that secondary occupants are protected against arbitrary or unlawful forced eviction. States shall ensure, in cases where evictions of such occupants are deemed justifiable and unavoidable for the purposes of housing, land and property restitution, that evictions are carried out in a manner that is compatible with international human rights law and standards, such that secondary occupants are afforded safeguards of due process [...] States should ensure that the safeguards of due process extended to secondary occupants do not prejudice the rights of legitimate owners, tenants and other rights holders to repossess the housing, land and property in question in a just and timely manner.[2417]

Noteworthy in this context is the duty of states to prevent homelessness and violations of the right to adequate housing by providing alternative housing or land to secondary occupants.[2418]

Arguably, in many cases, legal and practical difficulties associated with return cannot bar restitution, because the benefits of restitution are immense considering the nature of violations entailed (war crime) and the need for a just post-conflict transition. Benefits may include accountability and deterrence to guarantee non-repetition, a sense of dignity and justice among

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[2416] COHRE, *The Pinheiro Principles, United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (Geneva: Centre on Housing Rights and Evictions) at Principles 21.2, Online: http://2001-2009.state.gov/documents/organization/99774.pdf

[2417] COHRE, *ibid* at Principles 17.1 and 17.2.
[2418] COHRE, *ibid* at Principles 17.3.

victims, societal reconstruction based on non-discrimination and inclusive self-determination for all those remaining in the territory. A decision not to carry out restitution must therefore be carefully weighed against victims' individual and collective rights,[2419] redeemed dignity and more broadly, on the value of restorative justice to durable peace. That said, the right of return should be respected even if restitution proves impossible.

The rights of victims must thus be part of a process of transitional justice that strives at a principled application of justice and reconciliation to which reparation is crucial.[2420] In this regard, reparation may also include compensation (monetary or in kind) to cover damage caused by the wrongful act not covered by restitution[2421] and satisfaction as recognition of the wrongful act or apology.[2422] Compensation is complementary to restitution and should only be "when restitution is not factually possible, or when the injured party knowingly and voluntary accepts compensation in lieu of restitution, or when the terms of a negotiated peace settlement provide for a combination of restitution and compensation."[2423] Satisfaction, especially through apology in response to historic struggles,[2424] is often necessary for victims to return and embark upon a process of reconciliation.

Broadly, reparation is tied to recognition and restoration of a victim's equal humane worth as a citizen with equal bearer of rights.[2425] In this sense, components of reparation are intertwined: recognition contributes to reconciliation and satisfaction makes financial compensation

[2419] See Friedrich Rosenfeld, "Collective Reparation for Victims of Armed Conflict" (2010) 92:879 International Review of the Red Cross 731 at 735.
[2420] See for instance, Guidance Note of the Secretary-General, *United National Approach to Transitional Justice* (March 2010) at 3, Online: http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf; For a discussion of transitional justice as a holistic notion, see Pablo De Greiff, "Theorizing Transitional Justice" in Melissa S Williams, Rosemary Nagy & Jon Elster, eds, *Transitional Justice* (New York: New York University Press, 2012) 31 at 59-62.
[2421] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), 53rd Sess, UNGAOR, UN Doc A/56/10, II:2 Yearbook of the International Law Commission at Art 36 at 98.
[2422] International Law Commission, *ibid at* Art 37 at 105.
[2423] Noteworthy, the peace agreement must respect human rights, refugee and humanitarian law. COHRE, *The Pinheiro Principles, United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (Geneva: Centre on Housing Rights and Evictions) at Principles 18.3 and 21.1, Online: http://2001-2009.state.gov/documents/organization/99774.pdf

[2424] Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002) at 140.
[2425] Pablo De Greiff, "Theorizing Transitional Justice" in Melissa S Williams, Rosemary Nagy & Jon Elster, eds, *Transitional Justice* (New York: New York University Press, 2012) 31 at 42-43.

acceptable.[2426] Reparation therefore involves more than compensation to buy the peace; it is the acknowledgement of a wrong and its correction so as to prevent its continuation and reoccurrence and to allow the (re)establishment of the rule of law. It goes back to the biblical and Middle-Aged origins of the term redress as the "setting straight" through "ceremonial redressing", involving restoration of status, standing and dignity and "rehabilitation in the public eye."[2427] Ultimately, reparation allows the construction of an inclusive state where all are equals and participate in a joint political project.[2428]

For most victims, return and/or incentives to rehabilitate settlers transferred post-World War II are the preferred choice because legalizing the stay of settlers "would be tantamount to the condonation of a crime against humanity and would perpetuate the illegality and injury."[2429] Victims associate the integration of settlers with a continuation of the occupation or illegal regime, interference against the independence of a sovereign state or state in *status nascendi* and denial of their right of return and property restitution. Allowing settlers to remain could also set a precedent. Contributing to the discussion, Claire Palley writes:

> knowledge by potential settling Powers that the lawful government would, when its jurisdiction was revived, be incompetent to restore the *status quo ante* and demographic balance will encourage aggressive Powers into creating *faits accomplis*. It is also arguable that to accord rights of stay *en masse* to wrongfully implanted settlers is a retrospective validation of unlawful action and in a sense the equivalent of an indirect violation of international rules by the revised sovereign state.[2430]

Victims have clearly expressed that settlers should have no automatic right to remain and that their right of return is inviolable.[2431] Yet, the UNPO conference recognized that "settlers should be dealt with as the subject of negotiations between the states concerned in peaceful dispute

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[2426] Pablo De Greiff, *ibid* at 48-52; For a discussion of compensation as better than status quo or better see Adrian Vermeule, "Reparations as Rough Justice" in Melissa S Williams, Rosemary Nagy & Jon Elster, eds, *Transitional Justice* (New York: New York University Press, 2012) 151 at 160.
[2427] Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002) at 120.
[2428] Pablo De Greiff, "Reparations and Justice" in Pablo De Greiff, ed, *The Handbook of Reparations* (Oxford: Oxford University Press, 2008) 451 at 464.
[2429] UNPO Conference Report*, Human Rights Dimensions of Population Transfer,* held in Tallinn, Estonia January 11-13 (1992) at 10.
[2430] [Emphasis in original] Claire Palley, "Population Transfers" in *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 248.
[2431] UNPO Conference Report*, Human Rights Dimensions of Population Transfer,* held in Tallinn, Estonia January 11-13 (1992) at 10-11.

settlement procedures and be treated with humanity."[2432] It has been suggested that settlers be given economic incentives to leave gradually on their own and re-establish themselves in their country of origin.[2433] In addition, if settlers are to stay, their stay cannot be to the detriment of victims' right of return.[2434] No state can negotiate away the individual right of return in an agreement without their consent.[2435] But can the rights of settlers be reconciled with the rights of victims of population transfer to restitution? It is not impossible for settler integration to allow restitution and other forms of reparation to victims and a process of transitional justice to commence. In some cases, this could be the ideal outcome. The question is how to strike a balance agreeable to all, if not most? And if the fate of settlers and victims is up for negotiations, does the rule of law risk being compromised by a political process geared towards the rationalization of *faits accomplis*?

The legal position advanced by many victims of population transfer, which puts forward state and individual responsibility and their right to reparation, in particular return and restitution, aligns with the response prescribed under international human rights law, international humanitarian law, international criminal law and the law of state responsibility with regard to the transfer of settlers, as responsibility rests essentially with the settling state.[2436] Yet, victims' voice is seldom, if ever, a dominant feature of decision-making when determining the fate of settlers.

The limited importance accorded to victims of armed conflicts may be attributable to the still overwhelmingly inter-state nature of international law and international relations which seems to assume the obligations of the responsible state to be settled by political agreements. As Toni Pfanner explains,

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[2432] UNPO Conference Report*, ibid* at 11.
[2433] UNPO Conference Report*, ibid* at 22; Claire Palley, "Population Transfers" in *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 249.
[2434] See Georges Abi-Saab, Dieter Blumenwitz, James Crawford *et al*, "Legal Issues arising from Certain Population Transfers and Displacements on the Territory of the Republic of Cyprus in the Period since 20 July 1974" (1999) at 7-8.
[2435] Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 253.
[2436] See Claire Palley, *ibid* at 252.

> Preclusion by a peace settlement, sovereign immunity or the non-self-executing nature of the right to reparations under international law mostly rule out successful individual claims. Victims can thus only approach their own government, which may submit their complaints to the party or parties that committed the violation – a procedure that depends on relations between states, which have often both committed violations.[2437]

As evident from the above discussion, it is difficult to make victims' rights tangible since proportionality puts unequal parties on an equal plane and does not offer clear guidance on how to balance settlers' and victims' rights, apart from the fact that the solution should not create new violations of international law and should take into consideration the level of responsibility of settlers. This ambiguity leaves much room to solutions favoring recognition of *faits accomplis* to the detriment of victims' right of return and restitution and more broadly, to reparation.

Proportionality also highlights the relativity of human rights in the context of reparatory justice whose main task is to reconcile "the repair of present damage and the sanctioning of past wrongs, assertedly intended as corrective of the past, while advancing the broader future-related political goals of the transition."[2438] Palley points out the absurdity of submitting a successor or reviving state to two conflicting duties namely, "to repress grave war crimes and to allow implanted settlers to remain."[2439] This is an interesting point, as the obligation to ensure accountability and provide reparations belongs first and foremost with the settling state whereas the integration of settlers shifts the obligation to the formerly occupied state, which must ensure prosecution and protect and reconcile the rights of settlers with that of its own population. But this apparent contradiction is perhaps the inherent challenge of transitional justice: fight impunity so that crimes do not reoccur and justice is perceived to be done and provide equal protection for the rights of all in a way that is conducive to reconciliation. That is because reparatory justice is linked to the reconstruction of identity by restoring juridical and political standing to victims while ensuring reconciliation and societal transformation; a project possibly encompassing settlers.[2440]

[2437] Toni Pfanner, "Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims" (2009) 91: 874 International Review of the Red Cross 279 at 287-288.
[2438] Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002) at 122.
[2439] Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 248.
[2440] Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002) at 137.

Hence, in discussing the rights of settlers and the rights of victims from the perspective of the principle of proportionality, attention may have been diverted away from the broader question of settler transfer within transitional justice. It may be that the fate of settlers is not to be decided in accordance with the principle of proportionality involving conflicting rights or a special theory of justice, as discussed below, but as part of a process of transitional justice aimed at striking a balance between the need for accountability and reconciliation. However, attempts at ensuring accountability and reconciliation still require balancing different, competing considerations, although larger than from a rights perspective. Section four proposes guidelines that need to be taken into consideration when attempting to resolve settler transfer within a process of transtional justice.

4.2.1 A theory of justice recognizing the result of *faits accomplis*?

Recognition of the new reality created by the implantation of settlers may indicate that justice is not insensitive to changed circumstances. Jeremy Waldron proposes in his Supersession Thesis that "what justice requires and what it condemns are not always stable over time."[2441] In his thesis, Waldron posits "a recognition that facts that are established by violence do not, on that account, cease to be worth considering from the point of view of justice."[2442] The question is therefore whether the unlawful dispossession created by the transfer of settlers continues to be unjust or whether changes of circumstances require justice to be responsive by recognizing that what was unjust no longer is. But exactly how displacement and dispossession caused by settler implantation becomes just?

This is where Waldron's Thesis is less convincing. Waldron proposes the Supersession Thesis to trigger when settlers have nowhere else to go or when it responds to settlers' attachments and expectations.[2443] Waldron recognizes critics who denounce that such approach condones the product of violence, but goes on to say his Thesis is not so much concerned about the initial

[2441] Jeremy Waldron, "Settlement, Return, and the Supersession Thesis" (2004) 5 Theoretical Inquiries in Law 237 at 241, 254.
[2442] Jeremy Waldron, *ibid* at 267.
[2443] Jeremy Waldron, *ibid* at 268.

violence as about the "occurrent human realities."[2444] Fair enough. But this is where his Thesis probably needs further refining. The two changes of circumstances mentioned above are insufficient to justify the application of the Supersession Thesis, because they focus on the human realities of settlers alone, to the detriment of the human realities of all individuals affected.

I propose the change of circumstances must positively affect the enjoyment of the rights of all concerned; settlers and victims alike. If there are no corrective to the forceful dynamic brought about by the transfer of settlers – that is, that present relations are still tainted by violence, denial of self-determination and inequality, among others –, I doubt it can be just to allow settlers to remain in light of new circumstances, despite their having nowhere to go or being attached to the place. The issue therefore is not so much about the initial force, although it matters, as about the ongoing use of force to maintain an unlawful situation. After all, the transfer of settlers in an occupied territory is not a peaceful endeavor and at least the rationale underpinning this means of war should be corrected for justice to be 'seen to be done'.

4.2.2 The Repatriation of Settlers is rarely, if ever, carried out to remedy victims

Inasmuch as settlers have been repatriated from occupied territories, the decision was taken unilaterally and grounded on the military and security concerns of the withdrawing power rather than on a negotiated conciliatory process informed by the rights of all relevant parties. Indeed, the withdrawals of settlers that have taken place have not been carried out in the interests or in respect of the rights of victims, either local/displaced persons or settlers. This is for instance what occurred following Iraq's occupation and annexation of Kuwait in 1990-1991.[2445]

[2444] Jeremy Waldron, *ibid*.
[2445] SC Res 662, UNSCOR, 2934th Mtg, UN Doc S/RES/662 (1990); For a discussion of the occupation of Kuwait, see Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff: the Hague, 1995) at 158 - 162.

During its seven month long occupation of Kuwait, Iraq embarked upon a process of Iraquisation and transfer.[2446] It transferred Kuwaiti nationals[2447] and around two third of the Kuwaiti population left Kuwait as well as approximately 2 million migrant workers.[2448] Iraq also massively transferred foreign nationals and Kuwaiti men, both prisoners of war and civilians, to Iraq and Iraqis to the occupied territory.[2449] In fact, the Security Council condemned "the ongoing attempt by Iraq to alter the demographic composition of Kuwait."[2450] However, Iraqi settlers were quickly removed with the 300,000 to 600,000 withdrawing Iraqi troops following the international military response in February 1991.[2451] Yet, the withdrawal of settlers had little to do with the rights of victims and much to do with the withdrawal of a defeated army. Following the surrender of Iraq, the Security Council took great care through the institution of a UN Compensation Commission to make Iraq repay the costs attributable to its occupation and ensure restitution of all Kuwaiti property confiscated.[2452] Kuwaitis, as victims of aggression, were therefore entitled to reparations including restitution and compensation under UN auspices. Noteworthy to the feasibility and extent of restitution is the short nature of the occupation due to the prompt international response and a post-conflict programme geared towards reparations.

In a different context, the *Chittagong Hill Tracts Peace Accord* is perhaps one of the few examples of a peace agreement envisaging the repatriation of settlers combined to the return

[2446] Rapport intérimaire présenté au Secrétaire général par la mission des Nations Unies chargée d'évaluer les pertes en vies humaines subies pendant l'occupation du Koweït par l'Iraq et les pratiques utilisées par les Iraquiens contre la population civile du pays, UN Doc S/22536 (1991) in *Les Nations Unies et le conflit entre l'Iraq et le Koweït 1990-1996* (New York: Département de l'information des Nations Unies, 1996) at 254, paras 22, 30.
[2447] See SC Res 670, UNSCOR, UN Doc S/RES/670 (1990) at preamble.
[2448] Mr Walter Kälin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1991/67, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation*, UN Doc E/CN4/1992/26 (1992) at para 25; *Les Nations Unies et le conflit entre l'Iraq et le Koweït 1990-1996* (New York: Département de l'information des Nations Unies, 1996) at 20.
[2449] See SC Res 674, UNSCOR, UN Doc S/RES/674 (1990) at preamble; Mr Walter Kälin, UN Doc E/CN4/1992/26 (1992) *ibid* at paras 73(c), 79, 81.
[2450] SC Res 677, UNSCOR, UN Doc S/RES/677 (1990) at para 1. Security Council 677 must be interpreted to include condemnation of "l'expulsion de Koweïtiens par la force et la réinstallation de groupes de population au Koweït." The Kowaiti government in exile maintained that Iraqis "cherchaient à modifier la composition démographique du pays afin d'étayer leurs revendications politiques et territoriales." *Les Nations Unies et le conflit entre l'Iraq et le Koweït 1990-1996* (New York: Département de l'information des Nations Unies, 1996) at 17-18, 24.
[2451] *Les Nations Unies et le conflit entre l'Iraq et le Koweït 1990-1996, ibid* at 26.
[2452] SC Res 687, UNSCOR, UN Doc S/RES/687 (1991) at sections D at para 15 & G at para 30.

of displaced indigenous persons and restitution of their traditional lands. The exact fate of the settlers is not stipulated in any provision although it is considered the *non-dit* of the Accord.[2453] The Bangladeshi government began encouraging Bengali settlers to move to the Chittagong Hill Tracts as a counter-insurgency tactic during the thirty year armed conflict (1976-1997) between the army of Bangladesh and the armed group, Shanti Bahini, belonging to the indigenous Pahari people who request greater autonomy and recognition of their traditional lands rights.[2454] By the late 1990s, settlers were estimated at thirty nine percent of Chittagong Hill Tracts' population.[2455] The 1997 *Chittagong Hill Tracts Peace Accord* brought an end to the armed conflict and envisaged demilitarization, the return of displaced persons, property restitution to Pahari people as well as greater political autonomy.[2456] However, as of 2013, this agreement has been largely unimplemented by the Bangladeshi government by preventing the return of internally displaced persons and land restitution of the indigenous Pahari people.[2457] As Lars-Anders Baer, Special Rapporteur on the implementation of the Accord explained with regard to Bengali settlers,

> A critical but highly sensitive issue in relation to the restitution of indigenous peoples' land in accordance with the provisions and intentions of the Accord [...] is the voluntary relocation of Bengali settlers to areas outside the Chittagong Hill Tracts. Several suggestions for a relocation process that would protect the dignity of the settlers and facilitate their proper rehabilitation have been made but there appears to be no visible initiative by the successive Governments to start such a process. [2458]

[2453] For a contrary view: "Neither Sheikh Mujibur Rahman nor the subsequent leaders agreed to the expulsion of Bengali inhabitants within the hill districts, although the treaty will discourage the future influx of new Bengali settlers. Unless the new institutional powers are used as a tool for revenge in the hands of the tribal leaders, any large-scale expulsion of the nontribal population will be difficult." M Rashiduzzaman, "Bangladesh's Chittagong Hill Tracts Peace Accord: Institutional Features and Strategic Concerns" (1998) 38:7 Asian Survey 653 at 656, 669.

[2454] Amnesty International, *Pushed to the Edge, Indigenous Rights Denied in the Chittagong Hill Tracts*, ASA 13/005/2013, (London: Amnesty International, 2013) at 5.

[2455] Unofficial numbers put their percentage as much as fifty percent. M Rashiduzzaman, "Bangladesh's Chittagong Hill Tracts Peace Accord: Institutional Features and Strategic Concerns" (1998) 38:7 Asian Survey 653 at 660.

[2456] Amnesty International, *Pushed to the Edge, Indigenous Rights Denied in the Chittagong Hill Tracts*, ASA 13/005/2013, (London: Amnesty International, 2013) at 6; See generally, UN Economic and Social Council, Permanent Forum on Indigenous Issues, *Study on the Status of Implementation of the Chittagong Hill Tracts Accord of 1997*, Special Rapporteur Lars-Anders Baer, UN Doc E/C19/2011/6 (2011).

[2457] Most of the 70,000 refugees to India were however repatriated to the Chittagong Hill Tracts. The Land Commission mandated to rule on land disputes has yet to make a decision. However, the 100,000 IDP have still not returned. UN Economic and Social Council, Permanent Forum on Indigenous Issues, UN Doc E/C19/2011/6 (2011), *ibid* at paras 41, 43; Amnesty International, *ibid* at 6-7.

[2458] UN Economic and Social Council, UN Doc E/C19/2011/6 (2011), *ibid* at para 38.

Failure to clearly resolve the fate of settlers in the Accord is perhaps contributing to a perception of disproportionality on their part; hence unsatisfactory implementation and resistance to return and restitution. In fact, the transfer of Bengali settlers, themselves from poor and vulnerable communities, has continued under the protection of Bangladeshi armed forces following the Accord.[2459] The effects of this ongoing transfer are described by Baer:

> the continued migration of non-indigenous peoples from the plains into the region, the alienation of indigenous peoples' ancestral lands, the issuance of permanent residence certificates to Bengali settlers, the inclusion of Bengali settlers in the voter list and other developments clearly show that protecting the characteristics of the area as a tribal inhabited region has not been a genuine concern of the successive Governments.[2460]

Not uncommon to the policy of settling states is the normalization of settlers' presence through the granting of residency rights and their inclusion in electoral lists. These actions allow settlers to participate in democratic exercises such as elections and referenda to the detriment of the right of self-determination of the local people. Despite a promising Accord attempting to reconcile the rights of the settlers with the rights of the victims of population transfer (indigenous people), unclear terms with regard to settler's fate, weak political will and a powerful military actively opposed to the Accord has undermined its implementation and caused further tensions between the indigenous Pahari people and the Bengali settler population.[2461]

Another instance of settler withdrawal is the Gaza Strip. In 2004, the government of Israel unilaterally decided to redeploy its troops from inside to outside the Gaza Strip.[2462] The withdrawal of Israeli settlers from the Gaza Strip has been considered a re-transfer of settlers. For instance, Catriona Drew wrote,

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[2459] Amnesty International, *Pushed to the Edge, Indigenous Rights Denied in the Chittagong Hill Tracts*, ASA 13/005/2013 (London: Amnesty International, 2013) at 7; UN Economic and Social Council, UN Doc E/C.19/2011/6 (2011), *ibid* at para 51.
[2460] UN Economic and Social Council, UN Doc E/C.19/2011/6 (2011), *ibid* at para 24.
[2461] UN Economic and Social Council, UN Doc E/C.19/2011/6 (2011), *ibid* at paras 46, 51.
[2462] See Israel Ministry of Foreign Affairs, "The Cabinet Resolution Regarding the Disengagement Plan, Addendum A - Revised Disengagement Plan - Main Principles" (2004) at para 2, Online: http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/Revised%20Disengagement%20Plan%206-June-2004.aspx

> What is clear from the international response to the compulsory transfer of 8,500 Jewish settlers out of the Gaza Strip in August 2005 is that such little unease as there was stemmed, not from any concern for the Israeli settlers - their human rights; their right not to be subject to forcible population transfer - but rather with the Disengagement Plan's unilateral (not-negotiated-with-the-Palestinians) and partial (failed-to-include-major-West-Bank-settlements) nature. As such, international support for Israeli disengagement from the Gaza Strip provides a prominent example of contemporary state practice and *opinio juris* in favour of the legality of carrying out a compulsory population transfer of settlers as a complement to the international legal right of self-determination.[2463]

The problem of this analysis is its uncontextualised treatment of a settler community. I submit it is incorrect to cast the case of Gaza's settlers as an instance of re-transfer of settlers in contravention of international law. Israeli settlers in the Gaza Strip were incremental to the occupation regime in place at the time; simply put, the army and the settlers were one apparatus whose presence was imposed at the barrel of a gun. Removal of ground troops required removal of the settlers it was there to protect. The two came hand in hand; without a military presence, settlers who had established themselves on Palestinian land would no longer be able to remain. Besides, Israeli settlers had neither intention nor desire to integrate with the local population it perceived as a threat to its existence. In a transitional, post-conflict setting, settlers would most likely have been offered the possibility to remain as aliens, acquire Palestinian citizenship or leave the territory – that is, to exercise a voluntary choice as to their future status and place of residence, but since the redeployment did not result from an agreement with the Palestinians and since the Israeli government clearly did not intend on negotiating the possibility for Israeli settlers to live among the Palestinian people, something settlers themselves rejected, there was no possibility to remain in the occupied Gaza Strip.

The above analysis is also striking by its absence of reference to victims' rights, that is, the Palestinian population of Gaza as protected persons under military occupation. Palestinians have the right to redress and property restitution for the serious violation of international law that is the transfer of settlers and this redeployment, although not intended by the protagonist,

[2463] Catriona Janet Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination* (PhD thesis, London School of Economics and Political Science, University of London, 2005) [unpublished] at 229-231, 234-235.

does allow them to return to and regain the land previously reserved for settlements. Furthermore, the redeployment of the army had nothing to do with Palestinian self-determination. After the redeployment, there is still no independent state of Palestine, no end to the military occupation and not even a genuine peace process.[2464] Inasmuch as self-determination was involved, it was as an exercise of Israeli self-determination.

Therefore, a military redeployment such as the one unilaterally decided by the Israeli government is not a (re)transfer of settlers – that is, an act in contravention of international human rights, humanitarian or criminal law. Rather, it is a strategic realignment of the occupation regime through removal of its military-civilian colonial/demographic component in the Gaza Strip.[2465] In the words of Ariel Sharon, former Prime Minister of Israel,

> The Disengagement Plan will include the redeployment of IDF units along new security lines and a change in the deployment of settlements, which will reduce as much as possible the number of Israelis located in the heart of the Palestinian population. [....] Settlements which will be relocated are those which will not be included in the territory of the State of Israel in the framework of any possible future permanent agreement. At the same time, in the framework of the Disengagement Plan, Israel will strengthen its control over those same areas in the Land of Israel which will constitute an inseparable part of the State of Israel in any future agreement.[2466]

[2464] Whether the Gaza Strip remained occupied or not after the redeployment is a divisive debate. See Alvaro de Soto, Under-Secretary-General, United Nations Special Coordinator for the Middle East Peace Process and Personal Representative of the Secretary-General to the Palestine Liberation Organization and the Palestinian Authority, Envoy to the Quartet, *End of Mission Report* (May 2007) (in file with the author) at para 21; for the argument Gaza is in a grey area of the law of occupation (not occupied) and that natural law should apply, see Solon Solomon, "Occupied or Not: The Question of Gaza's Legal Status After the Israeli Disengagement" (2011) 19 Cardozo Journal of International and Comparative Law 59 at 81-89; For the argument the situation in Gaza is likely to remain one of occupation, see Harvard Program on Humanitarian Policy and Conflict research (HPCR), *Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law* (2004) Policy Brief at 17, 19, Online: http://www.hpcrresearch.org/research/ihl-israel-and-occupied-palestinian-territory; Arguing that Israel is still the occupying power because in effective control, Iain Scobbie, "An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination" (2004-2005) 11 Yearbook of Islamic and Middle East Law 3; For a conservative analysis arguing there is no effective control through a physical presence of the territory and concluding that "il n'y a aucune place pour le droit à l'occupation" and that the law of occupation could possibly apply *de facto* and based on the "bonne volonté d'Israël." see Robert Kolb and Sylvain Vité, *Le droit de l'occupation militaire, perspectives historiques et enjeux juridiques actuels* (Bruxelles : Bruylant, 2009) at 177-182.

[2465] "The purpose of the plan is to lead to a better security, political, economic and demographic situation."[Emphasis added] Israel Ministry of Foreign Affairs, "The Cabinet Resolution Regarding the Disengagement Plan, Addendum A - Revised Disengagement Plan - Main Principles" (2004) at para 2, Online: http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/Revised%20Disengagement%20Plan%206-June-2004.aspx

[2466] Israel Ministry of Foreign Affairs, "PM Ariel Sharon's Address to the Fourth Herzilya Conference" (2003), Online:

The contention that Israeli settlers in Gaza had the right not to be subjected to population transfer does not apply here. They, of course, had the right to be treated humanely, relocated and compensated by the state of Israel, and they have been, notably through relocation to the occupied West Bank.[2467] Assuming however that the removal of settlers is a reversed population transfer from which settlers should have been protected by the international community or that it has anything to do with Palestinian self-determination is problematic. In sum, the case of Israeli settlers in the Gaza Strip is a lawful, albeit involuntary, withdrawal of a settler population that does not conflict with international law.

4.3 Seven criteria for resolving settler transfer in a rights-based and context-sensitive way

From the viewpoint of transitional justice, a rights-based compromising stance is a context-sensitive response informed by a sound understanding of the root causes of the transfer and its effects on the rights of all affected groups, i.e., settlers, as perpetrators or victims of a state policy, and, victims, that is, receiving protected persons and/or displaced persons. It requires some forms of accountability for culpable individuals and state parties, through either prosecution and/or truth seeking commissions. It is possible for settlers wanting to remain and integrate on an equal footing with the people of the territory to do so as part of societal reconciliation and transformation accompanying transitional justice.

But no response claiming to respect the rule of law can unconditionally recognize *faits accomplis*. Otherwise said, settlers have no automatic right to remain where they settled; no automatic right to be treated as a minority, and no automatic right to partake in self-

http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/pages/Israeli%20Disengagement%20Plan%2020-Jan-2005.aspx

[2467] See Israel Ministry of Foreign Affairs, "The Cabinet Resolution Regarding the Disengagement Plan, Addendum C - Format of the Preparatory Work for the Revised Disengagement Plan" (2004) at paras 2,6, Online: http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/MFADocuments/Pages/Revised%20Disengagement%20Plan%206-June-2004.aspx

determination exercises in the settled territory.[2468] The integration of settlers into the formerly occupied population is conditional upon their will to live as equals, the consent of the displaced and protected people of the territory and the right of victims to reparation, in particular restitution. Settlers' integration requires rebuilding relations so that all individuals equally enjoy public and private autonomy[2469] through self-determination and respect for human rights in the name of a new collective.

To rebuild relations, a rights-based response must protect the rights of all individuals considering the particularities of each situation. More precisely, I propose a rights-based response to result from a careful contextual evaluation that considers seven factors, namely:

- The number of settlers and of persons displaced (extent of change to the demographic composition of the territory and effect on self-determination of the local population);
- The duration of settlers' presence in the territory, the level of integration with the local community, and attachment to the place;
- Settlers' individual in/voluntary participation in or knowledge of the commission of the crime of population transfer and other serious violations of international law (individual criminal responsibility);
- The nature of the occupation regime (international state responsibility of the occupying power for population transfer and other serious violations of international law);
- The post-conflict political context in which settlers' fate is decided and willingness on part of all to build a shared community of values (consensual peaceful agreement as part of a process of transitional justice involving reparation and reconciliation or unilateral decision by the occupying power to withdraw its settlers with little concern for victims' rights);

[2468] UNPO Conference Report*, Human Rights Dimensions of Population Transfer,* held in Tallinn, Estonia January 11-13, 1992 at 10; Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 251.

[2469] For a discussion of autonomy, both public (citizenship and public participation) and private (individualized self-government), see Luís Roberto Barroso, "Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse" (2012) 35 Boston College International & Comparative Law Review 331 at 368-371.

- The freely expressed choice of individual settlers and victims as to whether they want to live as one people or return to their original home or settle somewhere else (possibility of exercising an individual choice as to one's legal status and place of residence); and,
- International scrutiny to ensure respect with international law.

Crucial to a context-sensitive international response is whether settlers are victims of transfer and acting in good faith or whether they are perpetrators, such as if they are part of the military, police or security personnel who knowingly and willfully settled in the territory. The nature of the settler-regime, in particular its relation with the receiving local population, will impact the appropriateness of repatriation or integration as the primary solution, because it largely determines whether reconciliation and societal reconstruction is possible, both within the state and in between the liberated state and former occupying state.[2470] If settlers are perpetrators, there might be greater benefits in repatriating them, conditions allowing. In the alternative, settlers are victims of a state policy or have transferred to fulfil minimum existential needs, and it can be argued that the preferable solution is integration or a compromise. This is simply because settlers may also be in need of specific protection against the precariousness of their situation as victims or as vulnerable persons. Integration of the majority of settlers, however, will not absolve the responsibility of the perpetrator state nor of criminally implicated individuals.

The main effect of post-conflict settler integration is a reconfiguration of the people entitled to self-determine. In the eventuality settlers consent to live as equal and partake in a process of transitional justice accepted by the local/victim population, they should be entitle to exercise their right of self-determination on the same footing as the local people. The International Commission of Jurists explains who becomes a people for purpose of self-determination:

> the people exercising their right to self-determination are the totality of persons with a genuine and demonstrable link to a territory and its original community. This link is of course first and foremost derived from the shared characteristics

[2470] UNPO Conference Report*, Human Rights Dimensions of Population Transfer,* held in Tallinn, Estonia January 11-13 (1992) at 10.

> of a people as referred to above, while it can additionally be derived from an accumulation of a substantial number of years of residence in the territory, affiliation with its language and culture and an intention to reside in the territory and be part of the community in the future. Refugees residing outside the territory, and their offspring, are also included.[2471]

Based on this proposal, settlers, the local population and returnees may all be part of the people and equally entitled to self-determine. Through a transitional period, the illegality of the transfer of settlers is normalized.[2472] Under this scheme, settlers acquire the nationality of the new regime under a new nationality law; however, in most cases (e.g., East Timor, Estonia, and Latvia for instance), their presence during the illegal regime will not count for the purpose of naturalisation.[2473] The effect of this non-recognition is to nullify the validity of their presence under occupation by considering them foreigners for the purpose of naturalisation. [2474]

The case of the three Baltic States following the dissolution of the Soviet Union is an illustration of a progressive and rights-based integration of settlers that encompasses a number of the elements identified above. It will therefore be examined in light of these criteria. The Baltic States are considered clear examples of the interaction between national and international law in an endeavour to reconstruct identity and national interests in accordance with international law.[2475]

The Baltic States – Lithuania, Latvia and Estonia – were occupied and annexed by the Soviet Union in 1940 and subjected to a policy of russification through the expansion of Soviet values, ideals, and the Russian language.[2476] For instance, one quarter of the Estonian population perished under Soviet rule, thousands were deported to Siberia in 1941, 1945, and 1949 whereas Soviet settlers were gradually moved in – without much consultation – to live as a

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[2471] [Emphasis added] International Commission of Jurists, *Tibet: Human Rights and the Rule of Law* (1997) at 344

[2472] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 229.

[2473] Yaël Ronen, *ibid* at 248.

[2474] Yaël Ronen, *ibid* at 248.

[2475] See Harold Hongju Koh, "1998 Frankel Lecture: Bringing International Law Home" 35 Houston Law Review (1998-1999) 623 at 675-676.

[2476] Kristine Krūma, "Country Report: Latvia" (revised and updated 2013) EUDO Citizenship Observatory, RSCAS/EUDO-CIT-CR 2013/13 at 1, Online: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Latvia.pdf

closed society.[2477] Following the dissolution of the Soviet Union fifty years later, all three states regained their independence expressing the position they had been occupied by the USSR for fifty years.[2478] Initially, all three states reinstated pre-1940 citizenship laws excluding settlers who were then requested to apply for citizenship as any foreigners. The question of the status of Soviet settlers quickly became an issue in the 1990s, especially in Estonia and Latvia where the non-Baltic populations comprised over one third and nearly fifty percent of the population respectively.[2479] Latvia and Estonia wanted to preserve their national identity and political independence, which the presence of settlers from the previous regime was perceived as undermining. Despite such concerns, Estonia and Latvia quickly realized they could not to expel settlers *en masse*, effectively permitting them to remain.[2480] The main debate was thus about the legal statuses of settler populations; basically, about who is entitled to citizenship. Unsurprisingly, the process of inclusion and exclusion that entails citizenship took a bumpy road in the first few years following independence. Noteworthy, external pressure was exercised by the Council of Europe, among others, to make the process more 'settler/minority friendly'[2481] and conformed to international law.

In Estonia, the 1992 guidelines on the *Application of the Law on Citizenship* effectively reinstated pre-1940 citizenship law whereby only pre-occupation citizens were to make the base of citizenry. No dual citizenship was permitted. Those excluded – the majority of Soviet settlers (around a third of the population) – had to apply for naturalization after two years of permanent residence since 1990 and demonstrate command of the Estonian language.[2482] Stateless Soviet era settlers were given the option to repatriate to Russia, stay in Estonia with

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[2477] *UNPO Conference Report, Human Rights Dimensions of Population Transfer, held in Tallinn, Estonia January 11-13, 1992*, (1992) at 17-18.
[2478] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 210.
[2479] Lowell W Barrington, "The Making of Citizenship Policy in the Baltic States" (1998-1999) 13 Georgetown Immigration Law Journal 159 at 192; Yaël Ronen, *ibid* at 211; Oren Yiftachel and As'ad Ghanem, "Understanding 'ethnocratic' regimes" the politics of seizing contesyed territories" (2004) 23 Political Geography 647 at 660; Claire Palley, "Population Transfers" in Donna Gomien, ed, *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjørn Eide* (Oslo: Scandinavian University Press, 1993) 219 at 244.
[2480] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 251.
[2481] Yaël Ronen, *ibid* at 215-216, 251; Oren Yiftachel and As'ad Ghanem, "Understanding 'ethnocratic' regimes" the politics of seizing contested territories" (2004) 23 Political Geography 647 at 662; Lowell W Barrington, "The Making of Citizenship Policy in the Baltic States" (1998-1999) 13 Georgetown Immigration Law Journal 159 at 172.
[2482] Lowell W Barrington, *ibid* at 178; Yaël Ronen, *ibid* at 213, 235.

Russian citizenship or acquire citizenship from another country. In 1993, the *Citizenship Law* was broadened by waiving language and residency requirements for those who had applied prior to the elections after independence.[2483] Non-citizens could apply for a residency permit under the 1992 *Aliens Law*. In 1995, a new *Citizenship Law* was passed which was subsequently amended and now requires for naturalisation possession of a residence permit, residency of eight years, proficiency of the Estonian language, a permanent legal income, knowledge of the Constitution and Citizenship Act, and a oath of loyalty among others.[2484] The period following independence led to the emigration/repatriation of 133 000 Russians[2485], whereas citizenship came to be seen as an instrument of "containment of Soviet-era settlers."[2486]

According to Oren Yiftachel and As'ad Ghanem, "Estonian state policies in the 1989–2000 period clearly aimed to ensure the political, territorial and cultural dominance of ethnic Estonians by focusing on citizenship, culture, language and land."[2487] But are these policies really intended to "dominate" as much as reassert a nation's identity and sovereignty following decades of repression? Reclaiming self-determination as a collective can also be conceived as a necessary prelude to the integration of a group associated with the oppressor/occupying power and the foundation of a multinational state.[2488] Although by 2004 Yiftachel and Ghanem still considered Estonia to be an ethnocratic regime, they noted it appeared to be "undergoing a gradual process of democratization." [2489] This conclusion seems to confirm that

[2483] Lowell W Barrington, *ibid* at 179.
[2484] *Citizenship Act* (passed on 19 January 1995), Estonia, RT (State Gazette) I1995, 12, 122 (entered into force 1 April 1995) at chapt 2, art 6; Priit Järve & Vadim Poleshcnuk, "Country Report: Estonia" (last revised 2013) EUDO Citizenship Observatory, RSCA/EUDO-CIT-CR 2013/6 at 8-10, Online: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Estonia.pdf
[2485] Oren Yiftachel and As'ad Ghanem, "Understanding 'ethnocratic' regimes" the politics of seizing contested territories" (2004) 23 Political Geography 647 at 662.
[2486] Priit Järve & Vadim Poleshcnuk, "Country Report: Estonia" (last revised 2013) EUDO Citizenship Observatory, RSCA/EUDO-CIT-CR 2013/6 at 3, Online: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Estonia.pdf
[2487] Oren Yiftachel and As'ad Ghanem, "Understanding 'ethnocratic' regimes" the politics of seizing contested territories" (2004) 23 Political Geography 647 at 661.
[2488] For a discussion the relationship between an ethnic or political nation and a nation-state or a multinational one see at Lowell W Barrington, "The Making of Citizenship Policy in the Baltic States" (1998-1999) 13 Georgetown Immigration Law Journal 159 at183-187; Priit Järve & Vadim Poleshcnuk, "Country Report: Estonia" (last revised 2013) EUDO Citizenship Observatory, RSCA/EUDO-CIT-CR 2013/6 at 3-4, Online: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Estonia.pdf
[2489] Oren Yiftachel and As'ad Ghanem, "Understanding 'ethnocratic' regimes" the politics of seizing contesyed territories" (2004) 23 Political Geography 647 at 663.

democratization, reconciliation, and societal rebuilding is a generational process that follows a period of reassertion of national identity.

By 2010, Estonia had developed a dialogue process through the Council of Ethnic Minorities and a Roundtable of Nationalities; an *Equal Treatment Act*, prohibiting notably discrimination based on language and citizenship; a revised *Language Act* permitting regional language and other regional languages to appear next to Estonian on public signs, notices and advertisements.[2490] In 2010, the UN Committee on the Elimination of all Forms of Racial Discrimination noted with appreciation the Estonian Integration Strategy, but recommended Estonia adopts a non-punitive approach to the promotion of the Estonian language; to lessen language requirements for naturalization; and, to consider providing public services in dual language everywhere instead of only where minorities make up more than fifty percent of the population.[2491] However, by 2012, stateless Soviet-era settlers were still 6.8 percent of the population.[2492] Yet, the 13 amendments to the 1995 *Citizenship Law* indicate a liberalization of naturalization and greater democratic participation by a recomposed citizenry.

Latvian policy was considered more exclusive than Estonia as the perception of threat to the Latvian nation was much greater due to the number of settlers and the presence of the headquarters of the Soviet army.[2493] Latvia initially excluded settlers from citizenship, but it eventually allowed persons registered in the Residents' Register to naturalise progressively under the 1994 *Citizenship Law*, with some exceptions for military and intelligence personnel.[2494] Citizenship was conditional upon five years of residency after 1990, knowledge of Latvian language, the constitution and history, pledge of loyalty and a legitimate source of income among others.[2495] In 1995, an amendment to the *Citizenship Law* made eligible persons

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[2490] *Concluding Observations of CERD –Estonia*, UNCERD, 77th Sess, UN Doc CERD/C/EST/CO/8-9 (2010) at paras 5-8.
[2491] *Concluding Observations of CERD –Estonia*, *ibid* at para 13(a)(b)(c).
[2492] *Concluding Observations of CERD –Estonia*, *ibid* at para 15; Priit Järve & Vadim Poleshcnuk, "Country Report: Estonia" (last revised 2013) EUDO Citizenship Observatory, RSCA/EUDO-CIT-CR 2013/6 at 4, Online: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Estonia.pdf
[2493] Lowell W Barrington, "The Making of Citizenship Policy in the Baltic States" (1998-1999) 13 Georgetown Immigration Law Journal 159 at 191; Kristine Krūma, "Country Report: Latvia" (revised and updated 2013) EUDO Citizenship Observatory, RSCAS/EUDO-CIT-CR 2013/13 at 6, Online: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Latvia.pdf
[2494] *Citizenship Law* (adopted, 22 June 1994), Republic of Latvia (last amended 22 June 1998) at Chapt 2, Sect 11, para 1(4), 1(5) and 1(6); Kristine Krūma, *ibid* at 6.
[2495] Kristine Krūma, *ibid* at 12-13.

who had studied in Latvian, thus possibly including some settlers.[2496] Under international pressure from the European Union and NATO, Latvia further amended its *Citizenship Law* to grant citizenship to children born in Latvia after 1991 of stateless persons or non-citizens.[2497] Latvia developed the concept of non-citizens for former citizens of the former USSR as a compromise between State continuity and the need to avoid statelessness.[2498] The amended 1998 *Status of Former USSR Citizens Act* granted permanent residence to settlers and their children registered as resident before 1992 for no less than ten years, provided they are not citizens of Latvia or of any other state.[2499] Consequently, in 2007, an estimated 18 percent of former Soviet settlers were not Latvian (non-citizens) and could not hold public posts, work as lawyers, armed guards, or own land for instance.[2500] As in Estonia, this has pushed some Soviet-era settlers to leave the territory or take on Russian citizenship. Gradually, however, the differential treatment between Latvian citizens and non-citizens is expected to disappear.[2501] Yet, Kristine Krūma interestingly notes that "the policies advocated by both international organisations and Russia requiring more rights for non-citizens have resulted in a lack of motivation and incentives for them to naturalise."[2502] Whereas some settlers decided to leave because they were unable or unwilling to fulfil the criteria for citizenship and feared the insecurity of the non-citizen status, others accepted the relative security provided by the status of non-citizens and did not seek to further integrate by seeking citizenship. Settlers' capacity and willingness to integrate was thus tested through citizenship.

[2496] *Law on the Status of Former Soviet Citizens who are not Citizens of Latvia or any Other State* (last amended 25 September 1998) Latvia at Sec 2, para 1.3.
[2497] *Law on the Status of Former Soviet Citizens who are not Citizens of Latvia or any Other State*, *ibid* at Sec 3, para 1; Kristine Krūma, "Country Report: Latvia" (revised and updated 2013) EUDO Citizenship Observatory, RSCAS/EUDO-CIT-CR 2013/13 at 10, Online: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Latvia.pdf
[2498] *Law on the Status of Former Soviet Citizens who are not Citizens of Latvia or any Other State*, Official Gazette No 63, 25 April 1995 cited in Kristine Krūma, *ibid* at 7.
[2499] *Law on the Status of Former Soviet Citizens who are not Citizens of Latvia or any Other State* (last amended 25 September 1998) Latvia at Sec 1, para 1.
[2500] Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 216; Lowell W Barrington, "The Making of Citizenship Policy in the Baltic States" (1998-1999) 13 Georgetown Immigration Law Journal 159 at 164.
[2501] Kristine Krūma, "Country Report: Latvia" (revised and updated 2013) EUDO Citizenship Observatory, RSCAS/EUDO-CIT-CR 2013/13 at 21, Online: http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Latvia.pdf
[2502] Kristine Krūma, *ibid* at 22-23.

The regional context may also explain Latvia's policy. Indeed, faced with the 2008 Russian Foreign Policy Concept and "demographically and linguistically weak, the Latvian majority is not well placed to live with a big post-imperial minority that is politically supported by a non-democratic neighbouring state."[2503] In sum, the first decade of Latvian independence was tumultuous in terms of reconstructing national identity and citizenry, but is telling of the need for a gradual process of societal reconstruction.

In contrast, Lithuania had a smaller settler community perceived as less of a threat. Consequently, a more inclusive citizenship law allowed nearly 95 percent of the population to be citizens by 1994.[2504] Under the 1989 *Citizenship Law* pre-1940 citizens and descendants were included as well as all permanent residents born in Lithuania or with one parent or grandparent born there.[2505] Those still excluded by the law were given two years to choose Lithuanian citizenship conditional upon a pledge of loyalty, employment or a legitimate source of income.[2506] In 1991, Lithuania passed a more restrictive citizenship law eliminating automatic and dual citizenship but this law was gradually amended to become once more inclusive.[2507]

Applying the factors identified above to the Baltic states, it may be possible to make a number of summary conclusions, which do require deeper analysis, but can nevertheless be said to demonstrate a relatively successful rights-based response to settler transfer. In relation to the first factor on demographic, in both Latvia and Estonia, the number of settlers was an issue that mitigated against a speedier and smoother integration of the group as a minority in a multinational State whereas in Lithuania, the smaller number made integration easier. The variances in the treatment of Soviet era settlers by Lithuania, Estonia and Latvia can therefore largely be attributed to demographics and to the extent of military presence. However, in all three cases – Lithuania, Latvia and Estonia – settlers who also happened to be members of Russian military forces were perceived as a fifth column and excluded from citizenship, and,

[2503] Kristine Krūma, *ibid* at 24.
[2504] Lowell W Barrington, "The Making of Citizenship Policy in the Baltic States" (1998-1999) 13 Georgetown Immigration Law Journal 159 at 167, 188.
[2505] Lowell W Barrington, *ibid* at 168.
[2506] *Lithuanian Citizenship Law*, 1989, art 1(3) cited in Yaël Ronen, "Status of Settlers Implanted by Illegal Territorial Regimes" in James Crawford &Vaughan Lowe, eds, *British Yearbook of International Law 2008* (Oxford: Oxford University Press, 2009) 194 at 212; Lowell W Barrington, *ibid* at 168.
[2507] Lowell W Barrington, *ibid* at 168-171.

in some some cases, from permanent residence.[2508] It thus confirms that larger numbers require a slower and more sensitive process of integration not to undermine renewed self-determination by the local population following decades of oppression.

Regarding the second factor on the level of integration, and although settlers had been transferred in different waves since WWII, an important number had been in the territory for a long period and considered it their home. This is demonstrated by the fact that a not insignificant number chose to remain, despite the option to repatriate to Russia. However, some elements of their integration were deemed unsatisfactory, which justified language and historical requirements in all three countries. Notions of integration and attachment demonstrate that settlers need to make efforts to integrate with the local population, not unlike immigrants. These efforts also contribute to reconciliation by erasing their formerly privileged status.

The third factor pertaining to individual criminal responsibility did not appear to be an important issue as most settlers had a limited choice to refuse transfer under Soviet rule. Whether individual settlers knew their transfer was a violation of international law at the time is also debatable. Settlers may have consented to move and enjoyed advantageous conditions, yet it is unlikely they could be held criminally responsible for having moved into the occupied territory which by then was considered part of the Soviet Union.

This brings into play the fourth element concerning violations committed by the regime and reparation. Although Russia recognized annexation, it still has to offer reparation for the violations committed during its occupation such as an official apology and assistance for the return and reintegration of displaced persons.[2509] Lack of reparative measures on the part of Russia is undermining reconciliation and relations between Russia and the Baltic States. However, Baltic States did institute programs of property restitution for victims, many of which

[2508] See for instance *Status of Former USSR Citizens Act*, 25 September 1998, Latvia, section 1 (3); *Citizenship Act* (passed on 19 January 1995), Estonia, RT (State Gazette) I1995, 12, 122 (entered into force 1 April 1995) at Art 21 (1).
[2509] Requests for compensation for displaced persons in particular remains an important issue. See for instance *Law of the Republic of Lithuania on Compensation of Damage Resulting from the Occupation by the USSR*, 13 June 2000, Lithuania, No VIII-1727.

had been inhabited by settlers.[2510] Again, realizing victims' rights come to the fore as perhaps the main weakness of the response to the transfer of settlers.

On the other hand, the fact that the end of occupation was carried out in a largely peaceful fashion greatly facilitated the resolution of settlers' fate and protection of their rights. The relatively peaceful manner by which Baltic States regained their independence laid the ground work for societal reconstruction. Factor five concerning the post-conflict political context seems to confirm that a negotiated end to the occupation allows for greater protection of settlers' rights. This last point is not unrelated to the next factor, according to which a consensual resolution of settlers' fate allows for more options as to their status and choice of residence (stay, repatriate or resettle elsewhere) than a unilateral decision.

Lastly, international scrutiny was important in the Baltic States and this undeniably contributed to moderating positions by bringing them closer to international law. The case of the Baltic States highlights that the integration of settlers is a gradual, generational, process of reconciliation and reparation part of a transitional project of societal reconstruction. It however also tends to confirm that victims' rights remain secondary to settlers' rights.

International humanitarian law does not recognize any status granted to settlers by the occupying or illegal regime and actually requires prosecution for this grave breach and reparations; international criminal law similarly entails international individual responsibility for the crime; and, the international law of state responsibility orders the perpetrator to guarantee non-recognition, cessation and reparations, including where possible, return to the

[2510]"Property restitution became a cornerstone of Estonia's Law on the Fundamentals of Ownership Reform, adopted on 13 June 1991. Even though a panel of foreign legal experts had argued that the astronomic costs of mass restitution were prohibitive for Estonia, the process was launched nonetheless, arguably because the legislators felt that the difficulties of dealing with thousands of cases and disrupting the existing patterns of residence should not be an obstacle to achieving justice. Thus, restitution is an ideological and political project as much as a legal or economic one. [...] According to the Estonian Association of Restitutional Owners, a total of around half a million Estonians, nearly one third of the country's population, are involved as owners or family members in the 220 000 claims for restitution." Merje Feldman, "Justice in Space? The Restitution of Property Rights in Tallinn, Estonia" (1999) 6 Cultural Geographies 165 at 168.

status quo ante for wrongful state actions.[2511] Although these fields of international law tend to favour the protection and re-establishment of victims' rights, practice is otherwise, due to the prominence of individual human rights protection and the legal effect of *faits accomplis* combined to a certain dose of pragmatism.

The story of conflicting rights is a tale of *ex-post-facto* responses largely resulting in the integration of settlers. In most situations where settlers did not withdraw with the army in a unilateral fashion, they acquired rights and cannot be removed from the territory for reasons of humanity, privacy and family life. This reality attests to the difficulty of undoing the legal consequences of settler transfer in a dignified manner and to the power of facts on the ground.

The right of victims to self-determination and reparations, in particular restitution, often continue to be secondary, and this, especially when the fate of settlers is not concurrent with an end of the occupation. The subordination of victims' rights undermines the quality of a rights-based response and diminishes the effectiveness of the intertwined, albeit independent, international state responsibility and international individual criminal responsibility required by international law and, more broadly, by justice.[2512] Application of the proportionality test to resolve the conflicting rights of settlers and victims shows the need to develop a more elaborate mechanism of balancing rights. The current imbalance towards greater protection of settlers' rights puts at the forefront the need to tilt the scale towards greater enforcement of the reparatory obligations of the responsible state, even if this means settlers are repatriated to their country of origin or reinstalled elsewhere in the formerly occupied territory.

[2511] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (2001), 53rd Sess, UNGAOR, UN Doc A/56/10, II:2 Yearbook of the International Law Commission, Art 10(1) at 50, Art 31 at 91.
[2512] On a concomitant treatment of responsibility, see Antônio Augusto Cançado Trindade, *International Law for Humankind, Towards a New Jus Gentium*, 2nd ed (Leiden: Martinus Nijhoff Publishers, 2013) at 372-374, 380.

CONCLUSION – ENSURING GREATER PROTECTION AND JUSTICE BY FILLING THE GAPS

This thesis has identified definitional, interpretative and practical gaps with regard to the treatment of population transfer in international human rights, international humanitarian law and international criminal law and by the international community. The ten following solutions would fill the most important gap to the law prohibiting population transfer.

1. Construe population transfer as unlawful

Population transfer may be lawful under international human rights law and international humanitarian law when deemed 'voluntary'. Lawfulness is mainly determined by collective or individual consent. But consent is problematic for two main reasons: (1) first, transfer takes place under coercion, inherent to armed conflict; second, (2) collective transfer is not respectful of individual choice. Moreover, lawful transfer is an anachronistic legal construct at countercurrent with international human rights law since it reinforces the separation of nations as a solution. Because it leaves the door open to distortion, population transfer must be construed as unlawful under international law. Making population squarely unlawful will effectively close the door to lawful 'voluntary' transfer based on a malleable definition of consent and will pre-empt states from recognizing the legal consequences of the crime.

2. Provide a binding definition of population transfer under IHRL

International human rights law began to seriously study population transfer in the 1990s. Despite efforts to define population transfer in the *Draft Declaration on Population Transfer and the Implantation of Settlers*, no clear, binding definition of population transfer exists. The main advantage of the proposed definition is that it goes to the heart of what transfer is about, encompassing both internal and external displacements, international and non-international armed conflicts, as well as the crime of deportation and population transfer in international humanitarian and international criminal law. However, it reiterates the notion of lawful transfer and conceives transfer as a collective violation, not an individual one, as is the case in IHL and ICL. The proposed definition of population transfer should remove: (1) the notion of lawful

transfer; and (2) add population transfer as affecting both individuals and collectives to be in line with international humanitarian law and international criminal law. However, there seems to be little international interest to relaunch talks on a definition of population transfer under international human rights law.

The prohibition of population transfer would facilitate a purposive approach aimed at recognizing and protecting rights. Indeed, a binding definition of population transfer under IHRL would strengthen protection of rights, further comprehension of the prohibition for all relevant actors and facilitate its application by courts. More precisely, such definition would recognize the right to stay in one's home and homeland as counterpart to the right to freedom of movement and reaffirm the obligation to protect against population transfer. This definition would also permit an examination by courts of the act of displacement, and not only of ongoing violations flowing from displacement, as current case law does. Ultimately, a binding definition would contribute to greater semantical clarity, as international human rights law is terminologically prolific, but often at the expense of clarity.

3. Clarify terminology pertaining to forced displacement in IHRL

There is no clear terminology pertaining to displacement in international human rights law. Population transfer is used interchangeably with other related concepts, such as mass expulsion, forced or arbitrary displacement, forcible eviction, deportation, 'ethnic cleansing', etc. An analysis of these concepts situates population transfer on the same level as arbitrary displacement and mass expulsion because they originate from the same rights: freedom of movement, right to housing, freedom from interference with one's home and family, right to choose one's residence, right not to be arbitrarily exiled and right to a nationality. Essentially, they are referring to a right to stay in one's home. To protect rights more effectively, international human rights law needs to define and distinguish between relevant concepts.

4. Streamline definitions of the crime of deportation and population transfer in ICL

There are too many categories of the crime against humanity and war crime of deportation and population transfer. For instance, there are three categories of the crime of deportation and population transfer as crimes against humanity under the *Statute of the International Criminal*

Tribunal for the former Yugoslavia and four categories of deportation and population transfer as war crimes under the *Statute of the International Criminal Court*. Each definition possesses different elements, which makes proof that the crime occurred subject to different criteria. Such inflation undermines a systemic definition and interpretation of the crime under international criminal law.

5. Ensure international criminal law protects dignity and not technicality

A number of issues undermine a purposive interpretation of the law on population transfer attuned to the changing realities of armed conflict notably, indeterminacy as to the definition of border in customary international law. By focussing on the destination of the displaced, for instance, international criminal law has adopted an overly formalistic reading of the law on population transfer and deportation at countercurrent with the purpose of the law. A purposive interpretation should emphasise human rights protected by the prohibition of deportation and population transfer, namely the right to stay in one's home, community and land, above what can be considered a technical or formalistic interpretation based on the status of the boundary crossed.

The interpretation of the law pertaining to deportation and population transfer needs to be actualized to fit the nature of contemporary armed conflicts and the spirit of the law. The central issue to the treatment of population transfer in international and non international armed conflicts is coherence in the application of the norm prohibiting population transfer and the equal treatment of civilians in like situations. This means international humanitarian and international criminal law should afford all civilians the same protection against population transfer regardless the type of conflict. Part of the solution, therefore, is to conceive deportation and population transfer as one crime regardless the type of armed conflict.

6. Address the indeterminacy of the law of self-determination

The best way to undermine peoples' right of self-determination is through population transfer. A people victim of population transfer can hardly rely on the law of self-determination for protection. This is especially true when a people is not recognized an external right to self-determination and is faced with the alegal coin of the law of self-determination, namely the *ad hoc* and *ex post facto* solution that is remedial secession or when they are recognized an

external right to self-determination, but the state in which they live is in *statu nascendi*. The weakness of the law of self-determination is further compounded when self-determination is combined to the transfer of settlers, an exercise which can actually undermine the right to self-determination of victims by blurring their preferred solution. Hence, the law of self-determination, because of its indeterminacy when it comes to who is a people entitled to self-determination, remedial secession, the protection of states in *statu nascendi* and its treatment of settlers favoring facts on the ground is of little help to victims of population transfer.

Perhaps, secession should be conceived as a protective measure to remedy situations of population transfer, in particular in the case of settler transfer as it allows the distantiation of the victim from the perpetrator and the furtherance of its empowerment as a collective. In this regard, developing something akin to "protective secession" is core to making clear and tangible the right of self-determination and the accountability-driven concept of sovereignty as responsibility.

7. Strengthen the international law of recognition

The law of non-recognition has been developing since the 1930s, but is not entirely shielded against third state recognition, a certain dose of prescriptive acquisition and cession through peace treaties. The main problem rests on the false dichotomy between an illegal act and its legal consequences. By recognizing as legal the consequences of an illegal act, the law of recognition allows recognition of conquest, albeit indirectly. Time is incremental to such recognition closely tied to geopolitical considerations.

For greater certainty and a more predictable and humane response in the long run, the legal response to the crime of population transfer in armed conflict is nullity, not illegality. Population transfer breaches peremptory norms which should carry no legal consequence if it is to uphold the prohibition on the use of force, protect statehood and the right to self-determination of peoples. In this regard, the law of recognition must give greater weight to the will of the people than the will of states. Such shift in the law of recognition has already begun, but must be completed so as not to further reward the fruit of conquest.

8. Counter the rule of facts through state and individual responsability

The international response to population transfer generally calls for non-recognition and respect for the right to self-determination of peoples. But that is often as much as it does. In many cases, relevant international human rights and humanitarian law provisions are absent, particularly Article 49 of the *Fourth Geneva Convention*. In addition, state responsibility and individual criminal responsibility rarely feature prominently in the international response. An international legal framework constrained by states and other competing interests combined to impunity supports the realist and pragmatic contention according to which the solution is to be found in *de facto* recognition of the situation or in accommodation between competing claims. At this point, peace and stability often mean that the rule of *faits accomplis* dictates the application of the rule of law.

International law must develop clearer guidelines as to what states must do to ensure cessation of violations of international law. Crucial is enforcement of the law of state and individual responsibilities instead of repeated denunciations and calls for non-recognition that are known to fade into *de facto* and *de jure* recognition of the legal consequences of serious violations of international law over time. A more effective response aligned with the rule of law will emerge as a more cogent international law of responsibility evolves, treating concomitantly and more systematically international state responsibility and individual criminal responsibility.

9. Improve access to justice in foreign national courts and international courts

The national courts of a belligerent should not rule on the crime of population transfer. The nature of the crime with deep roots into the identity of the state and the people involved makes it difficult for courts not to legitimize population transfer, either directly or through avoidance.

States, victims and civil society organizations should have greater access to foreign national courts as well as regional and international courts in situations involving population transfer. What is therefore needed is more than a systemic interpretation of the crime of population transfer; it is a systemic application of the crime of population transfer through greater access to justice, ideally through compulsory and universal jurisdiction.

10. Develop a model to resolve conflicting settler and victim rights

The right of victims to a remedy is seldom, if ever, a prominent feature in the search for a solution to the transfer of settlers. In situations where settlers are not repatriated by their state,

the international response is largely complaisant of *faits accomplis* resulting in a tilted balance favouring the *status quo* to the detriment of the rights of victims to a remedy. Absent therefore from the international response are guidelines on how to address the legal consequences of settler transfer, especially in the context of peace negotiations, transitional justice and democratic regime-change.

To rebuild relations, a rights-based response must protect the rights of all individuals considering the particularities of each situation. I propose a rights-based response to result from a careful contextual evaluation that considers seven factors namely: The number of settlers and of persons displaced; The duration of settlers' presence in the territory, the level of integration with the local community, and attachment to the place; Settlers' individual in/voluntary participation in or knowledge of the commission of the crime of population transfer and other serious violations of international law; The nature of the occupation regime; The post-conflict political context in which settlers' fate is decided and willingness on part of all to build a shared community of values; The freely expressed choice of individual settlers and victims as to whether they want to live as one people or return to their original home or settle somewhere else; International scrutiny to ensure respect with international law.

In conclusion, this study is the beginning of a larger research project that should entail further work on: (1) the crime of confinement; (2) the development of an integrated definition of population transfer across all three relevant fields of law; (3) the jurisprudence of regional human rights courts and international criminal courts in light of a systemic conception and purposive interpretation of the crime; (4) the status of 'border' under international customary law; (5) the notions of remedial secession for peoples victims of population transfer; (6) 'Protective recognition' for states in *statu nascendi*; (7) access to foreign national courts and regional and international courts by victims and civil society; and, (8) the transfer of children, especially indigenous children and child soldiers, as the crime of genocide.

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