UNITED NATIONS

E

Economic and Social Council

E/CN.4/Sub.2/1994/18
30 June 1994

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-sixth session
Item 8 of the provisional agenda

THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS
The human rights dimensions of population transfer, including the implantation of settlers
Progress report prepared by Mr. Awn Shawhat Al-Khasawneh, Special Rapporteur

CONTENTS

		paragraph	*page*
Introduction		1 - 9	2
I.	HUMAN RIGHTS AND POPULATION TRANSFER: THE NORMATIVE STRUCTURE	10 - 17	4
II.	HUMAN RIGHTS STANDARDS CONCERNING THE TRANSFER OF POPULATIONS	18 - 56	5
III.	POPULATION TRANSFERS AND DEROGATION	57 - 62	14
IV.	POPULATION TRANSFER AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS	63 - 64	15
V.	POPULATION TRANSFER AND THE LAW OF ARMED CONFLICT	65 - 86	15
VI.	STATE RESPONSIBILITY AND POPULATION TRANSFER	87 -123	18

GE.94-13162 (E)

Introduction

1. In resolution 1992/28 of 27 August 1992, the Sub-Commission entrusted Mr. Awn Shawkat Al-Khasawneh and Mr. Ribot Hatano, as Special Rapporteurs, with preparing a preliminary study on the

human rights dimensions of population transfer, including the implantation of settlers and settlements, and requested them to examine, in the preliminary study, the policy and practice of population transfer, in the broadest sense, with a view to outlining the issues to be analysed in further reports, in particular the legal and human rights implications of population transfer and the application of existing human rights principles and instruments, and to submit the preliminary study to the Sub-Commission at its forty-fifth session.

2. This decision was endorsed by the Commission on Human Rights, at its forty-ninth session, in decision 1993/104 of 4 March 1993 and approved by the Economic and Social Council, by its decision 1993/288 of 28 July 1993.

3. In resolution 1993/34 of 25 August 1993, the Sub-Commission, at its forty-fifth session, took note with appreciation of the preliminary report on the human rights dimensions of population transfer, including the implantation of settlers and settlements (E/CN.4/Sub.2/1993/17 and Corr.1) submitted by Mr. Awn Shawkat Al-Khasawneh and Mr. Ribot Hatano, which found, inter alia, that population transfer is, prima facie, unlawful and violates a number of rights affirmed in human rights and humanitarian law for both transferred and receiving populations, and endorsed the conclusions and recommendations of the preliminary report. Furthermore, the Sub-Commission regretted that Mr. Hatano was unable to be further involved in the work on this subject as one of the Special Rapporteurs, and requested Mr. Al-Khasawneh, as Special Rapporteur, to continue the study on the human rights dimensions of population transfer, including the implantation of settlers and settlements and to submit a progress report on the question to the Sub-Commission at its forty-sixth session.

4. In the same resolution the Sub-Commission invited the Commission on Human Rights, at its fiftieth session, to request the Secretary-General to organize a multidisciplinary expert seminar prior to the preparation of the final report, in order to formulate appropriate final conclusions and recommendations. It also requested the Secretary-General to invite Governments, United Nations bodies and intergovernmental and non-governmental organizations concerned to provide the Special Rapporteur with information relevant to the preparation of his reports. It finally invited the Commission on Human Rights to request the Special Rapporteur to undertake on-site visits to diverse, ongoing cases of population transfer selected on the basis of information received for the next report.

5. At its fiftieth session, the Commission on Human Rights, noting Sub-Commission resolution 1993/34 adopted decision 1994/102 of 25 February 1994, in which it endorsed the resolution of the Sub-Commission.

6. On 29 March 1994 a note verbale and letter were sent to Governments, United Nations bodies and intergovernmental and non-governmental organizations concerned, in accordance with Commission

decision 1994/102, to solicit information relevant to the preparation of the reports. So far replies have been received from the following States: Cyprus, Latvia, Pakistan, Saudi Arabia; the following United Nations bodies: Economic Commission for Latin America and the Caribbean (ECLAC), Economic and Social Commission for Asia and the Pacific (ESCAP), International Research and Training Institute for the Advancement of Women (INSTRAW), United Nations Conference on Trade and Development (UNCTAD), United Nations Department for Development Support and Management Services, United Nations Development Programme (of Assistance to the Palestinian People), United Nations Fund for Population Activities (UNFPA), United Nations University; the following specialized and other agencies: Food and Agriculture Organization of the United Nations (FAO), International Labour Organisation, World Bank; the following intergovernmental organizations: Conference on Security and Cooperation in Europe, International Court of Justice, Organisation for Economic Cooperation and Development, and the following non-governmental organizations and other institutions: All Pakistan's Women's Organization, International Confederation of Midwives, Minority Rights Group, Palestinian Human Rights Information Centre, Syracuse University, The Tibet Bureau, University of Utrecht, Unrepresented Nations and People's Organization, World Federation of Free Latvians.

7. The Special Rapporteur wishes to acknowledge with gratitude the invitations extended to him to visit countries to appraise himself more fully of certain population transfer situations. He intends to do so, circumstances permitting, prior to the submission of the final report. Likewise, the Special Rapporteur wishes to take this opportunity to thank all those who have provided him so far with information. It is his intention to return in more detail to the wealth of information which these replies contained, in the preparation of his final report.

8. Further to the preliminary recommendations made by the Special Rapporteurs in their preliminary report, the aim of the present report is to examine in greater detail the legality of the issue of population transfer with the objective of elaborating criteria according to which the transfer of populations may be prohibited or justified. The mode of analysis of the subject matter at hand follows the perspective of international law, including the law of human rights, the law of armed conflict, and the law of State responsibility.

9. Part I of the report considers the normative structure of international law and human rights with respect to population transfers. It sets the legal context within which the treatment of population transfer is approached. Parts II and III examine the human rights dimensions of internal and international transfers of populations respectively, and includes, in this context, analysis of the standards pertaining to the legality of such population transfers. In part IV, brief consideration is given to the relation of economic, social and cultural rights to mass movements of populations. Population transfer under the Law of Occupation is

discussed in part V, and part VI is devoted to the question of State responsibility and the movement of populations. Conclusions and Recommendations can be found in part VII.

...

34. In the wake of the peace agreements between Israel and the Palestine Liberation Organization, there is little doubt that the existence of Jewish settlements in the Occupied Territories has become one of the thorniest problems and can therefore be seen as an obstacle to the achievement of a just peace.

35. These events confirm the illegality of the original act of implanting settlers and show not only the impropriety of attempts to establish hegemony over a subject population group for political reasons, but also that the policy of implantation and assimilation of heterogenous population groups is problematic.

36. The protection afforded by human rights standards in international law against the arbitrary transfer of populations and the implantation of settlements and settlers can further be seen in the application of the standards concerning freedom of movement and residence within States. Beyani, Restrictions on Internal Freedom of Movement and Residence in International Law, D.Phil thesis, Oxford, 1992.
Freedom of movement and residence within States is established as an integrated right containing a general principle to which restrictions are the exceptions and not the rule. The classic formulation of the right of persons to move freely and choose their place of residence within States is evident from article 12 (1) and (3) of the International Covenant on Civil and Political Rights:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his place of residence.
>
> "3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." (emphasis added)

...

54. A very significant aspect of population transfers takes place through the right to return. International practice shows that the right to return forms the basis for claims of a displaced population to the return to places of origin on a voluntary footing. As early as 1948, the General Assembly resolved, in resolution 194 (111), that Palestinian refugees wishing to return

to their homes and live at peace with their neighbours should do so at the earliest practical date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under the principles of international law or in equity, should be made good by the Governments or authorities responsible.

55. In practice, the return of a displaced population is a complex exercise which involves the role of international agencies. For the right to return requires the facilitation of repatriation, resettlement and economic and social rehabilitation of returnees by means of international arrangements or agreements. For those not wishing to return, the right to leave and return encapsulates the right to remain, which is evidently receiving some recognition. In recommendation 1154 (1991) on North African migrants in Europe, the Council of Europe recommended as follows: Council of Europe, Activities of the Council of Europe in the Field of Migration (Strasbourg, 1993) p. 45.

> "The fact that more than two million North African migrants are settled in Europe is no longer a temporary situation but a permanent one. The Council of Europe must provoke wide-ranging dialogue between the political leaders in the host countries, the countries of origin and representatives of North African migrants, so as to define the broad outlines of an integration policy."

56. Further discussion of the right to leave, remain and return, follows under the section on armed conflict below. For now, attention is drawn to the problem of forcible population transfers and derogation of rights.

...

80. The inadequacy of the protection afforded by humanitarian law to a civilian population under military occupation is particularly apparent in situations of prolonged military occupation and where, moreover, the belligerent occupant harbours designs of settlement and colonization upon the occupied territory.

81. In such situations, the authorities of the military occupant and their supporters may resort to exotic legal reasoning to justify forcible population transfer and/or the implantation of settlements. For instance, with regard to the Israeli occupation, Israel has argued for the inapplicability of the Fourth Geneva Convention on grounds that the territory in question was terra nullius, the ousted sovereign not having had title in the first place and the belligerent occupant possessing superior title having acquired it through self-defence. Yehuda Z. Blum, Secure Boundaries and the Middle East Peace In the Light of International Law and Practice, (Jerusalem, 1971) pp. 63-109. The inherent danger of abuse in predicating title to territory on unilaterally asserted

pleas of self-defence have been vividly illustrated by Judge Jenning's above-quoted passage. Jennings, op. cit., p. 55.

82. The important point to underscore is that many cases of occupation result from disputes relating to territorial claims; the whole concept of humanitarian protection would collapse if a State could successfully assert that humanitarian law is inapplicable because it claims better title to the territory under occupation than the ousted sovereign. The position taken by the international community emphatically denies any such title upon an Occupying Power. See, for example, Security Council resolution 242(XXII) of 22 November 1967, in which the Council emphasized the inadmissibility of the acquisition of territory by war. And it is extremely doubtful whether the discredited concept of res nullius has any application in the late twentieth century. This shift is evident in a recent decision of the Australian Supreme Court in the case of Mabo (No. 2) See 1 Common Law Report 175 (1992). where it stated that territory which was occupied by native Aborigines in Australia was not terra nullius.

83. Another argument to justify the implantation of settlers and settlements is that such implantation within the meaning of article 49 of the Fourth Geneva Convention is prohibited only to the extent that it bears directly to the expulsion or transfer of the inhabitants of the occupied territory. For a discussion of these issues, see Emma Playfair, Administration of Occupied Territories in International Law (Oxford, 1991). This claim finds no support in the plain meaning of the words of article 49 or in the intention of the drafters of the Fourth Geneva Convention and has been similarly rejected by the international community. Thus, for example, in Security Council resolution 484 of 19 December 1980, the Council reaffirmed the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 to all the Arab territories occupied by Israel in 1967, and called upon Israel as the Occupying Power to adhere to the provisions of the Convention.

84. An authoritative legal opinion on this issue was given in the Letter of the State Department Legal Advisor, Mr. Herbert J. Hansell, Concerning the Legality of Israeli Settlements in the Occupied Territories of 21 April, 1978. International Law Materials (1978) 777-779. In that Letter, the Legal Advisor to the State Department of the United States stated as follows:

> "Dear Chairmen Fraser and Hamilton:
>
> Secretary Vance has asked me to reply to your request for a statement of legal considerations underlying the United States view that the establishment of the Israeli civilian settlements in the territories occupied by Israel is inconsistent with international law. Accordingly, I am approving the following in response to that request:

The Territories Involved

The Sinai Peninsula, Gaza, the West Bank and the Golan Heights were ruled by the Ottoman Empire before World War I. Following World War I, Sinai was part of Egypt; the Gaza strip and the West Bank (as well as the area east of the Jordan) were part of the British Mandate for Palestine; and the Golan Heights were part of the French Mandate for Syria. Syria and Jordan later became independent. The West Bank and Gaza continued under British Mandate until May 1948.

In 1947, the United Nations recommended a plan of partition, never effectuated, that allocated some territory to a Jewish state and other territory (including the West Bank and Gaza) to an Arab state. On 14 May 1948, immediately prior to British termination of the Mandate, a provisional government of Israel proclaimed the establishment of a Jewish state in the areas allocated to it under the Jewish plan. The Arab League rejected partition and commenced hostilities. When the hostilities ceased, Egypt occupied Gaza, and Jordan occupied the West Bank. These territorial lines of demarcation were incorporated, with minor changes, in the armistice agreements concluded in 1949. The armistice agreements expressly denied political significance to the new lines, but they were de facto boundaries until June 1967.

During the June 1967 war, Israeli forces occupied Gaza, the Sinai Peninsula, the West Bank and the Golan Heights. Egypt regained some territory in Sinai during the October 1973 war and in subsequent disengagement agreements, but Israeli control of the other occupied territories was not affected, except for minor changes on the Golan Heights through a disengagement agreement with Syria.

The Settlements

Some seventy-five Israeli settlements have been established in the above territories (excluding military camps on the West Bank into which small groups of civilians have recently moved). Israel established its first settlements in the occupied territories in 1967 as para-military 'nahals'. A number of 'nahals' have become civilian settlements as they have become economically viable.

Israel began establishing civilian settlements in 1968. Civilian settlements are supported by the government, and also by non-governmental settlement movements affiliated in most cases with political parties. Most are reportedly built on public lands outside the boundaries of any municipality, but some are built on private or municipal lands expropriated for the purpose.

Legal Considerations

1. As noted above, the Israeli armed forces entered Gaza, the West Bank, Sinai and the Golan Heights in June 1967, in the course of an armed conflict. Those areas had not previously been part of Israel's sovereign territory nor otherwise under its administration. By reason of such entry of its armed forces, Israel established control and began to exercise authority over these territories; and under international law, Israel became a belligerent occupant of these territories.

Territory coming under the control of a belligerent occupant does not thereby become its sovereign territory. International law confers upon the occupying State authority to undertake interim military administration over the territory and its inhabitants; that authority is not unlimited. The governing rules are designed to permit pursuit of its military needs by the occupying power, to protect the security of the occupying forces, to provide for orderly government, to protect the rights and interests of the inhabitants, and to reserve questions of territorial change and sovereignty to a later stage when the war is ended. See L. Oppenheim, 2 International Law 432-438 (7th ed., H. Lauterpacht ed., 1952); E. Feilchenfield, The International Economic Law of Belligerent Occupation 4-5, 11-12, 15-17, 87 (1942); M. McDougal & F. Feliciano, Law and Minimum World Public Order 734-46, 751-7 (1961); Regulations annexed to the 1907 Hague Convention on the Laws and Customs of War on Land, Articles 42-56, 1 Bevans 643; Department of the Army, The Law of Land Warfare, Chapter 6 (1956) (FM-27-10).

'In positive terms, and broadly stated, the Occupant's powers are (1) to continue orderly government, (2) to exercise control over and utilize the resources of the country so far as necessary for that purpose and to meet his own military needs. He may thus, under the latter head, apply its resources to his own military objects, claim services from the inhabitants, use, requisition, seize or destroy their property, within the limits of what is required for the army of occupation and the needs of the local population.

But beyond the limits of quality, quantum and duration thus implied, the Occupant's acts will not have legal effect, although they may in fact be unchallengeable until the territory is liberated. He is not entitled to treat the country as his own territory or its inhabitants as his own subjects..., and over a wide range of public property, he can confer rights only as against himself, and within his own limited period of de facto rule. J. Stone, Legal Controls of International Conflict, 697 (1959).'

On the basis of the available information, the civilian settlements in the territories occupied by Israel do not appear to be consistent with these limits on Israel's authority as belligerent occupant in that they do not seem intended to be of limited duration or established to provide orderly government of the territories and, though some may serve incidental security purposes, they do not appear to be required to meet military needs during the occupation.

2. Article 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, provides, in paragraph 6:

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

Paragraph 6 appears to apply by its terms to any transfer by an occupying power of parts of its civilian population, whatever the objective and whether involuntary or voluntary. Paragraph 1 of article 49 prohibits "forcible" transfers of protected persons out of the occupied territory; paragraph 6 is not so limited. It seems clearly to reach such involvements of the occupying power as determining the location of the settlements, making land available and financing of settlements, as well as other kinds of assistance and participation in their creation. And the paragraph appears applicable whether or not harm is done by a particular transfer. The language and history of the provision lead to the conclusion that transfers of a belligerent occupant's civilian population into occupied territory are broadly proscribed as beyond the scope of interim military administration.

The view has been advanced that a transfer is prohibited under paragraph 6 only to the extent that it involves the displacement of the local population. Although one respected authority, Lauterpacht, evidently took this view, it is otherwise unsupported in the literature, in the rules of international law or in the language and negotiating history of the Convention, and it seems clearly not correct. Displacement of protected persons is dealt with separately in the Convention and paragraph 6 would seem redundant if limited to cases of displacement. Another view of paragraph 6 is that it is directed against mass population transfers such as occurred in World War II for political, racial or colonization ends; but there is no apparent support or reason for limiting its application to such cases.

The Israeli civilian settlements thus appear to constitute a 'transfer of parts of its own civilian population into

the territory it occupies' within the scope of paragraph 6.

3. Under Art. 6 of the Fourth Geneva Convention, paragraph 6 of Article 49 would cease to be applicable to Israel in the territories occupied by it if and when it discontinues the exercise of governmental functions in those territories. The laws of belligerent occupation generally would continue to apply with respect to particular occupied territory until Israel leaves it or the war ends between Israel and its neighbours concerned with the particular territory. The war can end in many ways, including by express agreement or by de facto acceptance of the status quo by the belligerent.

4. It has been suggested that the principles of belligerent occupation, including Article 49, paragraph 6, of the Fourth Geneva Convention, may not apply in the West Bank and Gaza because Jordan and Egypt were not the respective legitimate sovereigns of these territories. However, those principles appear applicable whether or not Jordan and Egypt possessed legitimate sovereign rights in respect of those territories. Protecting the reversionary interest of an ousted sovereign is not their sole or essential purpose; the paramount purposes are protecting the civilian population of an occupied territory and reserving permanent territorial changes, if any, until settlement of the conflict. The Fourth Geneva Convention, to which Israel, Egypt and Jordan are parties, binds signatories with respect to their territories and the territories of other contracting parties, and "in all circumstances" (Article 1), and in 'all cases' of armed conflict among them (Article 2) and with respect to all persons who 'in any manner whatsoever' find themselves under the control of a party of which they are not nationals (Article 4).

Conclusion

While Israel may undertake, in the occupied territories, actions necessary to meet its military needs and to provide for orderly government during the occupation, for reasons indicated above the establishment of the civilian settlements in those territories is inconsistent with international law."

...

101. Compensation is in practice the most commonly obtained remedy. As indicated above (para. 91), it might be sought singly or in combination with other remedies, primarily restitution in kind to obtain full reparation, i.e. the wiping out of the consequences of the wrongful act. In contrast to the relative scarcity of judicial and arbitral awards relating to mass population transfer, the

political organs of the United Nations have had, on more than one occasion, a chance to address this question and to demand restitution in kind and/or compensation. Thus, acting upon the suggestion of the United Nations Mediator on Palestine, Count Bernadotte, the General Assembly adopted resolution 194 (III) of 11 December 1948, resolving in paragraph 11 that

> "the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which under the principles of international law or in equity should be made good by the governments or authorities responsible." For a fuller treatment, see Donna Arzt and Karen Zagaib cited supra, note 54.

In 1950, the General Assembly adopted resolution 393 (V) on "Assistance to Palestine refugees, in which the Assembly considered that the reintegration of the refugees into the economic life of the Near East, either by repatriation or resettlement" - presumably in pre-existing Arab States as well as within Israel - was essential for the peace and stability of the area. Since 1948, the General Assembly has adopted many resolutions which typically note with deep regret that repatriation or compensation has not been effected. Resolution 242 (1967), adopted by the Security Council, is couched in more general terms - it only affirms "the necessity of achieving a just settlement of the refugee problem". In the current Middle East peace process, based on resolution 242, finding a just solution to the refugee problem is addressed both in the bilateral and multilateral talks. The two questions of compensation (integration of the refugees) and repatriation remain unresolved.

102. Language similar to General Assembly resolution 194 (III) can be found in the relevant resolutions on Afghanistan and Cambodia. Recently, addressing the situation of human rights in the territory of the former Yugoslavia, the General Assembly reaffirmed the right of all persons to return to their homes in safety and dignity. Likewise, the Commission on Human Rights stressed a few months ago the right of any victim [of ethnic cleansing] to return to their homes. In contrast to the resolution on Palestine, these resolutions are mostly silent on the question of compensation The Special Rapporteur is grateful to Professor Christian Tomuschat for providing him with the text of his paper, "State responsibility and the country of origin", presented at the colloquium organized by the Graduate Institute of International Studies and UNHCR on "The problem of refugees in the light of contemporary international law issues" (Geneva, 26-27 May 1994), in which this question is addressed in greater detail. except to the extent that such a notion of compensation is implicit in the call made in those resolutions that returning refugees should recover their assets.

103. Thus, in numerous resolutions adopted by the General Assembly with regard to the population transfer and implantation of settlers in Cyprus E.g. resolutions 3395 (XXX) of 25 November 1975, resolution 34/30 of 20 November 1979 and 37/253 of 13 May 1983, and Commission on Human Rights resolution 4 (XXXII) of 13 February 1975., the call was made for the return of all refugees to their homes in safety and to settle all other aspects of the refugee problems. They should be able to recover their former assets, in particular their homes and other land owned by them at the time of their departure. In any assessment of compensation, it is important to keep in mind that the situations giving rise to population transfer vary enormously and it is not inconceivable that compensation might operate to the detriment of the rest of the population who have remained in the country but who are innocent of the activities of the "criminal regime" that caused the population transfer. Thus, for example, a compensation claim on behalf of those who were transferred from South Africa by the former apartheid regime would today constitute a burden against the whole population of South Africa.

...

VII. CONCLUSIONS AND RECOMMENDATIONS

...

B. Conclusions

131. International law prohibits the transfer of persons, including the implantation of settlers, as a general principle. The governing principle is that the transfer of populations must be done with the consent of the population involved. Because the transfer of populations is subject to consent, this principle reinforces the prohibition against such transfer. The transfer of a population and the implantation of settlers and settlements is forcible if it is done without the consent of a given population. Thus, the criteria governing forcible transfer rest on the absence of consent and may also include the use of force, coercive measures, and inducement to flee.

132. Forcible population transfer, save in areas when derogation or military necessity permits, are prima facie internationally wrongful acts. In circumstances when the purpose or method of transfer constitutes genocide, slavery, racial or systematic discrimination and torture, the transfer may qualify as a crime within the meaning of article 19 (part I) of the International Law Commission's draft articles on State responsibility and carry all the consequences for internationally wrongful acts and, in addition, those normally associated with crimes. Within this purview fall acts such as "ethnic cleansing", dispersal of minorities or ethnic populations from their homeland within the State, and the implantation of settlers amounting to the denial of self-determination.

133. Less grave actions of population transfer, while not amounting to crimes, may qualify as internationally wrongful acts; thus, the State engaged in such actions is under the obligation of cessation and reparation. Its responsibility is delictual. Other States may react through countermeasures to compel compliance by the first State of its obligations. Such reactions (countermeasures) are carefully circumscribed to prevent abuse and escalation and to ensure that the reaction does not violate fundamental human rights.

134. Population transfers may be permissible on the basis of certain exceptions which require justification and carry corresponding obligations regarding conduct during the process of transfer and reparation afterwards. Although the exceptions may be used to justify population transfer in specified cases, they do not alter the fact that population transfers undertaken pursuant to such exceptions remain forcible transfers. Because of the precise formulation of the restrictions pertaining to freedom of movement and the right to leave and return to one's own country (art. 12 (3) of the International Covenant on Civil and Political Rights), and if indeed restrictions are exceptions, then the proposition that relocation, displacement and transfer of populations are subject to justification is reinforced. Consequently, restrictions have to be strictly construed and justified objectively by reference to the public interest grounds on which they are permissible.

135. Assuming that population transfer without consent can be considered as an internationally wrongful act under international law, a basis for a working definition of the term "forcible transfer" of populations can be laid down. In this respect, the basis of wrongfulness can be determined by reference to consent, or the lack of it, because it is the organizing general principle with status in customary international law.

136. Lack of consent as a basis for establishing internationally wrongful acts must be related to international law because it is not absolute and certain exceptions permit population transfer provided that resort to the exception in question is justified in international law. Accordingly, it is proposed that the term "forcible transfer" of populations shall refer to the settlement, relocation or displacement of a population without its consent for whatever purpose and by means contrary to international law.

137. In situations where population transfer is not unlawful, damage occurs nevertheless to the transferred group and it ought, as a matter of equity, to receive compensation. An innocent victim should not be left to bear his loss alone. This criterion will be developed in the final report with special emphasis on the World Bank standards. Operational Directive 4.30: Involuntary Resettlement of 29 June 1990. In a press release of 8 April 1994, the World Bank has stated that major multilateral and bilateral donors have recently adopted resettlement guidelines similar to those of the Bank.

138. Amongst the remedies contained in draft articles 6-10 on State

responsibility, attention was focused on cessation and reparation. The relationship of the two forms of reparation - restitution in kind and compensation - leaves no doubt as to the primacy of restitution in kind. The practice of international organs with regard to conflicts such as those in the Middle East, Cambodia, Cyprus and Afghanistan confirms that restitution in kind is normally demanded in the form of repatriation. Compensation is either explicitly mentioned, as in the case of the Palestinian refugees, or implicit in the language of the resolution referring to other conflicts.

...

C. Recommendations

...

Notes

1/ For evidence, see Restatement of the Law: Third Statement of US Foreign Relations Law, Vol. 2 (1987), p. 165; David Harris, Cases and Materials in International law, 4th ed., (London, 1991) p. 695; Barcelona Traction Case, ICJ Reports 1970, p. 32.