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**Unsettled: A Global Study  
of Settlements in  
Occupied Territories**

**Eugene Kontorovich**

**Northwestern University School of Law**

WORKING DRAFT

## UNSETTLED: A GLOBAL STUDY OF SETTLEMENTS IN OCCUPIED TERRITORIES

*Eugene Kontorovich*

### ABSTRACT

This Article provides the first comprehensive, global examination of state and international practice bearing on Article 49(6) of the Fourth Geneva Convention, which provides that an “Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.” This provision is a staple of legal and diplomatic international discussions of the Arab-Israeli conflict, and serves as the basis for criticism of Israeli settlement policy.

Despite its frequent invocation in the Israeli context, scholars have never examined – or even considered – how the norm has been interpreted and applied in any other occupation context in the post-WWII era. For example, the International Committee of the Red Cross’s (ICRC) influential *Study on Customary International Humanitarian Law* lists 107 instances of national practice and UN practice applying or interpreting the prohibition, and all but two relate to Israel. Many questions exist about the scope and application of Art. 49(6)’s prohibition on “transfer,” but they have generally been answered on theoretical grounds.

To better understand what Art. 49(6) does in fact demand, this Article closely examines its application in all other cases in which it could apply. Many of the settlement enterprises studied in this Article have never been discussed or documented. All of these situations involved the movement of settlers into the occupied territory, in numbers ranging from thousands to hundreds of thousands. Indeed, perhaps every prolonged occupation of contiguous habitable territory has resulted in significant settlement activity.

Clear patterns emerge from this systematic study of state practice. Strikingly, the state practice paints a picture that is significantly inconsistent with the prior conventional wisdom concerning Art. 49(6). First, the migration of people into occupied territory is a near-ubiquitous feature of extended belligerent occupations. Second, no occupying power has ever taken any measures to discourage or prevent such settlement activity, nor has any occupying power ever expressed *opinio juris* suggesting that it is bound to do so. Third, and perhaps most

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· Professor, Northwestern University School of Law. The author is grateful to Dana Brusca, whose research and insight were instrumental to this paper, as well as research assistance from Michael Botstein and Wilson Shirley, and Prof. Avi Bell for valuable comments.

strikingly, in none of these situations have the international community or international organizations described the migration of persons into the occupied territory as a violation of Art. 49(6). Even in the rare cases in which such policies have met with international criticism, it has not been in legal terms. This suggests that the level of direct state involvement in “transfer” required to constitute an Art. 49(6) violation may be significantly greater than previously thought. Finally, neither international political bodies nor the new governments of previously occupied territories have ever embraced the removal of illegally transferred civilian settlers as an appropriate remedy.

The deeper understanding – based on a systematic survey of all available state practice – of the prohibition on settlements developed here is crucial to informing all legal discussions of the Arab-Israeli- conflict, including potential investigations into such activity by the International Criminal Court. More broadly, the new understanding of Art. 49(6) developed here can also shed significant light on the proper treatment of several ongoing occupations, from Western Sahara and Northern Cyprus, to the Russian occupations of Ukraine and Georgia, whose settlement policies this Article is the first to document.

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## INTRODUCTION

This Article presents the first comprehensive, global study of possible violations of Article 49(6) of the Fourth Geneva Convention of 1949, and the international reactions and state practice related to such violations. Art. 49(6), which prohibits what is colloquially known as settlements in occupied territory, is ubiquitously invoked in relation to the Israeli presence in the West Bank and Golan Heights (and formerly in the Gaza Strip). Indeed, the legality of settlements is a central part of legal and diplomatic discussions of the Arab-Israeli conflict. Yet the scope and meaning of the underlying Geneva Convention rule remains a mystery. No national or international criminal tribunal has ever applied the rule.

Moreover, there has been no analysis of the application of the prohibition in any context aside from the Israeli one. As this Article will show, a wide range of erstwhile and ongoing occupations involve large-scale colorable violations of Art. 49(6). An examination of settlement activity – and international reactions to it – across all available geopolitical contexts yields a more scientific and accurate understanding of the nature of the prohibition than an examination of it in merely one (perhaps uniquely politicized) context.

If there were no other situations that arguably involve Art. 49(6) violations, then the focus on one context would be natural. However, there are numerous countries that have engaged and continue to engage in settlement policies that would constitute clear violations of Art. 49(6), at least under the conventional wisdom concerning the meaning of the prohibition as described in writings about the Israeli context. These non-Israeli settlement efforts have often been on a large scale, and have involved far-reaching demographic and economic consequences for the occupied population.

The narrow focus in studies of Art. 49 is ubiquitous. For example, the International Committee of the Red Cross's (ICRC) influential *Study on Customary International Humanitarian Law* lists 107 instances of national and UN practice applying or interpreting the prohibition, and all but two relate to Israel.<sup>1</sup> Scholars have also not studied the norm outside the Israeli context, let alone in a comprehensive, global fashion.<sup>2</sup> Westlaw searches for Art. 49(6) found that it was

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<sup>1</sup>Remarkably, the ICRC does not include any state practice dealing with any of the eight settlement situations discussed in this Article. See ICRC CUSTOMARY LAW DATABASE, PRACTICE RELATING TO RULE 130. TRANSFER OF OWN CIVILIAN POPULATION INTO OCCUPIED TERRITORY, PARTS VI-VII (Aug. 2106), available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule130#\\_VI0tNaPr](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule130#_VI0tNaPr). The two non-Israel related statements, by Kuwait and the U.S, are condemnations of Iraqi settlement activity in Kuwait during the 1990 invasion. U.N. Security Council Res. 677 (1990) “condemned attempts by Iraq to alter the demographic composition of the population of Kuwait” but did not mention Art. 49(6) or use the terms settlements or settlers.

<sup>2</sup> See, e.g., Yaël Ronen, *Status of Settlers Implanted by Illegal Territorial Regimes* BRIT. YRBK. INT'L LAW 154 (2008) casts her inquiry in broader terms – not merely settlers in occupied territory under the Geneva Conventions, but in any “illegal territorial regime.”

invariably discussed in the context of Israel, to the exclusion of all other situations.<sup>3</sup>

As a result, our understanding of Art. 49(6) remains thin and lacking; the interpretation of it comes from a single case, rather than from systematic evidence of state practice. Attempting to interpret the scope and meaning of Art. 49(6) from its application to a single situation is like trying to fix the position of a line knowing only a single point: one can draw an infinite number of lines through a point. Studying all the available data however, – i.e., all settlement practices elsewhere – can provide greater meaning and definition to the rule, or at least address some of the many questions about its meaning, which in current discussions are answered in an entirely theoretical or teleological manner. This Article seeks to remedy that, while disciplining discussions of 49(6) with a rich array of data on actual state practice.

This Article examines every occupation since the adoption of the Geneva Conventions that involve the movement of civilian population into occupied territory. Eight such situations were identified. No previous work has examined them together. Indeed, for several of the situations – such as the current high-profile Russian occupation of Crimea - there has been no prior research on the relevant settlement policy. Thus one of the additional contributions of this Article is the first scholarly examination of Russian and Armenian occupation practices in light of international law.

The state practice of the occupying powers in these other situations, as well as the international reaction to them, forms a remarkably consistent pattern, and thus can significantly inform discussions about the meaning of Art. 49(6). This pattern is contrary to, or at least in substantial tension with, hypotheses about Art. 49(6) generated solely based on the Arab-Israeli situation. Indeed, the discussion of Art. 49(6) in relation to Israel appears to be an anomalous exception to a clear pattern regarding similar conduct elsewhere. Thus, since the conventional understanding

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(This would not include many cases of belligerent occupation, which is not in itself unlawful.) Thus her inquiry does not relate to the Art. 49(6) norm in particular, and includes inapposite situations like Rhodesia, South Africa, which did not involve belligerent occupations that would trigger the application of the Geneva Conventions. Of the Art. 49(6) situations examined in this Article, she only examines only Cyprus. Similarly, one of the major treatises on the law of occupation only discusses Art. 49(6) in relation to Israel. See EYAL BENVENISTI, *THE LAW OF OCCUPATION* (2<sup>nd</sup> ed. 2012). (Benvenisti mentions Indonesia's and Turkey's settlement efforts in a few passing sentences, but does not discuss Art. 49(6) in light of these practices. *Id.* at 174, 310). See also, YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (2009).

<sup>3</sup> For example, there are 47 matches in the Westlaw “secondary source” database for <("49(6)" "its own civilian population" "illegal settlement") /20 Israel> - that is, a search for one of several terms relating to the Geneva prohibition within proximity of a discussion of Israel. There is only one match for the same search relating to all the other situations discussed in this article combined - <("49(6)" "its own civilian population" "illegal settlement") /20 (Lebanon Vietnam Russia Morocco Turkey Indonesia Armenia)>, Search conducted Aug. 23, 2016.

of Art. 49(6) has been based almost entirely on the Israeli example,<sup>4</sup> this Article shows that it requires a fundamental reexamination. While the study of state practice cannot precisely define the scope of Art. 49(6) liability, it does show that standard discussions of the norm define the prohibited conduct far too broadly. In particular, there is absolutely no support in state practice for the notion that mere facilitation or accommodation of settlement activity violates the norm, or that there is any duty to prevent, obstruct or discourage settlement activity. Moreover, uniform international practice is inconsistent with the notion that there is any requirement to expel settlers.

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Several questions about Art. 49(6) and related rules can be illuminated by the current study. Art. 49(6) of the Fourth Geneva Convention provides that the “Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”<sup>5</sup> Adopted in 1949, Art. 49(6) has no parallel in prior humanitarian law such as the Hague Convention of 1907, and is not seen as reflecting customary international law, at least at the time.<sup>6</sup> No one has ever been prosecuted for this war crime, and its interpretation has been confined to academic and political statements - entirely within the particular context of Israel. The one exception is a few sentences of dictum in an advisory opinion by the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>7</sup>

As a result, there are many unanswered questions about the scope and application of the prohibition. To the extent that answers have been suggested to these questions, they have been based on theory and casuistry, rather than on practice and precedent. Thus state practice is particularly useful for answering questions related to particular questions about the application and interpretation of Art. 49(6). The evidence presented here sheds light on at least three questions about Art. 49(6): what types of governmental conduct violate the prohibition; who is considered a settler; and what constitutes the proper remedy for the violation.

The first question involves the nature of government conduct required to violate the prohibition. For example, some argue that “transfer” of “part of a population” would only apply to large-scale governmental movements of people into an occupied territory. It would not, in this view, ban an occupying power for allowing its nationals to move into and inhabit such territories; to engage in private

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<sup>4</sup> See BENVENISTI, *supra*, at 240-41 (observing that “the scope of the prohibition... has been strengthened and refined” entirely “in light of this [Israeli] example”).

<sup>5</sup> Fourth Geneva Convention Art. 49, para. 6.

<sup>6</sup> Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT'L L. 469, 484 (1993).

<sup>7</sup> 2004 ICJ Rep. 136 (hereinafter *Wall Opinion*). While the legality of Israeli settlements was not part of the question submitted by the General Assembly, it nonetheless, mentioned in a dictum that all Israel’s settlements “have been established” in violation of the Geneva Convention. *Id.* at par. 120. However, the Court’s discussion of the issue consisted of a few conclusory sentences that offered nothing to justify its interpretation.

real estate transactions; and otherwise migrate. The ICJ *Wall Opinion* suggested a much broader reading of the provision, to prohibit “measures taken by an occupying power to organize or encourage” the otherwise autonomous movement of its civilian population.<sup>8</sup> However, the court did not cite any state practice or any other authority to justify this expansive gloss on Art. 49(6). Nor did it provide guidance about the types of state action that would fall into these two categories.<sup>9</sup>

A related question arises concerning the wording of the Art. 49(6) prohibition incorporated into the definition of crimes in the Rome Statute of the International Criminal Court. Unlike all other war crimes provisions in the statute, whose language is borrowed verbatim from existing IHL instruments, the settlement provision was broadened to include “directly or indirectly” transferring population.<sup>10</sup> Some interpretations view this as including mere “facilitation” of autonomous population movements (i.e., paving roads and so forth), and others have gone so far as to suggest that it transforms the prohibition into an affirmative duty to prevent people from moving into the territory.<sup>11</sup> On the other hand, the ICJ’s Elements of Crimes provide that the provision must be understood in light of existing IHL practice.<sup>12</sup> As a result, this Article’s survey of global state-sanctioned settlement practices is crucial to understanding not just the scope of Art. 49(6), but also its potentially broader Rome Statute counterpart.

Other questions involving the scope of the prohibition relate to who is counted as a settler. For example, are children born to transferred persons themselves “settlers” who constitute a further violation of the prohibition?<sup>13</sup> Similarly, Art. 49(6) prohibits the occupying power from transferring “its” civilian

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<sup>8</sup> *Wall Opinion*, 2004 I.C.J. at 183–84.

<sup>9</sup> Others have gone further and suggested that mere “passive acquiescence” in population movement into occupied territories violates Art. 49(6). See Report of the United Nations and Peoples Organization Conference on Population Transfer 8 (1992).

<sup>10</sup> See Rome Statute, Art. 8(2)(b)(viii). The provision was inserted in the drafting conference at the request of Arab states, specifically to cover Israel’s conduct. However, the legal impact of this is unclear because of the circumstances of the drafting, the novelty of the provision and the lack of subsequent applications. See Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in ROY S. LEE, ED., *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS AND RESULTS* 79, 112–13 (1999).

<sup>11</sup> See WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 235 (2010) (arguing that the provision applies to cases where “the occupying power does not actually organize the transfer of population, but does not take effective measures to prevent this”).

<sup>12</sup> The ICC’s Elements of Crimes provide that the language “needs to be interpreted in accordance with the relevant provisions of international humanitarian law”, a circular reference back to the Geneva Conventions. This provision in the Elements was sought by the American delegation to ‘remove novel arguments about indirect tax incentives to transfer a population.’ See DAVID J. SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (2013) 235–36.

<sup>13</sup> See, e.g. UN G.A. Res. 66/225 of 29 March, 2012 (calling on Israel to “freeze settlement activity, including so-called ‘natural growth’”).

population. It is not clear if this also prohibits settlers from third-countries. In the context of the Convention's text, it would seem to refer to prior residents of the territory of the occupying power. On the other hand, the UN Security Council has stated in one context that allowing immigrants from third-countries to settle in occupied territory constitutes an Art. 49(6) violation.<sup>14</sup>

A separate question is the remedy Art. 49(6) violations. A maxim of international law states that the remedy for a breach requires the violation to be halted immediately and reparations made for any damage caused.<sup>15</sup> A more controversial question is whether further action is required. The ICJ has stated that under customary law:

[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear . . . should serve to determine the amount of compensation due for an act contrary to international law.<sup>16</sup>

In accordance with this statement, some officials and scholars demand Israel dismantle its outposts, remove all settlers from the occupied territory, and make payments to Palestinians whose property was used or destroyed.<sup>17</sup> However, aside

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<sup>14</sup> UNSCU.N. S.C. Res. 465 Art. 5 (1980).

<sup>15</sup> *E.g.*, Robert Naiman, *Obama: Israeli Settlements Have to be Stopped*, HUFFINGTON POST, May 18, 2009, [http://www.huffingtonpost.com/robert-naiman/obama-israeli-settlements\\_b\\_204961.html](http://www.huffingtonpost.com/robert-naiman/obama-israeli-settlements_b_204961.html); Declaration by the Presidency on Behalf of the European Union on Israeli Decision Regarding Settlements, Doc. No. 17698/09 (Dec. 18, 2009), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=PESC/09/142&type=HTML>; Allan Woods, *Canada Denounces Israeli Settlement*, STAR.COM, Mar. 12, 2010, <http://www.thestar.com/news/canada/article/778855--canada-denounces-israeli-settlement>.

<sup>16</sup> *Wall Opinion*, 2004 I.C.J. at 198 (internal quotations omitted).

<sup>17</sup> *E.g.*, Black, *supra* note *\_*; Andrew Rettman, *EU's New Foreign Relations Chief Criticizes Israel*, EUOBSERVER.COM, Dec. 16, 2009, <http://euobserver.com/9/29167> (observing that a freeze in settlement activities is merely a "first step" for Israel); RUTH KLINOV, REPARATIONS AND REHABILITATION OF PALESTINIAN REFUGEES 1 (2007) ("The payment of financial reparations to Palestinian refugees has been widely recognised as an essential component of any resolution of the Israeli-Palestinian conflict."); John Quigley, *Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory*, 10 PACE INT'L L. REV. 1, 25 (although the occupying government must treat its civilian settlers humanely, it is nonetheless obligated to facilitate their evacuation).

During Israel's withdrawal from the Gaza Strip in 2005, the Israeli Defense Force forced Israeli citizens from the area and demolished over 2,000 homes and government structures. Marc S. Kalisar, Note, *A Modern Day Exodus: International Human Rights Law and International Humanitarian Law Implications of Israel's Withdrawal From the Gaza Strip*, 17 IND. INT'L & COMP. L. REV. 187, 219 (2007). Israel also removed all of its

from practical difficulties in expelling large populations, figuring out what the situation would look like in the absence of a decades-long settlement is not simple.<sup>18</sup>

This Article identifies and examines all the prolonged occupations that have involved the movement of civilian population into an occupied territory since the adoption of the Geneva Conventions.<sup>19</sup> A word should be said about the inclusion criteria used to identify the situations studied here. Every belligerent occupation since 1949 lasting more than one year was examined to see if there was a civilian population movement into the occupied territory. Those that involved such movement are examined in detail below.<sup>20</sup>

Because of the vast volume of work written on Israeli settlements from a political, historical<sup>21</sup> and legal perspective,<sup>22</sup> this Article does not replicate that

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several thousand settlers when it withdrew from Sinai in 1982.

<sup>18</sup> Some level of voluntary migration from one state into a neighbor typically occurs even absent prohibited population transfers. To truly recreate the demographic composition that would have existed in an occupied territory absent the Article 49(6) violation, perhaps such migration should be accounted for and some percentage of settlers allowed to remain. See, e.g., Hania Zlotnik, *International Migration 1965-96: An Overview*, 24 POPULATION & DEV. REV. 429, 434 (canvassing statistics on international migration from 1965 to 1996, and observing that “all countries . . . have been the destination of some migration during this century”).

<sup>19</sup> Some prolonged occupations have not resulted in discernible settlement activity – such as the U.S. occupations of Afghanistan. However, there have apparently been no instances of prolonged occupation of *adjacent* habitable territory that have not seen settlement activity.

<sup>20</sup> While the U.S. occupation of Afghanistan is not examined in detail here – as an occupation of non-contiguous territory, settlement activity is likely to be limited by practical factors — it is worth noting that a non-trivial number U.S. and other NATO citizens moved to the area during the occupation. The U.S. and other NATO nations participating in the occupation took no measures to prevent this migration, and even encouraged it. Indeed, despite a considerable literature on the law of occupation as it applies to Afghanistan, no one even raised the possibility that such movement could under any circumstances raise an a colorable 49(6) issue.

These “settlers” were typically Afghan expatriates who had lived in America for decades. See, e.g., Fariba Nawa & Juliette Terzieff, *Bay Area Afghan expatriates walk tightrope / Those who returned to rebuild are caught between 2 cultures*, S.F. Chronicle (June 17, 2002), available at <http://www.sfgate.com/bayarea/article/Bay-Area-Afghan-expatriates-walk-tightrope-2828350.php>. While the precise numbers are unclear, it is probably only in the thousands – not due to the any legal scruple but due to the danger of the area. See Eric Bailey & Nita Lelyveld, *Afghan Emigres Want a Role in Rebuilding*, L.A. TIMES (Oct. 14, 2001), available at <http://articles.latimes.com/2001/oct/14/local/me-57132>. The settlers went to Afghanistan, or sometimes even with the encouragement of U.S. authorities, to inject Westernized personnel into the management of the country. See NEAMAT NOJUMI, AMERICAN STATE-BUILDING IN AFGHANISTAN AND ITS REGIONAL CONSEQUENCES: ACHIEVING DEMOCRATIC STABILITY AND BALANCING CHINA'S INFLUENCE 265-65 (2016).

<sup>21</sup> See, e.g., GERSHOM GORENBERG, THE ACCIDENTAL EMPIRE: ISRAEL AND THE BIRTH OF THE SETTLEMENTS, 1967-1977 (2007); EDITH ZERTAL & AKIVA ELДАР, LORDS OF THE

work, but rather uses the legal theories about Art. 49(6) developed in the Israeli context to generate hypotheses about the prohibition, to test against the other situations. Because Art. 49(6)'s prohibition depends on the existence of an international armed conflict governed by the Geneva Conventions, several situations involving organized settlement of disputed areas are omitted. Thus the U.S. co-occupation of West Berlin (1945-90), the Chinese takeover of the Second East Turkestan Republic (1949) and Tibet (1950), the Indo-Pakistani division of the Kashmir (1947),<sup>23</sup> and the Egyptian and Jordanian occupation of parts of the former territory of Mandatory Palestine (1949-67) all took place before those countries signed the Geneva Conventions, and thus the Geneva provisions most likely do not apply to the ensuing occupation.<sup>24</sup> While all but the last of these have involved significant, and typically massive, government-organized "settlement" enterprises, they are excluded for the sake of definition precision and to ensure the comparison of legally comparable situations.

For the purpose of this study, situations where civilians move into territory occupied in an international armed conflict that began after the relevant country ratified the Geneva Conventions are treated as at least plausible Art. 49(6) violations. The inclusion of the situations does not mean that they do in fact violate Art. 49(6) – that is impossible to say due to the lack of authoritative application of the provision. However, they all fit the profile of the kind of activity that is generally said to violate Art. 49(6). The possible question of *de minimis* transfer does not arise, because in each of the contexts presented here the settlers constitute more than several percent of the population of the occupied territory.

A few words should be said about the evidentiary significance of state practice examined in this Article. State practice - the positive conduct and legal positions of states – is one of major modes of determining international law. International law rules are those that best fit observed state practice. To be sure, the question here involves a particular treaty provision.<sup>25</sup> While the extent to which subsequent practice can modify the express meaning of a treaty is highly controversial,<sup>26</sup> consistent practice is a widely accepted method of interpreting

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LAND: THE WAR OVER ISRAEL'S SETTLEMENTS IN THE OCCUPIED TERRITORIES, 1967-2007 (2007)

<sup>22</sup> See, e.g., BENVENISTI, *supra*; Ronen, *supra*.

<sup>23</sup> <http://timesofindia.indiatimes.com/india/Hurriyat-to-oppose-Israeli-settlements-in-Kashmir/articleshow/47460913.cms>

<sup>24</sup> Similarly, Indonesia's take-over of West New Guinea in 1963 did not involve an international armed conflict, as the territory was transferred to it by the United Nations. While Indonesia may have breached its international commitments by not complying with the self-determination guarantees it had provided prior to the hand-over, this does not trigger the Geneva Conventions.

<sup>25</sup> Vienna Convention on the Law of Treaties Art. 31(3)(b), 1155 U.N.T.S. 331 (codifying that a legitimate method of treaty interpretation is to consider "subsequent practice" under the treaty).

<sup>26</sup> See, e.g., GEORG NOLTE, ED., TREATIES AND SUBSEQUENT PRACTICE (2013); Georg Nolte, *Third Report for the ILC Study Group on Treaties Over Time: Subsequent*

treaty provisions.<sup>27</sup> Given that Art. 49(6) is - by the terms of its own official commentary - not based on past practice and is awkwardly drafted,<sup>28</sup> subsequent practice is crucial to defining its meaning.

Indeed, the idea that such practice can help define the scope of Geneva Convention rules is not controversial – it is the entire theoretical justification for the ICRC’s massive compendium of state practice. Moreover, most accounts of Art. 49(6) have not been based on a literal reading of its terms, but rather on an examination of how it has been applied in one particular situation. Thus its application in eight cases should have considerably more interpretive weight.

An examination of these conflicts suggests that there is no basis to assume (as for example the ICJ has) that a state’s mere “encouragement” of civilian settlers is enough to bring the state within the purview of Article 49(6). Moreover, neither international organizations nor the new governments of previously occupied territories have ever embraced the forcible removal of illegally transferred civilian settlers. On the contrary, 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.

Parts I-VII examine in detail every prolonged belligerent occupation that has involved a movement of settlers into the occupied territory since the adoption of the Geneva Conventions. Notably, the situations described in Parts IV and VII have never previously been studied as possible violations of Art. 49(6). Each of these sections describes the geopolitical context of the situation; explains how it qualifies as a belligerent occupation; describes in detail the possible violations of Art. 49(6) by the occupying power; and details any international reaction, including the treatment of settlers in peace plans or post-conflict transitions.

As an extension, Part VIII examines the situation in the post-Soviet Baltics, which may not formally be governed by the Geneva Conventions, but which provide uniquely rich source of state practice on the post-conflict treatment of settlers. The Conclusion summarizes what the state practice shows, and addresses methodological issues and objections.

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*Agreements and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings* (2012).

<sup>27</sup> See Sean Murphy, *The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties*, in NOLTE, *TREATIES AND SUBSEQUENT PRACTICE*, supra n. 26, at 81, 84 (noting the widespread acceptance of the “use of subsequent practice of treaty parties for the interpretation of an ambiguous treaty provision”).

<sup>28</sup> See JEAN PICTET, *IV COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949* 278 (1958) (noting that the provision was “adopted after some hesitation” and that its wording is not fully “logical”).

## I. EAST TIMOR (TIMOR-LESTE)

A. *History of the Conflict*

The island of Timor is located nearly halfway between the northwestern coast of Australia and the southeastern end of Indonesia's Sunda archipelago.<sup>29</sup> East Timor comprises the eastern half of the island and today has a population of just over 1,000,000 people.<sup>30</sup> Until the mid-1970s, East Timor was a Portuguese colony,<sup>31</sup> but after the Portuguese government's overthrow in 1974, Portugal recognized the right of self-determination for territories under Portuguese control.<sup>32</sup> The Portuguese passed legislation setting the stage for a transfer of power to a democratically elected independent government in this territory in October 1978.<sup>33</sup>

As Portugal began preparing to leave, Timorese groups initiated fighting for immediate independence. After several months, the Revolutionary Front for an Independent East Timor (FRETILIN) militia controlled most of the territory and on November 28, 1975, FRETILIN declared East Timor an independent nation.<sup>34</sup> Indonesia, however, wished to have all the territory of its archipelago within a united Indonesian state. On December 7, 1975, Jakarta launched naval, air and military forces against the East Timorese.<sup>35</sup> After a year and a half of fighting, in July 1976, the Indonesian parliament annexed East Timor and declared it the

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<sup>29</sup> EAST TIMOR AND THE INTERNATIONAL COMMUNITY, at xix (Heike Krieger ed. 1997).

<sup>30</sup> World Bank 2010 Assessment of the Ease of Doing Business in Timor-Leste, <http://www.doingbusiness.org/ExploreEconomies/?economyid=209> (last visited Dec. 14, 2009).

<sup>31</sup> G.A. Resolution 1542 (XV), U.N. Doc. A/RES/1542(XV) (Dec. 15, 1960); G.A. Resolution 3294 (XXIX), U.N. Doc. A/RES/3294(XXIX) (Dec. 13, 1974). See generally, Catriona Drew, *The East Timor Story: International Law on Trial*, 12 EUROPEAN J. OF INT'L L. 651 (2001); Krieger, *supra* note 29; THE UNITED NATIONS AND EAST TIMOR: SELF-DETERMINATION THROUGH POPULAR CONSULTATION 3–11 (2000); COMM'N FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR (CAVR), FINAL REPORT, pt. III (Oct. 31, 2005), available at <http://www.etan.org/news/2006/cavr.htm>.

<sup>32</sup> Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Working Paper on Timor Prepared by the Secretariat*, ¶ 4, U.N. Doc. A/AC.109/SC.6/Add.1, reprinted in Krieger, *supra* note 23, at 18; see also Portuguese Constitutional Law art. 1, 2 7/74 (July 27, 1974), reprinted in Krieger, *supra* note 29, at 34; Portuguese Constitutional Law 7/75 (July 17, 1974) art. 1, reprinted in Krieger, *supra* note 29, at 34–36.

<sup>33</sup> Portuguese Constitutional Law 7/75 arts. 2–5, *supra* note 32, at 35.

<sup>34</sup> *Id.*; see also Letter from the Charge d'affaires of the Permanent Mission of Portugal to the United Nations Secretary-General (Nov. 28, 1975), reprinted in Krieger, *supra* note 29, at 35.

<sup>35</sup> Letter from the Permanent Representative of Portugal to the President of the United Nations Security Council (Dec. 7, 1975), reprinted in Krieger, *supra* note 29, at 42.

country's 27th province.<sup>36</sup>

East Timor remained under Indonesian control for the next quarter-century. It was not until 1999, facing pressure from the UN and convinced that a referendum would in fact result in a pro-integration decision, that Indonesia permitted the East Timorese to hold a referendum – a choice that ultimately resulted in an independent East Timorese nation.

### B. *Reaction of the International Community*

From the moment of invasion until the popular referendum in 1999, Portugal maintained that Indonesia's occupation and annexation of East Timor was illegal, violating both the prohibition against the use of force in Article II of the UN Charter and the right of former colonies to self-determination adopted in General Assembly Resolution 2625 (XXV).<sup>37</sup> The international community strongly deplored Indonesia's use of force against Portuguese East Timor<sup>38</sup> and rejected its purported annexation.<sup>39</sup>

Still, the UN did not expressly characterize Indonesia's actions as aggression: "UN, "U.N. practice supports the view that the Indonesian invasion of East Timor was illegal."<sup>40</sup> For eight years, the General Assembly adopted annual resolutions condemning the situation in East Timor, although each year the number of affirmative votes declined.<sup>41</sup> Following its eighth resolution, in 1982, the General Assembly took no action regarding East Timor until 1999. During this

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<sup>36</sup> 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, Law 7/76 (1976).

<sup>37</sup> *E.g.*, Statement of the Permanent Representative of Portugal to the U.N. to the President of the U.N. Security Council, U.N. Doc. S/PV.1864 ¶¶ 48, 59 (Dec. 15, 1975), *reprinted in* Krieger, *supra* note 29, at 54, 58, 60 (noting the "Indonesian armed aggression against Portuguese Timor constitutes a blatant, undeniable violation of the Charter of the United Nations"); Report from the Permanent Mission of Portugal to the United Nations Secretary General ¶ 1, U.N. Doc. A/52/152 (May 19, 1997) (same).

<sup>38</sup> G.A. Resolution 3485(XXX), U.N. Doc. A/RES/3485(XXX), ¶ 4 (Dec. 12, 1975). (calling upon Indonesia to "[D]esist 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."). *Id.*, ¶ 5.

<sup>39</sup> G.A. Resolution 31/53, U.N. Doc. A/RES/31/53, ¶ 5 (Dec. 1, 1976).

<sup>40</sup> Krieger, *supra* note 29, at xxiii.

<sup>41</sup> *See* G.A. Resolution 3485(XXX), *supra* note 38 (14 members for: 1 against); G.A. Resolution 31/53, *supra* note 39 (15 for: 2 against); G.A. Resolution 32/34, U.N. Doc. A/RES/32/34 (Nov. 28, 1977) (16 for: 2 against); G.A. Resolution 33/39, U.N. Doc. A/RES/33/39 (Dec. 13, 1978) (16 for: 3 against); G.A. Resolution 34/40, U.N. Doc. A/RES/34/40 (Nov. 21, 1979) (15 for: 5 against); G.A. Resolution 35/27, U.N. Doc. A/RES/35/27 (Nov. 11, 1980) (15 for: 8 against); G.A. Resolution 36/50, U.N. Doc. A/RES/36/50 (Nov. 24, 1981) (16 for: 10 against); G.A. Resolution 37/30, U.N. Doc. A/RES/37/30 (Nov. 23, 1982) (13 for: 9 against). Additionally, the latter two resolutions, passed in 1981 and 1982 made no reference to Article II of the U.N. Charter; instead they focused on the humanitarian aspects of the conflict.

interim period the Secretary-General initiated consultations with all parties and issued annual progress reports to the General Assembly.<sup>42</sup> Portugal, meanwhile, continued to support the East Timorese and to denounce Indonesia's actions.<sup>43</sup>

In 1998, the conflict began to ease. Longtime Indonesian nationalist President H.E. Suharto resigned that year, allowing (then new) Secretary-General Kofi Annan to quietly initiate peace talks between Portugal and Indonesia.<sup>44</sup> Confident that after twenty-five years of occupation, Indonesia's influence on East Timor would result in a pro-integration decision, Suharto's successor, President B.J. Habibie, announced his intention to hold a popular referendum. Habibie proposed an autonomy plan that would continue to give Indonesia sovereignty over East Timor, but would cede control over most domestic affairs back to the East Timorese.<sup>45</sup> If voters rejected this plan, East Timor could become independent.<sup>46</sup> On August 30, 1999, 78% of the voters opted for independence.<sup>47</sup> East Timor became independent on May 20, 2002.<sup>48</sup>

### C. *Indonesia's settlement policy & Art. 49(6) violations*

Neither the UN governing bodies nor their European counterparts have ever formally accused Indonesia of violating the prohibition against civilian population transfers. While the international community has been involved in the post-conflict administration of justice in East Timor – creating a special tribunal to investigate crimes committed during Indonesian rule – the transfer of settlers was not among them.<sup>49</sup> However, the applicability of the Fourth Geneva Convention's rules on occupation—in light of the international armed conflict (between Indonesia and Portugal)<sup>50</sup> and subsequent occupation<sup>51</sup>—does not seem in doubt.<sup>52</sup>

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<sup>42</sup> See G.A. Resolution 37/30, *supra* note 41, ¶ 1.

<sup>43</sup> *E.g.*, Report from the Permanent Mission of Portugal to the United Nations Secretary General, U.N. Doc. A/52/152 (May 19, 1997)

<sup>44</sup> Ruth Wedgwood, *East Timor and the United Nations* 3 (paper prepared for the Columbia Int'l Affairs Online Curriculum Module) (2001); SELF-DETERMINATION THROUGH POPULAR CONSULTATION, *supra* note 31, at 6.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.* at 7.

<sup>47</sup> Press Release, Secretary-General, People of East Timor Reject proposed Special Autonomy, Express Wish to Begin Transition to Independence, Secretary-General Informs Security Council, U.N. Doc. SG/SM/7119 SC/6722 (Sept. 3, 1999) (announcing that of the 451,792 registered voters, 344, 580 or 78.5% rejected the proposed special autonomy plan while 20.1% voted for integration).

<sup>48</sup> See Report of the Secretary-General to the Security Council on the United Nations Transitional Administration in East Timor, U.N. Doc. S/2002/432 (Apr. 17, 2002).

<sup>49</sup> See Security Council Res. 1272; *see also* Järvinen, *supra* note \_ (giving an in depth discussion of the U.N.'s role in East Timor post-independence).

<sup>50</sup> See Ben Saul, *Prosecuting War Crimes at Balibo Under Australian Law: The Killing of Five Journalists in East Timor by Indonesia*, 31 SYDNEY L. REV. 83, 85-89 (concluding that the Indonesian invasion created an international armed conflict) (2009); Robert Dubler, *The International Law Aspects Of The Case Of The Balibo Five*, 11 MELB. J. INT'L L. 1, 10 (2010) (same).

Before the Indonesian invasion in 1974, the East Timorese population numbered somewhere between 635,000 and 689,000 persons.<sup>53</sup> By 1980, the indigenous population in East Timor is estimated to have dropped by approximately 15%, to 560,000 persons.<sup>54</sup> An Indonesian census puts the population of East Timor back near 650,000 a mere seven years later, but this number “clearly includes Indonesian transmigrants” who arrived in the territory during that period.<sup>55</sup>

Transmigration within Indonesia proper was an established government policy at the time,<sup>56</sup> and it continues on a smaller scale today.<sup>57</sup> Transmigration is essentially a program of internal relocation. Because its population is highly concentrated (in 1980, for example, 61% of the Indonesian population lived on the island of Java, which comprises only 7% of the country’s land<sup>58</sup>), transmigration was seen primarily as an effort to ease severe overpopulation in Indonesia’s urban areas.<sup>59</sup> Transmigration was also seen “as a ‘vehicle for nation-building through assimilation and ethnic integration,’” and as a core component of Indonesia’s national security scheme.<sup>60</sup>

Unpopulated areas or areas populated by peoples ethnically different from the Javans were viewed as inherently unlikely to support Jakarta. It was thus the Indonesian Army’s position that territorial management must be “implemented by the entire state apparatus.”<sup>61</sup> The objective was to manage “the geographical and demographic factors and the ideological-political-social-cultural-military conditions,” of an area “in order to create regional strength” and implement defense and security.<sup>62</sup> “Trouble spots” such as East Timor were prioritized as

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<sup>51</sup> See Saul, *supra*, at 104-05; Dubler, *supra*, at 10.

<sup>52</sup> *E.g.*, Christopher M. Goebel, *A United Concept of Population Transfer (Revised\*)*, 22 DENV. J. INT’L L. & POL’Y 1, 8, 9, 10 (1993); Unrepresented Nations and Peoples Organization, Report of the UNPO Conference on Population Transfer 15, 36 (1992).

<sup>53</sup> See Ben Kiernan, *The Demography of Genocide in Southeast Asia: The Death Tolls in Cambodia, 1975-79, and East Timor, 1975-80*, 35 CRITICAL ASIA STUD. 585, 590 (2003) (comparing Portuguese census estimates with those taken by the Catholic Church and observing problems with each study).

<sup>54</sup> *Id.* at 591, 592. The low population is also attributable to famine and the departure of refugees. *Id.* at 593.

<sup>55</sup> *Id.* at 591-92.

<sup>56</sup> Carmel Budiardjo, *The Politics of Transmigration*, 16 THE ECOLOGIST 2/3, 112 (1986).

<sup>57</sup> See Ministry of Manpower and Transmigration of the Republic of Indonesia, <http://www.nakertrans.go.id/> (last visited Mar. 12, 2010).

<sup>58</sup> J. Hardjono, *The Indonesian Transmigration Program in Historical Perspective*, 26 INT’L MIGRATION 427, 427 (1988).

<sup>59</sup> VICKERS, *supra* note \_ at 193.

<sup>60</sup> Budiardjo, *supra* note 57, at 112 (quoting Indonesia President Sukarno’s *Transmigration is A Matter of Life and Death for Nation Building*, Department of Information, Jakarta (1964)).

<sup>61</sup> *Id.* (quoting Indonesian Brigadier-General Sembiring Meliala).

<sup>62</sup> *Id.* (quoting Sembiring Meliala, *The Basic Pattern of Territorial Management*

areas most in need of new transmigration settlements.<sup>63</sup>

The Indonesian transmigration program was largely voluntary – at least according to most sources – but with significant levels of government organization, inducement and support.<sup>64</sup> In order to recruit new settlers during the period of East Timor’s occupation, the Indonesian government had branch offices in the capitals of the provinces as well as in larger towns. Employees in these offices were tasked with spreading information about the program throughout their respective jurisdictions.<sup>65</sup> Recruiting settlers from interior rural areas required a bit more dedication; “inviting” tribal members to move could take anywhere from three to six months, and those who agreed were given another six months of “guidance and instruction” on the agricultural methods they were expected to implement upon their relocation to new settlements.<sup>66</sup>

For East Timor, it was mostly Balinese farmers who were recruited.<sup>67</sup> Although the transmigrants were typically kept in separate villages, away from the “backward thinking” East Timorese, one or two “villages of potential” were populated with an even mix of settlers and locals.<sup>68</sup> These encampments were part of a larger government scheme to heavily develop cash crops on East Timor, and received sizeable government investments, ran largely on solar energy, and had equipment for employing high-tech farming methods.<sup>69</sup>

Frequently, it was the economic incentives that led poor or landless Indonesians to move. On paper, all migrants received “free transportation, a little pocket money, free land [typically five to six hectares] already cleared, and food until the first crop was harvested. Other assistance, which involved a house already constructed, tools, and seed, was to be repaid to the government ...”<sup>70</sup> Practically, however, assistance given to any individual family varied with the time and place of relocation.<sup>71</sup> Land provided might not be cleared as expected or houses not yet built.<sup>72</sup> When the government’s provisions fell short or crops failed, the

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*Specific to Irian Jaya, Employing the Method of Community Development Centeres* (Apr. 1984)).

<sup>63</sup> *Id.* at 113 (quoting that statement of Indonesian officials made to an Indonesian newspaper on September 6, 1985). One reason recruits faced particular pressure to resettle in East Timor was because of a government desire to increase the number of Muslims in the predominantly Catholic area. VICKERS, *supra* note \_ at 193.

<sup>64</sup> See Carolyn Marr, *Uprooting People, Destroying Cultures: Indonesia’s Transmigration Program*, 11 MULTINATIONAL MONITOR (Oct. 1990); J.M. HARDJONO, *TRANSMIGRATION IN INDONESIA* 26 (1977) (“p]ressure was brought to bear to force homeless people to migrate.”); Marr, *supra*.

<sup>65</sup> HARDJONO, *supra* note 64, at 26.

<sup>66</sup> HARDJONO, *supra* note 65, at 26.

<sup>67</sup> Budiardjo, *supra* note 57, at 115.

<sup>68</sup> Budiardjo, *supra* note 57, at 115.

<sup>69</sup> *Id.*

<sup>70</sup> HARDJONO, *supra* note 65, at 29.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* Or, as was the case in East Timor, the government might misrepresent the realities of transmigrant life. HARDJONO, *supra* note 65, at 26–27.

government was obligated to continue helping transmigrants with food and basic necessities for three or four farming seasons.<sup>73</sup>

Exact numbers of Indonesian settlers in East Timor are hard to obtain.<sup>74</sup> There was also some unaccounted-for migration by Indonesians who moved entirely of their own accord without government sponsorship or knowledge.<sup>75</sup> Some figures suggest that approximately 15,000 transmigrants arrived in East Timor between 1980 and 1987,<sup>76</sup> 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<sup>77</sup> – nearly 20% of the population.<sup>78</sup>

Given these numbers, and the unabashed manner in which Indonesia carried out transmigration, it is notable that neither the UN nor Portugal (which remained a constant and strong critic of Indonesia's occupation) raised the issue of Article 49(6). On the contrary, the Indonesian settlement program received financial backing from not only the World Bank, but also several Western powers.<sup>79</sup>

#### D. *Transitional and Post-Conflict Treatment of Settlers*

In advance of independence, East Timorese rebel leaders assured the international community that Indonesian settlers would not be expelled.<sup>80</sup> Indeed, pro-Timorese NGOs urged the Timorese to go further and guarantee that “Indonesian migrants would be protected,” for their home country “could not be expected to abandon its citizens to anarchy and revenge.”<sup>81</sup> The possibility that the settlers would have to be withdrawn by Indonesia itself was not raised by anyone. Many settlers (those born in East Timor or otherwise qualified) could vote in the referendum on independence as well as<sup>82</sup> in the election for the body responsible for drafting the first East Timorese constitution and the formation of an all-East

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<sup>73</sup> HARDJONO, *supra* note 65, at 29.

<sup>74</sup> Kiernen, *supra* note 53, at 592.

<sup>75</sup> HARDJONO, *supra* note 65, at 30.

<sup>76</sup> Kiernen, *supra* note 53, at 592.

<sup>77</sup> *Id.* at 597, n. 52.

<sup>78</sup> Columbia University's International Conflict Resolution Program forecast the East Timor population in 1997 to number approximately 881,600. International Conflict Resolution Program, Columbia University, *Social and Economic Conditions in East Timor* (Jon Pederson & Marie Arneberg eds., 1999), available at <http://www.fafu.no/pub/rapp/929/easttimor.PDF>.

<sup>79</sup> See The World Bank Group, *Transmigration in Indonesia*, <http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/4B8B0E01445D8351852567F5005D87B8> (last visited Mar. 12, 2010).

<sup>80</sup> Special Committee On The Situation With Regard To The Implementation Of The Declaration On The Granting Of Independence To Colonial Countries And Peoples, Summary Record Of The 1475th Meeting, par 17, A/AC.109/SR.1475 (24 February 1999).

<sup>81</sup> A/AC.109/SR.1489, pg. 2 (1 July 1999)

<sup>82</sup> UNTAET Regulation 2001/2, On the Election of a Constituent Assembly to Prepare a Constitution for Independent and Democratic East Timor § 30 (16 Mar. 2001).

Timorese Council of Ministers.<sup>83</sup>

The United Nations-led transitional regime created two mechanisms for post-conflict justice – a special mixed criminal tribunal with jurisdiction over crimes committed in the 1999 conflict that led to Timorese independence, and a truth and reconciliation committee, which had authority to deal with human rights abuses and violations of the Geneva Conventions during the entirety of the occupation.<sup>84</sup> The Commission’s 2,500-page report on Indonesian crimes makes no mention of Art. 49(6) or settlement as a crime.<sup>85</sup>

Nonetheless, the domestic citizenship laws adopted by independent East Timor, effective November 2002, largely exclude settlers from automatic citizenship. Section 8(1) of East Timor’s 2002 Nationality Law provides original East Timorese citizenship to anyone born in the national territory *to a parent born in East Timor*, stateless parents, or to parents whose citizenship is unknown; or anyone who is born in the national territory to a foreign parent if, being over 17 years old, the person declares him or herself an East Timorese.<sup>86</sup> Such provision is likely to preclude automatic East Timorese nationality for most children of settlers because only those children born in East Timor before 1985 would be able to take advantage of the law’s declaration provision in 2002.

It is likewise difficult for transmigrants to acquire East Timorese citizenship as the East Timor Nationality Law contains stringent naturalization requirements, including daunting language and cultural knowledge requirements.<sup>87</sup> While the Nationality Law does emphasize that a “foreign citizen who has settled in Timor-Leste as a result of transmigration policy or foreign military occupation shall not be considered as a usual or regular resident,”<sup>88</sup> and East Timor’s Immigration and Asylum Act specifies that such persons must obtain a visa from the Minister of the Interior in order to lawfully remain in the country long enough to become a naturalized citizen,<sup>89</sup> non-indigenous persons have been deported from

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<sup>83</sup> See Report of the Secretary-General to the U.N. Security Council ¶ 4, U.N. Doc. S/2001/983 (Oct. 18, 2001).

<sup>84</sup> UNTAET Reg. 2001/10, *On the Establishment of a Commission For Reception, Truth And Reconciliation In East Timor* Art. 1(c)-(d), 3.1(a)-(d).

<sup>85</sup> Timor-Leste Commission for Reception, Truth and Reconciliation, *Chaga Report*, Chapter 7.3: Forced Displacement and Famine, Par. 279, 289 (noting Indonesian transmigration in passing, without attaching any legal or ethical significance to it) (2005), available at <http://www.cavr-timorleste.org/chegaFiles/finalReportEng/07.3-Forced-Displacement-and-Famine.pdf>.

<sup>86</sup> *Law No. 9/2002 on Citizenship* (Timor-Leste), 9/2002, 5 Nov. 2002, art. 8(1)(a)–(c) (unofficial translation by UNTAET) (hereinafter East Timor Nationality Law), available at <http://www.unhcr.org/refworld/country,,NATLEGBOD,,TMP,4562d8cf2,3dd8de914,0.html>. A child born overseas to an East Timorese mother or father is also a citizen of East Timor. *Id.* § 8(2).

<sup>87</sup> *Id.* § 12(1).

<sup>88</sup> *Id.* § 12(2).

<sup>89</sup> See *Immigration and Asylum Act* (East Timor) art. 131, ¶¶ (1), (2), Law No. 9/2003, 15 Oct. 2003, available at <http://www.unhcr.org/refworld/docid/3fc75cd32.html> (“Foreigners who entered the country after September 7, 1975, and who are conducting

East Timor in only isolated instances.<sup>90</sup>

There has been no suggestion by any international authority that the Indonesian government should pay either the East Timor government or East Timorese nationals for land taken by settlers.<sup>91</sup> East Timor's first President, Xanana Gusmao, and his supporters overrode calls for reparations from factions within East Timor in an effort to build and maintain friendly relations with Indonesia.<sup>92</sup>

### E. *Summary*

The Indonesian occupation of East Timor involved a large-scale settlement enterprise run in a highly organized manner by the occupying power. Its goals were explicitly to change the demographic balance in the occupied territory, and to exploit it for economic purposes. Despite the scale and public nature of the project, no state or international organization – or the post-conflict justice mechanism – criticized the settlement program, let alone characterized it as a violation of the Geneva Conventions (despite the fact that many international actors were otherwise highly critical of Indonesia's occupation, and denounced its control of East Timor as illegal).

There was no suggestion that Indonesia should or must repatriate its settlers, and indeed it did not. The UN's treatment of the Indonesian settlers during East Timor's transition to independence further supports this proposition. Many settlers were allowed to vote in the referendum on the continuation of Indonesian rule. While Indonesian settlers were allowed to stay, most could do so only as resident aliens, not Timorese citizens.

## II. WESTERN SAHARA (SADR)

### A. *History of the Conflict*

Western Sahara (or the Sahrawi Arab Democratic Republic – SADR) is located in northwest Africa. The territory is approximately the same size as Colorado<sup>93</sup> and is bordered by the Atlantic Ocean on the West, Morocco to the North, Algeria to the northeast, and Mauritania to the south and east.<sup>94</sup> From the

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activities in the national territory for which under the present provisions it is mandatory to be a resident or holder of a proper visa, must . . . request a visa that will allow them to stay . . . .”).

<sup>90</sup> See e.g., U.S. Dept. of State, Country Reports on Human Rights Practices, East Timor § 2(c) (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61607.htm>.

<sup>92</sup> E.g., *East Timorese Leader 'Forgives' Indonesia*, TOWNSVILLE BULLETIN (Australia), Aug. 29, 2001, at 14.

<sup>93</sup> CIA, The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/fields/2023.html> (last visited Dec. 16, 2009). Western Sahara is approximately 252,120 km<sup>2</sup>. DEON GELDENHUYS, CONTESTED STATES IN WORLD POLITICS 190 (2009).

<sup>94</sup> JOHN DAMIS, CONFLICT IN NORTHWEST AFRICA: THE WESTERN SAHARA DISPUTE 1

late 19th Century until 1975, Western Sahara was a Spanish colony.<sup>95</sup> As early as 1960<sup>96</sup> however, Spain began facing significant international pressure to decolonize the territory in favor of the self-determination of the indigenous Sahrawi people.<sup>97</sup>

The first Sahrawi liberation movement began in 1968<sup>98</sup> and the Frente Popular para la Liberacion de Saguia al Hamra y Rio de Oro (POLISARIO Front), the most important independence faction, was established in 1973.<sup>99</sup> POLISARIO mounted its first attack on the Spanish military only ten days after its founding<sup>100</sup> and, in the face of continued harassment, Spain announced its intention to hold a referendum on the future of Western Sahara in the first half of 1975.<sup>101</sup>

Immediately after Spain's announcement, Morocco stated that it would not accept any referendum that included an option for Western Saharan independence.<sup>102</sup> Instead, Morocco suggested, together with the government of Mauritania, that the ICJ issue an advisory opinion establishing the pre-colonial status of the Western Sahara.<sup>103</sup> Morocco claimed that it had displayed public,

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(1983).

<sup>95</sup> GELDENHUYS, *supra* note 93, at 190–93. For general background on the history of Spain's influence in the Western Sahara, the decolonization process, Morocco's subsequent annexation of the territory and independence movement of the Saharawi people, see *id.*; AFRICAN GROUP OF THE INT'L LEAGUE FOR THE RIGHTS & LIBERATION OF PEOPLES, WESTERN SAHARA: THE STRUGGLE OF THE SAHARAWI PEOPLE FOR SELF-DETERMINATION (2d ed. 1979) (hereinafter STRUGGLE OF THE SAHARAWI); AKBARALI THOBHANI, WESTERN SAHARA SINCE 1975 UNDER MOROCCAN ADMINISTRATION (2002).

<sup>96</sup> The U.N. adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960. G. A. Resolution 1514 (XV), U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960).

<sup>97</sup> *E.g.*, G.A. Resolution 2072 (XX), U.N. Doc. A/RES/2072(XX) ¶ 2 (Dec. 16, 1965) (urgently requesting the Government of Spain immediately take all necessary measures to liberate Western Sahara); G.A. Resolution 2229 (XXI), U.N. Doc. A/RES/2229(XXI) ¶¶ 1, 4 (Dec. 20, 1966) (reaffirming the right of the people in Western Sahara to self-determination and inviting Spain to hold a referendum under U.N. auspices at the earliest possible date).

<sup>98</sup> GELDENHUYS, *supra* note 93, at 191, 192.

<sup>99</sup> *Id.* at 192. During its first two years, POLISARIO operated out of Mauritania, which provided material support to the fight against Spain. DAMIS, *supra* note 94, 38–42.

<sup>100</sup> THOBHANI, *supra* note 95, at 48.

<sup>101</sup> Letter dated 20 August 1974 from the Permanent Representative of Spain to the U.N. Secretary-General, U.N. Doc. A/9655 (1974).

<sup>102</sup> Anna Theofilopoulou, *The United Nations and Western Sahara: A Never-Ending Affair* 3 (U.S. Inst. of Peace Special Report No. 166, 2006), available at <http://www.usip.org/files/resources/sr166.pdf>; see also Statement of the Moroccan Minister for Foreign Affairs to the Members of the General Assembly, U.N. Doc. A/PV.2249 (Sept. 30, 1974).

<sup>103</sup> Letter dated 23 September 1974 from the Minister of Foreign Affairs of Morocco to the Minister for Foreign Affairs of Spain, UNU.N. Doc. A/9771, at Annex (1974) (threatening to mobilize to prevent Western Sahara's independence); see also Statement of the Moroccan Minister, *supra* note 102; Statement of the Minister for Foreign Affairs for

uninterrupted, and uncontested sovereignty over Western Sahara for several centuries, which entitled the Moroccan monarchy to “immemorial possession” of the territory.<sup>104</sup> Mauritania, for its part, argued that the people of the Western Sahara shared historical, religious, linguistic, cultural, and legal ties with its own population and that the two peoples were thus a single nation before the Spanish and French invasions.<sup>105</sup>

Contrary to these positions, the ICJ found that neither country could establish ties of territorial sovereignty over Western Sahara.<sup>106</sup> Instead, the ICJ ruled that it was a separate territory, and its inhabitants, the Sahrawi, had a right to self-determination, and potential independence. The same day the opinion was issued, Moroccan King Hassan II announced the organization of a Green March. The plan envisioned Moroccan citizens walking from Morocco into Western Sahara on a “pilgrimage” that symbolized the Moroccans’ dedication to a united Moroccan kingdom.<sup>107</sup> Despite serious logistical hurdles,<sup>108</sup> the Green March took place just three weeks later on November 6, 1974, when as many as 350,000 Moroccans entered the Western Sahara, including tens of thousands of Moroccan troops.<sup>109</sup> The Security Council immediately denounced the march and called on Morocco to withdraw its people, an instruction with which Rabat never fully complied.<sup>110</sup>

For three days after the march subsided, Morocco, Mauritania, and Spain secretly negotiated Western Sahara’s fate.<sup>111</sup> On November 14, 1974, the countries announced their agreement (the Madrid Accord): an interim tripartite government representing the three signatory states was to be established immediately.<sup>112</sup> Then,

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the Islamic Republic of Mauritania to the General Assembly, UNU.N. Doc. A/PV.2251 (Oct. 2, 1974).

<sup>104</sup> Western Sahara, Advisory Opinion, 1975 I.C.J. Reports 12, ¶¶ 90–91 (Oct. 1975).

<sup>105</sup> *Id.*, ¶¶ 135–139.

<sup>106</sup> *Id.*, ¶ 162.

<sup>107</sup> THOBHANI, *supra* note 95, at 50, 56, 57.

<sup>108</sup> King Hassan specified the number of Moroccans that would be allowed to participate from each part of the country and then had to move all marchers to a central location. *Id.* at 55.

<sup>109</sup> *Id.* at 57; GELDENHUYS, *supra* note 93, at 193. The Green March became “something of a crusade” and had tremendous unifying force throughout Morocco; apparently, thousands more Moroccans wanted to participate in the march than could because of resource constraints. See THOBHANI, *supra* note 95, at 57.

<sup>110</sup> S.C. Resolution 380 (1975) ¶ 2, U.N. Doc. S/RES/380(1975) (Nov. 6, 1975).

<sup>111</sup> See GELDENHUYS, *supra* note 93, at 193 (observing that the negotiations were “decidedly conspiratorial”). Although the official agreement was only six paragraphs long and contained no mention of Western Sahara’s partition, it is widely reported that a second, secret agreement setting forth a division of Western Saharan territory and assets was also made. *E.g.*, Thomas M. Franck, *The Stealing of Sahara*, 70 AM. J. OF INT’L LAW 694, 715 & nn.135, 136 (1976).

<sup>112</sup> Letter from the Permanent Representative of Spain to the United Nations Secretary-General (Nov. 18, 1975), annexed to Third Report by the Secretary-General in Pursuance of Resolution 379 Relating to the Situation Concerning Western Sahara, Annex II, U.N.

when Spain withdrew from the territory in February 1976, Morocco and Mauritania would bear joint responsibility for Western Sahara's administration.

The UN's response to the Madrid Accord was mixed. First, the General Assembly passed Resolution 3458(A), which again called on Spain to supervise a free and genuine act of Western Saharan self-determination.<sup>113</sup> But that same day the UN passed Resolution 3458(B), which recognized the Madrid Accord, requested that the interim administration respect the aspirations of the Saharan population, and consult with a representative of the UN to ensure the Saharan population could exercise its inalienable rights.<sup>114</sup>

When the Spanish left Western Sahara in late February 1976, Moroccan military and civilian personnel assumed control.<sup>115</sup> King Hassan, claiming the consent of the Saharawi people, decided to partition and annex Western Sahara between Morocco and Mauritania.<sup>116</sup> The POLISARIO declared Western Sahara's independence later that same day.<sup>117</sup>

### B. Moroccan Occupation and International Reactions

In the beginning, the POLISARIO fighters experienced a measure of success, staging several effective attacks against occupying forces and even striking blows inside Moroccan and Mauritanian borders.<sup>118</sup> The costs of the war began to wear on Mauritania and by 1979 it had withdrawn its troops and renounced all territorial claims over Western Sahara.<sup>119</sup>

Even more impressive than its military victories were POLISARIO's diplomatic achievements. After Mauritania's withdrawal, the UN formally recognized POLISARIO as the representative of the Western Saharan people, adopting a Resolution that declared Morocco an occupying power and reaffirmed the Saharawi's right to self-determination.<sup>120</sup> In fact, in the ten years following the

Doc. S/11880(1975) (Nov. 19, 1975) (hereinafter the "Madrid Accord").

<sup>113</sup> G.A. Resolution 3458(A) (XXX) ¶¶ 1–3, 5, U.N. Doc. A/RES/3458(XXX) (Dec. 10, 1975).

<sup>114</sup> G.A. Resolution 3458(B) (XXX) ¶¶ 3, 4, U.N. Doc. A/RES/3458(XXX) (Dec. 10, 1975).

<sup>115</sup> THOBHANI, *supra* note 95, at 58.

<sup>116</sup> N.Y. TIMES, *supra* note \_\_, at 8.

<sup>117</sup> Proclamation of the First Government of the Saharawi Arab Democratic Republic (Feb. 27, 1976), *reprinted in* STRUGGLE OF THE SAHARAWI, *supra* note 95, at 194–95 (note the typo in the date); *see also* Franck, *supra* note 111, at 718 n.168 (citing N.Y. TIMES, *supra* note at 8); GELDENHUYS, *supra* note 93, at 194. The SADR was to be ruled by an eight-man POLISARIO government based in Tindouf, Algeria. GELDENHUYS, *supra*, at 194.

<sup>118</sup> *Id.* at 195.

<sup>119</sup> Letter from the Permanent Representative of Mauritania to the U.N. Secretary-General (Aug. 18, 1979), U.N. Doc. A/34/427 (Aug. 20, 1979). The portion of the Western Sahara relinquished by Mauritania was promptly annexed by Morocco. G.A. Resolution 35/19, ¶ 3, U.N. Doc. A/RES/35/19 (Nov. 11, 1980).

<sup>120</sup> G.A. Resolution 34/37, ¶¶ 5, 7, U.N. Doc. A/RES/34/37 (Nov. 21, 1979). The General Assembly continued to pass similarly worded resolutions once a year for ten years

declaration of SADR independence, sixty-seven countries afforded the country *de jure* recognition<sup>121</sup> and the SADR was admitted as a full member of the Organization of African Unity.

Beginning in the early 1980s, Morocco began to construct a massive berm around the areas of Western Sahara it controlled.<sup>122</sup> The berm cut off POLISARIO's access to many Western Saharans, preventing it from replenishing its forces with new recruits.<sup>123</sup> Nonetheless, the POLISARIO, based partly in Algeria, continues to maintain a parallel government with limited recognition, controlling less than 20% of Western Sahara's territory.<sup>124</sup> While a ceasefire has been in place since 1991, violent attacks by Moroccan authorities on Saharawi protesters continue to occur.<sup>125</sup>

### C. Moroccan Settlement Policy and Art. 49(6) Violations

While the word "occupation" is rarely used in relation to Morocco's presence of Western Sahara by states and international organizations,<sup>126</sup> there is broad agreement<sup>127</sup> that the situation qualifies as a belligerent occupation. It has been described as such by the UN<sup>128</sup> and more recently the European Court of Justice.<sup>129</sup> As with Indonesia, Morocco has never been accused of violating Article 49(6) by state representatives or international organizations.<sup>130</sup> However, it has

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thereafter.

<sup>121</sup> GELDENHUYS, *supra* note 93, at 194.

<sup>122</sup> *Id.* at 196; THOBHANI, *supra* note 95, at 61.

<sup>123</sup> *See id.*

<sup>124</sup> <http://foreignpolicy.com/2014/06/25/nowhere-land/>

<sup>125</sup> See <http://www.reuters.com/article/us-morocco-sahara-camp-idUSTRE6A74C020101108>

<sup>126</sup> As memorably demonstrated recently when U.N. Secretary General Ban Ki-Moon used the term on a visit to Morocco, and promptly expressed his "regret" for doing so. <http://www.aljazeera.com/news/2016/03/chief-regrets-western-sahara-occupation-comment-160328201619417.html>

<sup>127</sup> See Eugene Kontorovich, *Economic Activity in Occupied Territory*, 53 COLUM. J. TRAN'TL L. 584, 611-12 & nn. 146-47 (2015) (describing academic and governmental consensus regarding the status of the territory).

<sup>128</sup> See U.N. Secretary-General, *The Situation Concerning Western Sahara: Report of the Secretary-General*, ¶ 16, U.N. Doc. S/21360 (June 18, 1990); G.A. Res. 34/37, U.N.

Doc. A/RES/34/37 (Nov. 21, 1979);

<sup>129</sup> See *Front Polisario v. European Commission*, ECJ (General Court) case T-512/12, par. 13, 76 (Dec. 10, 2015).

<sup>130</sup> While scholars have rarely addressed the issue, those who do tend to find the provision violated. For example, a report on the Western Saharan issue by the Parliamentary Assembly of the Council of Europe makes no mention of the settler issue at all. PACE Committee on Political Affairs, *Parliamentary contribution to resolving the Western Sahara conflict*, Doc. 13526 06 (June 2014). The issue of Moroccan violations of 49(6) has been raised by a few scholars. See *E.g.*, Randa Farah, *Western Sahara and Palestine: Shared Refugee Experiences*, 16 FORCED MIGRATION REV. 20, 23 (2003);

engaged in one of the world's most extensive settlement projects.

Since its invasion in 1976, “Moroccanization” of the Western Saharan population has been official Moroccan public policy.<sup>131</sup> Over the past 30 years the Moroccan government has spent as much as \$2.4 *billion* on Western Sahara's basic infrastructure, building airports, harbors, roads, and electricity plants.<sup>132</sup> The Moroccan government has offered higher salaries in order to incentivize settlers to move to the Western Sahara.<sup>133</sup> Salaries in the occupied territory are twice what they would be in Rabat.<sup>134</sup> Jobs in the lucrative state-controlled extractive industries go primarily to Moroccan settlers. They have received controlling stakes in companies that manage the highly lucrative fishing industry that operates off Western Sahara's coast.<sup>135</sup>

The Moroccan government also offers free or low cost housing and subsidies on basic commodities such as food and oil to its citizens.<sup>136</sup> Settlers are also largely exempt from taxes.<sup>137</sup> A reporter observed in 1991: “The first thing which strikes the visitor to el-Ayoune, the capital of Western Sahara, is the number of smart new apartment blocks and residential districts which have been built around it.”<sup>138</sup> In the months leading up to the anticipated 1991 referendum on independence, an estimated 170,000 persons were bribed or forced to move to Western Sahara in an effort to stack the vote.<sup>139</sup>

By devoting huge amounts of resources to the territory, Morocco developed what was in effect a Western-Saharan “affirmative action policy”<sup>140</sup> –

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Teresa K. Smith de Cherif, *Peace in Western Sahara?*, 38 AFRICA TODAY, at 49, 54 (1991). Major human rights groups, however, have not treated the settlers as constituting a 49(6) violation. See Human Rights Watch, *Human Rights in Western Sahara and in the Tindouf Refugee Camps*, at 24 n. 21 (noting the transfer of settlers in passing but not describing it as illegal) (2015), available at <https://www.hrw.org/sites/default/files/reports/wsahara1208webwcover.pdf>

<sup>131</sup> Anne Lippert, *The Human Costs of War in Western Sahara*, 34 AFRICA TODAY 47, 53 (1987) (“Rabat’s intention was to create an irreversible reality that would compel the international community to acknowledge Moroccan sovereignty over Western Sahara as a *fait accompli*.”); GELDENHUYS, *supra* note 93, at 199 (citing Neil Ford, *Oil Potential Could Provide Catalyst for Change*, 330 MIDDLE EAST, at 54 (Jan. 2003)).

<sup>132</sup> GELDENHUYS, *supra*, at 196.

<sup>133</sup> William J. Durch, *Building on Sand: UN Peacekeeping in the Western Sahara*, 17 INT’L SECURITY, 151, 164 (1993).

<sup>134</sup> Jacob Mundy, *Autonomy & Intifadah: New Horizons in Western Saharan Nationalism*, 33 REV. OF AFRICAN POL. ECON. 255, 262 (2006).

<sup>135</sup> Mundy, *supra* note 134, at 263.

<sup>136</sup> THOBHANI, *supra* note 95, at 105.

<sup>137</sup> *Life Under Occupation*, *supra*, note \_\_, at 12.

<sup>138</sup> Richard Dowden, *Hassan Accommodates Only One Side in Western Sahara*, THE INDEPENDENT (LONDON), Nov. 7, 1991, at 14.

<sup>139</sup> *Id.*; Steve Kirby, *Morocco Looks For UN ‘Rubber Stamp’ Over West Sahara*, THE INDEPENDENT (LONDON), Nov. 26, 1991, at 13.

<sup>140</sup> MOHAMED CHERKAoui, MOROCCO AND THE SAHARA: SOCIAL BANKS AND GEOPOLITICAL ISSUES 179 (2007).

and that policy achieved success.<sup>141</sup> In 1974, two years prior to the joint Moroccan/Mauritanian occupation, Spain conducted an official census that counted approximately 74,000 adult Sahrawi living in the Western Sahara.<sup>142</sup> It is estimated that as a result of the violence during 1975 and 1976 anywhere from one-half to one-third of this population fled to Tindouf, Algeria.<sup>143</sup>

The population estimates for the native Sahrawi living in Western Sahara between 1976 and 2000 vary significantly. Morocco conducted a census in 1994 that put the total population of Western Sahara at approximately 213,000,<sup>144</sup> yet only 151,000 residents were registered to vote in the local Moroccan elections held five years later.<sup>145</sup> Both counts are likely flawed. Official population estimates in less developed countries tend to be inflated<sup>146</sup> and this observation is likely to be especially true for the Moroccan government, which would want the census to indicate a thriving Western Sahara population. On the other hand, it seems reasonable to conclude that the 1999 voter registration list excluded Sahrawi who did not wish to validate the Moroccan occupation by participating in local elections; accordingly, it may underestimate the number of Western Saharan residents. If, nonetheless, the 1999 voter registration list is a good proxy for the area's total population – and if the voter identification criteria specified in the UN's 1991 Peace Plan (discussed below) enabled UN administrators to accurately identify all native Sahrawi and their descendants – then in 1999, at least 55% of the Western Saharan population were non-native settlers.<sup>147</sup> A more recent report suggests that Moroccan settlers in Western Sahara outnumber the Sahrawi by two to one.<sup>148</sup>

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<sup>141</sup> Because of their nomadic, tribal nature, the lack of reliable, identification documents, and other means of proving lineage, data regarding the Saharawi population is often heavily contested. Where possible, discrepancies are noted.

<sup>142</sup> Maddy-Weitzman, *supra* note \_\_, at 600..

<sup>143</sup> DAMIS, *supra* note 94, at #. Cf. THOBHANI, *supra* note 95, at 104 (noting that in the aftermath of the Moroccan takeover writers have placed the number of Saharawi refugees at anywhere between 12,000 and 150,000). According to one report, by 1987, refugees in Algerian camps numbered somewhere between 165,000–200,000 while approximately 60,000–70,000 Sahrawi remained in occupied SADR (behind the wall). Lippert, *supra* note 131, at 47.

<sup>144</sup> “Regions of Morocco,” Administrative Divisions of Countries (“Statoids”), <http://www.statoids.com/uma.html> (last visited Dec. 18, 2009).

<sup>145</sup> Pablo San Martín, *Western Sahara: Road to Perdition?*, 103 AFRICAN AFFAIRS 651, 653 (2004).

<sup>146</sup> “Explanation of Listings,” Administrative Divisions of Countries (“Statoids”), <http://www.statoids.com/info.html#psd> (last visited Dec. 18, 2009).

<sup>147</sup> Martín, *supra* note 145, at 654.

<sup>148</sup> *Deadlock in the Desert*, THE ECONOMIST, Mar. 10, 2007. A second Moroccan census conducted in 2004 estimates the Western Saharan population at about 355,000. Regions of Morocco, *supra* note 144. The CIA World Factbook puts the SADR's population today at just over 405,000. Western Sahara, CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html> (last visited Dec. 18, 2009).

D. *(Proposed) Transitional & Post-Conflict Treatment of Settlers*

The first formal settlement proposals, finalized in 1991, contemplated a UN-led referendum that would provide voters with two choices: independence or integration.<sup>149</sup> Both parties agreed that the 1974 Spanish census would be the basis for the voter registration list, thus excluding settlers.<sup>150</sup> Nonetheless, debates about the details of voter qualifications broke out almost as soon as the sides agreed to a referendum,<sup>151</sup> and this prevented the United Nations Mission for the Referendum in Western Sahara (MINURSO)<sup>152</sup> from successfully operating throughout much of the '90s.<sup>153</sup> Eventually, the UN Security Council recognized that the referendum scheduled to take place that year was no longer viable.<sup>154</sup>

In May 2003, the UN Security Council endorsed a new plan for Western Sahara. Baker Plan II (named after former U.S. Secretary of State James Baker, the Secretary-General's Personal Envoy to Western Sahara) contemplated a four to five year interim Western Sahara government followed by a referendum.<sup>155</sup> There were only two categories of people who would be eligible to vote for the transitional government: (1) persons aged 18 years or over and whose names appeared on MINURSO's approved voter list as of December 30, 1999 (exclusive

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<sup>149</sup> The 1991 settlement proposals are detailed in two lengthy reports of the Secretary-General. Report of the Secretary-General on the Situation Concerning Western Sahara, U.N. Doc. S/21360 (June 18, 1990); Report of the Secretary-General on the Situation Concerning Western Sahara, U.N. Doc. S/22464 (Apr. 19, 1991). U.N. Doc. S/21360, *supra*.

<sup>150</sup> This formulation left neither side entirely content. Morocco claimed that the many Western Saharans who left for Morocco during the Moroccan-sponsored uprising against the Spanish in the 1950s should be entitled to vote, while POLISARIO wanted to strictly limit the referendum participants to those who could prove ties with the territory in 1974. Dunbar, *supra* note \_ at 527–28; *see also* Report of the Secretary-General on the Situation Concerning Western Sahara ¶ 15, U.N. Doc. S/25170 (Jan. 26, 1993).

<sup>151</sup> Report of the Secretary-General on the Situation Concerning Western Sahara, Annex ¶ 6, U.N. Doc. S/25170 (Jan. 26, 1993).

<sup>152</sup> See S.C. Res. 691 (1991) (establishing UN agency to supervise the referendum and transitional period).

<sup>153</sup> MINURSO, Identification of Eligible Voters, <http://www.minurso.unlb.org/IDC.html> (last visited Dec. 20, 2009); Dunbar, *supra* note \_ at 535.); Report of the Secretary-General on the Situation Concerning Western Sahara ¶¶ 6, 8–11, U.N. Doc. S/1999/1219 (Dec. 6, 1999); Report of the Secretary-General on the Situation Concerning Western Sahara ¶¶ 25–29, U.N. Doc. S/2000/131 (Feb. 17, 2000).

<sup>154</sup> Security Council Resolution 1309 (2000), U.N. Doc. S/RES/1309 (2000) (July 25, 2000) (reaffirming its support for a West Saharan referendum but nonetheless encouraging the parties to reach a political solution).

<sup>155</sup> Report of the Secretary-General on the Situation Concerning Western Sahara, annex II, ¶ 2, U.N. Doc. S/2003/565 (May 23, 2003). Under this second plan it was expected that the referendum would have three options: independence, integration, and “autonomy,” which would essentially constitute a continuation of the interim power-sharing arrangement set forth in the Baker Plan.

of those persons objecting to or seeking appeals from the process); and (2) persons aged 18 years or over whose names appeared on the UNHRC's repatriation list as of October 31, 2000.<sup>156</sup>

The eligibility criteria for referendum voters, on the other hand, included a significantly broader swath of the territory's population. In addition to the two lists of persons eligible to vote for the transitional government, any persons residing in the territory continuously since December 30, 1999 would be entitled to vote.<sup>157</sup> Under this criterion a majority of Moroccan settlers in Western Sahara would be eligible to vote on independence.

The "settler provision" of Baker Plan II provoked some criticism. According to critics, the plan demonstrated that the UN was claiming to reaffirm its "commitment to provide for the self-determination of the people of Western Sahara, even while it seriously compromised on [that principle]."<sup>158</sup> Others, however, lauded Baker Plan II as "a unique opportunity to resolve the Western Sahara conflict peacefully and permanently . . . through self-determination." That the UN Security Council ultimately chose to endorse Baker Plan II despite the questions raised seems to suggest that it found that the plan accorded with international law.<sup>159</sup> Nonetheless, the Moroccan government rejected the plan in 2004.<sup>160</sup>

Since then, little progress has been made toward a permanent Western Saharan solution.<sup>161</sup> There continues to be no suggestion that the Moroccan government should make reparations for its actions in the territory – including for damages caused by the berm – or that Moroccan settlers should be removed from the area.

### E. Summary

Morocco's settlement program in Western Sahara is one of the longest, largest, and most ambitious. It involved transporting hundreds of thousands of settlers across a vast desert and implanting them in a difficult and hostile environment, at great expense to the occupying power. It also is one of the most

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<sup>156</sup> *Id.*, annex II, ¶ 16.

<sup>157</sup> *Id.*, annex II, ¶ 6.

<sup>158</sup> Ian Williams & Stephanie Zunes, *Self-Determination Struggle In the Western Sahara*, Foreign Policy in Focus (Sept. 2003), available at <http://www.globalpolicy.org/component/content/article/208/39893.html>.

<sup>159</sup> Security Council Resolution 1495 (2003) ¶ 1, U.N. Doc. S/RES/1495(2003) (July 31, 2003) (continuing to strongly support the efforts of the Secretary-General and his Personal Envoy and similarly supporting the Baker Plan for Peace as the "optimal political solution on the basis of agreement between the two parties").

<sup>160</sup> Report of the Secretary-General on the Situation Concerning Western Sahara ¶ 36, U.N. Doc. S/2004/325 (Apr. 23, 2004); see also Letter from the Minister of Foreign Affairs and Cooperation of Morocco to the Personal Envoy of the Secretary-General (Apr. 9, 2004), annexed to U.N. Doc. S/2004/325, *supra*.

<sup>161</sup> See Report of the Secretary-General on the Situation Concerning Western Sahara ¶ 4, U.N. Doc. S/2008/45 (Jan. 28, 2008).

demographically consequential, with the settlers now amounting to a substantial majority of the territory's population. The Moroccan settlers, by their numbers, undermine the possibility of Sahrawi self-determination called for by the ICJ, and also create problems of resource deprivation and economic harm. Despite significant interest in the situation, and repeated criticisms of Morocco's presence in the territory, no state or international organization has commented in any way on the settlement policy.<sup>162</sup>

Moreover, the unconsummated UN peace plan for the territory leaves all the settlers in place, and allows them to vote in a referendum. If the international community regarded Morocco's settlement program as illegal, this would be inconsistent with a purported duty to give no recognition or legal effect to a settlement enterprise.

### III. NORTHERN CYPRUS

#### A. *History of the Conflict*

The Mediterranean island of Cyprus has historically been home to a majority Greek and minority Turkish population. The island, just southwest of Turkey, was an Ottoman possession for 300 years until 1878, when it came under British control.<sup>163</sup> The Greek portion of the population, however, sought *enosis*, or reunion, with Greece.<sup>164</sup> The British were reluctant to give up the strategically important territory. When Britain contemplated granting independence to the island, it sought to maintain a level of strategic control, while preventing Turkish or Greek dominance. One possible solution was a partition of the island.<sup>165</sup> After nearly five years of negotiations, a different solution was reached: Cyprus would become an independent state,<sup>166</sup> but with some limitations: the island's territorial and political independence would be safeguarded by the joint efforts of Britain, Turkey, and Greece.

Embodied in five documents,<sup>167</sup> the agreement required the new republic

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<sup>162</sup> *Report on the Kingdom of Morocco's Violations of the International Covenant on Economic Social and Cultural Rights in the Western Sahara* 3, 13 (2015) (noting that U.N.'s Committee on Economic, Social and Cultural Rights "repeatedly denounced Israel's settlement policies, yet it has remained silent on Morocco's decades-long policy of moving Moroccan settlers into Western Sahara" and that its treatment of Israel is not "consistent"), available at [http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MAR/INT\\_CESCR\\_CS\\_S\\_MAR\\_21582\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MAR/INT_CESCR_CS_S_MAR_21582_E.pdf)

<sup>163</sup> *Id.* at 171.

<sup>164</sup> MICHALIS STAVROU MICHAEL, *RESOLVING THE CYPRUS CONFLICT: NEGOTIATING HISTORY* 14.

<sup>165</sup> MICHAEL, *supra* note 164, at 23.

<sup>166</sup> METIN TAMKOÇ, *THE TURKISH CYPRIOT STATE: THE EMBODIMENT OF THE RIGHT TO SELF-DETERMINATION* 71 (1988).

<sup>167</sup> See Treaty of Guarantee, Cyp.-Gr.-Tur.-U.K., Aug. 16, 1960; Treaty of Alliance,

to refrain from any political or economic association with another state that would be likely to result in either partition of the island or union of the island with such state (*i.e.*, it prohibited formal association with Greece or Turkey).<sup>168</sup> In return, Britain, Turkey and Greece would ensure the preservation of Cyprus's constitutional order.<sup>169</sup> Turkey and Greece were responsible for defending Cyprus and each was allowed to station troops on the island to fulfill this purpose.<sup>170</sup> Britain was given sovereignty over two military bases on the island and agreed to cooperate with Greece and Turkey for the island's defense.<sup>171</sup> Additionally, the three governing countries agreed to consult one another in the event that either Cyprus community took steps toward partition or union; if no consensus regarding a course of action could be reached, each reserved the right to act independently in order to restore the status quo.<sup>172</sup>

In December 1963, a yearlong Greek coup forcibly ousted the Turks from the government and into ethnic enclaves that brought about "a political, social, and demographic separation" between the two communities."<sup>173</sup> The all-Greek Cypriot government<sup>174</sup> sought to amend the 1960 constitution's ethnic power-sharing arrangements. In July 1974, President Makarios was deposed in a coup plotted by Greek military leaders.<sup>175</sup> Five days after the coup, Turkish troops invaded the island.<sup>176</sup> Over the next three weeks 35,000-40,000 Turkish soldiers took control of approximately 36.4% of the island's territory, leading the vast majority of Turkish Cypriots in the south to flee north and any Greek Cypriots in the occupied northern area to flee south.<sup>177</sup>

Seven months after the invasion, in February 1975, the Turkish administration unilaterally deemed the northern portion of the island a "Federated Turkish State."<sup>178</sup> Finally, in 1983, the Turkish-Cypriot community declared

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Cyp.-Gr.-Tur., Aug. 16, 1960; Treaty Concerning the Establishment of the Republic of Cyprus, Cyp.-Gr.-Tur.-U.K., Aug. 16, 1960; CONST. OF CYPRUS (1960); Basic Structure of the Republic of Cyprus, Cyp.-Gr.-Tur.-U.K., Feb. 11, 1959 (forming the basis of the Constitution of Cyprus). The treaties, found to be of integral importance to the state's structure, are also accorded constitutional status. CONST OF CYPUS annexes 1-3.

<sup>168</sup> Treaty of Guarantee, *supra* note 167, art. 1.

<sup>169</sup> *Id.* art. 2.

<sup>170</sup> Treaty of Alliance, *supra* note 167, art. 1-2. Greece and Turkey were allowed 950 troops and 650 troops respectively. *Id.* Add'l Protocol No. 1.

<sup>171</sup> Treaty of Guarantee, *supra* note 167, art. 3; Treaty Concerning the Establishment of Cyprus, *supra* note 167, art. 1 & annex A.

<sup>172</sup> Treaty of Guarantee, *supra* note 167, art. 4.

<sup>173</sup> MICHAEL, *supra* note 164, at 27.

<sup>174</sup> Galo Plaza Report, *supra* note \_\_, at ¶ 117.

<sup>175</sup> *Id.*

<sup>176</sup> KYPROS CHRYSOSTIMIDES, THE REPUBLIC OF CYPRUS: A STUDY IN INTERNATIONAL LAW 117 (2000).

<sup>177</sup> FRANK HOFFMEISTER, LEGAL ASPECTS OF THE CYPRUS PROBLEM 36, 37 (2006); the Turkish invasion created an estimated 200,000 refugees. MICHAEL, *supra* note 164, at 39.

<sup>178</sup> U.N. Security Council Resolution 367 (1975) ¶ 2, U.N. Doc. S/RES/367 (Mar. 12, 1975).

formal independence as the Turkish Republic of Northern Cyprus (“TRNC”).<sup>179</sup> Today, after five rounds of UN-led negotiations and almost four decades of disagreement, the Turkish military has yet to withdraw and the parties remain at loggerheads.

The international community has overwhelmingly rejected Turkey’s position that the Treaty of Guarantee provides a basis for its unilateral military action,<sup>180</sup> to say nothing of its continued control of the island. Shortly after the invasion, the UN Security Council adopted a resolution “demand[ing] an immediate end to foreign military intervention in the Republic of Cyprus . . . .”<sup>181</sup> The UN likewise asked all parties involved in the dispute to “refrain from any action which might prejudice [Cypriot] sovereignty, independence, territorial integrity and non-alignment, as well as from any attempt at partition of the island or its unification with any other country.”<sup>182</sup> The UN also declared the TRNC’s subsequent declaration of independence to be invalid, and called upon other states to similarly refrain from recognizing any Cypriot state other than the Republic of Cyprus.<sup>183</sup> Only Ankara has recognized the TRNC.<sup>184</sup>

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<sup>179</sup> Declaration of Independence by Turkish Cypriot Parliament on 15 November 1983, *appended to* Letter from the Permanent Turkish Representative to the U.N. addressed to the Secretary-General, U.N. Doc A/38/586 (Nov. 16, 1983).

<sup>180</sup> Hoffmeister, *supra* note 177, at 42 (citing Greek opinion).

<sup>181</sup> U.N. Security Council Resolution 353 (XXIX), U.N. Doc. S/RES/353 (1974) (July 20, 1974); *see also* U.N. Security Council Resolution 360 (XXIX), U.N. Doc. S/RES/360 (1974) (Aug. 16, 1974) (recording “its formal disapproval of the unilateral military actions undertaken against the Republic of Cyprus”).

<sup>182</sup> U.N. Security Council Resolution 367 (1975) ¶ 1, U.N. Doc. S/RES/367 (Mar. 12, 1975).

<sup>183</sup> U.N. Security Council Resolution 541 (1983), U.N. Doc. S/RES/541 (1983) (Nov. 18, 1983); *see also* U.N. Security Council Resolution 550 (1984), U.N. Doc. S/RES/550 (1984) (May 11, 1984) (condemning “all secessionist actions, including the purported exchange of ambassadors between Turkey and the Turkish Cypriot leadership” and declaring them “illegal and invalid”).

<sup>184</sup> Hannah K. Strange, *U.S. Biased Over Cyprus, Say Congressmen*, UNITED PRESS INT’L, July 8, 2004; *see also* Parliamentary Assembly of the Council of Europe Resolution 816 (1984), *available at* <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta84/eres816.htm> (“Deploing the illegal declaration by the leaders of the Turkish Cypriot community, . . . and regretting that these leaders have ignored numerous appeals from the international community to revoke their declaration of 15 November 1983 . . .”).

However, since the proposed U.N. plan failed in 2004 (see discussion *infra*), the TRNC has been upgraded from an observing “community” within the Organization of the Islamic Conference (OIC) to an observing “state.” *See* [http://www.mfa.gov.cy/mfa/embassies/embassy\\_doha.nsf/misc\\_en/52D53EC97ACC4A52432572CC003B9E90?OpenDocument](http://www.mfa.gov.cy/mfa/embassies/embassy_doha.nsf/misc_en/52D53EC97ACC4A52432572CC003B9E90?OpenDocument). Additionally, although it has yet to officially recognize the Turkish Cypriot State, Azerbaijan has opened a representative office in the TRNC.

B. *Turkey's Settlement Policy and Art. 49(6) violations.*

1. Issues in counting settlers

The presence of Turkish settlers in the TRNC is “an undisputed fact,”<sup>185</sup> which has been repeatedly noted by the European Court of Human Rights.<sup>186</sup> According to the first census after the independence in 1960, the island was home to a population of 573,566 Cypriots, of whom 442,138 (77.1%) were Greek Cypriots and 104,320 (18.2%) were Turkish Cypriots.<sup>187</sup> By 1974, the island's population had increased to 641,000, but the demographic ratio of the island remained essentially stable (506,000, or 78.9%, were Greek Cypriot and 118,000, or 18.2%, Turkish Cypriot).<sup>188</sup>

After the 1974 invasion, the island's demographics changed rapidly. An estimated 20,000 Greek Cypriots are said to have emigrated immediately following partition.<sup>189</sup> Moreover, roughly 140,000 Greeks fled or were forced out of the occupied territory following the invasion. At the same time, the Turkish population increased steadily and grew 28% in the five years following the invasion.<sup>190</sup> The increase in the north during this period is not attributable to births alone and is generally acknowledged to be the result of an influx of Turkish settlers.<sup>191</sup>

The next thirty years saw the Turkish population in Northern Cyprus grow even larger, with estimates of the number of settlers reaching as high as 160,000-170,000 – ironically, roughly equal to the number of Greeks who were displaced from the territory.<sup>192</sup>

The precise number of settlers remains a matter of some dispute,<sup>193</sup> but most agree they now represent an absolute majority in the occupied territory.<sup>194</sup> Part of the debate is due to a lack of an internationally-supervised census, or of any NGOs who actively monitor settlement growth. Part of the debate on numbers is

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<sup>185</sup> The Demographic Structure of Cyprus, Report of Alfons Cuco, Committee on Migration, Refugees and Demography to the Parliamentary Assembly of Europe ¶ 104, Doc. No. 6589, Apr. 27, 1992 (hereinafter “Cuco Report”).

<sup>186</sup> *Case of Cyprus v. Turkey*, Application no. 25781/94, pars. 28, 522, 299 (Judgment) (2001). The Court did not consider the legality of the implantation of settlers, but did find their presence connected with a violation of property rights, intimidation and abuse of Greek Cypriots. *Id.* at 299-301.

<sup>187</sup> Cuco Report, *supra* note 185, ¶ 34.

<sup>188</sup> *Id.* ¶ 35.

<sup>189</sup> *Id.* ¶ 41.

<sup>190</sup> *Id.* ¶ 42.

<sup>191</sup> *Id.*

<sup>192</sup> 2008 Demographic Report, *supra* note 213, at 11.

<sup>193</sup> See Colonisation By Turkish Settlers of the Occupied Part of Cyprus, Report of Jaakko Laakso, Committee on Migration, Refugees and Demography to the Parliamentary Assembly of Europe, ¶ 25, Doc. No. 9799, May 2, 2003 (hereinafter “Laakso Report”) (observing “in 2000, the number of the Turkish settlers exceeded the number of the indigenous”).

<sup>194</sup> Cuco Report, *supra* note 185, ¶ 71, 78.

definitional – who counts as a settler. One question is whether children of settlers – born after the “transfer” to the occupied territory – count as settlers. This issue has been neglected in most academic and diplomatic discussions of Art. 49(6). On the one hand, the “baby settlers” are not “part of the civilian population” of the occupying power, and were not transferred. On the other hand, their birth is to some extent an indirect consequence of the original transfer.<sup>195</sup> This issue has been addressed, however, in the Cypriot context, and the consensus appears to be that those born to transferees cannot be included in counts of the settler population.<sup>196</sup> As a U.K. Parliament Foreign Affairs Committee Report put it:

Many of these so-called 'settlers' were born on the island and know no other homeland. . . They should not be treated as a separate category from the [indigenous] Turkish Cypriots.<sup>197</sup>

A separate question deals with students. Turkey has built 10 universities and numerous colleges in the territory, all designed to attract students from outside the territory.<sup>198</sup> Indeed, today higher education is one of the Turkish occupation regime’s biggest industries. Students at these schools number more than 63,000,<sup>199</sup> the vast majority of whom are from mainland Turkey,<sup>200</sup> with most of the others from third-countries. Similarly, tens of thousands of foreigners, mainly British, have moved to the territory, as part of an active program by occupation authorities to improve Northern Cyprus’s economic base. These are routinely not counted in figures of settlement transfer,

## 2. Ongoing waves of settlers

In the immediate aftermath of the 1974 invasion, three different categories of Turkish settlers migrated to the territory until 1983 became known as Turkish Federated State of Cyprus (TFSC). First came white-collar workers and skilled laborers. This group came to Northern Cyprus to help rebuild its infrastructure (e.g. transportation networks and electricity plants) and to train Turkish Cypriot refugees in tourism, textile manufacture, and agriculture.<sup>201</sup> Second came Turkish

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<sup>195</sup> The consequence is indirect, because it depends on the settlers having children, and those children choosing as adults to remain in the territory.

<sup>196</sup> For example, the U.N. Human Rights Council differentiates between “Turkish settlers” and “their descendants.” See, e.g., Report of the Office of the United Nations High Commissioner for Human Rights on the question of human rights in Cyprus, A/HRC/28/20, Par. 31 (Jan. 23, 2015).

<sup>197</sup> <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaaff/196/19604.htm>

<sup>198</sup> See Republic of Cyprus MFA, *The illegally operating “universities” in the occupied areas of the Republic of Cyprus*, <http://www.mfa.gov.cy/mfa/mfa2006.nsf/0/632D3EF2D186156CC22571BC0033E0A0?OpenDocument>

<sup>199</sup> Susanne Gusten, *Students Flock to Universities in Northern Cyprus* (Feb. 16, 2014).

<sup>200</sup> Van Coufoudakis, *International Aggression and violations of human rights: the case of Turkey in Cyprus*, at 34, *Modern Greek Studies* (Univ. of Minn.)(No. 18, 2008).

<sup>201</sup> Hatay, *supra* note 192, at 11.

soldiers, who were likewise offered TFSC citizenship. Enacted in 1975,<sup>202</sup> TFSC Citizenship Law No. 3/1975 provided TFSC citizenship to the extended families (wives, children, parents and siblings) of Turkish soldiers killed during the 1974 invasion, as well as to any person who served in the Turkish Resistance Organization in Cyprus before August 18, 1974.<sup>203</sup> The Equivalent Property Law, enacted seven years later, allocated homes and other real property abandoned by Greek-Cypriot refugees to all military personnel who chose to remain permanently in northern Cyprus.<sup>204</sup>

The third and final group of migrants was made up of unskilled laborers. Many of these former farmers from Turkey's Anatolia region were underprivileged and landless.<sup>205</sup> After natural disaster struck a rural Turkish village, for example, the newly homeless inhabitants were offered a choice between resettlement in another part of Turkey or in Cyprus.<sup>206</sup> The Turkish authorities also recruited unskilled labor via radio broadcasts, which recommended agricultural workers interested in moving to Cyprus "apply" to their local TSFC consulate.<sup>207</sup> After receiving approval to relocate, these migrants were transferred from their local villages by bus to a Turkish seaport and then taken on to Cyprus.<sup>208</sup> Upon arrival, the settlers were temporarily housed in empty schools or hostels, but they were thereafter allocated homesteads based on household size.<sup>209</sup> In addition to the influx of these government-backed migrants between 1974 and 1980, Turkish citizens have continued to settle independently in northern Cyprus.<sup>210</sup>

Turkish settlement activity has continued, and perhaps increased, in recent decades. Settlement activity, which had fallen off in the '90s, increased considerably around the time of the Annan Plan. According to Turkish demographers<sup>211</sup> this activity has grown rapidly since the rejection of reunification. Roughly 10,000 settlers arrived each year from 2005-2009.<sup>212</sup> Other estimates are much higher. The U.S. Ambassador to Cyprus reported in a diplomatic cable that the tide of settlers from Turkey has "reached new heights," with 13,448 coming in

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*; see also Cuco Report, *supra* note 185, ¶ 95.

<sup>204</sup> Laakso Report, *supra* note 193, ¶ 33.

<sup>205</sup> Hatay, *supra* note 192, at 12; Cuco Report, *supra* note 185, ¶ 69.

<sup>206</sup> Hatay, *supra* note 192, at 12.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> One commentator reports: "Households with five members received between 100 and 150 donums. For each extra child, there was a 10% increment, but this was not to exceed 50% of the original land allocation." *Id.* at 13. Under a 1995 amendment to the Equivalent Property Law, settlers were given land deeds but barred from selling or passing the property to third parties until a period of twenty years has passed. Laakso Report, *supra*. *Id.* at 13, n.30; Laakso Report, *supra* note 193, ¶ 36.

<sup>210</sup> See Hatay, *supra* note 192, at 13; Cuco Report, *supra* note 185, ¶ 77.

<sup>211</sup> Ahmet Atasoy, *Population Geography Of The Turkish Republic Of Northern Cyprus*, MUSTAFA KEMAL U. J. OF SOC. SCIENCES INST. 16(8): 29-62, at 38 (2011).

<sup>212</sup> *Id.* at 39. This number does not include arrivals from countries other than Turkey.

2004 and 18,408 in 2005, and 5,318 in just the first quarter of 2006.<sup>213</sup> The most recent census information shows an increase in population (11.2% per annum from 2006-2011) that significantly increases net natural growth, and attests to significant ongoing settlement activity.<sup>214</sup> Indeed, numerous reports attest to a construction boom in Northern Cyprus in recent years.<sup>215</sup> Many large projects are being built to accommodate new arrivals on the island.<sup>216</sup>

Turkey continues to encourage the growth of the settlements. Turkish settlers are exempt from mandatory military conscription. Turkey promotes the growth of the population with major infrastructure projects for the growing population (such as an upgraded airport with flights only to Turkey, and a direct water supply from the mainland). Moreover, Turkish companies receive exclusive rights to these projects, and to the right to extract fossil resources of the occupied territory.<sup>217</sup>

While the Republic of Cyprus routinely condemns the Turkish settlement enterprise as a war crime,<sup>218</sup> some Turkish Cypriots (those resident on the island before the invasion), also resent the settlers, whom they hold responsible for lower wages.<sup>219</sup> Because the groups also differ in traditions and customs, the settlers are widely viewed as a foreign element by the Turkish Cypriot population,<sup>220</sup> which

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<sup>213</sup> Amb. Ronald Schlicher, Turkish Cypriot Census Debate Focuses On Natives Versus "Settlers", May 218, 2007, available at [http://www.wikileaks.org/plusd/cables/07NICOSIA434\\_a.html](http://www.wikileaks.org/plusd/cables/07NICOSIA434_a.html)

<sup>214</sup> KKTC'nin nüfusu 294 bin 906, Milliyet (Turkey), Dec. 12, 2011, available at <http://dunya.milliyet.com.tr/kktenin-nufusu-294-bin-906/dunya/dunyadetay/09.12.2011/1473436/default.htm>

<sup>215</sup> See, e.g., Republic of Cyprus, Ministry of Foreign Affairs, Memorandum: Illegal Construction in the occupied area (Nov. 22, 2006); Okan Veli Şafakali, *An overview of the construction sector in Northern Cyprus*, African Journal of Business Management Vol. 5(35), pp. 13383-13387 (Dec. 2011), DOI: 10.5897/AJBMX11.015.

<sup>216</sup> See, e.g., Emtan Construction: Projects Under Construction, <http://www.emtancons.com/en-project-list-ongoing.php>.

<sup>217</sup> Turkey to launch oil drilling in KKTC, Cihan News Agency (Turkey), Apr. 3, 2012, available at <http://en.cihan.com.tr/news/Turkey-to-launch-oil-drilling-in-KKTC-CHNjcxMDkzLzM=>

<sup>218</sup> Ministry of Foreign Affairs Republic of Cyprus, *Illegal Demographic Changes* (Oct. 2006), available at [http://www.mfa.gov.cy/mfa/mfa2006.nsf/cyprus06\\_en/cyprus06\\_en?OpenDocument](http://www.mfa.gov.cy/mfa/mfa2006.nsf/cyprus06_en/cyprus06_en?OpenDocument); see also, e.g., Gobel, *supra* note #, at 8–9.

<sup>219</sup> *Id.* ¶¶ 70–71. Other sources place the number of settlers—as differentiated from Turkish-originated *temporary residents*—at as little as 32,000 plus offspring. This belongs not here but earlier METE HATAY, BEYOND NUMBERS: AN INQUIRY INTO THE POLITICAL INTEGRATION OF TURKISH 'SETTLERS' IN NORTHERN CYPRUS viii (Report for the Int'l Peace Research Inst. 2005).

<sup>220</sup> Recommendation 1608, *supra* note 254, ¶ 3, but cf. Cuco Report, *supra* note 185, ¶¶ 66, 72, 92; see also S. Sonan, *From Bankruptcy to Unification and EU Membership? The Political Economy of Post-Nationalist Transformation in Northern Cyprus* 4 (RAMSES Working Paper 9/07, 2007) (Turkish Cypriots have sought to distinguish themselves from

occasionally leads to violence.<sup>221</sup>

### 3. Turkey's Legal Responsibility

For purposes of the Geneva Convention, the TRNC's actions are imputed to Turkey, because it is the power with effective control over the territory.<sup>222</sup> Thus the European Court of Human Rights ("ECHR") ruled that *Turkey* violated the European Convention on Human Rights when the TRNC denied a Greek Cypriot access to her property in Northern Cyprus.<sup>223</sup> Although Turkey argued that the TRNC "is a democratic and constitutional State which is politically independent of all other sovereign States,"<sup>224</sup> the ECHR emphasized:

*[I]n conformity with the relevant principles of international law governing State responsibility, . . . responsibility of a [Party to the European Convention] could [] arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. . . . The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.*<sup>225</sup>

It was therefore not necessary to determine whether Turkey "actually exercise[d] detailed control over the policies and actions"<sup>226</sup> of the Turkish Cypriot authorities. Rather, it was "obvious from the large number of troops engaged in active duties in northern Cyprus . . . that [the Turkish] army exercises effective overall control over that part of the island;" such control was sufficient to establish [Turkey's] responsibility for the policies and actions of the TRNC."<sup>227</sup>

The reasoning of the ECHR would seem to apply with equal force to Art. 49(6) of the Geneva Convention. It is not disputed that Turkey has provided financial support to Northern Cyprus since at least 1963. Turkey spent nearly US

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the settlers by "opting for a prioritization of the 'Cypriot' dimension of their identity").

<sup>221</sup> *But In the Turkish North the People Can't Get Along*, *GLOBE & MAIL*, Oct. 19, 1978; Cuco Report, *supra* note 185, ¶ 85.

<sup>222</sup> *Illegal Demographic Changes*, *supra* note 293 (Turkey has sought to "shift the balance of political power in the occupied part of Cyprus and influence elections in order to ensure that the Turkish Cypriot leadership is kept in line with the policy of the Turkish Government . . . To this effect, colonists have been given 'citizenship,' Greek Cypriot properties, 'voting rights,' [] work permits [and] have been organised in political parties"); see also Statement of Joseph Schechla, UNPO Report, *supra* note 18, at 29 ("There are important lessons to be drawn from a comparative analysis of the cases considered. They represent transfer carried out under official state policy and affirmed as 'legal' by more or less explicit legislation").

<sup>223</sup> *Loizidou v. Turkey*, 310 Eur. Ct. H.R. ¶¶ 13–14, 57 (Dec. 18, 1996).

<sup>224</sup> *Id.* ¶ 51.

<sup>225</sup> *Id.* ¶ 52 (emphasis added).

<sup>226</sup> *Id.* ¶ 56.

<sup>227</sup> *Id.*

\$3.07 billion on Northern Cyprus between 1974 and 2004 alone.<sup>228</sup> It is likewise undisputed that the security of Northern Cyprus is entirely dependent on the presence of Turkish armed forces. In fact, all TRNC security forces, including domestic police and fire brigades, are legislatively subordinate to Turkish authorities.<sup>229</sup> But beyond sending money and military – and most important for present purposes – it is (mostly<sup>230</sup>) undisputed that Turkey exerts significant political control over TRNC affairs. Even Turkish officials admit that “relations between Turkey and the TRNC go beyond those of normal bilateral ties.”<sup>231</sup>

### C. (Proposed) Transitional and Post-Conflict Treatment of Settlers

Beginning on March 6, 1995, when the EU announced its plan to “incorporate Cyprus at the next stage of its enlargement,”<sup>232</sup> the conflict in Cyprus took on new urgency. Turkey threatened to annex the TRNC if Cyprus was admitted to the EU<sup>233</sup> and confrontations between the two Cypriot communities reached a level of violence not seen since the unofficial cease-fire of 1974. Underlying Turkey’s reaction was Turkish desire to join the EU and frustration over its inability to do so.<sup>234</sup> Once the international community recognized that EU membership could be used to incentivize a Cyprus solution, the UN began renegotiating a settlement among the parties.

Contentious issues included the demilitarization of Northern Cyprus, the right of Greek Cypriots to return to their abandoned property in the north and of Turkish Cypriots to resettle in the south. But the question of the fate of the Turkish settlers played a significant role in the negotiations. Although Greek Cypriots viewed the presence of settlers as illegal, some officials had “no disposition for wrenching expulsions,”<sup>235</sup> but favored financial incentives to facilitate repatriation of the settlers to Turkey.<sup>236</sup> Suggestions that children of illegal settlers should be deemed to hold *jus soli* citizenship, on the other hand, were considered more

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<sup>228</sup> Sonan, *supra* note 220. Turkey continues to fund infrastructure related projects and to pay defense costs for the TRNC. *E.g.*, *North Adopts Fresh Approach to History*, TURKISH DAILY NEWS, Jan. 4, 2008. As further evidence of its financial dependence, the TRNC has adopted the Turkish lira and placed a Turkish national at the head of its central bank. Ischenko, at 8.

<sup>229</sup> Cuco Report, *supra* note 185, ¶ 75.

<sup>230</sup> *See, e.g.*, Brief of the Turkish Government. 310 Eur. Ct. H.R. at ¶¶ #-#.

<sup>231</sup> *See, e.g.*, *Turkey To Continue Financial Support For TRNC*, IPR STRATEGIC BUS. INFO. DATABASE (July 13, 2004) (quoting Turkish State Minister Abdullatif Sener).

<sup>232</sup> MICHAEL, *supra* note 164, at 152.

<sup>233</sup> *Id.* at 153.

<sup>234</sup> *See* MICHAEL, *supra* note 164, at 153.

<sup>235</sup> Benjamin Tyree, *Possibilities for the Future of Cyprus*, WASHINGTON TIMES, Apr. 26, 2002, at A17; *see also* HOFFMEISTER, *supra* note 177, at 141 (discussing the possibility that Turks not allowed to remain in Cyprus would be able to avail themselves of the applicable alien laws and were not threatened with mass expulsion *ex lege*).

<sup>236</sup> *Id.*

controversial.<sup>237</sup> In short, the Greek Cypriots desired the removal of settlers, but it did not seem reasonable or practical to remove all of them.

Ultimately, after several rounds of preliminary discussion, the Annan Plan tried to provide a middle ground on the settler issue. The first comprehensive draft of the Annan Plan, unveiled on November 11, 2002, automatically granted Cypriot citizenship to:

- (i) Any person who held Cypriot citizenship in 1960 and his or her descendants;
- (ii) Any 18-year-old person who was born in Cyprus and has permanently resided in Cyprus for at least seven years;
- (iii) Any person who is married to a Cypriot citizen and has permanently resided in Cyprus for at least two years; and
- (iv) Minor children of the persons in the above categories who are permanently residing in Cyprus.<sup>238</sup>

Additionally, Annan Plan I allowed up to 33,000 persons who were citizens of the TRNC, but who would otherwise not qualify for Cypriot citizenship, to be naturalized.<sup>239</sup> In short, many tens of thousands of settlers would automatically receive citizenship. The remainder would not be expelled; they would merely be resident aliens. Settlers resident in the territory for at least five years could apply for either financial assistance to relocate to Turkey<sup>240</sup> or, alternatively, remain as a resident alien in a reunited Cyprus for seven years and then apply for citizenship.<sup>241</sup> Interestingly, the plan envisaged that the new federal *Cypriot* government would be responsible for the settlers' relocation costs.<sup>242</sup> Although Turkey would likely be expected to contribute to the new island's budget, it was by no means the sole bearer of the financial burdens the plan imposed; the plan explicitly recognized that donations from international aid organizations would be necessary to implement its relocation provisions.<sup>243</sup>

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<sup>237</sup> Compare *id.* (noting that the President of the Republic of Cyprus House of Representatives believed parentage, as opposed to place of birth, should be the determinative factor in granting Cypriot citizenship), with *Population In Northern Cyprus Rises Significantly*, XINHUA GENERAL NEWS SERVICE, May 6, 2006 (quoting TRNC prime minister Ferdi Sabit Soyer as observing: "Those who came to the island 30 years ago and had children who have since then had their own children can be thought of as nothing other than citizens of the Turkish Republic of Northern Cyprus . . . There is no way anyone could describe them as foreigners.").

<sup>238</sup> Basis for Agreement On A Comprehensive Settlement of The Cyprus Problem, Tur.-Gr.-UK-Gr.Cyp.-Tur.Cyp., at Annex III, Attachment 4, Art. 3(1) (Nov. 11, 2002, available [http://www.hri.org/docs/annan/Annan\\_Plan\\_November2002.html#\\_Toc24695394](http://www.hri.org/docs/annan/Annan_Plan_November2002.html#_Toc24695394)). at

<sup>239</sup> *Id.* art. 3(2); see also HOFFMEISTER, *supra* note 177, at 119.

<sup>240</sup> *Id.* art. 5.

<sup>241</sup> HOFFMEISTER, *supra* note 177, at 119.

<sup>242</sup> Zenon Pophaides, *Pro: Economic Viability of Annan V*, in REUNIFYING CYPRUS: THE ANNAN PLAN AND BEYOND 138 (Andrekos Varnava & Hubert Faustmann, eds.) (2009).

<sup>243</sup> *Id.*

After agreeing to use the November 2002 proposals as a basis for negotiations, Secretary-General Annan received clarification and settlement demands from each Cypriot community. He then went back to the drawing board and tried to incorporate the desired changes. Two years and four drafts of the Annan Plan later, the number of former Turkish citizens that would have access to Cypriot citizenship was increased to 45,000 and both sides agreed to a longer naturalization period,<sup>244</sup> requiring nine years residence on the island. Despite the ability to acquire citizenship, some settlers may have been forced to leave the island because of a cap on the number of Turks that could be present in Cyprus at any given time. The Agreement provided: “[F]or a transitional period of 19 years or until Turkey’s accession to the European Union, whichever is earlier, Cyprus may limit the right of . . . Turkish nationals to reside in Cyprus if their number has reached 5% of the number of resident Cypriot citizens holding Turkish Cypriot internal constituent state citizenship status.”<sup>245</sup> Moreover, in the last moments before the referendum it was stipulated that anyone who did not obtain permanent residency rights in accordance with the plan had to leave Cyprus within five years.<sup>246</sup>

Annan Plan V, as the final version was called, received heavy criticism in both the academic and political arenas.<sup>247</sup> It was nevertheless put to a vote – in which Turkish settlers participated – on April 24, 2004.<sup>248</sup> While the Greek Cypriot community maintained the position that settler voting conflicts with Art. 49(6), the community “acknowledged that settler voting in the TRNC [did] not nullify the results of the separate referenda.”<sup>249</sup> The Greek Cypriots likewise announced no intention to reject the referenda as “illegal” because of the settler vote if both sides

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<sup>244</sup> HOFFMEISTER, *supra* note 177, at 126.

<sup>245</sup> Basis for Agreement On A Comprehensive Settlement of The Cyprus Problem, Tur.-Gr.-UK-Gr.Cyp.-Tur.Cyp., at Main Articles, ¶ 15 (Mar. 31, 2004), *reprinted in* HAKKI, *supra* note #, at 285. An identical limit was placed on Greek nationals. *Id.*

<sup>246</sup> Report of the Secretary-General on his mission of good offices in Cyprus ¶ 50, U.N. Doc. S/2004/437 (May 28, 2004), *available at* [http://www.un.org/en/peacekeeping/missions/unficypr/rep\\_mgo.shtml](http://www.un.org/en/peacekeeping/missions/unficypr/rep_mgo.shtml). Because the new change did not include an enforcement mechanism, however, it is doubtful this provision had real teeth. *See, e.g., EU/Cyprus: Political and Financial Pressure Behind UN Peace Plan*, EUROPEAN REPORT, Apr. 17, 2000 (“The Cypriot Government also highlights the absence of assurances from the international community that Turkish settlers not authorised to remain in the North of the island after reunification will indeed return to Turkey . . . ‘Who will ensure the departure of the other settlers?’”, one Cypriot diplomat wondered. He suggests the UN itself should step in as guarantor since the Cypriot Government is not in a position to force Turkish settlers to leave the island.”).

<sup>247</sup> For an academic discussion of the pros and cons of the Annan Plan, see generally VARNAVA & FAUSTMANN, *supra* note 242. *See also, e.g., Eric Silver, Cypriots Who Back UN Plan Face Damnation, Says Bishop*, INDEPENDENT (LONDON), Apr. 20, 2004, at 24; U.N. Doc. S/2004/437, *supra* note 246, ¶¶ 64–65.

<sup>248</sup> Statement issued by the Spokesman of the Secretary-General on the outcome of the referenda in Cyprus, Apr. 24, 2004, *annexed to* U.N. Doc. S/2004/437, *supra* note 246.

<sup>249</sup> HOFFMEISTER, *supra* note 177, at 184.

voted to accept Annan V.<sup>250</sup>

#### D. Summary

The ongoing Turkish occupation of northern Cyprus constitutes one of the most substantial settlement enterprises today, and is particularly notable in that it takes place within the territory of the European Union. The majority of the territory's population now consists of settlers, with a substantial ongoing influx (which does not appear to be the case in Western Sahara). Settlers have received substantial assistance and incentives from the Turkish government, though the extent of inducement has varied over time. Moreover, the influx of settlers has been at a direct cost of displacement and dispossession of the prior Greek inhabitants.

Despite this, no international organization and no state (aside from the Republic of Cyprus)<sup>251</sup> have described the settlement program as a violation of the Geneva Convention, or otherwise illegal.<sup>252</sup> Similarly, the ICC prosecutor is authorized to – and has been asked by Cypriot refugees – to investigate war crimes on the island dating back to 2002, but apparently the Turkish settlement project has not merited her attention.<sup>253</sup>

This is particularly notable because the European Union is an active and consistent critic of what it sees as illegal settlement activity elsewhere, but it has not used similar expressions regarding the legality of Turkish settlement activity in European territory. It is particularly notable that issues of legality under the Geneva Conventions have not been raised, because the Turkish invasion itself, as well as the settler influx, has been subject to criticism. One cannot say the international community overlooked the issue, or that countries were silent for political reasons. Thus proposals to condemn Turkish settlement activity have repeatedly been raised at in the EU Parliament and other bodies, but have not been adopted. For example, both the UN General Assembly and the Parliamentary Assembly of the Council of Europe have raised the issue of Turkish settlement

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<sup>250</sup> *Id.* (citing a 2005 Turkish study).

<sup>251</sup> See, e.g., Cypriot MFA, *Announcement regarding an appeal by individuals to the International Criminal Court* (July 29, 2014) (describing Turkish settlements as violations of Geneva Convention and ICC Rome Statute and placing itself “at the disposal” of the Court to provide documentation on the settlement practices), <http://www.mfa.gov.cy/mfa/mfa2006.nsf/All/C2EBDDCBD03DC450C2257D240032EA79?OpenDocument>.

<sup>252</sup> U.N. G.A. resolutions call for an end to the “occupation” but avoid the issue of settlements. See U.N. General Assembly Resolution 37/253, U.N. Doc. A/RES/37/253 (1983) (May 13, 1983); (“U.N. General Assembly Resolution 34/30, U.N. Doc. A/RES/37/253 (1983) (Nov. 20, 1979).

<sup>253</sup> See Eugene Kontorovich, *International Criminal Court action filed vs. settlements, Volokh Conspiracy* (Aug. 7, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/07/international-criminal-court-action-filed-vs-settlements/?utm\\_term=.25b98ebcd9f7](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/07/international-criminal-court-action-filed-vs-settlements/?utm_term=.25b98ebcd9f7)

activities,<sup>254</sup> but have not said they violate international law. Indeed, PACE has suggested that it is a purely political, rather than a legal problem, as it called on the “Turkish-Cypriot administration” to “keep the arrival of aliens... under control,” as opposed to banning it.<sup>255</sup>

Finally, the fate of Turkish settlers received considerable attention in the UN-backed peace proposals for the island. Despite significant Greek insistence on the removal of at least a substantial portion of settlers, the various proposals did not directly require the removal of any settlers, and instead required that a significant portion receive citizenship in a unified Cyprus, with the remainder being able to stay as residents. That the UN rejected more aggressive removal ideas at the expense of Greek support for the deal again emphasizes the lack of an evident international understanding that such removal is a legal obligation.

#### IV. SYRIA/LEBANON

One of the larger mass movements of civilians into occupied territory occurred during the Syrian occupation in Lebanon. The Syrian army first entered Lebanon in 1976, intervening in the country’s civil war, which erupted the year before. The Syrian military presence grew and gradually came to exert control over all aspects of politics and society in Lebanon. The Arab League gave the Syrian forces the status of “peacekeepers” in a 1976 decision, but that status expired in 1982. In 1983, the Lebanese government demanded the Syrian forces leave. The UN Security Council, in a series of resolutions, called on Syrian armed forces to withdraw from Lebanon. These demands were ignored, and the Syrians acquired a degree of control over certain regions that meets the criteria for belligerent occupation. A series of coerced treaties cemented Syrian control over much of Lebanese life, and by 1990, Syria had absolute control of a Beirut-based puppet

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<sup>254</sup> The European Parliament and Parliamentary Assembly of the Council of Europe have likewise passed resolutions condemning Turkey’s failure to address the settler issue. *E.g.*, European Parliament Resolution B7-0068/2010 par. 35 (Feb. 2, 2010) (calling on Turkey to “address[] the issue of the settlement of Turkish citizens on the island,” *available at* <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=B7-0068/2010>; Parliamentary Assembly of the Council of Europe Recommendation 1608 (2003), *available at* <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta03/erec1608.htm>; Recommendation 1197 ¶ 8; (1992) ¶ 9(ii); *see also* Cuco Report, *supra* note 185, ¶ 113 (noting similar resolutions of the UNCHR and Conference of Heads of State or Government of Non-Aligned Countries).

<sup>255</sup> Rec. 1197 at ¶ 9(ii). Oddly, the recommendation is addressed to the TRNC government, rather than the occupying power. Indeed, the Cypriot delegation complained that a subsequent PACE report had “some specific references that might be perceived as acquitting the occupying power, Turkey, of its primary responsibility for ... withdrawing its troops and settlers from Cyprus.”) See PACE Information Report, *The Situation in Cyprus*, Doc. 13501, Annex I, pg. 6 (22 April 2014).

government.

Syria maintained between 25,000-40,000 troops in the country during this period, as well as a broad and powerful secret police network. The Syrian domination of Lebanon certainly qualified as an occupation in an international armed conflict at some point between 1982 and 1990.<sup>256</sup> The Syrian presence has been labeled as such by the United States,<sup>257</sup> and several scholars have described the occupation, at least from 1982, as triggering Geneva Convention protections.<sup>258</sup> Following widespread Lebanese and international outrage at the Syrian-backed assassination of Prime Minister Hariri in 2004,<sup>259</sup> Syria ultimately withdrew its armed forces and brought an end to the occupation in 2005. However, the massive movement of Syrian civilians into Lebanon, consistent with government policy but mediated by the market, has met with almost no international notice or comment. It has never been discussed in the context of Art. 49(6). While the UN Security Council and other actors ultimately called for the withdrawal of Syrian troops, the presence of the settlers was not condemned.<sup>260</sup>

Hundreds of thousands of Syrian workers followed the occupying Syrian army in the 1980s and '90s. Lebanon had one of the most dynamic economies in the region, as well as significant demand for construction labor. Moreover, under the Syrian occupation, Syrian firms controlled key industries, and no entry or work permits were required for Syrian nationals. The scale of the migration was massive, with estimates running from half a million to over one million Syrian citizens in Lebanon by the mid-1990s.<sup>261</sup> Neither country kept any records of the actual numbers.

Syria actively supported the settlers, as their incomes provided a major boost for its economy. The settlers constituted up to 30% of Lebanon's workforce.

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<sup>256</sup> From 1982-85, Syria was also involved in an international armed conflict in Lebanon against Israel and allied Lebanese militias.

<sup>257</sup> Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Par. 7 (“Approximately 20,000 Syrian troops and security personnel occupy much of the sovereign territory of Lebanon...”).

<sup>258</sup> See GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW*, 687–688 (1992); WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 292 (2010); Nicholas Rostow, *Gaza, Iraq, Lebanon: Three Occupations under International Law Volume 37* ISR. YRBK. HUMAN RIGHTS 205 (2007) (concluding that Fourth Geneva Convention governs Syrian military presence in Lebanon, and that it constitutes an occupation, at least of the areas under its control); *The Lebanon Report*, 1 Palestine Yrbk. Int'l L.216, 230 (1984) (concluding that Syria is obligated to respect Fourth Geneva Conventions provisions on occupation in Lebanon). None of these sources addresses the question of Syrian settlers.

<sup>259</sup> U.N. S.C. Res. 1559 (2004) (“call[ing] upon all remaining foreign forces to withdraw from Lebanon”).

<sup>260</sup> This is particularly notable because, during this period, the G.A. and S.C. repeatedly condemned as a 49(6) violation the presence in the Golan Heights – “occupied Syrian territory” - of ten to twenty thousand Israeli civilians.

<sup>261</sup> ONN WINCKLE, *DEMOGRAPHIC DEVELOPMENTS AND POPULATION POLICIES IN BA'ATHIST SYRIA* 95-96 (1999).

Syrian companies received preferential public contracts and engaged in other forms of economic domination.<sup>262</sup> While many of the migrants were temporary laborers, many came for an indefinite period. The effect of the migration on Lebanon's economy was profound, leading to massive unemployment among Lebanese.<sup>263</sup> As for the demographic effect:

One Lebanese scholar has called the influx of Syrian workers into Lebanon "nothing short of a movement toward Syrian colonization of Lebanon."<sup>5</sup> Syrian nationals constitute at least one-third of Lebanon's resident population. Since most Syrian workers are between the ages of eighteen and fifty, there are probably more able-bodied adult Syrians in Lebanon than there are Lebanese. In 1994, under pressure from Syria, the Lebanese regime granted citizenship to over 200,000 Syrians resident in the country.<sup>264</sup>

As a result, the Syrian migrants faced hostility and often violence from the Lebanese, and depended heavily on the army and occupation regime to protect them.<sup>265</sup> When Syria withdrew its forces, large numbers of the workers left with the Syrian army, fearing reprisals from resentful Lebanese.<sup>266</sup> Yet large numbers stayed<sup>267</sup> – the precise numbers remain unknown. Despite the scale of the Syrian settler population and the international opposition to Syria's occupation, there was no international criticism of the former; the issue was not raised by humanitarian organizations, and almost entirely ignored by scholars. There was no international demand that Syrian nationals be removed along with the Syrian military, and indeed many remained as citizens or residents.

## V. VIETNAM/CAMBODIA

Tension between the Khmer majority and the Vietnamese minority in Cambodia dates back several centuries. During the Khmer Rouge takeover and associated turmoil in Cambodia in 1970s, the Vietnamese were subject to discriminatory measures and finally pogroms and expulsions that led almost all of

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<sup>262</sup> Mordechai Nisan, *The Syrian occupation of Lebanon*, NATIV, Ariel Center for Policy Research, Volume Thirteen, Number 3 (74), pg. 61-62, June 2000.

<sup>263</sup> Gary C. Gambill, *Syrian Workers in Lebanon: The Other Occupation*, 3 Mid. E. Bulletin no. 2 (Feb. 2001), available at [https://www.meforum.org/meib/articles/0102\\_11.htm](https://www.meforum.org/meib/articles/0102_11.htm).

<sup>264</sup> Id.

<sup>265</sup> Daniel Pipes, "*We Don't Need Syria*" in Lebanon, M.E. Quart. (Sept. 2000), available at <http://www.danielpipes.org/354/we-dont-need-syria-in-lebanon>.

<sup>266</sup> JOHN CHALCRAFT, *THE INVISIBLE CAGE: SYRIAN MIGRANT WORKERS IN LEBANON* (Stanford 2009).

<sup>267</sup> See id.

the population to flee.<sup>268</sup> In 1978, Vietnam invaded Cambodia (then styled as Kampuchea), and occupied it. In 1991, pursuant to the Paris Peace Accords signed in 1990 with various Cambodian factions, Vietnam withdrew its troops in favor of a transitional UN regime.

Several hundred thousand Vietnamese settlers came to Cambodia during the decade of occupation. Specific estimates of Vietnamese settlement vary greatly and are colored by politics, running between 300,000 and 700,000, with modal numbers in the 400-500,000 range.<sup>269</sup> The settlers fell into two groups: as many as half were returning to Cambodia after having fled violence in the previous decade, while the other half was “new migration of Vietnamese settlers who established themselves as shop owners, vendors, farmers or fishermen.”<sup>270</sup> Vietnamese occupation facilitated the migration principally by providing protection for the settlers. According to one scholar, “it is impossible to assess the extent to which the migration of ethnic Vietnamese...was encouraged by the Vietnamese authorities,” but they clearly did not oppose or prevent it.<sup>271</sup>

The UN Security Council failed to address the Vietnamese invasion and occupation because of a threatened Soviet veto, but the General Assembly dealt with it in annual resolutions. From 1983-89, these resolutions expressed “serious[] concern about reported demographic changes imposed in Kampuchea by foreign occupation forces.”<sup>272</sup> However, the resolutions did not call for any action regarding these changes. While the resolutions repeatedly called for the withdrawal of foreign forces, they did not concomitantly urge the withdrawal of the agents of demographic change. Moreover, none of the resolutions mentioned Art. 49(6) or suggested any violation of international law resulting from these changes.

The fate of the Vietnamese settlers was raised by Cambodian representatives in the multilateral Paris peace negotiations that were held between 1989 and 1991. The Kampuchean representatives were extremely hostile to the Vietnamese settlers, arguing that their continued presence would *de facto* perpetuate the Vietnamese occupation, and that they would serve as puppets of Vietnam.<sup>273</sup> These arguments were rejected by the peace brokers, and were not reflected in the final instruments.

Indeed, the internationally-sponsored and endorsed peace agreement did

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<sup>268</sup> Amer, 216-18.

<sup>269</sup> Ramses Amer, *The Ethnic Vietnamese in Cambodia: A Minority at Risk*, 16 *Contem. Southeast Asia* 210, 219-222 (1994).

<sup>270</sup> M. Giovanni Merli, ESTIMATION OF INTERNATIONAL MIGRATION FOR VIETNAM, 1979-1989, pg. 6-9. Working Paper Series 97-04, Center for Studies in Demography & Ecology, University of Washington.

<sup>271</sup> Amer, *supra* at 222

<sup>272</sup> Res. 38/3 (27 Oct. 1983); 40/7 (Nov. 5, 1985); 44/22 (Nov. 17, 1989).

<sup>273</sup> Steven Erlanger, *In Fear, Settlers From Vietnam Leave Cambodia*, N.Y. Times (Sept. 23, 1989); MICHAEL HAAS, GENOCIDE BY PROXY: CAMBODIAN PAWN ON A SUPERPOWER CHESSBOARD 200, 222 (1991) (noting that other countries involved in peace process rejected Cambodian demands that it include “just solution” to the issue of “foreign settlers”).

not call for the removal of any civilian settlers. Instead, following an Australian suggestion, it transformed the settler question into one of voter registration, to be decided by the new government under the supervision of a UN authority.<sup>274</sup> However, many settlers were allowed to participate in the special election for a new government. Voting would be open to those born in Cambodia, or with at least one parent born there,<sup>275</sup> a concession to the large numbers of settlers whose families originated in northern Cambodia and had fled in prior decades. This ultimately allowed many Vietnamese to participate in the elections. Notably, the Peace Agreement and its associated documents only required the withdrawal of Vietnamese military forces;<sup>276</sup> the civilians were allowed to stay, under the protection of the UN transitional regime and its peacekeepers.

However, many of Vietnamese fled in anticipation of mistreatment by the new Cambodian government, and many more fled when those fears were realized, and the Khmer Rouge massacred thousands. The years following the Vietnamese withdrawal saw widespread attacks on the Vietnamese population, which the UN condemned, but failed to stop.<sup>277</sup> After a new Cambodian government was elected, the situation has stabilized significantly. Nonetheless, it seems the majority of the settlers – some 700,000 people, or 5% of Cambodia’s population – have remained to this day,<sup>278</sup> despite significant hostility from the government and Khmer population.<sup>279</sup>

## VI. ARMENIA/AZERBAIJAN (NAGORNO-KARABAKH)

### A. *History of the Conflict*

Nagorno-Karabakh is a region in Azerbaijan that has historically had a substantial Armenian majority. Under the Soviet Union, the mountainous region had the status of an “autonomous province” or *oblast* within the borders and formally part of Azerbaijan Soviet Socialist Republic. Upon the collapse of the Soviet Union, the oblast declared its intent to secede from Azerbaijan, with

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<sup>274</sup> The UNTAC rejected a Cambodian proposal that registration of Vietnamese-born voters incorporate ethnic criteria. See Third Progress Report of the Secretary-General of the UNTAC, UN Doc S/25124 (1993), at par. 33-34; see also par. 30 (noting sensitivity of Cambodians to voting by Vietnamese).

<sup>275</sup> Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Annex III, Ar. 4.

<sup>276</sup> *Id.*, Annex II, Art. VI.

<sup>277</sup> CAROLINE HUGHES, UNTAC IN CAMBODIA: THE IMPACT ON HUMAN RIGHTS 65-70 (1996).

<sup>278</sup> CIA WORLD FACTBOOK: CAMBODIA, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html>

<sup>279</sup> See, Jennifer S. Berman, No Place Like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia, 87 Cal. L. Rev 817 (1996) (arguing Cambodian treatment of Vietnamese settlers violates international law); see also <http://www.scmp.com/magazines/post-magazine/article/1592212/hope-floats>

Armenia's military assistance. This led to a protracted war between Armenia and Azerbaijan that left 30,000 dead. A cease-fire was announced in 1994, leaving Armenia the clear victor in the field. Its armies secured Nagorno-Karabakh, its principal war goal. Armenia also seized control of the "Lachin Corridor," a mountainous region that serves as a corridor to the discontinuous Karabakh enclave, as well as a ring of territory around the erstwhile *oblast*. Azerbaijan's claim to Karabakh is based on the *uti possidetis* principle, whereas Armenia's (weaker) claim depends on self-determination and historical ties. However, the Lachin corridor and collar areas were undoubtedly *de jure* Azeri sovereign territory, and their return remains one of the central sticking points of the conflict. Subsequent OSCE-sponsored peace negotiations have failed to make any progress.<sup>280</sup>

While the Armenian army remains in control of the territory, it is notionally under the authority of the Nagorno-Karabakh Republic, an entity not recognized by any UN member states except Armenia. The United Nations regards NK and the surrounding region (amounting to approximately 16% of Azerbaijan) as Armenian-occupied territory,<sup>281</sup> a view shared by the U.S.<sup>282</sup> and the European Court of Human Rights.<sup>283</sup> Like Abkhazia and the TRNC, Nagorno-Karabakh styles itself an independent republic, but lacks international recognition and is entirely dependent on Armenian military and financial support.

#### B. Armenia's settlement policy & Art. 49(6) violations

Demographics have always been a central aspect of the Karabakh conflict. The core of the Armenian claim to the area lies in the Armenian population in the area. During the war, a million Azeris fled Armenian-controlled territory, and large numbers of Armenians fled Azerbaijan. As a result, Karabakh now has an almost entirely ethnic Armenian population, but the fate of Azeri refugees remains a major issue for Azerbaijan.

Against this background, Armenia has encouraged migration to the occupied territories, particularly those under clearly *de jure* Azeri sovereignty, such as the remote Lachin corridor. Azerbaijan has strongly and repeatedly protested these moves and denounced them as a violation of international law, and Art. 49(6) in particular.<sup>284</sup>

An OSCE fact-finding mission conducted numerous interviews over the entire Lachin District and revealed that private initiative and not government action was the driving force prompting a move to Lachin. The mission found no

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<sup>280</sup> <http://nationalinterest.org/blog/the-buzz/why-the-osce-keeps-failing-make-peace-nagorno-karabakh-16161>

<sup>281</sup> See U.N. G.A. Res. 62/243, par 5 (March 14, 2008) ("Reaffirms that no State shall recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation.")

<sup>282</sup> See CIA World Fact Book: Azerbaijan.

<sup>283</sup> *Sargsyan v. Azerbaijan*, E.C.J. (Grand Chamber), Judgment (Merits), par. 23-25 (1995).

<sup>284</sup> <http://docs.house.gov/meetings/AP/AP04/20130314/100434/HMTG-113-AP04-Wstate-BaguirovA-20130314.pdf>

evidence that the authorities, in a planned or organized manner, actually asked or selected people to settle in Lachin corridor. The authorities have tried, however, to create basic conditions for normal life and are, in this way, actively encouraging settlements.<sup>285</sup>

Moreover, various political parties and public associations helped recruit settlers. While many of the settlers had fled from other areas of Azerbaijan, they were issued Armenian passports when they settled in Armenia-occupied territory. In some places, settlers apparently received financial support from the government, such as grants, tax benefits, free utilities and so forth.<sup>286</sup>

### C. *(Proposed) Transitional & Post-Conflict Treatment of Settlers*

International discussions of the Karabakh conflict recognize it as an occupation, but have not declared this to be an Art. 49(6) violation or called for settler removal. The UN General Assembly has condemned Armenia's occupation and called for a withdrawal of its forces.<sup>287</sup> Nonetheless, the resolutions omit any reference to settlers, despite the issue being forcefully raised by Azerbaijan in the plenary discussions.<sup>288</sup> Indeed, draft language condemning settlers has been stripped from GA resolutions.<sup>289</sup> The OSCE's "Minsk Group," co-chaired by the U.S., France and Russia, has been stewarding attempts to end the conflict. While the OSCE has documented Armenian settlement efforts, neither its proposed roadmap of principles for resolving the conflict, nor any of its statements, mention either a halt to settlement activity or a removal of settlers.

The European Parliament has criticized Armenian actions in great detail, but has not mentioned settlements or Art. 49(6). Similarly, there have been several motions in PACE to condemn Armenian settlement as a violation of international law and Art. 49(6) in particular, but these never reached the floor.<sup>290</sup> The U.S. has shown no interest in the settlement policy, and refused to condemn it.<sup>291</sup> Perhaps

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<sup>285</sup> Report of the OSCE Minsk Group Co-Chairs' Field Assessment Mission to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh.

<sup>286</sup> *Id.* at 22, 25, 27.

<sup>287</sup> See U.N. G.A. Res. 62/243, par 5 (March 14, 2008) ("Reaffirms that no State shall recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation.")

<sup>288</sup> See GA 62<sup>nd</sup> Session, 86<sup>th</sup> Plenary, A/62/PV.86 pg 2 (March 14, 2008) Statement by Azerbaijan ("Armenia has launched an outrageous policy of massive illegal settlement of Armenian populations in the occupied territories, which is another blatant violation of international law."). Notably, none of the Western countries mentioned Armenia's settlement activity.

<sup>289</sup> See A/60/L60\* (Aug. 4, 2006) <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N06/453/93/PDF/N0645393.pdf?OpenElement>

<sup>290</sup> Doc. 10991, 28 June 2006, Illegal settlement of Armenians in the occupied territories of Azerbaijan by Armenia as a gross violation of the principles of international law, available at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11341&lang=EN>.

<sup>291</sup> <http://www.news.az/articles/politics/79923>

the most direct international condemnation can be found in resolutions of the Organization of Islamic States and its Council of Foreign Ministers, such as the one adopted in Tashkent in 2010.<sup>292</sup>

## VII. RUSSIA – GEORGIA (ABKHAZIA) & UKRAINE (CRIMEA)

Russia has in recent years occupied and annexed – *de jure* or *de facto* – parts of both Georgia and Ukraine. These conquests, and particularly the seizure of Crimea from Ukraine, have resulted in widespread condemnation. However, Russia’s occupation policies, and in particular issues involving Art. 49(6), have received almost no international attention. Moreover, there is very little public information on possible settlement activities, as a result of, among other things, the relative inaccessibility of Abkhazia, Russian restrictions on NGO activity and monitoring, and most importantly, an apparent disinterest in the issue by most international human rights groups. The analysis presented here is the first comprehensive examination of Russian settlement activities in its occupied territories.

A very significant number of settlers have been moving to Crimea, attracted in part by Russian economic incentives. There is also a not particularly successful, but highly deliberate, settlement enterprise in occupied Georgia. Both of these enterprises appear to involve purposeful efforts to change the demographic composition of the territory. Neither of these efforts has attracted any international interest or scrutiny, despite the high profile of the occupations within which they take place. None of these efforts have been described as an Art. 49(6) violation by an actor outside the occupied states.

### A. *Russia’s Occupation of Georgian Territory - Abkhazia*

Perhaps the most obscure settler situation examined in this article is an ongoing one. As a result of the Russo-Georgian war of 2008, Russia took complete control of Abkhazia and South Ossetia, two ethnic separatist areas that had been seeking to break away from Georgia since its independence in 1991 (Russia in effect sided with the separatists in their conflict with Georgia). While Russia remained in control of these areas, it purported to recognize both of them as independent states. The “Republics” of Abkhazia and South Ossetia maintain the styles and external trappings of states, but are in effect somewhat autonomous local administrations of Russia. Only three other states (Nicaragua, Venezuela, and Nauru) have recognized the independence of these entities, while the overwhelming reaction of the international community has been to reject and

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<sup>292</sup> See Resolution No. 10/37-POL par. 16 (“the transfer of settlers of the Armenian nationality... constitutes a blatant violation of international humanitarian law and has a detrimental impact on the process of peaceful settlement of the conflict.”); Res. 9/33-P, par. 14 (June 2006) (“demands to cease and reverse immediately the transfer of settlers of the Armenian nationality to the occupied territories of Azerbaijan.”)

condemn Russia's recognition of these entities and treat them as part of sovereign Georgian territory.

Since the war, the nominal Abkhaz authorities have engaged in a centralized, state-sponsored program to settle people in the territory. The explicit purpose of the program is to change the demographics. Abkhazia has traditionally had a large ethnic Georgian population, which at the time of Georgian independence constituted a substantial plurality of the population. Most of these ethnic Georgians were forced out by separatist rebels in a 1992-93 conflict.<sup>293</sup> In the aftermath of the 2008 war, Georgia claims that Russia has taken steps to expel or pressure out the remaining Georgian population.<sup>294</sup>

While the settlement policy described below is nominally undertaken by the Abkhaz government, it is directly attributable to Russia. That is because the territory is in fact occupied by Russia. To be sure, the Abkhaz local authorities have some degree of autonomy in their policy judgments, and occasionally even have disagreements with Moscow. Nonetheless, Russia has effective control over the area, and thus bears the responsibilities of an occupying power. As the ECtHR ruled in a similar situation – the TRNC in Northern Cyprus – the existence of a “subordinate local administration” in an occupied territory does not change the responsibility of the occupying power.<sup>295</sup> Similarly, ECtHR ruled in a case about another post-Soviet “frozen conflict” that Russia's extensive “military, political and economic support to the [Transdniestria] separatist regime” made the acts of the purported “Transdniestria Republic” legally imputable to Russia itself.<sup>296</sup> As will be seen, Russia's control of Abkhazia is, if anything, even greater.

### B. *Existence of an Occupation and Russia's Responsibility*

The Russo-Georgian war of 2008 qualified as an international armed conflict, which triggers the application of the Geneva Conventions.<sup>297</sup> The international community has largely avoided characterizing the territorial situation in any legal way,<sup>298</sup> but there is ample consensus that the territories remain under Russian belligerent occupation.<sup>299</sup> The view that they are not occupied appears to

<sup>293</sup> <https://www.hrw.org/reports/1995/Georgia2.htm>

<sup>294</sup> Ethnic Cleansing of Georgians Resulted from Russian Invasion and Occupation since August 8, 2008, <http://www.osce.org/odihr/34091?download=true>

<sup>295</sup> See *supra*, nn. 223-227.

<sup>296</sup> *Ilascu v Moldova & Russia*, App. 48787/99, Grand Chamber Judgment, par. 382-85 (2004), available at <http://hudoc.echr.coe.int/eng?i=001-61886>. The Court did not specifically discuss the law of occupation,

<sup>297</sup> *Situation in Georgia*, ICC Pre-Trial Chamber I, Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15 par. 23 (Jan. 27, 2011).

<sup>298</sup>

See,

e.g.,

[http://eeas.europa.eu/delegations/vienna/documents/press\\_corner/20160304-eu-statement-on-the-human-rights-situation-in-the-georgian-breakaway-regions-of-abkhazia-and-south-ossetia\\_en.pdf](http://eeas.europa.eu/delegations/vienna/documents/press_corner/20160304-eu-statement-on-the-human-rights-situation-in-the-georgian-breakaway-regions-of-abkhazia-and-south-ossetia_en.pdf)

<sup>299</sup> Parliamentary Assembly, Council of Europe, Res. 1916 Art. 5 (2013) (“[I]t is seen by Georgia and most of the international community as an occupation of part of the country

be held primarily by Russia itself, which claims it is merely providing support to the unrecognized Abkhaz Republic.

Shortly after the war, Georgia passed the “Law on the Occupied Territories,” declaring Abkhazia and S. Ossetia to be under Russian belligerent occupation, and purporting to forbid many kinds of interactions (including physical entry) by third-countries and their nationals with the occupation regime.<sup>300</sup> The existence of a belligerent occupation has been recognized by the European Parliament, the Parliamentary Assemblies of the COE, OSCE, and NATO.<sup>301</sup> The U.S. has repeatedly characterized the situation as one of occupation,<sup>302</sup> as has President Francois Hollande of France,<sup>303</sup> and numerous former Soviet republics.

Russia maintains full military and civil control of the territory, though it chooses to allow it to be administered through a local authority with some degree of discretion. Thousands of Russian troops have remained in the territories since

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by the troops of a neighbouring country.”).

<sup>300</sup> <http://www.smr.gov.ge/docs/doc216.pdf>. For example, the UNHRC’s Universal Period Review does not characterize the status of the territories at all, despite numerous states arguing that they are occupied. See Report of the Working Group on the Universal Periodic Review: Georgia (Jan. 13, 2015), A/HRC/31/15.

<sup>301</sup> See European Parliament resolution of 6 February 2014 on the EU-Russia summit (2014/2533(RSP), P7\_TA-PROV(2014)0101, Art. 22 (referring to “occupied territories” in Georgia); EU Parliament res. Of 17 April 2014 on Russian pressure on Eastern Partnership countries and in particular destabilisation of eastern Ukraine, 2014/2699(RSP) (“whereas Russia is still occupying the Georgian regions of Abkhazia ... in violation of the fundamental norms and principles of international law; whereas ethnic cleansing and forcible demographic changes have taken place in the areas under the effective control of the occupying force, which bears the responsibility for human rights violations in these area”) (emphasis added); OSCE Parliamentary Assembly, Tbilisi Declaration (July 2016), Resolution on the Conflict in Georgia, pars. 6-7, 12 (recognizing existence of occupation and “urg[ing] the Russian federation to ... stop occupation of territories in Georgia.”), available at, <https://www.oscepa.org/documents/all-documents/annual-sessions/2016-tbilisi/declaration-24/3371-tbilisi-declaration-eng/file>; PA COE, Res. 1916, supra, Art. 8.2; NATO Parliamentary Assembly, Res. 382, Art. 5, *On the Situation in Georgia*, (Nov. 2010) (“Deeply concerned by the humanitarian situation in Georgia’s occupied territories of Abkhazia and South Ossetia, as well as the ongoing denial of the right of return to Georgian populations displaced from the two regions.”). Cf. NATO Warsaw Summit Communiqué, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, Art. 113 (calling on Russia to respect Georgia’s territorial integrity, withdraw its troops from Abkhazia, and stop other actions, but avoiding term “occupation”).

<sup>302</sup> Amb. Daniel Baer, United States Mission to the OSCE on the Geneva International Discussions on the Conflict in Georgia (June 23, 2016) (“Russia’s ongoing occupation of Abkhazia and South Ossetia, which together constitute 20 percent of Georgia’s territory, remains unacceptable.”), available at [http://georgia.usembassy.gov/news-events/dc2016t/geneva\\_talksosce.html](http://georgia.usembassy.gov/news-events/dc2016t/geneva_talksosce.html); Statement by Sec. Kerry: On the Occasion of the Independence Day of Georgia (May 24, 2016), <http://georgia.usembassy.gov/news-events/dc2016t/24052016statement.html>.

<sup>303</sup> <http://agenda.ge/news/14057/eng>

the 2008 war.<sup>304</sup> Russia exercises complete military control over the area. Russian troops control the border crossings within the territory.<sup>305</sup> The unrecognized Abkhazian authorities purport to maintain a separate military, though it is headed by a Russian general,<sup>306</sup> acts under Russian control,<sup>307</sup> and is itself smaller in size than the Russian occupation forces. In any case, the Abkhaz local militia has been integrated formally into the Russian forces through a series of agreements that observers have described as “*de facto* annexation.”<sup>308</sup> (These agreements also formally integrate the Abkhaz civil authority with Russia.) These treaties have been roundly denounced by the U.S., the EU and others.<sup>309</sup> Some commentators have suggested the true question is not whether Abkhazia is occupied, but whether it has also been annexed.<sup>310</sup>

Aside from its troops in the territory, Russia controls the economy, which is heavily integrated with Russia’s.<sup>311</sup> The ruble is the official currency. Moscow’s direct budgetary support amounts to most of the Abkhaz entity’s state budget,<sup>312</sup> and additional grants and spending constitute up to 20% of the territory’s GDP.<sup>313</sup> That is just direct government support from Moscow; the territory’s trade is entirely dependent on Russia, and in particular the 1.5 million Russian tourists who come annually.<sup>314</sup> Russia has “passportized” the territory, giving 80% of the population Russian citizenship.

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<sup>304</sup> Joshua Kucera, *Russian Military To Stay In Abkhazia, South Ossetia, 49 More Years* (Oct. 10, 2011).

<http://www.eurasianet.org/node/64292>

<sup>305</sup> <http://www.aljazeera.com/indepth/opinion/2015/07/creeping-russian-border-georgia-south-ossetia-abkhazia-150722111452829.html>

<sup>306</sup> <http://www.rferl.org/content/georgia-russian-general-to-head-abkhazia-army/27024637.html>

<sup>307</sup> <http://www.georgianjournal.ge/politics/16-kremlin-new-directive-reduce-abkhazian-and-ossetian-armies.html>

<sup>308</sup> <http://gfsis.org/media/download/library/articles/kogan/33-kogan-ENG.pdf>

<sup>309</sup> <http://www.rferl.org/content/russia-abkhazia-nato-european-union-united-states-/26708819.html>

<sup>310</sup> <http://opiniojuris.org/2015/04/20/guest-post-the-status-of-the-territory-unchanged-russias-treaties-with-abkhazia-and-south-ossetia-georgia/>

<sup>311</sup> Freedom House, *Freedom in the World: Abkhazia* (2015) (“The ability of elected authorities to set and implement policies is limited by the influence of Moscow.”).

<sup>312</sup> See International Crisis Group, *Abkhazia: The Long Road to Reconciliation*, Europe Report N°224 | 10 April 2013, pg 6-8; see also, <http://www.cipe.org/blog/2015/12/07/the-impossible-independence-of-abkhazia/#.V6rquZN97ps>

<sup>313</sup> See <http://aa.com.tr/en/politics/nato-denounces-russia-abkhazia-treaty/983261>; <http://www.csmonitor.com/World/Europe/2016/0607/Breakaway-state-Abkhazia-has-friend-in-Russia-but-is-that-enough> (estimating Russian subsidies at \$100 million a year); <http://www.georgiatimes.info/en/news/37913.html> (estimating GDP at \$500 million).

<sup>314</sup> <http://www.rferl.org/content/abkhazia-soviet-riviera-russians-returning-hopes-concerns/27807503.html>.

The Abkhaz government is unrecognized, and is itself an instrumentality of Russia. Thus the acts of the purported Abkhaz officials are attributable to Russia. To put it differently, as the occupying power, Russia directly participates in the movement of new settlers into the territory by i) allowing them entrance into the territory, accessible only through Russia – and such entry is illegal under Georgian law<sup>315</sup>; ii) providing the bulk of the Abkhaz entity's budget.

### C. *Russia's settlement policy and Art. 49(6) violations*

Under Russian occupation, Abkhaz authorities have embarked on an explicit settlement enterprise, designed specifically to bolster the proportion of ethnic Abkhazians in territory, at the expense of Georgians, and thus cement the split from Georgia.<sup>316</sup> Such an enterprise faces inherent challenges, as the entire Caucasus region experiences net population outflow due to economic conditions. Georgia itself has perhaps the largest emigration rate in the world, having lost 20% of its population since independence.<sup>317</sup> Thus bringing in any number of people requires focused governmental policy.

The occupation authorities have established an official government entity, the State Committee on Repatriation, which encourages ethnic Abkhaz from the diaspora to move to the occupied territory. It actively recruits such individuals, and organizes their flights and transportation.<sup>318</sup> The authorities also provide them with free housing, subsidies, and other assistance.<sup>319</sup> Significant sums are invested in construction for the settlers.<sup>320</sup> In 2013 Abkhaz State Committee for Repatriation authorities reported that over 7,300 ethnic Abkhaz settlers had come to the occupied territory in the past two decades.<sup>321</sup> The number seems small until

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<sup>315</sup> The settlers first fly into the Russian airport in Sochi, and then travel overland to occupied Sukhumi, with "all necessary assistance ... on the part of the Russian" government, according to local Abkhaz officials. <http://abkhazworld.com/aw/diaspora/132-145-repatriants-from-the-syrian-arab-republic-are-settled-into-the-hotel-qaytarq-in-sukhum>

<sup>316</sup> Ellen Barry, *Abkhazia Lures Its Expatriates, Welcoming Them One by One*, NY Times A6 (May 8, 2009); Anaid Gorogyan, *Emigrants Return to Abkhazia*, <https://ge.boell.org/en/2014/01/16/emigrants-return-abkhazia> (describing purpose of settlement program as "chang[ing] the demographic balance" of the territory).

<sup>317</sup> WB Report: *Georgia Among Largest Emigration Countries*. Civil Georgia. January 16, 2007

<sup>318</sup> As part of the government budget, the settlement program is primarily financed by Russia. See Abkhaz Foreign Ministry, *The State Repatriation Committee Holds a Meeting on the Issue of Repatriation from Syria* (May 4, 2013) (describing budget of the program), available at <http://mfaapsny.org/en/information/?ID=1021>.

<sup>319</sup> Institute for War and Peace Reporting, *Abkhazia Looks to Turkey for Fresh Blood*, 12 November 2010, Anaid Gogoryan, available at: <http://www.refworld.org/docid/4ce247761a.html> [accessed 29 September 2013].

<sup>320</sup> <http://apsnypress.info/en/news/397.html>

<sup>321</sup> С 1993 года по 2013 год госкомитетом РА по репатриации зарегистрировано 7 365 человек". Apsnypress. 6 August 2013. Retrieved 9 August 2013. The Abkhaz

considered against the backdrop of local demographics. While precise numbers are disputed, there are roughly 180,000 inhabitants of the territory, a slight majority of them Abkhazi. Thus the settlers represent over 4% of the population, and an even greater share of the non-Georgian people.

The remoteness of the region has obviously limited the potential for settlement from Russia, but there has been some such movement. Still, it is poorly documented, as U.S. State Department cables reveal.<sup>322</sup> In particular, there have been many reports of Russians buying second homes and vacation properties in the region – some of which appear to be the abandoned houses of ethnic Georgians.<sup>323</sup> The Russian tourism industry is investing heavily in the territory, resulting in a major boom in visitors from Russia. Finally, Russia is engaging in significant infrastructure development, including the rail link from Sochi, the site of the 2104 Olympics, to Sukhumi. These projects will further integrate Abkhazia and promote Russian migration, and real estate prices have already risen in anticipation of the Russian influx.<sup>324</sup>

Russia has taken no measures to stop Russian nationals from moving into the territory, and certainly promotes infrastructure upgrades and construction that helps the settlers. While perhaps a third of the ethnic Abkhaz settlers come from Russia, the majority come from third-countries with an Abkhazi diaspora, raising interesting questions about the meaning of transfer. In the context of the Convention's text, the prohibition would seem to be limited to prior residents of the territory of the occupying power. It would seem to not include immigrants from third-countries, regardless of their ethnicity.<sup>325</sup> On the other hand, in at least one context the UN Security Council has declared that allowing "new immigrants" to settle in occupied territory constitutes a 49(6) violation,<sup>326</sup> and third-country Jews who move to the West Bank are typically treated as "settlers" in state practice.<sup>327</sup>

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settlement scheme gained new momentum in recent years as a result of the Syrian civil war, when Sukhumi brought in 500 people from there. Natia Kuprashvili & Nizfa Arshba, *Abkhazia Takes in Ethnic Kin From Syria*, Institute for War & Peace Reporting, CRS Issue 699, (Aug. 29, 2013).

<sup>322</sup> <http://www.cablegatesearch.net/cable.php?id=07TBILISI2595>

<sup>323</sup> ICG, *supra* at 7.

<sup>324</sup> <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?lng=en&id=88640>

<sup>325</sup> See YUKAKA ARAI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW* 349-50 (2009) (arguing that text of the provision would not apply to such circumstances, but speculating that an interpretation in light of custom might). One should note and the settlement of European nationals in Northern Cyprus has not encountered any international condemnation.

<sup>326</sup> U.N. S.C. Res. 465 Art. 5 (1980). Interestingly, Abkhazian president Sergei Bagapsh explicitly compared the settlement program to Israel's Law of Return, which is not aimed at settling diaspora immigrants in occupied territories: "Can anyone condemn Jews for calling on all the Jews of the world and inviting them to Israel?" See Barry, *supra*.

<sup>327</sup> The U.S. Consulate estimates 45,000 Americans live in the West Bank, though not all moved there. <http://www.haaretz.com/weekend/anglo-file/the-american-settler-you-don->

Finally, it is important to note that the settlement policy is accompanied by what appear to be efforts to force out ethnic Georgians from the territory. While most Georgians fled Abkhazia during the civil unrest of the early '90s, roughly 40,000 remain in one major enclave in the territory. Under the Russian occupation, various restrictive policies have been adopted to limit their freedom of movement, economic viability, and education choices. According to Georgia and human rights groups, these policies pressure them to leave the occupied territory.<sup>328</sup>

#### D. Crimea

Russia's occupation and annexation of the Crimean peninsula, legally part of Ukraine, in the spring of 2014, as well as its subsequent invasion of other parts of Ukraine, have provoked widespread international outrage and condemnation. The annexation has been overwhelmingly denounced as illegal.<sup>329</sup> Ukraine passed a law that declared the territory under Russian occupation, and restricted business and movement into the area.<sup>330</sup> The existence of a belligerent occupation does not seem to be in doubt. The existence of settlers in Crimea has not been discussed or reported, and this Article documents large-scale movement into Crimea for the first time.

In many ways, the international response was unusually robust. In particular, the U.S. and EU responded to Russia's annexation and ongoing aggression with a series of sanctions, implemented in several stages.<sup>331</sup> These included asset freezes on key allies of President Putin, an arms embargo, restrictions on access to capital markets, and several other measures targeted at certain Russian individuals and industries.<sup>332</sup> The illegality of Russia's annexation continues to be proclaimed repeatedly by states and international organizations.

Russia's occupation has been accompanied by large-scale rights abuses, including the expulsion of protected persons from the territory.<sup>333</sup> While these abuses have received international attention, there has been no discussion by states, international organizations or international human rights groups of Russia's settlement policy in Crimea.

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<sup>328</sup> Human Rights Watch, *Living in Limbo: The Rights of Ethnic Georgian Returnees to the Gali District of Abkhazia* (2011) (noting the occupation policies "could force large numbers of Abkhazia's ethnic Georgians to leave their homes forever"). The extent to which such policies have succeeded is unclear due to the lack of reliable population figures for Abkhazia as a whole, and the Georgian minority in particular. *Id.* at 22. See also, *Human Rights in the Occupied Territories of Georgia*, Information Note Distributed by the Delegation of Georgia to the OSCE, RC.DEL/186/10 pg. 3-4 (18 October 2010), <http://www.osce.org/home/73289?download=true>.

<sup>329</sup> See, e.g. U.N. G.A. Res. 68/262 (2104).

<sup>330</sup> [http://usa.mfa.gov.ua/mediafiles/sites/usa/files/2014.05.26\\_Law\\_on\\_occupied\\_Crimea.pdf](http://usa.mfa.gov.ua/mediafiles/sites/usa/files/2014.05.26_Law_on_occupied_Crimea.pdf)

<sup>331</sup> "EU Sanctions Against Russia Over Ukraine Crisis," European Union Newsroom, [http://europa.eu/newsroom/highlights/special-coverage/eu\\_sanctions/index\\_en.htm](http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm).

<sup>332</sup> *Id.*

<sup>333</sup> [https://freedomhouse.org/sites/default/files/CrimeaReport\\_FINAL.pdf](https://freedomhouse.org/sites/default/files/CrimeaReport_FINAL.pdf)

Russia has an explicit policy of attracting Russians to the occupied territory. There is very little publicly available information on the success of these efforts. The issue of settlers and Art. 49(6) violations in Crimea is not monitored or tracked by international human rights groups. Thus the discussion here will necessarily be cursory. In March 2015, Russia provided for the allotment of free agricultural land to Russian citizens, based on their professional occupation, with the stated aim of drawing in-demand professions to Crimea.<sup>334</sup> Russia also actively subsidizes Crimea tourism to attract Russians to the territory in large numbers,<sup>335</sup> and is developing a massive infrastructure project to allow easier movement from Russia into the territory.<sup>336</sup>

The only study of Russian settlement activity in the territory is a report by a coalition of Ukrainian human rights groups, supported by the Kiev government.<sup>337</sup> The report measures the movement of Russians into Crimea by using Russian residence registrations – Russians are required to register their address with the government, and also officially change their recorded residence when moving to a new town. Based on these registries, the study concludes that Russian “population transfer” has been quite rapid:

[The number of settlers moving to Crimea] from June 2014 to September 2015 totaled 20,163 people, which is about 1% of the territory’s official population. Taking into account other migration data, it can be claimed that this figure shows a percentage of substitution of the inhabitants of Crimea by citizens from the territory of the RF.<sup>338</sup>

For this Article, a similar analysis was conducted using the most recent available Russian population registry figures. The comparative report for January-June 2015/2016 shows that in the first half of 2015 some 16,640 persons moved to Crimea, while in the parallel period of 2016 some 13,307 persons did so. In total, 32,211 people settled in Crimea in 2015, roughly half of whom came from the Russian Federation, and the rest from other post-Soviet states or third-countries. Thus the total settler influx in the two years since the Russian occupation is already 50,000 people.

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<sup>334</sup> Announcement on the official webpage of the Ministry for Property and Land of Crimea,

<http://mzem.rk.gov.ru/rus/index.htm/news/297007.htm>. The list of professions is rather generous and includes 45 categories.

<sup>335</sup> <http://www.pri.org/stories/2014-08-13/russians-flock-their-little-bit-paradise-crimea-and-back-its-annexation>; <https://skift.com/2014/06/16/crimea-needs-tourists-so-russias-paying-their-way/>

<sup>336</sup> *‘Putin’s Bridge’ edges closer to annexed Crimea despite delays*, Reuters (Apr. 18, 2016), <http://www.reuters.com/article/us-ukraine-crisis-crimea-bridge-idUSKCN0XF1YS>.

<sup>337</sup> *Crimea Beyond Rules: Transfer by the Russian Federation of parts of its own civilian population into the occupied territory of Ukraine* (Nov. 2015), available at, [http://helsinki.org.ua/wp-content/uploads/2016/04/Crimea\\_Beyond\\_Rules\\_special-issue\\_en.pdf](http://helsinki.org.ua/wp-content/uploads/2016/04/Crimea_Beyond_Rules_special-issue_en.pdf)

<sup>338</sup> Id. at 12-13.

These possible Art. 49(6) violations are allegedly accompanied by efforts to force non-Russian minorities out of the territory. There have been numerous reports of widespread human rights violations against Ukrainians and Tartars in particular.<sup>339</sup> At the same time, up to 100,000 people – overwhelmingly non-Russians – have fled the territory since the annexation.<sup>340</sup> It is impossible to determine at this point if this is a result of a purposeful policy of forcible expulsion, but it does significantly increase the demographic effect of Russian settlers.

Despite the intense international attention on the Crimea situation, and the imposition of sanctions on Russia for many other violations of international law related to Crimea, no country, international organization or international human rights group has said anything about the Crimea settlers, or even attempted to monitor whether there was settlement activity.<sup>341</sup> To be sure, some Ukrainian officials have called for an international criminal inquiry of the settlement policy.<sup>342</sup> Ukraine has, by an Art. 12(3) declaration, accepted the jurisdiction of the ICC, and a preliminary examination extending to Crimea has recently begun. It remains to be seen whether the ICC Prosecutor will address these issues.<sup>343</sup> However, as with the situation in Georgia, to date the ICC Prosecutor's discussions of the situation in Ukraine make no mention of the transfer of settlers as a possible crime within the court's jurisdiction.<sup>344</sup>

## VIII. THE BALTIC STATES (ESTONIA, LATVIA, AND LITHUANIA)

During World War II, on June 15–17, 1940, the Soviet army occupied the

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<sup>339</sup> EU Parliament, Policy Dep't, Directorate-General for External Policies, *The situation of national minorities in Crimea following its annexation by Russia*, (April 13, 2016).

<sup>340</sup> See David Blair, *100,000 flee 'worsening oppression' as Russia tightens grip on Crimea*, *The Daily Telegraph* (June 11, 2016).

<sup>341</sup> For example, Human Rights Watch said in the wake of Russia's annexation that it was bound by Art. 49(6)'s prohibition on "transfer." See HRW, *Crimea: Human Rights in Decline* (Nov. 12, 2014), at <https://www.hrw.org/report/2014/11/17/rights-retreat/abuses-crimea>. However, subsequent reports on Crimea have not touched on the issue at all. See, e.g., HRW, *Ukraine: Fear, Repression in Crimea*, at <https://www.hrw.org/news/2016/03/18/ukraine-fear-repression-crimea>.

<sup>342</sup> Ministry of Information Policy of Ukraine, *"International crimes of Russia in the occupied Crimea can lead to a second Nuremberg,"* (Dec. 2, 2015), <http://mip.gov.ua/en/news/825.html>.

<sup>343</sup> See ICC OTP, Report on Preliminary Examinations par. 106-08 (2015).

<sup>344</sup> *Id.* at pg. 52-57. See also, Eugene Kontorovich, *ICC Prosecutor Says Full Inquiry into Russian War Crimes Might Come Soon, But Omits Some Crimes*, EJIL:TALK! (Dec. 10, 2014).

Baltic states (Estonia, Lithuania, and Latvia) in full.<sup>345</sup> However, the Soviet occupation began before the UN's creation and prior to the Fourth Geneva Convention. Soviet occupation lasted until 1991, but the extent to which the USSR (and later the Russian Federation) violated any international prohibition on "settlement activity" remains unclear, as it depends on whether the Convention's provisions apply to pre-existing occupations, as well as whether the territories' incorporation into the USSR reflects customary international law.<sup>346</sup> A straightforward reading of the Convention suggests its effect is purely prospective, and would not apply to occupations resulting from prior armed conflicts.<sup>347</sup> Moreover, the Baltics were not parties to the Geneva Conventions until the 1990s. Nonetheless, some Baltic officials have claimed the USSR has violated customary international law, and even Art. 49(6).<sup>348</sup>

Ultimately, it would appear that the Baltics likely do not fall within the Art. 49(6) prohibition for temporal reasons. This Article is concerned only with remedies and responses to Art. 49(6) violations, not more generally with "illegal territorial situations."<sup>349</sup> Thus this study excludes other situations involving significant migration into occupied territories that began before the Convention's entry into force, such as the American occupation of West Berlin (1945-89) and the ongoing Chinese presence in Tibet (which may also be excluded because of a lack of clarity about prior sovereignty). Nonetheless, given the uncertainty about Art. 49(6)'s application to the Baltics, this section will examine the situation because the domestic laws of post-Soviet Estonia, Latvia, and Lithuania deal extensively with the question of Russian settlers who relocated into those territories during Soviet occupation. The perception of and response to these Baltic policies by international political bodies may in any case be of some value in understanding the requirements and limits on the removal of settlers. This is because the Baltic situation is perhaps the only one discussed so far in which active measures were taken to exclude the settlers from citizenship, and to a limited extent from residence, in the occupied territory.

#### A. *History of the Conflict*

Apart from a brief period of Nazi occupation preceding the end of World War II,<sup>350</sup> the Baltic States remained under Soviet control until the break-up of the

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<sup>345</sup> MÄLKSOO, *supra* note 346, at 84. These countries had enjoyed internationally-recognized independence since the end of the First World War.

<sup>346</sup> For a thorough discussion of the competing views, see generally, LAURI MÄLKSOO, *ILLEGAL ANNEXATION AND STATE CONTINUITY: THE CASE OF THE INCORPORATION OF THE BALTIC STATES BY THE USSR* (2003).

<sup>347</sup> See Art. 153.

<sup>348</sup> See Part IV.B *infra*.

<sup>349</sup> See RONEN, *supra*.

<sup>350</sup> The German army entered Lithuania on June 22, 1941, see N.Y. TIMES, June 23, 1940, at 1, and entered Latvia and Estonia in July the same year, see, e.g., *Finns See Estonia Fall*, N.Y. TIMES, Jul. 4, 1941, at 2; *Invaders Closing in Toward Leningrad*, N.Y. TIMES, Jul. 17, 1941, at 4.

USSR. However, occupation as it is understood in modern international law is different from aggression, i.e., illegal war.<sup>351</sup> The Baltic States maintain not only that the Soviet aggression towards them was illegal, but also that they were illegally occupied until they reclaimed independence in August 1991.<sup>352</sup> Numerous states and organizations, including the U.S.,<sup>353</sup> European Court of Human Rights,<sup>354</sup> the Council of Europe,<sup>355</sup> and the European Parliament<sup>356</sup> continued to recognize the sovereign legal personality of the Baltic States and referred to them as being under occupation. The UN adopted resolutions reproving the Soviet Union for its occupation of the Baltic States – but, like many of the European institutions just mentioned, only after the Baltic States regained independence.<sup>357</sup> On the other hand, the U.K.<sup>358</sup> and Canada<sup>359</sup> both accorded the Baltic annexation

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<sup>351</sup> See generally Adam Roberts, *What is A Military Occupation*, 55 BRIT. YEARBOOK OF INT'L L. 299 (1985); MÄLKSOO, *supra* note 346, at 167–168.

<sup>352</sup> See, e.g., Resolution of the Supreme Soviet of the Estonian SSR on the State Status of Estonia (Mar. 30, 1990), *supra* note (“[T]he occupation of the Republic of Estonia by the Soviet Union on June 17, 1940 has not suspended the existence of the Republic of Estonia *de jure*. The territory of the Republic is occupied to this day.”); Renewal of the Independence of the Republic of Latvia, *supra* note \_\_, preamble (“[A]ccording to international law, the incorporation of the Republic of Latvia into the Soviet Union is invalid. Accordingly, the Republic of Latvia continues to exist *de jure* as a subject of international law.”); Declaration on the Occupation of Latvia, Saeima, Aug. 22, 1996 (asking the international community to condemn the actions of Nazi German and the USSR and to recognize the fact of occupation).

<sup>353</sup> E.g., S. Con. Res. 87, 110th Cong. (2008); Report (concluding that Estonia, Latvia, and Lithuania “were forcibly occupied and illegally annexed by the U.S.S.R.” and that the Baltic States continue to be under “military and political occupation”).

<sup>354</sup> See, e.g., Kolk & Kislyiy v. Estonia (European Court of Human Rights 17 January 2006), (“After the German occupation in 1941–44, Estonia remained occupied by the Soviet Union until the restoration of its independence in 1991.”)

<sup>355</sup> E.g., Parliamentary Assembly Resolution 189 (1960), Council of Europe, Sept. 29, 1960, *available at* <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta60/ERES189.htm> (recognizing the 20th anniversary of the “occupation” and “illegal annexation” of the Baltic States and noting that a great many governments still accord *de jure* recognition to the independent existence of the Baltic States).

<sup>356</sup> E.g., Resolution on the Situation in Estonia, Latvia and Lithuania, European Parliament, DOC. I-777/80 par.D. (Jan. 13, 1983) (condemning that Soviet “occupation” of Baltics “continues”). See also, European Parliament resolution of 24 May 2007 on Estonia, P6\_TA(2007)0215, par. P-Q.

<sup>357</sup> MÄLKSOO, *supra* note 346, at 170.

<sup>358</sup> See, e.g., Tallinna Laevauhisus v. Tallinna Shipping Co., 79 Ll. L. Rep. 245, 251 (1946).

<sup>359</sup> See, e.g., Estonian States Cargo & Passenger Line v. S.S. “Elise” (1949), 4 D.L.R. 247, (Can. Exchequer Ct.), *portions reprinted in* 43 Am. J. of Int'l L. 816, 818 (1949) (stating that in Canada, the “Government of the E.S.S.R. is recognized ‘to be the *de facto* Government of Estonia”). France and Italy also accorded the Soviet Republics *de facto* recognition.

*de facto* recognition. Still others went so far as to recognize the Baltic incorporation *de jure*.<sup>360</sup> Moreover, it is not clear if the *opinio juris* suggesting that the Baltics were occupied was meant in the sense of “occupation” under the Geneva Conventions.

### B. Russia’s Settlement Policy

From the inception of its occupation in June 1940, the U.S.S.R. implemented policies intended to colonize, ethnically dilute, and Russify<sup>361</sup> the Baltic nations.<sup>362</sup> In addition to the nationalization of “all large [Baltic] commercial, industrial, and transportation enterprises,”<sup>363</sup> the USSR collectivized the Baltic agricultural industries,<sup>364</sup> repressed religion in Baltic States,<sup>365</sup> and required Baltic schools (first explicitly and then constructively) to give instruction in Russian.<sup>366</sup> Arguably, however, the Russification policies that have had the biggest impact are those that changed the demographic composition of the Baltic States: the settlement of great numbers of Russians and other Soviet nationals within the Baltic States helped spread Soviet ideals to the Baltic masses.<sup>367</sup>

Many Russians were motivated to migrate due to the higher than average socio-economic conditions in the Baltic States and because of “the cultural incentives derived from the perceived ‘European-ness’ of the Baltic region.”<sup>368</sup> Additionally, Stalin’s heavy industrialization of the region created an abundance of jobs in the Baltic territories.<sup>369</sup> These jobs were often allocated to Russian migrants,<sup>370</sup> many of whom were also provided housing by the Soviet authorities.<sup>371</sup> It has moreover been noted that the factories the Soviets created in

<sup>360</sup> Sweden, Switzerland, the Netherlands, New Zealand, and, for a period during the 1970s, Australia accorded the Baltic Soviet republics *de jure* recognition.

<sup>361</sup> The demography-changing policies of the U.S.S.R. in the Baltic States have been described as “Russification” of those nations. MÄLKSOO, *supra* note 346, at 218.

<sup>362</sup> See, e.g., *Conference on Security and Cooperation in Europe, Hearing Before the Subcomm. on Int’l, Political, & Military Affairs of the H. Comm. on Int’l Relations*, 94th Cong. 27 (1975) (letter from Joseph Galia, President of the Lithuanian-American Community of the U.S.A.).

<sup>363</sup> E.g., KERSTEN, CHAIRMAN OF THE H. SELECT COMM. ON COMMUNIST AGGRESSION, 83RD CONG., SPECIAL REPORT NO. 12: COMMUNIST TAKEOVER & OCCUPATION OF LATVIA 13; see also MÄLKSOO, *supra* note 346, at 184.

<sup>364</sup> SPECIAL REPORT NO. 12, *supra* note 363, at 16–18.

<sup>365</sup> *Id.* at 18–20.

<sup>366</sup> Sonia Bychkov Green, *Language of Lullabies: The Russification and De-Russification of the Baltic States*, 19 MICH. J. OF INT’L L. 219, 245 & n.186, 253–55.

<sup>367</sup> COMMUNIST TAKEOVER & OCCUPATION OF ESTONIA, *supra* note \_ at 13.

<sup>368</sup> Ronen, *supra* note \_, at 19.

<sup>369</sup> MÄLKSOO, *supra* note 346, at 219 & n. 28.

<sup>370</sup> ESTONIA, LATVIA, AND LITHUANIA, *supra* note 363, at 56. Even Baltic authorities had limited access to such enterprises. *Id.*; cf. REPORT ON THE COMMUNIST TAKEOVER & OCCUPATION OF LATVIA, *supra* note 363, at 14. Sure, regional authorities had limited access to military enterprises everywhere. Imaginary offense.

<sup>371</sup> LIEVEN, *supra* note \_ at 219.

the Baltic States were often economically unreasonable; “the necessary natural resources and labor forces were imported from the USSR, just as most of the production was also sent back to the USSR,”<sup>372</sup> which suggests the USSR’s primary purpose in industrialization was Russification of the Baltic territories.

The net result of Moscow’s Russification policies was a severe reduction in the native populations of the Baltic States. The ethnic Latvian population had decreased from 77% in 1934 to only 52% in 1989.<sup>373</sup> The Estonians were similarly affected, with the number of ethnic Estonians falling from 88% to 61.5% over the same period.<sup>374</sup>

In the movement toward independence, the status of the large Russian-speaking populations became a topic of heated debate. The more radical Baltic nationalists in Latvia and Estonia maintained that the Soviet Russification policies and the subsequent influx of Russian-speakers violated Art. 49(6)<sup>375</sup> and that they were thus legally liable to deportation.<sup>376</sup> Latvian politicians spoke openly of their right to use social and economic pressure to effectuate out-migration.<sup>377</sup> The citizenship laws enacted in Latvia and Estonia reflect the nationalist attitude and make it extremely difficult for non-ethnic minorities to qualify for naturalization. By contrast, the citizenship laws in Lithuania are relatively lax; the small Russian population was not perceived as threatening to either the Lithuanian national identity or independence.

### C. Transitional and post-conflict treatment of settlers

Although only Lithuanian citizens in 1940 and their descendants were granted automatic citizenship when Lithuania reclaimed independence, all other non-military persons in the territory having either a permanent place of residence or a legal source of support had a two-year window to opt-in to Lithuanian citizenship.<sup>378</sup> Once the election period was over, Russian settlers could naturalize under the same terms as other foreigners,<sup>379</sup> with the exception of Soviet military

<sup>372</sup> MÄLKSOO, *supra* note 346, at 219 n.28.

<sup>373</sup> *Report on the Application by Latvia for Membership of the Council of Europe*, Eur. Parl. Ass., Doc. No. 7169 (1994), app. IV, at 1, Council of Eur. Parl. Ass. Working Docs. (Strasbourg 1995). Of the non-ethnic population in Latvia 34% were Russian, 4.5% were Belorussian, and 3.5% were Ukrainian. *Id.* James Hughes, *Exit in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration*, 43 J. OF COMMON MARKET STUDIES 739, 743–744 (2005).

<sup>374</sup> Estonia, UN Doc CERD/C/329/Add.2 (5 July 1999) ¶ 38.

<sup>375</sup> See e.g. LIEVEN, *supra* note \_\_, at xxvii; THREE OCCUPATIONS OF LATVIA, *supra* note, at 44; MÄLKSOO, *supra* note 346, at 223.

<sup>376</sup> LIEVEN, *supra* \_\_, at xxvii.

<sup>377</sup> *Id.* (“Leaders of both LNNK and Fatherland of Freedom have repeatedly gone on record as saying that the ‘colonists’ who entered Latvia under ‘Soviet military occupation’ are legally liable to deportation under the Geneva convention, which forbids the settling of colonists on occupied territory.”).

<sup>378</sup> Lithuania, Citizenship Law art.1(3) (1989). The deadline to apply was November 4, 1991. *Id.*

<sup>379</sup> *Id.* as amended in 1991.

and security personnel.<sup>380</sup>

### 1. Citizenship Laws

Upon reclaiming independence and in the immediate years thereafter, neither Estonia nor Latvia took any steps to expel settlers, nor did they require their removal as a precondition to independence. Indeed, at first the Estonian legislature enacted fairly minimal naturalization requirements for non-ethnic Estonian settlers, necessitating (i) permanent post-occupation residence<sup>381</sup> for at least two years before and one year after the citizenship application date and knowledge of Estonian.<sup>382</sup> A new harsher citizenship law was adopted in 1995. To attain citizenship under the 1995 version of the law applicants must: (i) demonstrate five years of permanent residence in Estonia before they may apply, plus an additional year of residence after registering an application; (ii) be at least 15 years of age; (iii) meet a high level of fluency in Estonian; (iv) know the Estonian Constitution and Law on citizenship; (v) have a permanent legal income; (vi) demonstrate loyalty to the State of Estonia; and (vii) take a prescribed oath.<sup>383</sup> However, Russians living in Estonia prior to July 1990 were exempted from the five-year residency requirement if they were living in Estonia permanently pursuant to the 1993 Aliens Act.<sup>384</sup> Both active military and retired USSR military personnel are ineligible for Estonian citizenship,<sup>385</sup> though they may be allowed to remain in the country as permanent residents.<sup>386</sup>

Latvia's citizenship laws are considered to be even more exclusive than those in Estonia.<sup>387</sup> During the period immediately following independence, only those persons who were Latvian citizens in 1940, or their descendants, were given

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<sup>380</sup> Constitutional Court of the Republic of Lithuania No. 1-2080, *Ruling on the compliance of the Seimas resolution*, 8 – 10 (Apr. 13, 1994, Vilnius), available at <http://eudo-citizenship.eu/NationalDB/docs/LITH%2013%20April%201994%20Ruling%20%28English%29.pdf>.

<sup>381</sup> The earliest date for establishing permanent residence was set at March 30, 1990. *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> Estonia Law on Citizenship, RT I, 1995, No. 12, at art. 6 (Jan. 19, 1995), art. 6, available at <http://www.uta.edu/cpsees/estoncit.htm> (unofficial translation).

<sup>384</sup> *Id.* art. 21. The 1993 Law on Aliens allows persons not qualified for either automatic or naturalized citizenship to become permanent residents. Estonia Aliens Act, RT I 1993, 4, at art.4(1) (July 8, 1993), available at <http://www.legaltext.ee/en/andmebaas/ava.asp?m=022> (official translation).

<sup>385</sup> *Id.* art. 21(1)(6), 21(2).

<sup>386</sup> Compare Estonia Aliens Act art. 11(2)(10), with art. 12(4)(6)-12(4)(7).

<sup>387</sup> See Letter from the CSCE High Commissioner for National Minorities to the Latvian Minister of Foreign Affairs, annexed to Recommendations by the CSCE High Commissioner on National Minorities upon his visits to Estonia, Latvia and Lithuania, CSCE Communication No. 124 (Prague, 23 April 1993), available at [www.osce.org/item/2959.html](http://www.osce.org/item/2959.html) (critiquing the Latvian citizenship laws more harshly than those of Estonia or Lithuania).

renewed Latvian citizenship.<sup>388</sup> Consequently, more than 40% of the Latvian population could not participate in the 1993 parliamentary elections.<sup>389</sup> The animosity toward occupation-era settlers was crystallized in the 1994 Law on Citizenship, pursuant to which applicants for naturalization must demonstrate (i) five years of post-occupation residence in Latvia; (ii) knowledge of the Latvian language, constitution, and history (iii) a legitimate source of income, and (iv) loyalty to the state.<sup>390</sup> The extremely high fluency requirements<sup>391</sup> and the relatively expensive application fee (equivalent to one month's wages) discouraged settlers from naturalizing.

## 2. *International Reaction*

Latvia and Estonia did not take any steps to remove or deport Russian settlers. Estonia, immediately upon independence, even allowed them near-automatic citizenship. Nonetheless, these countries did eventually create significant hardships to acquiring citizenship for settlers (and all other foreigners).

The international community expressed concern about these countries going too far in restricting the rights of settlers. On the one hand, it was generally accepted that the Baltic States had a right to base their citizenship policies on the principle of continuity with the pre-occupation state.<sup>392</sup> On the other hand, humanitarian principles such as non-discrimination and the reduction of stateless persons impacted the lens through which the international community viewed Estonia's and Latvia's citizenship policies;<sup>393</sup> because there was concern that the denial of citizenship and expulsions of settlers might endanger the stability of these countries.<sup>394</sup> The EU in particular criticized the citizenship restrictions placed on former settlers. None of the discussions by international bodies suggested the permissibility of such measures was any greater because the target group were

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<sup>388</sup> ESTONIA, LATVIA, AND LITHUANIA, at 150. It was additionally unclear whether non-citizens would be allowed to remain in Latvia at all. Letter from the CSCE High Commissioner, *supra* note 387, at 8 (“I assume that the Government of ... will not decide to oblige this group [Russian settlers] or parts of it to leave the country.”).

<sup>389</sup> ESTONIA, LATVIA, AND LITHUANIA, *supra* note \_\_, at 150.

<sup>390</sup> Latvian Citizenship Law. Art. 12 (Aug. 11, 1994) (as amended through 1998), available at [http://www.uniset.ca/naty/latvia\\_en.htm](http://www.uniset.ca/naty/latvia_en.htm).

<sup>391</sup> Compare Letter from the CSCE High Commissioner, *supra* note 387, at 10 (“Whatever language requirements are chosen, they should not exceed the level of conversational knowledge”), with Latvian Citizenship Law. §12(3) (requiring fluency in Latvian as a prerequisite to naturalization).

<sup>392</sup> MÄLKSOO, *supra* note 346, at 233.

<sup>393</sup> UN Doc. CCPR/C/79/Add.59 (Mar. 11, 1995), ¶ 12 (expressing concern that “a significantly large segment of the population, particularly members of the Russian-speaking minority, are unable to enjoy Estonian citizenship due to the plethora of criteria established by law, and the stringency of the language criterion”).

<sup>394</sup> Letter to the Minister of Foreign Affairs of Latvia, ref No 1463/93/L, *supra* note \_\_, at 3; Lowell W Barrington, *The Making of Citizenship Policy in the Baltic States*, 13 GEO. IMMIGR. L.J. 159, 159–160.

settlers brought in by an occupying power.

Ultimately, the Estonian and Latvian restrictions on former Soviet settlers led to those states being deemed ineligible to join the European institutions immediately following independence.<sup>395</sup> Latvia's citizenship policies were initially so strict, in fact, that Estonia became concerned that Latvia's laws would impact *Estonia's* ability to join the EU, leading Estonian officials to encourage a Latvian naturalization approach more in line with its own.<sup>396</sup> It was not until both countries relaxed their citizenship laws that they were finally invited to become EU members, in the summer of 2004. In the end, therefore, the international community rejected the idea that the Baltic States were free to treat Russian settlers entirely as they pleased, and pressed acceptance of the principle that long term residents of a territory had the right to acquire nationality.

### CONCLUSION

This Article has shown that it is impossible to form an accurate understanding of Art. 49(6) of the Fourth Geneva Convention by simply studying Israeli settlements and the international reaction to them. As this Article has shown through an in-depth examination of all other Geneva Conventions settlement contexts (eight in total), the Israeli situation, which dominates the legal literature, is entirely anomalous in terms of the international reaction. The state practice studied here suggests several things about the meaning and scope of the prohibition.

The most striking thing about the state practice is the ubiquity of settlement activity and the accompanying international acquiesce. Large-scale settlement activity appears to be an almost inevitable accompaniment of all but the briefest occupations of contiguous territory. All the examined settlement movements into occupied territory have proved demographically significant. Moreover, with few exceptions, the arrival of settlers has been accompanied by a similarly large-scale expulsion or departure of the prior population.<sup>397</sup> Vietnam and Israel appear to be among the unusual exceptions in which prior populations remained intact.

While the practice cannot define precisely what constitutes a transfer within the meaning of Art. 49(6), it does clearly show that a variety of broad and aggressive definitions of the term are plainly inconsistent with state practice under the Geneva Conventions, and incompatible with any positivist view of international custom. In particular, suggestions that Art. 49(6) prohibits mere facilitation by states, or even more broadly, requires them to take measures to

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<sup>395</sup> See, e.g., *U.S. Says Baltic Nations Are Not Ready for NATO*, N.Y. TIMES, Sept. 28, 1996, at 7; Council of the European Union, No. 14818/01, at 45, 70 (Dec. 4, 2001).

<sup>396</sup> LIEVEN, *supra* note \_\_, at xxvi.

<sup>397</sup> Depending on the circumstances of the flight of the prior population, this could itself be a violation of Art. 49.

prevent migration, have no support in state practice and international reaction to it. To the extent these interpretations are not mandated by the text of the provision, the state practice gives strong grounds for rejecting them. Moreover, state practice directly contradicts broad definitions of transfer as including births to transferees subsequent to transfer (“natural growth” in the argot of the Middle East Peace Process) or migrants from third-countries. In short, the more broadly one wishes to define the anti-settlement norm, the greater the tension with state practice.

Another major conclusion from the state practice is that the removal of Art. 49(6) settlers is not the required remedy for the relevant war crime. Indeed, significant state practice suggests that at least some of the settler population must not only be allowed to stay past the occupation, but also to participate in subsequent self-determination processes in the territory. In particular, those settlers born in the occupied territory have, in a wide variety of post-conflict situations, been treated as having a presumptive right to citizenship in any new post-conflict state.

One might suggest that the absolute absence of removal as a remedy for settlers is simply a result of the voluntary waiver or consent to their presence by the occupied peoples or countries, and thus does not establish the baseline rule. This possibility is heavily discounted by the fact that the notion of removal as a default remedy is simply not part of the negotiations or discussion surrounding these situations. Indeed, it is clear that in many cases the affected population would prefer removal, but it is simply not in the legal option set as framed by the international community.

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Before further elaborating on these conclusions, a methodological note is in order concerning what can and cannot be learned from such a study of state practice. One may wonder how much one can conclude from the state practice, given that it consists of affirmative acts by a few occupying powers, combined with a complete absence of legal condemnation or censure by others. This may raise questions about whether the vast state practice surveyed here is accompanied by an *opinio juris* sufficient to make it legally significant.<sup>398</sup> On the part of the acting (settling) states, *opinio juris* is strongly indicated by the lack of any abstention by states from acts that could violate Art. 49(6).<sup>399</sup> Simply put, no occupying power has ever taken any steps to discourage or obstruct migration into occupied territory. In no occupation has any occupying power – even those generally concerned with adherence to international humanitarian law – taken any action that would suggest it understands the Geneva Convention as creating any obligation to obstruct, discourage or deny facilities to settlement efforts. The

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<sup>398</sup> In international law, objective state practice must combine with *opinion juris*, a judgment by the relevant states that the action or inaction is legal or illegal.

<sup>399</sup> ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (explaining that existence of a prohibition can be illustrated in state practice by “physical practice abstaining from the prohibited behaviour.”)

occupying powers' evident judgment that they are not obligated to prevent or obstruct such activities has in no case been challenged by the international community, giving it presumptive validity.

And indeed, the migration of people into occupied territories is overwhelmingly the rule rather than the exception where such territories are geographically adjacent. If all this constitutes a violation of Art. 49(6), then it would easily be the most universally and ubiquitously violated prohibition in the Geneva Conventions. However, the ICRC, the Conventions' watchdog, has never identified any problem with systematic worldwide disrespect for Art. 49(6).

Another notable and extremely consistent pattern discovered in this study is the failure of third countries or international organizations to describe the settlement activity as violations of Art. 49(6). To be sure, silence does not have the same weight as affirmative approval in establishing *opinio juris*, but the latter is always rare.<sup>400</sup> Silence counts. As Prof. Shaw explains:

Generally, where states are seen to acquiesce in the behavior of other states without protesting against them, the assumption must be made that such behavior is accepted as legitimate... This means actual protests are called for to break the legitimizing process [when a new rule is being established by affirmative conduct].<sup>401</sup>

In the situations studied in this Article, the failure to raise legal objections is consistent and general, and extends to international organizations and groups (the U.N. Human Rights Commission, the ICRC, and humanitarian NGOs like HRW), whose work it is to systematically point out violations of these norms.

Numerous other circumstances give added weight to this silence.<sup>402</sup> For one, the situations here are not ones that escaped international political condemnation and legal scrutiny. In most of these contexts, the international community has condemned the underlying occupation or aggression, and in most if not all cases, it has criticized the occupying power for violations of IHL and human rights norms. Thus the UN, the EU Parliament, PACE, and other bodies have been asked to denounce these activities as illegal, and have refused.

Such omission speaks loudly. Indeed, in various contexts (e.g. Cyprus, Georgia) the occupying power has been criticized by the international community for the transfer out of protected people (Art. 49(1)), but nothing was said about Art. 49(6). Finally, when some of the settlement activities were criticized by the international community (Vietnam, Armenia), they were not branded illegal. In these cases, we are not dealing with pure silence, but rather with the kind of silence that suggests the underlying conduct is either legal or not clearly illegal.

Moreover, some of these settlement situations fall within the jurisdiction

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<sup>400</sup> See, e.g., MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 55 (2009).

<sup>401</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 55 (7<sup>th</sup> ed. 2014).

<sup>402</sup> See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 437 (2006) (noting that silence can under some circumstances be evidence of *opinio juris*).

of the International Criminal Court (Cyprus, Ukraine, and Georgia). Yet the Prosecutor has not taken any steps to investigate the settlement activities in those contexts, even as part of broader examinations or investigations of those situations. Given that the Prosecutor's job in a preliminary investigation is at least to note relevant crimes, its failure to do so is legally significant.<sup>403</sup>

Finally, this study has also shown affirmative practice and *opinio juris* by observer states, in the form of the numerous peace plans that deal with settler situations. These plans, approved by the UN or other international organizations, provide strong evidence that there is no legal obligation for a removal of settlers. It bears noting that in many situations, the presence of a large number of settlers has not been an obstacle to conflict resolution, or undermined self-determination.

Nor can the general acquiescence be explained in part by suggesting that some settlement enterprises (like Russia's in Georgia and Ukraine) may be too small or short-lived to reasonably warrant international notice. For example, the UN General Assembly first condemned Israeli settlements in 1975<sup>404</sup> and the UN Security Council in 1976, when the settler population numbered approximately 20,000, or roughly 1.6% of the population of the territories, a smaller proportion than in any of the situations discussed here, and smaller in absolute numbers than all but one (Nagorno-Karabakh).<sup>405</sup>

Doubtless some will attempt to dismiss the findings of this Article by saying the treatment of settlers in these other contexts was merely politics, rather than law. To be sure, geopolitics is always a presence in international law. That is why scholars must study an issue across all possible geopolitical contexts. Consistency of treatment across different geopolitical contexts suggests a legal rather than a political explanation. Moreover, the situations discussed here are not marked by an international fear of condemning the occupying power – they often are condemned, just not for illegal settlement activity.

Once one admits possible political explanations for how Art. 49(6) is applied, one would have to consider the possibility that maybe it is the exceptional treatment afforded to the Israeli case that is the political one. To put it differently, the point of looking at the broadest set of data is to help exclude alternative hypotheses like "politics." With a data set of one, one cannot determine whether observed reactions are political or not. Expanding the sample to eight other cases raises a sharp question: what is more likely to be political – the international community's consistent treatment of settlements across eight vastly different geopolitical situations – or its anomalous treatment of the single notoriously

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<sup>403</sup> Compare, ICC Rep. Prelim. Exam, supra at n. 332, par. 68-70 (discussing Israeli settlement activities in context of examination of situation in Palestine), with par. 235-55 & 110 (making no mention of settlement activities in context of Georgia and Russia preliminary examinations).

<sup>404</sup> See G.A. Res. 3225 Art. 5(a) (1975).

<sup>405</sup> Similarly, the U.N. denounced Israeli settlements on the Golan Heights as violations of the Geneva Conventions when there were well under 10,000 Israelis living there. See G.A. Res. 37/12 (16 December 1982). They continue to be repeatedly condemned, though after the 50 years the settler population is approximately 20,000.

politicized and emotional case of Israel?

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This Article's comprehensive survey of settlement activity in eight occupied territories around the world suggests several conclusions, some of them quite surprising. First, the significant migration of settlers into an occupied territory under the auspices of the occupying power is a ubiquitous feature of prolonged territorial control. Art. 49(6) notwithstanding, there is no instance of prolonged occupation of adjacent territory that has not seen large-scale settlement. Such migration occurs with varying degrees of governmental encouragement – from complete top-down organization in some cases, to mere facilitation in others. Second, there is absolutely no instance of an occupying power taking concerted measures to discourage, prevent or obstruct such migration. Nor in any of these cases has there been any effort by the occupying power to repatriate settlers or dismantle settlements.<sup>406</sup> Third, no international actor or body has described any of this activity – which has occurred in a wide variety of places, geopolitical contexts, and times – as a violation of Art. 49(6). Finally, there has been no suggestion that the occupying power is obligated to remove such settlers. In the numerous cases where the international community has been involved in establishing the parameters of an end to the occupation, the removal of settlers has not been required, with the partial exception of Northern Cyprus. In several other contexts, however, international parameters explicitly envision all settlers who wish so to remain, and calls by the occupied people for their removal have been rejected.

All of this is in complete contrast to how the settlement issue has been applied in relation to Israel (in both the West Bank and Golan Heights situations). At the very least, this suggests that any international legal discussion or understanding of the meaning and application of Art. 49(6) cannot proceed, as a scientific matter, solely via one anomalous case. Examining Art. 49(6) solely or primarily through this one context would simply be bad scholarship. Discussion of the rule must take into account how it has been applied or understood throughout the world, and it cannot be assumed that the Israeli case represents the customary rule or general understanding, rather than a politicized aberration.

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<sup>406</sup> In this context, Israel's removal of all Israeli civilians from the Sinai Peninsula, Gaza Strip and northern Samaria has no parallel elsewhere in the world.