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## UNLAWFUL POPULATION TRANSFER AND THE LIMITS OF INTERNATIONAL CRIMINAL LAW

EMILY HASLAM\*

### I. INTRODUCTION

THE most abiding television images of the wars in the former Yugoslavia are the lines of refugees displaced as a result of “ethnic cleansing”. Successful prosecutions have now been brought before the International Criminal Tribunal for the Former Yugoslavia (ICTFY) against a number of those involved in the worst atrocities.<sup>1</sup> Other prosecutions are pending.<sup>2</sup> And yet the events in the former Yugoslavia drew attention to the fact that international criminal law does not prohibit ethnic cleansing as such. It was therefore recognised that there is a danger that some incidents of ethnic cleansing could fall outside existing international criminal law. It is against this legal background that the UN Sub-Committee on the Prevention of Discrimination and the Protection of Minorities has recommended the adoption of an instrument criminalising involuntary population transfer. To this end it has prepared a draft Declaration on Population Transfer and Implantation of Settlers (hereafter, the draft Declaration).<sup>3</sup> The UN Commission on Human Rights has welcomed the draft Declaration and has called for it to be published and widely circulated.<sup>4</sup>

Surprisingly, the academic community has given the draft Declaration very little attention. Thus unless opposition develops elsewhere, there is every chance that it will be adopted in something

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<sup>1</sup> For example, *The Prosecutor v. Radislav Krstic* (Srebrenica) IT-98-33, 2 August 2001.

<sup>2</sup> For example, *The Prosecutor v. Karadzic and Mladic* IT-95-18.

<sup>3</sup> Final Report of the Special Rapporteur, Mr Al-Khasawneh, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities on the Human Rights Dimension of Population Transfer, including the Implantation of Settlers and Settlements E/CN.4/Sub.2/1997/23, 27 June 1997, which was preceded by a Preliminary Report E/CN.5.Sub.2/1993/17 and Corr.1 and a Progress Report E/CN.4/Sub.2/1994/19 and Corr. 1. The final report incorporates the conclusions and recommendations of an expert seminar on population transfer and implantation of settlers held at Palais des Nations, Geneva, February 1997. Annex II of the Final Report contains the draft Declaration. Alternative suggestions to the draft Declaration included the adoption of an additional protocol to the International Covenants on Human Rights and a Convention on the Prevention and Punishment of the Crime of Mass Expulsion.

<sup>4</sup> 52nd meeting, 17 April 1998 E/CN.4/Dec/1998/106.

like its current form. This article argues that this would be a serious mistake since there are a number of problems with the draft. The second part of this article explores these difficulties and shows that, in its current form, the draft Declaration would only serve to introduce further inconsistency and confusion into the law and is unlikely to be effective in practice. The third part of this article explores whether a new criminal offence is needed and argues that international criminal law already deals adequately with population transfer.<sup>5</sup> It suggests that the problems with the draft Declaration stem from the fact that international criminal law remains an underdeveloped discipline which fails to provide guidance on some of the most basic issues. It concludes that the desire to introduce a new offence reflects a *lacuna* in international law that may need to be addressed, but that the draft Declaration is not the way forward.

## II. PROBLEMS WITH THE DECLARATION

The intention is that the draft Declaration will lay the foundation for a crime of unlawful population transfer; it is envisaged that it will constitute a minimum standard of behaviour and that it will apply without prejudice to other international humanitarian and human rights norms. The key to the Declaration is the prohibition of population transfers which are defined in article 3 as, “a practice or policy having the purpose or effect of moving persons into or out of an area, either within or across an international border, or within, into or out of an occupied territory, without the free and informed consent of the transferred population and any receiving population”. The declaration further prohibits “the settlement, by transfer or inducement, by the Occupying Power of parts of its own civilian population into the territory it occupies or by the Power exercising defacto control over a disputed territory” (article 5) and “practices and policies having the purpose or effect of changing the demographic composition of the region in which a national, ethnic, linguistic, or other minority or an indigenous population is residing, whether by deportation, displacement, and/or the implantation of settlers, or a combination thereof” (article 6).

It is submitted that an analysis of these provisions, which form the core of the draft Declaration, reveals that it suffers from three key deficiencies: first, the prohibited acts have not been defined with the specificity required for a criminal offence; secondly, insofar

<sup>5</sup> On population transfer see A. Zayas, “International Law and Mass Population Transfers” (1975) 16 *Harvard International Law Journal* 207; C. Meindersma, “Population Transfers in Conflict Situations” (1994) 16 *Netherlands International Law Review* 31.

as it can be determined which acts will constitute the offence, the present definitions are too broad; thirdly, the declaration does not contain the enforcement obligations which would be necessary for it to be effective.

Perhaps the most important aspect of the draft Declaration which is unclear is the definition of unlawful population transfer in article 3. Read literally, the proposed offence would seem to apply even where the population transfer is an unintended consequence of the practice or policy in question. Thus the offence seems, on the face of it, to impose strict liability. However, strict liability is unknown in international criminal law and would normally be thought inappropriate for offences that are grave enough to attract the attention of international law.<sup>6</sup> It is, therefore, almost certain that unlawful population transfer will not in fact be treated as a strict liability offence. But the *mens rea* requirement which will be imposed is entirely unclear. A literal reading would also suggest that there are circumstances in which unlawful population transfer would operate as an inchoate offence. This is because the Declaration appears to criminalise policies aimed at population transfer even if they are never in fact implemented. Again, however, it seems highly unlikely that the offence would ever be deemed to have been committed in such circumstances.

Further uncertainty is introduced by the requirement of consent, which can be interpreted in two ways. Lack of consent could either be treated as part of the definition of the offence, or the presence of consent as an excusing factor. The resolution of this uncertainty may have important implications for where the burden of proof lies. Moreover, whichever interpretation is adopted, deciding whether a population consents to transfer is riddled with difficulty. In particular, it is unclear how consent is to be determined. For example, it is doubtful whether a bare majority in a referendum would be sufficient to establish consent. Even if it were, establishing the group/territory within which a majority must be attained is likely to be problematic. The obvious solution in the case of the population to be transferred would be to define the group/territory by reference to those who are to be directly affected. However, further reflection suggests that this solution may not be adequate. On the one hand, it may not provide sufficient protection for

<sup>6</sup> On the *mens rea* for international crimes see article 30, Rome Statute of the International Criminal Court 1998 U.N. Doc. A/CONF.183/9, (1998) 37 ILM 1002; article II, Convention on the Prevention and Punishment of the Crime of Genocide 1948 78 UNTS 277; *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, ICTY App.Ch., 15 July 1999; A. Cassese, *International Law* (Oxford, 2001) p. 248.

minority groups within a particular geographical area for whom the land which they currently occupy has a special significance. On the other hand, taken to its logical conclusion this would mean that it would become impossible to move a small community without its consent no matter how great the general public interest would be—it would become impossible to move a village to make way for a reservoir without the villagers' consent, as the only exceptions allowed by the draft in the case of population displacement are where the safety of the population is threatened or where there are "imperative military reasons" (article 4). In the case of the receiving population defining the relevant group is even more difficult and will inevitably involve questions of policy which it might be inappropriate to attempt to re-open in a criminal arena.

In sum, the above considerations in and of themselves suggest that the draft Declaration should not be implemented in its current form. In addition, these uncertainties suggest that, if it is adopted, it will be applied inconsistently at the national level, a problem to which this article will return. Not only is the draft Declaration uncertain, as has already been suggested, insofar as it can be determined, it casts its net far too widely and criminalises practices and policies that may not be suitable for judicial determination, let alone the blunt instrument of the criminal law. The difficulty is that the draft Declaration does not require that population transfer occurs as a direct result of proscribed policy and practice. Nor does it demand that population transfer takes place suddenly, rather than over a period of time. Thus, in theory at least, good faith economic policies which gradually result in population transfer are criminalised. Of course, this represents an extreme example which is unlikely to be prosecuted in practice. Prosecution is, however, more likely in cases where large numbers of people have been displaced to make way for a dam or some similar large-scale engineering project. The removal of the population without its consent would render those who devised and implemented the policy criminally responsible even where compensation or alternative housing had been provided and even if the project was supported by expert opinion. Admittedly, the disruption to the affected population in such a case may be considerable and the point is not that criminal responsibility in these circumstances is necessarily inappropriate, but rather that it represents a significant departure from existing international criminal law.

At least as importantly, the draft Declaration may limit the ability of the international community to determine on an *ad hoc* basis where the appropriate balance between national self-determination, the stability of states and the prohibition of

population transfer lies. Population transfers have often been used as an instrument of nation-state creation,<sup>7</sup> and it may be that in some cases their prohibition conflicts with the right to self-determination. Although the extent of the right to self-determination under international law is unclear, it is fairly certain that self-determining units will not always coincide with the groups that can consent to transfer under the draft Declaration.<sup>8</sup> Even if these groups were coterminous, it is debatable whether consent to population transfer can ever be free and informed in the face of momentous political (and possibly economic) changes often associated with the exercise of the right to self-determination. Strictly speaking, the draft Declaration cannot legally restrict the manner in which the right to self-determination is exercised because the right to self-determination is a *jus cogens* norm.<sup>9</sup> The failure of the draft Declaration to address the relationship between the right to self-determination and the proposed offence is, however, likely to give rise to controversy which it would have been better to have resolved now. The suffering, loss of life and threat to international stability that is often associated with population transfers might appear to be precisely why their prohibition should be given priority over the exercise of the right to self-determination. However, it should not be assumed that suffering, loss of life and threats to international stability are avoided by limiting the exercise of the right to self-determination in these cases. It may be that no universal rule can cover every situation, but rather, as has already been suggested, that each should be determined on an *ad hoc* basis.

Problems relating to the breadth of the offence are likely to be mitigated in practice by the fact that the draft declaration as it currently stands is unlikely to be enforced effectively at the national level. The failure to categorise unlawful population transfer as an international crime attracting individual criminal responsibility at the international and not just the national level, impacts negatively upon the relationship of the offence with existing international crimes, a point which will be dealt with in the next section. For now it suffices to note that the enforcement of the draft declaration will be hampered by the absence of obligations relating to grounds of jurisdiction, mutual legal assistance and extradition. Although these obligations apply as a matter of international customary law

<sup>7</sup> J. Preece, "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms" (1998) 20 H.R.Q. 817.

<sup>8</sup> On self-determination see A. Cassese, *Self-Determination of Peoples A Legal Reappraisal* (Cambridge 1995).

<sup>9</sup> On *jus cogens* see articles 53 and 64 of the Vienna Convention on the Law of Treaties 1155 UNTS 331; for the view that the right to self-determination constitutes a *jus cogens* norm, see *East Timor Case, Portugal v. Australia* I.C.J. Rep. 1995, 90.

to international crimes, they do not automatically apply to offences subject to indirect enforcement. The declaration does not list the grounds of jurisdiction upon which a state could or should prosecute, nor does it oblige states to prosecute or extradite suspects (*aut dedere aut judicare*) or to exclude the political offence exception to extradition. Even if a state were to include an obligation to extradite in its implementing legislation, the application of the principle of double criminality is likely to be fraught with difficulties because of uncertainties surrounding the definition of unlawful population transfer.

In contrast, article 10 of the draft Declaration obliges states and the international community when faced with prohibited conduct “(a) not to recognise as legal the situation created by such acts; (b) in ongoing situations to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or otherwise, to the State which has committed or is committing such act in the maintaining or strengthening of the situation created by such act”. Although these obligations, which do not usually apply to crimes subject to indirect enforcement, significantly increase the likely effectiveness of the draft Declaration, it is unclear how far states and the international community should go in order to comply with them. It is unclear whether these obligations justify, or even require, military intervention and whether they could restrict the discretion of member-states when they are acting within the framework of international organisations, such as the United Nations.

In sum, the draft declaration is simultaneously vague and overly broad and is unworkable in practice. Although some of these objections could be overcome if it were redrafted, the draft declaration is subject to more fundamental criticisms which are examined in the following section.

### III. ASSESSING THE WISDOM OF THE INTRODUCTION OF A NEW OFFENCE OF UNLAWFUL POPULATION TRANSFER

Certain aspects of the diverse range of practices which have been labelled ethnic cleansing already constitute international crimes. Because the definition of unlawful population transfer is uncertain it is impossible to determine the exact overlap between the proposed offence and existing international crimes. However, it is difficult to imagine any instances of population transfer serious enough to attract the opprobrium of the international community, which would not already constitute an international crime or which through reasonable interpretation could not be brought within the

definition of existing crimes. Of more concern is that the introduction of an offence of unlawful population transfer may create the impression that something has been done about ethnic cleansing, when more often than not in practice the problem has been that existing international law has been ineffectively enforced and not that it could not have been applied to a particular situation.

In its extreme form unlawful population transfer constitutes genocide under article II (a), (b) or (e) of the Genocide Convention if the perpetrator acts with the required specific intention.<sup>10</sup> The draft declaration differs from the Genocide convention in that the former seeks to protect populations against deportation whilst the latter aims at safeguarding certain groups as such. To this end the draft Declaration does not define the minimum number of people whose transfer triggers responsibility, nor their relationship to the wider group that is protected. Thus it is possible that the transfer of the elite of a population will not constitute population transfer, although it could constitute genocide. Notwithstanding the fact that “eliticide” was a notable feature of the wars of the former Yugoslavia, it may not be covered by the declaration.

However, in one respect the draft Declaration appears broader than the Genocide Convention because the latter protects a more limited range of groups. Insofar as this is the case, these groups could be interpreted flexibly and/or extended as has already begun to happen in practice.<sup>11</sup>

Similarly, crimes against humanity include deportation or unlawful population transfer.<sup>12</sup> Conduct that results in population

<sup>10</sup> Article II states that “... genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” Convention on the Prevention and Punishment of the Crime of Genocide 1948 78 UNTS (1951) 277.

<sup>11</sup> Accordingly, when determining whether it was able to prosecute former Chilean head of state, Pinochet, the Spanish court interpreted the requirements of the Genocide Convention broadly to require an intention to destroy a group as such “... based on shared characteristics. ... those persecuted in the Southern Cone were targeted as a group because they were perceived to deviate from the military view of society as Christian as well as anti-Marxist and to be insufficiently aligned with the peculiar military view of the ‘nation’. A similar argument has been made in UN reports and by human rights advocates, but had not been accepted by a court before.” A.B. de Brito, C. González-Enríquez and P. Aguilar (eds.), *The Politics of Memory Transitional Justice in Democratising Societies* (Oxford, 2001) p. 52; on the interpretation of the Genocide Convention by the United Nations War Crimes Tribunals see Verdine, “The Genocide definition in the jurisprudence of the ad hoc Tribunals” (2000) 49 *I.C.L.Q.* 578.

<sup>12</sup> Article 6(c), Charter of the International Military Tribunal at Nuremberg; Article 5, Statute of International Criminal Tribunal for the former Yugoslavia UN doc. S/25704 of 3 May 1993; Article 3, Statute of the International Tribunal for Rwanda UN doc. SC/5974 of 12 January 1995; Article 7, Rome Statute of the International Criminal Court UN doc. A/CONF. 183/9.



transfer may also constitute persecution as a crime against humanity. Although the draft declaration does not discriminate between different types of activity resulting in population transfer, acts constituting persecution as a crime against humanity must reach a certain level of gravity before they constitute international offences. Accordingly, ICTFY has held that deliberate and systematic killing, organised detention and expulsion and the destruction of homes and property constitute persecution.<sup>13</sup> However, it has refused to classify as persecution the encouragement and promotion of hatred<sup>14</sup> and the dismissal and removal of Bosnian Muslims from government<sup>15</sup> on the grounds that these abuses were insufficiently grave to constitute a crime against humanity. The point is not that the dividing line between these breaches was correctly drawn, nor that in future cases these distinctions will be unproblematic. Rather, these decisions evidence that ICTFY recognises that it is appropriate for the purpose of attributing criminal responsibility to draw distinctions between different types of harm. The failure of the draft declaration to do so significantly extends the ambit of international criminal law.

Finally, unlawful population transfer taking place during armed conflict already constitutes a war crime and in international armed conflicts a grave breach of the Geneva Conventions.<sup>16</sup>

From what is set out above it should be clear that international crimes overlap to a significant extent. The overlap that exists between international crimes already causes problems when international offences are charged cumulatively. The introduction of a crime covering substantially the same conduct is likely to raise similar issues before national courts. Whether individuals will be convicted for unlawful population transfer in addition to other international crimes will depend upon the law of the state where they are tried. It is, however, likely to depend upon whether each offence protects different interests or is composed of different

<sup>13</sup> ICTFY has held that persecution, is “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law reaching the same level of gravity as the other acts prohibited in article 5 [of its statute]” *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic and Vladimir Santic* Case No. IT-95-16-T. 14 January 2000, para. 621.

<sup>14</sup> *The Prosecutor v. Dario Kordic*, Case No. IT-95-14/2, 26 February 2001, para. 209.

<sup>15</sup> *Ibid.*, para. 210.

<sup>16</sup> Article 49, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 UNTS (1950) 387; Article 2 (g), Statute of International Criminal Tribunal for the former Yugoslavia, UN doc. S/25704 of 3 May 1993. In non-international armed conflicts see article 17, 1977 Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1125 UNTS (1979) 609 and article 3 common to the four Geneva Conventions 1949. It is now widely accepted that violations of Protocol II and common article 3 lead to individual criminal responsibility and attract universal jurisdiction, *Prosecutor v. Dusko Tadic*, Case No. IT-94-10A, ICTY App. Ch., 5 July 1999.

elements.<sup>17</sup> The application of this test is difficult to predict for two reasons. First, as we have seen, the definition of unlawful population transfer is unclear; secondly, its relationship with existing international crimes is uncertain. On the one hand, unlawful population transfer could be seen as an element of existing crimes, on the other hand, as an entirely separate offence which protects the link that people enjoy with their homeland, a point which is expanded below. Only in the former case would the prohibition on cumulative convictions operate.

The international community adopted the term ethnic cleansing in the early 1990s.<sup>18</sup> This followed the widespread use of the expression by the media and suggests that the international community was experiencing a lack of confidence in existing international criminal legal categories. At first sight, it also indicates the existence of a *lacuna* in positive international law. However, it is submitted that the real reason for the introduction of a distinct offence of unlawful population transfer reflects not so much the fact that ethnic cleansing falls outside existing international criminal law, but a sense that international law fails to accord sufficient recognition to the link between a people and its territory. Thus charging ethnic cleansing as genocide, war crimes or crimes against humanity could fail to capture the essence of ethnic cleansing. In much the same way it could be argued that charging rape as a property crime, whilst it may capture a criminal, would fail to capture the essence and gravity of that offence irrespective of the maximum sentence.

Thus to the extent that a loophole exists, it is in the failure of positive international law to recognise a right to a homeland. The attempt to address this gap through an international criminal instrument is fraught with difficulty. This is because the right to a homeland is at most only emerging in international law.<sup>19</sup> Its precise ambit is, therefore, unclear; it is uncertain both whether the right to a homeland is an individual or collective right and how it interacts with other controversial areas of international law relating to nationality, territory and state succession. This article has shown

<sup>17</sup> See, for example, at the international level, *Prosecutor v. Delalic et al.*, IT-96-21, App. Ch. Judgment, 20 February, 2001, paras. 412–413.

<sup>18</sup> On the meaning of ethnic cleansing and the use of the term by the international community, see D. Petrovic, "Ethnic Cleansing—An Attempt at Methodology" (1994) 5 E.J.I.L. 324; N. Lerner, "Ethnic Cleansing" (1995) *Israel Yearbook on Human Rights* 102; A. Bell-Fialkoff, "A Brief History of Ethnic Cleansing" (1993) *Foreign Affairs* 110; J. Preece, "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms" (1998) 20 H.R.Q. 817.

<sup>19</sup> A. De Zayas, "The Right to One's Homeland and Ethnic Cleansing" (1995) 6 *Criminal Law Forum* 257, 258.

that, until these and other issues are resolved, it is unwise to attempt to criminalise its breach.

Difficulties surrounding the introduction of the offence of unlawful population transfer illustrate that the successful introduction of new offences in international criminal law depends not only upon the outcome of phenomenological, criminological and jurisprudential debate, but also upon the ability of international criminal lawyers to develop concepts by which to articulate and prioritise the interests that are to be protected by the international criminal legal order. The development of these categories will determine the appropriate reach of international criminal law in the post-Cold War world. The key question is whether it should control not only the most heinous conduct known to mankind, but also other kinds of harm, thereby setting standards for good government more generally. Until such debate takes place international criminal law will remain at best reactive and unsystematic and, therefore, a potentially unfair and ineffective body of law.

#### IV. CONCLUSION

The principal aim of this article has been to demonstrate that the draft Declaration on Population Transfer suffers from a number of serious defects, such that it would be undesirable for it to be adopted in its present form. It has also been recognised, however, that merely extending existing international crimes to catch different aspects of the phenomenon which collectively make up ethnic cleansing may not adequately address the international community's sense of what it is that makes ethnic cleansing so heinous. Thus some action may need to be taken, particularly if predictions about ethnic conflict being a key feature of the post-cold war period are taken seriously. The question is how the international community ought to proceed. The difficulty, as the third part of this article has tentatively suggested, is that international criminal lawyers lack the basic tools and the concepts by which to categorise different types of harm. Until these are developed international criminal law will not enjoy the status and support which it requires to be truly effective.