From the Selected Works of Dr Nafees Ahmad

Winter December 22, 2017


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Human inception with autochthonic affinities coated in political proclivities harbingered and vouched for exclusivity of ethnicity, race, and religion in every part of the world. But civilizations have been interacting, intermingling and intermixing ever since the people have accomplished the art of movements from one place to another by utilizing and developing the transport technologies of all kinds. However, in the contemporary circumstances, humanity is at war *per se* that pandered to a catena of causes of population movements across the human spectrum. Population transfers, expulsions, and forced migrations that take place in inconsistent conditions and a wide diversity of circumstances at the moment are coordinated by a convoluted hodge-podge of legal labyrinth comprising the IHRL—International Human Rights Law, IRL—International Refugee Law, IHL—International Humanitarian Law, and IDL—International Development Law. The population transfer is allowed only in rare and restricted circumstances, with the standards of lawful transfer determined by explicit or implicit prohibitions contemplated predominantly in IHRL and IHL.

The Draft Population Transfer Declaration (PTD) defines illegal Population Transfer and the Implantation of Settlers, 1997 annexed to the Final Report of Special Rapporteur Al-Khasawneh, which was accepted by the UNCHR (UN Commission on Human Rights) and ECOSOC in 1998. The PTD was drafted by the UNCHR’s Sub-Commission on Prevention of Discrimination and Protection of Minorities, which was renamed as Sub-Commission on the Promotion and Protection of Human Rights in 1999 until its functions and responsibilities were assumed in 2006 by the United Nations Human Rights Council (UNHRC). The Article 3 of the PTD defines “unlawful population transfer”
as “a policy or practice having the goal or result of transferring the people into or out of a territory either within or across an international boundary or within into or out of an occupied territory without the informed and free consent of such transferred population and any obtaining population.” The focus of this entry is, first, in those circumstances in which expulsions and transfers may be lawful; and, second, upon the preconditions, limitations, and other requirements, including most notably the right to compensation which needs to be satisfied to render such transfers lawful. However, the forced population transfers have been ruminated upon separately.

The Genesis of the Legal Norms

History is replete with instances of population transfer and its devastating effects on communities and individuals. There is no shortage of examples: population transfer and slavery; dispossession of indigenous peoples; population transfers as a result of treaties. For three centuries, before the slave trade was legally prohibited in Britain in 1807, and afterwards, at the international level, by the General Act of the Brussels Conference Relating to the African Slave Trade-1890, the Slavery Convention-1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practice Similar to Slavery-1956, was banned. The transatlantic slave traders enslaved and transported at least 12 million Africans to the Americas. The American Colonization Society, established in 1816, organized the transportation of free black Americans and manumitted and emancipated the slaves to Liberia, a policy which generated significant debate and which had been disputed at the time by many African-Americans. While deportation for slave labour was rightly condemned as a war crime at Nuremberg, the failure of the Tokyo Tribunal to condemn the transfer of “Comfort Women” into sexual slavery during World War II has been justly castigated. It has been highlighted in the Gender-Based Crimes judgment handed down by the non-governmental organization called Women’s International War Crimes Tribunal that conducted the Trial of Japan’s Military establishment’s Sexual Slavery in 2001.

Indigenous people have been subject to widespread population transfers. Colonialism and Colonization led to the large-scale dispossession of indigenous peoples. Beginning with the Indian Removal Act, 1830[28 May 1830] whereunder an Exchange of Lands instead of the Indians Residing in any of the States, or Territories, and for Their Removal from the West of the Mississippi River was provided. Consequently, series of statutes in the United States of America provided for the forcible removal of an estimated 100,000 Native Americans to reservations to make way for the settlers. Segregationist practices and policies in South Africa saw the creation of reserves for Africans and eventually led a system of apartheid based on Racial and Religious Discrimination popularly also known as South African Bantustan Policy to the establishment of the much-criticized homelands. Article-II (d) of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 prohibits, among other things, the creation of separate reserves on racial grounds. However, indigenous people continue to suffer population transfers often as a result of development projects reported by the Royal Commission on Aboriginal People, 1996 of administrative and development relocations of Canadian aboriginal people.
The population transfers have also been provided for by treaty. Greece and Bulgaria agreed to the consensual exchange of minorities in the 1919 Convention Respecting Reciprocal Emigration. The Convention relating to the Exchange of Greek and Turkish Populations-1923 whereunder compulsory transfer of 1.5 million ethnic Greek population of Turkish nationality, and 400,000 ethnic Turks of Greek citizenship was provided. The treaty provided for a commission of representatives from Greece, Turkey, and the Council of the League of Nations to supervise transfers and the payment of compensation. However, controversy ascended over its scope *ratione personae*. When the treaty’s compensation provisions proved unworkable, they were replaced by lump sum agreements.

**The Legality of Forced Population Transfers**

The legality of forced or compulsory population transfer was robustly contested at the time both at and beyond the conference table. Extensive population transfers took place before, during, and after World War-II, including those resulting from some bilateral population transfer treaties between the Reich and, for example, Italy, the Baltics, and the Soviet Union. Typically these deals included an “option clause” although it has been disputed whether, in practice, consent was freely given. It is more accurate to categorize these events as a forced population transfer, as millions of individuals were in fact forcibly expelled (whether from the German-occupied territory, or within the Soviet Union) in blatant and unprecedented violations of international law.

At the conclusion of World War II, compulsory population transfers continued on a massive scale in Europe by inter-State agreement. A few weeks after the Allies adopted the UN Charter, the Soviet Union, the United Kingdom, and the US agreed at the Potsdam Conference-1945 that transfer to Germany of the German population in Czechoslovakia, Hungary, and Poland “will have to be undertaken” as per the Article XIII of the Potsdam Protocol and should “be effected in an orderly and humane manner” although in practice it was neither. The legality of the Potsdam Protocol under international law, as well as the subsequent forced population transfer, was strongly contested at that time. Particularly, Article 7 of the PTD provides that international agreement cannot legalize population transfers which violate fundamental human rights norms. Post-World War-II population transfers were not limited to German minorities: the agreement between Hungary and Czechoslovakia to exchange 200,000 Magyars and 200,000 Slovaks in February 1946 represents just one of some bilateral population exchange agreements of the impugned period.

The Potsdam Protocol has been regarded as an attempt to validate expulsions already in progress, as much as an endeavour to regulate future population transfers. Similarly, the Agreement between India and Pakistan on Minorities designated as “New Delhi Accord”-1950 served more like a “formal recognition of a *fait accompli* of the population transfer of about ten million population of Hindus and Muslims between India and Pakistan in the wake of the partition of the Indian Sub-continent in 1947. As the Preliminary Report observes, while such transfers were in some degree consensual and aimed at avoiding inter-ethnic conflict, they involved “a tragic human rights trade-off.” During the armed conflict in the former Yugoslavia, numerous resolutions by the UN
Security Council (UNSC), including UNSC Resolution 826 (1993) and 859 (1993) called for the reversal of the effects of ethnic cleansing in Yugoslavia in its post-dissolution stage. However, some commentators criticized the General Framework Agreement for Peace in Bosnia, and Herzegovina popularly designated as Dayton Peace Agreement that ended the war in 1995, for affirming territorial changes brought about by ethnic cleansing.

With the entrenchment of IHRL in the second half of the 20th century, it is increasingly accepted that population transfers violate a series of human rights guarantees as identified in the judgments of *Cyprus v. Turkey* delivered by the European Court of Human Rights (ECtHR) on May 10, 2001. The *Cyprus v. Turkey* was decided by the European Commission of Human Rights on October 04, 1992. The Sub-Commission constituted for the Prevention of Discrimination and Protection of Minorities, and its Special Rapporteur studied the population transfer from the early 1990s, and his Final Report was published in 1997. The Final Report had recommended the adoption of a Comprehensive International Instrument on Population Transfer and appended the Model Declaration on Population Transfer to apply in all situations, and to all persons, groups, and authorities under Articles 1 and 2 wherein a number of its terms reflect the current customary international law. Moreover, the jurisprudence developed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) has also significantly influenced the development of the law on forced population transfer.

**The Current Legal Phantasmagoria**

If the international legal policy has changed over time to restrict the legality of population transfer, history offers valuable lessons. Firstly, it regrettably demonstrates the recurrent use of population transfers in State and nation-building. Secondly, it shows the international community’s all-too-frequent *de facto* acceptance of population transfer or its effects in pursuit of its perception of how the interests of peace are best served. Thirdly, as instances of population transfer demonstrate, the enforcement of law poses considerable challenges. But it is also worth emphasizing the existence of significant new problems, including the question of climatic displacement identified in the UNHCR “Forced Displacement in the Context of Climate Change: Challenges for States under International Law.” Therefore, the Forced population transfers are, as the Preliminary Report concluded, *prima facie* unlawful because they violate core norms of IHRL and IHL. A vast pool of human rights instruments prohibit the mass expulsion of nationals and aliens, and the rights of Internally Displaced Persons (IDPs) not to be arbitrarily displaced is recognized in the authoritative soft law developed by the UN Secretary-General’s Representative on Internal Displacement adopted as UN ECOSOC “Guiding Principles on Internal Displacement” in 1998.

As Article 3 of the PTD makes clear, the concept of population transfer encompasses settler infusion such as the implantation of Moroccan, Indonesian, and Chinese settlers into Western Sahara, East Timor, and Tibet respectively. By altering the demographic composition of host populations, settler infusions can jeopardize the exercise of the right to self-determination. In practice settler infusion and expulsion are often related, as is
Illustrated by the illegal expulsion under the government of late Saddam Hussein of ethnic minorities from oil-rich regions of northern Iraq, accompanied by the resettlement of Arabs in furtherance of a policy of “Arabization.” However, in certain assiduously defined circumstances, population transfers may be lawful. Article 3 of the PTD makes the legality of population transfer dependent on the informed consent of host and transferred populations. In view of Special Rapporteur Al-Khasawneh’s “Progress Report” under Para 25 along with international jurisprudence and international conventions, concludes that this principle of consent has reached the status of a general principle of international law. The transfer is non-consensual where it is forcible, coerced, or induced. As obtaining informed consent often presents considerable difficulty, the Progress Report rightly emphasizes the need for monitoring mechanisms to ensure official approval.

International Human Rights Law
Additionally, population transfers may be lawful in certain situations such as national emergency, public disorder, or environmental crises, but in each case only subject to the fulfillment of conditions for lawful derogation from non-derogable human rights in the state of emergency. For example, while it follows from the protection of freedom of movement under Article 12 of International Covenant on Civil and Political Rights-1966 (ICCPR), Article 13 of Universal Declaration of Human Rights (1948) (UDHR), and Article 5 of International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) that population transfer within a State or across an international border is prohibited, derogations from the right to freedom of movement, to the choice of residence, to leave, and to return are permitted. Such derogations are tightly circumscribed and limited to the public interest and compensation must be awarded as expounded by the “Inter-American Commission on Human Rights Report of November 29, 1983, on a section of the Nicaraguan population of Miskito origin and their Human Rights conditions. Similarly, Article 4 of the PTD permits displacement only where either the safety of the transferred population or imperative military reasons demand. In such circumstances, displaced persons should be allowed to return immediately when the conditions rendering their displacement imperatively cease. Transfers must not interfere with minority and indigenous rights of the host population. Where the purpose or means of population transfer violate norms of jus cogens (preemptory norms of international law), it is, indeed, prohibited.

Forced Population Transfer & Indigenous Peoples
The Preliminary Report states that population transfer is the primary cause of land loss of the indigenous people as it constitutes a principal factor in the process of ethnocide as discussed at Para 101 of the Report. However, while Article 16 (1) of International Labour Organization (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) states that indigenous peoples should not be removed from the lands they inhabit. This fundamental principle is subject to the exception and prerequisites detailed in Article 16 (2) of ILO Convention No 169 as follows: Where the relocation of these peoples is considered to be necessary as an exceptional measure, therefore, such kind of relocation shall take place only with their free and informed consent. Where their consent cannot be obtained or ascertained,
such relocation shall take place just following appropriate procedures or due process established by the national laws and regulations including public inquiries where necessary, which provide the opportunity for valid representation of the peoples concerned.

If relocation occurs, indigenous peoples are entitled to be compensated for loss or injury as provided under Article 16 (5) of ILO Convention No 169 and they enjoy a right to return “wherever possible” once the reasons for relocation cease to apply ([Art. 16 (3) ILO Convention No 169]). Where are turn is impossible, indigenous peoples should be provided with comparable alternative lands or, should they prefer, compensation (Art. 16 (4) ILO Convention No 169). These provisions concerning consent and compensation represent international custom (Progress Report Para. 27). Many indigenous groups have disassociated themselves from the convention, in part because of the overly permissive tenor of Article 16 of ILO Convention No 169 favours the State. The convention has also been criticized for failing to acknowledge the importance of the relationship of indigenous peoples to a particular place (Preliminary Report Para. 257). The non-binding Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly (UNGA) on 13 September 2007, addresses some of these criticisms. Having noted in its Preamble the concern for the historical injustices indigenous people have suffered, among other things through colonization and the dispossession of lands, Article 10 of the Declaration on the Rights of Indigenous Peoples subjects relocation of indigenous people to their “free, prior and informed consent” in unqualified terms after “agreement on just and fair compensation” with an option to return where possible. “The Declaration on the Indigenous Peoples’ Rights” further provides that indigenous peoples have a right to redress and reparation for lands that have been taken or used in the past without their consent under Article 28. The Declaration obliges States to provide effective mechanisms to prevent and contain redress for forced population transfer under Article 8 (c) of the Declaration on the Rights of Indigenous Peoples regarding Environment and Indigenous Peoples also.

**Population Transfer and Development**

Beyond the context of indigenous people’s rights, the legality of population transfers carried out to make way for development projects is not currently subject to specific regulation by international treaties on the progressive development of International Law. However, referring to sources such as the principle of self-determination enshrined in Article 1 of the ICCPR-1966. UN resolutions on the development and human rights and development and the environment, the Preliminary Report authoritatively argues that customary international law already governs these incidences of population transfer (at Paras 300–311). The Final Report concludes that the legality of such population transfers depends on them being non-discriminatory, in the public interest, that they do not deprive people of their means of subsistence, and are subject to the consent of the people to be transferred. Their consent must be procured after dialogue and negotiation with the population’s elected representatives on “terms of equality, fairness, and transparency” (Article 68, Final Report). The transferred people should be provided with monetary compensation as well as equivalent land, housing, occupation, and employment.
Since 1980 the World Bank has responded to international pressure by developing a policy on involuntary resettlement documented by the World Bank Group. Operational Directive 4.30 (1990) was replaced in 2001 by Operational Policy 4.12 on Involuntary Resettlement, as revised in February 2011. Reports have documented great enforcement difficulties, however, and resettlement has faced popular resistance as recorded on pages 211–212. The transnational coalition against the Narmada river dams contributed to the World Bank withdrawing its funding in 1993. A cross-border campaign, together with a negative World Bank Inspection Panel Report, led the Bank to withdraw its support for the China Western Poverty Reduction Project, which would have involved the settler infusion of around 58,000 Chinese into Tibet.

**Population Transfer in Armed Conflict**

Apart from voluntary transfers during international armed conflicts, under Article 49 of the 4th Geneva Convention Relating to the Protection of Civilian Persons in Time of War-1949 provides that during hostilities, temporary evacuation is permissible only where it is necessary for the “security of the population” or where “imperative military reasons do demand.” Similar arguments are also advanced in situations of International Armed Conflicts and Military Necessity etc. Even then, temporary evacuation is subject to some conditions. Firstly, displacement is not permitted outside the territorial boundaries of the occupied State unless impossible to avoid “for material reasons” (Article 49, Geneva Convention-IV). Secondly, on the cessation of hostilities evacuees should be returned home. Thirdly, occupying powers are obliged to provide “to the greatest practicable extent” proper accommodation for those evacuated, and evacuations should be carried out “in satisfactory conditions of hygiene, health, safety, and nutrition.” Fourthly, family members should not be separated, and finally, protecting powers should be informed of all kinds of population transfers.

The transfer of a civilian population by an occupying power of its civilian population into occupied territory is also prohibited. However, there are few disputes as to whether it constitutes a grave breach of the customary international law? In 2004, the ICJ held in the case of the Construction of a Wall in the Occupied Territory of Palestine and its Legal Consequences [2004] ICJ Rep. 136 Para 134 popularly called “Israeli Wall Advisory Opinion Case” that the construction of the wall and “its associated régime” violated the rights of the people of the Occupied Territory to freedom of movement, work, an adequate standard of living, education, and health as well as the Jus Cogens right of self-determination.

In non-international armed conflicts, displacement is permitted only where it is required for the security of the transferees or imperative military necessity. In this case, Article 17 of the Additional Protocol-II, 1977 to Geneva Conventions-1949 requires that “all possible measures” must be taken to ensure the transferred population is “received under satisfactory conditions of shelter, safety, health, hygiene, and nutrition.” Otherwise, population transfers “for reasons relating to the conflict” are forbidden. The Final Report calls for the parameters of the concept of “military necessity” to be further developed to prevent abuse advocated at Para. 39. However, the belligerents have
“broad powers” to expel enemy nationals during an armed conflict as documented and titled under Civilians Claims: Eritrea’s Claims 15, 16, 23, 27–32 Para. 81 and further Paras 82 and 99; Civilians Claims: Ethiopia’s Claim 5 Para. 121. These powers are not, however, unlimited. Belligerents must ensure the application of humanitarian law, and humanitarian standards, including those contained in Articles 35 and 36 Geneva Convention IV enshrined in the Civilians Claims: Ethiopia’s Claim 5 Para. 122) but “Indiscriminate rounds-ups and expulsions based on ethnicity” are unlawful.

**Remedies and Enforcement**

Unlawful population transfer gives rise to State responsibility and individual criminal responsibility under Article 9 of the PTD where population transfers occur within the territorial boundaries of a single State, it may be difficult if not impossible to identify a State that is injured and, therefore, entitled to bring a claim under the traditional principles of State responsibility. However, third States may incur duties of non-recognition and non-assistance (the Construction of a Wall and its Legal Consequences in the Occupied Palestinian Territory Case [Advisory Opinion, Para. 136]. From Britain’s naval interdiction of slave traders in the first part of the 19th century through to the use of force by the North Atlantic Treaty Organization (NATO) against Yugoslavia wherein the right of humanitarian intervention to prevent population transfer has been contested in the case popularly known as Legality of the Use of Force Case (Yugoslavia v Spain, Provisional Measures Order).

The right to return is central to restitution in _inter-regnum_ under Article 8 of the PTD. Evidence for its customary international law status can be drawn from some international instruments such as provisions in human rights instruments, e.g. Article 13 (2) of the UDHR, Article 5 of the ICERD, Article 12 (4) of the ICCPR, Article 22 (5) of the American Convention on Human Rights, 1969, and Article 12 (2) of the African Charter on Human and Peoples’ Rights, 1981 as well as UN Resolutions, Peace Agreements and Soft Law relating to IDPs (UN Guiding Principles on Internal Displacement, 1998). The Final Report considers that the State of origin is obliged to facilitate return (at Para. 60). The _Dayton Peace Agreement_ made the return of refugees and displaced persons an “important objective of the settlement and resolution of the conflict in Bosnia and Herzegovina” as enunciated in Annexure 7, Article 1 (1) of Dayton Peace Agreement. It provides for refugees and displaced people to return to their “homelands of origin,” leaving the choice of destination to the returnees, and for the return of their property and compensation.

The practice of return has proved problematic with multi-dimensional ramifications as the right has been insufficiently enforced is illustrated by repeated failures to implement UNGA Resolution 194 (III) (1948) concerning the return of Palestinian refugees, and to secure the return of refugees in Cyprus. Likewise, security concerns and delay in resolving property claims have proved formidable obstacles to implementing return provisions in the Dayton Peace Agreement. Moreover, the scope of the right to return, particularly the effect of the passage of time, is unclear. As the Final Report states,
“peace is ultimately an act of compromise” as noted at Para 63. Thus, the ECtHR has observed that:

“It cannot be within this Court’s purview in interpreting and applying the provisions of the Convention to execute an unconditional obligation on a Government to get on the forcible ejection and rehousing of possibly large numbers of people (men, women, and children) even with the aim of justifying the rights of victims of violations of the Convention” (Demopoulos v. Turkey, Para. 116).

Of significant legal contestation is the effect of the Oslo Accords, which do not refer to UNGA Resolution 194 (III) on the right to return of Palestinian refugees. In 2003, the Danish Supreme Court refused to grant a right of return to the Thule tribe who were relocated in 1953 to facilitate the establishment of a US airbase, although it did order the payment of compensation (Hingitaq 53 v Prime Minister’s Office, Danish Supreme Court [28 November 2003] (2004) 98 AJIL 572). Similarly, on a number of occasions the whilst English courts have ruled that Britain’s removal of the Chagos Islanders between 1965 and 1973 to make way for an American Military Base, and the Orders in Council (2004) preventing their return, are illegal (R. [Bancoult] v. Secretary of State for Foreign and Commonwealth Affairs [No 2] [2007] EWCA Civ 498). The British government has opposed long-term resettlement, and the House of Lords has subsequently, on appeal, upheld the legality of prerogative orders preventing the unrestricted return of the Chagos Islanders (R [Bancoult] v. Secretary of State, Foreign and Commonwealth Affairs [No 2] [2008] UKHL 61).

Entitlement to compensation for unlawful population transfer forms part of duty on the part of the responsible State to compensate victims of human rights abuses, which is increasingly gaining recognition in modern international law (Report of the International Commission of Inquiry on Darfur Paras 590–603). Such a right is also recognized in specific international instruments, sometimes as a prerequisite to the lawfulness of transfer, but also for loss and injury arising from the transfer (Article 16, ILO Convention No 169; Article 8 of the PTD; Principle 29 of UN Guiding Principles, 1998). The Progress Report suggests that in the case of lawful transfer damage should be compensated “as a matter of equity” as per Para137 that analyses the Equity in International Law. There is also judicial recognition of a victim’s right to receive compensation for loss arising out of population transfer as stipulated in the Loizidou Case. This right may require general measures to be taken at the national level according to the Broniowski Case, Xenides-Arestis v. Turkey [ECtHR]). Further, in Demopoulos v. Turkey, the ECtHR dismissed the claims of Greek Cypriots based on the European Convention on Human Rights(ECHR) under its Article 8 and Article 1 of the Additional Protocol to the ECHR on grounds of non-exhaustion of domestic remedies, holding that the Turkish Republic of Northern Cyprus Immovable Property Commission provided “an accessible and practical framework of redressal in regarding complaints about interference with the property owned by Greek Cypriots adumbrated at Para 127. Amongst the recommendations of the Final Report at Para 74 is the establishment of an International
Trust Fund (ITF) for rehabilitation of population transfer survivors. The issue of reparations for the slave trade remains contested which has been shown by discussions taking place during the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001.

Conclusion
It may aptly be understood that presently many regions in the world mainly Balkans and the Caucasus in Europe, South Asia (Statelessness) and South East Asia (displaced persons—Rohingya refugees) have been devastated by ethnic and racial conflicts. The global conflicts in Gulf region, Syria, Yemen, Congo, Rwanda, South Sudan, Lebanon, etc. have triggered massive human displacements, refugee migration and asylum seekers that have been forcing people to flee within their homelands or abroad owing to fear of persecution. The absence of a single global instrument on population transfer leads to overlap, inaccessibility, and disparity in the level of protection available to victims of different forms of population transfer. Some of these problems would be overcome if States were to adopt the Population Transfer Declaration. Given the deleterious consequences of population transfer and the difficulties of enforcing the law on consent, return, and compensation, it might be questioned whether legal provisions still weigh too heavily in favor of States and entities seeking to transfer.

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