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INTERNATIONAL CONFERENCE ON THE HUMAN RIGHTS
DIMENSIONS OF POPULATION TRANSFER

UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION

Tallinn, Estonia

10-14 January 1992

POPULATION TRANSFER & THE RIGHT TO
SELF-DETERMINATION - DIFFERENCES & AGREEMENT

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Australia

CONFERENCE IN ESTONIA

This conference in Estonia has exposed sharp differences of perspective and opinion about population transfer, its definition, legality in different circumstances and what to do about it when it has occurred. The differences are at once healthy and understandable. They are healthy because it is the nature of free peoples to differ amongst themselves as a result of their different experiences and perceived interests. Only by the candid exposure of differences may a synthesis of reconciliation be achieved. The differences are understandable because, despite the age-old features of population transfers - described so vividly to our meeting and affecting peoples in the four

corners of the globe - comparatively little analysis or even description of the phenomenon has occurred in the context of international law. There was a flowering of study at various stages in this century to accompany the debates about self-determination of peoples. The Nuremburg Trials after the Second World War concentrated attention on a particular species of population transfer designed to afford so-called *Lebensraum* to the German peoples.¹ But perhaps it took the extraordinarily rapid decomposition of the empire of the USSR in the past two years to present the issue to the international community in all of its starkness. We have been fortunate to have with us a number of leading experts in international law to help us to put our debates into context within that imperfect but developing discipline.

Dr Alfred-Maurice de Zayas began writing about population transfers long before the Soviet collapse was conceived even by the most optimistic.² Dr Claire Palley, from a position of great influence in the United Nations Subcommittee on the Prevention of Discrimination and Protection of Minorities has provided us with a most insightful paper.³

The task assigned to me in this session is to continue to debate which is central to this conference. But with an emphasis on the exploration of the viable and humane methods which can be developed to resolve problems resulting from the practice of population transfer, once it has occurred. In order to approach that task, building on the debates which have already occurred, I plan to list some of the major points of difference which have appeared during this meeting. I will then attempt to explore some items upon

which there may be consensus. I will finally make some closing remarks which, although doubtless unable to command unanimity around this table, will endeavour to anchor our conclusions in international law and universal human rights.

It should never be forgotten that human rights matter most - some would say only - when they appear really difficult to accord.⁴ For example there is usually absolutely no difficulty in according basic human rights to religious observance to a religious majority in a peaceful society. The respect for the human right to free observance of one's religion is only really tested in a society of religious divisions, of antagonism and bigotry and where there are some who would deny that right. Other cases can generally look after themselves without troubling international or municipal law. So it is with respect to minorities' rights. They matter most where it seems painful to respect them. That is why the coming months and years will provide new tests to humanity's respect for basic principle. My thesis is that the only sure way to resolve these tests is by finding the solutions in strict observance of the rule of law and of the basic norms of human rights as developed by the international community.

SHARP DIFFERENCES

Let me start with a collection of some of the sharp differences which have emerged in this meeting:

1. Definition of population transfer - At the outset Christa Meindersma (UNPO) urged the need for a clear definition of what we are talking about - what precisely is "population transfer". Does it import the

notion of governmental connivance in the transfer? Must the numbers of peoples involved be large? How long must they have been on the territory for it to be "theirs"? Is a lack of consent to the move necessary on the part of those transferred and/or those receiving them? What is "consent" in the context of the displaced refugee or the impoverished immigrant settler? All of these seem legitimate questions. Knowing precisely what you are dealing with is not just a lawyer's fetish - it is the requirement of most scientific analysis of problems. Yet at the end of the first day Dr Claire Palley warned us of the danger of the centipede which, undecided about which legs to move first, did not move at all. She urged that too long a delay over agreeing on definitions could prevent our getting anywhere with the practical framework of the means to deal with a very urgent problem. Look at the delays which had attended the definition of a "people" for the people's right to self-determination.⁷ The delay over the definition of a "minority" has given the representatives of national states the excuse to delay for eighteen years the adoption of the *Declaration of the Rights of Minorities*. Perhaps it will be sufficient, to resolve this quandary, if we were to adopt Ms Meinderdema's attempt as a working "description" of population transfer at this stage. We could then pass beyond this debate to what to do about such transfers. This is the approach with the UNESCO experts on the rights of peoples adopted to the definition of a "people";⁸

2. Preservation of the right to movement - Then a number of speakers described the potential for misuse of the important human right to free internal movement within the borders of the nation state subject to international law⁹ - and the misuse of that right to cloak forced transfers of population - inimical to the rights of either or both of the transferred population and the receiving population. This is but a sub-species of the larger problem presented by the basal people's right to self-determination. Draw the borders here and the majority peoples will overwhelm minorities. Draw the borders in a different way, more sensitive to the existence of particular subgroups, and an entirely different result will emerge. There can be no clearer illustration of this phenomenon than in the case of the Kurds described by Mr Latif Rashid. But there were many other illustrations vividly recounted at this meeting. They included the description of the very movements of Russian and other Soviet peoples into the Baltic States described by the spokesmen from Latvia and Estonia. They included the case of Bougainville, an accident of colonial map drawers, described by Michael Forster. They included the case of the island of Zanzibar, described by Dr Y Salim. They included the ancient Assyrian peoples described by Senator John Nimrod. They included the Albanians in Yugoslavia, and the Greeks in Albania.¹⁰ Yet none of us would wish to diminish the importance of the basic human right to movement within the nation state and between states. It is the very movement of peoples

which has contributed to a realisation of the common ties of humanity, the globalisation of human rights and the preservation of peace. Perhaps a clue to resolving this apparent conflict is to lay emphasis on the fact that an essential precondition to the exercise of the human right to movement is consent by those moving and reasonable consent by the hosts who "receive" them. Reasonable limits to such consent, on grounds legitimate to a democratic state, may be imposed without derogating from the basic right or allowing its distortion into an excuse for involuntary large scale population transfers.

3. The limits of democracy - Talk of democracy highlights a third difference which emerged. A number of speakers urged the importance of finding solutions to the post-transfer problems in the mechanisms of democracy. This, for example, was the view of Dr Salim (Zanzibar). He felt that in democracy would lie the best vehicle for achieving the goals of sorting out the consequences of contested borders and population manipulation. In the current mood of democratisation this appeared to strike a responsive chord with many participants. But not all. For Latvia it was said that it all depended on who were the citizens of the democracy. They alone should have the right to vote. The point was also made at the outset by Mr Tunne Kelam for Estonia although Mr Adams pointed out that in Estonia non-citizen residents may vote in local government elections. The Latvian viewpoint, coloured doubtless by the much higher influx of Russian and

other non-Latvian speaking settlers in that country (being now approximately half the population of pre-annexation Latvia) - was that the "colonizers", as they were called, must go home. "Russians go home" - we were told - taking their language and traditions with them. Mr Reed Brody of the ICJ reminded us of President Havel's elaboration of what our "home" is in this context. The Russians in Latvia are hardly a minority. They had made themselves almost a majority. They could not enjoy democratic self-determination because this might invite the very "take-over" of the Latvian state: achieving by the ballot box what they had failed to achieve by armed annexation. Democracy, so defined, could lead to the extinguishment of a precious individual culture. So democracy had to be redefined for this purpose. But how to do it consistently with the rule of law and respect for the human rights of the Russian-speaking grandchildren of early settlers whose only country had been Latvia and who had nowhere else to go? The same concern applies to the Poles in Lithuania of whom we heard from Mr Jan Sienkiewicz. Could those people really be sent back to the metropolitan power from which, perhaps, their grandparents came? And like opinions were expressed by Mr Lodi Gyari from the perspective of Tibet, which has suffered greatly from Chinese government supported population transfers. Mention was made of the British Empire and its dissolution as if this might provide lessons. But in most, if not all, cases the British colonists were not expelled when the Union Jack came

down. Very many went "home" (or elsewhere more congenial to them than the former colony). In Zimbabwe, a sizeable minority continues to live in peace with the indigenous majority subject to the legal protection rigorously enforced in the courts. Widespread expulsion of the colonizers was not a feature of the end of that empire. But Latvia, with its fragile ethnic Latvian majority, was said to present a special case. And for it, we were told, democracy had to be redefined. But who will enjoy democratic rights? Normally it is, at the least, long-term residents of a region. Will a linguistic, racial or genetic test not be unfair to at least some long-term residents who have known no other land? We would do our Baltic friends a disservice if we failed to alert them to concerns about their proposed nationality laws which would deny the chance of citizenship of their countries on vague and irrelevant grounds such as advocacy of communism or a history of alcoholism.

4. Line-drawing in time and place - Then there was the issue of line drawing. Dr Palley acknowledged the ancient wrongs, stretching back even millennia. Many of the wrongs of population transfer, of which we have heard over the past two days have been very recent. Many are the direct by-product of the European colonial boundaries of the 19th and 20th centuries. Some are the result of the continuation in this century of the injustices brought by colonial boundaries (eg Aceh,¹¹ Bougainville, the Chittagong Hill

Tracts, the South Molukkas, East Timor, West Papua and Zanzibar). Some post-colonial rulers learnt well from their former masters in the school of oppression. Many boundaries concerned were the result of the Stalinist expansion of the Soviet Empire, although having roots deeper in history eg Armenia, Chechenskaya, Crimea, Georgia, Tartaristan, Estonia and Latvia). Yet Dr Palley suggested that it was necessary to draw lines - to close off the political and legal accounting. She chose the Second World War, after which the United Nations Organisation established the new world order. But other times could be chosen. Some such arbitrary terminal seems sensible. Otherwise the Anglo-Saxons, or the Picts, or perhaps the descendants of the Celts or the Romans could lay claim to Britain and ask all the modern residents to leave - or to pay tribute for their allegedly illegal occupation of "their" country for two millennia. Such claims would be dismissed as absurd and would gain neither the support of the international political or legal order. Nevertheless, a sharp division arose amongst us as to where the lines should be drawn. As Helen Corbett reminded us, the Australian Aborigines have never agreed to cede sovereignty. Sharon Venne was equally adamant that the settlers in North America since the advent of Christopher Columbus, five hundred years ago this year- were intruders into the lands of the Cree and other indigenous peoples. This is why she could certainly not agree to democratic solutions - for this would swamp the indigenous peoples and their

descendants. "We have the right to decide" she said - asserting that she, her people and the other indigenous peoples were "better than any Canadian", so that the rest were only "guests" in their land. Many of Ms Venne's heartfelt statements, reflecting centuries of cultural, linguistic, economic and environmental despoliation, would doubtless strike the captains of industry in Toronto and New York and the settlers in Thunder Bay and Palm Springs as unrealistic. But, clearly, they represent a perspective of this problem - and one undoubtedly defensive of a right of a particular people to self-determination which the United Nations Charter and international law guarantee. The issue of temporal line drawing remains an acute one. Some compromise between principle and reasonable practicalities would not seem beyond the ability of humanity. For the Baltic States, it is the very recent nature of their colonisation and its asserted reversibility at this stage which leads some of the spokesmen to suggest population re-transfer as a possible option to restore the integrity of such states and to preserve their distinct cultures.

5. Population re-transfers - The notion of population re-transfers is, I suspect, a very controversial one. According to Ms Meindersma, we should be working towards the acceptance in international law of the principle that deliberate mass population transfers are an international crime.¹² Yet some participants seemed to suggest that there were "good" and "bad" population transfers. The bad ones are done by others

to one's self. The good - or at least tolerable - population transfers are done by one's self to others - and in particular to redress the effects of earlier forced population transfers which, unredressed, will have the consequence of altering the formula by which self-determination will be achieved within a particular geographical territory. No-one would doubt the legitimacy of a state, once colonised, to require the ex-coloniser to remove from its sovereign territory the organs of power - police, military, security and control personnel - of the ex-coloniser. No one would deny the entitlement of a state, seeking to redress the consequences of colonisation and the disruptions which it causes, to require or permit voluntary repatriation of the coloniers and their families: offering them various inducements to return (if that be the correct word) to a land which many of them will never have known. "Voluntary" return in this way was discussed by Mr Maart Laar (Estonia). But forcing re-transfer of peoples who are the hapless remnants of empire to leave would not appear to be permitted by international law. In this I agree with Dr Palley. Of course, such transfers have happened. Idi Amin's Uganda expelled the Asians from that country. Fiji has adopted discriminatory laws to encourage the departure of ethnic Fijian Indians. The South African régime used its hated pass laws to remove ethnic Africans from parts of South Africa in ways described by Mr Joseph Shechla of Settlements Watch. But these are scarcely good models by which to resolve the outfall of the

crumbling Soviet Empire. They seem to be closer to the notions of racial and linguistic purity of the *Volksdeutsche* which informed the Hitlerian policies of Nazi Germany rather than the principles for a modern society living in a global community respecting universal human rights and particularly the rights of minorities (even big minorities) living in their borders. Often the better solution - and that more respectful of the basic dignity of the people involved - is to let time and education of children solve the problems. The alternatives may not only breach international law. By revisiting mass population on many new innocents, they may lay down dissidents for the future and provide fierce flashpoints of conflict for the present. One of the most depressing features of the past year (otherwise so full of hope) has been the revival of ancient enmities and hatreds and the abandonment of notions of multiculturalism which provided both legal protection of minority rights and the best safeguard for peace and human dignity in the future. Out of such racial enmities we run the risk that authoritarianism and even fascism (with its seductive promise of strong leadership) will revive. How horrible it would be if the phoenix of nationalistic fascism were to emerge from the ashes of authoritarian communism. With so many recently unemployed nuclear experts in the disintegrating world and a stray nuclear missile or two allegedly for sale on the international blackmarket, emergent politics could present real dangers for world

peace and security such as we did not even imagine during the Cold War; and

6. International law obligations - Finally, there are those who contend that international law is just politics written in legal terms. Mr Anthony Simpson (Centre for International Environmental Law) suggested that this was so - and of course there is an element of truth in the assertion that law follows and responds to changing events.¹³ Ian Brownlie, the distinguished international lawyer, confessed as much to Dr Palley. But international law is not just written in water. The body of international human rights jurisprudence is there - in part in black and white and with a developing case law and commentary to clarify and elaborate it. Basic human rights may be fuzzy at the edges. But they are not open to all the whims and fancies of any observer. We have made some progress over the past fifty years - and we are continuing to do so. As Dr Palley pointed out, states are now obliged to respect the human rights of peoples subject to their control and to treat such peoples with humanity and without arbitrariness.¹⁴ These requirements, established by international law and reinforced by busy institutions and the actuality of a global media covering events, rule out the arbitrary expulsion of populations such as occurred in earlier times. But they also suggest the way for the future. We must think positively and not just negatively about how to solve the issues which have emerged at this conference.

POSITIVE STEPS

This thought brings me to my closing remarks. There are various positive measures which can be taken to respond to forced population transfers. We can agree on a *description* of the phenomenon. We can agree that involuntary discharge (more cattle trucks crossing borders bearing humanity) are not acceptable to international law. To revert to Christa Meindersma's vivid phrase, the "pushing and shoving" around of populations must stop - and international law must help to stop it.¹⁵ We should collect and classify the examples of population transfers of the past (as suggested by Mr Sandor of Hungary and by Mr. Schechla). In doing this we will learn both the patterns and the problems - as well as the better solutions which have prevailed from time to time. Nor have all population movements, in the end, been an unrelieved disaster. People (who are, after all, our brothers and sisters on this planet) have been fed and housed. Cultures have flourished by the admixture of different traditions. As Victor Kaiseipo (West Papua) said, "the migrants of today become the indigenes of tomorrow" - at least sometimes. Isolated cultures, like isolated individuals, tend to be vulnerable. Cultures exposed to a variety of sources and influences can sometimes draw strength from them all. Reopening truly ancient wounds and territorial claims can often cause more problems than are solved. Some would say that the establishment of the State of Israel on the basis of ancient territorial claims interrupted by centuries, illustrates this fact painfully. We must learn to draw political lines, painful though this may be for those who continue to draw cultural strength from

their ethnic, linguistic and cultural traditions. This may be a lesson for the Serbian people who want to reclaim Kosovo despite the established Albanian population there. It may be the lesson for many other peoples with ancient claim.

I will not go over the steps which can be taken to clarify international law as it affects population transfers and minority rights. I agree with what Dr Palley, Dr de Zayas and Christina Bloch (Minority Rights Group) have said on these topics. We should support the International Law Commission's draft code of *Crimes Against the Peace and Security of Mankind*. We should support a General Assembly draft Declaration on the Principles of International Law, including Human Rights Law. We should also support, perhaps by way of Protocols, the idea of elaborating already existing conventions, such as the *Genocide Convention*. We should encourage the moral and financial support of governments seeking to resolve these problems peacefully, as Victor Kaisepo said.

A SPECIAL RAPPORTEUR FOR PEOPLES' & MINORITIES' RIGHTS

Yet there is something even more fundamental that we should be thinking about as a means of solving at least some of the international problems which are presented by the forced population transfers of the past. I refer to a new peaceful international mechanism for defining, where it is disputed, the promise of the peoples' right to self-determination. This basic right is enshrined in the opening words of the UN Charter and in the opening provisions of the *International Bill of Rights* which together form the centrepiece of the new world order under

the United Nations. That Organisation, so often the captive of nation states (as Mr Gyari pointed out) needs to develop a new peaceful means for providing self-determination to those groups who assert it. The urgency of such need cannot be doubted. Look at the claims of the Hungarians in Roumania. The Poles in Lithuania. The Greeks in Albania. The Albanians in Serbian Yugoslavia. The Croats. The Somalis. The Mari. The Kurds. The brave Tibetans represented by our Chairman, Mr Gyari.¹⁶ The people of Aceh. The South Mollucas. The Bougainvillians. The people of Hong Kong who will be handed over to a geriatric autocracy without an act of self-determination in the last great colonial abdication of perfidious Albion. Many borders of the past were drawn on defensible land frontiers, of rivers and mountains which bear no relation to the linguistic and cultural features of the peoples living there. Modern weapons of war are indifferent to such frontiers. The need for new alignments is plain if only nation states would face realities and trade-off the marginal loss of territory against self-determination and the peace of peoples and the peace and fulfilment this could bring.

In due course a mechanism of securing this kind of adjustment will be found, both within and outside the United Nations system. The need for it was recognised most recently by an International Meeting of Experts of UNESCO which took place in Budapest in September 1991.¹⁷ The report of that meeting (of which I had the honour to be rapporteur) is now available. I annex copy of it to my paper. It affirms the peoples' right to self-determination and the need to give that right real content in the dramatic contemporary world

contest. The experts recognised the competing international law claims such as those which would seek to avoid the serious destabilisation of the international order which could accompany disorganised secession. But they concluded that there was a need to take steps both within UNESCO and the United Nations organs generally to:

*"Secure the appointment of a special body or office to receive, consider and report upon derogations from peoples' rights, including the right to self-determination and to cultural identity. The defects of the present United Nations institutions in this regard were noted. The Experts recognised the undesirability of the duplication of machinery concerning the protection of human rights. They also recognised the valuable work which was being done and could be done by already existing institutions, such as the UN Commission on Human Rights, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, regional human rights bodies and non-governmental organisations such as the International Commission of Jurists and Amnesty International. However, the experts considered that an entirely new initiative was called for in the unique current international situation. One proposal was for the appointment of a United Nations' Special Rapporteur for Peoples' and Minority Rights, with particular reference to the right to self-determination."*¹⁸

LEARNING FROM HISTORY

Until such an institutional development occurs in the organs of international law we will continue to see increasingly dangerous flashpoints with many conflicts, deaths and so much suffering that it will make many long for the return of the good old days of the Cold War - which were bad old days really. If we had a mechanism for the peaceful readjustment of national borders by reference to principles of self-determination it would help solve at least some of the problems of the Unrepresentative Nations and Peoples.

Together with proper respect for minority rights, it might even eventually put the Unrepresented Nations' and Peoples' Organisation UNPO now representing 60 to 70 million peoples of the world out of business. Indeed, this should be UNPO's ultimate goal in a truly just new world order. We must look to that day. To those who say it is an unrealistic idealistic dream, I say with Victor Kaisiepo: reflect on the events of the past eighteen months. In human affairs the only thing that is certain - is uncertainty. Sitting here in Estonia, in the midst of events which would have been unthinkable not two years ago, we should be brave enough to think boldly. But we should anchor our thoughts at all times in the sure foundations of the rule of law and respect for the human rights of our brothers and sisters of every race, creed, culture and language. As our Chairman, Mr Gyari said, the eyes of the world are on the Baltics. We will pass from here confident that the Baltics will not disappoint our high expectations of them. Those who have suffered greatly must learn from their experience.

ENDNOTES

Chairman, Executive Committee, International Commission of Jurists. Rapporteur, UNESCO International Meeting of Experts for the Elucidation of the Concept of Rights of Peoples, Budapest, Hungary, September 1991. President, Court of Appeal, Supreme Court of New South Wales, Australia. Personal views.

1. See eg A M de Zayas, "Population, Expulsion and Transfer" in R Bernhardt (ed) *Encyclopaedia of Public International Law*, vol 8, North Holland, Amsterdam,

1985; A M De Zayas, "International Law and Mass Population Transfers", 16 *Harvard Intl LJ* 207 (1975); and "The Legality of Mass Population Transfers: The German Experience 1945-1948", in *East European Quarterly* Vol XII, No 1, 2 (1978) pp 1-23 and 143-160 and *Nemesis at Potsdam*, University of Nebraska Press, 4th ed, 1990. See also Goodwin-Gill *International Law and the Movement of Persons Between States*, Oxford, 1978, esp Ch XI "The Function of Expulsion in General International Law"; M C Bassiouni; "The Protection of 'Collective Victims' in International Law", 2 *New York School Human Rts Annual* 239 (1985); L Kuper, "The Sovereign Territorial State: The Right to Genocide" in Claude and Weston *Human Rights in the World Community*, L R Beres, "Genocide and Genocide-Like Crimes" in M C Bassiouni (ed) *International Criminal Law, Vol I, (Crimes)*, Transnational Publishers, New York; A R Kuhn, "The Genocide Convention and State Rights" in 43 *American J Int L* 498 (1949).

3. See C Palley, "Population Transfer and International Law", draft paper, *mimeo*, 1992, prepared for the conference. Cf M Colchester, "The social dimensions of government-sponsored migration and involuntary resettlement: policies and practice", *mimeo*, 1986. Paper prepared for the Independent Commission on International Humanitarian Issues, Geneva.

4. Cf remarks of Chief Justice Latham in *Adelaide Company of Jehovah's Witnesses v The Commonwealth of Australia* (1944) 67 CLR 116, 124 (High Court of

- Australia).
5. C Meindersma, "Introductory Remarks to the First Session", *mimeo*, paper for the conference, 1992.
 6. See C Palley, above n 3, p 2 and oral remarks to the conference.
 7. See generally J Crawford (ed) *The Rights of Peoples*, Oxford, Clarendon Press, 1988.
 8. See United Nations Educational, Scientific and Cultural Organisation, *Final Report of Third Meeting on the Rights of Peoples (SH5-89) Conf 602/7 (Paris, 1989)*.
 9. See *International Covenant on Civil and Political Rights*, Art 12. Note that this provision is subject to certain restrictions on grounds eg of public health, morals and *ordre public*.
 10. See M G Tzelios, "Population Transfer and the Greek Minority in Albania", report to conference, *mimeo*, 1992.
 11. See Tengky H M di Tiro, "Acheh / Sumatra: Victim of Indonesian Population Transfer", *mimeo*, 1992, paper for the conference.
 12. See Meindersma, above n 5, p 8.
 13. See generally, Palley, above n 3, p 2.
 14. See *ibid*, p 24.
 15. See Meindersma, above n 5, p 8.
 16. See L Gyari, "Population Transfer into Tibet - The Influx of Chinese and the Survival of the Tibetan Identity", *mimeo*, 1992, paper for the conference.
 17. See United Nations Educational, Scientific and Cultural Organisation, *International Meeting of Experts for the Elucidation of the Concept of the Rights of Peoples*

(SH5-91/Conf 603/31) September 1991, *Final Report*.

18. See *ibid*, p 12.