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**ARTICLE**

**FROG IN THE MILK VAT: INTERNATIONAL  
LAW AND THE FUTURE OF ISRAELI  
SETTLEMENTS IN THE OCCUPIED  
PALESTINIAN TERRITORIES**

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## I. INTRODUCTION

Every child is familiar of the story about the frog that fell into a vat of milk and avoided drowning by swimming in the milk long enough to turn the milk into butter. As far as international law is concerned, the enterprise of Israeli settlements in the occupied Palestinian territories is a frog swimming in a milk vat. The International Court of Justice (“ICJ”) has observed that the establishment of settlements violates article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”), which provides that “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”<sup>1</sup> The Court reasoned that the prohibition contained in article 49 encompasses “not only deportations or forced transfers of population . . . but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.”<sup>2</sup> This interpretation of article 49 represents near-consensus in the international community.<sup>3</sup> The U.N. Security Council has thus described “Israel’s policy and practices of settling parts of its population . . . in [the occupied Arab] territories” as a “flagrant violation of the Fourth Geneva Convention.”<sup>4</sup>

Customary international law generally requires a State that violated international law to re-establish the situation that existed

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1. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 183 (July 9) [hereinafter *Wall Advisory Opinion*].

2. *Id.*

3. See, e.g., EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 240 (2d ed. 2012); Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT’L L. 551, 581 (2005); *Implementation of the Fourth Geneva Convention in the Occupied Palestinian Territories: History of a Multilateral Process (1997-2001)*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/eng/resources/documents/misc/5fldpj.htm> (last updated Nov. 29, 2010).

4. S.C. Res. 465, para. 5, U.N. Doc. S/RES/465 (Mar. 1, 1980).

before the violation.<sup>5</sup> Moreover, Israeli officials acting to facilitate the settlement of Israeli nationals within the occupied Arab territories may incur individual criminal responsibility under article 8(2)(b)(viii) of the Rome Statute of the International Criminal Court (“Rome Statute”), which proscribes “the transfer, directly or indirectly, by the occupying Power of parts of its own civilian population into the territory it occupies” as a war crime.<sup>6</sup>

The legal recipe for turning milk into butter is found in the principle of *ex factis ius oritur* (the law arises from the facts), which recognizes the “normative pressure of facts.”<sup>7</sup> One expression of this principle in international law concerns the manner in which violations of customary international law bear on the content of the law. It has been observed that “[s]ince customary international law often changes by means of violation of its norms[,]” *ex factis ius oritur* “has more relevance in international law than in domestic law.”<sup>8</sup> Yet, the purview of *ex factis ius oritur* extends beyond changes in the law emanating from its violation. This principle also holds that “long-standing situations, even if illegal from the outset, crystallize over time to become legal situations.”<sup>9</sup> This article focuses on the latter expression of *ex factis ius oritur*.

The inquiry concerning the manifestations of *ex factis ius oritur* regarding the plea of illegally implanted settlers against repatriation is two-fold. First, the interests of settlers in non-repatriation may be protected under a norm of international human rights law prohibiting

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5. JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 510-11 (2013) [hereinafter CRAWFORD, STATE RESPONSIBILITY]; see *infra* note 47 and accompanying text.

6. Rome Statute of the International Criminal Court art. 8(2)(b)(viii), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; see Michael Cottier, *Article 8*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 275, 369 (Otto Triffterer, 2d ed. 2008) (“Certainly, state agents, including government officials and parliamentarians, incur criminal responsibility under article 8[(2)(b)(viii)] for conducting, ordering, soliciting or inducing a transfer”).

7. This expression appears in Rein Müllerson, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 42 INT’L & COMP. L. Q. 473, 487 (1993).

8. Rein Müllerson, *The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law*, 50 INT’L & COMP. L. Q. 509, 525 (2001).

9. Ruta M. Kalvaitis, Note, *Citizenship and National Identity in the Baltic States*, 16 B.U. INT’L L.J. 231, 243 (1998).

any State—both the occupier and the legitimate sovereign after it regains effective control over the territory—from repatriating settlers.<sup>10</sup> There are two conditions for such a prohibition. There must be a norm of international human rights law that brings the interests of settlers adversely affected by repatriation within the realm of a protected human right.<sup>11</sup> Because the vast majority of protected human rights are not absolute, a prohibition on the repatriation of settlers must also be justified on the basis of a strict balancing of interests analysis, which weighs the interests of the settlers against those of both the local population and of the legitimate sovereign.<sup>12</sup> Therefore, the protection against repatriation granted to illegally implanted settlers under international human rights law varies from one settler group to another, depending on the international human rights instruments that govern each situation and on the factual circumstances affecting the balancing of interests.<sup>13</sup>

Second, *ex factis ius oritur* may be manifested in the rules of customary international law concerning the responsibility of states for internationally wrongful acts (“State Responsibility Rules”), which determine the legal consequences of state conduct that violates international law.<sup>14</sup> International law recognizes the fundamental distinction “between primary norms that define rights and obligations and secondary norms that define the consequences of the breach of primary norms.”<sup>15</sup> State Responsibility Rules refer to “the body of secondary norms that sets out to explore the consequences of breaching primary norms.”<sup>16</sup> The legal obligations of an occupant resulting from violating the prohibition on settlement activity are thus determined by State Responsibility Rules. State Responsibility

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10. YAËL RONEN, TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW 190 (2011) [hereinafter RONEN, TRANSITION FROM ILLEGAL REGIMES] (“[T]he factual presence of settlers may generate legal consequences, embodied in international human rights law, that limit the post-transition regime’s right to expel them despite the illegality of their arrival in the territory.”).

11. *Id.* at 190-205; *infra* notes 87-90, 99-134 and accompanying text.

12. *See infra* notes 91-98, 135-148 and accompanying text.

13. *See* discussion *infra* Section III.

14. *See generally* U.N. Int’l L. Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [hereinafter *Draft Articles*].

15. BENVENISTI, *supra* note 3, at 307.

16. *Id.* at 308.

Rules generally require a State acting contrary to international law to eliminate the consequences of the violation.<sup>17</sup> However, the Rules recognize exceptions to this obligation resulting from “the realization that the breach of the primary norm may have created new circumstances which render impossible, unjust, or undesirable the reversion to the previous state of affairs.”<sup>18</sup>

International human rights law does not currently prohibit the repatriation of Israeli settlers.<sup>19</sup> However, this article’s main proposition turns on the relationship between *ex factis ius oritur* and State Responsibility Rules. This article argues that the interests of individual settlers may attain sufficient legal significance to support an exemption for an occupant from its duty under State Responsibility Rules to eliminate the consequences of its illegal settlement activity (i.e., the duty to repatriate the settlers) *before* the consolidation of a human rights law prohibition against repatriation. This article argues that such an exemption has emerged, or is in the process of emerging, with respect to illegally implanted Israeli settlers.

Section II reviews the legal regime set forth by State Responsibility Rules concerning the general obligation of States to eliminate the consequences of their violation of international law and the exceptions to this obligation. It also reviews the European Court of Human Rights (“ECtHR”) decision in *Demopoulos v. Turkey*,<sup>20</sup> which exemplifies the manner in which one of these exceptions protects the claims of individuals who would be adversely affected by the re-establishment of the situation preceding the violation of international law.

Section III argues that no provision of an international human rights convention brings the non-repatriation plea of Israeli settlers within the realm of a protected human right. Even if it were possible to point to such a provision, the repatriation of Israeli settlers would

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17. CRAWFORD, STATE RESPONSIBILITY, *supra* note 5, at 510 (clarifying that this does not involve the “re-establishment of the situation that would have existed had the wrongful act not been committed” but rather the situation that “existed before the wrongful act was committed”); *see also infra* note 47 and accompanying text.

18. BENVENISTI, *supra* note 3, at 308.

19. *See* discussion *infra* Section III.

20. 2010-I Eur. Ct. H.R. 365.

probably be permitted under the balancing of interest regime that generally prevails in international human rights law. This section therefore concludes that international human rights law does not prohibit the repatriation of Israeli settlers.

Section IV shows that examining whether or not international human rights law *prohibits* the repatriation of illegally implanted settlers is fundamentally different from examining whether or not State Responsibility Rules *exempt* the occupant from carrying out repatriation. Exemption under the latter does not depend on a prohibition under the former. Inquiring whether the interests of individual settlers have attained sufficient legal significance to support an exemption for an occupant from its obligation to eliminate the consequences of its illegal settlement enterprise does not entail the type of robust balancing of interest analysis that prevails in international human rights law. Rather, State Responsibility Rules recognize an exemption whenever imposing such an obligation would result in the “forcible eviction and rehousing of potentially large numbers of men, women and children.”<sup>21</sup>

Section V argues that a good faith assessment is immaterial in determining the extent of protection provided to illegally implanted settlers under international law. Section VI maintains that the absence of the occupant’s duty to repatriate the settlers allows for a strong argument in favor of including the interest in non-repatriation within the sphere of interests that an occupant may legitimately promote in negotiating the end of occupation.

The scope of the present inquiry is limited. Some commentators argue that actions on behalf of an occupant aimed at perpetuating the occupation, such as the settlement of the occupant’s own citizens in the occupied territory, may render the entire occupation regime illegal under international law, even if the occupation initially resulted from the lawful use of force by the occupant in self-defense.<sup>22</sup> Other international lawyers disagree, maintaining that the notion of illegal occupation in international law does not extend to occupation resulting from the lawful use of force by a State in self-

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21. *Demopoulos*, 2010-I Eur. Ct. H.R. at 411.

22. Ben-Naftali, Gross & Michaeli, *supra* note 3, at 551-56 (advancing this argument in relation to Israel’s occupation of Arab territories since 1967, which is currently the only prolonged occupation resulting from a war of self-defense).

defense.<sup>23</sup> Elsewhere, this author subscribed to the latter view.<sup>24</sup> Nonetheless, the debate on whether the illegality of occupation under international law may extend to occupation resulting from a lawful war of self-defense is beyond the scope of the present article.

Moreover, an Israeli insistence that the settlements continue to exist may present an insurmountable obstacle to any peace negotiation aimed at reaching a political solution to end the occupation. The present article does not consider whether such insistence on the part of Israel is advisable, nor does it explore any duties that Israel may have toward the Palestinian population transcending the law of occupation, which may emerge as a result of further prolonging the occupation.

## II. EXEMPTIONS FROM THE OBLIGATION TO ELIMINATE THE CONSEQUENCES OF A VIOLATION OF INTERNATIONAL LAW

### A. THE OBLIGATION TO MAKE RESTITUTION AND THE EC THR JUDGMENT IN *DEMOPOULOS V. TURKEY*

In 1974, as tensions between the Greek-Cypriot and Turkish-Cypriot communities in Cyprus culminated, the Turkish military

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23. See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 2 (2009) [hereinafter DINSTEIN, *BELLIGERENT OCCUPATION*] (“A . . . myth surrounding the legal regime of belligerent occupation is that it is, or becomes in time, inherently illegal under international law.”); Yoram Dinstein, *The International Legal Dimensions of the Arab-Israeli Conflict*, in ISRAEL AMONG THE NATIONS 137, 150 (Alfred E. Kellerman et al. eds., 1998) (“While belligerent occupation does not transfer title (sovereignty), it does mean that the occupying Power has a temporary right of possession (which can continue as long as peace is not concluded.)”); Michael Curtis, *International Law and the Territories*, 32 HARV. INT’L L.J. 457, 464-65 (1991) (“Israel is legally entitled to remain in the territory it now holds and to protect its security interests therein until new boundaries are drawn in a peace settlement.”); Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AM. J. INT’L L. 1, 8 (1970) (“[T]here is nothing in either the [U.N.] Charter or general international law which leads one to suppose that military occupation, pending a peace treaty, is illegal.”).

24. Ariel Zemach, *Can Occupation Resulting from a War of Self-Defense Become Illegal?*, 24 MINN. J. INT’L L. (forthcoming 2015) (manuscript at 1) (arguing “that the purview of the notion of illegal occupation in international law does not extend to occupation resulting from the lawful use of force by a state in self-defense”).

invaded Northern Cyprus, claiming to act in defense of the Turkish-Cypriot community.<sup>25</sup> The Turkish invasion resulted in Turkey occupying Northern Cyprus.<sup>26</sup> Hostilities surrounding the Turkish invasion resulted in massive dislocation of populations. Approximately 162,000 Greek-Cypriots fled from Northern Cyprus and the Turkish occupying forces subsequently prevented them from returning to their homes.<sup>27</sup> In addition, some 48,000 Turkish-Cypriots residing in Southern Cyprus left their homes and fled to the north, where they settled in the homes of Greek-Cypriots.<sup>28</sup>

In 1983, the Turkish-Cypriot community proclaimed a separate State, the "Turkish Republic of Northern Cyprus" ("TRNC"), in the territory occupied by Turkey.<sup>29</sup> The proclamation of the TRNC was widely condemned by the international community.<sup>30</sup> No State except Turkey recognized the TRNC as a State, and Northern Cyprus remained a territory under Turkish occupation in the eyes of the international community.<sup>31</sup> In 1985, the TRNC enacted the TRNC Constitution.<sup>32</sup> One of the provisions of this instrument provided for the expropriation of the properties owned by dislocated Greek-Cypriots on the ground that they had been abandoned in 1974.<sup>33</sup>

The consolidation of Turkish occupation in Northern Cyprus was followed by large waves of Turkish settlers who migrated from Turkey to Northern Cyprus with the encouragement of the Turkish government and of the TRNC.<sup>34</sup> Many of the Turkish settlers became occupants of expropriated Greek-Cypriot property.<sup>35</sup>

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25. Rhodri C. Williams, *Introductory Note to the European Court of Human Rights: Demopoulos v. Turkey*, 49 I.L.M. 816, 816 (2010).

26. *Id.*

27. *Cyprus: Prospects Remain Dim of Political Resolution to Change Situation of IDPs*, INTERNAL DISPLACEMENT MONITORING CTR. 4 (June 30, 2009), <http://www.refworld.org/docid/4a4a1ff92.html>.

28. *Id.* at 4-5.

29. Williams, *supra* note 25, at 816.

30. *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216 (describing the response of the international community to the proclamation of the TRNC).

31. Williams, *supra* note 25, at 816.

32. *Constitution*, LEXAS, <http://www.lexis.net/worldfactbook/data/government/constitution.asp> (last updated Dec. 25, 2010).

33. *Id.* at art. 159(1)(b); *Loizidou*, 1996-VI Eur. Ct. H.R. at 519-20.

34. RONEN, *TRANSITION FROM ILLEGAL REGIMES*, *supra* note 10, at 232.

35. Andrew Sanger, *Property Rights in an Occupied Territory*, 70 CAMBRIDGE L. J. 7, 8 (2011) (noting the tension "between the property rights of displaced



Greek-Cypriot refugees brought claims against Turkey before the ECtHR, which resulted in judgments stating that Turkey violated article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“First Protocol”) by preventing the refugees from returning to their properties.<sup>36</sup> Article 1 provides that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions.”<sup>37</sup> Moreover, the Court concluded that preventing the Greek-Cypriot refugees from returning to their homes violated article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), which states that “everyone has the right to respect for . . . his home.”<sup>38</sup> However, the most recent judgment on this matter, *Demopoulos v. Turkey*, demonstrates how the *ex factis ius oritur* principle erodes the general obligation of States acting contrary to international law to eliminate the consequences of the violation.

The applicants in *Demopoulos*, Greek-Cypriot refugees, claimed that the Turkish military deprived them of enjoying their possessions in Northern Cyprus, contrary to article 1 of the First Protocol.<sup>39</sup> Turkey, the respondent, argued that the applicants failed to meet a threshold condition for the admissibility of their application that requires the applicants to exhaust domestic remedies before applying to the Court.<sup>40</sup> In particular, Turkey pointed to how the applicants

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Greek Cypriots and the rights of individuals now living in their homes or using their land (some are Turkish-Cypriot refugees from the South of Cyprus, but many are Turkish settlers”).

36. *Alexandrou v. Turkey*, App. No. 16162/90, paras. 6-10 (Eur. Ct. H.R. July 28, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93694>; *Xenides-Arestis v. Turkey*, App. No. 46347/99, para. 23 (Eur. Ct. H.R. Dec. 22, 2005), available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-71800>; *Demades v. Turkey*, App. No. 16219/90, para. 12 (Eur. Ct. H.R. July 31, 2003), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61272>; *Loizidou*, 1996-VI Eur. Ct. H.R. at 522.

37. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

38. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; *Xenides-Arestis*, App. No. 46347/99, para. 16.

39. *Demopoulos*, 2010-I Eur. Ct. H.R. at 377-78.

40. ECHR, *supra* note 38, art. 35 (“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the

failed to bring their claims before the Immovable Property Commission (“IPC”), a domestic TRNC body established to resolve claims to property that had been expropriated under the TRNC constitution.<sup>41</sup> The Court accepted the Turkish argument.<sup>42</sup>

The applicants reasoned that requiring them to bring their claims before TRNC authorities lent legitimacy to an illegal regime.<sup>43</sup> However, considering the IPC to be essentially a Turkish entity, the Court determined that the authority of the IPC must be recognized, reasoning that “the key consideration is to avoid a vacuum which operates to the detriment of those who live under the occupation, or those who, living outside, may claim to have been victims of infringements of their rights.”<sup>44</sup> The Court then proceeded to conclude that the IPC constituted “an accessible and effective framework of redress in respect of complaints about interference with the property owned by Greek Cypriots.”<sup>45</sup> Therefore, the Court concluded that the applications were inadmissible because the applicants failed to exhaust domestic remedies.<sup>46</sup>

Although the Court formally determined the case on procedural grounds, its decision has far-reaching consequences for substantive international law, particularly in balancing the principle of *ex factis ius oritur* against its rival *ex injuria ius non oritur*, which holds that violating the law cannot have legal effect.<sup>47</sup> The legal regime that governs this balancing is contained in State Responsibility Rules, which set forth the obligation of restitution and its exceptions.<sup>48</sup> The International Law Commission (“ILC”) codified State Responsibility Rules in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts (“Draft Articles”).<sup>49</sup> Article 35 of the Draft Articles states that “[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-

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date on which the final decision was taken.”).

41. *Demopoulos*, 2010-I Eur. Ct. H.R. at 389-91.

42. *Id.* at 415.

43. *Id.* at 404.

44. *Id.* at 405.

45. *Id.* at 415.

46. *Id.*

47. ADOLF SPRUDZS, “EX INIURIA IUS NON ORITUR” AND THE BALTIC CASE: A BRIEF WESTERN PERSPECTIVE 1-2, 4 (1998).

48. *Draft Articles*, *supra* note 14.

49. *Id.*

establish the situation which existed before the wrongful act was committed.”<sup>50</sup> Article 35, however, recognizes two exceptions to the obligation of restitution. First, restitution is not required if it is “materially impossible” (the “material impossibility exception”).<sup>51</sup> Second, restitution is not required if it involves “a burden out of all proportion to the benefit deriving from restitution instead of compensation” (the “disproportionate burden exception”).<sup>52</sup>

Examining whether recourse to the IPC was required for the applicants to satisfy the exhaustion of domestic remedies requirement, the ECtHR inquired whether the remedies available to the applicants through IPC proceedings were adequate.<sup>53</sup> The applicants argued that the record of IPC proceedings suggests that only a small proportion of the property of Greek-Cypriot refugees was in practice eligible for restitution under the IPC mechanism.<sup>54</sup> Dismissing this argument, the Court replied that it “does not consider that this, to the extent that it can be considered as an accurate assertion, undermines the effectiveness of the new [IPC] scheme.”<sup>55</sup>

This position relies on an interpretation of State Responsibility Rules that recognizes an extremely broad material impossibility exception to the obligation to make restitution. The Court rejected the claim that the scope of the material impossibility exception is restricted to *physical* impossibility due to the permanent loss or destruction of the property.<sup>56</sup> The Court viewed that the passage of time imposes a price on restitution with regard to the interests of individuals adversely affected by it, which renders certain violations of international law legally irreversible as far as State Responsibility Rules are concerned. Commenting on the circumstances of the cases

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50. *Id.* at art. 35.

51. *Id.*

52. *Id.*

53. Demopoulos v. Turkey, 2010-I Eur. Ct. H.R. 365, 389.

54. *Id.* at 412.

55. *Id.*

56. *Id.* at 411.

before it, the Court observed:

In the present applications, some thirty-five years have elapsed since the applicants lost possession of their property in northern Cyprus in 1974. Generations have passed. The local population has not remained static . . . Turkish-Cypriot refugees from the south have settled in the north; Turkish settlers from Turkey have arrived in large numbers and established their homes. Much Greek-Cypriot property has changed hands at least once, whether by sale, donation or inheritance.<sup>57</sup>

In view of this reality, the Court deemed “unrealistic” the expectation that it orders Turkey to ensure that the applicants repossess their properties regardless of who is currently living there.<sup>58</sup> Rather, in determining the appropriate remedy for its own violations of international law, Turkey is entitled to take into account “the position of third parties.”<sup>59</sup> The ECtHR judgment has been criticized for undermining the primacy of restitution as a remedy for violating international law and for directly contradicting “the elementary principle of international law *ex injuria jus non oritur*.”<sup>60</sup>

The view that the material impossibility exception extends beyond physical impossibility to protect legitimate interests of third parties is hardly innovative. The ILC expressed the same view in its Commentary on State Responsibility Rules, which preceded *Demopoulos* and relied on an international arbitration judgment dating back to 1933.<sup>61</sup> The ILC observed that “[m]aterial impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations”<sup>62</sup> and that “in certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially

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57. *Id.* at 401-02 (stating that its jurisprudence “cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances”).

58. *Id.* at 410.

59. *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 411.

60. Loukis G. Loucaides, *Is the European Court of Human Rights Still a Principled Court of Human Rights After the Demopoulos Case?*, 24 LEIDEN J. INT'L L. 435, 435-36, 456 (2011) (criticizing the Court for its “disregard of the right of *restitutio in integrum*”).

61. *Forests of Central Rhodopia (Greece v. Bulgaria)*, 3 Rep. Int'l Arb. Awards 1389, 1432 (1950).

62. *Draft Articles*, *supra* note 14, art. 35 (commentary).

possible.”<sup>63</sup>

However, the ECtHR interpretation of the material impossibility exception helps clarify the scope of protection afforded to individuals under this exception in two ways. First, the Court’s reasoning indicates that the question of whether or not individuals who benefited from a State’s violation of international law were aware of the violation does not bear on the protection provided to them under the material impossibility exception.<sup>64</sup> Second, the *Demopoulos* judgment suggests that the inquiry into whether the interests of individuals justify relieving the violating State of its obligation to make restitution is different from the robust balancing of interest analysis that prevails in international human rights law.<sup>65</sup> Thus, the Court seems to recognize an exemption from the obligation to make restitution whenever imposing such obligation would result in the “forcible eviction and rehousing of potentially large numbers of men, women and children.”<sup>66</sup>

Although the ECtHR did not use the ILC’s terminology, which distinguishes between the material impossibility and the disproportionate burden exceptions,<sup>67</sup> the Court’s ruling relies exclusively on the former. The disproportionate burden exception applies “only where there is *grave* disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach.”<sup>68</sup> Setting the threshold for the exception to the restitution obligation at *grave* disproportionality, this balancing test grants “preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution.”<sup>69</sup> The Court’s analysis in *Demopoulos* seems far from the robust balancing required under this demanding disproportionality threshold.

Although in *Demopoulos* the ECtHR recognized the status of

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63. *Id.*

64. *See infra* text accompanying note 202.

65. *See* discussion *infra* Section IV.

66. *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 411.

67. *See supra* notes 48-50 and accompanying text.

68. *Draft Articles, supra* note 14, art. 35 (commentary) (emphasis added).

69. *Id.*

Northern Cyprus as an occupied territory,<sup>70</sup> it did not apply the norms of international humanitarian law. Rather, *Demopoulos* involved the obligations of Turkey arising from its violation of European human rights law. Whereas most rights conferred upon individuals under human rights law lend themselves to balancing analyses, the obligation imposed on an occupying State under international humanitarian law to refrain from settling its own nationals within the occupied territory is an absolute one.<sup>71</sup> Therefore, it has been argued that the duty of an occupant to repatriate illegally implanted settlers is absolute because it arises from the violation of an absolute prohibition.<sup>72</sup>

This argument is, however, unpersuasive. The distinction between absolute and non-absolute *primary* norms of international law is of little significance in applying *secondary* norms of international law.<sup>73</sup> The absolute nature of an international humanitarian law prohibition does not suggest that violating this prohibition gives rise to an absolute obligation to make restitution. Eyal Benvenisti thus noted that the unique gravity of a particular violation of international law and the status of the violated norm as *jus cogens* do not diminish the protection that State Responsibility Rules grant to individuals who would be adversely affected by restitution.<sup>74</sup> Cautioning against a theory that “conflates primary and secondary norms,”<sup>75</sup> Benvenisti observed that:

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70. *Demopoulos*, 2010-I Eur. Ct. H.R. at 404-05.

71. Geneva Convention, *supra* note 1, art. 49 (recognizing no exception to the prohibition on the transfer of an occupant's nationals into the occupied territory).

72. See, e.g., Yael Ronen, *International Law and the Rights of Settlers to Remain in Formerly Occupied Territory After the Transfer of Control: Settlers in the West Bank, Baltic States, and Northern Cyprus*, 13 L. & GOV'T 49, 89 (2011) (Hebrew) [hereinafter Ronen, *International Law*]. Ronen argues that:

In contrast with a sovereign state, which chooses whether or not to allow foreign nationals to reside within its territory, and which is required to do so by way of balancing the various rights and interests, the duty of an occupying power to refrain from settling its nationals within an occupied territory, as well as its duty, having settled such individuals [within the occupied territory] to repatriate them, are not subject to balancing analyses. The prohibition on the settlement of [the occupant's own] nationals and the derivative duty to repatriate them are absolute. The state has no discretion on this matter. *Id.*

73. BENVENISTI, *supra* note 3, at 312-13.

74. *Id.* at 312.

75. *Id.*

[T]here can be no logical inference from the assertion that certain norms are non-derogable to the conclusion that there can be no limitations on the consequences of unlawful derogations . . . . The concern that has always informed both domestic remedial norms and the international one, that it would be unjust to correct one wrong by creating another, also informs the international law relevant to the remedies of *jus cogens* violations.<sup>76</sup>

#### B. REPATRIATING ILLEGALLY IMPLANTED SETTLERS: RESTITUTION OR CESSATION OF A CONTINUING VIOLATION?

An exemption from the duty to repatriate illegally implanted settlers, arising from the plea of settlers adversely affected by repatriation, largely depends on whether repatriation is viewed as an exercise of the obligation to cease a continuing violation of international law or of the obligation to make restitution. State Responsibility Rules require a State to first cease its internationally wrongful conduct, if it is continuing, regardless of whether the unlawful conduct is an action or an omission.<sup>77</sup> Unlike the obligation to make restitution, the obligation of cessation has no exception.<sup>78</sup>

In the *Wall Advisory Opinion*, the ICJ found that Israel's construction of a wall within the occupied Palestinian territory violated international human rights law and international humanitarian law.<sup>79</sup> The Court concluded that, "cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem."<sup>80</sup> Can the presence in an occupied territory of settlers transferred to that territory in violation of international law be considered a continuing violation of international law, analogous with the presence of the Israeli Wall,

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76. *Id.* at 312-13.

77. *Draft Articles*, *supra* note 14, art. 30. *see also* Olivier Corten, *The Obligation of Cessation*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 545, 545 (James Crawford et al. eds., 2010).

78. *Draft Articles*, *supra* note 14, art. 30 (commentary); CRAWFORD, *STATE RESPONSIBILITY*, *supra* note 5, at 465 (observing, "restitution is subject to limitations that cessation is not"); Corten, *supra* note 77, at 548 (noting that exemptions from the obligation of cessation "would constitute a limitation that would call into question the binding force of the primary rules themselves and endanger the validity, certainty, and effectiveness of international legal relations. In law, a State must and can always put an end to a continuing breach.").

79. *See Wall Advisory Opinion*, *supra* note 1, paras. 114-37.

80. *Id.* at para. 151.

and give rise to the obligation of cessation?

Notwithstanding the far-reaching consequences of the distinction between cessation and restitution, the ILC observed that it is difficult to distinguish between cessation and restitution because “the result of cessation may be indistinguishable from restitution.”<sup>81</sup> The ICJ could have viewed Israel’s obligation to dismantle the Wall as part of the obligation to make restitution, which “consists in reestablishing the *status quo ante*, i.e., the situation that existed prior to the occurrence of the wrongful act[.]”<sup>82</sup> but it opted to invoke the obligation of cessation.

Preventing Greek-Cypriots from returning to their property in Northern Cyprus could also be viewed as a continuing violation of international law, giving rise to an absolute obligation of cessation. However, the ECtHR in *Demopoulos* clearly rejected this interpretation.<sup>83</sup> The ECtHR ruling suggested that if the reestablishment of the status quo preceding the violation directly interferes with the lives of individuals, the legal consequences of the violation are determined by the norm governing restitution and its exceptions.<sup>84</sup> The situation before the ECtHR in *Demopoulos* was different from the one considered by the ICJ in the *Wall Advisory Opinion*. Dismantling the Wall and rebuilding it within the borders of Israel may compromise the security of individual settlers, but such measure would not amount to *directly* interfering with their lives, as opposed to the forced eviction of those who currently occupy Greek-Cypriot property that the applicants sought in *Demopoulos*.

The ECtHR’s position in *Demopoulos* also avoids potential tension that may arise between State Responsibility Rules and international human rights law. Consider the case of settlers of Russian origin illegally implanted in the Baltic states by the Soviet

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81. *Draft Articles, supra* note 14, art. 30 (commentary) (noting “the difficulty of distinguishing between cessation and restitution”); CRAWFORD, STATE RESPONSIBILITY, *supra* note 5, at 512; *see also* Christine Gray, *The Different Forms of Reparation: Restitution*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 589, 590 (James Crawford et al. eds., 2010) (“The results of restitution and cessation, both legal consequences of a wrongful act, are not always distinct.”).

82. *Draft Articles, supra* note 14, art. 35 (commentary).

83. *See supra* notes 50-57 and accompanying text.

84. *Id.*



occupant.<sup>85</sup> The bulk of authority favors the view that at least some of these settlers are protected from expulsion under the ECHR.<sup>86</sup> If State Responsibility Rules had required the Soviet occupant to repatriate these settlers to fulfill the absolute obligation of cessation, the duty of the Soviet Union to evict the settlers would have given way overnight, upon the termination of occupation, to a duty of the Baltic states, arising under human rights law, not to evict them. This result seems counter-intuitive, if not absurd. An international law norm requiring an occupant to evict settlers does not sit well with another international law norm prohibiting the legitimate sovereign from evicting. Therefore, whether or not an occupant is duty-bound to repatriate settlers illegally implanted in the occupied territory must be determined under the norms governing the obligation to make restitution and its exceptions.

### III. DOES INTERNATIONAL HUMAN RIGHTS LAW PROHIBIT THE REPATRIATION OF ISRAELI SETTLERS?

Article 8 of the ECHR states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”<sup>87</sup> The ECtHR broadly construed the right to “private life” as protecting “the network of personal, social and economic relations that make up the private life of every human

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85. RONEN, *TRANSITION FROM ILLEGAL REGIMES*, *supra* note 10, at 216-17 (providing a general review of the policy of Russification of the Baltic states, pursued by the Soviet occupant).

86. *See Slivenko v. Latvia*, 2003-X Eur. Ct. H.R. 229, 260, 267 (concluding that the decision of Latvian authorities to expel the applicants to Russia violated the ECHR); RONEN, *TRANSITION FROM ILLEGAL REGIMES*, *supra* note 10, at 242-44; Letter from Max van der Stoep, CSCE High Comm’r on Nat’l Minorities, to Georgs Andrejevs, Minister for Foreign Affairs of the Republic of Latvia (Jan. 25, 1994), *available at* <http://www.osce.org/hcnm/30612?download=true> (“Massive expulsion of non-Latvian residents would be contrary to generally accepted international humanitarian principles.”).

87. *See ECHR*, *supra* note 38, art. 8:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

being.”<sup>88</sup> This right thus applies to the plea of settled immigrants, including illegally implanted settlers, against repatriation.<sup>89</sup> The ECtHR has noted:

[A]s [a]rticle 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of “private life” within the meaning of [a]rticle 8 . . . [T]he expulsion of a settled migrant therefore constitutes an interference with his or her right to respect for private life.<sup>90</sup>

The right to private life and the protection against repatriation that it affords to settlers are not absolute. Article 8 of the ECHR states that interfering with the rights under the article is permissible if it meets three cumulative requirements. First, the interference must be authorized under domestic law.<sup>91</sup> Second, the interference must serve a legitimate aim.<sup>92</sup> Article 8(2) sets forth an exhaustive list of legitimate aims: the interests of national security, public safety or economic well-being of the country, the prevention of disorder or crime, protection of health or morals, and the protection of the rights and freedoms of others.<sup>93</sup> Third, the interference must be “necessary in a democratic society.”<sup>94</sup> The ECtHR ruled that a measure interfering with rights guaranteed by article 8 may be “necessary in a democratic society” only “if it has been taken in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued.”<sup>95</sup> The proportionality requirement calls for a balancing analysis by weighing the interests in interfering with the right to private life against the adverse consequences associated with such interference.<sup>96</sup> The relative weight of the interests on both sides of the equation varies from case to case.

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88. *Slivenko*, 2003-X Eur. Ct. H.R. at 259.

89. *Id.*

90. *Maslov v. Austria*, 2008-III Eur. Ct. H.R. 301, 321 (2008).

91. *Slivenko*, 2003-X Eur. Ct. H.R. at 260.

92. *Id.*

93. ECHR, *supra* note 38, art. 8(2).

94. *Id.*; *Slivenko*, 2003-X Eur. Ct. H.R. at 260.

95. *Slivenko*, 2003-X Eur. Ct. H.R. at 263.

96. *Id.*

The right to private life contained in the ECHR directly applies to the case of Russian settlers implanted in the Baltic states by the Soviet occupant and to the case of the Turkish settlers in Northern Cyprus because both the occupying States and the legitimate sovereigns in these cases are parties to the ECHR. However, the ECHR has no direct bearing on the potential repatriation of Israeli settlers. The primary human rights instrument pertaining to the latter case is the International Covenant on Civil and Political Rights (“ICCPR”), to which Israel is a signatory and which a Palestinian State may also choose to join.<sup>97</sup> Because most States are parties to the ICCPR, its provisions have arguably attained the status of customary international law, binding upon all states.<sup>98</sup> It appears that the ICCPR does not protect immigrants who have not acquired the nationality of their state of residence against expulsion in a way that would be similar to the protection granted under article 8 of the ECHR.

Article 12(4) of the ICCPR states that “no one shall be arbitrarily deprived of the right to enter his own country.”<sup>99</sup> When interpreting the term “his own country” in *Nystrom v. Australia*, the U.N. Human Rights Committee (“HRC”) observed that:

[It] is broader than the concept “country of his nationality.” It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. In this regard, [the Committee] finds that there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words “his own country” invite consideration of such matters as long standing

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97. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

98. See, e.g., Louis B. Sohn, *The New International Law: Protections of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 32 (1982):

The law of human rights as embodied in the international instruments is not merely treaty law, but rather has become a part of international customary law of general application, except in areas in which important reservations have been made. These documents do not create new rights; they recognize them. Although the line between codification and development of international law is a thin one, the consensus on virtually all provisions of the Covenant on Civil and Political Rights is so widespread that they can be considered part of the law of mankind, a *jus cogens* for all.

99. ICCPR, *supra* note 97, art. 12(4).

residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.<sup>100</sup>

The *Nystrom* decision departed from previous HRC jurisprudence that viewed formal nationality of the state of residence as generally a decisive criterion for protection against expulsion under article 12(4) of the ICCPR, regardless of the strength of the factual ties between individuals and their state of residence.<sup>101</sup> *Nystrom* seems to narrow the gap between the protection granted to immigrants under article 12(4) of the ICCPR and that under article 8 of the ECHR, but the convergence is far from complete.

The balancing regime established under article 8 of the ECHR makes the right to private life far from absolute. By contrast, although the language of article 12(4) of the ICCPR prohibits only “arbitrary” interference with the right of individuals to enter their own country, the HRC interprets article 12(4) as a near-absolute prohibition against such interference. The HRC reasoned that, in accordance with the requirement of non-arbitrariness, any

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100. Human Rights Comm., *Nystrom v. Australia*, Comm. No. 1557/2007, para. 7.4, U.N. Doc. CCPR/C/102/D/1557/2007 (2011).

101. See Human Rights Comm., *Stewart v. Canada*, Comm. No. 538/1993, para. 12.4, U.N. Doc. CCPR/C/58/D/538/1993 (1996) (specifying exceptional cases in which an immigrant’s state of residence might be considered her “own country” in the absence of a formal nationality link); Human Rights Comm., *Madafferi v. Australia*, Comm. No. 1011/2001, para. 9.6, U.N. Doc. CCPR/C/81/D/1011/2001 (2004):

[A] person who enters a State under the State’s immigration laws, and subject to the conditions of those laws, cannot normally regard that State as his ‘own country,’ when he has not acquired its nationality and continues to retain the nationality of his country of origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality.

See also Michelle Foster, “An ‘Alien’ by the Barest of Threads” – *The Legality of the Deportation of Long-Term Residents from Australia*, 33 MELB. U. L. REV. 483, 519 (2009); Yaël Ronen, *The Ties that Bind: Family and Private Life as Bars to the Deportation of Immigrants*, 8 INT’L J.L. IN CONTEXT 283, 292 (2012) [hereinafter Ronen, *The Ties that Bind*] (commenting on HRC decisions in *Stewart* and *Madafferi*, “under the HRC’s jurisprudence, attachment to the territory through long-term presence does not suffice to protect a person from deportation . . . . Persons holding an effective nationality of another state who have not been unfairly denied the possibility of naturalization in the state of residence, are not protected by Article 12(4). Few ordinary long-term immigrants can therefore benefit from this provision.”).

deprivation of the right to enter one's own country must be "reasonable in the particular circumstances" and that "there are few, *if any*, circumstances in which deprivation of the right to enter one's own country could be reasonable."<sup>102</sup>

The legal consequences of the applicability of article 12(4) of the ICCPR—a near-absolute prohibition on expulsion—are thus far more drastic than the consequences of the applicability of article 8 of the ECHR, which is only the starting point of a balancing analysis that often may permit expulsion. This seems to affect the threshold for recognizing an interference with the right contained in article 12(4) of the ICCPR, which is arguably higher than that for interference with the right to private life, protected under article 8 of the ECHR. The *Nystrom* decision suggests that, in the absence of a formal nationality link, the willingness of the HRC to regard the country of residence as an immigrant's "own country" depends, to a considerable degree, on the "lack of any other ties than nationality"<sup>103</sup> between the immigrant and her state of origin and on the immigrant's lack of command of the language spoken in her country of origin.<sup>104</sup> These considerations, which preclude regarding the occupied Palestinian territory as the Israeli settlers' "own country,"<sup>105</sup> do not appear to guide the ECtHR in determining whether the repatriation of a settled immigrant interferes with the right to private life,<sup>106</sup> although they are considered relevant in determining the proportionality of such interference.<sup>107</sup>

Moreover, the realm of social ties examined by the HRC in determining whether the state of residence is an immigrant's own

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102. *Nystrom*, Comm. No. 1557/2007, para. 7.6 (emphasis added).

103. *Id.* at para. 7.5.

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[T]he author arrived in Australia when he was 27 days old, his nuclear family lives in Australia, he has no ties to Sweden and does not speak Swedish . . . . Given the particular circumstances of the case, the Committee considers that the author has established that Australia was his own country within the meaning of article 12, paragraph 4 of the Covenant, in the light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with Sweden. *Id.*

105. Ronen, *International Law*, supra note 72, at 79 (observing the strong social and economic ties maintained by the Israeli settlers with Israel).

106. *Maslov v. Austria*, 2008-III Eur. Ct. H.R. 301, 321; *Slivenko v. Latvia*, 2003-X Eur. Ct. H.R. at 259.

107. *Slivenko*, 2003-X Eur. Ct. H.R. at 259-60.

country extends beyond the immigrant's immediate social surrounding. The HRC requires a significant level of integration of the immigrant within the larger community; in other words, ties with the *State* must be substantial enough to substitute for the lack of formal nationality.<sup>108</sup> Such a requirement is not a condition for proving interference with the right to private life under article 8 of the ECHR.<sup>109</sup> Given the almost complete insulation of Israeli settlers from the larger Palestinian society and the grave hostility between the two communities, the integration requirement presented by the HRC also precludes the applicability of article 12(4) to Israeli settlers.

Article 17 of the ICCPR protects everyone from “arbitrary or unlawful interference with his privacy, family, home.”<sup>110</sup> The HRC interpreted the term “privacy” narrowly as referring only to isolation from society and protection of personal information.<sup>111</sup> Thus, the HRC interpretation of the right to privacy differs from the ECtHR interpretation of the right to a private life. Unlike the latter, the former does not protect “the network of personal, social and

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108. *See Nystrom*, Comm. No. 1557/2007, para. 7.5:

[H]is ties to the Australian community are so strong that he was considered to be an ‘absorbed member of the Australian community’ by the Australian Full Court in its judgment dated 30 June 2005; he bore many of the duties of a citizen and was treated like one, in several aspects related to his civil and political rights such as the right to vote in local elections or to serve in the army. Furthermore, the author alleges that he never acquired the Australian nationality because he thought he was an Australian citizen. The author argues that he was placed under the guardianship of the State since he was 13 years old and that the State party never initiated any citizenship process for all the period it acted on the author’s behalf. The Committee observes that the State party has not refuted the latter argument.

*See also* Rishi Gulati, *Resolving Dual and Multiple Nationality Dispute in a Globalised World*, 28 IMMIGR. ASYLUM & NATIONALITY L. 27, 38 (2014) (observing that the HRC “used essentially the ‘effective nationality’ test to determine Nystrom’s ‘own country,’” and considered Australia to be Nystrom’s “own country” because “Nystrom exhibits all the characteristics of an Australian national,” although he has not obtained formal Australian nationality).

109. *Slivenko*, 2003-X Eur. Ct. H.R. at 259.

110. ICCPR, *supra* note 97, art. 17.

111. *See* U.N. Human Rights Comm., CCPR General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, ¶¶ 8-10, U.N. Doc. CCPR/C/21/Rev.1/Add. (Apr. 8, 1988) [hereinafter CCPR General Comment No. 16].

economic relations”<sup>112</sup> forged by individuals.<sup>113</sup>

Expelling certain non-national immigrants may be prohibited under article 17 as an arbitrary interference with one’s family. In *Winata v. Australia*,<sup>114</sup> the HRC considered an application of an Indonesian couple facing deportation from Australia after illegally residing there for fourteen years. The couple had a thirteen-year-old child who had received Australian citizenship and was therefore entitled to remain in the country.<sup>115</sup> The HRC took the view that:

[A] decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents is to be considered ‘interference’ with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case.<sup>116</sup>

The Committee followed the same approach in *Madafferi v. Australia*,<sup>117</sup> under similar circumstances.<sup>118</sup>

The deportation decisions reviewed in *Winata* and *Madafferi* did not amount to direct interference with the unity of the family because the families in question could possibly relocate together.<sup>119</sup> The *Winata* dissent noted that it was not a case in which the State’s decision “results in the inevitable separation between members of the

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112. *Slivenko*, 2003-X Eur. Ct. H.R. at 259.

113. When reviewing decisions of state authorities to expel immigrants, the HRC opinions do not indicate that the prohibition against arbitrary interference with one’s privacy extends to protect immigrants against expulsion. *See also* CCPR General Comment No. 16, *supra* note 111, ¶¶ 8-10; *see generally* *Nystrom*, Comm. No. 1557/2007; *Madafferi*, Comm. No. 1011/2001; *Stewart*, Comm. No. 538/1993; *infra* notes 114-16, 129-32.

114. Human Rights Comm., *Winata v. Australia*, Comm. No. 930/2000, para. 7.3, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

115. *See id.* at para. 7.2.

116. *Id.*

117. Human Rights Comm., *Madafferi v. Australia*, Comm. No. 1011/2001, paras. 9.7-9.8, U.N. Doc. CCPR/C/81/D/1011/2001 (2004).

118. *Id.* (considering whether deporting a father to Italy and compelling his family with four children to choose whether to accompany him or stay in Australia amounts to “interference” with the family).

119. *See* Ronen, *The Ties that Bind*, *supra* note 101, at 290 (arguing that these decisions extended protection against deportation to “cases where the unity of the family was not necessarily at issue, since the possibility of relocating together was possible”).

family.”<sup>120</sup> Some commentators have understood the *Winata* and *Madafferi* decisions to equate any State action that results in “substantial changes to long-settled family life”<sup>121</sup> with “interference with the family.”<sup>122</sup> According to this view, article 17 “protects against deportation not only the unity of the family but also the family or its individual members in their social environment.”<sup>123</sup>

This reading of *Winata* and *Madafferi* supports extending the protection afforded by article 17 of the ICCPR to situations in which none of the family members are nationals of the state of residence, provided that at least some family members have developed close ties with the social environment in that State and repatriation would therefore upset “long-settled family life.” Such reading of HRC jurisprudence goes a long way to assimilate article 17 of the ICCPR with article 8 of the ECHR,<sup>124</sup> so that the two provisions differ only with respect to adult immigrants “who are attached to the state of residence, but have no formal family relationships there.”<sup>125</sup>

Reading *Winata* and *Madafferi* to mean that any State action resulting in “substantial changes” to the long-settled life of individual family members is an “interference with the family” appears to be an overreach. The *Winata* and *Madafferi* deportation decisions clearly, if indirectly, compromised the unity of the family by imposing a high price on maintaining such unity. These circumstances hardly support understanding the HRC jurisprudence as extending the protection against deportation, emanating from the right against interference with one’s family, to cases in which deportation would neither directly interfere with the unity of the family nor attach a price to maintaining such unity.<sup>126</sup> Therefore, the

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120. *Winata*, Comm. No. 930/2000, Annex, para. 3.

121. *Winata*, Comm. No. 930/2000, para. 7.2.

122. See Foster, *supra* note 101, at 534 (“[I]t is clear that where deportation will result in ‘substantial changes to long-settled family life’ the Australian government is required to balance ‘the State party’s reasons for the removal of the person concerned’ on the one hand and, ‘on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.’”); Ronen, *The Ties that Bind*, *supra* note 101, at 291.

123. Ronen, *The Ties that Bind*, *supra* note 101, at 291.

124. *Id.* (commenting on the decision of the HRC in *Winata*, Ronen observed that “[t]he result resembles the ‘private life’ jurisprudence under ECHR Article 8. The Committee’s majority may well have been attempting to follow the ECtHR”).

125. RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 199.

126. See Human Rights Comm., *Ngambi v. France*, Comm. No. 1179/2003,



protection against interference with the family provided by article 17 of the ICCPR does not extend to deportations of entire families of non-national immigrants.

Article 17 also protects individuals from interference with their “home.”<sup>127</sup> In its General Comment No. 16, the HRC observed that the term “home” refers to “the place where a person resides or carries out his usual occupation.”<sup>128</sup> Although any deportation of long-term immigrants inherently entails removing them from their place of residence, the HRC has never considered the protection against interference with one’s home as a bar to deportation. The HRC examined the protection against expulsion provided to immigrants under article 17 only in relation to interference with the family. In *Canepa v. Canada*,<sup>129</sup> the HRC reviewed a decision of the Canadian authorities to deport an immigrant who invoked his right against interference both with his family and with his home.<sup>130</sup> A finding that the complainant “has neither spouse nor children in Canada [and] has extended family in Italy”<sup>131</sup> sufficed for the Committee to conclude that such deportation would not violate Article 17.<sup>132</sup> General Comment No. 16 and the Committee’s jurisprudence clearly suggest that the Committee “attached no weight to social ties as ‘home’ for the purpose of Article 17.”<sup>133</sup> It therefore appears that “settlers cannot

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para. 6.4, Doc. CCPR/C/81/D/1179/2003 (2004) (emphasizing that the right against interference with the family concerns the protection of “a family bond”); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 229 (1993) (indicating that the prohibition against interference with the family protects “interpersonal relationships”); Richard Burchill, *The Right to Live Wherever You Want? The Right to Family Life Following the UN Human Rights Committee’s Decision in Winata*, 21 NETH. Q. HUM. RTS. 225, 244 (2003) (observing, with regard to the HRC decision in *Winata*, that once the child who is a citizen of Australia becomes a self-sufficient adult, “Australia will be able to remove the parents as family life can easily be maintained through visits, phone calls and other means”); see also DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 375-76 (2d ed. 2009) (“The essential ingredient of family life is the right to live together so that family relationships may ‘develop normally’ and that members of the family may ‘enjoy each other’s company’”).

127. ICCPR, *supra* note 97, art. 17.

128. CCPR General Comment No. 16, *supra* note 111, ¶ 5.

129. Human Rights Comm., *Canepa v. Canada*, Comm. No. 558/1993, U.N. Doc. CCPR/C/59/D/558/1993 (1997)

130. *Id.* at para. 11.4.

131. *Id.* at para. 11.5.

132. *Id.*

133. See RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 200

successfully challenge their expulsion on the ground that it constitutes a violation of their home.”<sup>134</sup>

The standard of protection that currently applies to Turkish and Russian settlers under article 8 of the ECHR may eventually apply to Israeli settlers as well, in light of future developments of the HRC interpretation of ICCPR rights. However, would a balancing regime of the type established under article 8 of the ECHR preclude repatriating Israeli settlers? Answering this question in the negative, Yael Ronen identified four interests that a Palestinian post-transition regime would have in repatriating the Israeli settlers, which correspond to the legitimate grounds for expulsion stipulated under article 8 of the ECHR.<sup>135</sup>

First, “the protection of the rights and freedoms of others” includes the protection of the right to self-determination.<sup>136</sup> The presence of many Israeli settlers in the Palestinian territory may jeopardize the Palestinian people’s ability to exercise its right to self-determination because it is likely to facilitate interference on the part of Israel in the internal affairs of the Palestinian state by political or military means.<sup>137</sup> Second, the presence of a settler population raises national security concerns because it may amount to “presence of foreign military forces on the post-transition regime’s territory.”<sup>138</sup> These concerns are heightened in the case of Israeli settlers because of their relatively high military capacities.<sup>139</sup> Third, the post-transition regime may wish to remove settlers for the “economic wellbeing of the country” because the presence of Israeli settlers adversely affects the local population’s ability to enjoy the land and its limited natural resources.<sup>140</sup> Fourth, corresponding to the purpose

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(“The HRC’s General Comment on Article 17 also suggests that the acceptable interpretation is limited to ‘home’ as a tangible structure rather than as a social institution”).

134. *Id.*

135. *See supra* note 93 and accompanying text.

136. RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 207.

137. Ronen, *International Law*, *supra* note 72, at 77-78

138. RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 208.

139. Ronen, *International Law*, *supra* note 72, at 79 (noting that a large proportion of Israeli settlers have had military training and experience).

140. *Id.* at 79-80 (noting that the presence of large numbers of settlers creates disputes of private property and conflicts over the public distribution of natural resources); *see also* RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 212.

of preventing disorder or crime, are the immense resources that would be required to guarantee the safety of the Israeli settler population in light of the grave hostility that exists between the settlers and the local Palestinian population.<sup>141</sup>

Weighing the interference in the lives of Israeli settlers that would result from their repatriation against the interests of the local Palestinian population and those of the legitimate sovereign in pursuing such a measure, Ronen concluded that repatriating the settlers survives the proportionality test and is therefore permissible under international human rights law.<sup>142</sup> By contrast, the same balancing formula has led Ronen to conclude that “in both the Baltic states and Cyprus, international law protects the right of settlers to remain in the territory.”<sup>143</sup>

The Russian and Turkish settlers fare better than their Israeli counterparts in Ronen’s balancing analysis because of several distinguishing features: (a) the strong social and economic ties maintained by the Israeli settlers with their state of nationality would likely mitigate the adverse consequences of their repatriation;<sup>144</sup> (b) Israel’s argument that its control over the West Bank is essential for its safety increases the likelihood that Israel would attempt to influence the future Palestinian state through the settlers population;<sup>145</sup> (c) the grave and long-standing hostility between the Israeli settlers and the local Palestinian population increases the likelihood that the continued presence of the settlers would incite violence within the future Palestinian state.<sup>146</sup> Moreover, Ronen argued that Israeli settlers are more likely than their Turkish counterparts to have been aware, at the time of their migration, that their settlement in an occupied territory violates international law and that this type of good faith analysis provides another ground for

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141. Ronen, *International Law*, *supra* note 72, at 81-82 (arguing that the cost of protecting Israeli settlers in a Palestinian state would be enormous).

142. *Id.* at 91 (comparing the proportionality test results of Cyprus, the Baltics, and the West Bank).

143. RONEN, *TRANSITION FROM ILLEGAL REGIMES*, *supra* note 10, at 242-43.

144. Ronen, *International Law*, *supra* note 72, at 79.

145. *Id.* at 82 (pointing to a high likelihood that Israel, after a withdrawal from the West Bank, will continue to influence the future of the Palestinian state due to the continued presence of settlements).

146. *Id.* at 82, 84 (describing the probability of continued hostility between the Palestinian population and the remaining Israeli settlers).

distinguishing the Israeli from the Russian and Turkish settlers when considering the proportionality of expulsion.<sup>147</sup> Assessing individuals' awareness of their State's violation of international law in determining the degree of protection granted to such individuals under international law raises serious fairness concerns.<sup>148</sup> However, the claim that a balancing analysis of the type required under article 8 of the ECHR would permit the repatriation of Israeli settlers is plausible.

Does this balancing model also extend to the sphere of State Responsibility Rules? Does an exception to the obligation to make restitution, relieving Israel of the duty to repatriate the settlers, have to be justified under a strict balancing-of-interest analysis that weighs the interests of the settlers against those of the local population and of the legitimate sovereign? Section IV answers this question in the negative.

#### IV. STATE RESPONSIBILITY RULES AND THE INTERESTS OF ILLEGALLY IMPLANTED SETTLERS: IS STRICT BALANCING OF INTERESTS REQUIRED?

In *Demopoulos*, the ECtHR rejected the notion that "a Contracting State must pursue a blanket policy of restoring property to owners without taking into account the current use or occupation of the property in question."<sup>149</sup> Having determined that the applicants' restitution claims must be determined with regard to each property on a case-by-case basis, the Court also concluded that States must be allowed to choose how to redress breaches of property rights because they are in "the best position to assess the practicalities, priorities and conflicting interests on a domestic level even in a situation such as that pertaining in the northern part of Cyprus."<sup>150</sup>

The Court has clearly rejected not only the view that exceptions to restitution must be limited to physical impossibility, but also the basic formula that restitution is the rule and its denial is the

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147. *Id.* at 86-88.

148. *See infra* Section V (discussing whether protection of settlers under international law depends on good-faith analysis).

149. *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365, 411-12.

150. *Id.* at 412.

exception.<sup>151</sup> The Court rejected this formula partly because the weight of the Greek-Cypriot refugees' interests in restitution had diminished with the passage of time.<sup>152</sup> The Court, however, was also aware of the large number of current occupiers of the expropriated property. The language used by the Court suggests it was wary of international law imposing a positive obligation on a State to interfere with the lives of a large number of individuals. In the words of the Court:

It cannot be within this Court's task in interpreting and applying the provisions of the Convention to impose an unconditional obligation on a Government to embark on the forcible eviction and rehousing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention.<sup>153</sup>

This statement does not merely clarify that denying restitution may extend beyond physical impossibility and that claims for restitution must be considered on a case-by-case basis taking into account the interests of third parties. It also represents a "not by my hand" pronouncement by the Court, which seems repulsed by the notion that international law should impose a positive obligation on a State that entails, in the somewhat emotional language used by the Court, "the forcible eviction and rehousing of potentially large numbers of men, women and children."<sup>154</sup>

This position may explain the Court's approach toward the balancing process required of Turkey. The requirement that States consider claims to restitution on a case-by-case basis, taking into account the interests of the particular individuals involved, does not preclude the Court from handing down guidelines for a balancing process.<sup>155</sup> Former Israeli Chief Justice, Aharon Barak, has observed

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151. *See supra* notes 54-55 and accompanying text.

152. *See Demopoulos*, 2010-I Eur. Ct. H.R. at 410 ("[T]he Court can only conclude that the attenuation over time of the link between the holding of title and the possession and use of the property in question must have consequences on the nature of the redress that can be regarded as fulfilling the requirements of Article 35 § 1 of the Convention.").

153. *Id.* at 411.

154. *Id.*

155. *See, e.g., Maslov v. Austria*, 2008-III Eur. Ct. H.R. 301, 320 (listing guidelines for balancing analyses that concern the permissibility of interference with the right to a private life).

that principled balancing, which is “based on a general ‘formula’ that can be applied in similar cases,” is preferable to *ad hoc* balancing, which is guided only by “the baseline determination that one should balance the competing principles according to what the circumstances of the case require,” because the latter is more susceptible to arbitrariness.<sup>156</sup>

The interest in conducting principled balancing, guided by general criteria set forth by the ECtHR, possibly gains significance given the large number of restitution claims that Turkey must consider. The guidelines might require Turkey to take into account the period of residence of current occupiers in the expropriated property, the period of residence of the dispossessed owners in the property before its expropriation, and whether or not the dispossessed owners built the dwelling in dispute.<sup>157</sup> Guidelines for balancing analyses might also distinguish between two categories of current occupiers of Greek-Cypriot property: Cypriot-Turks who have fled from Southern Cyprus where they lost their homes and Turkish settlers who have migrated from the mainland.<sup>158</sup>

Yet, the Court has not attempted to lay out any guidelines for balancing analyses that weigh the interests of the applicants against those of the present occupiers of the property. The Court did not provide any examples of circumstances, beyond the passage of time since the dispossession of the Greek-Cypriot owners, which the IPC should typically consider.

The *Demopoulos* judgment did not examine whether primary norms of international human rights law protect current occupiers of

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156. Aharon Barak, *Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 95-96 (2002) (recommending that judges “formulate a rational principle that reflects a criterion that incorporates a principled guideline, thus distancing themselves from a random paternalistic criterion, whose directions and nature cannot be anticipated”) (internal citations omitted).

157. Examples of these general criteria can be found in the plan for the reunification of Cyprus submitted in 2004 by the Secretary General of the UN at the time, Kofi Annan. See *The Comprehensive Settlement of the Cyprus Problem*, HELLENIC RES. INS. (Mar. 31, 2004), art. 10, [http://www.hri.org/docs/annan/Annan\\_Plan\\_April2004.pdf](http://www.hri.org/docs/annan/Annan_Plan_April2004.pdf) (laying out, among others, principles for resolving conflicting claims to property by the dispossessed owners and the current occupiers of the property).

158. *Id.* at arts. 10(3)(d), 10(3)(f).

the property against eviction.<sup>159</sup> Rather, the case concerned State Responsibility Rules, and the Court examined Turkey's obligation to redress violations of international law resulting from the dispossession of Greek-Cypriots.<sup>160</sup> However, underlying the Court's reluctance to lay down a robust balancing regime that would qualify Turkey's otherwise near-absolute discretion in examining restitution claims is the ethos of international human rights law, which is governed by strong anti-utilitarian sentiment. Commentators have observed that human rights law "insists that the rights of negatively affected individuals are inviolable and cannot be canceled out in a utilitarian calculus."<sup>161</sup> To be sure, the balancing model that prevails in international human rights jurisprudence represents a certain departure from this anti-utilitarian ethos. Moreover, in several decisions, the ECtHR recognized that international human rights law may require the balancing of *competing human rights*, which may result not only in a negative duty of a State not to interfere with the rights of individuals, but also in a positive duty to interfere with the human rights of one person to secure the rights of another.<sup>162</sup> The Court demonstrated, however, a certain degree of reluctance to engage in a balancing of interests that may yield such positive obligation, affording States a wide margin of appreciation with

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159. See generally, Demopoulos v. Turkey, 2010-I Eur. Ct. H.R. 365.

160. See *id.*

161. Adam McBeth, *A Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights*, 40 GEO. WASH. INT'L L. REV. 1101, 1124 (2009).

162. Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, 381 (concerning an applicant that requested to use embryos she created jointly with her former spouse notwithstanding the latter's objection and recognizing that the case concerned "a conflict between the Article 8 rights of two private individuals . . . each person's interest is entirely irreconcilable with the other's"). The ECtHR observed that:

Although the object of Article 8 [of the ECHR] is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves . . . regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation.

*Id.*; see also Odièvre v. France, App. No. 42326/98 (Eur. Ct. H.R. Feb. 13, 2003) (Wildhaber et al., J., dissenting).

respect to “the relations of individuals between themselves.”<sup>163</sup> The *Demopoulos* decision suggests that a model of robust balancing analysis cannot survive in situations in which its application results in international law *requiring* a State to interfere with the lives of a large number of individuals on grounds that are unrelated to misconduct. It seems that a balancing requirement that yields such interference strays too far from the anti-utilitarian ethos underlying human rights law.

The ECtHR rejected the balancing model in yet another case when applying an exception that concerns the protection of individuals to an obligation under State Responsibility Rules. These Rules decree that States are obligated to neither recognize a situation created by a serious breach of a peremptory norm of general international law as lawful, nor render aid or assistance in maintaining that situation (“obligation of non-recognition”).<sup>164</sup> This rule of customary international law prohibits States from recognizing the validity of acts performed by an illegal regime. However, in the *Namibia Advisory Opinion*, in 1971, the ICJ recognized an exception to the obligation of non-recognition (the “Namibia exception”), which considers the interests of individuals residing in territory controlled by the illegal regime.<sup>165</sup> Noting the obligation of States not to recognize the acts of the illegal regime established by South Africa

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163. *Odièvre*, App. No. 42326/98, para. 46 (“The Court reiterates that the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States’ margin of appreciation”); *see also Evans*, 2007-I Eur. Ct. H.R. at 382; Lorenzo Zucca, *Evans v United Kingdom: Frozen Embryos and Conflicting Rights*, 11 EDINBURGH L. REV. 446, 448 (2007) (distinguishing horizontal conflict between competing human rights from vertical conflict between a public interest and a human right, Zucca observes that the ECtHR in *Evans* “seems more at ease with the vertical conflict of interests rather than with the horizontal conflict of rights,” because, in the view of the Court, balancing between competing rights to private life “would amount to arbitrariness”).

164. *Draft Articles*, *supra* note 14, art. 41 (“No state shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation”).

165. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 44 (June 21) [hereinafter *Namibia Advisory Opinion*].



in Namibia, the ICJ stated:

[N]on-recognition . . . should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.<sup>166</sup>

Delineating the contours of the exception to the non-recognition obligation, the *Namibia Advisory Opinion* referred only to *ex post facto* recognition of acts of routine administration, such as the registration of births, marriages, and deaths.<sup>167</sup> However, “[t]he increasingly voluminous body of human rights law has had an important effect on the obligation of non-recognition and on the exception to it.”<sup>168</sup> Thus, in recent years, the ECtHR has adopted a broad construction of the Namibia exception, which provides for a broad *ex ante* recognition of an illegal regime’s legal authority to the extent that such authority is necessary for complying with the positive obligations of the regime to ensure and protect human rights. The ECtHR has thus recognized the validity of criminal laws enacted by the illegal regime of the TRNC on the ground that criminal legislation is an essential instrument for the protection of human rights and its invalidity would be detrimental to the local population.<sup>169</sup> The Court emphasized that this conclusion did not

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166. *Id.* .

167. *Id.*

168. RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 88.

169. Recognizing the validity of criminal laws enacted by the “TRNC”, the ECtHR observed:

The Court recalls that the overall control exercised by Turkey over the territory of northern Cyprus entails her responsibility for the policies and actions of the “TRNC” and that those affected by such policies or actions come within the “jurisdiction” of Turkey for the purposes of [a]rticle 1 of the Convention with the consequence that Turkey is accountable for violations of Convention rights which take place within that territory. It would not be consistent with such responsibility under the Convention if the adoption by the authorities of the “TRNC” of civil, administrative or criminal law measures, or their application or enforcement within that territory, were to be denied any validity or regarded as having no “lawful” basis in terms of the Convention.

undermine the international community's position regarding the illegality of the TRNC regime.<sup>170</sup> Little doubt, however, exists that the ECtHR broadly recognizing the legal authority of the TRNC "benefits the purported sovereignty of the illegal regime."<sup>171</sup> Indeed, "[t]his jurisprudence provides such a wide exceptional validity under the Namibia exception, that little remains of the obligation of non-recognition insofar as internal acts are concerned."<sup>172</sup>

The ECtHR did not subject its willingness to recognize the legislative powers of the illegal regime to any balancing analysis.<sup>173</sup> It did not weigh the benefits of the legislation in question for the local population against the interests compromised by broadly recognizing the legal authority of the illegal regime, particularly the interests of the ousted sovereign and the interest in vindicating the international legal order.<sup>174</sup> It has been observed that expanding the *Namibia* exception is "an inevitable consequence of the expansion of international human rights law, which was not fully envisaged in 1971."<sup>175</sup> Thus, the ECtHR jurisprudence expanding the Namibia exception is another example of the Court rejecting the balancing model in applying an exception that concerns the protection of a large number of individuals to an obligation under State Responsibility Rules.

The reluctance of international law to require a State to interfere with the lives of a large number of individuals, even as a means of amending previous violations of international law, also affects the

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Foka v. Turkey, App. No. 28940/95, para. 83 (Eur. Ct. H.R. June 24, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87175>; see also Protopapa v. Turkey, App. No. 16084/90, para. 94 (Eur. Ct. H.R. Feb. 24, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91499>.

170. *Foka*, App. No. 28940/95, para. 84.

171. RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 95; see Martin Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 677, 678 (James Crawford et al. eds., 2010) ("As a minimum, the rationale of the obligation of non-recognition is to prevent, in so far as possible, the validation of an unlawful situation by seeking to ensure that a *fait accompli* resulting from serious illegalities do not consolidate and crystallize over time into situations recognized by the international legal order.")

172. RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 92.

173. See Protopapa v. Turkey, App. No. 16084/90; *Foka*, App. No. 28940/95.

174. *Id.*

175. RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 94.

international law approach toward the claims of victims of mass dislocations to return to their country. Although both the Universal Declaration of Human Rights and the ICCPR recognize that everyone has the right to enter one's own country,<sup>176</sup> "scholars generally have viewed it to apply only to an individual but not to individuals belonging to a [dislocated] mass group."<sup>177</sup> Moreover, the prevailing view in the legal literature holds that the right of return following mass dislocation of populations has not been accepted as a norm of customary international law.<sup>178</sup> One of the main considerations underlying this approach concerns the potential interference with the lives of many current occupiers of the property that the refugees left behind because the claim of refugees to return to their country is typically linked to their claim to repossess such property.<sup>179</sup> Indeed, the return of refugees to their country is often practical only if the State recognizes their claim to repossession.<sup>180</sup>

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176. ICCPR, *supra* note 97, art. 12(4) ("No one shall be arbitrarily deprived of the right to enter his own country."); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), art. 13(2) [hereinafter UDHR] ("Everyone has the right to leave any country, including his own, and to return to his country.").

177. Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1095 (1998); *see also* Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 324-25 (1995):

International practice . . . does not support the claim that the right of return following mass relocation of populations is recognized under international law. This observation of state practice is enhanced by the lack of support in legal literature for the right of refugees to return to the country they have fled. Despite persistent calls for the recognition of such a right, mainly by German and Palestinian jurists, the prevailing view is that this right is not recognized in human rights instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and that it is yet to be generally accepted as part of customary law.

HURST HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 59 (1987) ("There is no evidence that mass movements of groups such as refugees or displaced persons were intended to be included within the scope of article 12 of the Covenant by its drafters").

178. Benvenisti & Zamir, *supra* note 177, at 325.

179. *Id.* at 328-29 (stating that the main concern rests in the "interest and expectations" of current possessors who relied on domestic laws to gain possession of the property that the refugees have left behind); *see* Rosand, *supra* note 177, at 1101-03 (observing that one of the obstacles to the return of Bosnian refugees is the tension between their claim to repossess their properties and the claims of current occupiers of the property).

180. *Id.*

Here, the protection of current occupiers of the property of refugees takes the form of restrictively interpreting a primary norm of international human rights law (i.e., the right of everyone to enter one's own country).<sup>181</sup> Such an interpretation does not provide for a balancing of interests that takes into account the circumstances of each situation.<sup>182</sup> It is premised, in part, on the recognition that international law should never impose a positive obligation on a State that is likely to result in interference with the lives of a large number of individuals.

In sum, international law is reluctant to impose a positive obligation to interfere with the lives of a large number of individuals upon States. Therefore, the inquiry into whether international human rights law *prohibits* repatriating illegally implanted settlers is fundamentally different from whether State Responsibility Rules *exempt* the occupant from bringing about repatriation. An exemption under the latter does not depend on a prohibition under the former. The inquiry into whether the interests of individual settlers have attained sufficient legal significance to support an exception to an occupant's duty to make restitution (i.e., repatriate the settlers) seems far from the strict balancing of interest analysis that prevails in international human rights law. Rather, State Responsibility Rules seem to recognize an exception to the obligation of restitution whenever imposing such obligation would result in the "forcible eviction and rehousing of potentially large numbers of men, women and children."<sup>183</sup>

## V. DOES THE PROTECTION OF SETTLERS UNDER INTERNATIONAL LAW DEPEND ON GOOD-FAITH ANALYSIS?

The ILC commentary regarding the scope of the material impossibility exception to the restitution obligation recognizes that "in certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible."<sup>184</sup> The ILC notes, however, that "whether the position of a

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181. Benvenisti & Zamir, *supra* note 177, at 324-25.

182. *Id.*

183. Demopoulos v. Turkey, 2010-I Eur. Ct. H.R. 365, 411.

184. *Draft Articles, supra* note 14, art. 35 (commentary).

third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.”<sup>185</sup>

Several commentators have resorted to good-faith analysis in applying either international human rights law or State Responsibility Rules to the claims of individuals who are the beneficiaries of a State’s violation of international law. Addressing the scope of protection granted to such individuals under State Responsibility Rules, Eyal Benvenisti views that “the good faith of the individual who benefited from the consequences of the breach is a necessary condition for upholding her claim.”<sup>186</sup> Benvenisti thus maintains that “the expectations of citizens who took part in or benefited from illegal acts knowing that these acts violated the law of occupation . . . do not merit respect.”<sup>187</sup>

Similarly, Yael Ronen relies on good-faith analysis to examine the extent of protection against repatriation granted under international human rights law to settlers illegally implanted in an occupied territory. Observing that such protection turns largely on the proportionality requirement,<sup>188</sup> Ronen contends that “the proportionality of expulsion is measured, *inter alia*, against the behavior of the individual” and “[a] person acting in good faith is entitled to greater consideration than one who has deliberately acted in bad faith.”<sup>189</sup>

Contrasting the Turkish settlers of Northern Cyprus with the Israeli settlers of the West Bank, Ronen observes that whereas the migration of the former was voluntary, induced by promises of a higher quality of life, it was also characterized by “ignorance of the political and legal circumstances that concern the new habitat, the legal status of the territory and its consequences regarding the status

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185. *Id.*

186. BENVENISTI, *supra* note 3, at 313.

187. *Id.*

188. Yaël Ronen, *Status of Settlers Implanted by Illegal Regimes Under International Law* 55, 67 (Int’l L. Forum, Hebrew Univ. of Jerusalem, Research Paper No. 11-08, 2008) [hereinafter Ronen, *Status of Settlers*] (highlighting that the proportionality test comes out with different results when determining the extent of protection against repatriation).

189. *Id.* at 68.

of the settlers.<sup>190</sup> Ronen attributes such ignorance to the low level of education among the Turkish settlers, arguing that many of them may have not known where Cyprus was located before arriving there.<sup>191</sup>

By contrast, Ronen observes that:

[T]he status of the [Israeli] settlements has been, and still is, a central part of the political and legal discourse in Israel. Although not every settler is an expert of international law, only few among the inhabitants of the settlements are completely unaware of the political and legal ramifications of the settlement activity.<sup>192</sup>

Ronen also observes that, whereas the Turkish settlers were not politically motivated, many of the Israeli settlers migrated into the occupied territory intending to influence its status.<sup>193</sup> Using a good-faith analysis as one of her considerations, Ronen concludes that international human rights law prohibits the repatriation of the Turkish settlers of Northern Cyprus,<sup>194</sup> but it does not provide a similar protection to the Israeli settlers of the Palestinian occupied territory.<sup>195</sup>

This type of good-faith analysis is problematic, however, because it indirectly requires individuals to follow norms that do not apply to them, attaching a price tag to conduct that ignores such norms. The international prohibition against an occupying State settling its nationals within the occupied territory is binding upon the occupying State itself and upon state officials who are in a position to facilitate such settlement, but it is not binding upon individual settlers.<sup>196</sup>

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190. Ronen, *International Law*, *supra* note 72, at 87 (author's translation).

191. RONEN, *TRANSITION FROM ILLEGAL REGIMES*, *supra* note 10, at 233.

192. Ronen, *International Law*, *supra* note 72, at 87 (author's translation).

193. *Id.*; *see also* RONEN, *TRANSITION FROM ILLEGAL REGIMES*, *supra* note 10, at 233 (observing that the Turkish settlers "were not politically motivated in coming").

194. RONEN, *TRANSITION FROM ILLEGAL REGIMES*, *supra* note 10, at 242-43 (using international human rights law analysis, Ronen concludes that "even in Cyprus, large-scale expulsion does not seem to be legally possible . . . in both the Baltic states and Cyprus, international law protects the right of settlers to remain in the territory").

195. Ronen, *International Law*, *supra* note 72, at 91 (finding that the proportionality test does not prohibit repatriation of Israeli settlers as it does for the Turkish settlers of Northern Cyprus).

196. *See* Rome Statute, *supra* note 6, art. 8(2)(b)(viii) (proscribing "the transfer,

Moreover, although good faith is considered a “general principle” of international law, binding upon *States* in the exercise of their rights and obligations under international law,<sup>197</sup> “there exists no obligation on individuals to act in good faith under international law.”<sup>198</sup>

Applying a good-faith analysis in considering the plea of settlers for non-repatriation does not directly punish individual settlers for disregarding an international law norm that does not apply to them. Nevertheless, it holds them accountable for such conduct by detracting from the protection provided to them under international law. This position assumes that the international community may legitimately expect individuals to feel bound by norms that do not formally apply to them, but which are binding upon their State. This expectation is, however, far from self-evident. It blurs the distinction between individual and state responsibility and raises fairness concerns similar to those underlying a prevalent maxim of criminal law: *nulla poena sine lege* (i.e., no punishment without law).<sup>199</sup>

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directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” as a war crime); Cottier, *supra* note 6, at 369 (observing that this international criminal prohibition extends beyond the forceful transfer of population and encompasses “indirect” transfers, consisting in actions of state officials aimed at facilitating the voluntary settlement of the occupant’s nationals within the occupied territory). However, this prohibition cannot be construed to impose criminal responsibility upon individual settlers who were the object of such indirect transfer. *See* RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 207 (“[I]t is unlikely that criminal responsibility rests with every individual settler.”); Cottier, *supra* note 6, at 369 (specifying categories of individuals that may incur criminal responsibility under Article 8(2)(b)(viii) of the Rome Statute, and making no reference to individual settlers).

197. Steven Reinhold, *Good Faith in International Law*, 2 UCL J.L. & JURISPRUDENCE 40, 40 (2013) (“As a ‘general principle,’ good faith forms part of the sources of international law.”). Reinhold further observes that:

The principle of good faith therefore acts not as a source of rights or obligations, but more as a means of guiding the exercise of those rights or obligations. Instead of answering what the obligations placed on a State are, or why they create legal effects for the State, the principle of good faith . . . can guide a State’s behavior as to how the inherent rights and obligations are exercised.

*Id.* at 58; *see also* Michael Virally, *Review Essay: Good Faith in Public International Law*, 77 AM. J. INT’L L. 130, 130 (1983).

198. Hélène Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 INT’L & COMP. L.Q. 161, 172 (2006).

199. STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 32 (3d ed. 2000) (observing that this

Moreover, concerns of arbitrariness loom large. Individuals' awareness of violations of international norms that do not directly apply to them may vary in degree from mere rumors to certainty. What is the degree and nature of awareness of violations of international law that attains legal significance in the application of international human rights law or of State Responsibility Rules?

Various factors may indicate the degree to which individual settlers are aware of the violation of international law arising from their settlement in the occupied territory. These factors include: extensive public discourse about the settlements in their society, which exposes them to claims from the international community about the illegality of the settlement activity; the social circumstances of the settlers (e.g., their level of education) that affect their exposure to opinions about violations of international law; the relative moral gravity of the acts that amount to violations of international law; and presentations made by the settlers' government regarding the content of international law. The passage of time may be another factor that is relevant for assessing the good faith of individual settlers. Our moral expectations of the second or third generation of settlers may differ from our expectations of the settlers who migrated to the occupied territory. Various factors that are key to assessing an individual's bad-faith may point in different directions and international law provides no guidance regarding the relative weight of each factor.

As noted by one commentator, "bad faith is never to be presumed

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principle's manifestation includes "constitutional prohibitions on ex post facto laws, judicial rules of construction limiting the use of analogy in interpreting criminal laws, doctrines prohibiting ambiguous criminal laws, and provisions in international human rights instruments barring prosecutions for acts not criminal at the time of their commission"); M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327, 373 (2005) ("The maxims *nulla poene sine lege* and *nullum crimen sine lege* have long been regarded as cornerstone principles of criminal law. They have become known in almost all of the world's legal systems as the principles of legality"); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 576 (2006) ("Ultimately, the *nullum crimen* principle turns on fairness to the defendant."); Jürgen Schwarze, *Judicial Review of European Administrative Procedure*, 68 LAW & CONTEMP. PROBS. 85, 104-05 (2004) (arguing that this principle should also govern the imposing of non-criminal sanctions).



but, rather, always has to be proven.”<sup>200</sup> Settlers may be exposed to conflicting messages about the legality of settlements under international law from their government and others in their country and abroad.<sup>201</sup> How should the settlers address such conflicting claims? Are individual settlers expected to question their government’s position about the state of international law? Is it sufficient that an individual settler knew of a *claim* regarding a violation of international law? The lack of clear international law rules that provide guidance for assessing good faith is likely to cause arbitrariness and political manipulation in distinguishing one group of settlers from another.

The position that ties the protection of individuals under State Responsibility Rules to the assessment of their good faith has been clearly rejected by the ECtHR in *Demopoulos*. Although the Court ascribed considerable weight to the interests of current occupants of the applicants’ property, it saw no reason to inquire into their good faith in occupying property previously expropriated in violation of international law. The Court’s judgment completely disregards the question of whether and to what extent current occupants were aware of the violations of international law arising from the dispossession of the owners of the property and whether Turkish settlers occupying Greek-Cypriot property were aware of the violation of international law arising from their migration to Northern Cyprus. Proponents of good-faith analysis have thus critically observed that “the ECtHR took into account the interests of the Turkish settlers . . . . [and] [i]t did not tie the legitimacy of these interests with considerations of the legality or good faith involved in those settlers’ residence in the TRNC.”<sup>202</sup> By contrast, the ECtHR did examine the good faith of

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200. Reinhold, *supra* note 197, at 50.

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The legal debate concerning the Israeli settlements has focused primarily on Article 49 paragraph 6 of the Fourth Geneva Convention, which prohibits the occupant from transferring parts of its own civilian population into the territory it occupies. The Israeli government has always maintained that the prohibition does not include voluntary transfer of citizens to occupied territories because it was informed by, and should be interpreted in light of, the policies practiced by Germany during WWII, to which the Israeli policy cannot be compared.

Ben-Naftali, Gross & Michaeli, *supra* note 3, at 581; *see supra* notes 2-4 and accompanying text (discussing how the international community has rejected this position).

202. RONEN, TRANSITION FROM ILLEGAL REGIMES, *supra* note 10, at 100; *see*

individuals in purchasing previously expropriated property if it was alleged that the purchase violated *domestic* regulations.<sup>203</sup> The position that links the protection of individuals under State Responsibility Rules to good-faith analysis concerning awareness of violation of international law also lacks support in the ICJ jurisprudence.<sup>204</sup>

The reluctance of the ECtHR in *Demopoulos* to resort to good faith analysis seems to undermine the position stated in the ILC Commentary, which maintains that the good faith of a third party that would be adversely affected by restitution should be considered in examining whether the material impossibility exception applies to protect that party.<sup>205</sup> Alternatively, a combined reading of *Demopoulos* and of the ILC Commentary may suggest that good-faith analysis has limited weight in determining the applicability of the material impossibility exception. According to this understanding, although good-faith analysis may be significant in determining whether the interests of one or a few third parties preclude restitution, such analysis cannot overturn the fundamental reluctance of international law to impose on States a positive obligation to interfere with the lives of a large number of individuals. *Demopoulos* suggests that good-faith analysis that concerns the

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*also* Loucaides, *supra* note 60, at 461 (“[I]t is submitted that the Court wrongly . . . makes allowances for persons living on the properties of the applicants, granted that all those persons who do use the properties in question without the consent of the lawful owners are trespassers.”).

203. *Pincová v. Czech Republic*, 2002-VIII Eur. Ct. H.R. 311, 323 (underlining that the Czech authorities argued that the applicants have purchased the expropriated property “at a price lower than the price resulting from application of the rules on prices then in force”).

204. The jurisprudence of the International Court of Justice does not directly address the question of whether or not the protection of individuals under State Responsibility Rules should be linked to good-faith analysis. As noted above, in its *Namibia Advisory Opinion*, the ICJ recognized an exception to the obligation of states under State Responsibility Rules not to recognize as lawful a situation resulting from a serious breach of a peremptory norm of international law. *Namibia Advisory Opinion*, *supra* note 165, at 44 (noting that the exception holds that such non-recognition is not warranted where it can operate “only to the detriment of the inhabitants of the Territory”). See RONEN, *TRANSITION FROM ILLEGAL REGIMES*, *supra* note 10, at 99 (“[T]he majority opinion in the *Namibia Advisory Opinion* does not mention good faith as a condition for protection under the exception”).

205. See *supra* note 161 and accompanying text.

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awareness of Israeli settlers of the violation of international law arising from the settlements enterprise does not preclude the application of the material impossibility exception to their plea for non-repatriation.

## VI. THE FUTURE OF SETTLEMENTS AND NEGOTIATIONS TOWARD ENDING THE OCCUPATION

An exemption from the obligation to repatriate illegally implanted settlers granted to an occupant under the material impossibility exception does not shield the settlers from repatriation by the legitimate sovereign of the occupied territory when the occupation ends, if that repatriation is not prohibited under international human rights law. However, applicability of the material impossibility exception is highly significant in determining whether an occupant may legitimately advance the interest of settlers in non-repatriation as part of negotiating the end of occupation.

The applicability of the restitution obligation, which reflects the occupant's duty to repatriate the settlers, *a priori* precludes considering the interest in non-repatriation as a legitimate claim by the occupant in negotiating the end of occupation. The argument that an occupant may insist, in the course of negotiations, on the continued existence of a factual reality that the occupant itself is duty-bound to terminate, is hardly tenable. Yet, this article shows that the absence of a duty of the occupant to repatriate the settlers allows for a strong argument in favor of including the interest in non-repatriation within the sphere of interests that an occupant may legitimately promote in negotiating the end of occupation.

Any inquiry into the range of interests that an occupant may legitimately promote in negotiating the end of occupation is inherently confined to occupations resulting from the lawful use of force. Occupations emanating from an unlawful use of force by the occupant represent a continuing violation of the international prohibition against the use of force.<sup>206</sup> Because customary

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206. An amendment to the Rome Statute of the International Criminal Court, adopted by consensus in 2010, provides that one of the acts that qualify as an "act of aggression" is "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting

international law recognizes no exception to the obligation of States to cease an internationally wrongful conduct, such occupation must be terminated unconditionally. Examining whether Israel may insist on the non-repatriation of Israeli settlers in negotiating the end of its occupation of Arab territories, this article follows the prevailing view that this occupation resulted from Israel's lawful use of force in self-defense.<sup>207</sup>

Some commentators argue that, in the case of an occupation that resulted from the occupant using force in self-defense, whether the continued occupation is legal is subject to the necessity and proportionality requirements that delineate the contours of the right to self-defense.<sup>208</sup> According to this view, the interests that the occupant may legitimately pursue in maintaining the occupation and

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from such invasion or attack." See Resolution RC/Res.6 of the Review Conference of the Rome Statute, Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court, (June 11, 2010). Similarly, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, adopted by consensus by the U.N. General Assembly, states that "the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter." Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970); see also *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100 (June 27) (holding that this General Assembly resolution is indicative of customary international law).

207. See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 206-07 (5th ed. 2012); GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 20-21 (1990); THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 105-06 (2002); GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* 30 (2000); Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 491-92 (1999):

The United Nations appeared to recognize the right of anticipatory self-defense when Israel launched a preemptory airstrike against Egypt, precipitating the 1967 "Six Day War." Many countries supported Israel's right to conduct defensive strikes prior to armed attack and draft resolutions condemning the Israeli action were soundly defeated in the Security Council and the General Assembly.

But see John Quigley, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements*, 25 SUFFOLK TRANSNAT'L L. REV. 73, 81 (2001) ("Israel's claim of self-defense in the 1967 war is factually implausible.").

208. ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 55, 99 (1995); BENVENISTI, *supra* note 3, at 17.

negotiating its termination are limited to those security objectives that a State may promote in a war of self-defense.<sup>209</sup> This view does not seem to allow an occupant to present conditions for ending the occupation, other than the establishing of security measures that are designed to “remove the threat of reasonably foreseeable future attacks.”<sup>210</sup> It is possible, however, to point to international practice that runs counter to this view.

U.N. Security Council Resolution 242, adopted in the wake of the 1967 war that resulted in the Israeli occupation of Arab territories, tied Israel’s withdrawal from occupied territories to the establishment of “a just and lasting peace,” which entails “respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace.”<sup>211</sup> This Resolution indicates that Israel may legitimately require *political* measures, such as Arab countries formally recognizing Israel’s right to exist, as a condition to ending the occupation.

Moreover, a large segment of the international community seems to have accepted the Israeli position that withdrawing from occupied territories must be part of a comprehensive political settlement that

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209. See Cassese, *supra* note 180, at 55; BENVENISTI, *supra* note 3, at 17.

210. Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law* 20 (George C. Marshall Ctr., Paper No. 5, 2002) (justifying use of force in self-defense that is “no more than necessary to defeat the armed attack and remove the threat of reasonably foreseeable future attacks.”). Some commentators have argued that the use of force in self-defense must be limited to halting and repelling the armed attack that triggered the right to use force, and that the aims of war may not extend to the creation of permanent conditions of security. See ANTONIO CASSESE, *INTERNATIONAL LAW* 355 (2d ed. 2005) (“Self-defence must limit itself to rejecting the armed attack; it must not go beyond this purpose.”); Enzo Cannizzaro, *Contextualizing Proportionality: Jus As Bellum and Jus In Bello in the Lebanese War*, 88 INT’L REV. RED CROSS 779, 785 (2006).

211. Providing that the Security Council:

1. *Affirms* that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles: (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict; (ii) Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.

S.C. Res. 242, para. 1, U.N. Doc. S/RES/242 (Nov. 22, 1967).

marks the “end of all claims.”<sup>212</sup> In the context of the Israeli-Palestinian conflict, the “end of all claims” mainly refers to settling the controversy between Israel and the Palestinians regarding the claim of Palestinian refugees to a right of return to the territory of Israel proper.<sup>213</sup> International practice thus suggests that in negotiating the end of occupation, an occupant may legitimately pursue certain interests that extend beyond security measures on the ground.

Yoram Dinstein has suggested that, in negotiating the terms of a peace treaty ending the occupation, an occupant may insist on vindicating state interests that seem remote from the sphere of security considerations, such as the payment of reparations to the occupant by the sovereign of the occupied territory.<sup>214</sup> The scope of interests transcending security considerations, which an occupant may legitimately pursue in maintaining the occupation or negotiating its termination, remains unclear. Addressing the uncertainty concerning the range of legitimate interests that may be pursued by an occupant, Gabriella Blum observed that, “the only uniform restraint upon present-day occupations seems to be the ban on annexation.”<sup>215</sup>

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212. *Statement by PM Netanyahu on Address by US President Obama*, ISR. MINISTRY OF FOREIGN AFFAIRS (May 19, 2011), [http://mfa.gov.il/MFA/PressRoom/2011/Pages/PM\\_Netanyahu\\_US\\_President\\_Obama\\_speech\\_19-May-2011.aspx](http://mfa.gov.il/MFA/PressRoom/2011/Pages/PM_Netanyahu_US_President_Obama_speech_19-May-2011.aspx) [hereinafter *Statement by PM Netanyahu*]; see, e.g., Press Release, European Union, Joint Statement by the EU High Representative Catherine Ashton and the Foreign Minister of the Russian Federation Sergey Lavrov on Middle East Peace Process (Dec. 21, 2012), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/134545.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/134545.pdf) (“The parties must engage in direct and substantial negotiations without preconditions in order to achieve a lasting solution to the Israeli-Palestinian conflict, ending all claims”).

213. See *Statement by PM Netanyahu*, *supra* note 212; see also Benvenisti & Zamir, *supra* note 177, at 295 (observing that this controversy is perceived to be “one of the major stumbling blocks to Israeli-Palestinian reconciliation.”).

214. DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 23, at 270:

The treaty of peace may even permit future return of armed forces of the (formerly) Occupying Power to at least a portion of what used to be an occupied territory, in response to a material breach of its provisions by the restored sovereign. Article 430 of the Treaty of Versailles permitted such reoccupation as a countermeasure against Germany’s possible failure to observe its obligations in the sphere of reparations. In the event, France and Belgium actually reoccupied the Ruhr Valley on that basis in 1923.

215. Gabriella Blum, *The Fog of Victory*, 24 EUR. J. INT’L L. 391, 405 (2013).

International practice directly supports the view that an occupant may legitimately insist on the non-repatriation of settlers in negotiating the end of occupation. Reviewing the various cases of illegally implanted settlers, Yael Ronen observes that “in most of the cases . . . the settler population was eventually given the opportunity to remain in the territory, either unreservedly (as in Zimbabwe and South Africa), or with qualifications (in the Baltic States only to civilian population, in the TRNC on a numerical basis).”<sup>216</sup> Recognizing the role of political realities and considerations that shape these arrangements does not justify dismissing the emerging practice in construing customary international law. An analogy to the claim of victims of mass deportations to a right of return and to the repossession of their property seems instructive.

Reviewing international practice, Eyal Benvenisti and Eyal Zamir observed that “history shows that in no case of massive relocation—either in accordance with an agreed plan or as a result of the horrors of war—have the refugees regained the property they left behind.”<sup>217</sup> Similarly, they demonstrated that international practice runs contrary to the claim that the right of return of victims of mass dislocations is recognized under international law.<sup>218</sup> This practice affects the strength of refugees’ claims to repossess the property that they have left behind and to a right of return, and was one of the factors that led Benvenisti and Zamir to conclude that customary international law does not recognize such rights.<sup>219</sup> Addressing later events, Eric Rosand expressed hope that the return of hundreds of thousands of Bosnian refugees would support a construction of international treaties that recognizes such a right.<sup>220</sup>

It seems that the weight attributed to state practice regarding the claims of refugees stems from the recognition that in addition to the role of power politics such practice is influenced by “countervailing humanitarian considerations”<sup>221</sup> that concern the interests of individuals who would be adversely affected by the return of refugees to the property they have left behind. Similarly, past

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216. Ronen, *Status of Settlers*, *supra* note 188, at 43.

217. Benvenisti & Zamir, *supra* note 177, at 324.

218. *Id.* at 324-25.

219. *Id.* at 325.

220. Rosand, *supra* note 177, at 1097-98.

221. BENVENISTI, *supra* note 3, at 308.

international practice of non-repatriation of illegally implanted settlers, which may also be attributed to both power politics and “countervailing humanitarian considerations,” suggests that an occupant may legitimately advance the interest of settlers in non-repatriation in negotiating the end of occupation.

## VII. CONCLUSION

State Responsibility Rules provide illegally implanted settlers with protection that is weaker but broader than that they enjoy under international human rights law. International human rights law may prohibit the repatriation of certain settlers. Such protection is not available under State Responsibility Rules. Yet, the interests of individual settlers may support an occupant being exempt from its obligation to dismantle illegally established settlements even if international human rights law allows this measure. Such exemption neither depends on the contours of human rights contained in international human rights treaties of which the occupant is a signatory, nor does it have to be justified under a strict balancing-of-interest analysis. Rather, State Responsibility Rules exempt an occupant from eliminating the consequences of its illegal conduct whenever such measure would entail the forceful eviction of a large number of individuals from their homes. Israel is therefore allowed, but is not required, to repatriate the settlers it has transferred into the Arab territories it occupies. The absence of a duty to repatriate the settlers allows for a strong argument in favor of including non-repatriation within the sphere of interests that Israel may legitimately promote in negotiating the end of occupation.