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Chapter 8

Initial Citizenship and Rectificatory Secessions

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Secessions that are justified by rectificatory justice – i.e. by the fact that they rectify a previous unjust incorporation into another state – very often seem to confront us with a moral dilemma when it comes to the delimitation of the initial citizenry. In non-rectificatory secessions, all legal residents of a seceding unit have legitimate expectations to retain the equal citizenship status that they possessed in the old state, which means that the unconditional inclusion of all inhabitants becomes a requirement of justice. However, what justice requires in the delimitation of the initial citizenry seems more uncertain if the seceding unit has first been unjustly incorporated into another state and then also subjected to settlement of new residents from the incorporating state during the period of incorporation. This is the situation that the Baltic States faced in 1991 and – to some extent – that East Timor experienced in 2002. Moreover, it is a situation that Palestine, Tibet, and Western Sahara would also face if those political units would become independent states in the future. The question called forth in these cases is if justice really requires the unconditional inclusion of all legal residents in the initial citizenry or if the rectification of the injustice does not, in fact, require the exclusion of the settlers.

This chapter investigates what justice requires in the delimitation of the initial citizenry in rectificatory secessions.¹ I will concentrate on the right to unconditional, initial citizenship of people whose presence on the territory of the state is a result of settlement during a period of unjust incorporation into another state. These are people like the Chinese settlers and their descendants in the forcibly annexed Tibet; the Israeli settlers and their descendants on the

occupied West Bank; and the Moroccan settlers and their descendants in the occupied and annexed Western Sahara. Does justice require that these persons are treated as lawful inhabitants who are entitled to unconditional citizenship in the state that emerges or re-emerges on the territory after the incorporation? This was basically the approach chosen in post-Soviet Lithuania. Or does the rectification of injustice require that they are treated as illegal settlers whose right to membership the members of the wronged nation have been unjustly prevented from trying and whom they therefore may deny admission? That was basically the approach chosen in post-Soviet Estonia and Latvia – where the relative share of Soviet era settlers and descendants to settlers was higher than in Lithuania, it should perhaps be added.

I will argue that we should draw a line between inclusion and exclusion in these cases on the basis of a distinction between choice and circumstance. The distinction between choice and circumstance speaks in favour of granting descendants to settlers a right to unconditional inclusion in all these cases. As for the settlers, the distinction speaks in favour of a second distinction between occupations and annexations. On this second distinction, we should grant persons who have settled on annexed territory a right to be unconditionally included while persons who have settled on occupied territory may, in general, justifiably be excluded.

Right against right

The delimitation dilemma addressed here may be described as a situation of right against right, where a right to rectification of the wronged group stands against a right to inclusion of the settlers and their descendants (Reinikainen, 1999). The way we prioritize between these rights ultimately seems to hinge upon how we prioritize between two different conceptions of justice: We either give priority to a rectificatory conception of justice or to a conception of formal justice (as Rawls calls it).

If we prioritize the right of the wronged group we are likely to be morally motivated by a rectificatory conception of justice similar to that defended by theorists like Rodney Roberts in the contemporary debate. Roberts endorses a conception of rectification which includes ‘compensation, restoration, apology, and punishment’ (Roberts, 2002, p. 7). However, the principal aim and benchmark of this conception of rectification seems to be the restoration of *status quo ante*, which means the restoration of the situation that existed before the injustice took place. This presupposes returning exactly the same rights, tenures or possessions that have been unjustly taken whenever possible (Roberts, 2002, p. 15). Rectification, thus understood, is essentially backward looking and it should not be confused with compensation for past injustices. Compensation is both backward-looking and forward-looking in the sense that compensation for past injustices is justifiable from a compensatory perspective when the injustices of the past affect the wronged group negatively today in terms of distributive justice. By contrast, the restoration of *status quo ante* means that we should return what was unjustly taken even if the wronged group is not disadvantaged by the historical injustice today in distributive terms. The reason is that restoration aims ‘to set unjust situations right’ – and in order to undo ‘*the rights violation itself*’ we must restore the very same thing that has been unjustly taken (Roberts, 2002, p. 15).

It is easy to see that this understanding of rectification justifies restoration of the territorial sovereignty of a seized unit in cases of unjust seizure of territory. But what are the implications of restoration of *status quo ante* if we move beyond restoration of sovereignty to the delimitation of the initial citizenry? One understanding of these implications – which I take to be consistent with the idea of restoration of *status quo ante* – is expressed in various declarations by restorationist organizations in Estonia from the early 1990’s. A declaration from 1990 by the so called Congress of Estonia (a restorationist shadow parliament that existed in Estonia at the time) states that the Soviet Union ‘on June 17, 1940 ... commenced a

still current act of aggression against the Republic of Estonia' and that 'the Republic of Estonia is to this day still occupied by the USSR and an illegally annexed country'.² The declaration continues by demanding that 'the free and independent Republic of Estonia must be restored' and that the 'restoration of the Republic of Estonia must be based on the continuity of the Republic of Estonia's citizenship'. The message here is that the Soviet Union has seized Estonia unjustly, and that this injustice can only be rectified through the restoration of the pre-annexation state together with its legal citizenry (Reinikainen, 1999, p. 76-95).

As for the Soviet era migrants and their descendants, the Congress of Estonia describes all considerations 'to give the comers from the Soviet Union the right to obtain Estonian citizenship in a simplified manner ... [as] an attempt to legalize (even partially) the wrong done to Estonia by the Soviet Union during World War II as well as the consequences'.³ According to another declaration from 1995 by the purist restorationist so called Initiative Centre for the Decolonisation of Estonia, 'the only lawful and ethical way to relieve the tensions in Estonia is the peaceful decolonisation of Estonia'.⁴ For the most principled advocates of restoration it was not enough to give the Estonians and Latvians their states and their citizenships back. For them, the restoration of *status quo ante* also included the restoration of the demographic situation that existed before the injustices took place.

That goal was part and parcel of the restoration of the legal situation that existed before the injustices took place, however. Proceeding from an elusive conception of 'legal restoration', the Baltic restorationists argued that the laws of the pre-annexation republics were valid in an ideal sense during the whole Soviet era, creating an ideal legal continuity from the pre-annexation republics and onwards. At the same time, the laws that were introduced by the Soviet Union were claimed to be invalid and basically unlawful in the same ideal sense. Legality could therefore only be restored by restoring the pre-annexation states and their basic laws, such as the constitutions and the citizenship laws. In addition, legal

restoration also required the official annulment of all Soviet laws, including the law on residence (the *Propiska*) and the law on suffrage in local election – which were the laws that the Soviet era migrants and their descendants had acquired an equal citizenship status in Estonia and Latvia on the basis of (Reinikainen, 1999, p. 16-19). If legal restoration had gone this far, the Estonians and Latvians would, in fact, have been able to deny the Soviet era migrants and their descendants the right to continue their residence in Estonia and Latvia.⁵

However, the perception of justice as the restoration of *status quo ante* is not the only way to look upon justice in these cases. As already mentioned, we may also prioritize justice for the group that is threatened by exclusion, which is how Michael Walzer perceives justice in cases like the ones discussed here. Walzer calls attention to the fact that ‘many newly independent states find themselves in control of territory into which alien groups have been admitted under the auspices of the old imperial regime’ and that in some cases ‘these people are forced to leave’ (Walzer, 1983, p. 42). According to him, there is ‘a kind of territorial or locational right’ on which the ‘state owes something to its inhabitants simply, without reference to their collective or national identity’, and in his eyes ‘the first place to which the inhabitants are entitled is surely the place where they and their families have lived and made a life’ (Walzer, 1983, p. 42). Walzer presumes that the ‘attachments and expectations they have formed argue against a forced transfer to another country’ (Walzer, 1983, p. 42). His conclusion is that ‘[i]nitially, at least, the sphere of membership is given: the men and women who determine what membership means, and who shape the admission policies of the political community, are simply the men and women who are already there’ (Walzer, 1983, p. 43). According to Walzer, ‘[n]ew states and governments must make their peace with the old inhabitants of the land they rule ... including [with] aliens of some sort or another – whose expulsion would be unjust’ (Walzer, 1983, p. 43).

Note the bottom line of Walzer's argument. According to him, the principal argument for including the 'the men and women who are already there' is the 'attachments and expectations they have formed'. The underlying assumption, I take it, is that these expectations are legitimate. This is why their inclusion in the initial citizenry is warranted. If this is the correct reading, the conception of justice implicitly invoked by Walzer is what Rawls calls formal justice or justice as regularity. I will soon return to that.

How should we draw the line?

How, then, should we draw the line between the right to rectification of the wronged group and the right to inclusion of the settlers and their descendants? I will defend a solution here that brands settlement on forcibly seized territory as unjust when done in bad faith, i.e. in full awareness of the fact that the territory is forcibly incorporated. I will assume that the conscious participation in that injustice undermines the claim to both residence and unconditional citizenship in the seceding unit. However, I will also assume that there are acquitting circumstances that absolve the individual from responsibility for the role that they have played in the injustice. These circumstances include settlement in good faith and the haphazardness of being born on the territory to settler parents, grandparents or more remote ancestors. When these circumstances are at hand, a person has a valid claim to unconditional inclusion even if the presence of the person on the territory of the seceding unit is, in fact, a result of settlement during a period of forcible incorporation. If such persons are not granted a right to unconditional membership, a new injustice is done – against the ones excluded this time.

The solution that I defend draws a line between inclusion and exclusion on the basis of a distinction between choice and circumstance. According to this distinction, a person is responsible for her conscious choices but not for circumstances beyond her control. The fact

that I propose to apply the distinction to the question of initial citizenship does not mean that I wish the distinction to be used in a luck egalitarian way on other policy areas as well.⁶ A luck egalitarian application of the distinction, rather, seems relevant in this particular question. The distinction between choice and circumstance is inherent in the principles that ‘a criminal offense requires both a voluntary act (*actus reus*) and a culpable state of mind (*mens rea*)’, which have been described as ‘the most basic principles of modern criminal law’ (Levenson, 1993, p. 401). The distinction may, thus, be described as a taken for granted point of departure that we already implicitly proceed from in our evaluations of responsibility for injustice. What I propose is basically that we should proceed from the same principles in the cases discussed here and see people’s responsibility for their participation in injustices against an unjustly incorporated group as decisive to whether they may be justifiably excluded or included when the territorial sovereignty of the seized unit is restored. Another reason for invoking the distinction between choice and circumstance in this context is that the distinction does a justificatory job in terms of warranting a claim to compensation for those who are disadvantaged by circumstances beyond their control, as is the case if people who have no responsibility for the role they have played in the injustice against a wronged group are divested of their citizenship. In that situation, a right to unconditional inclusion for these persons may be looked upon as the equivalent compensation that they are entitled to.

On the basis of the distinction between choice and circumstance, we should regard persons who have settled on forcibly seized territory in bad faith as personally responsible for their participation in the injustice. The relevant analogy in this situation is a person who wilfully takes the liberty to move into another person’s house in spite of the fact that she knows that the house belongs to another person who has been unjustly deprived of it. On the same distinction, we should not see people who end up on the territory of a forcibly seized unit as a result of circumstances beyond their control as responsible for the role they have

played in the injustice against the wronged group. The relevant analogy in this case could be a person who is deceived to buy an apartment in the house that the original owner has been unjustly bereft of. In the former case, the liberty that the person has taken is illegitimate. In the latter case, the right to residence that the person has acquired should not be seen as illegitimate.

It may be objected here that while being a descendant to settlers is a circumstance beyond a person's control, migrants who have settled in good faith have actually made a choice to settle on the territory of the forcibly seized unit, albeit in good faith. Should a choice – even if made in good faith – really be described as a circumstance that the individual has no personal responsibility for? As far as I can see, it should. The person who is deceived to buy an apartment in a house which the righteous owner has been unjustly bereft of has certainly made a choice to buy the apartment. Yet, she is still a victim of circumstances beyond her control in terms of her participation in the injustice, which is not voluntary (*actus reus*) and intended (*mens rea*). If so, the contract on the apartment should not be considered null and void if the property is restored to the righteous owner, which the property should be since it is a requirement of justice. If the contract on the apartment is nonetheless annulled in the process of restoration, the person who has acted in good faith should be compensated by being offered an equivalent contract on the apartment from the righteous owner unconditionally.

By the same token, persons who settle in good faith on a territory that is unjustly taken from another group have certainly made a choice to settle on the territory, but they are still victims of circumstances beyond their control in terms of their participation in the injustice, which is not voluntary and intended in this case either. The legal rights to residence, suffrage, etc that they have acquired on the territory are not illegitimate and their legal rights should therefore not be considered null and void. If their legal rights are annulled notwithstanding

(i.e. through the disintegration of their state and the abrogation of the citizenship of the old state), these persons ought to be compensated by being offered the option of unconditional registration as citizens in the state that emerges or re-emerges on that territory.

From the point of view of these persons, it would not be sufficient to be offered unconditional citizenship in the annexing state or in its successor state, which the non-citizens in Estonia and Latvia were, indeed, offered by Russia. In a situation where those excluded previously possessed the same citizenship rights as the other inhabitants of the political entity where they reside, that option may not be considered equivalent compensation. The reason is that this option will not grant a person the same rights as the other inhabitants enjoy in their common state of residence. The underlying idea here is that an individual has a claim to equivalent compensation if she is disadvantaged by circumstances beyond her control (Dworkin, 1981), and, in order to be equivalent, compensation must take the form of an option of unconditional citizenship in the restored state in this case. When seen from this perspective, it would, in fact, be just as unfair to annul legal rights that settlers have acquired in good faith without equivalent compensation as it would be to annul the contract on an apartment that a person has acquired in good faith without equivalent compensation. In both cases, good faith similarly tips their actions over from choice to circumstance, which absolves them from responsibility for their participation in the injustice and accords them a claim to equivalent compensation.

The distinction between choice and circumstance may be claimed to offer a criterion for establishing when the right to inclusion should be given normative precedence over the right to rectify injustice. It does so by pinpointing when the expectations of the settlers and their descendants are legitimate and when they are not. The view that the distinction between choice and circumstance implicitly suggests is that settlers and descendants to settlers should be granted a right to be unconditionally included when they have legitimate expectations to

continue their residence on the basis of the rights and the status that they have acquired on the seized territory. The distinction conversely also suggests that settlers may justifiably be excluded when they have illegitimate expectations to continue their residence on the basis of the rights and the status that they have acquired on the seized territory. There are two normative logics in operation here: Settlement in good faith and nascency on seized territory are on the circumstance side in terms of participation in the injustice, which gives rise to legitimate expectations to retain legal rights and an equal citizenship status, as well as to a claim for equivalent compensation if those expectations are not met. Settlement in bad faith is on the conscious choice side in terms of participation in the injustice, which gives rise to illegitimate expectations as well as to a right for the wronged group to exclude the settlers.

The philosophical basis for this view on legitimate expectations may be found in Rawls' conception of justice as regularity – or formal justice as he also calls it (Rawls, 1971, p. 58-60 and 235). According to Rawls, justice as regularity is the justice in a regulatory system, such as a legal system. Justice as regularity safeguards the fair application and administration of the rules that regulate the lives of those subject to the rules. In the legal sphere, formal justice is synonymous with the rule of law: The 'regular and impartial administration of public rules becomes the rule of law when applied to the legal system', Rawls explains (Rawls, 1971, p. 235). According to him, the rule of law is intimately connected with the security that people may feel in the possession of their rights and liberties, and hence it is also intimately connected with freedom. The connection, however, runs through the legitimate expectations that people form under the rule of law. Rawls writes that the 'rule of law is obviously closely related to liberty' since laws that are just in the regulatory sense 'establish a basis for legitimate expectations' (Rawls, 1971, p. 235). They 'constitute grounds upon which persons can rely upon one another and rightly object when their expectations are not fulfilled' he

argues, and continues: ‘If the bases of their claims are unsure, so are the boundaries of men’s liberties’ (Rawls, 1971, p. 235).

One complication with using Rawls’ rule of law based notion of legitimate expectations as a basis for a judgement of the legitimacy of expectations in this context is the fact that there are generally two sets of laws in the type of cases that we discuss here and, into the bargain, these two sets of laws declare diametrically opposite things as regards the legality of settling on the incorporated territory. In the Baltic case, there were, accordingly, the Soviet laws on residence and participation in local elections which declared that the residence and voting rights of the Soviet era migrants in Estonia and Latvia were legal and valid. At the same time, there was an article (49) in the fourth Geneva Convention, which declares that population transfers on occupied territory are illegal and which brands settlement on forcibly seized territory as a breach of international law. On top of that, there was a Western policy of non-recognition which the restorationists in Estonia and Latvia claim undermined the validity of all Soviet laws in Estonia and Latvia, including the laws that the Soviet era migrants and their descendants acquired residence and voting rights on the basis of.

Why should we, then, base our judgment of the legitimacy of the expectations of the settlers and their descendants on the laws of the incorporating state, here the Soviet Union? Why should we not proceed from the norms in international law that brand settlement on forcibly seized territory as illegal? The answer is that we should proceed from the laws that the settlers knew of and perceived as valid, and in the Baltic case those laws were the Soviet laws. One of the features of the rule of law mentioned by Rawls that is particularly relevant in this context is the ‘precept that there is no offense without a law (*Nulla crimen sine lege*)’ (Rawls, 1971, p. 238). Rawls writes that this ‘precept demands that laws be known and expressly promulgated, [and] that their meaning be clearly defined’ for a transgression to be able to take place. If it is not clear what the laws ‘enjoin and forbid, the citizen does not know

how he is to behave' (Rawls, 1971, p. 238). If this is clarified later on by new laws, the new law 'should not be retroactive to the disadvantage of those to whom they apply'. According to Rawls, it would be tyrannical to 'change laws without notice, and punish ... [the] subjects accordingly ... these rules would not be a legal system, since they would not serve to organize social behaviour by providing a basis for legitimate expectations' (Rawls, 1971, p. 238).

It should be pointed out that Rawls has penal law in mind when he writes these lines. Nevertheless, I believe his guidelines to be relevant also to when we may hold people liable for transgressions of other norms, such as the prohibition against settlement on occupied territory in the fourth Geneva Convention. On the basis of Rawls' precept, we may conclude that the legitimacy of the expectations of the Soviet era migrants in Estonia and Latvia should not be judged on the basis of the fourth Geneva Convention if they were unaware of the fact that the Baltic republics were *de facto* occupied and forcibly annexed. If we would judge them on the basis of the Geneva Convention although the information that was available to them at the time of their migration announced that settlement in these republics was entirely lawful, we would apply laws retroactively 'to the disadvantage of those to whom they apply'. To use laws in that way does 'not serve to organize social behaviour by providing a basis for legitimate expectations'.

It should also be pointed out here that the Rawlsian view on legitimate expectations seems highly relevant in these cases also in the sense that it is congruent with the view on legitimate expectations implicitly invoked by many advocates of an inclusionary approach to initial membership in Estonia and Latvia. In a report on the Estonian citizenship policy from 1993, Helsinki Watch argues that the residency of the Soviet era migrants in Estonia 'was legally established under the applicable law at the time they entered the territory of Estonia' and that the migrants therefore should be seen as '(former) legal residents' who are now 'entitled to ... Estonian citizenship ... on the same basis as any other residents of Estonia'

(Helsinki Watch, 1993, p. 14). A declaration by the Russian Democratic Movement (RDM) – a moderate non-citizen oriented party that existed in Estonia in the 1990's – develops the same view. According to the RDM, 'the majority of the people who have found themselves stateless ... have settled here before the republic regained its independence and in accordance with the laws which were in force in the Soviet Union at the time', and that '39 percent of them were born in Estonia' (Semionov, 1993, p. 2). The RDM argues that neither 'they nor their parents could have forecasted the circumstances which have radically changed their legal and political status' (Semionov, 1993, p. 2).

Boris Tsilevich, a Latvian-Russian social scientist, similarly refers to what the migrants and their descendants could have forecasted when he tries to explain the difference between applying conditions for naturalization on newly arrived immigrants and applying the same conditions on a group that has already taken up residence and acquired an equal citizenship status on the basis of existing laws. According to Tsilevich, the 'usual trap is comparing rights and freedoms of Latvian "non-citizens" with rights of immigrants of other European countries' (Tsilevich, 1993, p. 1). According to him, 'these matters are quite different'. Immigrants are 'completely aware of all the rules of the game in advance' while Latvia's disenfranchised 'non-citizens came to Latvia in ... accordance with laws which were in force at the time of arrival ... [and] kept the same citizenship' (Tsilevich, 1993, p. 1). The basic point here is that settlement in the incorporated unit appeared to be lawful to the migrants when they took up residence in Latvia. Hence their expectations to retain the status and the rights that they have acquired on the territory should be considered legitimate.

The legitimacy of a settlement policy on forcibly seized territory is one thing and the legitimacy of the expectations of the settlers is another. The expectations of the settlers to continue their residence on the basis of the rights and status that they have acquired on a territory may, in fact, be legitimate even if the population transfers that the Soviet authorities

put through on the same territories were illegal and unjust. In a situation where the individual settlers have acted in good faith, the fact that settlement on forcibly seized territory is a breach of the Geneva Convention only taints the actions of the occupying state. Eide correctly points out that the fourth Geneva Convention primarily ‘addresses the legality of the acts of the occupier, but does not solve the question of the fate of the human beings that have settled in good faith during long-standing incorporations which, according to the information available to them, appeared to be lawful’ (Eide, 1993, p. 13).

Legitimate expectations as a constraint on rectification

On the view defended here, legitimate expectations should be seen as a constraint on the right to rectification of the wronged group. This means that restoration of *status quo ante* may justifiably be invoked to restore the sovereignty of an unjustly seized unit as well as the citizenship of the pre-annexation population and their descendants. But it cannot be stretched so far as to exclude people who have acquired equal citizenship rights on the territory in good faith and who therefore have formed legitimate expectations to maintain their legal rights and their equal citizenship status. We should, thus, not ‘deny the right of any sovereign state to dismantle the institutions of a former occupying power and to erase the cruel legacy of colonialism’, as Jeri Laber of Human Rights Watch correctly points out (Laber, 1992, p. 15). ‘However’, Laber continues, ‘the rights of individuals should not be compromised in the process’ (Laber, 1992, p. 15). The upshot is that ‘those who have become, in good faith, permanent residents on a territory ... should have the option, without discrimination [with] regard to the other inhabitants of that territory, to become citizens of that ... state’ (Eide, 1993, p. 13).

But why must wronged groups respect legitimate expectations when they restore their sovereignty and citizenry? Can it not be objected here that they have a right to thwart

legitimate expectations if this is necessary for the rectification of the more fundamental injustice that they are the victims of? Rawls actually suggests something similar – even if he, as we have seen, pleads for respect for legitimate expectations in other regards. His argument in this part may seem to belie the idea that legitimate expectations should be seen as a constraint in the process of rectifying injustice. Let us therefore take a closer look at what Rawls says about this and then return to the Baltic case to see if his argument offers a reason for reconsidering my judgment.

According to Rawls, justice as regularity may sometimes coexist with a more fundamental injustice. The reason is that justice as regularity is ‘simply an aspect of the rule of law which supports and secures legitimate expectations’, and that it in itself does not prevent an unjust basic structure (Rawls, 1971, p. 59). In situations where justice as regularity coexists with an unjust basic structure, justice as regularity may be described as a painkiller which does nothing to cure the underlying disease but which still makes life more decent and foreseeable: ‘In this way’, writes Rawls, ‘those subject to them [i.e. the laws] at least know what is demanded and they can try to protect themselves accordingly; whereas there is even greater injustice if those already [unjustly] disadvantaged are also arbitrarily treated in particular cases when the rules might give them some security’ (Rawls, 1971, p. 59). But then he adds that ‘it might be still better in particular cases to alleviate the plight of those unfairly treated by departures from the existing norms’. Rawls is uncertain of ‘[h]ow far we are justified in doing this, especially at the expense of expectations founded in good faith on current institutions’ (Rawls, 1971, p. 59). However, let us presume that this would be justified whenever it is necessary to put an end to a more fundamental injustice.

If we translate this argument to the Baltic case, it might be argued that the Soviet laws on residence and suffrage in local elections were, to some extent at least, formally just in the sense that they applied to the whole Soviet Union and that virtually all residents in the union

could take up residence and acquire local voting rights in another Soviet republic on the basis of them (Reinikainen, 1999, p. 110). At the same time, the relative formal justice of these laws was combined with injustice at a more fundamental level as the Baltic republics were forcibly annexed and subjected to population transfers. The situation was one of relative formal justice in the application and administration of these laws on top of an unjust basic structure if you wish. Can it not be argued that it was better to alleviate the plight of the Estonians and Latvians in this situation by departing from the norms that the Soviet era migrants and their descendants had formed their expectations on the basis of? Is it not justifiable to thwart legitimate expectations in this case for the sake of rectifying the injustice against the Estonians and Latvians?

As far as I can see, it is not. Note that in Rawls' argument the ones who have formed expectations that would be forsaken by a departure from existing norms are the same persons as those who are unfairly treated on a more fundamental level and whose plight would be alleviated by the departure. The situation referred to by Rawls is, thus, a situation where we sacrifice the formal justice of a person for the sake of realizing justice for the same person on a more fundamental level. I take this to be justifiable, at least in some situations. An analogy could be a doctor who secretly swaps her patient's painkillers against another drug which intensifies the pain considerably but which ultimately cures the patient. This would be offending but it may still be justifiable if it is necessary for the recovery of a patient who will otherwise die or have a very poor life quality. However, this is not the situation that we are faced with in the Baltic case. In this case, the formal justice of one group of persons – the Soviet era migrants and their descendants – was sacrificed for the sake of rectifying injustice against another group of persons – the Estonians and Latvians. This is to replace one injustice with another. The relevant analogy to this situation would be if our doctor secretly would add a cure with long-lasting and harmful side-effects to the drinking water of a whole population

in spite of the fact that only a part of the population would have suffered from the disease that the cure healed. This is to sacrifice one group of innocent persons for the benefit of another.

It might be objected here that this sacrifice may still be justifiable since formal justice is less weighty than a just basic structure and that there is a net profit in terms of justice nonetheless. Certainly the reasonable view is that ‘an injustice is tolerable only when it is necessary to avoid an even greater injustice’ (Rawls, 1971, p. 4). Can not the restorationists in Estonia and Latvia justifiably argue that the forcible annexation of the Baltic States and the subsequent Soviet population transfers is the greater injustice in this case and that the exclusion of the Soviet era migrants and their descendants was necessary to avoid that greater injustice? I cannot see that, either. The exclusion of the Soviet era migrants and their descendants was hardly necessary to avoid the forcible annexation of the Baltic States and the subsequent population transfers. Those things had already happened and the exclusion of the Soviet era migrants and their descendants could not make them undone. What the exclusion of the Soviet era migrants and their descendants at most could accomplish was to undo the demographic consequences of those injustices, i.e. through the extruding effects of the exclusion.

Yet, those who are prone to give priority to the aspiration to undo the demographic consequences of these injustices proceed from a misconceived understanding of what should count as an injustice in this situation. As far as I can see, it is an injustice to exclude people who have legitimate expectations to retain their rights and equal citizenship status but it is not an injustice to deny a misappropriated group the right to exclude and extrude the same persons. An injustice is, indeed, only tolerable when it is necessary to avoid an even greater injustice. But in this case, the perceived demographic harm that the Estonian and Latvian restorationists would have had to live with if they would have been denied the right to exclude the settlers and their descendants should not be seen as an injustice. The analogy that I

referred to previously with a person who gets her house back after having been unjustly bereft of it may, again, illustrate the point. Would it be an injustice against this person if she was denied the right to evict a tenant who had acquired a contract in good faith during the period of unjust deprivation? If there is no other and relevant ground for eviction (failure to pay the rent, disturbance, etc), that does not seem to be the case.

It should also be added that the exclusion of the Soviet era migrants and their descendants was not necessary for the rectification of the injustice against the wronged groups in other respects. A right to unconditional option of citizenship for the Soviet era migrants and their descendants in Estonia and Latvia would not have prevented the restoration of these states, nor would it have averted the restoration of the pre-annexation citizenries. The restoration of the pre-annexation states and citizenries in Estonia and Latvia would, instead, have been just as realizable in a situation where the Soviet era migrants and their descendants had been offered the possibility to register as citizens unconditionally. This is precisely how Lithuania chose to restore the pre-annexation Lithuanian state and its legal citizenry. This was far from restoration *status quo ante* in the demographic sense that the purist restorationists dreamed of. Nevertheless, it was the justifiable amount of restoration and therefore the adequate rectification also in the Estonian and Latvian cases.

Occupations and annexations

Restorationists in Estonia and Latvia often point out that Estonia and Latvia are restored states and that they therefore are exempt from the inclusionary obligations that apply to new states. They, thus, try to establish a distinction between new and restored states according to which new states are seen as obligated to include all inhabitants on their territories in the initial citizenry. Restored states are, by contrast, only presumed to be obligated to include the pre-annexation citizenries and their descendants unconditionally. At the same time, they are

presumed to have a right to exclude persons whose presence on their territories is a result of settlement during the period of forcible incorporation. However, the argument that I have developed here disallows that distinction and, instead, speaks in favour of an alternative distinction between occupations and annexations that is defended by Eide. According to Eide, ‘occupations are different from ... annexations which are illegal under international law and which may have been brought about through illegal occupation’ (Eide, 1993, p. 13). Under annexations ‘legal rights can be acquired in good faith by individuals ... [and] human beings who have entered may have had no reason to believe that this was a temporary and illegal occupation, and it would be unacceptable in regard to most of them to deprive them of the option of citizenship’ (Eide, 1993, p. 13). According to Eide, settlement in good faith is, thus, only possible under annexations; it is not possible during an occupation.

According to this alternative distinction, states that emerge or re-emerge after occupations are therefore the only units that have a right to exclude persons who have settled on the territory of the seized unit prior to independence. States that are restored after longstanding annexations, such as the Baltic States, ought to have the same obligation as entirely new states to include all legal residents on the territory of the seceding unit unconditionally. The reason is the acquisition of legal rights in good faith and the legitimate expectations that follow from good faith. The crucial feature in these cases is that the same legal system has applied to the annexed territory as to the rest of the territory of the incorporating state. As a consequence, people who have settled on the territory cannot be expected to have thought of the territory as an irregular part of the country. It seems unreasonable to demand that settlers should be aware of the fact that settlement on the territory is an injustice if the territory is a regular part of the country and settlement on the territory is legal according to the laws of the state.

States that emerge or re-emerge after occupations are distinct from all other seceding units on this point. Under occupations, it is, in fact, reasonable to presume that persons who enter the territory of the seized unit should be aware of the fact that the territory is occupied. The crucial feature in these cases is the fact that the territory is under military administration and that another legal system therefore applies to that territory than to the rest of the territory of the incorporating state. This means that there are rules and regulations that apply specifically to the territory and that the jurisdiction is run by military courts, as on the parts of the West Bank that lie outside the zone where Israel has complete security authority (i.e. zone A and B). Persons from the incorporating state who establish settlements on such territory may therefore be presumed to be aware of the fact that the rights and status that they acquire on the territory are connected with the occupation and that their continued possession of these rights is dependent on the continuation of the occupation. They may also be expected to be able to foresee that their possession of their status and rights will be interrupted by an altered statehood of the territory if and when the territory is freed from occupation. In that sense, they are implicitly aware of the conditioned character of the rights that they acquire, which implicitly disallows the validity of these rights. If they expect to retain the rights and the status that they acquire, they do so because they trust the power of their country's army. Such expectations are based on might rather than right, and it would be wrong to see them as legitimate.⁷

But is not the distinction between occupations and annexations that I propose here too blunt? Is there not, rather, a sliding scale between these endpoints reflecting the duration of an occupation, where an occupation more and more takes the form of a *de facto* annexation the longer it lasts? To some extent, there is, indeed, a sliding scale between endpoints. However, it is not the duration of the occupation as such which creates a grey zone. The sliding scale, rather, reflects the extent to which an occupying power phases out occupation legislation or

marshal laws and instead introduces its regular legal system on the seized territory. That process may create a blurred legal situation where legal rights may be acquired on the seized territory on the same terms as in other parts of the country in spite of the fact that the territory is not formally annexed.

Nevertheless, the act of formal annexation is still a moral divide here. When a territory is formally annexed, the incorporating state not only legalises settlement and acquisition of rights on the territory on the same terms as in other parts of its territory. It also signals that the territory is a regular part of the country. Both factors are crucial to the acquisition of legal rights in good faith. A state that introduces its regular legal system on an occupied territory without formally annexing the territory sends mixed signals to its citizens. The message is that it is possible to acquire legal rights on the territory but that this is still not a regular part of the country. This is basically the situation in the zone of the West Bank where Israel has full security authority (zone C). Although the legal situation must seem blurred for the Israeli settlers in this zone, I do not think that their acquisition of legal rights amounts to acquisition in good faith. The situation is different if a state has annexed a territory, which is thereupon recognized by other states as a legal part of the state – as was the case after the extensive annexations of unjustly seized territories by the U.S.A. in the 19th century. Under these circumstances, a claim for acquisition of legal rights in good faith becomes far more credible.

But is there not something profoundly disturbing about the idea of acquiring legal rights in good faith? Can states really be so good at disguising the injustice of their seizures so that all citizens buy a doctored version of the history as the true version of the incorporation? Surely the settlers must know that there is something fishy about their settlement on the territory even when the territory is annexed. The discouraging truth, however, seems to be that some states are, in fact, totalitarian or authoritarian to a point where they are able to establish a doctored version of the incorporation as the true version of history.⁸ However, the

mythology surrounding the European conquest of Native American territory in the Americas reveals that it is possible to establish a beautified and romanticized picture of unjust seizure of territory without the powerful propaganda apparatus of a modern state. Yet again, the crucial factor seems to be that the state has annexed a piece of territory. The act of annexation legally sanctions the state's version of the incorporation, which means that the official version of the incorporation becomes the legal version. This may explain how North American settlers in the 19th century could regard their acquisition of land as lawful – in spite of the fact that they also knew that the land was originally inhabited by the Native Americans.

The best way to see the difference between acquisition of rights under occupations and annexations is probably to look upon the existing cases, however. If we take a brief look at the cases mentioned initially we may only find credible cases for settlement in good faith in cases of settlement under longstanding annexations. Of the cases mentioned initially, these cases include Tibet, where Han-Chinese migrants have settled since the unit was forcibly annexed by China in 1950-1951; Western Sahara, where Moroccan migrants have settled since the Moroccan occupation and annexation in 1975-1976; and in the Baltic republics, where the Soviet era migrants settled subsequent to the forcible annexation of these units in 1940-1944. All these cases subsume protracted periods of incorporation when legal rights have been acquired by new residents on identical conditions as in other parts of the country. Yet, even in these cases the credibility of a claim for settlement in good faith appears stronger for later generations of migrants than for the first generation, who took up residence in a situation that actually had elements of a regular occupation (Reinikainen, 1999, p. 107).

Indeed, the first wave of settlements in all these cases may very well have resembled the present Israeli settlement in zone C on the West Bank, which Israel seems to be in the process of annexing. But the West Bank is still essentially different from these other cases in the sense that Israel has not formally annexed any parts that territory yet, which is the reason why good

faith may not be invoked in this particular case. The clearest cases of settlement in bad faith (i.e. in full awareness of the forcible character of the incorporation of the territory) are likely to be the first Israeli settlements on the West Bank as well as the numerous outposts that have stretched over the territory the last decades. These settlements have been set up wilfully by radical settlers groups, although they have regularly been backed up by the state of Israel later on. Yet, even persons who choose to join one of the established settlements in zone C on the West Bank today should be aware of the fact the territory is occupied and that settlement on the territory is a breach of international law. The fact that Israel may be in the process of annexing that particular part of the territory certainly confuses the legal situation but not to a point where the settlers may invoke good faith.

The flip side of the legitimate expectations argument is that there are situations where we may, in fact, justifiably use the international norms on population transfers and non-recognition as the basis for our judgment of the legitimacy of the expectations of settlers. These are situations where it is reasonable to demand that the settlers should be aware of the fact that the territory is unjustly incorporated and that settlement on the territory is a breach of international law. This actually seems to be the case with the Israeli settlers on the West Bank. In situations such as on the West Bank, the expectations of the settlers to continue their residence on the basis of the status and the rights that they have acquired on the territory must be described as illegitimate. The Israeli settlers on the West Bank may therefore justifiably be excluded from initial citizenship if they end up on the territory of an independent Palestinian state subsequent to a new partition of the territory. At the same time, however, the Palestinians may not be granted a right to enforce their return to the territory of the incorporating state, i.e. to the territory that Israel would receive in a new partition. The descendants to settlers who would end up on Palestinian territory are not responsible for the role they have played in the injustices against the Palestinians. These persons have legitimate

expectations to continue their residence on the territory where they were born and when they come of age they should have a right to be unconditionally included in a Palestinian citizenry. They should not be expelled together with their parents, which is the likely outcome of a right to enforce the return of the settlers for the Palestinians.

Implications for international law

The legal situation concerning initial citizenship in international law may be described as unclear and contradictory (Reinikainen, 1999, p. 51-75). There are no norms that address the issue of initial citizenship head-on and the norms that are relevant to the issue point in both an exclusionary and an inclusionary direction. On the one hand, there is the customary rule on non-recognition of forcibly seized territory, which became institutionalized subsequent to the refusal of the major Western states to recognize the Soviet Union's forcible annexation of the Baltic Republics in 1940 (Hough, 1985). This norm may be interpreted in an exclusionary way, i.e. as a rejection of the validity of the rights to residence or suffrage that settlers acquire on seized territory (Reinikainen, 1999, p. 76-95). Another possible foothold for an exclusionary approach is article 49 of the fourth Geneva Convention from 1949, which stipulates that 'Individual or mass forcible transfers ... [on] occupied territory ... are prohibited, regardless of their motive' and that an 'Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies'.⁹ On the basis of this article, it may, perhaps, be argued that the very presence of settlers and descendants to settlers on forcibly seized territory is a breach of international law, and that they therefore should return to the territory of the incorporating state rather than be included in the initial citizenry of the state that emerges or reemerges on the seized territory.

On the other hand, there are various human rights norms and conventions that point in the direction of inclusion, albeit none of them may be claimed to be entirely clear and

unequivocal either. One of the academic advocates of an inclusionary approach, Eide, admits that neither 'international law in general, nor international human rights are entirely clear on [initial] citizenship requirements of the kind that have emerged in the dissolution of the federations of USSR and Yugoslavia' (Eide, 1993, p. 7, see also Eide, 2000 and 2007). His opinion, however, is that it 'would undoubtedly be most in conformity with modern human rights ... if persons, who under the law ... preceding restored independence had become lawful residents of the territory were given the option to become automatic (initial) citizens of the ... restored state' (Eide, 1993, p. 13). According to Eide, the Estonian and Latvian approach does not violate any specific rule of international law but it still 'runs so strongly counter to a number of basic principles of modern human rights that the cumulative effect must be to consider them as violations'.¹⁰

International law generally recognizes that states have the right to set their own citizenship standards (de Groot, 2006) and the contradictive legal situation concerning initial citizenship in international law has left new and restored states with basically the same prerogatives in their delimitation of the initial citizenry. However, against the background of the exclusion of the Soviet era migrants and their descendants from initial citizenship in Estonia and Latvia, there seems to be a need for a new convention on initial citizenship which would prevent new and restored states from unjust exclusion (Reinikainen, 1999, p. 163-164). The convention should, first and foremost, grant a right to unconditional citizenship to all descendants to settlers who end up on the territory of a new or restored state. These persons are not responsible in any way for the role they have played in an injustice against a wronged group and, as I have argued, they therefore have a claim for unconditional inclusion. In other respects, the convention ought to follow the distinction between settlement during annexations and settlement under occupations that I have defended here. Hence another article should specifically address settlers on annexed territory who have taken up residence in

accordance with existing laws. These persons should also be granted a right to unconditional inclusion, preferably by way of a right to register unconditionally as citizens in the new or restored state.

Furthermore, the convention should also include an article that denies a right to unconditional, initial citizenship for persons who voluntarily take up residence on occupied territory. That article would be vital to the rectification of the injustice against a wronged group and it is also significant as a signal to regimes that contemplate upon or currently carry through colonization projects. The article would, moreover, be in agreement with article 49 of the fourth Geneva Convention, which, as we have seen, prohibits population transfers specifically on occupied territories.¹¹ Another article in this convention ought to grant persons who have settled on occupied territory an unconditional right to *residence* in the state that emerges or re-emerges on the territory after the occupation. This is necessary as a protection against their expulsion. A right for the wronged group to enforce their return to the territory of the incorporating state would, indeed, be justifiable if it only affected the settlers. Yet, such a right would indirectly also jeopardize the right to residence of the children to the settlers. On territories such as the West Bank, the divide between legitimate and illegitimate expectations may often run right through families, with, on the one hand, parents who have settled in bad faith and, on the other hand, children who have been born on the territory. The most just solution in that situation would be to grant the descendants/children a right to unconditional citizenship and the settlers/parents a right to unconditional residence but not to unconditional citizenship.

Some may fear that granting these rights to settlers on unjustly seized territory would give rise to worrisome incentives. The principal fear may, perhaps, be that incorporating states would be encouraged to annex territories that they have occupied since that will make sure that settlers from the incorporating state will be entitled to citizenship if the

independence of the seized unit is restored. While these fears may be well-founded, they should still not be allowed to stand in the way for a convention on initial citizenship. The perverse incentives that a convention on initial citizenship may possibly give rise to should, instead, be neutralized by a sharpening of the prohibition against annexation in international law. It should cost more for states to annex unjustly seized territory than they may gain in terms of possible future influence and control of neighbouring states by means of the settlers that they have left on their territories during a period of unjust incorporation.

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ENDNOTES

¹ I will use the term rectificatory secession instead of restoration of statehood here. The reason is that I wish to also cover cases of unjust divestiture of territorial sovereignty where a group has had sovereign control over a territory without having been recognized as an independent state in the legal sense. Tibet prior to the Chinese seizure in the 1950's is one example.

² ‘Declaration of the Congress of Estonia Concerning the legal restoration of state authority on the territory of the Republic of Estonia’, 11 March 1990.

³ ‘The plan of activities of the Estonian Committee concerning the issue of citizenship’, *Minutes of the Second Estonian Congress*, May 25, 1990.

⁴ Initiative Centre for the Decolonisation of Estonia (1995) ‘Decolonization: The Only Solution for Estonia’, *Nationalities Papers*, Volume 23, Issue 1, p. 229.

⁵ Indeed, in 1993 the Estonian parliament adopted a new Law on Aliens that actually went this far, although the Estonian president withdraw the law after widespread civic disobedience from the non-citizens and intervention from international organisations and Western countries.

⁶ The distinction between choice and circumstance was originally introduced by John Rawls as a key justificatory element in his theory of justice. See J Rawls (1971) *A Theory of Justice* (Oxford: Oxford University Press). Later on, it was developed by Ronald Dworkin and luck egalitarian theorists as a basis for distinguishing the outcomes of choices – which the individual is seen as personally responsible for – from the results of circumstances – which the individual is not considered personally responsible for and which generates a valid claim for compensation. See R. Dworkin (1981) ‘What is Equality? Part 2: Equality of Resources,’ *Philosophy and Public Affairs* 10, pp. 283-345. The distinction has also been invoked by Will Kymlicka as a basis for distinguishing the claims to cultural protection of national minorities from the claims of immigrants. See W. Kymlicka (1995) *Multicultural Citizenship* (Oxford: Oxford University Press). My general view is that the Rawlsian use of the distinction is the adequate. However, this does not mean that we should be forbidden to use the distinction in a more policy-decisive, luck egalitarian way in particular questions where this is relevant, as in the case of the delimitation of initial citizenship.

⁷ But although the act of annexation is a moral divide in this sense, there may nonetheless be cases of settlement on occupied territory where the settlers should not be seen responsible for their participation in the injustice against the wronged group and where they therefore have a justifiable claim for inclusion. This would, for

instance, be the case if army personnel or civilians have been commanded to settle on unjustly seized territory by the occupying state. The distinction between annexations and occupations should be seen as a way of implementing the distinction between choice and circumstance in international law. It approximates the distinction between choice and circumstance but it may still deviate from it in particular cases. In cases of deviation, we should start back in the underlying distinction between choice and circumstance and allow for exceptions on the basis of that more fundamental moral distinction.

⁸ In Estonia, for instance, the impact of the official propaganda version of the history was profound even among the Estonians. Rein Taagepera claims that even the Estonians who were brought up during the Soviet era were deceived by it. When the Estonian history began to be debated in the late 1980's – subsequent to the publication of the Estonian historian's Evald Laasi's revisionist *To fill in some gaps* in 1987 – they were chocked: “Many among the one and a half generations of Estonians who had learned falsified history during their entire schooling may have asked their parents and grandparents, upon readin Laasi: ‘Was it really like that?’.” See R. Taagepera (1993) *Estonia: Return to Independence* (Boulder: Westview Press), p. 155.

⁹ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva 12 August 1949. Commentary on Part III: Status and treatment of protected persons, section III: Occupied Territories Article 49.

¹⁰ The norm that Eide primarily tries to lean on is Article 15 of the Universal Declaration of Human Rights from 1948, which declares that everyone has a right to a nationality and that no one shall be arbitrarily deprived of his nationality. But he also refers to the anti-discriminatory precepts of the International Convention on the Elimination of all Forms of Racial Discrimination from 1965. According to Eide, the exclusion of the Soviet era migrants and their descendants – who basically made up the Russophone minority in Estonia and Latvia – was an invidious distinction that was incompatible with the Convention.

¹¹ It should be noted that article 49 of the fourth Geneva Convention prohibits settlement on “occupied territory”, and not on annexed territory. The reason for this formulation may very well be the predicament that a number of signatories of the Convention would have faced if also annexed territories would have been covered by the prohibition – as they have annexed territories themselves historically. As we have seen, however, there is generally a relevant moral difference between settlement on occupied and annexed territory that justifies the prohibiting the former but not the latter.